ENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: SB 524

SPONSOR: Senator Campbell

SUBJECT: Rules of Evidence

DATE: March 6, 2003 REVISED: 03/11/02

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Forgas	Roberts	JU	Favorable
2.	White	Wilson	GO	Fav/1 amendment
3.				
4.				
5.				
6.				

I. Summary:

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

The bill takes effect July 1, 2003.

This bill substantially amends the following sections of the Florida Statutes: 90.104; 90.803; and 90.902.

II. Present Situation:

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 pre-trial 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. *See, e.g., State v. Gaines,* 770 So.2d 1221 (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.]

Section 90.104(1), F.S., is silent on the issue of whether an objection to a trial court's pre-trial 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 pre-trial ruling that evidence is admissible. *See, e.g., Horne v. Hudson,* 772 So.2d 556 (Fla. 1st DCA 2000)[when motion in limine was denied prior to trial, error was not preserved on appeal when there was no contemporaneous objection made at the time the evidence was offered at trial.] If the pre-trial ruling finds certain evidence inadmissible, some Florida courts have held that it is unnecessary to make a renewal objection at trial, i.e, 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. *See, Ehrhardt* at s. 104.5, citing *Bender v. State,* 472 So.2d 1370,1373 (Fla. 3rd DCA 1985); *Brantley v. Snapper Power Equip.,* 665 So.2d 241-243 (Fla. 3rd DCA 1995); *Spindler v. Brito-Deforge*, 762 So.2d 963, 964 (Fla. 5th DCA 2000). However, other Florida courts have required a proffer of the excluded evidence for appellate preservation. *See, Ehrhardt* at s. 104.5, citing *Brantley*, 665 So.2d at 243; and *Robinson v. State*, 575 So.2d 699, 703 (Fla. 1st DCA 1991).

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 pre-trial. *See, e.g., Collins v. Wayne Corp.*, 621 F.2d 777 (5th Cir. 1980); Rosenfeld *v. Basquiat*, 78 F.3d 84 (2d Cir. 1996).

An example of one federal court's holding on this issue is contained in *Wilson v. Williams*, 182 F.3d 562 (7th Cir. 1999). 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. *Wilson*, 182 F.3d at 566-568. The majority explained that:

> 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. *Id.* at 566.

Further, the majority noted that a definitive ruling is sufficient by itself for appellate preservation because requiring a renewal objection: (a) places a lawyer in the position of potentially annoying a judge with repetitive arguments; and (b) creates an opportunity for lost rights due to mere lawyer inadvertence. *Id.*

The dissent in *Wilson* stated, however, 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."*Id.* at 575. Further, the dissent noted that a renewal objection is not time consuming, nor difficult, and that it can be done at a side bar outside of the jury's hearing. *Id.*

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. *See, e.g., E.E.O.C. v. Indiana Bell Telephone Company,* 256 F.3d 516, 526 (C.A. 7th 2001).

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.[1]

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. *See, Ehrhardt* at s. 803.6. 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. *Id.* 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. *Id.*

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. *See, Forester v. Norman Roger Jewell & Brooks,* 610 So.2d 1369 (Fla. 1st DCA 1992). It is not necessary to call the person who actually prepared the document. *Id.* The records custodian or any qualified witness who has the necessary knowledge to testify as to how the record was

[1] The Federal Rule Advisory Committee Notes are persuasive, not binding, authority for the courts when interpreting evidence rules. *See, e.g., Tome v. U.S.*, 513 U.S. 150, 168 (1995).

made can lay the necessary foundation. *Id.* If a party does not lay the necessary foundation, then the document is not admissible under s. 90.803(6), F.S. *Id.* Whether an adequate foundation has been laid rests largely within the discretion of the trial court. *See, Ehrhardt* at s. 803.6, citing *LEA Indus., Inc. v. Raelyn Int'l, Inc.,* 363 So.2d 49, 52 (Fla. 3rd DCA 1978).

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.

Foreign Business Records

A separate exception to the hearsay rule for foreign business records is provided in s. 92.60, F.S. The exception provides for the admissibility of foreign business records in both civil and criminal cases without the necessity of calling a custodian or other qualified witness to testify to the foundation that is normally required under the business record exception pursuant to s. 90.803(6), F.S. Section 92.60, F.S., provides that the foundation for the admission of foreign business records can be laid through a foreign certification, rather than the testimony of the custodian or other witness with knowledge of the record keeping process.

To comply with s. 92.60, F.S., the custodian of a foreign record of a regularly conducted business activity or other qualified person must make a written declaration and sign it in a foreign country under conditions so that, if the declaration was falsely made, the maker would be subjected to criminal penalties under the laws of that country. Section 92.60, F.S., requires the certification to attest that the record:

- Was made at or near the time of occurrence of the matters set forth by, or from information transmitted by a person with knowledge of, those matters;
- Was kept in the course of a regularly conducted business activity; and
- Was made as a regular practice of that business.

Duplicates of foreign business records are admissible to the same extent as are originals, as long as the certification attests that the records are duplicates of the originals.

Section 92.60(4), F.S., provides that a party seeking to offer evidence under the section shall provide written notice of that intention to each other party. In a criminal proceeding, the notice is to be given at the arraignment or as soon as practicable. In a civil action, the notice must be given at least 60 days prior to trial. A party objecting to the introduction of such records must make a motion to that effect, which must be determined by the court before trial. Failure to make a timely motion is a waiver of the objection, but the court may grant relief from the waiver for "good cause shown."

In criminal cases, the issue arises as to whether records admitted under s. 92.60, F.S., violate a criminal defendant's constitutional right to confront witnesses. Federal courts that have considered this issue have found no infringement upon confrontation when evidence is offered under the federal counterpart to s. 92.60, F.S. *Ehrhardt,* at s. 803.6d, citing *United States v. Ross,* 33 F.3d 1507 (11th Cir. 1994), [remaining citations omitted.]

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 "self-authentic," that is, the document has sufficient guarantees of genuiness, proves itself, and is admissible into evidence without proof of extrinsic evidence. *See, Ehrhardt,* at s. 902.1. 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.

The provisions of s. 90.902, F.S., regarding self-authentication are available as an alternative to introducing evidence to prove the requirements of s. 90.901, F.S., which provides that authentication or identification of evidence is required as a condition precedent to its admissibility. Therefore, if a document fails to meet the requirements of one of the requirements of s. 90.902, F.S., and cannot be self-authenticated, then it may be authenticated under other procedures for authentication. *See, Ehrhardt* at s. 902.1, citing *Sunnyvale Maritime Co. v. Gomez,* 546 So.2d 6 (Fla. 3d DCA 1989).

Federal Rule of Evidence 902 is similar to s. 90.902, F.S., with the exception that it 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), which is the business records exception to the hearsay rule.

III. Effect of Proposed Changes:

Section 1 of the bill amends subsection (1) of s. 90.104, F.S., pertaining to rulings on evidence, 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 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.

Section 2 of the bill amends subsection (6) of s. 90.803, F.S., which is the business records exception to the hearsay rule, to provide that certification of business records under s. 90.902 (11), F.S, will also be considered business records that are not considered to be hearsay.

Additionally, subsection (6) is amended to provide that parties intending to offer business records into evidence via the certification route will be required to provide every other party reasonable written notice of that intention and shall 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. 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.

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

Section 3 of the bill amends s. 90.902, F.S., pertaining to self-authentication of documents, to create a new subsection (11) deeming 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:

- 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;
- Was kept in the course of a regularly conducted activity; and
- 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 this rule similar to the corresponding federal rule.

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

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

It appears that the bill would clarify the varying approaches taken by Florida courts regarding when a renewal objection or offer of proof is necessary for appellate preservation by providing that no such renewal is necessary where there has been a "definitive ruling." The bill may generate litigation, however, over the precise meaning of the term "definitive ruling."

The bill would also make it less cumbersome and less costly for litigants to gain the admissibility of business records into evidence as they will not be required to depose records custodians or secure their attendance at trials.

C. Government Sector Impact:

It appears that the bill would clarify the varying approaches taken by Florida courts regarding when a renewal objection or offer of proof is necessary for appellate preservation by providing that no such renewal is necessary where there has been a "definitive ruling." The bill may generate litigation, however, over the precise meaning of the term "definitive ruling."

The bill would also make it less cumbersome and less costly for litigants to gain the admissibility of business records into evidence as they will not be required to depose records custodians or secure their attendance at trials.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

#1 by Governmental Oversight and Productivity:
The amendment transfers s. 43.195, F.S., to s. 90.959, F.S., for the purpose of consolidating provisions of law relating to evidence in Ch. 90, F.S.