

IN THE SUPREME COURT OF FLORIDA

CASE NO.:

IN RE: AMENDMENTS TO THE
FLORIDA RULES OF EVIDENCE

**REGULAR-CYCLE REPORT OF THE FLORIDA BAR
CODE AND RULES OF EVIDENCE COMMITTEE**

Dedee Costello, Chair of the Code and Rules of Evidence Committee, and John F. Harkness, Jr., Executive Director of The Florida Bar, file this regular-cycle report with the court under the direction and approval (28-0) 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, and is filed in accordance with *Fla. R. Jud. Admin.* 2.140(b).

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). In the following years, the Florida Legislature frequently amended statutory provisions of the Code, and these statutory amendments have been adopted as amended rules of evidence by the Supreme Court. The Florida Legislature's latest amendments to the Code of Evidence were made in 2005 and 2006, in bills identified as Chapter 2005-46, §§1-2, and Chapter 2006-204, §1, Laws of Florida. The Supreme Court, however, has not yet 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 three years and has approved and made recommendations for adoption of these provisions of the Evidence Code as Florida Rules of Evidence as shown below. The committee recommends that:

(1) Chapter 2005-46, §§1-2, Laws of Florida, be adopted as Florida Rules of Evidence. The committee vote on whether to recommend adoption of 2005-46, §§1-2, was 23 in favor, 1 against, 5 abstaining. These provisions of the Evidence Code repeal what is known as the Deadman's (or Deadperson's) Statute (§90.602, Fla. Stat.) and, in its stead, add an exception to the hearsay rule (§90.804(2)(e), Fla. Stat.) to permit relevant communications of the deceased or

incompetent person to be heard by the trier of fact. Specifically, Chapter 2005-46, §1, repeals provisions relating to testimony of interested persons regarding oral communication with a deceased or mentally incompetent person. Chapter 2005-46, §2, provides a hearsay exception in specified actions or proceedings for a statement made by a declarant who is unavailable due to death, illness, or infirmity regarding the same subject matter as a statement made by the declarant that was previously offered by an adverse party and admitted.

The Code and Rules of Evidence Committee was initially asked (in June 2004) by the Probate and Trust Litigation Committee of The Florida Bar Real Property, Probate and Trust Law Section to support the proposed repeal of the Deadperson's Statute and the amendment to the hearsay exception. Reasons stated for repeal of the Deadperson's Statute were that (1) it was difficult to understand; (2) its application sometimes led to harsh results and hair-splitting decisions; and (3) it was frequently unintentionally and unknowingly waived. (See the memorandum to the Code and Rules of Evidence Committee from William Hennessey of the Probate and Trust Litigation Committee, included as Appendix C.) The Code and Rules of Evidence Committee voiced no opposition to the legislation (the session laws are included as Appendix D), and agrees with the stated rationale in the Hennessey memorandum, and with the staff analysis that accompanied the statutory revisions when they were proposed by House Bill 523. (Relevant portions of that analysis are duplicated and included with this report as Appendix E.) Notice of the proposed rules was posted in *The Florida Bar News* on October 1, 2005 (see Appendix F), and no responses were received.

(2) Chapter 2006-204, §1, Laws of Florida, be adopted as a Florida Rule of Evidence. The committee vote on whether to recommend adoption of Chapter 2006-204, §1, was 29 in favor, 0 against. This provision of the Evidence Code (§90.503(1)(a)5., Fla. Stat.) broadens the psychotherapist-patient privilege by adding certain certified registered nurses whose primary practice is the diagnosis or treatment of mental or emotional conditions, to the list of those who will be deemed "psychotherapists." Notice of the proposed rule was posted in *The Florida Bar News* on October 1, 2006 (see Appendix F), and no responses were received.

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 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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