HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1927 Rules of Evidence
SPONSOR(S): Judiciary
TIED BILLS: None **IDEN./SIM. BILLS:** SB 524

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Judiciary	17 Y, 0 N	Billmeier	Havlicak
2)			
3)			
4)			
5)			

SUMMARY ANALYSIS

This bill amends three sections of the Florida Evidence Code. The first section provides that, in order to preserve an evidentiary issue for appellate review, a party does not have to renew an objection or offer of proof during trial in response to a pretrial evidentiary ruling. The second section allows business records to be admitted into evidence by means of a certificate of authenticity. The third section sets forth the criteria for establishing the certificate of authenticity.

The bill takes effect July 1, 2003.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

1. Reduce government?	Yes[]	No[]	N/A[]
2. Lower taxes?	Yes[]	No[]	N/A[]
3. Expand individual freedom?	Yes[]	No[]	N/A[]
4. Increase personal responsibility?	Yes[]	No[]	N/A[]
5. Empower families?	Yes[]	No[]	N/A[]

For any principle that received a "no" above, please explain:

B. EFFECT OF PROPOSED CHANGES:

The Florida Evidence Code is contained in chapter 90, F.S.[1] This bill changes three sections of the Code.

Rulings on Evidence

Section 90.104(1), F.S., provides that 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. However, the court may only take these actions when:

> (1) the ruling is one admitting evidence and a timely objection or motion to strike appears on the record wherein the specific ground of objection is stated or is apparent from the context; or
>
> (2) the ruling is one excluding evidence and 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.

A motion in limine or other pretrial hearing to determine the admissibility of evidence is often a desirable method of determining the admissibility of evidence prior to the trial. The trial court has discretion in determining whether to rule on the motion prior to trial or to rule on the admissibility of the evidence when it is actually offered. Rulings made prior to trial are subject to reconsideration during the trial.[2]

Section 90.104(1), F.S., is silent on the issue of whether an objection to a trial court's pretrial ruling regarding the admissibility of evidence must be renewed at trial in order to preserve the ruling for appellate review. Florida courts have generally held that a renewal objection is necessary to preserve appellate review for a pretrial ruling that evidence is admissible. If the pretrial ruling finds certain evidence inadmissible, some Florida courts have held that it is unnecessary to make a renewal objection at trial, such as an offer of proof of the excluded evidence, for appellate preservation because such defeats the motion in limine's purpose of preventing a proffer of the evidence at trial.[3] However, other Florida courts have required a proffer of the excluded evidence for appellate preservation.[4]

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[1] See s. 90.101, F.S.

[2] See, e.g., State v. Gaines, 770 So. 2d 1221, 1227 (Fla. 2000)(noting that the reason the defendant is required to renew a pretrial motion to suppress at the time the evidence is introduced is the possibility that the trial court might change its prior ruling based on the testimony and evidence introduced during the trial.)

[3] See Ehrhardt, Florida Evidence, s. 104.5 (2001 Edition).

[4] See Ehrhardt, Florida Evidence, s. 104.5 (2001 Edition).

Prior to 2000, Federal Rule of Evidence (FRE) 103(a), was nearly identical to s. 90.104(1), F.S., and likewise was silent on the issue of whether a renewal objection to a pre-trial ruling was necessary for appellate preservation. Like Florida courts, the federal courts in the face of the federal rule's silence had taken varying approaches to this issue. Some federal courts always required a renewal objection, while other courts did not require renewal if the trial court had definitively ruled pretrial.

The Seventh Circuit discussed the issue in Wilson v. Williams.[5] In Wilson, a majority of the court held that an unconditional, definitive ruling in limine regarding the admissibility of evidence preserves an issue for appellate review without the necessity of a renewal objection or offer of proof at trial.[6] The majority explained:

> When the judge makes a decision that does not depend on how the trial proceeds, then an objection will not serve the function of ensuring focused consideration at the time when decision is best made. A judge who rules definitively before trial sends the message that the right time has come and gone. An objection is unnecessary to prevent error, and it may do little other than slow down the trial. Sometimes an objection or offer of proof will alert the jury to the very thing that should be concealed.[7]

Further, the majority noted that a definitive ruling is sufficient by itself for appellate preservation because requiring a renewal objection places a lawyer in the position of potentially annoying a judge with repetitive arguments and creates an opportunity for lost rights due to an error by a lawyer.[8]

The dissent in Wilson argued that a renewal objection should be required because holding that a definitive ruling is sufficient will only generate "satellite litigation" over what constitutes a "definitive ruling."[9] Further, the dissent noted that a renewal objection is neither time consuming nor difficult and that it can be done at a side bar outside of the jury's presence.[10]

The Federal Rule Advisory Committee's Notes to FRE 103(a) note that the differing federal court views on the question of renewal objections had created uncertainty for litigants and unnecessary work for the appellate courts. In order to address this problem, FRE 103(a) was amended by Congress, effective December 1, 2000, to specify that once the court makes 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. The Federal Rule Advisory Committee's Notes explain that the requirement of a "definitive ruling" before objection or offer of proof renewal becomes unnecessary imposes an obligation on counsel to clarify whether a ruling is definitive if there is doubt. Further, the Notes indicate that a "definitive ruling" will be reviewed in light of the facts and circumstances before the trial court at the time of the ruling. In the event those facts and circumstances change materially, a new objection or offer of proof must be made in order to preserve an appeal based on the changed facts and circumstances. Finally, the Notes explain that even though the court may issue a "definitive ruling" that nothing in the new rule precludes the court from subsequently revisiting and changing its ruling.[11]

Effect of Proposed Changes

Section 1 of the bill amends s. 90.104, F.S., to provide that 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

[5] 182 F.3d 562 (7th Cir. 1999).
[6] See Wilson, 182 F.3d at 566-68.
[7] See Wilson, 182 F.3d at 566.
[8] See Wilson, 182 F.3d at 566.
[9] See Wilson, 182 F.3d at 575-576 (Manion, J., dissenting).
[10] See Wilson, 182 F.3d at 575-576 (Manion, J., dissenting).
[11] See Advisory Committee Notes to Federal Rule of Evidence 103.

or offer of proof to preserve a claim of error for appeal. This change would now make the Florida rule nearly identical to the corresponding Federal rule.

Business Records Exception to the Hearsay Rule

Section 90.803(6), F.S., provides an exception to the hearsay rule for records of regularly conducted business activities. The exception makes it possible to introduce relevant evidence without the inconvenience of producing all persons who had a part in preparing the documents during the trial. The evidence is reliable because it is of a type that is relied upon by a business in the conduct of its daily affairs and the records are customarily checked for correctness during the course of the business activities.[12]

To lay the foundation for the admission of evidence under the business record exception, it is necessary that a witness be called who can show that each of the foundation requirements is present but it is not necessary to call the person who actually prepared the document.[13] The records custodian or any qualified witness who has the necessary knowledge to testify as to how the record was made can lay the necessary foundation.[14] If a party does not lay the necessary foundation, then the document is not admissible under s. 90.803(6), F.S.[15]

Federal Rule of Evidence 803(6) is similar to the Florida business records rule. However, the federal rule provides that the testimony of the records custodian necessary to lay the foundation for the business record exception may be a certification of the record custodian, in lieu of live testimony.

Effect of Proposed Changes

Section 2 of the bill amends s. 90.803(6), F.S., to permit a business record to be admitted if the foundation can be laid with a certification or declaration. The bill requires parties intending to offer business records into evidence via certification route to provide every other party reasonable written notice of that intention. The offering party must make the evidence available for inspection sufficiently in advance of its offer in evidence to provide any other party 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 in a criminal proceeding must provide written notice of that intention at the arraignment or as soon thereafter as practicable, or, in a civil proceeding, 60 days before trial. The bill provides that a motion opposing the admissibility of such evidence must be made and determined before trial. A party's failure to file such a motion before trial constitutes a waiver of the objection to the evidence, but the court may grant relief from the waiver for good cause shown.

Section 92.60, F.S., provides a procedure for admitting business records from foreign countries. This bill applies similar procedures for domestic locations.

The bill would make this portion of the business records exception to the hearsay rule similar to the corresponding federal rule.

Self-Authentication of Records

Documents must be authenticated before they are admissible evidence. In order to authenticate a document, counsel must show the court evidence upon which the jury could base a finding that the document was genuine. Section 90.902, F.S., sets forth a list of documents that will be considered

[12] See Ehrhardt, Florida Evidence, s. 803.6 (2001 Edition).
[13] See Forester v. Norman Roger Jewell & Brooks, 610 So.2d 1369 (Fla. 1st DCA 1992); Ehrhardt, Florida Evidence, s. 803.6 (2001 Edition).
[14] See Forester, 610 So. 2d at 1373.
[15] See Forester, 610 So. 2d at 1373.

"self-authenticating."[16] The documents considered to be self-authenticating under s. 90.902, F.S., include documents bearing official seals of governments, copies of official public records, documents issued by governmental authorities, newspapers, commercial papers as provided in the Uniform Commercial Code, and documents declared to be authentic by the Legislature or courts.

Federal Rule of Evidence 902 is similar to s. 90.902, F.S. However, the federal rule sets forth procedural requirements for preparing a declaration of a custodian or other qualified witness that will establish a sufficient foundation for a business record under the certificate procedure of Federal Rule of Evidence 803(6), the business records exception to the hearsay rule.

Effect of Proposed Changes

Section 3 of the bill amends s. 90.902, F.S., pertaining to self-authentication of documents, to provide a mechanism for certified foreign and domestic business records to be self authenticated records. These business records will be deemed authentic when they are accompanied by a certification or declaration from the custodian of the records, or another qualified person, certifying or declaring that the record:

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

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

(3) Was made as a regular practice in the course of the regularly conducted activity;

provided that falsely making such 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.

The bill will make the Florida rule similar to the corresponding federal rule.

Section 4 of the bill provides that the bill will take effect July 1, 2003.

C. SECTION DIRECTORY:

Section 1. Amends 90.104, F.S., relating to rulings on evidentiary issues by the trial court.

Section 2. Amends 90.803, relating to the business records exception to the hearsay rule.

Section 3. Amends 90.902, relating to certification of business records for admission under s. 90.803(6), F.S.

Section 4. Providing an effective date of July 1, 2003.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

This bill does not appear to impact state revenues.

[16] Professor Ehrhardt explains that a "self authenticating" document "has sufficient guarantees of genuiness to be admitted into evidence. The document proves itself and is admissible into evidence without proof of extrinsic evidence." Ehrhardt, Florida Evidence, s. 902.1 (2001 Edition).

2. Expenditures:

This bill does not appear to impact state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

This bill does not appear to impact local government revenues.

2. Expenditures:

This bill does not appear to impact local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill does not appear to have a direct economic impact on the private sector.

D. FISCAL COMMENTS:

While the bill does not appear to have a direct fiscal impact on government or the private sector, it could result in lower witness costs in court cases involving business records.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, does not appear to reduce the authority that counties or municipalities have to raise revenue in the aggregate, and does not appear to reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Legislative Authority to Amend the Evidence Code

Article V, s. 2(a), Fla. Const., requires the Supreme Court of Florida to adopt rules for the practice and procedure in Florida courts. While the Legislature can enact substantive law, matters of procedure must be determined by the court. The Florida Supreme Court can strike down laws that conflict with court rules. Accordingly, in Florida, if a matter is substantive in nature it is for the legislature to address; if procedural it is for the Florida Supreme Court to attend. However, determining the difference between the two is not simple or clear. In 1973, Justice Adkins described the difference between substance and procedure:

> The entire area of substance and procedure may be described as a "twilight zone" and a statute or rule will be characterized as substantive or procedural according to the nature of the problem for which a characterization must be made. From extensive research, I have gleaned the following general tests as to what may be encompassed by the term "practice and procedure." Practice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. "Practice and procedure" may be described as the machinery of the judicial process as opposed to the product thereof. Examination of many authorities leads me to conclude that substantive law includes those rules and principles which fix and declare the primary rights of individuals as respects their persons and their property. As to the term "procedure," I conceive it to include the administration of the remedies available in cases of invasion of primary rights of

individuals. The term "rules of practice and procedure" includes all rules governing the parties, their counsel and the Court throughout the progress of the case from the time of its initiation until final judgment and its execution.[17]

The Florida Evidence Code contains elements that are both substantive and procedural.[18] The Florida Supreme Court has routinely adopted changes in the Code, to the extent that such changes are procedural, as court rule and has not defined which portions are substantive and which portions are procedural.[19] In 2000, the court declined to adopt a legislative change to the Code.[20] However, the court did not determine whether the change (a modification of the former testimony provision of the hearsay rule) was substantive or procedural so that issue must be decided in future litigation.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

This bill is identical to SB 524 which passed the Senate on March 27, 2003, and is currently in House Messages.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On April 9, 2003, the Committee on Judiciary adopted this proposed committee bill and reported it favorably.

[17] See In re Florida Rules of Criminal Procedure, 272 So. 2d 65, 66 (Fla. 1973)(Adkins, J., concurring).
[18] See In re Amendments to the Florida Evidence Code, 782 So. 2d 339, 341-42 (Fla. 2000).
[19] See e.g. Id., at 341-342; In re Fla. Evidence Code, 372 So. 2d 1369 (Fla. 1979) (adopting Evidence Code to the extent it is procedural), clarified, In re Florida Evidence Code, 376 So. 2d 1161 (Fla. 1979); In re Amendment of Fla. Evidence Code, 497 So. 2d 239 (Fla. 1986) (adopting amendments to Code to the extent they are procedural); In re Florida Evidence Code, 638 So. 2d 920 (Fla. 1993) (same); In re Florida Evidence Code, 675 So. 2d 584 (Fla.1996) (same); In re Amendments to the Florida Evidence Code, 825 So. 2d 339 (Fla. 2002)(same).
[20] See In re Amendments to the Florida Evidence Code, 782 So. 2d 339 (Fla. 2000).