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A LOOK AT FLORIDA'S PROPOSED CODE OF EVIDENCE

CHARLES W. EHRHARDT*

The law of evidence had been codified in three states, California,¹ New Jersey² and Kansas,³ prior to the United States Supreme Court's promulgation of the Proposed Federal Rules of Evidence.⁴ The submission of the rules to the Congress, and their approval, as amended, by the House of Representatives,⁵ served as the catalyst for renewed interest in evidence codification. Three states⁶ have recently adopted comprehensive Rules of Evidence that closely parallel the Proposed Federal Rules, and at least four other states, including Florida, have drafted or are actively considering the adoption of such a codification.⁷

During the 1974 session of the Florida Legislature, a comprehensive Code of Evidence (hereinafter referred to as the Code) was intro-

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1. CAL. EVID. CODE §§ 1-1605 (West 1966).

2. N.J.R. EVID. 1-72 (1967). The New Jersey codification contains both statutory enactments and rules issued by the New Jersey Supreme Court. Each section, however, has a rule number, to which all citations to the rules will refer. See N.J. STAT. ANN. §§ 2A:84A-1-49 (Supp. 1974).

3. KAN. STAT. ANN. §§ 60-401 to -470 (1964).

4. Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183 (1972) [hereinafter cited as PROP. FED. R. EVID.].

5. H.R. 5463, 93d Cong., 1st Sess. (1973). For an excellent compilation of the materials presented during the House discussion on the Proposed Federal Rules, see *Hearings on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. (1973).

6. See NEV. REV. STAT. tit. 4 (1973); N.M. STAT. ANN. §§ 20-4-101 to -1102 (Supp. 1973); WIS. STAT. ANN. chs. 901-11 (Spec. Pamphlet 1974).

7. See NEBRASKA SUPREME COURT COMMITTEE ON PRACTICE AND PROCEDURE, PROPOSED RULES OF EVIDENCE FOR NEBRASKA (1973); Fla. H.R. 3670 (1974). The Nebraska proposal is examined in *Symposium—The Proposed Nebraska Rules of Evidence*, 53 NEB. L. REV. 331-461 (1974). In hearings before the House Judiciary Committee's Subcommittee on Criminal Justice, witnesses from North Dakota and Maine testified that each state had a proposed evidence code under consideration. See *Hearings on Proposed Rules of Evidence*, *supra* note 5, at 185, 268.

duced.⁸ The Code was drafted and its adoption recommended by the Florida Law Revision Council (hereinafter referred to as the Council).⁹ The proposed Code, together with any further changes made by the Council, will be reintroduced for consideration by the 1975 Florida Legislature.

In drafting the Code, an attempt was made to codify existing Florida evidence law. There was also an effort to recommend new provisions differing from the existing law when a significant improvement in the law of evidence was possible. To obtain the viewpoint of the practicing attorney, copies of the Preliminary Working Drafts¹⁰ were distributed to the bench and bar for comment and criticism. Many of the suggested changes were made by the Council's drafting committee and by the Council itself prior to submission of the Code to the legislature.

Adoption of the Code would ease the research burden upon lawyers and judges by providing, in statutory form, the basic rules of evidence; its adoption would also ensure uniformity in the application of the rules of evidence in the various courts throughout the state. In addition, the Code provides certainty and stability in those areas where the law is unclear because of a paucity of decisions or conflict among them.

Although the Code's sectional organization is similar to the Proposed Federal Rules, various sections differ more significantly in sub-

8. The proposed Code was introduced in both the Florida House of Representatives, *see* Fla. H.R. 3670 (1974), and Senate, *see* Fla. S. 1039 (1974), on the last day for filing bills in the 1974 Session and no consideration was given to it, either in committee or on the floor. The Code will be cited throughout this article as PROP. FLA. EVID. CODE together with the appropriate section number from the House bill. The reader should be alerted that if and when the code is enacted, there may be significant changes in the numbering of the sections.

9. The Florida Law Revision Council has the statutorily imposed duty to:

- (1) Examine the common law, constitution and statutes of the state and current judicial decisions for the purpose of discovering defects and anachronisms in the law and recommending needed reforms;
- (2) Recommend, from time to time, such changes in the law as it deems proper to modify or eliminate antiquated and inequitable rules of law, and to bring the law of the state into harmony with modern conditions

FLA. STAT. § 13.96 (1973).

10. The Reporter's initial draft of various code sections was submitted to the Council's drafting committee for consideration and approval. The work product of the drafting committee was printed and distributed to the bench and bar as Preliminary Working Drafts. The final changes made in the Preliminary Working Drafts by the Law Revision Council itself were incorporated directly into the bills submitted by the sponsors. The major provisions of the Preliminary Working Drafts are summarized in Smith & Ehrhardt, *Proposed Code of Evidence*, 48 FLA. B.J. 13 (1974). Copies of the Preliminary Working Drafts are on file with both the Council and the Florida State University Law Library, Tallahassee, Florida.

stance from that model than do the codifications adopted in other states. While most of the section numbers correspond to the number of the federal rule that pertains to the same subject, many of the Code provisions adopt an opposite view from the Proposed Federal Rules and others represent minor refinements.

This article examines several of the provisions of the Code that significantly change existing Florida law or that the author feels should be explained in order to foster a thorough understanding of the significance of the Code.

I. HEARSAY

The traditional rule is that hearsay statements are inadmissible as evidence because of the inability of counsel to test the credibility of the statement by cross-examination of the declarant under oath.¹¹ When the circumstances surrounding a hearsay statement indicate a circumstantial probability of reliability—usually a lack of motive by the declarant to falsify—an exception to the hearsay rule is recognized.¹²

The Code defines hearsay as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."¹³ "Statement" is defined to include nonverbal assertive conduct.¹⁴ Thus, if a person nods his head indicating his response to a question calling for a "yes" or "no" answer, that conduct is intended as an assertion of fact and is included in the definition of hearsay. But if there was other conduct, such as leaving a room by way of a door, which was not intended by the person to indicate a method of leaving the room, it is not an assertion and is not hearsay; its admissibility is governed by the other exclusionary rules of evidence, principally the rule regarding relevancy.¹⁵

11. See 5 J. WIGMORE, EVIDENCE § 1367 (3d ed. 1940). For a good discussion of other reasons justifying the exclusion of hearsay evidence, see C. McCORMICK, EVIDENCE § 245 (2d ed. 1972).

12. See Ladd, *The Hearsay We Admit*, 5 OKLA. L. REV. 271, 280 (1952).

13. PROP. FLA. EVID. CODE § 90.801(3). See *State Farm Mut. Auto. Ins. Co. v. Ganz*, 119 So. 2d 319 (Fla. 3d Dist. Ct. App. 1960); C. McCORMICK, EVIDENCE § 246 (2d ed. 1972). The definition of hearsay is the same as that in PROP. FED. R. EVID. 801, which is discussed at length and compared to existing Florida law in Ladd, *Some Highlights of the New Federal Rules of Evidence*, 1 FLA. ST. U.L. REV. 191, 192-214 (1973).

14. PROP. FLA. EVID. CODE § 90.801(1)(b).

15. The Code excludes from its definition of hearsay nonverbal conduct from which the inference sought to be proved may be drawn. PROP. FLA. EVID. CODE § 90.801. Although some courts and scholars argue that, in effect, the inference from such conduct is an assertion and properly includable as hearsay, see, e.g., 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, 217 (1948), the Code adopts the philosophy of California, see CAL. EVID.

The Code recognizes twenty-seven types of out-of-court statements that have sufficient circumstantial probability of reliability to be recognized as exceptions to the hearsay rule.¹⁶ Under section 803 of the Code, twenty-three exceptions exist regardless of whether the person making the statement is available as a witness.¹⁷ Four exceptions that do not possess as great a circumstantial probability of reliability are recognized only when the declarant is unable to testify during the trial.¹⁸ When the declarant is unavailable and the only method of bringing a statement before the trier of fact is through proof of the out-of-court statement, an exception to the general exclusionary rule is provided.¹⁹ Under the Code, "unavailability" occurs when: (1) the court has sustained the declarant's claim of privilege relating to the subject matter of the statement;²⁰ (2) the declarant refuses to testify concerning the matter although the court orders him to do so²¹ or the declarant suffers "a lack of memory of the subject matter . . . as to destroy his effectiveness as a witness . . .";²² (3) death or physical or mental infirmity prevents the declarant from testifying at the trial;²³ or (4)

CODE §§ 225, 1200 (West 1966), and New Jersey, *see* N.J.R. EVID. 62(1) (1967), as well as that of the Proposed Federal Rule of Evidence 801. The Advisory Committee's note to the federal rule states:

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. Falknor, *The "Hear-Say" Rule as a "See-Do" Rule: Evidence of Conduct*, 33 Rocky Mt.L.Rev. 133 (1961). Similar considerations govern nonassertive verbal conduct and verbal conduct which is assertive but offered as a basis for inferring something other than the matter asserted, also excluded from the definition of hearsay

16. *See* PROP. FLA. EVID. CODE §§ 90.803-04.

17. *See* PROP. FLA. EVID. CODE § 90.803.

18. *See* PROP. FLA. EVID. CODE § 90.804(2).

19. If the proponent of the hearsay is responsible for the unavailability of the declarant, the declarant is then not "unavailable" under the Code. PROP. FLA. EVID. CODE § 90.804(1). *See* CAL. EVID. CODE § 240 (West 1966); PROP. FED. R. EVID. 804(a). C. McCORMICK, EVIDENCE § 253 (2d ed. 1972), contains a thorough discussion of unavailability and hearsay exceptions.

20. PROP. FLA. EVID. CODE § 90.804(1)(a).

21. PROP. FLA. EVID. CODE § 90.804(1)(b).

22. PROP. FLA. EVID. CODE § 90.804(1)(c). *See* *Anderson v. Gaither*, 162 So. 877 (Fla. 1935).

23. PROP. FLA. EVID. CODE § 90.804(1)(d). *See* *James v. State*, 254 So. 2d 838 (Fla. 1st Dist. Ct. App. 1971) (recognizes death as unavailability under former-testimony exception).

the proponent of the declarant's testimony is "unable to procure the attendance or testimony by process or other reasonable means."²⁴

A. *Prior Inconsistent Statements*

The Code adopts the view of the California Code of Evidence,²⁵ which allows the use of a witness's prior inconsistent statements as substantive evidence of the facts contained in the statement. Such statements are excluded from the definition of hearsay when the prior statement was made by a declarant who testifies at the trial and is subject to cross-examination concerning the prior statements.²⁶ The Code allows these prior inconsistent statements to be used for both the impeachment of the witness's credibility²⁷ and for affirmative proof of the substantive matter contained in the statement itself.

Generally, prior inconsistent statements have been used to attack the credibility of a witness by showing that he made an earlier statement inconsistent with his testimony at the trial.²⁸ In an old decision²⁹ the Florida Supreme Court held that inconsistent statements may be used to attack the credibility of a witness, but "they are not evidence to prove a fact not otherwise shown."³⁰ In 1972 the Florida Third District Court of Appeal in *Wallace v. Rashkow*³¹—apparently the first appellate decision on the issue since 1911—interpreted the prior supreme court opinion as applicable solely to situations in which the only proof of the facts contained in the inconsistent statement is the prior statement itself:

While the . . . [supreme court opinion] is by no means illuminating on the legal issue involved, it appears to assert certain qualifying language to the general rule. That language is the last three words of the quoted phrase, to wit: "not otherwise shown." In the decisions

24. PROP. FLA. EVID. CODE § 90.804(1)(e). See *Putnal v. State*, 47 So. 864 (Fla. 1908) (recognizes unknown whereabouts of declarant as unavailability under former-testimony exception). The drafters recognized the vagueness of the language "other reasonable means" but were unable to substitute a more precise qualification. The provision of the PROP. FED. R. EVID. 804(a)(5) was retained and included in the Florida Code.

25. See CAL. EVID. CODE § 1235 (West 1966). See also PROP. FED. R. EVID. 801(d)(1). The constitutionality of the California provision was upheld in *California v. Green*, 399 U.S. 149 (1970).

26. PROP. FLA. EVID. CODE § 90.801(4)(a). See generally Ladd, *Some Highlights of the New Federal Rules of Evidence*, 1 FLA. ST. U.L. REV. 191, 197-203 (1973).

27. PROP. FLA. EVID. CODE § 90.608(1)(a).

28. See *Wingate v. New Deal Cab Co.*, 217 So. 2d 612 (Fla. 1st Dist. Ct. App. 1969) (construing FLA. STAT. § 90.10 (1969)); *People v. Tate*, 197 N.E.2d 26 (Ill. 1964).

29. *Tomlinson v. Peninsular Naval Stores Co.*, 55 So. 548 (Fla. 1911).

30. *Id.*

31. 270 So. 2d 743 (Fla. 3d Dist. Ct. App. 1972).

cited by the appellant, each involve [*sic*] a prior extrajudicial statement which is the *only* evidence contrary to that offered by the appealing party. In this case, there is considerable testimony of the witnesses and parties, exclusive of the extrajudicial statement, upon which the jury could find that Wallace was contributorily negligent. In other words, the extrajudicial statement in this case would appear to be admissible under the qualifying language of the . . . [supreme court] decision.³²

In most cases, the facts sought to be proved by the prior statement would be corroborated by other evidence and the prior statement would be admissible. The Code expands the *Wallace* decision by eliminating the requirement of the corroborating proof of the fact sought to be proved.

Since the major reason for excluding hearsay is the lack of opportunity to test the truth of the statement by cross-examination of the declarant under oath,³³ when the declarant testifies in court and is subject to cross-examination the justification for exclusion disappears. The witness must be confronted with the statement and given the opportunity to explain or deny it.³⁴ If the witness admits making the statement, further inquiry must cease;³⁵ but if the witness denies making the statement, independent evidence of the statement may be offered. If the statement is admissible only for impeachment, as was formerly the case, the jury is generally instructed as to the limited purpose for which the evidence was offered.³⁶ It is unrealistic, however,

32. *Id.* at 744-45.

33. See note 11 and accompanying text *supra*.

34. PROP. FLA. EVID. CODE § 90.614 provides:

(1) EXAMINING WITNESS CONCERNING PRIOR STATEMENT.—When a witness is examined concerning his prior written statement, or oral statement which has been reduced to writing, the court shall, upon request, order that the statement be shown the witness or its contents disclosed to him.

(2) EXTRINSIC EVIDENCE OF PRIOR INCONSISTENT STATEMENT OF WITNESS.—Extrinsic evidence of a prior inconsistent statement by a witness is inadmissible unless the witness is first afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This subsection is not applicable to admissions of a party-opponent as defined in Section 90.801 (d) (2).

35. Although the Code does not specifically provide that a witness may not be further examined regarding a prior inconsistent statement that he admits making, the drafters did not intend to change the rule prohibiting such examination as it presently exists in FLA. STAT. § 90.10 (1973). The Code recognizes that when the prior statement is first discovered, the witness may be unavailable. An exception is included to permit the court, in its discretion, to allow the use of the prior statement without first questioning the witness about it. PROP. FLA. EVID. CODE § 90.614(2). See CAL. EVID. CODE § 770 (West 1966); N.J.R. EVID. 22(b) (1967).

36. See *Bartley v. United States*, 319 F.2d 717, 719-20 (D.C. Cir. 1963); *THE SUPREME*

to believe that a jury will consider the evidence only for purposes of judging the credibility of a witness. Instead, if it believes the prior statement is truthful, it will base its findings of fact thereon. The Code recognizes that reality and excludes from the definition of hearsay prior inconsistent statements once the witness has testified and has been subjected to cross-examination.³⁷

B. Dying Declaration

Traditionally, dying declarations have been admissible in homicide cases when they concern the cause of the declarant's death and are made when the declarant is in fear of immediate, impending death.³⁸ Justification for the use of dying declarations has generally been that a person's awe of impending death is sufficiently strong to provide the circumstantial guarantee of the statement's reliability.³⁹ Assuming the logic of this justification, there is no reason why a dying declaration should be limited to homicide cases, provided that the declarant has the same fear of imminent death when he makes an out-of-court statement. In addition, whether the declarant actually dies should be immaterial to the statement's admissibility; it is the declarant's state of mind at the time the statement is made that provides the circumstantial guarantee of reliability. Thus, the Code recognizes the admissibility of all declarations made under fear or belief of impending death.⁴⁰

COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES, FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 2.12(e)(1) (1970).

37. As Dean Ladd stated in Ladd, *Some Highlights of the New Federal Rules of Evidence*, 1 FLA. ST. U.L. REV. 191, 200 (1973):

The . . . rule is sound in reason and is practical and realistic. The witness who perceived the events in issue is present in court and has given testimony of those events under oath. If he admits making the inconsistent statement, he has the opportunity to explain it. If his explanation is not acceptable to the triers of fact, they may use what he admitted to be a prior inconsistent statement to discredit his testimony. If the triers of fact believed the witness spoke the truth in the prior statement that he admitted making, it is not reasonable to expect the triers to limit its use to credibility in their decision-making process regardless of a court's instruction that it may be used to discredit but not to prove. The mental gymnastics required to articulate and segregate the use of prior statements for impeachment purposes only makes the limitation rule a formalistic fiction in disregard of realism.

38. *See Johnson v. State*, 58 So. 540 (Fla. 1912); C. McCORMICK, EVIDENCE § 282 (2d ed. 1972).

39. *See Coatney v. State*, 55 So. 285 (Fla. 1911).

40. PROP. FLA. EVID. CODE § 90.804(2)(b) provides:

The following are not excluded by . . . [the hearsay rule] if the declarant is unavailable as a witness:

. . . .

(b) Statement under belief of impending death.—A statement made by a de-

In order that a statement be admissible it is not necessary that the declarant actually be dead; it is sufficient if he is "unavailable" as defined in the Code.⁴¹ For example, in a negligence action, if a declarant is physically or mentally unable to testify at the time of trial, his "dying declaration" regarding the cause of what he believed to be his impending death is admissible. If the declarant recovers, however, and is available to testify, the "dying declaration" is excluded as hearsay.

C. Former Testimony

Recorded testimony given by a witness during a deposition or trial is sometimes offered during a subsequent proceeding as substantive proof of the facts stated therein. Even though the former testimony was given under oath and the witness was subject to cross-examination, it is hearsay because it was not made during the instant proceeding and is being offered to prove the truth of the matter asserted.

Most jurisdictions provide an exception to the hearsay rule for "former testimony."⁴² The Code recognizes differing needs and justifications for the admission of this testimony in designating three different former-testimony exceptions. First, under section 90.803(23), testimony given by a witness at a civil trial is admissible when it is introduced at a subsequent civil trial involving substantially the same parties and issues as did the first trial.⁴³ Thus, in a retrial of a civil action, it is unnecessary to call as a witness an investigating police officer who testified during the first trial. The party offering the testimony, however, is not prohibited from calling the witness. The applicability of the section is strictly limited to successive civil trials, so that testimony offered in a criminal trial or taken during a discovery deposition would be inadmissible under this section. There appears to be no reason, other than a possible tactical consideration, to call the

clarant while reasonably believing that his death was imminent, concerning the physical cause or instrumentalities of what he believed to be his impending death.

41. PROP. FLA. EVID. CODE § 90.804(2)(b).

42. See, e.g., CAL. EVID. CODE § 1290 (West 1966); FLA. STAT. § 92.22 (1973); N.J.R. EVID. 63(3) (1967).

43. PROP. FLA. EVID. CODE § 90.803 provides in part:

Hearsay exceptions: availability of declarant immaterial.—The following are not inadmissible under . . . [the hearsay rule], even though the declarant is available as a witness:

....

(23) FORMER TESTIMONY.—Testimony given by declarant at a civil trial, when used at a subsequent civil trial involving substantially the same parties and issues.

ordinary witness in a civil trial to testify a second time if the party offering the testimony does not so desire.

When an offer of former testimony is made in a proceeding or a trial other than a retrial of a civil action, the testimony will be excluded as hearsay unless it qualifies under one of the section 90.804 exceptions, which require that the witness be unavailable to testify. When testimony was given in a different proceeding which (1) involved substantially the same issues as the present proceeding, and (2) is introduced at the instance of or against a party who had the opportunity to develop the testimony by direct, cross- or redirect examination and had a motive and interest similar to those of the party against whom it is now offered, the testimony is admissible under section 90.804(2) as an exception to the hearsay rule.⁴⁴ Thus, the testimony may be offered against a party who was not a party to the action in which the testimony was given when the section 90.804(2) criteria are met. If the testimony was taken by means of a deposition, it is admissible as an exception to the hearsay rule only when the deposition is (1) the sole source of evidence to prove an element of the offering party's prima facie case, or (2) the offering party has indicated a need for the testimony to properly present his case and is unable without undue hardship to introduce substantially equivalent testimony by other means.⁴⁵ Because a deposition is normally taken for discovery purposes, the nature of the questions and the scope of the cross-examination are significantly different from the testimony presented at trial. Consequently, the Code strictly limits the admissibility of depositions taken in a prior case to those instances of extreme necessity.

As previously stated, the most plausible reason to exclude hearsay testimony is the lack of an opportunity to test the veracity of an out-of-court statement by cross-examination.⁴⁶ When a statement has been tested by effective cross-examination by a person with a motive and

44. PROP. FLA. EVID. CODE § 90.804(2)(a)(1). Through a drafting error, the statutory provision included in the bill as introduced in the legislature was not the provision recommended by the Council. The section should read:

1. Testimony, given as a witness at a proceeding before a court involving substantially the same issues, at the instance of or against a party who had an opportunity to develop the testimony by direct, cross- or redirect examination, with motive and interest similar to those of the party against whom now offered. Subsection 90.804(1)(c) is not applicable in determining unavailability for this exception.

See Reporter's Tentative Draft, Hearsay § 90.804(2)(a)(1) (unpublished, 1974). As indicated in the text of the above section, a witness's loss of memory does not provide a basis of unavailability for this type of former testimony. See PROP. FLA. EVID. CODE § 90.804(1)(c).

45. PROP. FLA. EVID. CODE § 90.804(2)(a)(1).

46. See note 11 and accompanying text *supra*.

interest similar to the party against whom the testimony is offered in the present case, the reason to exclude the evidence disappears. Thus, when former testimony has met this test, it is no longer excluded. Strict identity of issues or identity of parties is not required when the transcript of testimony of an unavailable witness, taken in another proceeding, is offered in a civil trial. If the witness is available and can testify in person, however, he must be called.

In criminal cases the former-testimony exception is more limited. It is recognized when the testimony is offered against a party who previously offered it in his own behalf in a prior case. The former-testimony exception also is recognized when the party against whom the testimony is offered in the present case was a party to the prior proceeding in which the testimony was actually given and, during the prior proceeding, had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has during the present proceeding.⁴⁷ This provision reflects the position that a criminal defendant should have the actual opportunity to cross-examine a witness in order to ensure a fair trial and to meet the constitutional requirements of the right of confrontation. Thus, if a defendant in a criminal action was not a party to the prior criminal proceeding, the testimony is not admissible against him even though the testimony when offered would have been subject to cross-examination by a person with a similar motive to cross-examine. It could be offered against the prosecution, however, since it was party to the prior criminal action.

D. Res Gestae

Despite criticism of the use of the term "res gestae,"⁴⁸ Florida courts have consistently recognized its use in describing a number of

47. PROP. FLA. EVID. CODE § 90.804(2)(a)(3) states:

This exception is applicable in criminal cases only in a situation when the testimony is offered in evidence against a party who offered it in his own behalf on the former occasion or against the successor in interest of such person; or the party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing.

In *Richardson v. State*, 247 So. 2d 296 (Fla. 1971), the Florida Supreme Court recognized the former-testimony exception when the testimony, which was offered during a criminal trial, was given during a preliminary hearing and the defendant's counsel had been given the opportunity to cross-examine. The Code goes beyond *Richardson* by providing that certain testimony is admissible against the prosecution and against a defendant who previously offered it in his own behalf. See generally C. McCORMICK, EVIDENCE §§ 254-61 (2d ed. 1972).

48. The court in *Williams v. State*, 188 So. 2d 320, 323 (Fla. 2d Dist. Ct. App. 1966),

different exceptions to the hearsay rule.⁴⁹ It has also been used, however, as the basis for the admission of evidence that has nothing to do with hearsay.⁵⁰ For example, in a murder prosecution, the clothes that the victim wore at the time of the murder were admitted as part of the *res gestae*.⁵¹ Under the Code, a court, rather than invoke the ambiguous term “*res gestae*,” would determine the admissibility of this evidence on the basis of relevancy and would not rely on a hearsay concept. The Code does not use the term “*res gestae*”; the exceptions that have traditionally been included under it are separately recognized.

(1) Spontaneous Statements and Excited Utterances

If out-of-court statements were made spontaneously in reaction to a stimulus, there is little likelihood that the declarant had the motive or opportunity to falsify since the statements were made before the opportunity to falsify arose. The Code recognizes the circumstantial probability of reliability of these statements in the “spontaneous state-

modified, 198 So. 2d 21 (Fla. 1967), quoted with approval the following passage from 6 J. WIGMORE, EVIDENCE § 1767 (3d ed. 1940):

The phrase “*res gestae*” has long been not only entirely useless, but even positively harmful. It is useless, because every rule of Evidence to which it has ever been applied exists as a part of some other well established principle and can be explained in the terms of that principle. It is harmful, because by its ambiguity it invites the confusion of one rule with another and thus creates uncertainty as to the limitations of both. It ought therefore wholly to be repudiated, as a vicious element in our legal phraseology. No rule of Evidence can be created or applied by the mere muttering of a shibboleth.

See *Green v. State*, 113 So. 121, 123 (Fla. 1927); C. McCORMICK, EVIDENCE § 288 (2d ed. 1972).

49. Professor Morgan described the different meanings possessed by the term “*res gestae*”:

Courts and lawyers constantly use *res gestae* to describe: (a) part of a relevant transaction the offered evidence of which has no hearsay aspect, (b) declarations of presently existing subjective symptoms offered in evidence as tending to prove the existence of those symptoms, (c) declarations of a presently existing mental condition offered in evidence as tending to prove that condition, its probable continuance and its previous existence, and to prove conduct in accord with that mental condition, (d) declarations of a past mental condition or of past symptoms, and (e) spontaneous statements or statements made contemporaneously with a relevant event or condition, evidence of which is offered as tending to prove the truth of the matter stated.

Morgan, *The Law of Evidence, 1941-45*, 59 HARV. L. REV. 481, 568 (1946).

50. See *Powell v. State*, 175 So. 213 (Fla. 1937).

51. See *Browne v. State*, 109 So. 811, 812 (Fla. 1926).

ment"⁵² and "excited utterance"⁵³ exceptions. When a statement is made contemporaneously with an event and the statement explains the event while, or immediately after, the declarant perceives it, the Code recognizes the statement's admissibility.⁵⁴ The opportunity for the declarant to deliberately or subconsciously misrepresent what he is seeing is quite small. If the declarant's statement does not explain the event, it is not included within this exception. A statement by a witness, "Look at that Chevrolet run the red light," would be admissible under the spontaneous statement exception but a statement, "Boy, the driver of the Chevrolet must have been crazy," would not be included because it does not describe the event. In a Florida case, an electric lineman was electrocuted while working on a wire. Testimony by his assistant that the lineman had told him that he had ordered the power turned off when he had telephoned the power company was admitted since the court found that none of the hearsay vices were present—there was no occasion for reflection and premeditation and no motive to make the statement self-serving.⁵⁵ Since there is a possibility of fraudulent testimony being admitted under this exception, the Code provides that the court may exclude the statement when it is made under circumstances indicating its lack of trustworthiness.

The same degree of contemporaneity is not necessary if the statement is made while the declarant is under the stress of excitement caused by an event. The excited state of the declarant negates his capacity for reflection and produces an utterance free of conscious fabrication. If a statement relates to the event causing the excitement, it is admissible. It is not necessary that the statement be made by a party or that the declarant be available to testify. A statement by an unidentified party at the scene of an automobile accident would be

52. PROP. FLA. EVID. CODE § 90.803(1) provides:

SPONTANEOUS STATEMENT.—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 the statement is made under circumstances which indicate its lack of trustworthiness.

53. PROP. FLA. EVID. CODE § 90.803(2) states: "EXCITED UTTERANCE.—A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." See generally KAN. STAT. ANN. § 60-460(d)(1) (1964); N.J.R. EVID. 63(4) (1967); PROP. FED. R. EVID. 803(1); UNIFORM RULE OF EVIDENCE 63(4)(a).

54. See PROP. FLA. EVID. CODE § 90.803(1). See generally CAL. EVID. CODE § 1240 (West 1966); KAN. STAT. ANN. § 60-460(d)(2) (1964); N.J.R. EVID. 63(4) (1967); PROP. FED. R. EVID. 803(2); UNIFORM RULE OF EVIDENCE 63(4)(b).

55. Tampa Elec. Co. v. Getrost, 10 So. 2d 83 (Fla. 1942).

admissible under this exception when the offering party establishes the necessary foundation.⁵⁶

(2) Declarations of Mental or Physical Condition

When the state of mind of the declarant is at issue, statements made by the declarant relating to his state of mind are admissible to prove the state of mind.⁵⁷ It is often difficult, if not impossible, to prove an individual's state of mind without reliance upon the individual's manifestation of his feelings. Statements made by a declarant, however, from which an inference of state of mind is drawn, are not included within the exception; such statements are not hearsay since they are not offered to prove the truth of the matter asserted.⁵⁸ Rather, they are circumstantial evidence of the declarant's state of mind and are admissible if the court finds them relevant.⁵⁹ For example, a letter written by *A* to *B* that includes the statement "I am Julius Caesar," when offered as proof of *A*'s state of mind, is not hearsay and is admissible, if relevant, to show *A*'s lack of mental competence. It can be inferred that *A* would not have stated that he was Caesar unless he was not mentally competent. A declaration of present state of mind—such as, "I intend to sell Blackacre to *A*"—when offered on the issue of the declarant's intent is certainly offered to prove the truth of the matter asserted and is admissible as an exception to the hearsay rule.⁶⁰

If a declaration of state of mind is not offered to prove the state of mind, but rather to prove that the declarant acted in conformity with previously announced intentions, the declaration is generally admitted.⁶¹ For example, if *A* states: "I am going to Atlanta next week," the statement is admissible to prove that *A*, in fact, did go to Atlanta during the week in question. If the declaration of state of mind is made subsequent to the event, however, such as, "I went to Atlanta last week," the Code does not include it within the exception and it is

56. See PROP. FLA. EVID. CODE § 90.803(2).

57. PROP. FLA. EVID. CODE § 90.803(3). See *Wetjen v. Williamson*, 196 So. 2d 461 (Fla. 1st Dist. Ct. App. 1967); C. McCORMICK, EVIDENCE § 294 (2d ed. 1972).

58. See *Atlanta Gas Light Co. v. Slaton*, 160 S.E.2d 414 (Ga. Ct. App. 1968); *Betts v. Betts*, 473 P.2d 403 (Wash. 1970); 6 J. WIGMORE, EVIDENCE § 1788 (3d ed. 1940). Some courts do not recognize this distinction, and include both types of statements within a general exception to the hearsay rule. See C. McCORMICK, EVIDENCE § 294 (2d ed. 1972).

59. The admissibility of the statements would be governed by the general relevancy provisions. See PROP. FLA. EVID. CODE §§ 90.401-03.

60. See PROP. FLA. EVID. CODE § 90.803(3)(a).

61. See PROP. FLA. EVID. CODE § 90.803(3)(a)(2). For similar provisions, see CAL. EVID. CODE 1250-51 (West 1966); N.J.R. EVID. 63(12) (1967); PROP. FED. R. EVID. 803(3). In *Bowen v. Keen*, 17 So. 2d 706, 711 (Fla. 1944), the court adopted this view: "The rule is quite generally recognized that the statements of a deceased person as to the purpose and destination of a trip or journey he is about to take are admissible."

inadmissible to prove the truth of the matter asserted.⁶² In following the rationale of *Mutual Life Insurance Co. v. Hillmon*,⁶³ the Code rejects the arguments that the need for this testimony is greater when the declarant is unavailable and that the best evidence of whether a person did an act is that person's statement. The Code recognizes the ease with which an individual, once a controversy has arisen, could manufacture favorable testimony by telling many people that certain facts had occurred.⁶⁴ If a statement of a fact that has occurred concerning the making, revoking or terms of the declarant's will is offered, the statement is specifically made admissible since these statements may in fact be the best evidence available under the circumstances.⁶⁵

When statements are made by a patient for the purpose of medical treatment, there is an inherent circumstantial probability of reliability in the statements since the individual goes to the physician to be treated for his illness or injury and is unlikely to have a motive to falsify.⁶⁶ Therefore, these out-of-court statements, "made for the purpose of medical diagnosis or treatment by a person seeking the diagnosis or treatment or the person legally responsible for him,"⁶⁷ are recognized as an exception to the hearsay rule. Included in this exception are statements made to physicians, ambulance attendants and nurses. The compulsion to make truthful statements to members of all these groups is similar. If the person seeking the treatment is a child, it may be

62. PROP. FLA. EVID. CODE § 90.803(3)(b)(1). The Code adopts the philosophy of *Shepard v. United States*, 290 U.S. 96 (1933), in which the United States Supreme Court refused to extend *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285 (1892), to permit statements of state of mind as proof of previous happenings.

63. 145 U.S. 285 (1892).

64. See generally 6 J. WIGMORE, EVIDENCE §§ 1725-26 (3d ed. 1940); Maguire, *The Hillmon Case—Thirty-Three Years After*, 39 HARV. L. REV. 709 (1925).

65. PROP. FLA. EVID. CODE § 90.803(3)(b)(1). The reason for this inclusion is best stated in the Advisory Committee Note to Proposed Federal Rule of Evidence 803:

The carving out, from the exclusion mentioned in the preceding paragraph, of declarations relating to the execution, revocation, identification, or terms of declarant's will represents an *ad hoc* judgment which finds ample reinforcement in the decisions, resting on practical grounds of necessity and expediency rather than logic. McCormick § 271, pp. 577-578; Annot., 34 A.L.R.2d 588, 62 A.L.R.2d 855. A similar recognition of the need for and practical value of this kind of evidence is found in California Evidence Code § 1260.

66. See *Meaney v. United States*, 112 F.2d 538, 539-40 (2d Cir. 1940), where Judge Learned Hand reasoned:

If his narrative of present symptoms is to be received as evidence of the facts, as distinguished from mere support for the physician's opinion, these parts of it can only rest upon his motive to disclose the truth because his treatment will in part depend upon what he says. . . . A patient has an equal motive to speak the truth; what he has felt in the past is as apt to be as important in his treatment as what he feels at the moment.

67. PROP. FLA. EVID. CODE § 90.803(4).

necessary for a parent or member of the family to give information regarding the child in order to supply a sufficient basis for the doctor's treatment. Those statements are also included within the exception.⁶⁸

In the past Florida has recognized a distinction between statements made to a doctor who is a "treating physician,"⁶⁹ that is, one who has been sought by the patient to treat the illness or injury, and an "examining physician,"⁷⁰ that is, one whom the patient consults only to lay the foundation for the doctor's testimony at trial. Apparently the Florida courts have not admitted as substantive proof statements made to the latter on the basis that there is not the same compulsion for the patient to be truthful since he will not be treated by the doctor. In fact, there may be a motive to falsify in order to affect the jury verdict. The Code, however, does not recognize this distinction. While under existing law the examining physician cannot base his opinion on the statements of the declarant, the doctor's testimony nevertheless often includes the medical history that was furnished by the patient.⁷¹ The jury is now instructed (albeit unrealistically) not to give substantive effect to the statements. In addition, counsel can avoid classifying his expert as an "examining physician" by the simple expedient of sending the client to the doctor for a short period of treatment prior to requesting the doctor's testimony concerning diagnosis and prognosis. The Code avoids this essentially artificial distinction by admitting the statements of both types of doctors as substantive proof of the facts contained therein.⁷²

68. PROP. FLA. EVID. CODE § 90.803(4), Sponsors Note at 125.

69. In *Bill Kelley Chevrolet, Inc. v. Kerr*, 258 So. 2d 280 (Fla. 3d Dist. Ct. App. 1972), a treating physician was allowed to testify based on the history given by the patient. A history would normally be set forth by the doctor prior to expressing his opinion. Thus, while Florida courts have not expressly recognized an exception to the hearsay rule for these statements, they have permitted them to be brought before the jury. See *Jones v. State*, 289 So. 2d 725 (Fla. 1974); C. McCORMICK, EVIDENCE §§ 292-93 (2d ed. 1972).

70. Cf. *Bondy v. West*, 219 So. 2d 117 (Fla. 2d Dist. Ct. App. 1969) (examining physician's opinion based, in part, upon patient's medical testimony is inadmissible). Compare *Raydel, Ltd. v. Medcalfe*, 162 So. 2d 910 (Fla. 3d Dist. Ct. App. 1964), *quashed on other grounds*, 178 So. 2d 569 (Fla. 1965) (examining physician allowed to testify from medical history given him by patient when opinion also based on findings of own examination).

71. See note 69 *supra*.

72. PROP. FLA. EVID. CODE § 90.803(4) 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 an individual legally responsible for the person, which describe medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof.

A limitation is imposed, however, and the statements admissible under the exception cannot go beyond those of medical history, past or present symptoms, or the inception or general character of the cause or external source of the pain or injury.⁷³ Thus, a statement, "I broke my leg when a car collided with the one I was driving," is included within the exception, while a statement, "My leg was broken during a collision with a car that was being driven on the wrong side of the road," is not.

II. ADMISSIBILITY OF CRIMINAL CONVICTIONS

The circumstances under which a witness's or party's record of prior criminal convictions may be used in the course of a civil or criminal trial presents a problem of more than trivial simplicity. To analyze properly whether a conviction is admissible it is necessary to identify the issue upon which the conviction is being introduced in order to determine whether it is relevant. When the character of an individual is itself an issue, such as in a libel action arising out of the statement, "Mrs. Smith is a crook," the relevancy of evidence relating to her criminal activity is apparent, and no specific Code provision is included to provide for its admission.⁷⁴ There are three additional issues upon which evidence of prior criminal convictions currently may be admitted. First, prior convictions have traditionally been used as one of the methods to impeach the credibility of a witness testifying at a trial. Secondly, evidence has been admitted on the issue of a criminal defendant's motive, intent or lack of mistake. Finally, a conviction occasionally has been admitted in a subsequent action as proof of a fact inherent in the conviction.

A. Convictions Used To Impeach the Credibility of a Witness

When a witness takes the stand to testify, he places in issue his character trait of truth and veracity, and the party cross-examining the

See generally Wis. R. EVID. 908.03(4) (1973); PROP. FED. R. EVID. 803(4); C. McCORMICK, EVIDENCE § 266 (1954).

73. PROP. FLA. EVID. CODE § 90.803(4).

74. As Wigmore points out in his treatise, the policy reason underlying the exclusion of proof of prior criminal activities lies not in the fact that it has no probative value, but that it has too much. 1 J. WIGMORE, EVIDENCE § 194 (3d ed. 1940). Crimes are excluded on the rationale that the jury will be unduly influenced by the prior acts and thus not give clear consideration to the present charges. See also C. McCORMICK, EVIDENCE § 190 (2d ed. 1972). If this rationale can be accepted, there is no reason to exclude evidence of a prior conviction when it is offered as proof of an issue in dispute. The same prejudice does not result. PROP. FED. R. EVID. 404 takes a position similar to the Code.

witness may introduce evidence attacking the witness's credibility. It has been generally agreed that evidence of a witness's prior criminal convictions is relevant to the issue of his truth and veracity.⁷⁵ There has, however, been disagreement as to which crimes are admissible for this purpose.⁷⁶ For example, some jurisdictions have limited the convictions which may be used to crimes that are "felonies,"⁷⁷ others to those involving "dishonesty or false statement."⁷⁸ Florida courts have followed the legislative standard currently set forth in section 90.08 of the statutes, which permits evidence of the conviction "of any crime" to be used to attack credibility.⁷⁹ As long as an offense can be classified as a "crime" the evidence has been admissible.⁸⁰ For example, if the witness had been previously convicted of a traffic offense outside the city limits,⁸¹ he could be asked on cross-examination whether he had ever been convicted of a crime. The relevancy of this evidence to the issue of whether the witness is truthful is difficult to discern.⁸²

75. See C. McCORMICK, EVIDENCE § 43 (2d ed. 1972); 3A J. WIGMORE, EVIDENCE § 980 (3d ed. 1940); 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 416 (1969).

76. At common law, conviction of a person of treason, a felony, a misdemeanor involving dishonesty or obstruction of justice resulted in the convicted person's being rendered incompetent as a witness. Later, the disqualification was removed and these "infamous crimes" became grounds for impeaching the credibility of a witness. Unfortunately, just as the common law "incompetency" provisions were imprecise, so are the statutes defining what criminal convictions may be used for impeachment. See C. McCORMICK, EVIDENCE § 43 (2d ed. 1972). One view requires the trial judge to determine that the probative value of the prior conviction outweighs the dangers of unfair prejudice prior to admitting it for impeachment purposes. See *Luck v. United States*, 348 F.2d 763 (D.C. Cir. 1965).

77. See CAL. EVID. CODE § 788 (West 1966); IDAHO CODE § 9-1209 (Cum. Supp. 1973).

78. See UNIFORM RULE OF EVIDENCE 21; MODEL CODE OF EVIDENCE rule 106.

79. FLA. STAT. § 90.08 (1973) states:

No person shall be disqualified to testify as a witness in any court of this state by reason of any conviction of any crime, but his testimony shall be received in evidence under the rules, as any other testimony. Evidence of such conviction, including the fact that the prior conviction was for the crime of perjury, may be given to affect the credibility of the said witness, and such conviction may be proved by questioning the proposed witness or, if he deny it, by producing a record of his conviction. Testimony of the general reputation of said witness may likewise be given in evidence to affect his credibility.

80. See *Hendrick v. Strazzulla*, 135 So. 2d 1, 3 (Fla. 1961), where the court states that under the Florida statute "a crime is a crime." Thus, a witness may be impeached in Florida by use of felony or misdemeanor convictions whether or not they involve moral turpitude. Note, however, that violations of municipal ordinances are not considered to be convictions of a crime, *Roe v. State*, 119 So. 118 (Fla. 1928), and interrogation concerning former arrests for other crimes is also improper. *Jordan v. State*, 144 So. 669 (Fla. 1932).

81. See *Roe v. State*, 119 So. 118, 121 (Fla. 1928).

82. See *Hendrick v. Strazzulla*, 135 So. 2d 1, 3 (Fla. 1961). The court states that it would seem logical to limit discrediting crimes to those involving moral turpitude. See generally C. McCORMICK, EVIDENCE § 43 (2d ed. 1972); 3A J. WIGMORE, EVIDENCE §§ 980-87 (Chadbourn rev. 1970).

The Code recognizes that since the evidence is being offered on the issue of the witness's truth and veracity, the criminal conviction should be relevant to that issue and, therefore, that admissibility should be limited to only those crimes that involve dishonesty or false statement, regardless of whether the witness is a disinterested third person or a criminal defendant.⁸³ Thus, if a witness has been convicted of involuntary manslaughter, that conviction is not admissible on the issue of the witness's character trait of truthfulness.

The Code also recognizes that a conviction, although it may involve dishonesty or false statement, may lack probative value because it is too remote in time.⁸⁴ If the witness is fifty years old and has led an exemplary life with the exception of a conviction for petty larceny when she was twenty, it is difficult to find probative value in that conviction on the issue of whether she is now telling the truth.⁸⁵ The Florida courts have recognized the need for probative value in the conviction and have generally allowed the proponent of the witness to demonstrate on redirect the remoteness of the conviction.⁸⁶ The Code adopts an arbitrary ten-year time limit within which the conviction must fall to be admissible.⁸⁷ Without an easily ascertainable limit, uncertainty and inconsistency in the admissibility of the evidence in different cases results, since trial judges may differ in their rulings on when the evidence is too remote. The Code follows existing law and bars the use of juvenile adjudications⁸⁸ and allows the use of convictions despite the pendency of an appeal.⁸⁹

Nothing is contained in the Code concerning the permissible procedure counsel may use in cross-examining a witness regarding his

83. PROP. FLA. EVID. CODE § 90.610. Note that this position is similar to those taken by the model codes and the new federal rules. See UNIFORM RULE OF EVIDENCE 21; MODEL CODE OF EVIDENCE rule 106; PROP. FED. R. EVID. 609(a)(2).

84. PROP. FLA. EVID. CODE § 90.610(2) states: "If the witness has been released from custody for ten years or more for his most recent conviction or from the date of his most recent conviction, whichever is later, the crime may not be used."

85. See generally C. McCORMICK, EVIDENCE § 43 (2d ed. 1972); Ladd, *Credibility Tests—Current Trends*, 89 U. PA. L. REV. 166, 177 (1940). For similar provisions see *Toms v. State*, 200 S.W.2d 174 (Tex. Crim. App. 1947) (remoteness limited by judge's discretion); MASS. GEN. LAWS ANN. ch. 233, § 21 (1973) (exclusion for remoteness within judge's discretion); PROP. FED. R. EVID. 609(b) (ten-year period).

86. See, e.g., *McArthur v. Cook*, 99 So. 2d 565 (Fla. 1957). See generally 4 J. WIGMORE, EVIDENCE §§ 1116-17 (Chadbourn rev. 1970).

87. See note 84 *supra*.

88. See PROP. FLA. EVID. CODE § 90.610(4); FLA. STAT. §§ 39.10(3), 39.12(6) (1973). While the Florida position follows that taken by the majority of jurisdictions, the new federal rules adopt the Wigmore position that the admissibility of juvenile adjudications should be left to the discretion of the court. See PROP. FED. R. EVID. 609(d); 1 J. WIGMORE, EVIDENCE § 196 (3d ed. 1940).

89. See PROP. FLA. EVID. CODE § 90.610(5).

prior convictions. Under existing law, a witness may be asked, "Have you been convicted of any crimes?" Under the Code the question is qualified so that the crimes referred to would be limited to those involving dishonesty and false statement.⁹⁰ If the witness truthfully answers "yes," the next permissible question is, "How many times?" If this question is correctly answered, counsel must cease his examination regarding the witness's criminal record and may not inquire further regarding specific crimes. If the answer is not truthful, however, the examination may continue and specific inquiry may be made into whether the witness has been convicted of particular crimes on particular dates.⁹¹ Of course, if the witness correctly answers the questions regarding his prior convictions, his counsel on redirect may explore the convictions disclosed to demonstrate that they were relatively minor or involved mitigating factors.⁹²

B. Proof of Other Criminal Activity

The prosecution may not introduce evidence of other criminal activity of an accused to show that he has bad character or has a propensity to commit the crime charged unless the accused first raises the issue.⁹³ The evidence is excluded because the prejudice that would result from its admission far outweighs any probative value such evidence contains.⁹⁴

When the proof of other criminal activity is relevant to an issue other than propensity, Florida courts have followed the rule announced in *Williams v. State*⁹⁵ and have found the evidence admissible:

90. See PROP. FLA. EVID. CODE § 90.610(1).

91. FLA. STAT. § 90.08 (1973). *McArthur v. Cook*, 99 So. 2d 565, 567 (Fla. 1957), sets forth the accepted procedure for using prior convictions to impeach.

92. 99 So. 2d at 567.

93. PROP. FLA. EVID. CODE § 90.404(1)(a) provides:

(1) CHARACTER EVIDENCE GENERALLY.—Evidence of a person's character or a trait of his character including a character trait is inadmissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

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

94. See C. McCORMICK, EVIDENCE § 190 (2d ed. 1972); 1 J. WIGMORE, EVIDENCE § 194 (3d ed. 1940).

95. 110 So. 2d 654, 662 (Fla. 1959). This decision has been interpreted in *Green v. State*, 190 So. 2d 42, 46 (Fla. 2d Dist. Ct. App. 1966), to mean that evidence of other offenses is admissible if:

—it is relevant and has probative value in proof of the instant case or some material fact or facts in issue . . . and

—its sole purpose is not to show the bad character of the accused; and

—its sole purpose is not to show the propensity of the accused to commit the instant crime charged and

[E]vidence revealing other crimes is admissible if it casts light upon the character of the act under investigation by showing motive, intent, absence of mistake, common scheme, identity or a system or general pattern of criminality so that the evidence of the prior offenses would have a relevant or a material bearing on some essential aspect of the offense being tried.⁹⁶

For example, if the fraudulent intent of a criminal defendant is in issue, it may be necessary for the prosecution to introduce similar prior criminal acts to show the absence of a mistake in judgment and the presence of the necessary fraudulent intent. Therefore, if a person is prosecuted for larceny of a motor vehicle after renting a car for two hours but driving it for two weeks prior to being apprehended, the fact that the same individual had, on prior occasions, failed to return other rented automobiles would indicate her lack of mistake in the case at bar.⁹⁷

In examining several appellate opinions, it becomes apparent that evidence offered under the *Williams* rule is often proffered not because the evidence is relevant to an issue in the case, but because it shows that the defendant has a prior criminal record involving the same type of conduct.⁹⁸ The Code contains a procedure, similar to that followed in Louisiana,⁹⁹ which, it is hoped, will limit the abuses under *Williams*. Section 90.404(b) provides that, in a criminal action, when

—its admission is not precluded by some other specific exception or rule of exclusion.

While amounting to a significant change in Florida law at the time it was announced, *Williams* was not an innovation in the area of evidence as this position was already recognized by the legal scholars. See C. McCORMICK, EVIDENCE § 190 (2d ed. 1972); 1 J. WIGMORE, EVIDENCE § 194 (3d ed. 1940). For an analysis of the Florida cases in this area, see 2 FLA. ST. U.L. REV. 197 (1974).

96. 110 So. 2d at 662.

97. It should be noted that whether this rule is stated as one of admissibility or as an exception to a general exclusionary rule, the test remains that of relevancy, and in most instances such evidence would be admitted since its probative value outweighs its prejudicial effect. See note 103 and accompanying text *infra*.

98. In *Duncan v. State*, 291 So. 2d 241, 243 (Fla. 2d Dist. Ct. App. 1974), the court commented that the state's urging of the rule "demonstrates, we think, that which we perceive to be a prevalent misunderstanding on the part of some trial judges and prosecutors of the discipline of *Williams* . . ." See, e.g., *Williams v. State*, 117 So. 2d 473, 476 (Fla. 1960) (court reverses on grounds that evidence of collateral crime was so disproportionate that jury decision was not based on present crime being charged); *Davis v. State*, 276 So. 2d 846, 849 (Fla. 2d Dist. Ct. App. 1973), *aff'd*, 290 So. 2d 30 (Fla. 1974) ("The excessive resort to evidence of other crimes is a prime source of over-prosecution." (footnote omitted)); *Christie v. State*, 246 So. 2d 605, 606 (Fla. 2d Dist. Ct. App. 1971) (court condemns prosecutors trying to bolster uncertain case by use of evidence of another crime).

99. See LA. REV. STAT. ANN. §§ 15:445-46 (1967).

the state intends to offer proof of evidence of other crimes, it must within a reasonable time before trial furnish the accused a written statement of the acts or offenses that it intends to offer at the trial. The exception to the general exclusionary rule that the state relies upon for admissibility also must be specified.¹⁰⁰ The state must show that the evidence it will seek to admit is not merely repetitive and cumulative, is not a subterfuge for depicting the accused's bad character and propensity for bad behavior, and does serve the actual purpose for which it is offered.¹⁰¹ The jury, upon request, will be charged as to the limited purpose for which the evidence may be considered.¹⁰² Requiring written notice to the accused provides the court an opportunity to give prior consideration to the admissibility of the evidence and to give the defendant the opportunity to meet the issue.

It is important to note that when the court determines the admissibility of proof of other criminal activity, it must determine not only whether the evidence is relevant to an issue in the case, but also that the prejudicial nature of the evidence does not outweigh its probative value.¹⁰³ Under section 90.403 of the Code, relevant evidence is not admissible when its probative value is outweighed by unfair prejudice. This qualification, applicable to the admission of all evidence, means that when evidence is admissible under a particular section of the Code, it must also meet the standards of section 90.403.¹⁰⁴

C. Prior Convictions as Proof of Facts Inherent Therein

When a criminal conviction is offered in a civil suit to prove the truth of an essential fact that is inherent in the conviction, it has traditionally been inadmissible as substantive evidence.¹⁰⁵ The Code

100. PROP. FLA. EVID. CODE § 90.404(2)(b)(2) states: "In the written statement the State shall specify the exception to the general exclusionary rule upon which it relies for the admissibility of the evidence of other acts or offenses." The adoption of this provision has been urged in *Thomasson v. State*, 277 So. 2d 299 (Fla. 4th Dist. Ct. App. 1973) (dissenting opinion), and in both 2 FLA. ST. U.L. REV. 197 (1974) and J. ACADEMY FLA. TRIAL LAWYERS, April 1974, at 18. The Proposed Federal Rules of Evidence do not include such a protective provision.

101. PROP. FLA. EVID. CODE § 90.404(2)(b)(3).

102. PROP. FLA. EVID. CODE § 90.404(2)(b)(4).

103. PROP. FLA. EVID. CODE § 90.403. While the Florida courts speak in somewhat different terms, the effect they achieve is similar to the proposed provision. See *Davis v. State*, 276 So. 2d 846 (Fla. 2d Dist. Ct. App. 1973), *aff'd*, 290 So. 2d 30 (Fla. 1974); 2 FLA. ST. U.L. REV. 197, 202 (1974); *cf.* *Young v. State*, 234 So. 2d 341, 348 (Fla. 1970) (evidence must be excluded if it would unduly prejudice the jury). See generally Weinstein & Berger, *Basic Rules of Relevancy in the Proposed Federal Rules of Evidence*, 4 GA. L. REV. 43 (1969).

104. See PROP. FLA. EVID. CODE § 90.403.

105. It is an out-of-court declaration from the prior case offered to prove the truth of the matter asserted in the instant civil suit. See *Stevens v. Duke*, 42 So. 2d 361

provides an exception to the hearsay rule for prior convictions offered to prove an essential fact contained therein¹⁰⁶ and recognizes that a prior adjudication of criminal guilt involves a higher degree of proof—that is, proof beyond a reasonable doubt—than is required in a civil suit. As a Kentucky court stated: “With all of the known safeguards . . . thrown around a defendant in a criminal prosecution, why . . . should a judgment convicting a litigant of a crime not create a circumstance tending to prove his guilt in a later civil action involving the same facts?”¹⁰⁷ For example, the prior arson conviction of a person would be admissible during a subsequent civil suit against his insurance company seeking the proceeds of a policy covering the building that had burned.

Since there may be little motivation to defend charges involving minor offenses, the Code includes in the hearsay exception only those convictions which carry a maximum sentence of one year or more imprisonment.¹⁰⁸ Therefore, convictions for most traffic offenses are inadmissible.

III. WITNESSES

A. *Deadman's Statute*

Existing Florida statutes negate the common law incompetency of various classes of witnesses¹⁰⁹ and specifically disqualify only persons covered by the Deadman's Statute.¹¹⁰ Rather than specify particular circumstances that qualify or disqualify a witness, the Code includes a general provision that, unless otherwise provided, a witness is compe-

(Fla. 1949); Annot., 18 A.L.R.2d 1287 (1950). It is important to distinguish the offer of a guilty plea which is admissible as an admission by a party-opponent. See *Boshnack v. World Wide Rent-A-Car, Inc.*, 195 So. 2d 216 (Fla. 1967).

106. PROP. FLA. EVID. CODE § 90.803(22).

107. *Wolff v. Employers Fire Ins. Co.*, 140 S.W.2d 640, 645-46 (Ky. 1940).

108. See PROP. FLA. EVID. CODE § 90.803(22).

109. See FLA. STAT. § 90.04 (1973) (both husband and wife are competent witnesses); FLA. STAT. § 90.06 (1973) (atheists and agnostics are competent witnesses); FLA. STAT. § 90.08 (1973) (prior criminal conviction does not disqualify witness); cf. C. McCORMICK, EVIDENCE §§ 61-71 (2d ed. 1972).

110. FLA. STAT. § 90.05 (1973) provides in part:

[N]o party to such action or proceeding, nor any person interested in the event thereof, nor any person from, through or under whom any such party, or interested person, derives any interest or title, by assignment or otherwise, shall be examined as a witness in regard to any transaction or communication between such witness and a person at the time of such examination deceased, insane or lunatic, against the executor, or administrator, heir at law, next of kin, assignee, legatee, devisee or survivor of such deceased person, or the assignee or committee of such person or lunatic

tent.¹¹¹ The only class of witness that is specifically disqualified is that covered by the proposed amendment to the Deadman's Statute.¹¹²

Originally, the drafters of the Code felt that the Deadman's Statute should be eliminated because its ultimate effect was to defeat legitimate claims against an estate rather than to protect it against false claims.¹¹³ The Code recognized the possibility of fraudulent claims

111. PROP. FLA. EVID. CODE § 90.601.

112. See PROP. FLA. EVID. CODE § 90.602. The Code provision reads:

90.602 Testimony of interested persons.—

(1) No person interested in an action or proceeding against the personal representative, heir-at-law, assignee, legatee, devisee or survivor of a deceased person or the assignee, committee or guardian of an insane person shall be examined as a witness regarding any oral communication between an interested person and the person deceased or insane at the time of the examination.

(2) This section does not apply when:

(a) a personal representative, heir-at-law, assignee, legatee, devisee or survivor of a deceased person or the assignee, committee or guardian of an insane person is examined in his own behalf regarding the oral communication, or

(b) evidence of the subject matter of the oral communication is offered by the personal representative, heir-at-law, assignee, legatee, devisee or survivor of a deceased person or the assignee, committee or guardian of an insane person.

Any person who is either incapable of expressing himself so that he can be understood or is incapable of understanding the duty of a witness to tell the truth is specifically disqualified under § 90.603 of the Code. That section provides, however, that an interpreter may be used so that the witness may be understood. In addition, the witness, unless she qualifies as an expert, may testify only to matters about which she has personal knowledge. PROP. FLA. EVID. CODE § 90.604.

113. C. EHRHARDT, PRELIMINARY WORKING DRAFT: EVIDENCE CODE, WITNESSES § 601 (1974). The drafting committee agreed with the comments of the Florida Supreme Court in *Jackson v. Parker*, 15 So. 2d 451, 455 (Fla. 1943):

[T]he provisions of this statute are entirely eliminated by the Model Code of Evidence adopted last year by the American Law Institute. In this book there is incorporated a valuable commentary by Mr. Mason Ladd on the changes wrought by this code. As to exclusion [of] statutes of this nature, Mr. Ladd, among other things, says: "In every jurisdiction where the statute now exists, there is a wide range of hairsplitting distinctions opening the avenue for the survivor to testify. The most common of these is overheard statements rather than direct communications. If disposed to falsify, the survivor may make out a case sufficient to sustain a decision in spite of these statutes. The honest claimant suffers by being denied the right to testify to personal communications and transactions. The honest rights of the living are sacrificed in a vain effort to protect a dead man's estate from false claims"

But until the legislature sees fit to repeal or modify the rigors of this statute, the courts must enforce it.

See C. McCORMICK, EVIDENCE § 65 (2d ed. 1972); 2 J. WIGMORE, EVIDENCE § 578 (3d ed. 1940); 18 U. FLA. L. REV. 693 (1966). FLA. STAT. § 90.05 (1973) reads in part: "No . . . person interested . . . shall be examined as a witness . . . against the executor or administrator . . ." Although it has been suggested that the statute is applicable only when the executor or administrator is the defendant, see Ray, *Deadman's Statutes*, 24 OHIO ST. L.J. 89, 94 (1963), the Florida courts have not adopted this interpretation but have applied the statute when the executor is enforcing a claim. See *Clark v. Grimsley*,

being filed against estates and included a specific provision that the trier of fact was not bound by the uncontroverted testimony of a claimant.¹¹⁴ Under this proposal the trier of fact would judge the credibility of the witness and his testimony, and, if the witness was not believed, deny a judgment solely based on this testimony. On the other hand, if the testimony was credible and uncontroverted, judgment for the claimant would be entered. An exception to the hearsay rule would have been recognized so that statements by the decedent concerning the claim could also be considered by the trier of fact; that is, the executor of the estate could introduce statements made by the decedent relating to the claim against the estate based on his personal knowledge when the matter was recently perceived by him and while his recollection was clear.¹¹⁵

At the last meeting of the Law Revision Council prior to submission of the Code to the Florida Legislature, it was decided to partially reinstate the Deadman's Statute, limiting its application only to disqualify testimony of an interested person regarding his oral communication with a decedent or lunatic in a claim against his estate. The Code eliminates the existing statutory bar of testimony of an interested person regarding "transactions" between him and the deceased.¹¹⁶ The inclusion of the transaction bar in the existing statute has led to untoward results. For example, in *Stebnow v. Goss*¹¹⁷ the plaintiff brought suit against the administratrix of decedent's estate in order to recover money allegedly loaned to the decedent. In an effort to establish the indebtedness, plaintiff testified, over objection, that he was not indebted to the decedent. He then placed into evidence, again over objection, a number of cancelled checks drawn by the plaintiff payable to the

270 So. 2d 53 (Fla. 1st Dist. Ct. App. 1972); *Broward Nat'l Bank v. Bear*, 125 So. 2d 760 (Fla. 2d Dist. Ct. App. 1961). Thus, the statute is applicable when the evidence is offered in an action involving the executor.

114. The drafters were concerned that unsubstantiated claims would be filed against estates based on alleged oral promises and the claimant would move for a summary judgment or a directed verdict on the basis that no testimony conflicting with his claim had been introduced. An exception to the general rule, that unrebutted testimony must be accepted as fact, see *Rountree v. Davis*, 167 So. 820, 824 (Fla. 1936); *Bergh v. Bergh*, 160 So. 2d 145 (Fla. 1st Dist. Ct. App. 1964), was created by including, in a draft subsequent to the Preliminary Working Draft, a provision that: "Uncorroborated testimony of an interested person at the time of the action, deceased, or the assignee or committee of a person at the time of the action insane or lunatic is not binding on the trier of fact." This provision was eliminated when the Council decided to include the amended Deadman's Statute. This view was recommended in *Brooker, Let's Repeal the Dead Man Act*, 38 FLA. B.J. 181 (1964).

115. See C. EHRHARDT, PRELIMINARY WORKING DRAFT: EVIDENCE CODE, HEARSAY § 804(b)(2), at 68 (1974).

116. See PROP. FLA. EVID. CODE § 90.602.

117. 165 So. 2d 251 (Fla. 2d Dist. Ct. App. 1964).

order of the decedent. The appellate court, in reversing the lower court, held that plaintiff's testimony as to indebtedness to the decedent at the time of the issuance of the checks was in contravention of the Deadman's Statute, and that the checks could not, in and of themselves, establish an alleged indebtedness. A disinterested witness was required.

*Broward National Bank v. Bear*¹¹⁸ involved the opposite factual situation. There the executor brought suit to recover the principal amount of defendant's note which decedent held. The defendant alleged payment of the note, testified on his own behalf and introduced checks purporting to show payment to the decedent. Subsequently, judgment was entered for the makers of the note, and the executor appealed claiming that admission of the defendant's testimony showing payment of the note, and admission of the check violated the prohibition of the Deadman's Statute concerning testimony as to a "transaction." In reversing, the appellate court held that "testimony of a witness of the payment or non-payment of an obligation to a deceased person concerns a transaction with him within the statute relating to transactions with a deceased person, thereby rendering the testimony incompetent."¹¹⁹

The result in situations such as *Goss* and *Bear* is that the surviving party can make no use of his personal knowledge concerning the facts and circumstances of the transaction. Any personal documents that tend to prove or disprove the indebtedness, payment or nonpayment, would also be excluded, as one cannot do indirectly that which he cannot do directly.¹²⁰ Thus, unless a disinterested witness existed who could testify as to the circumstances of the obligation, the surviving party is summarily precluded from establishing an action on the obligation or a defense to it.

Under the proposed modification allowing testimony as to transactions, the surviving party has an opportunity to establish by personal documents and testimony the facts and circumstances surrounding the obligation. The executor has an equal opportunity to establish the decedent's side of the case by use of witnesses or personal documents, or by implication from the lack of documents or proof of contact. Ultimately, it is for the jury to decide which party has established the better case. While a survivor may give some personal testimony under the Code, he still is precluded from testifying as to "oral communica-

118. 125 So. 2d 760 (Fla. 2d Dist. Ct. App. 1961).

119. *Id.* at 762.

120. 165 So. 2d at 254-55. See Murray, *Negotiable Instruments*, 20 *MIAMI L. REV.* 225, 241-42 n.108 (1965); McKenna, *Negotiable Instruments*, 16 *MIAMI L. REV.* 533, 534 (1962).

tions."¹²¹ Thus, the plaintiff is given his day in court, while the estate is protected by excluding fraudulent claims based on oral "promises" of the decedent.

B. Competency of Jurors

Although the Florida courts have not ruled directly upon the question, it is hoped that they would agree with the Code provision that a juror is not a competent witness in the trial in which he is sitting as a juror.¹²² Under existing law a juror may be challenged for cause if he is to be a witness for either party during the trial.¹²³ The unfairness of allowing a juror to testify and then to return to the box is evident.¹²⁴ The Code also allows counsel to object out of the presence of the jury to the calling of a juror as a witness,¹²⁵ so that counsel does not prejudice his cause in the eyes of the remainder of the jury by objecting to testimony of a fellow juror.

The Code does not establish the substantive grounds required to set aside a jury verdict, but it does set forth the matters upon which a member of the jury is incompetent to testify when a verdict is challenged.¹²⁶ Presently, a juror is not competent to testify as to matters that concern a juror's mind, emotions or beliefs.¹²⁷ As a result a juror is not competent to testify as to his interpretation of the court's instructions to the jury. The finality of the jury verdict, the protection of

121. PROP. FLA. EVID. CODE § 90.602.

122. Compare PROP. FLA. EVID. CODE § 90.607(3).

123. See FLA. STAT. § 913.03(11) (1973).

124. Regardless of the prejudice involved in the practice, at common law a juror was allowed to testify and return to the jury box. See 6 J. WIGMORE, EVIDENCE § 1910 (3d ed. 1940).

125. PROP. FLA. EVID. CODE § 90.607(3)(a).

126. PROP. FLA. EVID. CODE § 90.607(3)(b). This section is based on the 1969 Draft of the Federal Rules of Evidence, PRELIMINARY DRAFT OF PROPOSED RULES OF EVIDENCE OF THE UNITED STATES DISTRICT COURTS AND MAGISTRATES rule 606(b) (1969), which was later amended in the version approved by the Supreme Court to render incompetent any testimony regarding quotient verdicts. PROP. FED. R. EVID. 606(b). The House of Representatives amended the Proposed Rules to conform the original 1969 version. H.R. 5463, 93d Cong., 1st Sess. (1973). For a similar provision see CAL. EVID. CODE § 1150 (West 1966).

127. See 8 J. WIGMORE, EVIDENCE § 2349 (McNaughton rev. 1961). As the Florida Supreme Court in *McAllister Hotel, Inc. v. Porte*, 123 So. 2d 339, 344 (Fla. 1960), explained:

[T]he law does not permit a juror to avoid his verdict for any reason which essentially inheres in the verdict itself, as that he "did not assent to the verdict; that he misunderstood the instructions of the Court; the statements of the witnesses or the pleadings in the case; that he was unduly influenced by the statements or otherwise of his fellow-jurors, or mistaken in his calculations or judgment, or other matter resting alone in the juror's breast."

jurors from annoyance and embarrassment, and the jury's freedom of deliberation are preserved.¹²⁸ The Code retains the Florida rule that "the law does not permit a juror to avoid his verdict for any reason which essentially inheres in the verdict itself."¹²⁹

Testimony by a juror concerning extraneous prejudicial information that was incorrectly brought before the jury, or outside influences improperly brought to bear upon any juror, is not made incompetent by the Code.¹³⁰ Thus overt acts that are not inherent in the jury verdict are competent subjects about which a juror may testify. For example, if a juror were to testify that he voted for the verdict because of the threats upon his family made by one of the parties to the proceeding, such testimony would be competent.

IV. EXPERT TESTIMONY

When expert testimony is sought to be introduced, the Code provisions include two sections¹³¹ that follow the practices of the experts themselves and eliminate much of the confusion from the use of the hypothetical question.¹³² Generally, when an expert renders an opinion in his testimony during a trial, present practice requires that it be based on his personal knowledge or on facts propounded in a hypothetical question; expert testimony may not be based upon out-of-court opinions and statements of third persons.¹³³ In contrast, when a physician actually diagnoses a child's illness, he ordinarily relies, in forming his opinion, not only upon his personal examination and the statements of the child but also upon the statements of parents or relatives. Additionally, he may rely upon the reports of other

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

129. *McAllister Hotel, Inc. v. Porte*, 123 So. 2d 339, 344 (Fla. 1960), See 53 IOWA L. REV. 1366, 1367 (1968), listing the twelve states adopting this view and examples of the various types of misconduct that do not inhere in the verdict.

130. See PROP. FLA. EVID. CODE § 90.607(3).

131. PROP. FLA. EVID. CODE §§ 90.704-05.

132. As Professor Wigmore stated in his treatise:

The hypothetical question, misused by the clumsy and abused by the clever, has in practice led to intolerable obstruction of truth. In the first place, it has artificially clamped the mouth of the expert witness, so that his answer to a complex question may not express his actual opinion on the actual case. This is because the question may be so built up and contrived by counsel as to represent only a partisan conclusion. In the second place, it has tended to mislead the jury so as to the purport of actual expert opinion. This is due to the same reason. In the third place, it has tended to confuse the jury, so that its employment becomes a mere waste of time and a futile obstruction.

2 J. WIGMORE, EVIDENCE § 686 (3d ed. 1940) (footnote omitted).

133. See *Jones v. State*, 289 So. 2d 725 (Fla. 1974); C. McCORMICK, EVIDENCE § 14 (2d ed. 1972).

physicians. Similarly, the Code permits an expert to give opinion testimony at trial based upon facts that are of a type upon which experts in the field rely in forming their particular opinions on that subject.¹³⁴ Thus, the test for the basis of the expert's opinion is resolved by the routine practice of experts in that field, rather than by the exclusionary rules of evidence. If, for example, certain facts are considered and evaluated by an orthopedic surgeon in deciding what type of treatment is necessary for a particular patient when the patient appears for treatment in the physician's office, the doctor should also be able to rely upon those same facts when testifying in court.

The Code also recognizes that hypothetical questions are subject to a great deal of valid criticism. As Dean Wigmore states: "The hypothetical question, misused by the clumsy and abused by the clever, has in practice led to intolerable obstruction of truth."¹³⁵ Section 90.705 of the Code¹³⁶ permits an expert to testify not only by answering hypothetical questions but also by giving his opinion without any disclosure of the underlying facts upon which it is based. Recently, the Florida Supreme Court in *Jones v. State*¹³⁷ permitted an expert to state his opinion, based on his examination of a party, without first stating the details of his investigation: "It is not necessary that the

134. PROP. FLA. EVID. CODE § 90.704 provides:

Bases of opinion testimony by experts.—The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the trial. If the facts or data are of a type reasonably relied upon by experts in the particular subject to support the opinion expressed, the facts or data need not be admissible in evidence.

For similar provisions see CAL. EVID. CODE § 801 (West 1966); PROP. FED. R. EVID. 703. C. McCORMICK, EVIDENCE § 15 (2d ed. 1972) and 3 J. WIGMORE, EVIDENCE § 688 (Chadbourn rev. 1970) contain thorough discussions of the need for this rule.

135. 2 J. WIGMORE, EVIDENCE § 686 (3d ed. 1940) (footnote omitted); see note 132 *supra*.

136. PROP. FLA. EVID. CODE § 90.705 states:

Disclosure of facts or data underlying expert opinion.—

(1) Unless otherwise required by the court, an expert may testify in terms of opinion or inferences and give his reasons therefor without prior disclosure of the underlying facts or data. Upon cross-examination he shall be required to specify the facts or data.

(2) 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.

In McCormick, *Some Observations Upon the Opinion Rule and Expert Testimony*, 23 TEXAS L. REV. 109, 126 n.60 (1945), the author cites a case in which a hypothetical question covered 83 pages of the reporter's transcript and the objection to it covered 14 pages.

137. 289 So. 2d 725 (Fla. 1974).

expert state the detailed circumstances of the examination before giving his finding. The facts and symptoms which he observed, and on which he bases his opinion, may be brought out on cross-examination."¹³⁸ The Code extends this decision by permitting the facts to be disclosed to the expert witness by counsel prior to his being called to testify rather than reading a 30-minute hypothetical question to the witness in the courtroom before the jury. To ensure that there is a sufficient basis for the opinion, opposing counsel is permitted, upon cross-examination, to inquire into the facts and data upon which the expert based his opinion.¹³⁹ By discovery and investigation, the opposing counsel should have the knowledge that is essential for an effective cross-examination.

To prevent abuse of the practice of calling an alleged expert and asking him to testify without requiring the hypothetical question, two additional provisions are included in section 90.705. First, the court retains discretion to disallow a particular expert's testimony without a hypothetical question.¹⁴⁰ Secondly, if the party against whom the testimony is being offered alleges that the expert does not have sufficient basis for his testimony, the party has the right to conduct a *voir dire* examination of the witness to challenge such basis prior to the expression of any expert opinion. This is done in order to determine what facts and data the witness is using to form his opinion. If the cross-examining party establishes *prima facie* evidence that the witness has not based his opinion on sufficient facts, the burden is then placed upon the offering party to establish the necessary facts and data which underlie the opinion in order for the witness's testimony to be admissible.¹⁴¹ It is envisioned that counsel will employ this *voir dire*

138. *Id.* at 727.

139. PROP. FLA. EVID. CODE § 90.705(1).

140. PROP. FLA. EVID. CODE § 90.705(1).

141. *See* PROP. FLA. EVID. CODE § 90.705(2). The drafters felt that the ability to cross-examine the alleged expert was insufficient protection for the opposing party if a completely unqualified "expert opinion" was already before the jury. The prejudice that would result from the testimony could not then be cured by cross-examination or court instruction. It was felt that the inclusion of the *voir dire* provision gives counsel adequate protection. From the language of the Code it is not clear whether the *voir dire* would take place in the jury's presence. Since the purpose of the *voir dire* is to determine whether there is an adequate basis for the expert's opinion, it is reasonable that the admissibility of the testimony should be determined out of the jury's presence. From opposing counsel's viewpoint, however, it would be beneficial to show, in the jury's presence, the inadequacy of the opinion's foundation before it is expressed in direct testimony. The author, as Reporter to the Council, intends to draw this potential problem to the Council's attention before the Code is resubmitted to the legislature. A provision similar to § 90.705(2) of the proposed Florida Code is not included in either the California Code or the Proposed Federal Rules.

provision, but only in the few cases where counsel is unfamiliar with the substance of an expert witness's testimony. The Code takes the position that if opposing counsel were required to wait until cross-examination to attempt to attack the opinion testimony, nothing done on cross-examination by counsel or by the court could eliminate the prejudice that results from statement of the opinion before the jury.

V. PRIVILEGES

For more than three centuries it has now been recognized as a fundamental maxim that the public . . . has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule . . .¹⁴²

Since evidentiary privileges do not aid in the ascertainment of truth, the Code recognizes only a limited number of privileged confidential communications.¹⁴³ The attorney-client,¹⁴⁴ priest-penitent¹⁴⁵ and marital privileges¹⁴⁶ are codified. The confidential communications protected by the existing privileges between psychiatrist-patient¹⁴⁷ and psychologist-patient¹⁴⁸ have been combined into one privilege termed the psychotherapist-patient privilege,¹⁴⁹ and confidential communications

142. 8 J. WIGMORE, EVIDENCE § 2192 (McNaughton rev. 1961).

143. Wigmore has set forth the fundamental requisites that are generally recognized as necessary for the establishment of a testimonial privilege:

(1) The communications must originate in a *confidence* that they will not be disclosed.

(2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.

(3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.

(4) The *injury* that would inure to the relation by the disclosure of the communication must be *greater than the benefit* thereby gained for the correct disposal of litigation.

Id. § 2285 (footnote omitted).

144. See PROP. FLA. EVID. CODE § 90.503.

145. See PROP. FLA. EVID. CODE § 90.506. This section is a substantial restatement of existing FLA. STAT. § 90.241 (1973).

146. See PROP. FLA. EVID. CODE § 90.505.

147. See FLA. STAT. § 90.242 (1973).

148. See FLA. STAT. § 490.32 (1973).

149. PROP. FLA. EVID. CODE § 90.504 states:

Psychotherapist-patient privilege.—

(1) For purposes of this chapter, the following definitions are applicable:

(a) A "psychotherapist" is:

1. A person authorized to practice medicine in any state or nation, or reason-

made for the purpose of diagnosis and treatment of a mental or emotional condition are protected. The existing privilege is expanded from psychiatrists and psychologists to include communications to all persons authorized to practice medicine while engaged in such diagnosis or treatment. Therefore, confidential communication to any medical doctor engaged in the treatment of a mental or emotional condition are privileged. In order to treat mental and emotional disorders, it is necessary to persuade the patient to talk freely and reveal his problem.

ably believed by the patient so to be, while engaged in the diagnosis or treatment of a mental or emotional condition, including drug addiction; or

2. A person licensed or certified as a psychologist under the laws of any state of [sic] nation, engaged primarily in the diagnosis or treatment of a mental or emotional condition, including alcoholism and other drug addiction.

(b) A "patient" is 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.

(c) A communication is "confidential" if it is not intended to be disclosed to third persons other than:

1. Those present to further the interest of the patient in the consultation, examination or interview; or

2. Those persons reasonably necessary for the transmission of the communication; or

3. Those persons who are participating in the diagnosis and treatment under the direction of the psychotherapist, including members of the patient's family.

(2) A patient has a privilege to refuse to disclose, and to prevent any other person from disclosing confidential communications, made for the purpose of diagnosis or treatment of his mental or emotional condition, including alcoholism and other drug addiction, among himself, his psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.

(3) The privilege may be claimed by:

(a) The patient or his attorney,

(b) A guardian or conservator of the patient when the patient has a guardian or conservator,

(c) The personal representative of a deceased patient,

(d) The psychotherapist at the time of the communication, but only in behalf of the patient. The authority of a psychotherapist to claim the privilege is presumed in the absence of evidence to the contrary.

(4) There is no privilege under this section:

(a) As to 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) As to communications made in the course of such a court-ordered examination of the mental or emotional condition of the patient.

(c) As to 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.

Generally the patient must orally reveal his thoughts and feelings, and he is less likely to do so if he is not confident they will be confidential. The same justification exists for the privilege whether treatment is provided by a psychiatrist, psychologist or medical doctor.

The Code does not provide for the existing accountant-client privilege.¹⁵⁰ In eliminating the privilege, it was determined that the injury to the public interest and administration of justice which results from the recognition of the privilege outweighs the benefits that flow to the accountant-client relationship from the existence of the privilege. The major policy supporting the privilege seems to be the need to protect a client under investigation by the Internal Revenue Service.¹⁵¹ If this protection actually resulted from the privilege, perhaps the Council would have recommended its retention. In *Falsone v. United States*,¹⁵² however, the United States Court of Appeals for the Fifth Circuit refused to recognize Florida's existing accountant's privilege in federal income tax investigations. The court found that privileges in federal tax proceedings were questions of federal law, which does not include an accountant-client privilege.¹⁵³ The existence of a state accountant-client privilege is irrelevant in federal tax matters and the Code's failure to recognize the privilege will not further inhibit the full disclosure of information for the preparation of income tax returns.¹⁵⁴

150. The existing Florida statute establishing the privilege provides:

All communications between a certified public accountant or public accountant and the person for whom such certified public accountant or public accountant shall have made any audit or other investigation in a professional capacity, and all information obtained by a certified public accountant and public accountant in his professional capacity concerning the business and affairs of a client, shall be deemed privileged communications in all of the courts of this state, and no such certified public accountant or public accountant shall be permitted to testify with respect to any of said matters, except with the consent in writing of such client or his legal representative.

FLA. STAT. § 473.141 (1973). The accounting profession itself does not agree on the desirability of a statutory privilege. See J. CAREY & W. DOHERTY, *ETHICAL STANDARDS OF THE ACCOUNTING PROFESSION* § 78, at 134 (1966).

151. See 46 N.C.L. REV. 419, 424 (1968). See also Fahey, *Testimonial Privilege of Accountants in Federal Tax Fraud Investigations*, 17 TAX L. REV. 491 (1962); Tigue, *Accountant-Client Communications*, 12 TAX COUNSELOR'S Q. 1 (1968); Note, *Functional Overlap Between the Lawyer and Other Professionals: Its Implication for the Privileged Communications Doctrine*, 71 YALE L.J. 1226, 1248 (1962).

152. 205 F.2d 734 (5th Cir. 1953), cert. denied, 346 U.S. 864 (1953).

153. For a discussion of other cases involving this issue, see Cohen, *Accountants' Workpapers in Federal Tax Investigations*, 21 TAX L. REV. 183, 213-15 (1966).

154. It is in the public interest to ensure that taxes will be properly paid and that tax fraud does not go unchecked—that the community as a whole is sharing fairly the support of the government. If a person discloses to the accountant all relevant information, his taxes will be fairly and honestly computed and paid. When the taxpayer un-

A great deal of the accountant's responsibility to a client outside the tax area is in the area of auditing and certification of the client's financial statements that are used as the basis of dealing with the company's potential and present creditors and shareholders.¹⁵⁵ Thus, it is inherent in communications received from the client that they will be used by the accountant as the basis of subsequent reports which will be distributed to third persons. In addition, the accountant's code of ethics requires that he disclose to the public any relevant material that will prevent publication of a misleading financial statement.¹⁵⁶ As opposed to the attorney-client and psychotherapist-patient relationships, in which the client and patient assume that the professional will not reveal the substance of the communications, a client often knows that, when he conveys information to an accountant, that information might be subsequently disclosed.

Another argument for the retention of the privilege is that the accountant may be compelled to disclose a client's trade secrets, learned while rendering professional services. The Code's recognition of the trade-secret privilege¹⁵⁷ prevents such an occurrence. The dissemination, outside of the courtroom, of information concerning the client is prevented by the accountant's own code of ethics.¹⁵⁸

A fishing expedition into the affairs of a client during an accountant's testimony is barred by the requirement that evidence be relevant to the proceedings.¹⁵⁹ Moreover, many activities that might be the source of courtroom inquiry—such as false entries or transfers to defraud creditors—would be unethical actions on the part of the accountant if he knowingly fails to disclose them and should not be protected by a privilege.¹⁶⁰

If the accountant-client privilege is necessary to preserve the effective relationship between an accountant and client, the rendition of an accountant's services should be demonstrably less efficient in that majority of states where the privilege is not recognized than in the

intentionally fails to disclose some information, payment of a deficiency will, in most instances, end the matter. If he fails intentionally to disclose information, such an instance is not in the public interest as it would assist in perpetrating a tax fraud. See 46 N.C.L. REV. 419 (1968).

155. See *id.*

156. See CODE OF PROFESSIONAL ETHICS OF THE AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS rule 2.02; J. CAREY & W. DOHERTY, ETHICAL STANDARDS OF THE ACCOUNTING PROFESSION §§ 43, 46 (1966).

157. See PROP. FLA. EVID. CODE § 90.507.

158. See J. CAREY & W. DOHERTY, ETHICAL STANDARDS OF THE ACCOUNTING PROFESSION § 76 (1966).

159. See PROP. FLA. EVID. CODE § 90.401.

160. See J. CAREY & W. DOHERTY, ETHICAL STANDARDS OF THE ACCOUNTING PROFESSION §§ 46, 80 (1966).

fifteen states where the privilege presently exists.¹⁶¹ Since there apparently has been no such demonstration of harm when the privilege is not recognized, it seems that the administration of justice and the public interest in ascertaining the truth outweigh the benefits to the accountant-client relationship that flow from recognition of the privilege.

VI. CONCLUSION

While this article has dealt with only a few highlights of the Code, there are additional provisions which are in themselves important. Many restate existing law concerning evidentiary rules that are not controversial. Others represent change in areas in which the general interest is not as great as in those sections discussed. The drafting of the Code is a significant undertaking and disagreement with a few of its sections should not serve as a barrier to the benefits of uniformity and clarity that would flow from its adoption. If there is objection to particular sections, an attempt should be made by the objectors to improve those sections rather than to oppose the Code in its entirety. If frequent legislative tampering with the Code is feared, it should be remembered that several statutes dealing with isolated evidentiary matters have existed in Florida for a number of years¹⁶² and the legislature has not amended them often. Moreover, the problem has not arisen in California, New Jersey and Kansas—the three states with the most experience with evidence codification. Although there has been much study and discussion of the Code during the past year, these deliberations should continue in order to ensure that the product presented to, and hopefully adopted by, the Florida Legislature will represent a sound codification of evidence law that will aid both the Florida bench and bar.

161. These states are Arizona, Colorado, Florida, Georgia, Illinois, Iowa, Kentucky, Louisiana, Maryland, Michigan, Missouri, Nevada, New Mexico, Pennsylvania and Tennessee. Puerto Rico also recognizes the accountant-client privilege. For discussion of the relevant provisions of each state statute see Note, *Privileged Communications—Accountants and Accounting—A Critical Analysis of Accountant-Client Statutes*, 66 MICH. L. REV. 1264 (1968).

162. See FLA. STAT. chs. 90, 92 (1973).