IN THE SUPREME COURT OF FLORIDA

CASE NO.:

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

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

Michael P. Dickey, Chair of the Code and Rules of Evidence Committee, and John F. Harkness, Jr., Executive Director of The Florida Bar, file this amended two-year-cycle report with the court under the direction and approval (32–0) 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 amendments 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 in 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 2000 in *In re Amendments to the Florida Evidence Code*, 782 So. 2d 339 (Fla. 2000). In 2002, the court adopted certain statutory amendments passed by the Florida Legislature in 2000 and 2001 in *In re Amendments to the Florida Evidence Code*, 825 So.2d 339 (Fla. 2002).

The Florida Legislature since has further amended the Code of Evidence in bills identified as Chapters 2002-22, §18; 2002-246, §1; and 2003-259, §§1–3,

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. Chapter 2002-22, §18, Laws of Florida (amending section 90.6063, Florida Statutes), be adopted as a Florida Rule of Evidence. Section 90.6063 deals with the provision of interpreter services for deaf persons, and had previously stated that a request for qualified interpreters could be channeled through, *inter alia*, the Vocational Rehabilitation Program Office of the Department of Labor and Employment Security. The amendment serves only to change the entity name to the Division of Vocational Rehabilitation of the Department of Education. The committee vote on whether to recommend adoption of 2002-22, §18 as a rule was 29 in favor, 0 against.

2. Chapter 2002-246, §1, Laws of Florida (amending section 90.5035, Florida Statutes), be adopted as a Florida Rule of Evidence. The amendment to section 90.5035 extends the sexual assault counselor-victim privilege to a "trained volunteer," and goes on to define this new category. Previously, the privilege set forth in section 90.5035 applied only to communications with a sexual assault counselor. The committee vote on whether to recommend adoption of 2002-246, §1 was 16 in favor, 11 against. The specific reasons raised for dissenting votes all related to concerns regarding the extension of the sexual assault counselor-victim privilege to a "trained volunteer." Dissenting members expressed concern that the breadth of the privilege, as amended, would prevent the disclosure of probative and otherwise admissible evidence. The majority of the committee took these concerns into account and voted to recommend adoption as a rule of procedure notwithstanding.

3. Chapter 2003-259, §§1–3, Laws of Florida (amending sections 90.104, 90.803, and 90.902, Florida Statutes), be adopted as Florida Rules of Evidence. This revision to the Evidence Code was brought about at the initiation of the committee to effect two changes to the Code. The committee vote on whether to

recommend adoption of 2003-259, §§1–3, was 29 in favor, 0 against.

In 2003-259 §1, Laws of Florida, the legislature changed the language in section 90.104, Florida Statutes, to eliminate the need for a trial objection, in order to preserve an evidentiary issue for appeal, when the trial judge had made a definitive ruling on the admissibility of the evidence before trial. No such language was in the prior version of section 90.104. This change comports with a change made to Federal Rule of Evidence 103(a)(2) in 2000, and eliminates the danger of inadvertent waiver of an evidentiary objection at trial.

In 2003-259 §§2–3, Laws of Florida, the legislature created a business records certification procedure that eliminates the need for a records custodian to appear at trial. Two sections of the Evidence Code, sections 90.803(6) and 90.902, Florida Statutes, have been amended as a result. Section 90.803(6), which sets forth the hearsay exception for records of a regularly conducted business activity, was amended to add language allowing for the admission of such evidence upon a certification or declaration by a records custodian, subject to certain procedural safeguards. The legislature made an unrelated change to subsection (b) for the purpose of making it easier to understand. Section 90.902, which deals with self-authentication of documents, likewise was amended to include the requirements for certification by a records custodian, and is cross-referenced by section 90.803(6). Once again, these changes are consistent with the changes to the Federal Rules of Evidence enacted in 2000, and will serve to streamline the trial process while maintaining a procedure by which a party may still challenge the authenticity of, and business records foundation for the admission of, documentary evidence.

The Code and Rules of Evidence Committee and The Florida Bar thus respectfully request that the court adopt the amendments in the listed bills as amendments to the Supreme Court's Rules of Evidence to the extent that they concern court procedure, and 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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TEXT OF LEGISLATIVE BILLS REFERENCED IN REPORT

Chapter 2003-259, §1:

90.104. Rulings on evidence

(1) A court may predicate error, set aside or reverse a judgment, or grant a new trial on the basis of admitted or excluded evidence when a substantial right of the party is adversely affected and:

(a) When the ruling is one admitting evidence, a timely objection or motion to strike appears on the record, stating the specific ground of objection if the specific ground was not apparent from the context; or

(b) When the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer of proof or was apparent from the context within which the questions were asked.

If the court has made a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

Chapter 2002-246, §1:

90.5035. Sexual assault counselor-victim privilege

(1) For purposes of this section:

(a) A "rape crisis center" is any public or private agency that offers assistance to victims of sexual assault or sexual battery and their families.

(b) A "sexual assault counselor" is any employee of a rape crises center whose primary purpose is the rendering of advice, counseling, or assistance to victims of sexual assault or sexual battery.

(c) A "trained volunteer" is a person who volunteers at a rape crisis center, has completed 30 hours of training in assisting victims of sexual violence and related topics provided by the rape crisis center, is supervised by members of the staff of the rape crisis center, and is included on a list of volunteers that is maintained by the rape crisis center.

(d)~~(c)~~ A "victim" is a person who consults a sexual assault counselor or a trained volunteer for the purpose of securing advice, counseling, or assistance concerning a mental, physical, or emotional condition caused by a sexual assault or sexual battery, an alleged sexual assault or sexual battery, or an attempted sexual assault or sexual battery.

(e)~~(d)~~ A communication between a sexual assault counselor or trained volunteer and a victim is "confidential" if it is not intended to be disclosed to third persons other than:

1. Those persons present to further the interest of the victim in the consultation, examination, or interview.

2. Those persons necessary for the transmission of the communication.

3. Those persons to whom disclosure is reasonably necessary to accomplish the purposes for which the sexual assault counselor or the trained volunteer is consulted.

(2) A victim has a privilege to refuse to disclose, and to prevent any other person from disclosing, a confidential communication made by the victim to a sexual assault counselor or trained volunteer or any record made in the course of advising, counseling, or assisting the victim. Such confidential communication or record may be disclosed only with the prior written consent of the victim. This privilege includes any advice given by the sexual assault counselor or trained volunteer in the course of that relationship.

(3) The privilege may be claimed by:

(a) The victim or the victim's attorney on his or her behalf.

(b) A guardian or conservator of the victim.

(c) The personal representative of a deceased victim.

(d) The sexual assault counselor or trained volunteer, but only on behalf of the victim. The authority of a sexual assault counselor or trained volunteer to claim the privilege is presumed in the absence of evidence to the contrary.

Chapter 2002-22, §18:

90.6063. Interpreter services for deaf persons

(5) The appointing authority may channel requests for qualified interpreters through:

(b) The Division of Vocational Rehabilitation ~~Program Office~~ of the Department of Education~~Labor and Employment Security~~; or

Chapter 2003-259, §2:

90.803. Hearsay exceptions; availability of declarant immaterial

The provision of s. 90.802 to the contrary notwithstanding, the following are not inadmissible as evidence, even though the declarant is available as a witness:

(6) Records of regularly conducted business activity.—

(a) A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or as shown by a certification or declaration that complies with paragraph (c) and s. 90.902(11), unless the sources of information or other circumstances show lack of trustworthiness. The term "business" as used in this paragraph includes a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(b) ~~No e~~Evidence in the form of an opinion or diagnosis is inadmissible~~admissible~~ under paragraph (a) unless such opinion or diagnosis would be admissible under ss. 90.701–90.705 if the person whose opinion is recorded were to testify to the opinion directly.

(c) A party intending to offer evidence under paragraph (a) by means of a certification or declaration shall serve reasonable written notice of that intention upon every other party and shall make the evidence available for inspection sufficiently in advance of its offer in evidence to provide to any other party a fair opportunity to challenge the admissibility of the evidence. If the evidence is maintained in a foreign country, the party intending to offer the evidence must provide written notice of that intention at the arraignment or as soon after the arraignment as is practicable or, in a civil case, 60 days before the trial. A motion opposing the admissibility of such evidence must be made by the opposing party and determined by the court before trial. A party's failure to file such a motion before trial constitutes a waiver of objection to the evidence, but the court for good

cause shown may grant relief from the waiver.

Chapter 2003-259, §3:

90.902. Self-authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required for:

(11) An original or a duplicate of evidence that would be admissible under s. 90.803(6), which is maintained in a foreign country or domestic location and is accompanied by a certification or declaration from the custodian of the records or another qualified person certifying or declaring that the record:

(a) Was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person having knowledge of those matters;

(b) Was kept in the course of the regularly conducted activity; and

(c) Was made as a regular practice in the course of the regularly conducted activity,

provided that falsely making such a certification or declaration would subject the maker to criminal penalty under the laws of the foreign or domestic location in which the certification or declaration was signed.

FULL PAGE LEGISLATIVE FORMAT

90.104. Rulings on evidence

(1) A court may predicate error, set aside or reverse a judgment, or grant a new trial on the basis of admitted or excluded evidence when a substantial right of the party is adversely affected and:

(a) When the ruling is one admitting evidence, a timely objection or motion to strike appears on the record, stating the specific ground of objection if the specific ground was not apparent from the context; or

(b) When the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer of proof or was apparent from the context within which the questions were asked.

If the court has made a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(2) In cases tried by 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.

(3) Nothing in this section shall preclude a court from taking notice of fundamental errors affecting substantial rights, even though such errors were not brought to the attention of the trial judge.

90.5035. Sexual assault counselor-victim privilege

(1) For purposes of this section:

(a) A "rape crisis center" is any public or private agency that offers assistance to victims of sexual assault or sexual battery and their families.

(b) A "sexual assault counselor" is any employee of a rape crises center whose primary purpose is the rendering of advice, counseling, or assistance to victims of sexual assault or sexual battery.

(c) A "trained volunteer" is a person who volunteers at a rape crisis center, has completed 30 hours of training in assisting victims of sexual violence and related topics provided by the rape crisis center, is supervised by members of the staff of the rape crisis center, and is included on a list of volunteers that is maintained by the rape crisis center.

~~(c)~~(d) A "victim" is a person who consults a sexual assault counselor or a trained volunteer for the purpose of securing advice, counseling, or assistance concerning a mental, physical, or emotional condition caused by a sexual assault or sexual battery, an alleged sexual assault or sexual battery, or an attempted sexual assault or sexual battery.

~~(d)~~(e) A communication between a sexual assault counselor or trained volunteer and a victim is "confidential" if it is not intended to be disclosed to third persons other than:

1. Those persons present to further the interest of the victim in the consultation, examination, or interview.

2. Those persons necessary for the transmission of the communication.

3. Those persons to whom disclosure is reasonably necessary to accomplish the purposes for which the sexual assault counselor or the trained volunteer is consulted.

(2) A victim has a privilege to refuse to disclose, and to prevent any other

person from disclosing, a confidential communication made by the victim to a sexual assault counselor or trained volunteer or any record made in the course of advising, counseling, or assisting the victim. Such confidential communication or record may be disclosed only with the prior written consent of the victim. This privilege includes any advice given by the sexual assault counselor or trained volunteer in the course of that relationship.

(3) The privilege may be claimed by:

(a) The victim or the victim's attorney on his or her behalf.

(b) A guardian or conservator of the victim.

(c) The personal representative of a deceased victim.

(d) The sexual assault counselor or trained volunteer, but only on behalf of the victim. The authority of a sexual assault counselor or trained volunteer to claim the privilege is presumed in the absence of evidence to the contrary.

90-6063. Interpreter services for deaf persons

(1) The Legislature finds that it is an important concern that the rights of deaf citizens be protected. It is the intent of the Legislature to ensure that appropriate and effective interpreter services be made available to Florida's deaf citizens.

(2) In all judicial proceedings and in sessions of a grand jury wherein a deaf person is a complainant, defendant, witness, or otherwise a party, or wherein a deaf person is a juror or grand juror, the court or presiding officer shall appoint a qualified interpreter to interpret the proceedings or deliberations to the deaf person and to interpret the deaf person's testimony, statements, or deliberations to the court, jury, or grand jury. A qualified interpreter shall be appointed, or other auxiliary aid provided as appropriate, for the duration of the trial or other proceeding in which a deaf juror or grand juror is seated.

(3)(a) "Deaf person" means any person whose hearing is so seriously impaired as to prohibit the person from understanding oral communications when spoken in a normal, conversational tone.

(b) For the purposes of this section, the term "qualified interpreter" means an interpreter certified by the National Registry of Interpreters for the Deaf or the Florida Registry of Interpreters for the Deaf or an interpreter whose qualifications are otherwise determined by the appointing authority.

(4) Every deaf person whose appearance before a proceeding entitles him or her to an interpreter shall notify the appointing authority of his or her disability not less than 5 days prior to any appearance and shall request at such time the services of an interpreter. Whenever a deaf person receives notification of the time of an appearance before a proceeding less than 5 days prior to the proceeding, the deaf person shall provide his or her notification and request as soon thereafter as practicable. In any case, nothing in this subsection shall operate to relieve an appointing authority's duty to provide an interpreter for a deaf person so entitled, and failure to strictly comply with the notice requirement will not be deemed a waiver of the right to an interpreter. An appointing authority may require a person requesting the appointment of an interpreter to furnish reasonable proof of the person's disability when the appointing authority has reason to believe that the

person is not so disabled.

(5) The appointing authority may channel requests for qualified interpreters through:

(a) The Florida Registry of Interpreters for the Deaf;

(b) The Division of Vocational Rehabilitation ~~Program Office~~ of the Department of ~~Labor and Employment Security~~Education; or

(c) Any other resource wherein the appointing authority knows that qualified interpreters can be found.

(6) No qualified interpreter shall be appointed unless the appointing authority and the deaf person make a preliminary determination that the interpreter is able to communicate readily with the deaf person and is able to repeat and translate statements to and from the deaf person accurately.

(7) Before a qualified interpreter may participate in any proceedings subsequent to an appointment under the provisions of this act, such interpreter shall make an oath or affirmation that he or she will make a true interpretation in an understandable manner to the deaf person for whom the interpreter is appointed and that he or she will repeat the statements of the deaf person in the English language to the best of his or her skill and judgment. Whenever a deaf person communicates through an interpreter to any person under such circumstances that the communication would be privileged, and the recipient of the communication could not be compelled to testify as to the communication, this privilege shall apply to the interpreter.

(8) An interpreter appointed by the court in a criminal matter or in a civil matter shall be entitled to a reasonable fee for such service, in addition to actual expenses for travel, to be paid out of general county funds.

90.803. Hearsay exceptions; availability of declarant immaterial

The provision of s. 90.802 to the contrary notwithstanding, the following are not inadmissible as evidence, even though the declarant is available as a witness:

(1) Spontaneous statement.—A spontaneous statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter, except when such statement is made under circumstances that indicate its lack of trustworthiness.

(2) Excited utterance.—A statement or excited utterance relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then-existing mental, emotional, or physical condition.—

(a) A statement of the declarant's then-existing state of mind, emotion, or physical sensation, including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health, when such evidence is offered to:

1. Prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when such state is an issue in the action.

2. Prove or explain acts of subsequent conduct of the declarant.

(b) However, this subsection does not make admissible:

1. An after-the-fact statement of memory or belief to prove the fact remembered or believed, unless such statement relates to the execution, revocation, identification, or terms of the declarant's will.

2. A statement made under circumstances that indicate its lack of trustworthiness.

(4) Statements for purposes of medical diagnosis or treatment.—Statements made for purposes of medical diagnoses or treatment by a person seeking the diagnosis or treatment, or made by an individual who has

knowledge of the facts and is legally responsible for the person who is unable to communicate the facts, which statements describe medical history, past or present symptoms, pain, or sensations, or the inceptions or general character of the cause or external source thereof, insofar as reasonably pertinent to diagnosis or treatment.

(5) Recorded recollection.—A memorandum or record concerning a matter about which a witness once had knowledge, but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly. A party may read into evidence a memorandum or record when it is admitted, but no such memorandum or record is admissible as an exhibit unless offered by an adverse party.

(6) Records of regularly conducted business activity.—

(a) A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or as shown by a certification or declaration that complies with paragraph (c) and s. 90.902(11), unless the sources of information or other circumstances show lack of trustworthiness. The term "business" as used in this paragraph includes a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(b) ~~No e~~Evidence in the form of an opinion or diagnosis is ~~admissible~~ inadmissible under paragraph (a) unless such opinion or diagnosis would be admissible under ss. 90.701–90.705 if the person whose opinion is recorded were to testify to the opinion directly.

(c) A party intending to offer evidence under paragraph (a) by means of a certification or declaration shall serve reasonable written notice of that intention upon every other party and shall make the evidence available for inspection sufficiently in advance of its offer in evidence to provide to any other party a fair opportunity to challenge the admissibility of the evidence. If the evidence is

maintained in a foreign country, the party intending to offer the evidence must provide written notice of that intention at the arraignment or as soon after the arraignment as is practicable or, in a civil case, 60 days before the trial. A motion opposing the admissibility of such evidence must be made by the opposing party and determined by the court before trial. A party's failure to file such a motion before trial constitutes a waiver of objection to the evidence, but the court for good cause shown may grant relief from the waiver.

(7) Absence of entry in records of regularly conducted activity.—Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, of a regularly conducted activity to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances show lack of trustworthiness.

(8) Public records and reports.—Records, reports, statements reduced to writing, or data compilations, in any form, of public offices or agencies, setting forth the activities of the office or agency, or matters observed pursuant to duty imposed by law as to matters which there was a duty to report, excluding in criminal cases matters observed by a police officer or other law enforcement personnel, unless the sources of information or other circumstances show their lack of trustworthiness. The criminal case exclusion shall not apply to an affidavit otherwise admissible under s. 316.1934 or s. 327.354.

(9) Records of vital statistics.—Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if a report was made to a public office pursuant to requirements of law. However, nothing in this section shall be construed to make admissible any other marriage of any party to any cause of action except for the purpose of impeachment as set forth in s. 90.610.

(10) Absence of public record or entry.—Evidence, in the form of a certification in accord with s. 90.902, or in the form of testimony, that diligent search failed to disclose a record, report, statement, or data compilation or entry, when offered to prove the absence of the record, report, statement, or data compilation or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation would regularly have been made and

preserved by a public office and agency.

(11) Records of religious organizations.—Statements of births, marriages, divorces, deaths, parentage, ancestry, relationship by blood or marriage, or other similar facts of personal or family history contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates.—Statements of facts contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, when such statement was certified by a member of the clergy, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and when such certificate purports to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family records.—Statements of fact concerning personal or family history in family Bibles, charts, engravings in rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property.—The record of a document purporting to establish or affect an interest in property, as proof of the contents of the original recorded or filed document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorized the recording or filing of the document in the office.

(15) Statements in documents affecting an interest in property.—A statement contained in a document purporting to establish or affect an interest in property, if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents.—Statements in a document in existence 20 years or more, the authenticity of which is established.

(17) Market reports, commercial publications.—Market quotations, tabulations, lists, directories, or other published compilations, generally used and

relied upon by the public or by persons in particular occupations if, in the opinion of the court, the sources of information and method of preparation were such as to justify their admission.

(18) Admissions.—A statement that is offered against a party and is:

(a) The party's own statement in either an individual or a representative capacity;

(b) A statement of which the party has manifested an adoption or belief in its truth;

(c) A statement by a person specifically authorized by the party to make a statement concerning the subject;

(d) A statement by the party's agent or servant concerning a matter within the scope of the agency or employment thereof, made during the existence of the relationship; or

(e) A statement by a person who was a coconspirator of the party during the course, and in furtherance, of the conspiracy. Upon request of counsel, the court shall instruct the jury that the conspiracy itself and each member's participation in it must be established by independent evidence, either before the introduction of any evidence or before evidence is admitted under this paragraph.

(19) Reputation concerning personal or family history.—Evidence of reputation:

(a) Among members of a person's family by blood, adoption, or marriage;

(b) Among a person's associates; or

(c) In the community,

concerning a person's birth, adoption, marriage, divorce, death, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

(20) Reputation concerning boundaries or general history.—Evidence of reputation:

(a) In a community, arising before the controversy about the boundaries of, or customs affecting lands in, the community.

(b) About events of general history which are important to the community, state, or nation where located.

(21) Reputation as to character.—Evidence of reputation of a person's character among associates or in the community.

(22) Former testimony.—Former testimony given by the declarant which testimony was given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, or a person with a similar interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination; provided, however, the court finds that the testimony is not inadmissible pursuant to s. 90.402 or s. 90.403.

(23) Hearsay exception; statement of child victim.—

(a) Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by a child victim with a physical, mental, emotional, or developmental age of 11 or less describing any act of child abuse or neglect, any act of sexual abuse against a child, the offense of child abuse, the offense of aggravated child abuse, or any offense involving an unlawful sexual act, contact, intrusion, or penetration performed in the presence of, with, by, or on the declarant child, not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if:

1. The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination, the court may consider the mental and physical age and maturity of the child, the nature and duration of the

abuse or offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate; and

2. The child either:

a. Testifies; or

b. Is unavailable as a witness, provided that there is other corroborative evidence of the abuse or offense. Unavailability shall include a finding by the court that the child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm, in addition to findings pursuant to s. 90.804(1).

(b) In a criminal action, the defendant shall be notified no later than 10 days before trial that a statement which qualifies as a hearsay exception pursuant to this subsection will be offered as evidence at trial. The notice shall include a written statement of the content of the child's statement, the time at which the statement was made, the circumstances surrounding the statement which indicate its reliability, and such other particulars as necessary to provide full disclosure of the statement.

(c) The court shall make specific findings of fact, on the record, as to the basis for its ruling under this subsection.

(24) Hearsay exception; statement of elderly person or disabled adult.—

(a) Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by an elderly person or disabled adult, as defined in s. 825.101, describing any act of abuse or neglect, any act of exploitation, the offense of battery or aggravated battery or assault or aggravated assault or sexual battery, or any other violent act on the declarant elderly person or disabled adult, not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if:

1. The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient

safeguards of reliability. In making its determination, the court may consider the mental and physical age and maturity of the elderly person or disabled adult, the nature and duration of the abuse or offense, the relationship of the victim to the offender, the reliability of the assertion, the reliability of the elderly person or disabled adult, and any other factor deemed appropriate; and

2. The elderly person or disabled adult either:

a. Testifies; or

b. Is unavailable as a witness, provided that there is corroborative evidence of the abuse or offense. Unavailability shall include a finding by the court that the elderly person's or disabled adult's participation in the trial or proceeding would result in a substantial likelihood of severe emotional, mental, or physical harm, in addition to findings pursuant to s. 90.804(1).

(b) In a criminal action, the defendant shall be notified no later than 10 days before the trial that a statement which qualifies as a hearsay exception pursuant to this subsection will be offered as evidence at trial. The notice shall include a written statement of the content of the elderly person's or disabled adult's statement, the time at which the statement was made, the circumstances surrounding the statement which indicate its reliability, and such other particulars as necessary to provide full disclosure of the statement.

(c) The court shall make specific findings of fact, on the record, as to the basis for its ruling under this subsection.

90.902. Self-authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required for:

(1) A document bearing:

(a) A seal purporting to be that of the United States or any state, district, commonwealth, territory, or insular possession thereof; the Panama Canal Zone; the Trust Territory of the Pacific Islands; or a court, political subdivision, department, officer, or agency of any of them; and

(b) A signature by the custodian of the document attesting to the authenticity of the seal.

(2) A document not bearing a seal but purporting to bear a signature of an officer or employee of any entity listed in subsection (1), affixed in the officer's or employee's official capacity.

(3) An official foreign document, record, or entry that is:

(a) Executed or attested to by a person in the person's official capacity authorized by the laws of a foreign country to make the execution or attestation; and

(b) Accompanied by a final certification, as provided herein, of the genuineness of the signature and official position of:

1. The executing person; or

2. Any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation.

The final certification may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States or a

diplomatic or consular official of the foreign country assigned or accredited to the United States. When the parties receive reasonable opportunity to investigate the authenticity and accuracy of official foreign documents, the court may order that they be treated as presumptively authentic without final certification or permit them in evidence by an attested summary with or without final certification.

(4) A copy of an official public record, report, or entry, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification by certificate complying with subsection (1), subsection (2), or subsection (3) or complying with any act of the Legislature or rule adopted by the Supreme Court.

(5) Books, pamphlets, or other publications purporting to be issued by a governmental authority.

(6) Printed materials purporting to be newspapers or periodicals.

(7) Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) Commercial papers and signatures thereon and documents relating to them, to the extent provided in the Uniform Commercial Code.

(9) Any signature, document, or other matter declared by the Legislature to be presumptively or prima facie genuine or authentic.

(10) Any document properly certified under the law of the jurisdiction where the certification is made.

(11) An original or a duplicate of evidence that would be admissible under s. 90.803(6), which is maintained in a foreign country or domestic location and is accompanied by a certification or declaration from the custodian of the records or another qualified person certifying or declaring that the record:

(a) Was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person having knowledge of those

matters;

(b) Was kept in the course of the regularly conducted activity; and

(c) Was made as a regular practice in the course of the regularly conducted activity,

provided that falsely making such a certification or declaration would subject the maker to criminal penalty under the laws of the foreign or domestic location in which the certification or declaration was signed.

Proposed Rule	Reasons for Change
90.104. Rulings on evidence	
(1) A court may predicate error, set aside or reverse a judgment, or grant a new trial on the basis of admitted or excluded evidence when a substantial right of the party is adversely affected and:	
(a) When the ruling is one admitting evidence, a timely objection or motion to strike appears on the record, stating the specific ground of objection if the specific ground was not apparent from the context; or	
(b) When the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer of proof or was apparent from the context within which the questions were asked.	
<u>If the court has made a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.</u>	To bring the statutory code and court rules into agreement and thereby avoid the problem of determining which portions of these statutory code provisions are procedural and which are substantive.
(2) No change.	
(3) No change.	

90.5035. Sexual assault counselor-victim privilege

(1) For purposes of this section:

(a) A "rape crisis center" is any public or private agency that offers assistance to victims of sexual assault or sexual battery and their families.

(b) A "sexual assault counselor" is any employee of a rape crises center whose primary purpose is the rendering of advice, counseling, or assistance to victims of sexual assault or sexual battery.

(c) A "trained volunteer" is a person who volunteers at a rape crisis center, has completed 30 hours of training in assisting victims of sexual violence and related topics provided by the rape crisis center, is supervised by members of the staff of the rape crisis center, and is included on a list of volunteers that is maintained by the rape crisis center.

To bring the statutory code and court rules into agreement and thereby avoid the problem of determining which portions of these statutory code provisions are procedural and which are substantive.

~~(c)~~(d) A "victim" is a person who consults a sexual assault counselor or a trained volunteer for the purpose of securing advice, counseling, or assistance concerning a mental, physical, or emotional condition caused by a sexual assault or sexual battery, an alleged sexual assault or sexual battery, or an attempted sexual assault or sexual battery.

To bring the statutory code and court rules into agreement and thereby avoid the problem of determining which portions of these statutory code provisions are procedural and which are substantive.

~~(d)~~(e) A communication between a sexual assault counselor or trained volunteer and a victim is "confidential" if it is

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not intended to be disclosed to third persons other than:

1. Those persons present to further the interest of the victim in the consultation, examination, or interview.

2. Those persons necessary for the transmission of the communication.

3. Those persons to whom disclosure is reasonably necessary to accomplish the purposes for which the sexual assault counselor or the trained volunteer is consulted.

(2) A victim has a privilege to refuse to disclose, and to prevent any other person from disclosing, a confidential communication made by the victim to a sexual assault counselor or trained volunteer or any record made in the course of advising, counseling, or assisting the victim. Such confidential communication or record may be disclosed only with the prior written consent of the victim. This privilege includes any advice given by the sexual assault counselor or trained volunteer in the course of that relationship.

(3) The privilege may be claimed by:

(a) The victim or the victim's attorney on his or her behalf.

(b) A guardian or conservator of the victim.

(c) The personal representative of a deceased victim.

statutory code provisions are procedural and which are substantive.

To bring the statutory code and court rules into agreement and thereby avoid the problem of determining which portions of these statutory code provisions are procedural and which are substantive.

To bring the statutory code and court rules into agreement and thereby avoid the problem of determining which portions of these statutory code provisions are procedural and which are substantive.

(d) The sexual assault counselor or trained volunteer, but only on behalf of the victim. The authority of a sexual assault counselor or trained volunteer to claim the privilege is presumed in the absence of evidence to the contrary.

To bring the statutory code and court rules into agreement and thereby avoid the problem of determining which portions of these statutory code provisions are procedural and which are substantive.

90-6063. Interpreter services for deaf persons

(1) No change.

(2) No change.

(3)(a) No change.

(b) No change.

(4) Every deaf person whose appearance before a proceeding entitles him or her to an interpreter shall notify the appointing authority of his or her disability not less than 5 days prior to any appearance and shall request at such time the services of an interpreter. Whenever a deaf person receives notification of the time of an appearance before a proceeding less than 5 days prior to the proceeding, the deaf person shall provide his or her notification and request as soon thereafter as practicable. In any case, nothing in this subsection shall operate to relieve an appointing authority's duty to provide an interpreter for a deaf person so entitled, and failure to strictly comply with the notice requirement will not be deemed a waiver of the right to an interpreter. An appointing authority may require a person requesting the appointment of an interpreter to furnish reasonable proof of the person's disability when the appointing authority has reason to believe that the person is not so disabled.

(5) The appointing authority may channel requests for qualified interpreters through:

(a) The Florida Registry of Interpreters for the Deaf;

(b) The Division of Vocational Rehabilitation ~~Program Office~~ of the Department of ~~Labor and Employment Security~~Education; or

(c) Any other resource wherein the appointing authority knows that qualified interpreters can be found.

(6) No change.

(7) No change.

(8) No change.

To bring the statutory code and court rules into agreement and thereby avoid the problem of determining which portions of these statutory code provisions are procedural and which are substantive.

90.803. Hearsay exceptions; availability of declarant immaterial

The provision of s. 90.802 to the contrary notwithstanding, the following are not inadmissible as evidence, even though the declarant is available as a witness:

(1) No change.

(2) No change.

(3) No change.

(4) No change.

(5) No change.

(6) Records of regularly conducted business activity.—

(a) A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or as shown by a certification or declaration that complies with paragraph (c) and s. 90.902(11), unless the sources of information or other circumstances show lack

To bring the statutory code and court rules into agreement and thereby avoid the problem of determining which portions of these statutory code provisions are procedural and which are substantive.

of trustworthiness. The term "business" as used in this paragraph includes a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(b) ~~No e~~Evidence in the form of an opinion or diagnosis is ~~admissible~~ inadmissible under paragraph (a) unless such opinion or diagnosis would be admissible under ss. 90.701–90.705 if the person whose opinion is recorded were to testify to the opinion directly.

To bring the statutory code and court rules into agreement and thereby avoid the problem of determining which portions of these statutory code provisions are procedural and which are substantive.

(c) A party intending to offer evidence under paragraph (a) by means of a certification or declaration shall serve reasonable written notice of that intention upon every other party and shall make the evidence available for inspection sufficiently in advance of its offer in evidence to provide to any other party a fair opportunity to challenge the admissibility of the evidence. If the evidence is maintained in a foreign country, the party intending to offer the evidence must provide written notice of that intention at the arraignment or as soon after the arraignment as is practicable or, in a civil case, 60 days before the trial. A motion opposing the admissibility of such evidence must be made by the opposing party and determined by the court before trial. A party's failure to file such a motion before trial constitutes a waiver of objection to the evidence, but the court for good cause shown may grant relief from the waiver.

To bring the statutory code and court rules into agreement and thereby avoid the problem of determining which portions of these statutory code provisions are procedural and which are substantive.

(7) No change.

(8) No change.

(9) No change.

(10) No change.

(11) No change.

(12) No change.

(13) No change.

(14) No change.

(15) No change.

(16) No change.

(17) No change.

(18) No change.

(19) No change.

(20) No change.

(21) No change.

(22) No change.

(23) No change.

(24) No change.

90.902. Self-authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required for:

(1) No change.

(a) No change.

(b) No change.

(2) No change.

(3) No change.

(a) No change.

(b) No change.

1. No change.

2. No change.

(4) No change.

(5) No change.

(6) No change.

(7) No change.

(8) No change.

(9) No change.

(10) No change.

(11) An original or a duplicate of evidence that would be admissible under s. 90.803(6), which is maintained in a foreign country or domestic location and is accompanied by a certification or declaration from the custodian of the records or another qualified person certifying or declaring that the record:

To bring the statutory code and court rules into agreement and thereby avoid the problem of determining which portions of these statutory code provisions are procedural and which are substantive.

(a) Was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person having knowledge of those matters;

To bring the statutory code and court rules into agreement and thereby avoid the problem of determining which portions of these statutory code provisions are procedural and which are substantive.

(b) Was kept in the course of the regularly conducted activity; and

To bring the statutory code and court rules into agreement and thereby avoid the problem of determining which portions of these statutory code provisions are procedural and which are substantive.

(c) Was made as a regular practice in the course of the regularly conducted activity,

To bring the statutory code and court rules into agreement and thereby avoid the problem of determining which portions of these statutory code provisions are procedural and which are substantive.

provided that falsely making such a certification or declaration would subject the maker to criminal penalty under the laws of the foreign or domestic location in which the certification or

To bring the statutory code and court rules into agreement and thereby avoid the problem of determining which portions of these statutory code provisions are procedural and which are substantive.

declaration was signed.

SUMMARY OF RULES CONTAINED IN REPORT

SESSION LAW	STATUTE/RULE	SUMMARY OF CHANGE
2002-22, §18	§90.6063	Section 90.6063 deals with the provision of interpreter services for deaf persons, and had previously stated that a request for qualified interpreters could be channeled through, *inter alia*, the Vocational Rehabilitation Program Office of the Department of Labor and Employment Security. The amendment serves only to change the entity name to the Division of Vocational Rehabilitation of the Department of Education.
2002-246, §1	§90.5035	The amendment to section 90.5035 extends the sexual assault counselor-victim privilege to a "trained volunteer," and goes on to define this new category. Previously, the privilege set forth in section 90.5035 applied only to communications with a sexual assault counselor.
2003-259, §1	§90.104	This amendment eliminates the need for a trial objection, in order to preserve an evidentiary issue for appeal, when the trial judge had made a definitive ruling on the

		admissibility of the evidence before trial. This change comports with a change made to Federal Rule of Evidence 103(a)(2) in 2000, and eliminates the danger of inadvertent waiver of an evidentiary objection at trial.
2003-259, §2	§90.803	Section 90.803(6), which sets forth the hearsay exception for records of a regularly conducted business activity, was amended to add language allowing for the admission of such evidence upon a certification or declaration by a records custodian, subject to certain procedural safeguards. It eliminates the need for a records custodian to appear at trial. These changes are consistent with the changes to the Federal Rules of Evidence enacted in 2000, and will serve to streamline the trial process while maintaining a procedure by which a party may still challenge the authenticity of, and business records foundation for the admission of, documentary evidence.
2003-259, §3	§90.902	Section 90.902, which deals with self-authentication of documents, likewise was amended to include the requirements for certification by a records custodian. These changes are consistent with the changes to

the Federal Rules of Evidence enacted in 2000, and will serve to streamline the trial process while maintaining a procedure by which a party may still challenge the authenticity of, and business records foundation for the admission of, documentary evidence.