

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**

Caroline Iovino, 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 (38-0-0) 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, and is filed in accordance with *Fla. R. Jud. Admin.* 2.140(b).

This Court 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 this Court. The Florida Legislature's latest amendment to the Code was made in 2008, in a bill identified as Chapter 2008-172, §9, Laws of Florida. This Court, however, has not yet adopted this Code amendment to the extent that it is 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 this provision of the Evidence Code as Florida Rules of Evidence as shown below. The committee recommends the following:

(1) That Chapter 2008-172, §9, Laws of Florida, be adopted as Florida Rules of Evidence. The specific Evidence Code provision being amended is section 90.404(2)(b), Florida Statutes, dealing with child molestation. The amendment to section 90.404(2)(b)2, Florida Statutes, adds conduct proscribed by section 847.0135(5), Florida Statutes, to the definition of child molestation. That

statute addresses computer pornography, and subsection (5) deals with prohibited transmissions. As reflected in the bill analysis, “[t]he bill contains technical conforming changes to other statutes affected by the bill, including the criminal punishment code to reflect the relocation of the law proscribing lewd or lascivious exhibition live over a computer online service.”

The Code and Rules of Evidence Committee vote on whether to recommend adoption of 2008-172, §9, was 21 in favor, 10 against, 1 abstention. The majority of the committee members who voted in favor of recommending the change generally found the amendment to be technical as it only adds an additional criminal statutory reference. These members agree with the rationale and need for the “technical conformity.” The members voting in favor of adoption also acknowledged that the matter appeared more substantive than procedural, and that their recommendation to the court is merely to adopt “to the extent the amendment is procedural in nature.” Those voting against the amendment voiced concern over expanding the definition of child molestation and thereby enlarging the range of crimes that may be admissible. They oppose expanding the scope of Rule 90.404 beyond its original intent of limiting the crimes that can be used to prove bad character or propensity. Notice of the proposed rule was posted in *The Florida Bar News* on July 15, 2009, and no responses were received.

The rule in legislative format is included with this report as Attachment A. A chart of the rule contained in the report is included as Attachment B. The two-column format setting forth the revisions is in Attachment C. The referenced session law is included as Attachment D. The *Florida Bar News* notice is Attachment E.

(2) That Committee Comments to Rules 90.502 and 90.507 (section 90.502, Florida Statutes, which sets forth the lawyer-client privilege, and section 90.507, Florida Statutes, which provides for the waiver of privilege by voluntary disclosure) be approved. These Comments resulted from the Committee’s work with The Florida Bar Attorney-Client Privilege Task Force, which sought input regarding waiver of the attorney-client privilege and the work product privilege through inadvertent disclosure. The Committee determined by unanimous vote that Rules 90.502 and 90.507 adequately address the relevant privileges and waiver issue, but that a Committee Comment (identical for each rule) should be added to the rules for clarity. The proposed Comment has been approved by the Task Force, and is included with this report as Attachment F.

The Code and Rules of Evidence Committee and The Florida Bar thus respectfully request that the Court adopt Chapter 2008-172, §9, Laws of Florida as Florida Rules of Evidence to the extent that it concerns court procedure, and to declare the adoption of the amendment retroactively effective to the date when the bill took effect as law. Adoption of this amendment will bring the statutory code and court rules into agreement as to this provision. Doing so will avoid the problem of determining which portion of the statutory code provision is procedural and which is substantive.

The Code and Rules of Evidence Committee and The Florida Bar also respectfully request that the Court adopt the Committee Comments to Rules 90.502 and 90.507.

Respectfully submitted,

CAROLINE M. IOVINO
Chair, Code and Rules of
Evidence Committee
Adorno & Yoss, LLP
2525 Ponce de Leon Blvd.
Miami, FL 33134-6037
(305) 460-1000
Florida Bar No. 181110

JOHN F. HARKNESS JR.
Executive Director
The Florida Bar
651 E. Jefferson St.
Tallahassee, FL 32399-2300
(850) 561-5600
Florida Bar No. 123390

CERTIFICATION OF COMPLIANCE

I certify that this rule was read against *West's Florida Rules of Court – State* (2009).

I certify that this report was prepared in compliance with the font requirements of *Fla. R. App. P. 9.210(a)(2)*.

Ann Chittenden
Florida Bar Staff Liaison, Code and Rules of Evidence Committee
Florida Bar No. 311456

TEXT OF RULE CONTAINED IN REPORT
(LEGISLATIVE FORMAT)

90.404. Character evidence; when admissible

(1) Character evidence generally.--Evidence of a person's character or a trait of character is inadmissible to prove action in conformity with it on a particular occasion, except:

(a) *Character of accused.*--Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the trait.

(b) *Character of victim.*--

1. Except as provided in s. 794.022, evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the trait; or

2. Evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the aggressor.

(c) *Character of witness.*--Evidence of the character of a witness, as provided in ss. 90.608–90.610.

(2) Other crimes, wrongs, or acts.--

(a) Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

(b) 1. In a criminal case in which the defendant is charged with a crime involving child molestation, evidence of the defendant's commission of other crimes, wrongs, or acts of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

2. For the purposes of this paragraph, the term “child molestation” means conduct proscribed by s. 794.011, ~~or~~ s. 800.04, or s. 847.0135(5) when committed against a person 16 years of age or younger.

(c) 1. When the state in a criminal action intends to offer evidence of other criminal offenses under paragraph (a) or paragraph (b), no fewer than 10 days before trial, the state shall furnish to the defendant or to the defendant's counsel a written statement of the acts or offenses it intends to offer, describing them with the particularity required of an indictment or information. No notice is required for evidence of offenses used for impeachment or on rebuttal.

2. When the evidence is admitted, the court shall, if requested, charge the jury on the limited purpose for which the evidence is received and is to be considered. After the close of the evidence, the jury shall be instructed on the limited purpose for which the evidence was received and that the defendant cannot be convicted for a charge not included in the indictment or information.

(3) Nothing in this section affects the admissibility of evidence under s. 90.610.

CHART OF RULE CONTAINED IN REPORT

**FLORIDA CODE AND RULES OF EVIDENCE
2010 THREE-YEAR CYCLE AMENDMENTS**

RULE	COMMITTEE VOTE	REASONS FOR CHANGE
90.404(2)(b)2	21-10-1	To bring the statutory code and court rules into agreement and thereby avoid the problem of determining which portions of this statutory code provision are procedural and which are substantive.

**TWO-COLUMN FORMAT OF
RULE CONTAINED IN REPORT**

Proposed Rule	Reasons for Change
<p>RULE 90.404 CHARACTER EVIDENCE; WHEN ADMISSIBLE</p> <p>(1) Character evidence generally. [NO CHANGE]</p> <p>(2) Other crimes, wrongs, or acts.</p> <p>(a) [NO CHANGE]</p> <p>(b) 1. In a criminal case in which the defendant is charged with a crime involving child molestation, evidence of the defendant's commission of other crimes, wrongs, or acts of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.</p> <p>2. For the purposes of this paragraph, the term "child molestation" means conduct proscribed by s. 794.011, or s. 800.04, <u>or s. 847.0135(5)</u> when committed against a person 16 years of age or younger.</p>	<p>To bring the statutory code and court rules into agreement and thereby avoid the problem of determining which portions of this statutory code provision are procedural and which are substantive.</p>

FLORIDA 2008 SESSION LAW

Additions are indicated by Text; deletions by ~~Text~~. Changes in tables are made but not highlighted.

Chapter 2008-172

C.S.C.S.C.S.S.B. No. 1442

CRIMES AND OFFENSES--CHILDREN AND MINORS--PORNOGRAPHY

An act relating to exploited children; amending s. 92.56, F.S.; permitting use of a pseudonym to designate the victim of a crime involving a victim of production, possession, or promotion of child pornography; revising provisions concerning use of victim pseudonyms to specify that they may be used in civil and criminal proceedings; amending s. 796.035, F.S.; revising provisions relating to the sale or transfer of minors into sex trafficking or prostitution; amending s. 800.04, F.S., relating to lewd or lascivious exhibition, to conform to changes made by the act; amending s. 847.0135, F.S.; conforming provisions to changes made by the act; creating s. 847.002, F.S.; requiring law enforcement officers to provide certain information to the National Center for Missing and Exploited Children; requiring law enforcement officers submitting a case for prosecution that involves the creation, possession, or promotion of child pornography to provide specified information to prosecutors; requiring prosecutors to enter specified information in a database maintained by the Attorney General; creating s. 847.01357, F.S.; providing a civil remedy for any person who, while under the age of 18, was a victim of certain sexual abuse crimes wherein any portion of that abuse was used in the production of child pornography and who suffers personal or psychological injury as a result of the production, promotion, or possession of such images; specifying damages; providing for limitation of actions; providing for confidential pseudonyms to specified claimants; precluding a defense to certain civil actions; permitting the Attorney General to pursue cases on behalf of victims; providing for disposition of damages and attorney's fees; amending s. 960.03, F.S.; expanding the definition of "crime" for purposes of victim compensation to include violations of s. 827.071, s. 847.0135, s. 847.0137, or s. 847.038, related to online sexual exploitation and child pornography; defining the term "identified victim of child pornography;" expanding the definition of "victim" for purposes of victim

compensation to include a person less than 18 years of age who was present at the scene of a crime, saw or heard the crime, and suffered a psychiatric or psychological injury because of the crime, but who was not physically injured; creating s. 960.197, F.S.; authorizing victim compensation awards to certain persons who suffer psychiatric or psychological injury as a result of certain crimes; amending ss. 90.404, 92.565, 394.912, 409.2355, 775.082, 775.084, 775.15, 775.21, 784.048, 787.01, 787.02, 787.025, 794.065, 914.16, 921.0022, 921.244, 938.10, 943.04354, 947.1405, 948.03, 948.06, 948.101, 948.30, and 948.31, F.S.; conforming provisions to changes made by the act; providing an effective date.

WHEREAS, children who are sexually abused and then exploited by the creation of permanent images of that sexual abuse through child pornography are further harmed by the continued possession, promotion, and distribution of those images on the Internet, and

WHEREAS, the possession of child pornography is not a victimless crime, and more than 1,200 victims of child pornography are known by law enforcement agencies, more than 30 of whom were residents of this state at the time of their abuse, and

WHEREAS, victims of child pornography suffer repeated unending abuse not only as children, but throughout their lives, by those individuals who engage in the collection and distribution of the image of the victim's sexual abuse and exploitation, and

WHEREAS, victims of child pornography currently do not receive notice, consideration, compensation, or any other rights assured to crime victims in this state pursuant to chapter 960, F.S., and

WHEREAS, victims of child pornography are entitled to be heard and considered in any case involving the production, possession, and promotion of an image of their sexual abuse, and these victims are due all the rights and protections afforded every other crime victim in this state, NOW, THEREFORE,

Be It Enacted by the Legislature of the State of Florida:

....

Section 4. Present subsections (5), (6), and (7) of section 847.0135, Florida Statutes, are renumbered as subsections (6), (7), and (8), respectively, and a new subsection (5) is added to that section, to read:

<< FL ST § 847.0135 >>

847.0135. Computer pornography; traveling to meet minor; penalties

(5) Certain computer transmissions prohibited.--

(a) A person who:

1. Intentionally masturbates;

2. Intentionally exposes the genitals in a lewd or lascivious manner; or

3. Intentionally commits any other sexual act that does not involve actual physical or sexual contact with the victim, including, but not limited to, sadomasochistic abuse, sexual bestiality, or the simulation of any act involving sexual activity live over a computer online service, Internet service, or local bulletin board service and who knows or should know or has reason to believe that the transmission is viewed on a computer or television monitor by a victim in this state who is less than 16 years of age, commits lewd or lascivious exhibition in violation of this subsection. The fact that an undercover operative or law enforcement officer was involved in the detection and investigation of an offense under this subsection shall not constitute a defense to a prosecution under this subsection.

(b) An offender 18 years of age or older who commits a lewd or lascivious exhibition using a computer commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(c) An offender less than 18 years of age who commits a lewd or lascivious exhibition using a computer commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(d) A mother's breastfeeding of her baby does not under any circumstance constitute a violation of this subsection.

...

Section 9. Paragraph (b) of subsection (2) of section 90.404, Florida Statutes, is amended to read:

<< FL ST § 90.404 >>

90.404. Character evidence; when admissible

(2) Other crimes, wrongs, or acts.--

(b) 1. In a criminal case in which the defendant is charged with a crime involving child molestation, evidence of the defendant's commission of other crimes, wrongs, or acts of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

2. For the purposes of this paragraph, the term "child molestation" means conduct proscribed by s. 794.011, ~~or s. 800.04,~~ or s. 847.0135(5) when committed against a person 16 years of age or younger.

Section 33. This act shall take effect October 1, 2008.

FLORIDA BAR NEWS NOTICE
JULY 15, 2009

Proposed Code and Rules of Evidence amendments

The Code & Rules of Evidence Committee invites comment on the proposed three-year cycle amendment to the Florida Code and Rules of Evidence shown below. After reviewing comments received in response to this publication, the committee will make its final proposal to the Florida Supreme Court. The full text of the proposal can be found at the Bar's Web site at floridabar.org. Interested persons have until August 15 to submit comments electronically to Caroline Iovino, chair of the Code & Rules of Evidence Committee at ciovino@adorno.com.

RULE 90.404. CHARACTER EVIDENCE; WHEN ADMISSIBLE

(1) NO CHANGE

(2) OTHER CRIMES, WRONGS, OR ACTS.--

(a) Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

(b) 1. In a criminal case in which the defendant is charged with a crime involving child molestation, evidence of the defendant's commission of other crimes, wrongs, or acts of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

2. For the purposes of this paragraph, the term "child molestation" means conduct proscribed by s. 794.011, ~~or~~ s. 800.04, or s. 847.0135(5) when committed against a person 16 years of age or younger.

(c) 1. When the state in a criminal action intends to offer evidence of other criminal offenses under paragraph (a) or paragraph (b), no fewer than 10 days

before trial, the state shall furnish to the defendant or to the defendant's counsel a written statement of the acts or offenses it intends to offer, describing them with the particularity required of an indictment or information. No notice is required for evidence of offenses used for impeachment or on rebuttal.

2. When the evidence is admitted, the court shall, if requested, charge the jury on the limited purpose for which the evidence is received and is to be considered. After the close of the evidence, the jury shall be instructed on the limited purpose for which the evidence was received and that the defendant cannot be convicted for a charge not included in the indictment or information.

(3) NO CHANGE

CODE AND RULES OF EVIDENCE COMMITTEE
COMMENT TO RULES 90.502 AND 90.507

[NOTE: The identical comment is proposed for both rules.]

2010 Committee Comment. The concept of waiver by voluntary disclosure requires that the disclosing party intend by its disclosure to waive the applicable privilege. Inadvertent disclosure of a confidential matter or communication does not constitute a voluntary waiver of a privilege.

Florida appellate courts addressing the issue have applied the “relevant circumstances” test in determining whether a claimed inadvertent disclosure amounts to a waiver of the privilege. See, e.g., *Jenney v. Airdata Wiman, Inc.*, 846 So. 2d 664 (Fla. 2d DCA 2003); *General Motors Corp. v. McGee*, 837 So. 2d 1010 (Fla. 4th DCA 2003); *Abamar Housing & Development, Inc. v. Lisa Daly Lady Decor, Inc.*, 698 So. 2d 276 (Fla. 3d DCA 1997). See also Report of the American Bar Association Task Force on Attorney-Client Privilege, Recommendation 120D (2006).