

9-1-1977

## Evidence

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### Recommended Citation

William M/ Hicks and Joseph M. Matthews, *Evidence*, 31 U. Miami L. Rev. 951 (1977)

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# EVIDENCE

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*The authors examine the new Florida Evidence Code through a comparative analysis of the Code, pre-Code Florida case and statutory law, and the Federal Rules of Evidence. The article identifies possible sources of difficulty in mechanical application of Code rules and offers some practical suggestions in these areas.*

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## I. INTRODUCTION

On June 23, 1976, the Florida Legislature enacted the Florida Evidence Code<sup>1</sup> (Code) which is to become effective July 1, 1978. Much like the Federal Rules of Evidence (Federal Rules), the Code is designed to bring together in one codification the case and statutory law which in the past governed the admission and exclusion of evidence in the courts of the State of Florida.

The purpose of this article is to explore the Code. We will treat each article of the Code separately and analyze each in the following manner: 1) describe each rule and explain the mechanics of its application; 2) compare and contrast each rule with the prior law of Florida; 3) compare and contrast each rule with its federal coun-

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1. FLA. STAT. § 90.101-.958 (Supp. 1976). Professor Charles W. Ehrhardt, who was the reporter to the Florida Law Revision Council for the Proposed Florida Evidence Code, wrote an instructive article which highlighted and explained several of the more controversial provisions in the code. 2 FLA. ST. U.L. REV. 681 (1974). His article generally offers persuasive arguments in favor of the Code provisions discussed. It is hoped that this article will further explain to the bar the extent to which the Code will alter prior law.

terpart; and 4) provide some practical assistance to the lawyer on use of the Code.

A note of caution to the reader is in order. The 1977 legislature moved the effective date of the Code to 1978. Therefore, this article must be sent to press well before the effective date of the Florida Evidence Code. Consequently, when using this article, be certain to determine if the 1977 Legislature has subsequently changed any provisions of the Code.

## II. ARTICLE 1—GENERAL CONSIDERATIONS

The act which gave birth to the Florida Evidence Code created sections 90.101 through 90.958 of the Florida Statutes and repealed most of former chapters 90 and 92,<sup>2</sup> which represented the primary statutory provisions concerning evidence previously existing in Florida. The act also transferred certain sections of former chapter 90 into present chapter 92.<sup>3</sup>

Sections 101 through 108 of new chapter 90 contain general provisions, some of which have substantive significance. Section 101 is the Short Title. Section 102 dictates that the Code "shall replace and supersede existing statutory or common law in conflict with its provisions."<sup>4</sup> This provision results in every evidentiary problem giving rise to a simple, two-pronged analysis. First, one must determine whether the issue is governed by a provision of the Code. If so, the issue should be resolved by interpreting the legislative intent underlying the Code provision.<sup>5</sup> Second, if the issue presented does not find resolution in the Code, then reference must be made to prior statutory and common law principles.

Section 103(1) provides that the Code applies in the same proceedings in which the general law of evidence previously applied. Consequently, prior law must be consulted to determine whether the Code will be authority in any particular administrative, or other proceeding. Furthermore, section 103(1) combined with rule 501 of

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2. Repealed were FLA. STAT. §§ 90.04-.06, .08-.10, .241-.243; FLA. STAT. §§ 92.01-.04, .10-121, .22, .35-37.

3. Transferred and renumbered were Florida Statutes sections 90.01, .011, .02, .14, .141, .15, .231, .25.

4. FLA. STAT. § 90.102 (Supp. 1976).

5. Of course, the legislative intent will in most instances be evidenced by the legislature's acceptance or rejection of the prior case law.

the Federal Rules<sup>6</sup> dictates that the witness privileges provided by article 5 of the Code<sup>7</sup> will apply to federal courts in Florida.<sup>8</sup>

Section 103(2) makes it clear that the Code applies to both civil and criminal actions unless specifically stated otherwise. Section 103(3) preserves the parole evidence rule.<sup>9</sup>

Section 104 lays out the appropriate procedure for rulings on evidence. In order to reverse a judgment on the basis of the admission or exclusion of evidence, a substantial right of the party must be adversely affected. In addition, a timely objection with specific grounds therefore (unless the grounds were apparent from the context) must have been made if the ruling admitted evidence; or when the evidence was excluded, an offer of proof must have been made, unless the substance was clear from the context.<sup>10</sup>

The requirement that a substantial right be affected is essentially the same as the general common law requirement that the error result in a miscarriage of justice before a judgment is reversed.<sup>11</sup> The Federal Rules contain the same requirement.<sup>12</sup> The requirement of a timely objection accompanied by specific grounds also mirrors the common law<sup>13</sup> and the Federal Rules.<sup>14</sup> The same is true of the offer of proof.<sup>15</sup>

The Code also contains the standard provisions that the trial

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6. FED. R. EVID. 501. This rule provides:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

7. FLA. STAT. §§ 90.501-.510 (Supp. 1976).

8. The desirability of applying the state law of privileges is discussed in the analysis of section 504 of article 5. See text accompanying notes 130-38 *infra*.

9. FLA. STAT. § 90.103(3) (Supp. 1976).

10. FLA. STAT. § 90.104(1) (Supp. 1976).

11. *Jennings v. Pope*, 101 Fla. 1476, 136 So. 471 (1931); S. GARD, *FLORIDA EVIDENCE*, rule 498 (1967). See also FLA. STAT. § 59.041 (1975).

12. FED. R. EVID. 103(a).

13. *Western Union Tel. Co. v. Merritt*, 55 Fla. 462, 46 So. 1024 (1908); S. GARD, *supra* note 11, at rule 494-95.

14. FED. R. EVID. 103(a)(1).

15. *Vaughan's Seed Store v. Stringfellow*, 56 Fla. 708, 48 So. 410 (1909); S. GARD, *supra* note 11, at rule 496. See also FED. R. EVID. 103(a)(2), 3(b).

be conducted to prevent inadmissible evidence from getting to the jury by any means.<sup>16</sup> The court may also always take notice of fundamental errors affecting substantial rights, even when they are not brought to the court's attention.<sup>17</sup>

Section 105 provides that the court determine preliminary questions concerning qualification of a witness, existence of a privilege, or admissibility of evidence.<sup>18</sup> Also, the court can make preliminary findings of relevancy conditioned on subsequent production of essential facts<sup>19</sup> and hearings of preliminary matters can be held outside the hearing of the jury when the interests of justice so require.<sup>20</sup>

The Code, in section 105, fails to dictate whether the trial judge is bound by the rules of evidence in making preliminary determinations. The federal rule provides that the rules of evidence do not apply at this stage, except those with respect to privileges.<sup>21</sup> As a practical matter, it would be impossible for a judge to follow all of the rules of evidence in making such preliminary determinations. Consequently, the absence of any provision in the Code should not be interpreted as requiring the judge to perform this impossible task. However, the rules governing privileges ought to be followed as much as possible.

The Code also fails to protect an accused who testifies on a preliminary matter from cross-examination as to other issues in the case.<sup>22</sup> In light of the broad scope of cross-examination that may be allowed at the judge's discretion,<sup>23</sup> the accused should be afforded the protections extended by Federal Rule 104(d). This protection would insure full participation by the accused during preliminary determinations.

Section 106 prohibits the judge from summing up the evidence or commenting on the weight or credibility of witnesses or the guilt

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16. FLA. STAT. § 90.104(2) (Supp. 1976). *See also* FED. R. EVID. 103(c).

17. FLA. STAT. § 90.104(3) (Supp. 1976). *See also* FED. R. EVID. 103(d).

18. FLA. STAT. § 90.105(1) (Supp. 1976). *See also* FED. R. EVID. 104(a).

19. FLA. STAT. § 90.105(2) (Supp. 1976). *See also* FED. R. EVID. 104(b).

20. FLA. STAT. § 90.105(3) (Supp. 1976). This section mandates that all hearings on the admissibility of confessions be conducted out of the hearing of the jury. *See also* FED. R. EVID. 104(c).

21. FED. R. EVID. 104(a).

22. *See* FED. R. EVID. 104(d). This rule provides: "The accused does not, by testifying upon a preliminary matter, subject himself to cross-examination as to other issues in the case."

23. FLA. STAT. § 90.612(2) (Supp. 1976).

of the accused. This section reflects the common law rule in Florida,<sup>24</sup> but differs from the federal practice.<sup>25</sup> Reacting to the fact that most states were in accord with the Florida rule, a "proposed" federal rule<sup>26</sup> codifying the federal practice was eliminated from the final version of the Federal Rules of Evidence enacted by Congress. A careful analysis of the relative merits of these opposing views is beyond the scope of this article, however, the authors feel the better rule is the one followed in Florida.<sup>27</sup>

Section 107 is the standard provision for limited admissibility. It requires the judge, upon request, to instruct the jury on the proper scope of evidence that is admissible for a limited purpose. This section represents both the common law rule<sup>28</sup> and the federal rule.<sup>29</sup>

The last section in article 1 is also a standard provision for introduction by an adverse party of the remainder of a writing, or related writings, when the opponent offers to place only a portion of the writing into evidence.<sup>30</sup> This provision also represents both the common law<sup>31</sup> and federal rule.<sup>32</sup>

Article 1 provides a general set of guidelines for the procedural application of the subsequent articles. It does not alter the common law to any significant degree, and with the exception of the prohibi-

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24. See generally HICKS, TRIAL HANDBOOK FOR FLORIDA LAWYERS, §§ 12-15 (1970).

25. Capital Traction Co. v. Hof, 174 U.S. 1, 13-14 (1899).

26. The "proposed" federal rule provided:

After the close of the evidence and arguments of counsel, the judge may fairly and impartially sum up the evidence and comment to the jury upon the weight of the evidence and the credibility of the witnesses, if he also instructs the jury that they are to determine for themselves the weight of the evidence and the credit to be given to the witnesses and that they are not bound by the judge's summation or comment.

FED. R. EVID., Appendix of Deleted and Superseded Materials, Rule 105 (West) (as prescribed by the Supreme Court).

Both the House and Senate Judiciary Committees were careful to note that they were not overruling the prior federal practice. They merely wanted to avoid deciding which was the better rule and leave the subject for separate consideration at a later time.

Hereinafter, all references to "proposed" Federal Rules of Evidence include those rules which Congress chose not to include in the final version enacted into law.

27. For further discussion of this issue, see Wright, *The Invasion of Jury: Temperature of the War*, 27 TEMP. L.Q. 137 (1953).

28. Barnett v. Butler, 112 So. 2d 907, 910 (Fla. 2d Dist. 1959); Hicks, *supra* note 24, at § 524.

29. FED. R. EVID. 105.

30. FLA. STAT. § 90.108 (Supp. 1976).

31. 7 WIGMORE ON EVIDENCE §§ 2102-2125 (3d ed. 1940).

32. FED. R. EVID. 106.

tion against the trial judge commenting on the evidence, it is similar to its federal counterpart.

### III. ARTICLE 2—JUDICIAL NOTICE

Article 2 governs judicial notice of facts. Facts subject to judicial notice are divided into two categories: those which the court must notice,<sup>33</sup> and those which the court may notice.<sup>34</sup>

Section 203 of article 2, however, provides a procedure by which a party can compel the court to notice those facts which fall in the

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33. FLA. STAT. § 90.201 (Supp. 1976). This section provides:

A court shall take judicial notice of:

- (1) Decisional, constitutional, and public statutory law and resolutions of the Florida Legislature and the Congress of the United States.
- (2) Ordinances and municipal and county charters, the enforcement of which is within the jurisdiction of the court.
- (3) Florida rules of court that have statewide application, its own rules, and the rules of United States courts adopted by the United States Supreme Court.
- (4) Rules of court of the United States Supreme Court and of the United States Courts of Appeal.

34. FLA. STAT. § 90.212 (Supp. 1976). This section provides:

A court may take judicial notice of the following matters, to the extent that they are not embraced within § 90.201:

- (1) Special, local, and private acts and resolutions of the Congress of the United States and of the Florida Legislature.
- (2) Decisional, constitutional, and public statutory law of every other state, territory, and jurisdiction of the United States.
- (3) Contents of the Federal Register.
- (4) Laws of foreign nations and of an organization of nations.
- (5) Official actions of the legislative, executive, and judicial departments of the United States and of any state, territory, or jurisdiction of the United States.
- (6) Records of any court of this state or any court of record of the United States or of any state, territory, or jurisdiction of the United States.
- (7) Rules of court of any court of this state or of any court of record of the United States or of any other state, territory, or jurisdiction of the United States.
- (8) Provisions of all municipal and county charters and charter amendments of this state, provided that they are available in printed copies or as certified copies.
- (9) Rules promulgated by governmental agencies of this state which are published in the Florida Administrative Code or in bound written copies.
- (10) Duly enacted ordinances and resolutions of municipalities and counties located in Florida, provided that such ordinances and resolutions are available in printed copies or as certified copies.
- (11) Facts that are not subject to reasonable dispute because they are generally known within the territorial jurisdiction of the court.
- (12) Facts that are not subject to reasonable dispute because they are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
- (13) Official seals of governmental agencies and departments of the United States and of any state, territory, or jurisdiction of the United States.

second category. Pursuant to this statutory scheme if the requesting party (1) gives each adverse party notice of the request so that the adverse party can refute the request, and (2) furnishes the court with sufficient information to enable it to take judicial notice, the court must do so.<sup>35</sup>

Section 204 establishes safeguards to prevent prejudice to the party against whom notice is taken. It provides that each party must be afforded an opportunity to present evidence on the propriety of taking the notice; that the court is not bound by any exclusionary rules, but rather, may use any source of pertinent and reliable information in deciding whether to notice a fact; and that each party be given an opportunity to challenge any documentary source of information the court relies on in making its determination.<sup>36</sup>

Prior to the Code, it was apparently common practice to allow the parties to dispute the propriety of taking notice of a particular fact.<sup>37</sup> In addition, courts have never been bound by exclusionary rules in making such a decision.<sup>38</sup> The Code's establishment of a specific procedure, therefore, seems helpful in insuring that notice not be taken improvidently.

Section 206 provides that the court shall instruct the jury to accept as a fact any matter judicially noticed. Unlike the Federal Rules, the Code does not distinguish between criminal and civil juries. The Federal Rules do not compel a criminal jury to accept a judicially noticed fact.<sup>39</sup> The failure of the Code to make such provision for criminal juries may be contrary to the spirit of the sixth amendment.<sup>40</sup>

The issue of whether evidence should be admitted in disproof of facts which have been judicially noticed was a subject of much dispute when the Federal Rules were being promulgated.<sup>41</sup> The Federal Rules generally do not allow evidence in disproof to be admitted; however, they draw the above-noted distinction allowing dis-

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35. See also FED. R. EVID. 201(d).

36. A comparable federal provision appears in Federal Rule of Civil Procedure 201(e).

37. See S. GARD, *supra* note 11, at rule 79, Author's Comment.

38. *Amos v. Moseley*, 74 Fla. 555, 77 So. 619 (Fla. 1917); S. GARD, *supra* note 11, at rule 79; *Hicks*, *supra* note 24, at § 209.

39. FED. R. EVID. 201(g).

40. See FED. R. EVID. 201(g), Advisory Comm. Note, subdivision (g).

41. See, e.g., McNaughton, *Judicial Notice — Excerpts Relating to the Morgan-Whitmore Controversy*, 14 VAND. L. REV. 779 (1961).

proof in criminal cases. The Federal Rules also distinguish between adjudicative facts and legislative facts.<sup>42</sup> Those who argued in favor of admitting evidence in disproof were generally concerned with notice of legislative facts.<sup>43</sup> Since the Federal Rules only govern adjudicative facts, the controversy was dissipated somewhat.<sup>44</sup>

The Florida Code provision seems to revitalize this controversy. Its liberal notice provisions apparently govern legislative as well as adjudicative facts; consequently, there are now strong arguments in favor of admitting evidence in disproof of noticed facts.<sup>45</sup> Such evidence, however, is not allowed under section 206.

It would be desirable for the legislature to clarify article 2 concerning this issue. In the absence of such legislative relief, courts hopefully will insure fairness to the parties by permitting evidence in dispute of judicially noticed legislative facts.

As noted previously, section 201 lists matters which must be noticed, and section 202 lists matters which may be noticed. The specific listing of matters in these two sections reflects the approach of the prior Florida statutory<sup>46</sup> and common law.<sup>47</sup> Rather than comparing the listings in sections 201 and 202 with the prior rules, we suggest that the lawyer consult this list when confronted with an attempt to notice any matter which in the past has been subject to notice.

The final provisions worthy of comment in article 2 are contained in subsections (11) and (12) of section 202. These subsections codify the previously existing case law which provided that a court may notice "facts that are not subject to reasonable dispute because they are generally known within the territorial jurisdiction of the court,"<sup>48</sup> or because they are "capable of accurate and ready deter-

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42. This terminology was coined by Professor Kenneth Culp Davis. Adjudicative facts are the facts of the particular case. Legislative facts are those which have relevance to legal reasoning and the lawmaking process. Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 404-07 (1942). See also FED. R. EVID. 201, Advisory Comm. Note.

43. See, e.g., *United States v. Gonzalez*, 442 F.2d 698, 711 (2d Cir.) (Feinberg & Smith, JJ., dissenting), cert. denied sub nom. *Ovalle v. United States*, 404 U.S. 845 (1971).

44. See FED. R. EVID. 201, Advisory Comm. Note, subdivision (g).

45. For a discussion of these arguments, see Davis, *A System of Judicial Notice Based on Fairness and Convenience*, in PERSPECTIVES OF LAW 69, 76-77 (1964). Compare *Makos v. Prince*, 64 So. 2d 670 (Fla. 1953) with *Schrivver v. Tucker*, 42 So. 2d 707 (Fla. 1949).

46. FLA. STAT. § 92.01-.40 (1975), repealed in part, 1976 Fla. Laws ch. 76-237.

47. See HICKS, supra note 24, at §§ 212-29.

48. FLA. STAT. § 90.202(11) (Supp. 1976); see *Makos v. Prince*, 64 So. 2d 670 (Fla. 1953); *Amos v. Moseley*, 74 Fla. 555, 77 So. 619 (1917); S. GARD, supra note 11, at rule 61; HICKS,

mination by resort to sources whose accuracy cannot reasonably be questioned."<sup>49</sup> These subsections are identical to those in the Federal Rules.<sup>50</sup>

The Code's treatment of judicial notice is certain to raise disputes when courts notice matters in criminal trials. Furthermore, the Code's seemingly absolute prohibition of the introduction of evidence in dispute of noticed matters may rekindle the debate over the fairness of such a rule.

#### IV. ARTICLE 3—PRESUMPTIONS

Article 3, which governs the law of presumptions, attempts to clarify this very murky area of the law of evidence.

Section 301 defines a presumption as "an assumption of fact which the law makes from the existence of another fact or group of facts found or otherwise established."<sup>51</sup> This section also provides that presumptions are rebuttable, unless it appears from the law which creates them that they are intended to be conclusive.<sup>52</sup>

The Code takes a very interesting approach in prescribing the effect of presumptions. Section 302 provides that every rebuttable presumption is either one affecting only the burden of producing evidence, or one which has the effect of shifting the ultimate burden of proof as to the presumed fact to the party against whom the presumption operates. Section 303 then dictates that in civil proceedings "a presumption established primarily to facilitate the determination of the particular action in which the presumption is applied, rather than to implement public policy, is a presumption affecting the burden of producing evidence." All presumptions which do not fall within this definition are presumptions affecting the burden of proof.<sup>53</sup>

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*supra* note 24, at § 208.

49. FLA. STAT. § 90.202(12) (Supp. 1976); see *Tyrus v. Apalachicola N. R.R.*, 130 So. 2d 580 (Fla. 1961); S. GARD, *supra* note 11, at rule 61.

50. FED. R. EVID. 201(b).

51. FLA. STAT. § 90.301(1) (Supp. 1976).

52. FLA. STAT. § 90.301(2) (Supp. 1976). A conclusive presumption is actually a rule of substantive law. For example, many states have a conclusive presumption that when a man and woman are married and living together, any child conceived by the woman is the child of the husband. The purpose for this presumption is that the law does not want to facilitate proof of illegitimacy. J.R. WALTZ, *THE NEW FEDERAL RULES OF EVIDENCE* 23 (2d ed. 1975).

53. FLA. STAT. § 90.304 (Supp. 1976). For purposes of this article, there is a distinction between the burden of proof (persuasion) and burden of production (going forward). The

The Code's approach deftly handles the debate that has raged for years among scholars as to the effect that a presumption ought to have. Professor Thayer and Professor Wigmore argued that a presumption should disappear upon production of evidence sufficient to support a finding that the presumed fact does not exist.<sup>54</sup> Their arguments came to be known as the "bursting bubble" theory. More recently, however, Professor Morgan and Professor McCormick have argued that the same policy considerations that go into determining the allocation of burdens of proof go into the creation of presumptions. Therefore, the effect of a presumption should be to shift the burden of proof.<sup>55</sup> Prior to the adoption of the Code, Florida courts followed the general rule that presumptions do not shift the burden of proof.<sup>56</sup> In those few cases where Florida courts have held that presumptions shift the burden of proof, the courts were dealing with presumptions that other states deem to be conclusive.<sup>57</sup>

The tortured history of article 3 of the Federal Rules dealing with presumptions is indicative of the complexity of this problem. The original version supported by the Supreme Court took the view that presumptions should shift the burden of proof.<sup>58</sup> The version recommended by the House of Representatives took an intermediary view under which a presumption could be considered evidence by the trier of fact and weighed against the evidence that was introduced against it.<sup>59</sup> The final version eventually adopted by the fed-

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former shifts to the party against whom the presumption operates, the burden of disproving the presumed fact by a preponderance of the evidence. The burden of production relates only to the necessity of coming forward with sufficient evidence so as not to have an action dismissed by a motion for a directed verdict.

54. J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 313-52 (1898); 9 WIGMORE ON EVIDENCE §§ 2485-2493 (3d ed. 1940).

55. E. MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION 81 (1956); MCCORMICK ON EVIDENCE § 345 (2d ed. 1972).

56. *In re Estate of Carpenter*, 253 So. 2d 697, 703 (Fla. 1971); *Leonetti v. Boone*, 74 So. 2d 551, 552 (Fla. 1954).

57. *Compare Eldridge v. Eldridge*, 153 Fla. 873, 16 So. 2d 163 (1944) with the discussion of conclusive presumptions in note 52, *supra*.

58. FED. R. EVID., Appendix of Deleted and Superseded Materials, Rule 301 (West ed) (as prescribed by Supreme Court).

59. FED. R. EVID., Appendix of Deleted and Superseded Materials, Rule 301 (West) (as passed by House of Representatives). This "presumption as evidence" approach was rejected in the final version passed by Congress on the basis of an unsatisfactory experience with the rule in California. See *Speck v. Sarver*, 20 Cal. 2d 585, 128 P.2d 16 (1942) (Traynor, J., dissenting).

eral rules returns to the "bursting bubble" approach.<sup>60</sup>

Theoretically the approach of the Florida Code avoids the Thayer-Morgan debate and is logically appealing. In practice, however, the mechanics of its application may be overly complicated. First, the lawyer who desires to benefit from a presumption must establish the basic facts from which the presumption is made. These basic facts may be subject to dispute, and the jury may ultimately be called on to determine their existence.

Second, the lawyer must present arguments to the judge as to the purpose behind the presumption. Presentation of these arguments will be difficult where the presumption is statutory. It will be all the more difficult when the presumption is one created by the common law. Lawyers will find language in the cases indicating that some presumptions were created both to facilitate the production of evidence and to implement some public policy.<sup>61</sup> In such a case the trial judge must determine which is the major purpose behind the presumption. These determinations will produce additional issues for appeal, and care must be taken that they are preserved in the record.

Third, once the judge makes his determination as to the purpose of the presumption, he must be prepared to instruct the jury. Assuming the jury finds that the basic facts exist, if the presumption is one affecting the burden of proof, the court must instruct the jury that the existence of the presumed fact is to be assumed unless the party against whom the presumption operates meets his burden of disproving the presumed fact. If on the other hand, the presumption is one that only shifts the burden of producing evidence, the judge must determine whether sufficient evidence has been presented to sustain a finding of the nonexistence of the presumed fact. If the judge finds such evidence, the presumption disappears, and the jury is instructed without reference to the presumption.<sup>62</sup>

As noted above, by adding the necessity of determining the

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60. FED. R. EVID. 301.

61. *E.g.*, Contracts regular on their face are assumed to have been properly executed and to have included in their execution all formalities essential to their validity. 29 AM. JUR. 2d *Evidence* § 247 (1967). Is the purpose for this presumption a public policy intention to respect contractual obligations or is it an attempt to facilitate the determination of particular actions involving written contracts? Is it both?

62. This discussion of the mechanics of the application of presumptions is cursory. For a more in-depth discussion, see FLA. STAT. ANN. §§ 90.301-.304 West Special Pamphlet 1976), Sponsors' Note.

purpose behind the presumption to the already complicated task of applying presumptions in a trial, the Code's approach may be too complex to be effective. Hopefully, complexity will not prove to be an obstacle. If the trial bar is disciplined and systematic in its efforts to make use of presumptions, the job of the bench will be made far easier, and the approach of the Code may provide a good example for other jurisdictions to follow.

There are two additional points of interest regarding article 3. First, it is important to distinguish between presumptions and inferences. A presumption is an assumption of fact which operates as a matter of law. An inference is a "deduction of fact that the fact-finder, in his discretion, may logically draw from another fact or group of facts that are found to exist . . . ." <sup>63</sup> Section 301 notes that the Code has no affect whatsoever on the right of juries to draw inferences.

Second, article 3 dictates the affect of presumptions in civil cases only. In this respect, the Florida approach is like that of Congress, which rejected "proposed" Federal Rule 303.<sup>64</sup> This "proposed" rule would have required courts to treat presumptions differently in criminal matters. However, Congress declined to enact it because the subject was being considered at the time as part of the revision of the federal criminal code. Since the Florida Code does not govern presumptions in criminal cases, reference must be made to preexisting law for this matter.

#### V. ARTICLE 4—RELEVANCY

Article 4 governs questions of relevancy. The first two sections establish the basic rule of relevancy. Section 401 defines relevant evidence as "evidence tending to prove or disprove a material fact."<sup>65</sup> Section 402 provides that "[a]ll relevant evidence is admissible, except as provided by law."<sup>66</sup> The rest of the sections in article 4 and the remaining articles in the Code set forth specific rules requiring exclusion of certain evidence despite its relevance, based on reasons of public policy.<sup>67</sup>

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63. FLA. STAT. ANN. § 90.301 (Special Pamphlet 1976), Sponsor's Note.

64. FED. R. EVID., Appendix of Deleted and Superseded Materials Rule 303 (West) (as prescribed by the Supreme Court).

65. FLA. STAT. § 90.401 (Supp. 1976).

66. FLA. STAT. § 90.402 (Supp. 1976).

67. There are also constitutional limitations that require exclusion of evidence. *See, e.g.,*

The Code's definition of relevancy is apparently intended to codify prior case law. The Sponsors' Note to section 401, citing *Zabner v. Howard Johnson's Inc.*,<sup>68</sup> defines relevant evidence as "evidence that has a legitimate tendency to prove or disprove a given proposition that is material as shown by the pleadings. [It is] a tendency to establish a fact in controversy or to render a proposition more or less probable."<sup>69</sup>

One very important difference appears between the Code definition and the cited case. The case definition requires that the fact be in dispute. This requirement was the subject of some analysis in the debate over the federal rules and resulted in its rejection in the final draft.<sup>70</sup> Similarly, the Code provision does not require that the fact be in dispute.

The significance of this requirement should not be underestimated. Charts, photographs, murder weapons and other items of evidence often relate to a fact that is not in dispute. Such items should not be subject to an absolute rule of exclusion. Hopefully, the courts will read the Code provision strictly and avoid unnecessary questions over admission of such background evidence.

The Code definition of relevant evidence differs from the federal rule in one interesting respect. The federal rule uses the phrase "fact that is of consequence to the determination of the action" in place of the word "material." The reason the federal rules chose not to use "material" is because of the word's ambiguity.<sup>71</sup> The concept of materiality is so engrained in the trial bar, however, eliminating it from the statutory language would probably be of little consequence. It is more important that the bar and the bench continue to require precision in stating the grounds for objection to the admission of evidence. Such precision should foster elimination of the term's ambiguity.

The basic rule of relevancy as prescribed by the first two sections of the Code should not pose any major new problems for the trial lawyer. As Professor James suggests,

[r]elevancy is [a] formal relation between two propositions. To determine the relevancy of an offered item of evidence one must

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*Mapp v. Ohio*, 367 U.S. 643 (1961) (evidence obtained by unlawful search and seizure is not admissible).

68. 227 So. 2d 543 (Fla. 4th Dist. 1969).

69. FLA. STAT. ANN. § 90.401 (West Special Pamphlet 1976), Sponsors' Notes.

70. FED. R. EVID. 401, Advisory Comm. Note.

71. *Id.*

first discover to what proposition it is supposed to be relevant. This requires analysis of the express or tacit argument of counsel. Then, since evidence is admissible only if relevant to a *material* proposition, analysis of the pleadings and applicable substantive law is required to determine whether the proposition ultimately sought to be proved is material. Having isolated the material proposition sought to be proved, we still must determine whether the evidentiary proposition is relevant to it—does tend to prove it. This tendency to prove can be demonstrated only in terms of some general proposition, based most often on the practical experience of the judge and jurors as men, sometimes upon generalizations of science introduced into the trial to act as connecting links.<sup>72</sup>

The role of the lawyer is still, as it always has been, to assure that those connecting links are present when he seeks to establish the relevancy of his evidence.

When the admissibility of evidence has been established under the basic rule of relevancy in sections 401 and 402, reference must be made to the remaining sections in article 4 to determine if the evidence must be excluded because of some overriding policy consideration. Section 403 provides that if the probative value of relevant evidence "is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, undue waste of time, or needless presentation of cumulative evidence," it is inadmissible.<sup>73</sup>

Prior Florida case law apparently gave the trial judge discretion to exclude evidence based on the reasons incorporated in section 403.<sup>74</sup> This Code section, however, seems to be patterned after Federal Rule 403, which calls for "balancing the probative value of and need for the evidence against the harm likely to result from its admission."<sup>75</sup> The trial lawyer must be prepared to argue that this balance, in any given instance, rests on his side. The effectiveness of a limiting instruction and the availability of other means of proof are factors which should be considered when arguing whether evi-

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72. James, *Relevancy, Probability and the Law*, 29 CALIF. L. REV. 689, 696 n.15 (1941).

73. FLA. STAT. § 90.403 (Supp. 1976).

74. *E.g.*, *Young v. State*, 234 So. 2d 341 (Fla. 1970) (the supreme court found an abuse of the trial court's discretion in its admission of large numbers of gruesome photographs). See also FLA. STAT. ANN. § 90.403 (West Special Pamphlet 1976), Sponsors' Note.

75. FED. R. EVID. 403, Advisory Comm. Note.

dence ought to be excluded on grounds of unfair prejudice.<sup>76</sup> Section 404 treats the admissibility of character evidence and 405 dictates the proper method for such proof. Section 404(1) proscribes use of general character evidence when such evidence is used to prove that an individual "acted in conformity with it [his general character] on a particular occasion." The policy behind this exclusion is apparently that such evidence is so prejudicial that the prejudice outweighs any probative value.<sup>77</sup> When, however, character itself is an element of a crime, claim or defense, evidence relating to it is admissible.<sup>78</sup>

This general prohibition against character evidence to show action in conformity with a person's general character has three specific exceptions: 1) an accused may offer evidence of a pertinent trait of his own character and the prosecution may rebut such evidence;<sup>79</sup> 2) an accused may offer, except in rape cases,<sup>80</sup> evidence of a pertinent trait of the victim of the crime, and the prosecution may rebut such evidence;<sup>81</sup> and in a homicide case, the prosecution may introduce evidence showing the peacefulness of a murder victim if the accused claims the victim was the aggressor;<sup>82</sup> and 3) evidence of the character of a witness may be offered under the provisions of sections 608-610.<sup>83</sup>

Subsection 404(2)(a) prohibits evidence of specific crimes, wrongs or acts when used solely to show bad character, but permits such evidence "when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." However, when the state offers evidence of other crimes for anything but impeachment purposes, it must notify the defendant ten days before trial of its intent to make such an offering. When such evidence is admit-

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76. *Id.*

77. See Falknor, *Extrinsic Policies Affecting Admissibility*, 10 *RUTGERS L. REV.* 574, 584 (1956).

78. For example, the chastity of a victim is evidence under a statute specifying her chastity as an element of the crime of seduction.

79. *FLA. STAT.* § 90.404(1)(a) (Supp. 1976).

80. *FLA. STAT.* § 794.022 (1975). This section provides limited admissibility of character evidence of the rape victim and establishes a screening procedure whereby the judge hears such evidence to determine its propriety before it is presented to the jury.

81. *FLA. STAT.* § 90.404(1)(b) (Supp. 1976).

82. *FLA. STAT.* § 90.404(1)(b) (Supp. 1976).

83. *FLA. STAT.* § 90.404(1)(c) (Supp. 1976).

ted, the court must give the jury a limiting instruction.<sup>84</sup>

The statutory scheme in section 404 generally reflects the prior Florida law.<sup>85</sup> It differs from Federal Rule 403 only in imposing safeguards where the state intends to use evidence of prior crimes. The lawyer, however, should be aware of two subtleties in the provisions of section 404. First, the exception permitting character evidence by an accused concerning his own character in subsection (1)(a) is limited to criminal actions. This limitation is consistent with the federal rules and is probably the better rule.<sup>86</sup> Second, the admissibility of evidence of specific crimes, wrongs or acts under subsection (2)(a) is a discretionary matter. Defense counsel should be prepared to argue that under section 403 the danger of undue prejudice outweighs the probative value of evidence in view of the availability of other means of proof.

Once character evidence is determined to be admissible under section 404, section 405 dictates that such evidence may be presented either by testimony about the party's reputation or by testimony in the form of an opinion. It also permits inquiry into specific instances of conduct when cross-examining the character witness or when character is an element of the charge.

By permitting general character evidence in the form of an opinion the Code departs from prior Florida law<sup>87</sup> and adopts the approach of the federal rules.<sup>88</sup> This change in Florida law eliminates unnecessary complications in the introduction of character evidence. The trial lawyer may now ask the character witness in direct fashion what is his opinion of the party's character.

The express allowance of inquiry into specific instances of conduct on cross-examination and where character is actually in issue contemplates that it is not permissible on direct examination of a character witness. This treatment of specific instances of conduct comports with prior case law,<sup>89</sup> the Federal Rules,<sup>90</sup> and is proper in

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84. FLA. STAT. § 90.404(2)(b) (Supp. 1976).

85. For a discussion of the leading Florida precedents see the Sponsors' Note to section 404 of the Code. See also S. GARD, *supra* note 11, at rule 90-101.

86. For a discussion of the justification for the federal rule see the Advisory Committee's Note to rule 404.

87. See *Maloy v. State*, 52 Fla. 101, 41 So. 791 (1906).

88. FED. R. EVID. 405.

89. For a discussion of the Florida precedents see the Sponsor's Note to section 405 of the Code. FLA. STAT. ANN. § 90.405 (West Special Pamphlet 1976), Sponsors' Note.

90. FED. R. EVID. 405.

light of the potential such evidence has for prejudice, confusion and waste of time.

Sections 406 through 410 treat specific recurring problems of relevancy. Section 406 permits evidence of the routine practice of an organization, whether corroborated or not, to prove that it acted in conformity with the routine on a particular occasion. The Code provision is in line with the most recent Florida case law on the issue.<sup>91</sup> It differs, however, from the federal approach; Federal Rule 406, in addition to admitting the routine practice of organizations, also permits evidence of the habit of a person.

By eliminating the requirement that routine practice of an organization be corroborated by other evidence, the Code and the Supreme Court of Florida implicitly accept the reliability of such evidence. Neither the Code nor the Sponsors' Note, however, give any reason for not having a similar provision for habits of an individual. The Sponsors' Note states only that the section does not apply to the habit of an individual.<sup>92</sup> Habit of an individual and routine behavior of an organization are equivalents. As Professor McCormick points out, "surely any sensible man in investigating whether X did a particular act would be greatly helped in his inquiry by evidence as to whether he was in the habit of doing it."<sup>93</sup>

Section 407 makes evidence of subsequent repairs inadmissible to infer negligence. It is based on the theory that the law does not want to discourage a person from making repairs to protect against future injuries.<sup>94</sup>

Compromises and offers to compromise are likewise inadmissible to prove liability for the claim or its value.<sup>95</sup> Any relevant conduct or statements made during settlement negotiations are also

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91. See, e.g., *Brown v. Griffen Indus., Inc.*, 281 So. 2d 897 (Fla. 1973).

92. FLA. STAT. ANN. § 90.406 (West Special Pamphlet 1976), Sponsors' Note.

93. MCCORMICK ON EVIDENCE § 195 (2d ed. 1972). The biggest problem with accepting evidence of habit is determining what constitutes habit. However, the trial judge could pass on the adequacy of the sampling and the uniformity of the response and make preliminary determinations of whether certain evidence achieves the status of habit. See, e.g., *Levin v. United States*, 338 F.2d 265 (D.C. Cir. 1964) (testimony as to the accused's religious "habits" offered to show that he was home observing the Sabbath when the crime was committed, was properly excluded). See also Lewan, *The Rationale of Habit Evidence*, 16 SYRACUSE L. REV. 39 (1964).

94. See *City of Miami Beach v. Wolfe*, 83 So. 2d 774 (Fla. 1955). See also FED. R. EVID. 407, Advisory Comm. Note.

95. FLA. STAT. § 90.408 (Supp. 1976).

inadmissible.<sup>96</sup> This latter provision is apparently a departure from prior case law.<sup>97</sup> The Code provision is based on a public policy which favors settlements. The belief is that permitting admissions of fact made during negotiations would deter settlement negotiations.<sup>98</sup>

Section 409 prohibits evidence of payment of medical bills or expenses to infer liability. It is a standard rule in conformity with existing case law and the federal rules.<sup>99</sup>

The final provision in article 4, section 410, prohibits evidence of pleas of guilty or *nolo contendere*, or statements made in connection with such pleas, except when such statements are used for impeachment or in a perjury charge. The purpose for the rule is to promote plea bargaining.<sup>100</sup>

Conspicuous in its absence from the Code is a provision making evidence of liability insurance inadmissible. At present the admissibility of evidence of liability insurance must be determined on a case-by-case basis with reference to the applicable case law and statutes.<sup>101</sup>

## VI. ARTICLE 5—PRIVILEGES

Article 5 displaces the common law of privileges. It codifies five of the primary common law privileges: lawyer-client, psychotherapist-patient, husband-wife, clergy, and trade secrets. The Code provisions are extensive in their treatment of the many intricacies of the law of privileges.

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96. *Id.*

97. *See Mutual Benefit Health & Accident Ass'n v. Bunting*, 133 Fla. 646, 183 So. 321 (1938).

98. FLA. STAT. ANN. § 90.408 (West Special Pamphlet 1976), Sponsors' Note. At first blush the Code's provision appears sound; however, it possesses some potential for misuse. Some parties may attempt to immunize certain factual information by producing it during settlement negotiations. This fear was expressed during the debates on Federal Rule 408 and resulted in a provision that evidence otherwise discoverable is not excludable merely because it is presented during negotiations. Florida may want to consider adding a similar clause. Another difficult problem will be determining the parameters of settlement negotiations. Such determinations will have to be made on a case-by-case basis.

99. *See Babcock v. Flowers*, 144 Fla. 479, 198 So. 326 (1940); FED. R. EVID. 409.

100. *See also* FED. R. EVID. 410. The provision allowing statements made during plea bargaining to be used in perjury actions and for impeachment purposes is predicated on a desire not to allow perjury an immunity. *See generally Harris v. New York*, 401 U.S. 222 (1971).

101. *Compare Shingleton v. Bussey*, 223 So.2d 713 (Fla. 1969) with FLA. STAT. §§ 627.7262, 768.50 (Supp. 1976).

Section 501 begins by eliminating all witness privileges except those specifically provided by statute or constitution. Previously existing statutory privileges<sup>102</sup> are still effective unless they are repealed by the Code. The most significant privilege repealed by the Code is the accountant's privilege.<sup>103</sup> No reason is given in the Sponsors' Notes for repealing this privilege. Much debate over this issue is certain to arise, and the lawyer should be aware that the Code may be subject to change in its exclusion of the accountant's privilege.

The Code does not attempt to govern constitutional privileges, such as the fifth amendment right against self-incrimination and the fourth amendment ban on use of illegally obtained confessions, because of their constantly changing nature.<sup>104</sup> The lawyer must still look to case law for the parameters of these privileges.

Section 502 governs the lawyer-client privilege. It does not alter the common law privilege to any great extent.<sup>105</sup> It is also very similar to the "proposed" federal rule.<sup>106</sup> Subsection 1 of section 502, defines the three terms crucial to establishing the privilege: a lawyer,<sup>107</sup> a client<sup>108</sup> and a confidential communication.<sup>109</sup> Subsection 2 sets forth the privilege using the defined terms: "A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, the contents of confidential communications when such other person learned of the communications because they were

102. *E.g.*, FLA. STAT. § 405.01.03 (1975) (allows a person or organization to give health treatment information to research groups but insures confidentiality of the person whose treatment has been studied).

103. FLA. STAT. § 473.141 (1975), *repealed by* 1976 Fla. Laws ch. 76-273.

104. FLA. STAT. ANN. § 90.501 (West Special Pamphlet 1976), Sponsors' Note.

105. *See generally* FLA. STAT. ANN. § 90.502 (West Special Pamphlet 1976), Sponsors' Note; S. GARD, *supra* note 11, at rule 422-27; HICKS, *supra* note 24, at § 207.

106. FED. R. EVID., Appendix of Deleted and Superseded Materials, Rule 503 (West) (as prescribed by the Supreme Court).

107. "A 'lawyer' is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation." FLA. STAT. § 90.502(1)(a) (Supp. 1976).

108. "A 'client' is any person, public officer, corporation, association, or other organization or entity, either public or private, who consults a lawyer with the purpose of obtaining legal services or who is rendered legal services by a lawyer." FLA. STAT. § 90.502(1)(b) (Supp. 1976).

109. "A communication between lawyer and client is 'confidential' if it is not intended to be disclosed to third persons other than:

1. Those to whom disclosure is in furtherance of the rendition of legal services to the client.
2. Those reasonably necessary for the transmission of the communication." FLA. STAT. § 90.502(1)(c) (Supp. 1976).

made in the rendition of legal services to the client."<sup>110</sup> Subsection 3 dictates who may claim the privilege.<sup>111</sup> Subsection 4 lists five well-established situations when the privilege may not be claimed.<sup>112</sup>

The key to determining whether a particular communication between a lawyer and his client is privileged is the intent to disclose information "in furtherance of the rendition of legal services." If the communication is not in furtherance of legal services to the client, then the policy behind the privilege—the facilitation of judicial administration by encouraging free communication between client and attorney—is not served, and the privilege is not available.

The Code incorporates most of the intricacies of the privilege as they have developed through case law.<sup>113</sup> The Sponsors' Note to

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110. FLA. STAT. § 90.502(2)(Supp. 1976).

111. FLA. STAT. § 90.502(3) (Supp. 1976). This section provides:

The privilege may be claimed by:

- (a) The client.
- (b) A guardian or conservator of the client.
- (c) The personal representative of a deceased client.
- (d) A successor, assignee, trustee in dissolution, or any similar representative of an organization, corporation, or association or other entity, either public or private, whether or not in existence.
- (e) The lawyer, but only on behalf of the client. The lawyer's authority to claim the privilege is presumed in the absence of contrary evidence.

112. FLA. STAT. § 90.502(4) (Supp. 1976). This section provides:

There is no lawyer-client privilege under this section when:

- (a) The services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew was a crime or fraud.
- (b) A communication is relevant to an issue between parties who claim through the same deceased client.
- (c) A communication is relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer, arising from the lawyer-client relationship.
- (d) A communication is relevant to an issue concerning the intention or competence of a client executing an attested document to which the lawyer is an attesting witness, or concerning the execution or attestation of the document.
- (e) A communication is relevant to a matter of common interest between two or more clients, or their successors in interest, if the communication was made by any of them to a lawyer retained or consulted in common when offered in a civil action between the clients or their successors in interest.

113. See FLA. STAT. ANN. § 90.502 (West Special Pamphlet 1976), Sponsors' Note, subsections (1)-(2). The definition of client includes one who consults an attorney for the purpose of retaining him, even though employment does not actually result. The privilege is extended to such communications, reflecting prior case law. *Keir v. State*, 152 Fla. 389, 11

section 502 does an excellent job of reviewing the case law development. There are, however, two noteworthy aspects about the Code's privilege that deserve further discussion.

First, the Code changes the common law privilege in one very important way. The common law held that the privilege did not apply when a third party overheard the conversation.<sup>114</sup> The Code deems a communication to be confidential "if it is not intended to be disclosed to third persons."<sup>115</sup> The Sponsors' Note indicates that the reason for this provision is the recent development of sophisticated techniques for eavesdropping. This approach is similar to that of the "proposed" federal rule<sup>116</sup> and claims to reflect existing state legislative policy.<sup>117</sup> The wording of the section itself, however, makes no reference to mechanical eavesdropping techniques. The Code is not clear on whether the privilege will apply where the communication takes place in a crowded area, and the client claims that he did not intend for it to be overheard by someone not a party to the communication.<sup>118</sup>

The second noteworthy aspect of the Code's attorney-client privilege is its failure to deal with the very difficult problem of who is to be considered the client for privilege purposes when the client is an organization. This issue is very important to the lawyer who represents a corporation, a union, or some other type of organization; yet neither the Code nor the Sponsors' Note make any reference to the problem. In all likelihood, the drafters of the Code in-

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So. 2d 886 (1943). The Code also extends the privilege to communications that are channeled through intermediaries normally used in the communication process. *Vann v. State*, 85 So. 2d 133 (Fla. 1956). A third example is the Code's inclusion of the common law rule that when clients with similar interests retain separate lawyers, each client may claim the privilege for his own statements made during joint conferences, but not for those of the other client. *Dominquez v. Citizens' Bank & Trust Co.*, 62 Fla. 148, 56 So. 682 (1911).

114. See *Horn v. State*, 298 So. 2d 194 (Fla. 1st Dist. 1974); 8 WIGMORE ON EVIDENCE § 2326 (McNaughton rev. 1961).

115. FLA. STAT. § 90.502(1)(c)(Supp. 1976).

116. FED. R. EVID., Appendix of Deleted and Superseded Materials, Rule 503(a)(4) (West) (as prescribed by the Supreme Court).

117. Subsection (2) of the Sponsors' Note makes reference to Florida Statutes section 934.08(4)(Supp. 1976), which provides that privileged communications do not lose their privilege when they are intercepted. However, section 934 deals specifically with interception of communications by use of an electronic or mechanical device.

118. A more difficult problem might arise when a client has reason to believe that his phone is being legally tapped, yet he still communicates to his lawyer information that facilitates the rendition of legal services. Did he intend to disclose the information to a third party?

tended to follow the lead of the "proposed" federal rule, which specifically leaves this problem to a case-by-case resolution.<sup>119</sup> Regardless of the reason for the Code's failure to mention the issue, corporate counsel should be aware of the issue's existence and of the law as it has developed in other jurisdictions.<sup>120</sup>

Section 503 provides a psychotherapist-patient privilege. It is drafted in the same fashion as section 502. Subsection 1 defines psychotherapist,<sup>121</sup> patient<sup>122</sup> and confidential communication.<sup>123</sup> Subsection 2, by using the defined terms, establishes the privilege:

A patient has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications or records made for the purpose of diagnosis or treatment of his mental or emotional condition, including alcoholism and other drug addiction, between himself and his psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist. This privilege includes any diagnosis made, and advice given, by the psychotherapist in the course of that relationship.<sup>124</sup>

119. FED. R. EVID., Appendix of Deleted and Superseded Materials, Rule 503, Advisory Comm. Note (West).

120. See generally *City of Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 483 (E.D. Pa. 1962); *Zenith Radio Corp. v. Radio Corp. of America*, 121 F. Supp. 792 (D. Del. 1954); Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 YALE L.J. 953 (1956); Note, *Attorney-Client Privilege for Corporate Clients: The Control Group Test*, 84 HARV. L. REV. 424 (1970).

121. FLA. STAT. § 90.503(1)(a)(1)-(2) (Supp. 1976). These subsections define a psychotherapist as:

1. A person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, who is engaged in the diagnosis or treatment of a mental or emotional condition, including alcoholism and other drug addiction; or
2. A person licensed or certified as a psychologist under the laws of any state or nation, who is engaged primarily in the diagnosis or treatment of a mental or emotional condition, including alcoholism and other drug addiction.

122. FLA. STAT. § 90.503(1)(b)(Supp. 1976). This subsection defines a patient as "a person who consults, or is interviewed by, a psychotherapist for purposes of diagnosis or treatment of a mental or emotional condition, including alcoholism and other drug addiction."

123. FLA. STAT. § 90.503(1)(c)(Supp. 1976). This subsection provides that [a] communication between psychotherapist and patient 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 patient in the consultation, examination or interview.
2. Those persons necessary for the transmission of the communication.
3. Those persons who are participating in the diagnosis and treatment under the direction of the psychotherapist.

124. FLA. STAT. § 90.503(2)(Supp. 1976).

Subsection 3 dictates who may claim the privilege.<sup>125</sup> Subsection 4 establishes three exceptions to application of the privilege.<sup>126</sup> The policy behind the psychotherapist-patient privilege is a recognition that in order to be effective, a psychotherapist must be able to persuade his patient to talk freely. Consequently, the key to establishing the privilege in a particular set of facts is to show that the communication was "made for the purpose of diagnosis or treatment of his [the patient's] mental or emotional condition, including alcoholism and other drug addiction."<sup>127</sup>

The three exceptions to the privilege touch on controversial issues of personal liberty: involuntary commitment of mental patients, court-ordered mental examinations, and examination of a litigant who places his mental state in issue. By excepting application of the privilege in these cases, the Code shifts these controversies to another, more appropriate forum, beyond the scope of the law of evidence.

The Sponsors' Note does an excellent job of explaining these provisions. Therefore, no effort is made to examine all of the intricacies of the privilege. The Code, it should be noted, expands on the statutory privilege that it replaced<sup>128</sup> and is nearly identical to the "proposed" federal rule.<sup>129</sup>

125. FLA. STAT. § 90.503(3) (Supp. 1976). This subsection provides:

The privilege may be claimed by:

- (a) The patient or his attorney on his behalf.
- (b) A guardian or conservator of the patient.
- (c) The personal representative of a deceased patient.
- (d) The psychotherapist, but only on behalf of the patient. The authority of a psychotherapist to claim the privilege is presumed in the absence of evidence to the contrary.

126. FLA. STAT. § 90.503(4) (Supp. 1976). This subsection provides:

There is no privilege under this section:

- (a) For communications relevant to an issue in proceedings to compel hospitalization of a patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has reasonable cause to believe the patient is in need of hospitalization.
- (b) For communications made in the course for a court-ordered examination of the mental or emotional condition of the patient.
- (c) For communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense.

127. FLA. STAT. § 90.503(2) (Supp. 1976).

128. FLA. STAT. § 90.242 (1975), *repealed* by 1976 Fla. Laws ch. 76-237.

129. FED. R. EVID., Appendix of Deleted and Superseded Materials, Rule 504 (West).

Section 504 covers the husband-wife privilege. It establishes a communications privilege only, in recognition of the fact that Florida has abrogated by statute the common law testimony rules which provided that one spouse was incompetent to testify against the other spouse, and that one spouse was privileged from being compelled to testify against the other spouse.<sup>130</sup>

The Code provides that either spouse has the privilege, during and after coverture, for "communications which were intended to be made in confidence between the spouses while they were husband and wife."<sup>131</sup> Subsection 2 then dictates who may claim the privilege<sup>132</sup> and subsection 3 lists four well-established exceptions to application of the privilege.<sup>133</sup>

The policy behind the privilege is to promote and encourage mutual confidence between husband and wife and to preserve the marital status.<sup>134</sup> Consequently, the privilege only attaches to communications made when confidentiality could be anticipated.

The Florida approach to this privilege, both common law and Code, is radically different from the "proposed" federal rule.<sup>135</sup> The only husband-wife privilege recognized by the federal rule is the right of an accused in a criminal trial to prevent his spouse from

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130. FLA. STAT. § 90.04 (1975). See also FLA. STAT. ANN. § 90.504 (West Special Pamphlet 1976), Sponsors' Note. For a discussion of the difference between testimony and communications privilege, see Comment, *The Marital Testimony and Communications Privileges: Improvements and Uncertainties In California And Federal Courts*, 9 U. CAL. D.L. REV. 569 (1976).

131. FLA. STAT. § 90.504(1)(Supp. 1976).

132. FLA. STAT. § 90.504(2)(Supp. 1976). This subsection provides that "[t]he privilege may be claimed by either spouse or by the guardian or conservator of a spouse. The authority of a spouse, or guardian or conservator of a spouse, to claim the privilege is presumed in the absence of contrary evidence."

133. FLA. STAT. § 90.504(3)(Supp. 1976). This subsection provides:

There is no privilege under this section:

(a) In a proceeding brought by or on behalf of one spouse against the other spouse.

(b) In a criminal proceeding in which one spouse is charged with:

1. A crime committed at any time against the person or property or the other spouse, or the person or property of a child of either; or

2. A crime committed at any time against the person or property of a third person, which crime was committed in the course of committing a crime against the person or property of the other spouse.

(c) In a criminal proceeding in which the communication is offered in evidence by a defendant-spouse who is one of the spouses between whom the communication was made.

134. *Brown v. May*, 76 So. 2d 652 (Fla. 1954).

135. FED. R. EVID., Appendix of Deleted and Superseded Materials, Rule 505 (West).

testifying against him, a privilege that the Florida Legislature, as noted earlier, previously abrogated.<sup>136</sup> The federal rule does not recognize a privilege for confidential communications such as that provided by section 504 of the Code. The federal rule's drafters apparently subscribed to the philosophy that married couples, in all likelihood, are unaware of such a privilege, and consequently, that existence of the privilege would have little or no beneficial affect on marital conduct.<sup>137</sup> This reasoning is questionable. The increase in litigation and publicity for legal matters has probably made the public very aware of such a privilege.<sup>138</sup> At the very least, television may well have given the public a general impression that spouses may not be compelled to testify against one another.

The Code's approach to the husband-wife privilege appears to be the better view. In addition, there should be no problem in application of this privilege, since the Code provision has the salutary effect of maintaining the prior case law.

Section 505 sets forth the privilege with respect to communications to clergymen. It mirrors the former statutory provision<sup>139</sup> which it replaced. To invoke the privilege, one must establish that the communication was "made privately for the purpose of seeking spiritual counsel and advice from the clergyman in the usual course of his practice or discipline."<sup>140</sup> Such problems as who qualifies as a clergyman and what constitutes spiritual counsel are issues that must be resolved by interpreting the Code's language in light of specific fact situations.

Section 506 establishes a privilege for trade secrets.<sup>141</sup> It is an extension of Florida Rule of Civil Procedure 1.280(c)(7), which permits the trial judge to protect trade secrets from unlimited discovery. "The purpose of the privilege is to prohibit a party from using the duty of a witness to testify as a method of obtaining a valuable trade secret . . . ."<sup>142</sup> In attempting to claim the privilege, a lawyer

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136. See n.133 *supra*.

137. FED. R. EVID., Appendix of Deleted and Superseded Materials, Rule 505, Advisory Comm. Note, subdivision (a) (West).

138. See Comment, *The Marital Testimony and Communications Privileges: Improvements and Uncertainties in California and Federal Courts*, 9 U. CAL. D.L. REV. 569, 573 (1976).

139. FLA. STAT. § 90.241 (1975), *repealed by* 1976 Fla. Laws ch. 76-237.

140. FLA. STAT. § 90.505(1)(b)(Supp. 1976).

141. FLA. STAT. § 90.506 (Supp. 1976). The relevant federal provision is Federal Rules of Evidence, Appendix of Deleted and Superseded Materials, Rule 508 (West).

142. FLA. STAT. ANN. § 90.506 (West Special Pamphlet 1976), Sponsors' Note.

must be prepared to argue that the importance of protecting his client's secret outweighs the value of such testimony to the litigation.

It should also be noted that the Code gives the trial judge discretion to order the testimony under some protective procedure. Consequently, the trial lawyer should be prepared to suggest use of an in camera viewing by the judge, sealing of the record or other approaches designed to insure fairness to his client.

Since the primary purpose for most privileges is to promote some relationship by giving it a supporting confidentiality, section 507 provides that a holder of a privilege waives his right to claim it when he "voluntarily discloses, or consents to disclosure of, any significant part of the matter or communication."<sup>143</sup> This waiver provision reflects both prior Florida law<sup>144</sup> and federal law.<sup>145</sup> It should be noted that the waiver is not dependent on knowledge of the existence of the privilege. Once the client destroys confidentiality through voluntary disclosure, it does not matter if he was unaware of the privilege at the time of the disclosure.

The only exception to this waiver provision is provided by section 508, which declares that a privilege is not lost where disclosure was compelled by an erroneous ruling of the court or made without opportunity to claim the privilege. This provision eliminates the "hazard of being cited and punished for contempt"<sup>146</sup> for asserting a privilege and refusing to testify.<sup>147</sup>

The final two sections of article 5 provide that privilege communications made prior to the effective date of the Code are not abrogated by article 5<sup>148</sup> and that a court may dismiss any claim or affirmative defense when the party asserting it also asserts a privilege as to a communication necessary to an adverse party.<sup>149</sup>

## VII. ARTICLE 6—WITNESSES

Article 6 determines the competency of witnesses and governs

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143. FLA. STAT. § 90.507 (Supp. 1976).

144. See *Savino v. Luciano*, 92 So. 2d 817 (Fla. 1957).

145. See FED. R. EVID., Appendix of Deleted and Superseded Materials, Rule 511, Advisory Comm. Note (West).

146. *Fraser v. United States*, 145 F.2d 139, 144 (6th Cir. 1944).

147. See *Tibado v. Brees*, 212 So. 2d 61, 63 (Fla. 2d Dist. 1968).

148. FLA. STAT. § 90.509 (Supp. 1976).

149. FLA. STAT. § 90.510 (Supp. 1976).

the scope and mode of their interrogation. It contains some substantial changes from the pre-Code Florida approach.

Section 601 establishes a general rule that "[e]very person is competent to be a witness, except as otherwise provided by statute." This does not alter the prior Florida law drastically because former chapter 90 of the Florida Statutes had already eliminated most of the common law rules of incompetency.<sup>150</sup> The Code does have the effect, however, of reversing the presumption concerning competency and requires that anyone who would challenge the competency of a witness must find a specific statutory provision to support the challenge. Sections 602 through 607 provide the statutory support for challenges to competency.

Section 602 is the "Deadman's Statute." It prohibits testimony by an interested party concerning any oral communication between the interested party and a decedent or incompetent in an action against the decedent's successor in interest or the incompetent's personal representative. Like the prior Florida Deadman's Act,<sup>151</sup> the Code's provision has two exceptions. The rule of incompetency does not apply where the decedent's successor in interest testifies on his own behalf about the oral communication or when the successor in interest offers some other evidence of the subject matter of the communication.<sup>152</sup>

Section 602 differs in one major respect from the prior act. It applies only to *oral communications* between the interested party and the decedent, whereas the prior act applied to all *transactions* between the two. This provision clearly overrules cases in which the act was held to prohibit testimony as to the non-oral aspects of a transaction between the interested party and the deceased.<sup>153</sup> The Sponsors' Note to section 602 indicates that the change to oral communications was made because of problems that had arisen in

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150. *E.g.*, FLA. STAT. § 90.04 (1975) (originally enacted as 1874 Fla. Laws, ch. 1983) (abrogated the common law rule that spouses were incompetent to testify in civil actions where the other was a party); FLA. STAT. § 90.05 (1975) (eliminated the rule that all persons with a pecuniary interest in the litigation were incompetent).

151. FLA. STAT. § 90.05 (1975), *repealed by* 1976 Fla. Laws ch. 76-273.

152. FLA. STAT. § 90.602(2) (Supp. 1976).

153. *E.g.*, *Catlett v. Chestnut*, 107 Fla. 498, 146 So. 241 (1933) (holding a woman incompetent to testify to any facts tending to establish the existence of a marriage relation between her and the deceased in an action to recover property owned by the deceased); *Holliday v. McKinne*, 22 Fla. 153 (1886) (holding that a party may not be permitted to prove the signature of a deceased person to a bill of sale that covers the transaction). Both of the above decisions are no longer good law.

connection with the term transaction. The new rule does have the salutary effect of eliminating the difficulties inherent in defining the term transaction. However, the new rule is also indicative of a desire to limit the application of this aspect of incompetency and perhaps suggests that the "Deadman's Statute" should be eliminated altogether.<sup>154</sup>

The theory behind the rule is that the potential for fraud is great where no testimony exists to challenge that of the interested party. The application of the rule, however, may result in the destruction of a legitimate cause of action or defense. Cross-examination and other truth-testing devices reduce the potential for fraud. Consequently, the desire not to eliminate evidence essential to a legitimate claim or defense should outweigh the fear of fraud and should sanction rejection of the rule.<sup>155</sup> The Federal Rules reject the rule, except in diversity cases where state law applies.<sup>156</sup>

Section 603 disqualifies a person who is so incapable of expressing himself that he can not be understood directly or through an interpreter or a person who is incapable of understanding the duty of a witness to tell the truth. The trial judge is to make such determinations as they arise in the course of litigation. This rule codifies the prior Florida approach.<sup>157</sup> It should be noted that this rule has its primary application in cases where children are offered as witnesses.<sup>158</sup>

Section 604 prohibits a witness, other than an expert testifying in response to a hypothetical question, from testifying on matters of which he has no personal knowledge. Thus, prior to questioning a witness on a particular matter, a predicate must be established to show that the witness has personal knowledge of the matter. This

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154. The original draft of the Code did not contain a "Deadman's Statute." It was later included because "there is generally no opposing testimony to meet the allegation of the interested claimant and fraud and hardship could result if the surviving party was permitted to testify concerning the oral communication." FLA. STAT. ANN. § 90.602 (West Special Pamphlet 1976), Sponsors' Note.

155. There is a wealth of materials discussing the pros and cons of the "Deadman's Statute." For a compilation of many of these materials, see J. MAGUIRE, J. WEINSTEIN, J. CHADBOURN, & J. MANSFIELD, EVIDENCE, CASES AND MATERIALS 243-48 (6th ed. 1973).

156. FED. R. EVID. 601, Advisory Comm. Note.

157. See *Bell v. State*, 93 So.2d 575 (Fla. 1957); *Clinton v State*, 53 Fla. 98, 43 So. 312 (1907).

158. See, e.g., *Bell v. State*, 93 So. 2d 575 (Fla. 1957); *Clinton v. State*, 53 Fla. 98, 43 So. 312 (1907).

159. See *Herndon v. State*, 73 Fla. 451, 74 So. 511 (1917).

requirement reflects the common law<sup>159</sup> and the federal approach<sup>160</sup> and presents nothing new for experienced trial counsel.

Section 605 provides a flexible form of oath<sup>161</sup> and allows discretion in the trial judge to determine whether a child understands the duty to tell the truth. Section 606 establishes the requirements for use of interpreters in the courtroom. Neither section presents any change from pre-Code rules.

Section 607 specifically prohibits judges and jurors from serving as witnesses. A judge is allowed to testify, however, when both parties agree to the judge's giving evidence "on a purely formal matter to facilitate the trial of the action."<sup>162</sup> Under pre-Code law a judge was competent to testify. He was bound to disqualify himself if he were a material witness in the cause,<sup>163</sup> but the lawyer was in a precarious position if the judge chose not to recuse himself. The most important provision in section 607 is the one which provides that an objection is not necessary to preserve the issue of the judge's competency to testify.<sup>164</sup> This provision relieves the lawyer of having to challenge the competency of the judge as a witness.

Another important provision in section 607 allows a party to object to the calling of a juror as a witness out of the presence of the jury. This provision relieves the lawyer of having to challenge the competency of a juror in front of the jury, and eliminates the potential prejudice that could flow from such an objection.

Perhaps the most intricate provision in section 607 is subsection (2)(b): "Upon an inquiry into the validity of a verdict or indictment, a juror is not competent to testify as to any matter which essentially inheres in the verdict or indictment." The purpose for this rule is to promote freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment.<sup>165</sup>

The Sponsors' Note points out that the Code rule "distinguishes between a juror's own thought processes and conduct which might affect all the jurors and thus does not inhere in the

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160. FED. R. EVID. 602.

161. The rule suggests the following form: "Do you swear or affirm that the evidence you are about to give will be the truth, the whole truth and nothing but the truth?" FLA. STAT. § 90.605 (Supp. 1976).

162. FLA. STAT. § 90.607(1)(b) (Supp. 1976).

163. FLA. STAT. § 38.02 (1975).

164. FLA. STAT. § 90.607(1)(a) (Supp. 1976).

165. See *McDonald v. Pless*, 238 U.S. 264 (1915).

verdict."<sup>166</sup> Where the lawyer suspects that there has been a quotient verdict or some other conduct which does not appear in the verdict, he is apparently justified under the Code in questioning the jurors and using their testimony in challenging the validity of the verdict.

Section 608 controls impeachment of witnesses. Sections 609 and 610 govern the use of character evidence for impeachment purposes. Together these rules represent a move away from the common law rule strictly limiting impeachment of one's own witness, but fall short of adopting the absolutism of the federal rules<sup>167</sup> which allow impeachment of a witness by any party through any permissible means.

Under the Code, any party, except the party calling the witness, may attack the credibility of a witness by (1) an introduction of inconsistent statements, (2) a showing of bias, (3) an attack on the witness' character for truthfulness, (4) a showing of a defect in observation or memory, or (5) a proof by other witnesses that material facts are not as the witness testified.<sup>168</sup> The party producing the witness is never permitted to impeach the character of his witness for truthfulness, but he may impeach by any of the other means established by the Code if the witness proves to be adverse.

The primary difference between the Code and pre-Code law is that the Code does not require the party to be surprised or entrapped by the testimony before he is allowed to attempt to impeach his own witness.<sup>169</sup> The Code does not go as far as the Federal Rules which allow any party to impeach the credibility of any witness.<sup>170</sup> The Code still requires that the witness' testimony be adverse and

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166. Federal Rule 606 takes a different approach. It distinguishes between matters that take place inside the jury room during deliberations and matters such as extraneous prejudicial information improperly brought to the jury's attention or outside influence improperly brought to bear on any juror. Under this approach, a juror is not permitted to testify as to the use of a quotient verdict or the misconduct of another juror during deliberations. However, the Federal Rules compensate by providing that jurors should be encouraged to promptly report to the court any misconduct that occurs during deliberations.

It is not clear which approach is better. Does the Code approach open a floodgate for potential harassment of jurors? Is the federal rule acceptable in such a blatant case as a drunken juror? These and other questions should be subject to empirical analysis and further debate.

167. See FED. R. EVID. 607, 609(a)-(e).

168. FLA. STAT. § 90.608(1)(Supp. 1976).

169. *Foremost Dairies, Inc. v. Cutler*, 212 So. 2d 37 (Fla. 4th Dist. 1968); *Johnson v. State*, 178 So. 2d 724 (Fla. 2d Dist. 1965).

170. FED. R. EVID. 607.

prejudicial before the party calling him may attempt impeachment.<sup>171</sup> Thus, if a party calls a witness expecting him to testify favorably and the witness in fact gives testimony harmful to the party's case, the witness may be impeached by any means other than an attack on his character. However, if a party calls a witness expecting him to testify favorably and the witness merely refuses to give the favorable testimony, or gives testimony that is not harmful to the party, he may not be impeached.<sup>172</sup>

The common law rule against impeaching one's own witness is apparently based on two policy considerations: (1) a party who calls a witness holds him out as worthy of belief,<sup>173</sup> and (2) allowing such impeachment would permit the party to "get the benefit of those expected facts, as substantive evidence, through the mouth of another witness, under the guise of impeachment. Evidence adduced in this manner is nothing more than the veriest hearsay, and is inadmissible."<sup>174</sup> Both considerations represent archaic policy.

As was pointed out in *Johnson v. State*,<sup>175</sup>

The rule that one may not impeach his own witness has its most likely origin in trial by compurgation, or wager of law, in which the defendant or person accused was to make oath of his own innocence, and to produce a number of compurgators, to swear that they believed his oath. III Blackstone 342. It is logical enough to say that the party avouches for or guarantees 'oath-helpers,' but there is no apparent reason for saying that he avouches for or guarantees the credibility of his 'fact-tellers.' This rule has, however, become so deeply embedded in the law that a major operation will be required to remove it, and this the courts, no doubt, will leave to the legislative bodies.

The Code has foregone the opportunity to perform this operation. Furthermore, the second policy consideration is no longer valid because the Code provides that "[a] statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-

171. FLA. STAT. ANN. § 90.608 (West Special Pamphlet 1976), Sponsors' Note, citing *Hernandez v. State*, 156 Fla. 356, 22 So. 2d 781 (1945).

172. *Adams v. State*, 34 Fla. 185, 195, 15 So. 905, 908 (1894); FLA. STAT. ANN. § 90.608 (West Special Pamphlet 1976), Sponsors' Note, subsection (2).

173. *Johnson v. State*, 178 So. 2d 724, 727 (Fla. 2d Dist. 1965).

174. *Adams v. State*, 34 Fla. 185, 195, 15 So. 905, 908 (1894).

175. 178 So. 2d at 727. For discussion of the reason for rejecting the common law rule, see FED. R. EVID. 607, Advisory Comm. Note.

examination concerning the statement, and the statement is: (a) [i]nconsistent with his testimony . . . ."<sup>176</sup>

The legislature, unfortunately, did not reject entirely the common law rule against impeaching one's own witness. Eliminating the requirement of surprise, however, is at least a step in the right direction.

Section 609 treats more specifically the use of character evidence for impeachment purposes. It provides that such evidence is permissible in the form of reputation or opinion, but that it must be limited to the witness' character for truthfulness. Evidence in support of a witness' character for truthfulness is admissible only after his character has been attacked. Section 609 explains the exception to the limitation on use of character evidence set forth in section 404.<sup>177</sup> These two sections should always be considered in conjunction with each other.

Section 609 is surprisingly silent concerning whether specific instances of the conduct of a witness may be proved by extrinsic evidence for the purpose of attacking or supporting the credibility of the witness. Presumably, inquiries into such specific conduct may be made on cross-examination under section 405(1), as long as they concern his character for truthfulness only.<sup>178</sup> However, to allow extrinsic proof of specific instances of conduct to impeach the credibility of a witness could be time consuming, confusing and potentially very prejudicial.<sup>179</sup> Hopefully, the legislature will clarify this section. In the meantime, if the lawyer is faced with an opponent attempting to make such proof, he can argue that the judge should use his discretion under section 403 to rule it inadmissible on grounds of prejudice, confusion and waste of time.<sup>180</sup>

Section 610 treats specifically the use of criminal convictions as an impeachment tool. Such evidence is permitted only where the crime involved dishonesty or false statement and where the crime

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176. FLA. STAT. § 90.801(2)(a) (Supp. 1976).

177. See text accompanying notes 77-86 *supra*.

178. See text accompanying notes 87-90 *supra*.

179. See FED. R. EVID. 608. A similar issue was presented in *Stateright v. State*, 278 So. 2d 652 (Fla. 4th Dist. 1973), *rev'd on other grounds*, 300 So. 2d 674 (1974), where the state offered extrinsic evidence that the defendant-witness was a homosexual after the defendant had denied it on cross-examination. On appeal, the court reversed, holding that on cross-examination of a witness on collateral matters the answer given by the witness is conclusive, and extrinsic evidence contradicting the witness' answer is inadmissible.

180. See text accompanying notes 74-76 *supra*.

was not "so remote in time as to have no bearing on the present character of the witness."<sup>181</sup> The section prohibits use of crimes for which the witness received a pardon and also prohibits introduction of evidence of juvenile adjudications. Evidence of the pendency of an appeal is admissible, but it does not render evidence of the conviction inadmissible.

Section 610 changes pre-Code Florida law and differs from the Federal Rules. The pre-Code Florida law allowed a witness to be impeached "by reason of conviction of any crime."<sup>182</sup> The Federal Rules permit use of crimes punishable by death or imprisonment in excess of one year or evidence of any crime involving dishonesty or false statement.<sup>183</sup> This approach is illogical since there is no reason to believe that the commission of a certain type crime, such as a crime of passion, is indicative of the characteristic of untruthfulness. The Code's approach of admitting *only* crimes involving dishonesty or false statement is more sound.

By prohibiting use of juvenile adjudications, the Code may produce serious injustice, particularly in some criminal cases. The desire to protect the juvenile is salutary, but may be accomplished without the side effect of producing serious injustices by granting the trial judge discretion to admit evidence of such adjudications where necessary to insure a fair trial.<sup>184</sup>

Section 611 prohibits evidence of the religious beliefs of a witness to either enhance or impair the credibility of a witness. It comports with prior Florida law<sup>185</sup> and the federal rule.<sup>186</sup>

Section 612 gives the trial judge discretion to control the mode and order of interrogating witnesses.<sup>187</sup> It also reflects the common law<sup>188</sup> and Federal Rules<sup>189</sup> by limiting the scope of cross-

181. FLA. STAT. § 90.610(1)(a)(Supp. 1976).

182. FLA. STAT. § 90.08 (1975), *repealed by* 1976 Fla. Laws ch. 76-237.

183. FED. R. EVID. 609.

184. *See* FED. R. EVID. 609(d).

185. FLA. STAT. § 90.06 (1975), *repealed by* 1976 Fla. Laws ch. 76-237.

186. FED. R. EVID. 610.

187. The judge's discretion should be exercised to:

"(a) Facilitate, through effective interrogation and presentation, the discovery of the truth.

(b) Avoid needless consumption of time.

(c) Protect witnesses from harassment or undue embarrassment."

FLA. STAT. § 90.612 (Supp. 1976).

188. *See* Padgett v. State, 64 Fla. 389, 59 So. 946 (1912).

189. FED. R. EVID. 611(b).

examination to the subject matter of the direct examination, except where the court in its discretion permits inquiry into additional matters. The Code provision does not pose any new problems for the trial lawyer. However, the scope of the subject matter permissible is unclear. Trial counsel will have to settle such problems on a case-by-case basis through reference to decisional law.<sup>190</sup>

Section 612 also contains a prohibition against the use of leading questions on direct or redirect examination. The judge has discretion to allow leading questions when the interests of justice so require it.

Section 613 provides that when a witness uses a writing to refresh his memory while testifying, the adverse party is entitled to see it, cross-examine the witness about it, and introduce it into evidence.<sup>191</sup> Both the common law<sup>192</sup> and the Federal Rules<sup>193</sup> have similar provisions.

Section 613 should present no serious problems in application; however, it is important to distinguish between writings used to refresh the witness' memory and writings which fall under the recorded recollection exception to the hearsay rule.<sup>194</sup> In the case of the former, the writings may be of any nature because they only serve to jog the witness' memory, from which he then gives an independent account of the occurrence. In the case of the latter, the writing must meet certain specifications because it is introduced as evidence of the occurrence. Section 613 allows writings used to refresh memory in evidence only at the instance of the adverse party, and only if the witness actually testifies after having used the writing to refresh his memory.

Section 614 codifies the Florida Supreme Court decision in

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190. For discussion of the decisions regarding the permissible scope of cross-examination, see the Sponsors' Note to § 612; Hicks, *supra* note 24, at § 189.

191. Section 613 contains the protective features:

If it is claimed that the writing contains matters not related to the subject matter of his testimony, the judge shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objection shall be preserved and made available to the appellate court in the event of an appeal. If a writing or other item is not produced or delivered pursuant to order under this section, the testimony of the witness concerning those matters shall be stricken.

192. See *Allen v. State*, 243 So. 2d 448 (Fla. 1st Dist. 1971).

193. FED. R. EVID. 612.

194. FLA. STAT. § 90.803(5)(Supp. 1976); see note 253 *infra*.

*Smith v. State*<sup>195</sup> and requires that prior to cross-examination concerning a prior inconsistent statement, the substance of the prior statement must be revealed to the witness. The counsel cross-examining, however, may not be compelled to reveal private memoranda used to aid his memory during the trial. This section is a modified version of the rule in *The Queen's Case*<sup>196</sup> and seeks to protect against unwarranted insinuations by the cross-examiner that a statement has been made when in fact it was not, but also seeks to avoid invading the work product of trial counsel.<sup>197</sup> The effect of the Code provision is that the cross-examiner need only disclose the contents of the witness' prior statement, without delivering to the witness or opposing counsel his private papers.

The second half of section 614 imposes the familiar requirement that a witness be given an opportunity to explain or deny the prior statement and the opposite party afforded an opportunity to interrogate him on it *before* it can be proved by extrinsic proof. This requirement reflects prior Florida law<sup>198</sup> but differs from the Federal Rules,<sup>199</sup> which simply provide the witness an opportunity to explain without specifying any particular time or sequence.

The requirements of section 614 are not unduly restrictive. They do not alter the present requirements for conducting an impeachment by use of prior inconsistent statements.

The final section of article 6 gives the court power to call witnesses and permits the court, as well as all parties, to cross-examine such witnesses.<sup>200</sup>

It should be noted that the Code does not include a section governing the exclusion or sequestration of witnesses. It is not clear why no attempt was made to codify the existing law on this familiar procedure, but its absence should certainly not be taken to indicate any disfavor of the common law rule. Reference should be made to

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195. 95 So. 2d 525 (Fla. 1957).

196. 129 Eng. Rep. 976 (C.P. 1820).

197. Federal Rule 613(a) does not require that the statement be shown to the witness prior to questioning him about it. It is questionable whether the rule of *The Queen's Case* was effective in protecting against the insinuations of the cross-examiner. See Ladd, *Some Observations on Credibility: Impeachment of Witnesses*, 52 CORNELL L.Q. 239, 246-47 (1967).

198. *Hancock v. McDonald*, 148 So. 2d 56, 58 (Fla. 1st Dist. 1963); FLA. STAT. § 90.10 (1975), repealed by 1976 Fla. Laws ch. 76-237.

199. FED. R. EVID. 613.

200. FLA. STAT. § 90.615 (Supp. 1976).

prior case law<sup>201</sup> for support of motions to exclude or sequester witnesses.

Article 6 is an extensive and fairly comprehensive statute governing competency of witnesses and the scope and mode of their interrogation. It interacts closely with the provisions of article 4 and presents some substantial changes from pre-Code law.

#### VIII. ARTICLE 7—OPINIONS AND EXPERT TESTIMONY

Opinion testimony by lay and expert witnesses is governed by the provisions of article 7, which presents some major changes from the pre-Code law. Section 701 permits lay witnesses to testify in the form of an opinion or an inference when:

- (1) The witness cannot readily, and with equal accuracy and adequacy, communicate what he has perceived to the trier of fact without testifying in terms of inferences or opinions and his use of inferences or opinions will not mislead the trier of fact to the prejudice of the objecting party; and
- (2) The opinions and inferences do not require a special knowledge, skill, experience, or training.<sup>202</sup>

The language of the section is not particularly helpful to the trial lawyer in determining whether a specific instance of lay opinion testimony is objectionable. The best way to decide whether an objection is warranted is probably a common sense judgment whether the opinion given is of a type characteristic of ordinary conversation and cannot otherwise be made intelligible.<sup>203</sup>

Federal Rule 701, which provides a better guideline, requires that the opinion be rationally based on the perceptions of the witness and helpful to a clear understanding of the testimony. If the opinion offered is patently irrational in light of what the witness perceived or could have perceived, it should be objectionable under the Code's language as misleading and prejudicial. In any event, cross-examination can reveal any irrationality in the opinion or inference.

As the Sponsors' Note indicates, it is unclear to what extent Florida common law allowed lay opinion testimony. Section 701 may expand somewhat the instances in which lay opinion testimony

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201. See generally HICKS, *supra* note 24, at § 134. See also FED. R. EVID. 615.

202. FLA. STAT. § 90.701 (Supp. 1976).

203. See FLA. STAT. ANN. § 90.701 (West Special Pamphlet 1976), Sponsors' Note.

is permissible, since the legislature's intent is to insure that the trier of fact receives a complete rendition of the occurrence. The trial bar and bench will find it helpful to bear this goal in mind.

Expert opinion testimony is permitted by section 702 where it will assist the trier of fact in understanding the evidence or in determining a fact in issue." However, it is admissible only if applicable to evidence at trial. An expert is defined as an individual possessing special knowledge, skill, experience, training, or education.<sup>204</sup> It is for the court to consider these factors and determine whether a witness is qualified as an expert.

The Sponsors' Note to section 702 and the Advisory Committee's Note to Federal Rule 702 both quote a test developed by Professor Ladd<sup>205</sup> for determining whether expert testimony is admissible:

There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute.<sup>206</sup>

The Code reflects the approach of recent Florida cases in providing that opinion testimony admissible under sections 701 or 702 is not objectionable merely because the opinion concerns an "ultimate" fact in issue.<sup>207</sup> The distinction between ultimate and evidential facts is unsatisfactory, and its continued rejection is appropriate. Rejection of such a distinction should facilitate presentation of the case to the trier of fact.

There are still important limitations on the use of opinion testimony that should not be overlooked. Trial counsel should be prepared to argue that an opinion offered against his side of the case is inadmissible under section 701 because it is not rationally based on the witness' perceptions or because the testimony could be put forward easily without using the opinion. Furthermore, expert opinion may be challenged under section 702 or section 403 as a waste of

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204. See also FED. R. CIV. P. 1.390.

205. Ladd, *Expert Testimony*, 5 VAND. L. REV. 414 (1952).

206. *Id.* at 418.

207. FLA. STAT. § 90.703 (Supp. 1976). The leading Florida case permitting opinion testimony on an ultimate issue is *North v. State*, 65 So. 2d 77 (Fla. 1953), *aff'd*, 346 U.S. 932 (1954). See also FED. R. EVID. 704.

time. Finally, an opinion is not permitted where it amounts to a legal conclusion. The classic example is that a witness may not testify that someone was negligent, since this is a legal conclusion.<sup>208</sup>

Sections 701 through 703, establishing when opinion testimony may be used, do not radically alter pre-Code law<sup>209</sup> and should pose no problems in application. The remaining two sections in article 7, however, present major changes in the common law. Section 704 expands the sources of facts upon which an expert opinion may be based to include data "of a type reasonably relied upon by experts in the subject to support the opinion expressed," whether such data is admissible in court or not. Section 705 removes the necessity of using hypothetical questions to elicit the opinion of an expert by eliminating the common law requirement that facts upon which an opinion is based must be disclosed prior to admission of the opinion.<sup>210</sup> Under the Code, uncovering the factual basis of an opinion is left to cross-examination.

At common law an expert could base his opinion on facts he observed first hand or on facts presented in evidence by others at trial. In the latter situation the witness could either sit through the trial observing the testimony and give his opinion on that basis, or he could testify in response to a hypothetical question which had to be constructed on the basis of evidence presented prior to the expert's testimony.<sup>211</sup>

The Code follows the approach of the Federal Rules by allowing experts to rely on data which experts in the subject area normally rely upon.<sup>212</sup> This approach recognizes that if experts make critical decisions daily based on certain data, data of the same type ought to suffice as a basis for expert testimony in a court of law.<sup>213</sup> However, there is potential for abuse in this rule since experts under the stress of certain situations may be required to make decisions based

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208. See, e.g., *Atlantic Coast Line R.R. v. Shouse*, 83 Fla. 156, 91 So. 90 (1922).

209. See generally *HICKS*, *supra* Note 24, §§ 304-334.

210 See *Alls v. State*, 104 Fla. 373, 139 So. 789 (1932); *Fekany v. State Road Dep't*, 115 So. 2d 418 (Fla. 2d Dist. 1959).

211. *MCCORMICK ON EVIDENCE* § 14 (2d ed. 1972).

212. *FED. R. EVID.* 703.

213. For example, a physician makes life and death decisions based on statements by patients and relatives, on reports and opinions of nurses, technicians and other doctors, and on hospital records. Some of these may not be admissible, and it would be expensive and time consuming even if they were. Rheingold, *The Basis of Medical Testimony*, 15 *VAND. L. REV.* 473, 493 (1962).

on unreliable data. This type of data should not be permitted to serve as the basis of an expert's opinion in court. Opposing counsel and the trial judge should be careful to insure that such data be of a type *reasonably relied upon* by experts in the field. Opposing counsel should also be well prepared to cross-examine experts relying on such data to expose opinions that have no reliable basis in fact.

By eliminating the requirement that facts upon which an expert opinion is based must be disclosed prior to presentation of his opinion, the Code accepts the vast amount of literature criticizing the hypothetical question as confusing, misleading, and a tool of abuse in the hands of a skilled trial counsel.<sup>214</sup> However justified this conclusion may be, there is some danger in allowing expert opinion without disclosure of any underlying facts. Opposing counsel may have undue difficulty in cross-examining an experienced prostitute expert without some indication of the basis of that expert's opinion. The Code improves on the Federal Rules<sup>215</sup> in this respect by giving the trial judge discretion to compel prior disclosure.<sup>216</sup> In addition, section 705 (2) provides:

Prior to the witness giving his opinion, a party against whom the opinion or inference is offered may conduct a voir dire examination of the witness directed to the underlying facts or data for his opinion. If the party establishes prima facie evidence that the expert does not have a sufficient basis for his opinion, the opinions and inferences of the expert are inadmissible unless the party offering the testimony establishes the underlying facts or data.

Trial counsel should not hesitate to use this voir dire procedure where he has reason to doubt whether the expert has a sufficient basis for his opinion.

The Code should not be interpreted as prohibiting the use of a hypothetical question where it will be the most effective method of presenting the expert's opinion.<sup>217</sup> In many instances the impact of expert opinion may not be as strong as possible unless the underlying facts are revealed so that the trier of fact can follow the expert's reasoning process. Consequently, the Code's changes may not be as major as they appear.

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214. See, e.g., 2 WIGMORE ON EVIDENCE § 686 (3d ed. 1940).

215. FED. R. EVID. 705.

216. FLA. STAT. § 90.705(1) (Supp. 1976).

217. See FLA. STAT. ANN. § 90.705 (West Special Pamphlet 1976), Sponsors' Note.

Conspicuous in its absence from the Code is a provision, similar to Federal Rule 706, for court-appointed experts. This absence is a controversial issue upon which a diversity of opinion exists. Some commentators argue that court-appointed experts tend to acquire an aura of infallibility to which they are not entitled.<sup>218</sup> Others suggest that the fear of a court-appointed expert will exert a sobering effect on the expert witness of a party, thereby cutting back on the availability of prostitute experts.<sup>219</sup> In view of the fact that the trial judge may have inherent power to appoint an expert of his own choosing,<sup>220</sup> it may not be too significant that the Code does not statutorily provide for such appointments.

### IX. ARTICLE 8—HEARSAY

An adequate treatment of the law of hearsay and the effect the Code has on it are beyond the scope of this article. No effort will be made to analyze each section and subsection of article 8. Rather, an attempt will be made to give a general picture of the Code's approach to the hearsay problem and to highlight some of its more significant differences from the common law and the Federal Rules.

Article 8 is identical in format to article 8 of the Federal Rules of Evidence. Section 801(1) defines "statement," "declarant," and "hearsay." Section 802 provides that hearsay is inadmissible, except as provided by statute. The statutory exceptions are provided in sections 803 and 804. The exceptions provided in section 803 do not depend on the availability of the declarant to testify at trial. Those provided by section 804 are only permissible when the declarant is not available to testify as a witness at trial. Sections 805 and 806 complete the treatment of hearsay. Section 805 provides that hearsay included within hearsay is admissible if an exception is found for each of the hearsay statements. Section 806 allows attacks on the credibility of the declarant even though he is not present in the court room.

The Code's basic approach does not differ radically from the common law approach to hearsay. There are certain Code sections,

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218. Levy, *Impartial Medical Testimony - Revisited*, 34 *TEMPLE L.Q.* 416, 424 (1961). This aura of infallibility can become particularly unfair in the classical "battle of the experts" situation.

219. See *FED. R. EVID.* 706, Advisory Comm. Note.

220. See 2 *WIGMORE ON EVIDENCE* §§ 563, 2484 (3d ed. 1940); Sink, *The Unused Power of a Federal Judge to Call His Own Expert Witness*, 29 *S. CAL. L. REV.* 195 (1956).

however, which may prove troublesome in application. These sections will be discussed in depth.

The starting point for all hearsay problems is the basic proposition that hearsay evidence is inadmissible, except as provided by statute.<sup>221</sup> Hearsay evidence, generally, is excluded because the declarant of the hearsay evidence is not subjected to the truth-testing techniques which the Anglo-American judicial system has devised as the basis for dispute resolution by trial. These truth-testing techniques include testifying under oath, being subject to the penalty for perjury, testifying before the trier of fact to permit observation of the witness' demeanor, and most important, subjecting the witness to cross-examination by the adverse party.<sup>222</sup>

The first and perhaps most difficult problem for trial counsel is determining whether a witness' testimony constitutes hearsay. Section 801 defines what hearsay is, and is, therefore, probably the single most important section of the Code to know and understand. The Code defines hearsay as "an out-of-court statement, other than one made by a declarant who testifies at the trial or hearing, offered in court to prove the truth of the matter contained in the statement."<sup>223</sup> There are two critical elements of this definition: what constitutes a "statement" and what constitutes an offering "in court to prove the truth of the matter contained in the statement."

The Code defines a "statement" as: "1. An oral or written assertion; or 2. Nonverbal conduct of a person if it is intended by him as an assertion."<sup>224</sup> The oral or written assertion poses no difficulty. Certain nonverbal conduct also poses no difficulty. For example, both the Sponsors' Note to section 801 and the Advisory Committee's Note to Federal Rule 801 describe the act of pointing to identify a suspect in a lineup as nonverbal conduct clearly assertive in nature. Some nonverbal conduct, however, may be offered as evidence that the person acted as he did because of his belief in the fact sought to be proved. The classic example of this situation involves a case where it is critical to establish that a person had good eyesight at a particular time. Evidence is offered that while the individual was working on a ship, the captain gave him the job of

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221. FLA. STAT. § 90.802 (Supp. 1976).

222. See MCCORMICK ON EVIDENCE § 245 (2d ed. 1972).

223. FLA. STAT. § 90.801(1)(c) (Supp. 1976). This definition is the same as the common law of Florida. See *Lombardo v. Flaming Fountain, Inc.*, 327 So. 2d 39, 40 (Fla. 2d Dist. 1976).

224. FLA. STAT. § 90.801(1)(a) (Supp. 1976).

lookout. The action of the captain is thought to infer that the individual had good eyesight. At common law such evidence was inadmissible hearsay because the captain's action was deemed to be an "implied assertion."<sup>225</sup>

The Code adopts the approach of the Federal Rules in rejecting the common law rule governing implied assertions.<sup>226</sup> The Sponsors' Note to section 801(1)(a) quotes the following from the Advisory Committee's Note to Federal Rule 801:

Admittedly evidence of this character is untested with respect to the perception, memory, and narration (or their equivalents) of the actor, but the Advisory Committee is of the view that these dangers are minimal in the absence of an intent to assert and do not justify the loss of the evidence on hearsay grounds. No class of evidence is free of the possibility of fabrication, but the likelihood is less with nonverbal than with assertive verbal conduct. The situations giving rise to the nonverbal conduct are such as virtually to eliminate questions of sincerity. Motivation, the nature of the conduct, and the presence or absence of reliance will bear heavily upon the weight to be given the evidence . . . .

Although not quoted in the Sponsors' Note, the Advisory Committee's Note to Federal Rule 801 continues:

When evidence of conduct is offered on the theory that it is not a statement, and hence not hearsay, a preliminary determination will be required to determine whether an assertion is intended. The rule is so worded as to place the burden upon a party claiming that the intention existed; ambiguous and doubtful cases will be resolved against him and in favor of admissibility. (citations omitted)

It would appear that under the Code, nonverbal conduct is only a "statement" when the person who engaged in it intended it as an assertion. Furthermore, the burden is on the party seeking to exclude evidence of conduct to establish that it was intended as an assertion.

The second critical element in the Code's definition of hearsay is that the statement be "offered in court to prove the truth of the matter contained in the statement." This element reflects the com-

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225. See generally Finman, *Implied Assertions as Hearsay: Some Criticisms of the Uniform Rules of Evidence*, 14 STAN. L. REV. 682 (1962); Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 214-17 (1948).

226. FED. R. EVID. 801(a), Advisory Comm. Note.

mon law's exclusion from hearsay treatment of "verbal acts,"<sup>227</sup> statements whose significance lies solely in the fact that they were made, and not in their truthfulness.<sup>228</sup>

Simply because evidence consists of an out-of-court "statement" "offered in court to prove the truth of the matter contained in the statement" does not necessarily mean that it falls within the Code's definition of hearsay. First, if the out-of-court statement were made by a declarant who is present in court and testifies, his out-of-court statement is not hearsay and may be offered to prove his truthfulness.<sup>229</sup>

More specifically, subsection 2 of section 801 excludes from the definition of hearsay certain statements which would otherwise be hearsay. If a witness testifies at trial and is subject to cross-examination, any out-of-court statement of his which is "(a) Inconsistent with his testimony; (b) Consistent with his testimony and is offered to rebut an express or implied charge against him of improper influence, motive, or recent fabrication; or (c) one of identification of a person made after perceiving him," is not hearsay.<sup>230</sup> This provision differs considerably from pre-Code Florida law, which generally held that such statements were hearsay and could not be used as substantive evidence to prove the truth of their contents.<sup>231</sup>

The Code's definition of hearsay is a considerable improvement over pre-Code law. Subsection 2 of section 801 recognizes the ineffectiveness of instructions to the jury that they may consider certain statements only as they reflect on the credibility of a witness and not as substantive evidence. It also recognizes that no evidence is perfect; but as long as the declarant is in court testifying and subject to cross-examination, the dangers which lead to the prohibition of hearsay in the first place are not present. As a result, such statements are excluded from the definition of hearsay. For trial counsel, the most significant part of this change is that prior inconsistent statements may not be used as substantive evidence and need not be limited to use for impeachment only.

The Code's definition of hearsay is very similar to Federal Rule

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227. See *Chacon v. State*, 102 So. 2d 578, 591 (Fla. 1958).

228. See generally, *McCORMICK ON EVIDENCE* § 249 (2d ed. 1972); 6 *WIGMORE ON EVIDENCE* §§ 1766, 1770 (Chadbourn rev. 1976).

229. *FLA. STAT. ANN.* § 90.801(1)(c) (West Special Pamphlet 1976), Sponsors' Note.

230. *FLA. STAT.* § 90.801(2) (Supp. 1976).

231. See *FLA. STAT. ANN.* § 90.801(2) (West Special Pamphlet 1976), Sponsors' Note.

801, with a few notable exceptions. First, the Federal Rules require that prior inconsistent statements must have been made under oath before they are admissible as substantive evidence.<sup>232</sup> This requirement does not appear to be too important as long as the declarant appears before the trier of fact and submits to cross-examination. Second, the Federal Rules do not exclude identifications from the definition of hearsay. Finally, under the Federal Rules, admissions by a party-opponent are excluded from the definition of hearsay on the theory that no guarantee of trustworthiness is necessary in the case of such admissions.<sup>233</sup> Under the Code, admissions are treated as an exception to the hearsay rule.<sup>234</sup> Whether this difference in treatment has any practical significance is not clear; however, counsel who practice in both federal and state court should be aware of it.

Once it is determined that evidence is hearsay, analysis shifts to sections 803 and 804 to ascertain whether the evidence is admissible under one of the statutory exceptions. The majority of these exceptions are well known to experienced trial counsel, and do not differ from pre-Code law or the Federal Rules. These exceptions will not be discussed in this article. However, several of these statutory exceptions represent major changes in Florida law and will be analyzed in some depth.

The most significant change the Code makes in regard to hearsay exceptions is that it replaces the *res gestae* exception with two statutory exceptions: (1) spontaneous statement,<sup>235</sup> and (2) excited utterance.<sup>236</sup> As the Sponsors' Note indicates, rejection of the term *res gestae* is long overdue. It was an ambiguous, imprecise "catch-all" term which was often used to justify an unjustifiable ruling on the admissibility of evidence.

The spontaneous statement exception is defined as: "[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."<sup>237</sup> The

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232. FED. R. EVID. 801(d)(1)(A).

233. FED. R. EVID. 801(d)(2), Advisory Comm. Note.

234. FLA. STAT. § 90.803(18) (Supp. 1976).

235. FLA. STAT. § 90.803(1) (Supp. 1976).

236. FLA. STAT. § 90.803(2) (Supp. 1976).

237. FLA. STAT. § 90.803(1) (Supp. 1976).

theory underlying this exception is that the contemporaneity of the event and the statement negate the likelihood of conscious misrepresentation.<sup>238</sup>

The excited utterance exception is defined as: "[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."<sup>239</sup> The theory behind this exception is that the excitement of the event temporarily eliminates the capacity of reflection and consequently reduces the chances of conscious misrepresentation.<sup>240</sup>

The theories underlying these exceptions demonstrate that timing is the essence of both exceptions. As a result, they overlap to some extent. There are two differences, however, which provide keys not only for distinguishing between the two exceptions, but also for deciding whether either exception applies to a particular statement.

First, the time requirement with respect to the spontaneous statement exception is that the statement must have been made in substantial contemporaneity with the event being described. On the other hand, if a statement is to be admissible under the excited utterance exception, it must have been made during the duration of the state of excitement. For example, if a witness to an accident goes into shock and five days later comes out of shock screaming that the Cadillac ran the red light, his statement is not subject to the spontaneous statement exception because it was not made in substantial contemporaneity with the accident. However, it might fall within the excited utterance exception because the state of excitement lasted through the period of shock.

Second, the permissible subject matter differs between the two exceptions. To qualify for the spontaneous statement exception, the statement must be limited to a description or explanation of the event. Anything more than a mere description would possess greater potential for conscious misrepresentation. To qualify for the excited utterance exception, a statement need only relate to the event which caused the excitement since it is the state of excitement which guards against conscious misrepresentation.<sup>241</sup>

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238. See E. MORGAN, *BASIC PROBLEMS IN EVIDENCE*. 340-41 (1962).

239. FLA. STAT. § 90.803(2) (Supp. 1976).

240. See 6 WIGMORE ON EVIDENCE § 1747 (Chadbourne rev. 1976).

241. See FLA. STAT. ANN. §§ 90.803(1), (2) (West Special Pamphlet 1976), Sponsors' Note.

The effect of the Code's elimination of the *res gestae* exception is that trial counsel will have to be more specific in establishing exceptions previously based on this vague term. Consequently, counsel is well advised to become familiar with the spontaneous statement and excited utterance exceptions.

Section 803(3) codifies prior case law and mirrors the Federal Rules' exception for then existing mental, emotional, or physical condition. The exception is defined as:

(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.

Such statements are generally offered to prove that the declarant did the acts which he intended to do.<sup>242</sup> The most important aspect of this exception is that it does not apply to an after-the-fact statement of memory to belief, except in regard to a will. This section is not a new requirement.

The Code recognizes the common law exception for statements by a person seeking medical diagnosis or treatment.<sup>243</sup> The theory

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242. The landmark case establishing this exception is *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285 (1892). In *Hillmon*, The Supreme Court admitted the statement of a deceased declarant that he intended to go from one city to another on a certain date to infer that the deceased was killed during the trip. As a result the beneficiary of an insurance policy on the deceased's life could recover the proceeds. See also Hinton, *States of Mind and the Hearsay Rule*, 1 U. CHI. L. REV., 394 (1934); Maguire, *The Hillmon Case—Thirty-Three Years After*, 38 HARV. L. REV. 709 (1925).

243. FLA. STAT. § 90.803(4) (Supp. 1976). This subsection provides:

Statements for purposes of medical diagnosis or treatment. - Statements made for purposes of medical diagnosis or treatment by a person seeking the diagnosis or treatment, or made by an individual who has knowledge of the facts and is

behind the exception is that there is a strong motivation to tell the truth since the declarant's treatment depends on his statements to the physician. Consequently, the key to determining whether a particular statement made to a physician falls within the exception is whether it was "reasonably pertinent to diagnosis or treatment."<sup>244</sup> For example, a statement to the doctor by the patient that he was struck by an automobile would be admissible; however, a statement that the automobile had run through a stop sign would not.

The Code also resolves an apparent conflict in Florida case law as to whether statements made to a physician who is consulted solely for the purpose of qualifying him to testify are within this exception to the hearsay rule.<sup>245</sup> The Code follows the approach of the Federal Rules in admitting such statements as substantive evidence under this exception.<sup>246</sup> The Code approach represents a considerable liberalization of the exception.

The Code's business records exception provision<sup>247</sup> differs from pre-Code law<sup>248</sup> in one respect—records containing opinions are admissible if such opinions would be admissible under article 7,<sup>249</sup> and if the person whose opinion is recorded were to testify to the

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.

See MCCORMICK ON EVIDENCE § 292 (2d ed. 1972).

244. FLA. STAT. § 90.803(4) (Supp. 1976).

245. Compare *Bondy v. West*, 219 So. 2d 117 (Fla. 2d Dist. 1969) with *Raydel, Ltd. v. Medcalfe*, 162 So. 2d 919 (Fla. 3d Dist. 1964).

246. FLA. STAT. ANN. § 90.803(4) (West Special Pamphlet 1976), Sponsors' Note; FED. R. EVID. 803(4), Advisory Comm. Note.

247. FLA. STAT.+4 § 90.803(6) (SUPP. 1976). THIS SUBSECTION PROVIDES:

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 a knowledge, if kept in the course of a regularly conducted business activity to make such memorandum report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, 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 eviience in the form of an opinion or diagnosis is admissible under paragraph (a) unless such opinion or diagnosis would be admissible under §§ 90.701-90.705 if the person whose opinion is recorded were to testify to the opinion directly.

248. FLA. STAT. §§ 92.36, .37 (1975), repealed by 1976 Fla. Laws ch. 76-237.

249. See section VIII *supra*.

opinion directly.<sup>250</sup> Otherwise, the Code's business records exception is the same as the pre-Code law and Federal Rules. It is based on the theory that business records possess reliability stemming from "systematic checking, regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation."<sup>251</sup>

There are three keys to determining the applicability of this exception. First, the records must be identified by the custodian or some other qualified witness. Second, the motivation of the informant must have been business accuracy.<sup>252</sup> In other words, the sources of information for the records must be trustworthy. Third, all of the participants in the recording process must be acting routinely. They must all be under a business duty to report truthfully the information they possess. If these three conditions are met, business records should qualify as an exception to the hearsay rule.

The remaining exceptions in section 803 basically restate pre-Code law.<sup>253</sup> They will not be discussed in this article; however, trial

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250. See FLA. STAT. ANN. § 90.803(6) (West Special Pamphlet 1976), Sponsors' Note.

251. FED. R. EVID. 803(6), Advisory Comm. Note; FLA. STAT. ANN. § 90.803(6) (West Special Pamphlet), Sponsors' Note.

252. See *Palmer v. Hoffman*, 318 U.S. 109 (1943). *Palmer* and its commentators raise the difficult issue of the motivation behind filing accident reports, particularly in the railroad industry. An in-depth analysis of this issue is beyond the scope of this article. The Code follows the lead of the Federal Rules, avoiding this problem by dictating that such records made in the course of regularly conducted activity will be taken as admissible, subject to authority to exclusion if "the sources of information or other circumstances show lack of trustworthiness." See also FLA. STAT. ANN. § 90.803(6) (West Special Pamphlet 1976), Sponsors' Note.

253. FLA. STAT. § 90.803 (Supp. 1976). These exceptions are:

(5) Recorded recollection. - A memorandum or record offered by an adverse party concerning a matter about which a witness once had knowledge, but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his 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.

(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, records, 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, or setting forth

the activities of the office or agency, or matters observed pursuant to duty imposed by law as 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.

(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.

(10) Absence of public record or entry. - Evidence, in the form of a certification in accord with § 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 would regularly have been made and preserved by a public office and agency.

(11) Records of religious organizations. - Statements of births, marriages, divorces, deaths, legitimacy, 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 acts contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, when such statement was certified by a clergyman, 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 facts 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.

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

- (a) His own statement in either an individual or a representative capacity;
- (b) A statement of which he has manifested his adoption or belief in its truth;
- (c) A statement by a person specifically authorized by him to make a statement concerning the subject;
- (d) A statement by his 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 co-conspirator of the party during the course, and in furtherance, of the conspiracy. Upon request of counsel, the court

counsel should be aware of their existence and recall that they do not depend upon the unavailability of the declarant.

Before leaving the section 803 exceptions it should be noted that the section does not include two significant exceptions which appear in Federal Rule 803. First, the Code does not include an exception for learned treatises.<sup>254</sup> This omission means that under the Code, treatises are admissible solely for the purposes of cross-examination of experts, not as substantive evidence.<sup>255</sup>

Second, Federal Rule 803(24) provides:

(24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to

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shall instruct the jury that the conspiracy itself and each member's participation in it must be established by independent nonhearsay 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 his family by blood, adoption, or marriage;

(b) Among his associates; or

(c) In the community,

concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his 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 his associates or in the community.

(22) Former testimony. - Former testimony given by the declarant at a civil trial, when used in substantially the same civil proceeding. (citations omitted).

254. See FED. R. EVID. 803(18).

255. For a good discussion of the merits of this exception, see the Advisory Committee's Notes to Federal Rule 803(18).

prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

This provision, permitting evolution of new hearsay exceptions through the exercise of judicial discretion, has no counterpart in the Code. As a result, all hearsay exceptions are now and forever legislative matters. In light of the fact that the existing exceptions were established through years of arduous judicial experience, it seems doubtful that all possible exceptions have been developed and codified. The legislature cannot respond quickly enough with appropriate new exceptions to produce justice to the litigants in those controversies which provide the impetus for new exceptions. The legislature, therefore, may wish to include a provision permitting judicial discretion to establish new hearsay exceptions as justice demands.

The underlying rationale of section 803 is that a hearsay statement falling within one of the section's exceptions possesses certain qualities to insure against the dangers of fabrication and imprecision which the hearsay rule seeks to avoid. These qualities are thought to justify the evidence's admission whether the declarant is available at trial or not.

The policy behind the section 804 exceptions is different. The section's theoretical basis is that while testimony of the declarant at trial is preferred over hearsay, use of the hearsay is preferred over complete loss of evidence when the declarant is unavailable to testify at trial.<sup>256</sup> Consequently, the section 804 exceptions may only be used when the declarant is unavailable to appear at the trial.

Section 804(1) defines unavailability as follows:

"Unavailability as a witness" means that the declarant:

- (a) Is exempted by a ruling of a court on the ground of privilege from testifying concerning the subject matter of his statement;
- (b) Persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so;
- (c) Has suffered a lack of memory of the subject matter of his statement so as to destroy his effectiveness as a witness during the trial;
- (d) Is unable to be present or to testify at the hearing because of death or because of then existing physical or mental illness or infirmity; or

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256. FED. R. EVID. 804(b), Advisory Comm. Note.

(e) Is absent from the hearing, and the proponent of his statement has been unable to procure his attendance or testimony by process or other reasonable means.

However, a declarant is not unavailable as a witness if such exemption, refusal, claim of lack of memory, inability to be present, or absence is due to the procurement or wrongdoing of the party who is the proponent of his statement in preventing the witness from attending or testifying.

This section represents a major change from the common law, which had developed different requirements of unavailability for different hearsay exceptions.<sup>257</sup> For example, a statement under belief of impending death qualified for an exception to the hearsay rule only where the declarant actually died.<sup>258</sup> Under the Code, the question of unavailability is treated uniformly. If a declarant is unavailable for any of the reasons listed in section 804(1), then all four of the exceptions listed in 804(2) can be used to support admission of the declarant's statement.

The first exception in section 804 is for former testimony.<sup>259</sup> This section of the Code replaces former section 92.22 of Florida Statutes and changes somewhat the requirements for establishing the exception. The prior law admitted former testimony of a witness provided

- (1) such evidence has at such former trial been reported stenographically or reduced to writing in the presence of the court;
- (2) that the party against whom the evidence is offered, or his privy, was a party on the former trial;
- (3) that the issue is substantially the same in both cases;
- (4) that a substantial reason is shown why the original witness or document is not produced; and
- (5) that the court is satisfied that the report of such evidence taken at such formal trial is a correct report.<sup>260</sup>

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257. See generally MCCORMICK ON EVIDENCE §§ 255, 280, 322 (2d ed. 1972).

258. *Id.* § 282.

259. FLA. STAT. § 90.804(2)(a) (Supp. 1976). this subsection provides:

Hearsay exceptions. - The following are not excluded under §90.802, provided that the declarant is unavailable as a witness:

(a) *Former testimony.* - Testimony 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, had an opportunity and similar motive to develop the testimony by direct cross, or re-direct examination.

260. FLA. STAT. § 92.22 (1975), *repealed by* 1976 Fla. Laws ch. 76-237, § 2.

Section 804(2)(a) does not contain specific provisions such as those in subsections (1) and (5) of former section 92.22, but they can fairly be implied. The Code clarifies section 92.22 by requiring that the party against whom the former testimony is offered must have been a party in the first proceeding or, in civil cases only, a successor in interest to a party in the first proceeding.<sup>261</sup>

The Code does not require, as did section 92.22(3), that the issue be substantially the same in both cases. Rather, the Code requires only that the party against whom the testimony is offered "had an opportunity and similar motive to develop the testimony by direct, cross, or re-direct examination."<sup>262</sup>

The Code makes availability of the former testimony exception dependent primarily upon whether the party against whom the evidence is offered had an opportunity and similar motive in cross-examining the witness during the first proceeding.<sup>263</sup> This opportunity and motive is the primary issue which trial counsel should be prepared to argue when confronted with an attempt to admit former testimony of a witness who is unavailable at the second trial.

The second exception in section 804 is for statements made under belief of impending death.<sup>264</sup> At common law such statements were known as dying declarations, and in Florida they were only admissible in criminal cases.<sup>265</sup> The Code expands the exception,

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261. When former testimony is used in criminal cases, the Code makes it clear that the party against whom it is offered must himself have been a party in the first proceeding. This requirement is apparently to insure against any possible violation of the defendant's right to confrontation.

The use of former testimony which was given during a defendant's preliminary hearing does not violate the defendant's right to confrontation. *California v. Green*, 399 U.S. 149 (1970).

Florida recognized the former testimony exception in criminal cases in *Richardson v. State*, 247 So. 2d 296 (Fla. 1971).

262. FLA. STAT. § 90.804(2)(a) (Supp. 1976).

263. The code does not, however, go as far as some commentators have suggested in relying solely on the availability of cross-examination. Professor Wigmore did not believe it was necessary that the party against whom the evidence is offered be the one who conducted the cross-examination in the first proceeding, as long as the party in the first proceeding had the same interest and motive in his cross-examination. 5 WIGMORE ON EVIDENCE § 1388 (3d ed. 1972).

264. FLA. STAT. § 90.804(2)(b) (Supp. 1976). This subsection provides: "*Statement under belief of impending death.* - In a civil or criminal trial, a statement made by a declarant while reasonably believing that his death was imminent, concerning the physical cause or instrumentalities of what he believed to be his impending death or the circumstances surrounding his impending death."

265. FLA. STAT. ANN. § 90.804(2)(b) (West Special Pamphlet 1976), Sponsors' Note.

making it applicable in civil cases as well.<sup>266</sup>

The Code retains the common law requirement that only statements "concerning the physical cause or instrumentalities of what the declarant believed to be his impending death"<sup>267</sup> are admissible. This requirement is consistent with the theory behind the exception, which is that the religious or psychological impact of impending death will reduce the potential for conscious misrepresentation concerning the cause of the impending death.<sup>268</sup>

The most important effect of the Code on the dying declaration exception is to make it available in civil cases where appropriate.

The third exception in section 804 is for statements against interest.<sup>269</sup> Statements by an unavailable witness against his interest must be distinguished from admissions of a party-opponent in a dispute. Statements against interest are made by non-parties to a dispute and must be against the declarant's interest as defined by the Code. In addition, the declarant must be unavailable at trial. An admission can be any statement of a party-opponent.

The most controversial issue presented by the Code in its formulation of this exception is that a statement made against the declarant's penal interest cannot qualify for the exception "unless corroborating circumstances show the trustworthiness of the statement."<sup>270</sup> This provision was apparently an attempt to avoid the possibility of violating the United States Supreme Court decision in *Chambers v. Mississippi*,<sup>271</sup> without completely adopting statements

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266. See also FED. R. EVID. 804(b)(2).

267. FLA. STAT. § 90.804(2)(b) (Supp. 1976).

268. See 5 WIGMORE ON EVIDENCE § 1443 (3d ed. 1972); *The King v. Woodcock*, 168 Eng. Rep. 352, 353 (K.B. 1789).

269. FLA. STAT. § 90.804(2)(c) (Supp. 1976). This subsection provides:

*Statement against interest.* - A statement which, at the time of its making, was far contrary to the declarant's pecuniary or proprietary interest or tended to subject him to liability or to render invalid a claim by him against another, so that a person in the declarant's position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is inadmissible, unless corroborating circumstances show the trustworthiness of the statement. A statement or confession which is offered against the accused in a criminal action, and which is made by a codefendant or other person implicating both himself and the accused, is not within this exception.

270. FLA. STAT. § 90.804(2)(c) (Supp. 1976). See also FED. R. EVID. 804(b)(3).

271. 410 U.S. 284 (1973). In *Chambers* the Court held that the combination of the Mississippi rule denying statements against penal interest status as hearsay exceptions, coupled with the prohibition against impeaching one's own witness, violated due process.

against penal interest as an exception to the hearsay rule.

After the Code was enacted, however, the Florida Supreme Court, in *Baker v. State*,<sup>272</sup> adopted statements against penal interest as an exception with no mention of a requirement of corroborating circumstances. The court did not appear to base its decision on constitutional grounds; therefore, it is unclear what will result from the present conflict between case law and the Code. Hopefully, the legislature will redraft this section to include penal interest in the statement against interest exception.

The final exception provided by section 804 is for statements of personal or family history.<sup>273</sup> More commonly known as the pedigree exception, it should present nothing new.

Once hearsay evidence is found admissible under some exception in sections 803 or 804, the party against whom it is admitted has one last important opportunity. Under section 806, this party can attack the credibility of the declarant.<sup>274</sup> Furthermore, inconsistent statements or conduct may be used for impeachment, "regardless of whether or not the declarant has been afforded an opportunity to deny or explain it," as section 90.614 otherwise requires.<sup>275</sup> Industrious counsel can use this provision to attempt to blunt the impact of not being able to cross-examine the declarant.

The Code's treatment of hearsay is fairly understandable and comprehensive. In highlighting some of the Code's article 8 provisions this article has examined only a small number of the multitude of issues that will surely arise as the hearsay provisions of the Code are put into practice.

## X. ARTICLE 9—AUTHENTICITY AND THE BEST EVIDENCE RULE

The final article of the Code concerns two separate problems in the law of evidence. Sections 901 through 903 essentially restate the pre-Code requirement that evidence be authenticated or identified as

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272. 336 So. 2d 364 (Fla. 1976).

273. FLA. STAT. § 90.804(2)(d) (Supp. 1976). This subsection provides: "*Statement of personal or family history.* - A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, ancestry, or other similar fact of personal or family history, including relationship by blood, adoption, or marriage, even though the declarant had no means of acquiring personal knowledge of the matter stated."

274. When the credibility of the declarant is attacked, his credibility "may be supported by any evidence that would be admissible for those purposes if the declarant had testified as a witness." FLA. STAT. § 90.806(1) (Supp. 1976).

275. FLA. STAT. ANN. § 90.806(1) (West Special Pamphlet 1976), Sponsors' Note.

a logical step in establishing its relevance and admissibility.<sup>276</sup> Sections 951 through 958 clarify and liberalize the Florida best evidence rule.<sup>277</sup>

Article 9's treatment of the requirement of authenticity is conceptually and mechanically straightforward and should pose no problems in application. Section 901 states the general rule, requiring that any corporeal object of evidence be authenticated or identified as a condition precedent to its admissibility. This requirement is a question of conditional relevancy for the judge to determine prior to ruling on the admissibility of the evidence.<sup>278</sup> Satisfaction of this requirement does not insure that the evidence will ultimately be held authentic. The ultimate determination will be made by the trier of fact.

Section 901 provides that "[t]he requirements of this section are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." The Sponsors' Note to section 901 gives nine examples of methods which Florida courts have approved for authenticating a piece of evidence.<sup>279</sup> These examples should not be taken as an exhaustive list. Inventive counsel may develop new methods if the ones in existence do not meet the needs at hand. However, the Sponsors' Note to section 901 should be a helpful starting point for the trial lawyer with evidence which he desires to authenticate for admission at trial.

Certain kinds of evidence are held to satisfy the requirement of section 901 without extrinsic evidence of authenticity.<sup>280</sup> Of course,

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276. See, e.g., *DeLong v. Williams*, 232 So. 2d 246 (Fla. 4th Dist. 1970). For a discussion of authentication as an element of relevancy, see *McCORMICK ON EVIDENCE* § 218 (2d ed. 1972); Weinstein & Berger, *Basic Rules of Relevancy in the Proposed Federal Rules of Evidence*, 4 GA. L. REV. 43 (1969).

277. See text accompanying notes 279-88 *infra*.

278. See text accompanying note 19 *supra*.

279. See also *FED. R. EVID.* 901(b).

280. *FLA. STAT.* § 90.902 (Supp. 1976). These self-authenticated documents are:

(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 his official capacity.

the opponent can still challenge the authenticity of such evidence. Trial counsel, however, should always check this list to insure that his evidence at least gets before the jury.

Section 903 provides that "testimony of a subscribing witness is not necessary to authenticate a writing unless the statute requiring attestation requires it." The most notable statutory exception to section 903 is the requirement that a witness to a will be produced at trial to attest to the signing of the will if he is available.<sup>281</sup> The section itself merely restates the pre-Code law.<sup>282</sup>

The Code's treatment of the best evidence rule is not complicated but does represent a liberalization of the pre-Code Florida law. Existing case law provides that when attempting to prove the

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- (3) An official foreign document, record, or entry that is:
- (a) Executed or attested to by a person in his 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 certificate 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 subsections (1), (2), or (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. (citation omitted).

281. FLA. STAT. § 733.201 (1975).

282. *Windle v. Sibold*, 241 So. 2d 165 (Fla. 4th Dist. 1970).

contents of a writing, recording or photograph, duplicates can only be used when the original is unavailable.<sup>283</sup> Section 953 of the Code now provides to the contrary:

A duplicate is admissible to the same extent as an original, unless:

- (1) The document or writing is a negotiable instrument as defined in § 673.104, a security as defined in § 678.102, or any other writing that evidences a right to the payment of money, is not itself a security agreement or lease, and is of a type that is transferred by delivery in the ordinary course of business with any necessary endorsement or assignment.
- (2) A genuine question is raised about the authenticity of the original or any other document or writing.
- (3) It is unfair, under the circumstances, to admit the duplicate in lieu of the original.

The time and expense that should be saved as a result of this new rule ought to be considerable.

Section 951 defines "writings and recordings,"<sup>284</sup> "photographs,"<sup>285</sup> "original,"<sup>286</sup> and most importantly "duplicate."<sup>287</sup> Some dispute will likely arise over what constitutes a duplicate since the effect of finding a duplicate is probable admissibility under section 953. The key to the Code's definition of duplicate is that the copy be "so accurately reproduced as to eliminate almost every

283. *Wicker v. Board of Pub. Instruction*, 31 So. 2d 635 (Fla. 1947).

284. "'Writings' and 'recordings' include letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photography, magnetic impulse, mechanical or electronic recording, or other form of data compilation, upon paper, wood, stone, recording tape, or other materials." FLA. STAT. § 90.951(1) (Supp. 1976).

285. "'Photographs' include still photographs, x-ray films, videotapes, and motion pictures." FLA. STAT. § 90.951(2) (Supp. 1976).

286. An "original" of a writing or recording means the writing or recording itself, or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print made from it. If data are stored in a computer or similar device, any printout or other output readable by sight and shown to reflect the data accurately is an "original." FLA. STAT. § 90.951(3) (Supp. 1976).

287. "Duplicate" includes:

- (a) A counterpart produced by the same impression as the original, from the same matrix; by means of photography, including enlargements and miniatures; by mechanical or electronic re-recording; by chemical reproduction; or by other equivalent technique that accurately reproduces the original; or
- (b) An executed carbon copy not intended by the parties to be an original.

FLA. STAT. § 90.951(4) (Supp. 1976).

possibility of error.”<sup>288</sup> Manually reproduced copies such as would be produced by handwriting or typing are not contemplated within this definition.

Section 952 states the best evidence rule as: “Except as otherwise provided by statute, an original writing, recording, or photograph is required [in order] to prove the contents of the writing, recording, or photograph.” The Sponsors’ Note refers to the Uniform Photographic Copies of Business and Public Records as Evidence Act<sup>289</sup> as an example of the statutory exception to the production of the original. This is confusing since the Uniform Photographic Copies Act is repealed by the Code.<sup>290</sup> It is not clear why the legislature repealed the Uniform Act. Perhaps it felt that the Act was rendered unnecessary since section 953 now admits duplicates to the same extent as originals. If this were the reason, however, the other statutory exceptions<sup>291</sup> listed in the Sponsors’ Notes to section 952 and 953 are redundant. Whatever the reasons for repealing the Uniform Act, the Sponsors’ Notes’ reference to it is misleading.

When the original and any duplicates of a writing are lost, destroyed, unavailable, in the control of the party against whom offered, or not related to a controlling issue, section 954 permits other evidence of the writing’s contents to be offered. This provision eliminates the pre-Code practice of determining degrees of secondary evidence that may be used in such cases<sup>292</sup> and will greatly simplify the presentation of proof when the originals are excusably unavailable.

Section 955 provides for the admissibility of certified copies of public records that are actually recorded or filed with a governmental agency. Section 956 permits use of summaries of voluminous writings if presented by a qualified witness who actually performs the summarization and if the originals are made available to the

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288. FLA. STAT. ANN. § 90.951(4) (West Special Pamphlet 1976), Sponsors’ Note.

289. FLA. STAT. § 92.35 (1975), *repealed by* 1976 Fla. Laws ch. 76-237.

290. 1976 FLA. LAWS ch. 76-237.

291. Other provisions of the Florida Statutes which allow for admissibility of duplicates include: section 15.16(2) (1975) (records of the Department of State); section 18.20(4) (records of the State Treasurer); section 28.30(4) (vouchers and cancelled warrants of the clerk of the circuit court); section 229.781(1) (Department of Education records); section 230.331(2) (district school records) sections 320.833(3), 321.23(3) (records of Department of Highway Safety and Motor Vehicles).

292. See the Sponsors’ Note to section 954 for a discussion of the cases which established this practice. FLA. STAT. ANN. § 90.954 (West Special Pamphlet 1976), Sponsors’ Note.

opponent with timely notice for inspection.

Section 957 allows a party to avoid the best evidence rule if he can prove the contents of the writing by the testimony or the admissions of the party against whom it is being offered. Section 958 completes the best evidence rule by procedurally dividing up the functions for it between the court and the jury. Preliminary matters of fact affecting admissibility of a writing are determined by the court while the ultimate determination as to the contents of the writing or if it ever actually existed is a matter for the jury.

The Code's approach to the best evidence rule is very similar to that of the Federal Rules.<sup>293</sup> It represents some improvement over the prior Florida rule and should simplify this area of the law.

## XI. CONCLUSION

There was considerable resistance by many of the members of the trial bar to the concept of codifying the rules of evidence. For the present, at least, it appears that the Code is something with which we must learn to live. It is sincerely hoped that this article will simplify the task of learning and living with the Code.

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293. FED. R. EVID. 1001-08.