>> ALL RISE.

>> HEAR YE, HEAR YE, HEAR YE,

SUPREME COURT OF FLORIDA'S NOW

IN SESSION.

ALL WHO HAVE CAUSE TO PLEA, DRAW

NEAR, GIVE ATTENTION AND YOU

SHALL BE HEARD.

GOD SAVE THESE UNITED STATES;

THE GREAT STATE OF FLORIDA, THIS

HONORABLE COURT.

[BACKGROUND SOUNDS]

LADIES AND GENTLEMEN, THE

SUPREME COURT OF FLORIDA.

PLEASE BE SEATED.

>> WELCOME TO THE FLORIDA

SUPREME COURT.

FIRST CASE FOR THE DAY IS IN RE

AMENDMENTS TO THE FLORIDA

EVIDENCE CODE.

YOU MAY PROCEED.

>> THANK YOU, YOUR HONOR.

IF IT PLEASES THE COURT, MY NAME

IS THOMAS SHULTS, I'M THE CHAIR

OF THE CODE AND RULE OF EVIDENCE
FOR THE FLORIDA BAR.
WE COME BEFORE THE COURT TODAY
WITH THREE RECOMMENDATIONS UNDER
THE THREE-YEAR CYCLE PROCESS.
THOSE RECOMMENDATIONS ARE THAT
THE NEW FIDUCIARY LAWYER/CLIENT
PRIVILEGE EMBODIED IN 90.5023 BE
ADOPTED AS A RULE OF COURT TO
THE EXTENT IT'S PROCEDURAL.
THE SECOND RECOMMENDATION IS
THAT THE NEW HEARSAY EXCEPTION
WHICH CALLS FOR THE ADMISSION OF
HEARSAY WHERE THE DECLARANT'S
ABSENCE IS PROCURED BY
WRONGDOING, THAT'S EMBODIED IN
90.8042F.
AND THE LAST RECOMMENDATION
WHICH I ANTICIPATE WILL GENERATE
THE MOST DISCUSSION THIS MORNING
IS THE RECOMMENDATION THAT THE
EXPERT WITNESS CERTIFICATE
STATUTE EMBODIED IN 766.102

SUBSECTION 12 BE ADOPTED AS A

RULE OF PROCEDURE TO THE EXTENT

IT IS PROCEDURAL.

>> LET ME JUST ASK YOU ABOUT THE

FIRST ONE, THE FIDUCIARY.

NOW, THIS IS A PRIVILEGE THAT

WOULD EXTEND TO PERSON WHO IS

THE FIDUCIARY OF, SAY, AN

ESTATE.

AND, THEREFORE, THEIR

COMMUNICATIONS WITH THEIR LAWYER

WOULD BE PRIVILEGED.

>> YES, YOUR HONOR --

>> AND MY QUESTION REALLY IS WHY

DOESN'T THAT FALL UNDER THE

REGULAR ATTORNEY/CLIENT

PRIVILEGE?

>> WELL, IT'S DUE TO TWO CASES

OUT OF THE SECOND DISTRICT.

THOSE ARE THE JACOB V BARTON AND

TRIPP V --

[INAUDIBLE]

THE SECOND DISTRICT HAS RULED IN

THOSE CASES THAT A BENEFICIARY
OF THE TRUST MIGHT BE ABLE TO
DISCOVER WHAT WOULD OTHERWISE BE
CONFIDENTIAL BILLING RECORDS
BETWEEN THE ATTORNEY AND THE
TRUSTEE IF THAT BENEFICIARY
COULD SHOW THE COURT THAT THEY
WERE THE WORDS THAT THE COURT
USED WERE THE PERSONS WHO WOULD
ULTIMATELY BENEFIT FROM THAT
ATTORNEY'S ADVICE.
SO THE SECOND DCA OPENED IT UP
TO PERMIT BENEFICIARIES OF
ESTATES AND TRUSTS TO DISCOVER
CONFIDENTIAL COMMUNICATIONS
BETWEEN THE LAWYER AND THE
TRUSTEE OR PERSONAL
REPRESENTATIVE IF THE
BENEFICIARY OR WARD COULD SHOW
THAT THEY WERE THE ACTUAL
BENEFICIARIES OF THE ADVICE.
SO THIS NEW STATUTE CLEARLY
STATES THAT THE ATTORNEY/CLIENT

PRIVILEGE APPLIES ONLY BETWEEN
THE LAWYER AND THE FIDUCIARY,
THAT IT GOES NO FURTHER THAN
THAT IN ORDER TO MEET THE
CONCERNS RAISED BY THOSE TWO
CASES.
>> WELL, WOULDN'T -- AND, YOU
KNOW, SOMETHING LIKE THIS, AND I
UNDERSTAND WE SAY, WE ADOPT IT
TO THE EXTENT IT'S PROCEDURAL.
BUT IF YOU WHOLESALE ADOPT A
STATUTE, WE'RE NOT GIVING IT
REALLY ANY INTERPRETATION.
SO HOW IS IT ANY DIFFERENT FOR
SOMEBODY TRYING TO CLAIM THE
PRIVILEGE?
THE STATUTE'S THERE.
IF WE'RE ADOPTING IT NOW AS A
RULE OF PROCEDURE, HOW DOES THAT
CHANGE WHATEVER THE OUTCOME WAS
IN THIS SECOND DISTRICT CASE?
>> I UNDERSTAND, YOUR HONOR.
IT WOULD, ESSENTIALLY, THE

DISCOVERY OF THE ATTORNEY/CLIENT
BILLING RECORDS WAS FOR THE
PURPOSE OF EVENTUALLY LEADING TO
ADMISSIBLE EVIDENCE.
IN OTHER WORDS, THAT THEY WOULD
BE ABLE TO USE COMMUNICATIONS
BETWEEN THE LAWYER AND THE
FIDUCIARY --
>> NO, BUT WE'RE NOT RULING ON
WHETHER IT'S CONSTITUTIONAL,
WHETHER -- WE'RE JUST SAYING
SORT OF IT'S JUST KIND OF A
COMITY THING TO TAKE CERTAIN
ASPECTS OF STATUTES THAT THE
LEGISLATURE ADOPTS AND SAYING
WE'RE ADOPTING IT.
NOT THE SUBSTANTIVE PART, TO THE
EXTENT IT'S PROCEDURE.
>> CORRECT.
>> YOU'RE TALKING ABOUT
SOMETHING I'M NOT SURE IT'S AN
APPLICATION OF THE STATUTE.
BUT THAT'S ALSO A CONCERN I HAVE

JUST BEFORE WE GET TO THE ONE

THAT'S CONTROVERSIAL.

FOR 90.8042F WHICH SAYS THAT A

STATEMENT CAN BE OFFERED AGAINST

A PARTY THAT WRONGFULLY CAUSED

THE DECLARANT'S UNAVAILABILITY.

NOW, THIS COURT DEALS WITH A LOT

OF DEATH CASES, AND IN THOSE

CASES YOU'VE GOT OFTEN TIMES A

VICTIM WHO MAY HAVE MADE A

STATEMENT.

WE DEAL WITH THE SIXTH AMENDMENT

IN CRAWFORD AS TO WHETHER THAT

STATEMENT IS ADMISSIBLE.

WHAT IS THE STANDARD TO BE USED

BY A COURT IN DECIDING BEFORE

THE DEFENDANT IS FOUND GUILTY

WHETHER IT WAS THAT DEFENDANT

THAT CAUSED THE DECLARANT'S

UNAVAILABILITY?

I SEE IN THE FOURTH DISTRICT

CASE IT'S A VERY DIFFERENT

SITUATION.

A WITNESS WAS ACTUALLY, I GUESS,
INTIMIDATED AND MADE
UNAVAILABLE.
BUT COULDN'T, I MEAN,
UNAVAILABILITY COULD BE DEATH.
IS IT MEANT TO APPLY -- AND I
SEE THE PUBLIC DEFENDERS HAVEN'T
COME IN TO OPPOSE IT, BUT I HAVE
A CONCERN AS TO HOW THAT REALLY
WILL BE APPLIED SUBSTANTIVELY
WHEN WE, WHEN IT'S NOW A RULE OF
EVIDENCE.
>> THE PERSON AGAINST WHOM THE
STATEMENT IS ADMITTED MUST HAVE,
MUST HAVE HAD AS HIS OR HER
PURPOSE PREVENTING THE PERSON
FROM TESTIFYING AND PROCURING --
>> OKAY.
SO IT DOESN'T APPLY THEN TO
SOMETHING THAT WOULD HAVE
HAPPENED IN THE COURSE -- I
MEAN, THAT'S A DIFFERENT
SITUATION.

>> RIGHT, YOUR HONOR.

>> ACTUALLY, AFTER THE PERSON'S

BEEN EITHER INDICTED OR CRIMINAL

CHARGES OR --

>> I'M NOT SURE THAT THAT'S

NECESSARILY THE CASE, YOUR

HONOR.

THERE WAS SOME CONCERN THIS

WOULD AUTOMATICALLY APPLY IN ALL

HOMICIDE CASES --

>> UH-HUH.

>> -- FOR INSTANCE.

HOWEVER, IT'S THE COMMITTEE'S

VIEW UNDER THE CASE LAW THAT'S

BEEN DECIDED AND THE LANGUAGE OF

THE STATUTE ITSELF IS THAT THE

PARTY MUST HAVE FOR ITS PURPOSE,

FOR INSTANCE, IF THE PARTY

CAUSES THE WITNESS' DEATH, THEN

THAT PERSON MUST HAVE BEEN

MOTIVATED BY A DESIRE TO PREVENT

THAT WITNESS FROM TESTIFYING.

>> WELL, IN THIS CASE THAT'S ONE

OF THE AGGRAVATING CIRCUMSTANCES
WHICH IS WITNESS ELIMINATION,
AVOID ARREST.
BUT, AGAIN, AT THE FIRST
INSTANCE THE JURY'S DECIDING
WHETHER THE DEFENDANT ACTUALLY
IS GUILTY BEYOND A REASONABLE
DOUBT, BUT ARE WE GOING TO ALLOW
IN A STATEMENT THAT THE
DECLARANT MADE THAT MIGHT ALSO
HAVE SOME SIXTH AMENDMENT
PROBLEMS BECAUSE OF THE
CIRCUMSTANCES UNDER WHICH IT'S
MADE?
THAT -- MY CONCERN -- I MEAN, I
THINK ALTHOUGH THE COMMITTEE MAY
HAVE THOUGHT THAT THEY WERE JUST
SORT OF ADOPTING WHAT'S IN THE
STATUTE, I THINK THERE'S SOME
PROBLEMS IN HOW THAT WOULD APPLY
AND POTENTIALLY HAVE SOME SIXTH
AMENDMENT IMPLICATIONS.
ARE YOU -- DID ANYONE DISCUSS

THAT DURING THE COMMITTEE

DELIBERATIONS ON --

>> NO, NOT SPECIFICALLY, YOUR

HONOR.

WE LOOKED AT THE WAY THE FEDERAL

COURTS HAVE APPLIED THIS

STATUTE, AND THEY HAVE,

ESSENTIALLY, CONDUCTED

PRELIMINARY HEARINGS AND HAVE

DETERMINED THE STANDARD TO BE

PREPONDERANCE OF THE EVIDENCE.

IF BY THE PREPONDERANCE OF THE

EVIDENCE IT'S SHOWN THAT THE

PARTY --

>> BUT THERE'S NOTHING IN HERE

THAT SAYS WHAT THE STANDARD IS

TO BE IN THAT --

>> THAT IS CORRECT.

>> SO IN OTHER WORDS, I DON'T

SEE HOW DOES IT HELP BY MAKING

THIS A RULE OF EVIDENCE IF

THERE'S A STATUTE AND THE STATE

CAN RELY ON STATUTE AND THEN THE

COURTS CAN DECIDE WHAT STANDARD
OF PROOF, BUT HOW DOES IT HELP
TO MAKE IT A ROLE OF EVIDENCE?
>> WELL, IT'S A PREDICATE TO THE
ADMISSION OF A STATEMENT WHICH
WOULD MAKE IT A --
>> BUT IF IT'S A STATUTE, IT'S,
THE STATUTE WOULD BE ANOTHER
EXCEPTION TO HEARSAY.
AND I, YOU KNOW, AGAIN, I DON'T
SEE WHAT'S PROCEDURAL ABOUT WHAT
YOU'VE JUST DESCRIBED.
IT SEEMS TO ME THAT'S
SUBSTANTIVE.
>> WELL, IF IT'S A PREDICATE TO
THE ADMISSION OF TESTIMONY OF A
STATEMENT THAT IS UNDER THE --
OUR INTERPRETATION IS UNDER THE
CURAN DECISION THAT'S PART OF
THE METHODOLOGY THAT IS USED BY
THE COURT IN DETERMINING WHETHER
OR NOT TO LET EVIDENCE IN.
>> YOU HAVEN'T GIVEN THAT

PREDICATE.

YOU HAVEN'T SAID IF THE COURT

FINDS BY A PREPONDERANCE OF THE

EVIDENCE --

>> THAT IS UNDER THE CASE LAW,

YOUR HONOR.

AND I WOULD ALSO NOTE THAT THIS

PARTICULAR HEARSAY EXCEPTION IS

ONE OF THE TWO ORIGINAL HEARSAY

EXCEPTIONS UNDER THE COMMON LAW

THAT WAS ACTUALLY LIKELY IN

EFFECT IN FLORIDA UNTIL THE

ADOPTION OF THE EVIDENCE CODE,

AND WE --

>> AND SO IT SEEMS TO ME THAT

WHAT YOU'RE SAYING THEN IS IF A

PERSON IS ACTUALLY ON TRIAL FOR

THE MURDER OF SOMEONE, THAT THAT

VICTIM, THAT MURDER VICTIM'S

STATEMENT WOULDN'T FALL UNDER

HERE.

IT'S SOMEONE ELSE WHO WOULD BE A

WITNESS IN THAT PARTICULAR

TRIAL?

IS THAT, IS THAT WHAT --

>> IT MAY OR MAY NOT FALL.

THE VICTIM'S STATEMENT MAY OR

MAY NOT FALL WITHIN THE

EXCEPTION.

THE TEST WOULD BE WHETHER THE

DEFENDANT KILLED THE VICTIM FOR

THE SPECIFIC --

>> BUT THAT'S WHERE YOU GO BACK

TO WHAT JUSTICE PARIENTE WAS

JUST SAYING.

THAT'S WHAT WE ARE ON TRIAL TO

DETERMINE, WHETHER OR NOT HE OR

SHE IS THE ACTUAL PERSON WHO

KILLED THE VICTIM.

>> CORRECT.

>> AND SO YOU'RE GOING TO MAKE A

DETERMINATION TO ADMIT THAT

VICTIM'S STATEMENT, HEARSAY

STATEMENT PRIOR TO ACTUALLY A

DETERMINATION OF WHETHER OR NOT

THE DEFENDANT ACTUALLY KILLED

THE PERSON?

>> THAT IS THE WAY THE COURTS

HAVE APPLIED THIS.

>> YEAH.

BUT THEY HAVEN'T -- YOU

MENTIONED COMMON LAW, BUT THEY

DON'T KNOW, THE COMMON LAW

APPARENTLY FORGOT ABOUT JUSTICE

SCALIA AND CRAWFORD WHICH SAYS

THESE ARE SIXTH AMENDMENT

PROBLEMS.

AND SO WE'VE GOT TO BE ALERT TO

THAT.

BUT ANYWAY, I THINK THE MAIN ONE

THAT HAS GENERATED ALL THE

CONTROVERSY IS THIS 12, SO I

DIDN'T WANT TO GET YOU OFF HERE.

>> OH, NO, THAT'S ALL RIGHT.

IN AUGUST OF 2011, THIS COURT

ASKED THE COMMITTEE TO EVALUATE

THE NEW WITNESS CERTIFICATE

STATUTE IN 766.102, AND IT'S

EMBODIED IN SUBSECTION 12.

AND PRIOR TO ADDRESSING THAT, I
WOULD LIKE TO NOTE TO THE COURT
THAT BOTH THE COMMENTERS AND THE
COMMITTEE CITED TO SUBSECTION 14
OF 766.102 FOR DIFFERENT
REASONS.
SECTION 14 ESSENTIALLY STATES
THAT THE TRIAL COURT IS NOT
BOUND BY THE CRITERIA IN 766 IN
DETERMINING WHETHER TO ADMIT AN
EXPERT'S TESTIMONY OR NOT.
THAT SECTION 14 HAS BEEN
REPEALED BY HOUSE BILL -- I HAVE
THE SITE, I CAN GIVE IT TO YOU
LATER -- THAT HAS BEEN REPEALED
BY A HOUSE BILL.
AND TO THE EXTENT THAT IF IT
DOES BECOME LAW, IF THAT REPEAL
DOES TAKE EFFECT AS LAW, THEN
THE ARGUMENTS THAT ARE MADE BOTH
BY THE COMMITTEE AND BY THE
COMMENTERS WOULD NOT BE
APPLICABLE.

GETTING BACK TO THE WITNESS
CERTIFICATE STATUTE ITSELF, AS I
SAID IN AUGUST OF 2011 WE WERE
ASKED TO EVALUATE THIS WITNESS
CERTIFICATE STATUTE.
WE HAD MULTIPLE COMMITTEE AND
SUBCOMMITTEE MEETINGS TO
EVALUATE THE CERTIFICATE
STATUTE.
THE COMMITTEE SHARES MANY OF THE
CONCERNS EXPRESSED BY THE
COMMENTERS.
OUR RECOMMENDATION IS NOT,
CERTAINLY, AN ENDORSEMENT OF
THIS LAW.
BUT THE RECOMMENDATION IS MADE
ACCORDING TO THE CRITERIA AS
VIEWED BY THE COMMITTEE
ESTABLISHED BY THIS COURT UNDER
BOTH ITS 2000 OPINION AND 2002
OPINION.
IN THE 2000 OPINION, WHAT THE
COURT WAS FACED WITH WAS AN

AMENDMENT TO THE HEARSAY RULES
WHICH ESSENTIALLY SAID THAT ALL
DEPOSITION TESTIMONY IS
ADMISSIBLE REGARDLESS OF WHETHER
THE DECLARANT IS AVAILABLE OR
NOT.
THE COMMITTEE RAISED VARIOUS
CONCERNS.
THE BOARD OF GOVERNORS RAISED
THE SAME CONCERNS, AND BOTH THE
COMMITTEE AND THE BOG
RECOMMENDED THAT THIS COURT NOT
ADOPT THAT HEARSAY REGULATION AS
A RULE OF COURT.
THE COURT FOLLOWED THE
REGULATION AND DID NOT ADOPT
THAT RULE, THAT STATUTE AS A
RULE OF COURT.
IN DOING SO, THE COURT APPLIED
WHAT WE COULD ASCERTAIN WAS A
CRITERIA THAT WOULD BE APPLIED
BY THE COURT IN REJECTING
STATUTES AS RULES, EVIDENTIARY

STATUTES AS RULES.

IN THAT PARTICULAR CASE, THE

COURT FOUND GRAVE CONCERNS

REGARDING THE SIXTH AMENDMENT

RIGHT OF CONFRONTATION THAT WERE

CAUSED BY THAT HEARSAY

EXCEPTION.

THE COURT ALSO NOTED WHAT

APPEARED TO BE DIRECT CONFLICTS

WITH THE RULES OF CIVIL AND

CRIMINAL PROCEDURE REGARDING THE

THE ADMISSION OF DEPOSITION

TESTIMONY.

IN OTHER WORDS, UNDER THE 2000

OPINION THE COURT APPEARED TO

ESTABLISH A CRITERIA THAT IF THE

EVIDENTIARY STATUTE DIRECTLY

CONFLICTS WITH A CONSTITUTIONAL

PROCEDURAL RIGHT OR A PROCEDURE

THAT IS ALREADY IN PLACE, TO THE

EXTENT IT WOULD BE IMPOSSIBLE TO

COMPLY WITH ONE AND APPLY THE

OTHER THAT THE COURT WOULD NOT

ADOPT THE EVIDENTIARY STATUTE AS

A RULE OF PROCEDURE.

>> WHAT ARE THE CRITERIA TO GET

A CERTIFICATE?

I MEAN, DOES A WITNESS, EXPERT

WITNESS FROM ANOTHER STATE HAVE

TO APPLY TO THE DEPARTMENT OF

BUSINESS AND PROFESSIONAL

REGULATION?

I MEAN, WHAT IS THE CERTIFICATE?

WHAT DOES THAT MEAN?

>> THEY APPLY TO THE DEPARTMENT

OF HEALTH.

THERE'S A $50 FEE.

AS LONG AS THEY ARE LICENSED IN

THEIR HOME STATE, THE DEPARTMENT

OF HEALTH IS REQUIRED TO ISSUE

THE CERTIFICATE WITHIN TEN DAYS.

>> SO THERE'S NOTHING -- IT'S A

PRO FORMA THING TO GIVE $50?

I MEAN, WHAT'S THE -- I JUST

DON'T GET WHAT ITS PURPOSE IS.

>> WELL, ONE PURPOSE MIGHT BE TO

CONFIRM THE WITNESS' LICENSURE
STATUS BECAUSE ALL WITNESSES IN
A MED-MAL CASE HAVE TO BE
LICENSED --
>> WELL, IF THE JUDGE SAYS, YOU
KNOW, IF YOU'RE LICENSED IN THIS
STATE, IF THE DEFENDANT
DOESN'T -- EITHER SIDE, I MEAN,
IT WORKS EITHER WAY.
SO IT'S TO CONFIRM LICENSING OF
THIS --
>> WELL, ONE PURPOSE MIGHT BE TO
CONFIRM LICENSING.
THE OTHER PURPOSE IS TO SUBJECT
THAT WITNESS TO POTENTIAL
ADMINISTRATIVE DISCIPLINE IF THE
WITNESS DELIVERS WHAT COULD BE
FOUND AS DECEPTIVE OR FRAUDULENT
TESTIMONY.
THERE IS A PROVISION IN ANOTHER
STATUTE UNDER THE LICENSING
STATUTES WHICH STATES IF THE
WITNESS IS FOUND TO HAVE

DELIVERED FALSE OR FRAUDULENT

TESTIMONY, THAT THEIR

CERTIFICATE COULD BE REVOKED.

NOW, THAT'S THE SAME SANCTION

THAT ALL FLORIDA PHYSICIANS

ALREADY FACE AS WELL AS

DENTISTS, SURVEYORS, ENGINEERS

AND ARCHITECTS ALREADY FACE THAT

KIND OF SANCTION IF THEY ARE

FOUND TO DELIVER --

>> DO DOCTORS, IF THEY'RE

TESTIFYING FOR PERSONAL INJURY

CASES, DO THEY HAVE TO ALSO TO

TESTIFY HAVE A CERTIFICATE?

>> NO, YOUR HONOR.

THIS CERTIFICATE APPLIES ONLY TO

STANDARD OF CARE TESTIMONY AND

MEDICAL MALPRACTICE CASES.

>> GOING BACK TO --

[INAUDIBLE]

FACED A SANCTION.

WHAT SANCTION DO THEY FACE

WITHOUT THE CERTIFICATE BEING IN

PLACE?

>> WELL, IF THEY HAVE A

CERTIFICATE, THEY ARE SUBMITTING

TO THE JURISDICTION OF THE

FLORIDA --

>> RIGHT.

LET'S ASSUME FOR A SECOND THAT

THEY DON'T HAVE A CERTIFICATE.

YOU SAID PHYSICIANS ALREADY FACE

SANCTION WITHOUT THE

CERTIFICATE.

WHAT SANCTION DO THEY FACE?

>> OH, I'M SORRY, YOUR HONOR.

I PROBABLY STATED IT WRONG.

WHAT I MEANT TO SAY IS THAT

FLORIDA PHYSICIANS ALREADY FACE

THAT SANCTION.

FLORIDA PHYSICIANS DON'T NEED

THIS WITNESS CERTIFICATE

BECAUSE THEY'RE ALREADY LICENSED

AND UNDER THE JURISDICTION OF

THE FLORIDA DEPARTMENT OF

HEALTH.

>> SO IF THEY GO TO, IF THEY

TESTIFY IN COURT AND COMMIT

FRAUD OR WHATEVER, WHAT HAPPENS

TO THEM IN COURT?

THEY LOSE THEIR LICENSE TO

PRACTICE MEDICINE?

>> THEY COULD.

A FLORIDA PHYSICIAN COULD.

>> ALL RIGHT.

>> A FOREIGN PHYSICIAN WITH THIS

WITNESS CERTIFICATE WOULD FACE

REVOCATION OF THAT CERTIFICATE

SO HE OR SHE COULD NOT TESTIFY

AGAIN UNDER FLORIDA COURT.

>> AND THE MOST THAT COULD

HAPPEN TO THAT PHYSICIAN IS THAT

HE OR SHE WOULD NOT BE ALLOWED

TO TESTIFY IN FLORIDA AGAIN.

>> CORRECT.

>> WHEREAS IF IT'S A FLORIDA

DOCTOR, A DOCTOR COULD LOSE HIS

LICENSE.

>> CORRECT, YOUR HONOR.

THE 2002 OPINION ALSO PROVIDED
THE COMMITTEE WITH SOME GUIDANCE
IN EVALUATING THIS PARTICULAR
STATUTE.
IN THAT CASE WE WERE ASKED TO
MAKE A RECOMMENDATION REGARDING
AN EXPANSION OF THE SIMILAR
FACT/EVIDENCE RULE IN CHILD
MOLESTATION CASES.
BOTH THE BOG AND --
[INAUDIBLE]
RECOMMENDED THAT IT NOT BE
ADOPTED AS A RULE OF COURT DUE
TO CONFLICT WITH OTHER --
>> ISN'T THIS, THOUGH, THE VERY
ESSENCE IN CONFLICT, BUT NOW
WITH 14 BEING REPEALED OR HAS
BEEN REPEALED, WITH EVERYTHING
THAT WE HAVE OUR JURISPRUDENCE
ON HOW AN EXPERT WITNESS IS
QUALIFIED?
AND MY OTHER QUESTION ABOUT IT
IS SEEING THAT, I GUESS, IT CAME

FROM US -- I DIDN'T REALIZE

THAT -- THERE ARE MANY OTHER

PROVISIONS OF THIS 766.102 ABOUT

THEY HAVE TO BE IN THE SAME

SPECIALTY AND ALL THAT.

THOSE AREN'T INCORPORATED IN THE

RULES OF EVIDENCE, ARE THEY?

>> THEY ARE -- THEY HAVE NOT

BEEN ADOPTED AS A RULE.

>> SO WHY ARE WE, EXCEPT THAT WE

ASKED YOU TO LOOK AT IT, WHY ARE

WE PICKING OUT ONE OF TWELVE

SUBSECTIONS TO SAY THAT'S GOING

TO BE IN THE RULE OF EVIDENCE?

IT SEEMS LIKE IT COULD BE

MISLEADING.

>> BECAUSE THE COURT DID ASK US

TO LOOK AT IT --

>> WE ASKED YOU TO LOOK AT IT, I

MEAN, ASSUMING WE ASKED -- ADOPT

IT OR JUST LOOK AT IT?

>> NO, EVALUATE IT AND DETERMINE

WHETHER IT INVOLVES PROCEDURAL

MATTERS --

>> WHO DID THAT?

[LAUGHTER]

>> I HAVE THE LETTER HERE.

[LAUGHTER]

>> I ASSUME THAT SOMEONE ELSE IS

GOING TO DISCUSS THE OPPOSITE

VIEW OF THIS, EVEN THE

COMMITTEE'S OPPOSITE VIEW?

YOU'RE BRINGING US THE

COMMITTEE'S VIEW WHICH IS TO

ADOPT IT TO THE EXTENT THAT IT'S

PROCEDURAL.

>> YES, YOUR HONOR.

>> OKAY.

AND SO I ASSUME --

>> YES.

AND I WOULD LIKE TO RESERVE SOME

TIME FOR REBUTTAL, SO I'LL TURN

OVER THE PODIUM.

>> GOOD MORNING, YOUR HONORS.

DAVID BUCKNER FROM GROSSMAN ROTH

IN MIAMI ALONG WITH MY

CO-COUNSEL.

WE ARE GOING TO TAKE THE

OPPOSING VIEW.

WE ARE NOT ON THE COMMITTEE,

JUST SO THE COURT KNOWS, BUT

WE'VE COME AMONG THE COMMENTERS

TO OPPOSE THE ADOPTION OF

102-12, AND THERE ARE THREE

BASES.

AND THEN MY CO-COUNSEL IS GOING

TO TALK ABOUT SOME OF THE

PRACTICAL ISSUES.

FIRST, THIS RULE, THIS STATUTE

IS NOT AN APPROPRIATE RULE OF

EVIDENCE.

SECOND, THERE ARE SIGNIFICANT

CONSTITUTIONAL CONSIDERATIONS.

AND THIRD, THE PRECEDENT OF THIS

COURT ARGUES STRONGLY FOR NOT

ADOPTING THIS AS A RULE OF

EVIDENCE.

FIRST, I THINK WE CAN ALL AGREE

AS A GENERAL RULE THAT THE RULES

OF EVIDENCE EXIST TO DO
PRIMARILY TWO THINGS: MAKE SURE
THAT THE EVIDENCE THAT COMES
BEFORE FINDERS OF FACT IS
SUFFICIENTLY RELIABLE AND THAT
IT'S PROBATIVE.
THIS RULE DOESN'T DO THAT.
THERE'S BEEN NO FINDING ANYWHERE
IN THE LEGISLATIVE HISTORY WITH
REGARD TO THIS PARTICULAR
STATUTE THAT THERE IS A PROBLEM
ANYWHERE WITH OUT-OF-STATE
PHYSICIANS TESTIFYING
UNTRUTHFULLY.
AND THEY'D BE HARD PRESSED TO
COME UP WITH ANY SUCH EVIDENCE
BECAUSE IT'S SUCH A BLANKET
RULE.
THE HISTORY OF THE COURT IS TO
THE CONTRARY.
ON MONTGOMERY V. STARR FROM
1955, THIS COURT EXPOUNDED ON
THE VIRTUES OF HAVING

OUT-OF-STATE PHYSICIANS COME IN
AND TESTIFY IN MEDICAL
MALPRACTICE ISSUES NOW THAT
THERE IS MORE OF A NATIONAL
PRACTICE OF MEDICINE, AND THAT
WAS AS FAR BACK AS 1955.
THIS LEGISLATION, YOUR HONORS,
IS NOT AN APPROPRIATE RULE OF
EVIDENCE BECAUSE IT DOESN'T
SERVE AN EVIDENTIARY PURPOSE.
IT DOESN'T INCREASE THE QUALITY
OF THE EVIDENCE COMING BEFORE
THE JURIES IN FLORIDA.
WHAT IT DOES --
>> TO THE EXTENT THAT IT IS
SIMPLY TO CONFIRM THE STATUS OF
THE EXPERT WITNESS AS A LICENSED
PHYSICIAN --
>> YES, SIR.
>> -- I DON'T UNDERSTAND WHY IT
DOESN'T SERVE AN EVIDENTIARY
PURPOSE.
>> WELL, FIRST OF ALL, I DON'T

THINK THAT'S THE LEGISLATURE'S
PURPOSE.
IF YOU LOOK AT THE LEGISLATIVE
HISTORY, I THINK THAT THE
LEGISLATURE'S PURPOSE WAS TO
SUBJECT OUT-OF-STATE PHYSICIANS
TO DISCIPLINE, AND I THINK THAT
PURPOSE WAS DESIGNED TO
DISCOURAGE OUT-OF-STATE
PHYSICIANS FROM COMING TO
TESTIFY IN FLORIDA.
BUT TO ANSWER YOUR QUESTION
DIRECTLY, SIR, THE FACT IS THERE
ARE RULES OF EVIDENCE, AND THE
COURTS OF THIS STATE ARE THE
AUTHORITY TO EXCLUDE WITNESSES
THAT DON'T MEET EVIDENTIARY
CRITERIA.
FOR EXAMPLE, THE EXISTING RULE
OF EVIDENCE REGARDING EXPERT
90.702 VESTS WITH THE TRIAL
COURTS AT THE FIRST CUT THE
ABILITY TO DECIDE WHETHER A

WITNESS IS APPROPRIATELY

QUALIFIED TO TESTIFY.

AND THAT'S PART OF THE PROBLEM

WITH THIS STATUTE IF IT'S

ADOPTED AS A RULE OF EVIDENCE.

AND PERHAPS STANDING ALONE.

IT YOU USURP FROM THE COURTS OF

THIS STATE THE AUTHORITY TO DO

WHAT THEY ARE SUPPOSED TO DO

UNDER ARTICLE V, MAKE

DETERMINATIONS ABOUT WHAT

EVIDENCE COMES BEFORE A JURY,

AND THEY DO IT IN A BLANKET

FIRST OF ALL.

BUT THE ADOPTION OF THE RULE

TAKES FROM THE COURT AND GIVES

TO THE COUNTY OF HEALTH THE --

THE DEPARTMENT OF HEALTH THE

DETERMINATION WITH REGARD TO THE

CERTIFICATE CAN MEET THAT

CRITERIA, CAN GET THE

CERTIFICATE AND, THEREFORE, COME

BEFORE A COURT AND TESTIFY AS AN

EXPERT AND LEAVES WITH THE
DEPARTMENT OF HEALTH THE ABILITY
TO RESCIND THE CERTIFICATE
THEREBY GIVING THE COUNTY OF
HEALTH, AS YOU KNOW AN EXECUTIVE
BRANCH AGENCY, ESSENTIALLY A
VETO OVER EVIDENCE THAT CAN COME
BEFORE TRIAL COURTS IN THIS
STATE.
>> IS THERE ANY -- I GUESS WE
DON'T HAVE IN THIS RECORD WHAT
MR. SHULTS HAS SAID THAT IT'S
REALLY JUST A PRO FORMA THING.
YOU SHOW YOUR LICENSE, YOU'RE
LICENSED IN ILLINOIS, YOU SHOW
THAT, AND YOU GET THE
CERTIFICATE.
THERE ISN'T ANY DISCRETION.
DO WE HAVE ANYTHING IN THIS
RECORD TO KNOW IF IT HAD BEEN
APPLIED IN WHAT WOULD BE AN
APPROPRIATE WAY TO TAKE EXPERTS
THAT ARE ASSISTING PLAINTIFFS

AND BAR THEM FROM TESTIFYING?

>> THERE'S NOTHING IN THE RECORD OF THAT, YOUR HONOR, AND I THINK THAT'S LARGELY BECAUSE, A, THE RECORD IS UNDEVELOPED, IN FAIRNESS.

AND, B, IT HASN'T BEEN IN FORCE FOR A PERIOD OF TIME.

BUT I THINK THAT IGNORES ANOTHER SIGNIFICANT NEGATIVE EFFECT OF THIS STATUTE AND CERTAINLY AS ADOPTED AS A RULE WHICH IS WE DON'T KNOW HOW MANY EXPERTS FROM OUT OF STATE HAVE REFUSED TO COME IN AND BE CERTIFIED AND TESTIFY AS EXPERTS IN FLORIDA BECAUSE OF THE RISK OF BEING SUBJECTED TO DISCIPLINE BY THE DEPARTMENT OF HEALTH, BECAUSE OF THE RISK OF, FRANKLY, RETRIBUTIVE DISCIPLINE BECAUSE DOCTORS IN FLORIDA DON'T LIKE OUT-OF-STATE PHYSICIANS COMING

IN.

MY CO-COUNSEL WILL SPEAK MORE TO

THIS POINT, BUT IT IS MUCH MORE

DIFFICULT TO FIND AN EXPERT IN

FLORIDA ON A MEDICAL MALPRACTICE

CASE TO TESTIFY AGAINST OTHER

FLORIDA PHYSICIANS, AND THAT IS

OFTEN WHY PLAINTIFFS GO OUT OF

STATE TO FIND THEIR EXPERT.

I WOULD ALSO --

>> COULD I ASK ONE QUESTION?

>> YES, SIR.

>> I'M NOT AWARE OF ANY

REQUIREMENT THAT OUR PROFESSORS

IN OUR MEDICAL SCHOOLS BE

SPECIFICALLY LICENSED IN THE

STATE OF FLORIDA.

ARE THEY?

>> YOUR HONOR, I DON'T KNOW THE

ANSWER TO THAT QUESTION.

THEY MAY WELL NOT BE, I DON'T

KNOW.

>> WELL, I'VE RUN INTO EXPERTS

THAT HAVE BEEN PROFESSORS AND IN
THE PAST HAVE NOT BEEN LICENSED
IN FLORIDA, BUT HAVE BEEN
LICENSED IN OTHER STATES.
SO IT'S NOT NECESSARILY WE'RE
LIMITED TO FOLKS FROM OUT OF
STATE.
IT COULD BE OUR LEADING EXPERTS
IN THE STATE OF FLORIDA --
>> IT COULD WELL BE.
>> -- COULD BE PROHIBITED.
WELL, OKAY.
I DON'T WANT TO TAKE THAT ROUTE
IF THAT'S INCORRECT, BUT IT
SEEMS TO ME THAT WOULD BE THOSE
WHO ARE TEACHING THE STANDARD OF
CARE WOULD THEN, IN FACT, BE
ELIMINATED UNLESS THEY GO
THROUGH THE EXECUTIVE BRANCH
AGENCY.
>> RIGHT.
AND BE WILLING TO SUBJECT
THEMSELVES WHICH, I THINK, IS NO

SMALL THING.

AND I THINK IT'S WORTH

MENTIONING FRANKLY, YOUR HONORS,

THAT THERE ARE CERTAINLY MORE

NOBEL PRIZE WINNERS IN MEDICINE

LIVING OUTSIDE FLORIDA THAN

THERE ARE INSIDE.

I THINK THIS IS QUITE TO THE

CONTRARY, AND THIS GOES TO MY

FIRST POINT.

THE REASON THIS IS NOT AN

APPROPRIATE RULE OF EVIDENCE IS

IT HAS THE OPPOSITE EFFECT.

IT DOESN'T INCREASE THE QUALITY

OF EVIDENCE COMING INTO COURTS,

IT THREATENS TO DECREASE --

>> ISN'T THERE ALSO SUBSECTION 5

SEEMS TO ALREADY COVER THE

CONCERN.

AND THAT'S NOT A RULE OF

EVIDENCE, BUT IT'S A STATUTE.

IT SAYS A PERSON MAY NOT GIVE

TESTIMONY, EXPERT TESTIMONY

CONSIDERING THE PREVAILING
PROFESSIONAL STANDARD OF CARE
UNLESS THE PERSON IS A HEALTH
CARE PROVIDER WHO HOLDS AN
ACTIVE AND VALID LICENSE.
SO THAT WOULD, IF SOMEBODY WANTS
TO CHALLENGE AN EXPERT ON THE
GROUNDS THAT THEY ARE NOT, DON'T
HAVE A VALID LICENSE, SUBSECTION
5 ALREADY DEALS WITH THAT.
>> THAT'S RIGHT, YOUR HONOR.
>> IS THAT CORRECT?
>> I THINK THAT'S CORRECT.
>> AND NONE OF THE OTHER
SUBSECTIONS OF 766.102 WHICH I
ASSUME CAN BE USED BY EITHER
SIDE TO TRY TO PREVENT AN EXPERT
FROM TESTIFYING ARE INCORPORATED
IN THE RULES OF EVIDENCE.
SO WE'D BE PICKING OUT ONE
SUBSECTION OF 12 --
>> THAT'S RIGHT.
>> -- TO HIGHLIGHT.

>> THAT'S RIGHT.

AND AGAIN, LEAVING THINGS AS

THEY STAND NOW WHICH IS NOT

ADOPTING 74.102-12 AS A RULE OF

EVIDENCE LEAVES TO THE COURT THE

TRADITIONAL FUNCTION OF DECIDING

WHO IS APPROPRIATE AS AN EXPERT

WITNESS TO COME AS A FINDER OF

FACT.

THE PROBLEM WITH 766.102-12 IS

IT TAKES THAT AWAY FROM THE

COURTS, IN OUR ARGUMENT

UNCONSTITUTIONALLY, AND GIVES

IT --

[INAUDIBLE CONVERSATIONS]

>> YEAH, GO AHEAD.

>> BUT IN THE FACE OF THAT

STATUTE, IF SOMEONE, AN

OUT-OF-STATE EXPERT IS AWKWARD

IN A MEDICAL-MAL CASE AND DOES

NOT HAVE A CERTIFICATE, WHAT

WOULD A COURT DO?

>> YOU KNOW, I THINK THAT'S AN

INTERESTING QUESTION BECAUSE OF
EXACTLY WHAT MR. SHULTS POINTED
OUT WHICH IS BY REPEALING 766,
THE SUBSECTION 14 WHICH LEFT TO
THE COURTS THE DISCRETION TO
DECIDE WHETHER OR NOT A
PARTICULAR EXPERT CAN COME IN
AND TESTIFY BEFORE A JURY EVEN
IF THEY DIDN'T HAVE THEIR
CERTIFICATE, BASICALLY FOLLOWING
THE TRADITIONAL RULES, THAT FAIL
SAFE, I'LL CALL IT, IS NOW
APPARENTLY GOING TO BE GONE.
AND I APPRECIATE MR. SHULTS, HE
CALLED ME LAST WEEK AND TOLD ME
THAT.
I, FRANKLY, WASN'T AWARE.
I THINK THAT ACTUALLY RAISES THE
UNCONSTITUTIONAL SPECTER OF THIS
ENTIRE PIECE OF LEGISLATION --
>> BUT THAT CAN BE DONE IN A
CASE IN CONTROVERSY.
>> EXACTLY.

>> THEORETICALLY OR NOT, OR
ACTUALLY IF 14 IS REPEALED --
IT WOULD SEEM A JUDGE WOULD
REALLY NOT HAVE DISCRETION IN
EXCLUDING.
AND WHETHER THERE'S A CHALLENGE
TO THAT, YOU KNOW, YOU'D HAVE
TO -- WHAT WOULD BE THE -- I
MEAN, I GUESS THE QUESTION I
HAVE IS WHAT WOULD BE THE
CONSTITUTIONAL ARGUMENT THAT YOU
WOULD MAKE IF, IN A CIVIL CASE,
IN A MEDICAL MALPRACTICE CASE?
WHAT WOULD BE THE CONSTITUTIONAL
PROBLEM?
>> OH, I CAN THINK OF A FEW.
FIRST, I THINK THERE'S A
SEPARATION OF POWERS ISSUE ALONG
THE LINES OF WHAT I DESCRIBED
BEFORE.
I THINK THERE'S POTENTIALLY A
DORMANT COMMERCE CLAUSE PROBLEM.
IN-STATE, LICENSED BEINGS CAN

COME IN AND TESTIFY BEFORE

THE -- OUT-OF-STATE PHYSICIANS

HAVE TO FILE AN APPLICATION, PAY

A FEE, BE APPROVED TO BEING

SUBJECT TO BEING DISAPPROVED

UNDER CRITERIA THAT, FRANKLY,

AREN'T ENTIRELY CLEAR.

>> SAY SOMEONE FROM OUT OF STATE

GETS A CERTIFICATE.

HOW LONG A PERIOD OF TIME IS IT

GOOD FOR?

I MEAN, IF A YEAR LATER THIS

SAME PERSON WANTS TO COME AND BE

A WITNESS IN A CASE, DO THEY

HAVE TO GO THROUGH THAT

CERTIFICATE PROCESS AGAIN?

>> I'M GOING FROM MEMORY HERE,

BUT I BELIEVE IT'S TWO YEARS

THAT THE CERTIFICATE IS GOOD

FOR.

AND I'M SURE COUNSEL WILL

CORRECT ME IF I'M WRONG, BUT I

BELIEVE IT'S TWO YEARS.

BUT AGAIN, THE PHYSICIAN COMING
IN FROM OUT OF STATE IS NOW
BURDENED WITH HAVING TO GO
THROUGH THIS PROCESS AND TO HAVE
TO GO THROUGH THIS PROCESS EVERY
TWO YEARS AND TO BE SUBJECT TO
HAVING THEIR CERTIFICATE PULLED
AT THE DISCRETION OF THE
DEPARTMENT OF HEALTH, LIKE I
SAID, UNDER CRITERIA THAT,
FRANKLY, ARE NOT ENTIRELY CLEAR.
THERE'S ALSO, I THINK, ACCESS TO
COURT CONSTITUTIONAL CONCERNS.
AS MY CO-COUNSEL'S GOING TO
POINT OUT, AND I SEE I'M RUNNING
OUT OF TIME, SO I WANT TO LEAVE
HIM SOME TIME TO DO THIS.
AS I SAID BEFORE, THERE'S NO
QUESTION THAT CERTAINLY IN
FLORIDA IN MEDICAL MALPRACTICE
CASES HAVE A HARDER TIME FINDING
EXPERTS.
AND TO THE EXTENT THAT THIS RULE

IS ADOPTED AS A RULE OF
EVIDENCE, IT'S GOING TO MAKE IT
HARDER STILL.
AND I THINK THAT RAISES CERTAIN
CONSTITUTIONAL QUESTIONS AS
WELL.
AND I WOULD, FOR MY THIRD POINT,
YOUR HONORS, THE STATUTE SHOULD
BE REJECTED BECAUSE, BECAUSE
THIS COURT'S PRECEDENT SPEAKS TO
THAT REJECTION.
THE 2000 DECISION OF THIS COURT
WITH REGARD TO THE RULES OF
EVIDENCE -- AND I WANT TO BE
CLEAR HERE -- THIS COURT SAID
TWO THINGS.
IT SAID, ONE, THAT IT HAD GRAVE
CONCERNS ABOUT THE
CONSTITUTIONALITY OF THE
AMENDMENT, AND IT SAID, TWO,
UNLIKE THE EXCEPTION TO THE
HEARSAY RULE TO THE EXTENT THEY
WERE PROCEDURAL WHEN THE

EVIDENCE CODE WAS FIRST ENACTED
AT 98-2 SECTION 1 IS NOT BASED
ON ESTABLISHED LAW, NOR MODELED
AFTER THE FEDERAL RULES OF
EVIDENCE.
BOTH OF THOSE POINTS APPLY IN
SPADES HERE.
THIS IS, FIRST OF ALL, A
CONSTITUTIONALLY-QUESTIONABLE
STATUTE TO BEGIN WITH AND
DOESN'T DESERVE TO BE PART OF
THE RULES OF EVIDENCE BECAUSE IT
DOESN'T ADVANCE THE CAUSE AND
QUALITY OF EVIDENCE.
BUT SECOND OF ALL, IT DOES NOT
LINE UP WITH ANY FEDERAL RULE OF
EVIDENCE, ANY COMMON LAW RULE OF
EVIDENCE.
IT IS UNPRECEDENTED WITH REGARD
TO EVIDENTIARY RULES.
AND WHILE THE 766.102-12 OR
OTHER PARTS OF THIS STATUTE MAY
EVENTUALLY COME BEFORE THIS

COURT ON A CONSTITUTIONAL
CHALLENGE, THAT IS A SEPARATE
QUESTION FROM WHETHER THIS COURT
SHOULD ADOPT IT AS A RULE OF
EVIDENCE.
GIVEN ALL OF THESE REASONS THAT
I'VE LAID OUT TODAY, THIS COURT
SHOULD NOT ADOPT IT AS A RULE OF
EVIDENCE AND LET THE
CONSTITUTIONAL QUESTION OF THE
STATUTE ITSELF COME BEFORE THE
COURT IN DUE TIME.
AND WITH THAT, I'M GOING TO
YIELD TO MY CO-COUNSEL.
THANK YOU, YOUR HONORS.
>> THANK YOU.
>> GOOD MORNING.
MAY IT PLEASE THE COURT, MY NAME
IS SEAN DOMNICK FROM PALM BEACH
GARDENS, AND I SPEAK AGAINST THE
COURT'S ADOPTION OF THIS RULE.
JUSTICE PARIENTE, TO DIRECTLY
ADDRESS -- I WAS ACROSS THE

STREET WHEN SAUSAGE WAS BEING
MADE, AND IT IS NOT THE DENYING
PURPOSE OF IT TO JUST HAVE A
LICENSE CHECK.
THE PURPOSE OF THIS STATUTE IS
TO MAKE IT HARDER FOR PLAINTIFFS
TO PURSUE MEDICAL MALPRACTICE
CASES.
THAT IS WHY IT IS LIMITED TO
MEDICAL MALPRACTICE CASES AND
NOT TO THE OTHER TYPES OF EXPERT
TESTIMONY THAT MIGHT BE OUT
THERE.
I HAVE, IN DEPOSITION, SWORN
TESTIMONY OF DR. LEONITIS, A
CARDIOTHORACIC SURGEON AT THE
UNIVERSITY OF MIAMI, DR. KIM --
[INAUDIBLE]
FROM THE UNIVERSITY OF FLORIDA,
ATTORNEY KEN GARLAND GAVE ME THE
TESTIMONY OF AN ONCOLOGIST DOWN
IN MIAMI.
ALL OF THESE WHO ARE AFFILIATED

WITH OUR FINEST TEACHING

INSTITUTIONS IN THE STATE OF

FLORIDA, ALL OF WHOM HAVE

CONFIRMED THAT THEY ARE NOT

ALLOWED TO TESTIFY ON BEHALF OF

PLAINTIFFS IN THE STATE OF

FLORIDA.

THEY ARE ALLOWED TO TESTIFY ON

BEHALF OF DEFENDANTS.

SO IF PLAINTIFFS WANT TO GO

OUT --

>> WHAT DOES THAT MEAN?

WHAT DO YOU MEAN THEY'RE NOT

ALLOWED?

>> THEY ARE FORBIDDEN --

>> BY THEIR INSTITUTIONS?

>> BY THEIR INSTITUTIONS.

>> SO YOU'RE SAYING THAT MAKES

IT MORE DIFFICULT TO OBTAIN

IN-STATE TESTIMONY.

>> IT MAKES IT VERY DIFFICULT

FOR THE PLAINTIFF TO OBTAIN

IN-STATE TESTIMONY --

>> THEIR INSTITUTION, I MEAN,
THERE'S SWORN TESTIMONY THAT THE
INSTITUTIONS ACTUALLY SAY YOU
SHALL NOT DO THIS?
>> RIGHT.
THEY SHOULD NOT DO IT, THEY HAVE
TO GO THROUGH A PROCESS IN ORDER
TO DO IT.
I HAD A CASE MYSELF WHERE I HAD
AN EXPERT FROM THE -- WHO HAD
BEEN WORKING WITH ME FOR SEVERAL
YEARS, AND THEN HE JOINED UP AT
THE UNIVERSITY OF SOUTH FLORIDA,
AND A WEEK BEFORE TRIAL I GOT A
PHONE CALL FROM HIM SAYING THAT
THEY HAD TOLD HIM THEY DIDN'T
WANT HIM TESTIFYING ON BEHALF --
>> BUT THIS IS ALL IN SUPPORT OF
THE IDEA WHY THERE'S A NECESSITY
FOR OUT --
>> ABSOLUTELY, YOUR HONOR.
AND IN ORDER FOR US, FOR THE
PLAINTIFFS TO HAVE A BALANCED

FIELD AND GET SIMILAR QUALITY OF
TESTIMONY, WE NEED TO BE ABLE TO
GET TO EXPERTS FROM DUKE,
VANDERBILT, HARVARD, STANFORD OR
WHEREVER IT MIGHT BE.
AND THAT'S OFTEN WHERE THE
LEADING EXPERTS ON THESE
PARTICULAR SUBJECTS ARE.
AND AS I TELL MY CLIENTS, THESE
FOLKS ARE NOT JUST SITTING
AROUND SAYING, GEE, I HOPE THAT
SEAN DOMNICK'S GOING TO SEND ME
SOME RECORDS TODAY TO REVIEW.
THESE ARE FOLKS WITH ACTIVE
PRACTICES TAKING CARE OF
PATIENTS --
>> WELL, THAT'S ALL VERY
INTERESTING, BUT THEY STILL,
UNDER THE STATUTE WHETHER WE
ADOPT IT OR NOT, THEY STILL ARE
FACED WITH THE ARGUMENT THAT
THEY CAN'T TESTIFY UNLESS THEY
HAVE A CERTIFICATE.

SO THIS IS STILL GOING TO BE A

CASE IN CONTROVERSY SITUATION.

YOU AGREE WITH THAT.

>> OH, ABSOLUTELY.

THERE HAS TO BE A CASE IN

CONTROVERSY SITUATION TO DO IT.

THE QUESTION HERE TODAY IS

WHETHER THE COURT SHOULD ADOPT

THIS AS A PROCEDURAL RULE AND DO

AWAY WITH, FOR EXAMPLE, THE

ARTICLE V IMPLICATIONS THAT

MIGHT BE HERE AND WHETHER IT'S

WISE FOR THIS COURT TO ADOPT

THIS TYPE OF RULE THAT HAS SO

MANY CONSTITUTIONAL INFIRMITIES

THAT ARE OUT THERE THAT NEED TO

HAVE --

>> LET ME ASK YOU THIS ABOUT

THIS RULE.

I MEAN, IT SEEMS ON THE SURFACE

VERY SIMPLE, THAT AN

OUT-OF-STATE PHYSICIAN WHO WANTS

TO TESTIFY IN ONE OF THESE

MEDICAL-MAL FILL OUT THIS FORM,
SAY THEY'RE LICENSED WHEREVER
THEY'RE LICENSED, PAY $50, AND
THEY'RE ALLOWED TO TESTIFY.
WHAT IS SO ONEROUS ABOUT THAT?
>> WELL, THE PROBLEM IS WHEN YOU
PEEL BACK THE ONION AND YOU LOOK
AT THE TRUTH AND YOU SEE WHAT IT
IS THAT'S BEEN GOING ON AROUND
THE COUNTRY FOR THE LAST 10 OR
15 YEARS WITH REGARD TO MEDICAL
SOCIETIES THAT ARE POLICING
THEMSELVES AND GOING AFTER FOLKS
WHO ARE TESTIFYING IN MEDICAL
MALPRACTICE CASES, AND THE LAST
TIME I LOOKED AT THE STATISTICS
ACROSS THE COUNTRY, THESE
MEDICAL SOCIETIES HAD GONE AFTER
OVER 50 EXPERTS WHO HAD
TESTIFIED ON BEHALF OF
PLAINTIFFS AND LESS THAN A
HANDFUL WHO HAD TESTIFIED ON
BEHALF OF THE --

>> I MEAN, I WOULD THINK THAT WE
WOULD WANT PEOPLE WHO TESTIFY
NOT TO TESTIFY FRAUDULENTLY.
>> ABSOLUTELY.
>> AND SO IF THAT'S THE CRITERIA
THAT YOUR CERTIFICATE IS REVOKED
IF IT'S FOUND THAT YOU HAVE BEEN
TESTIFYING FRAUDULENTLY, I'M
STILL HAVING A HARD TIME TRYING
TO FIGURE OUT WHAT IS SO BAD
WITH THIS.
>> WELL, IT'S A MATTER OF WHO IT
IS THAT'S MAKING THE
DETERMINATION, THE FACT THAT THE
CRITERIA FOR IT ARE PRETTY VAGUE
AND AMBIGUOUS WITH REGARD TO
IT --
>> AND IT'S STILL THE DEPARTMENT
OF HEALTH.
>> YES.
IT'S A SOLUTION TO A PROBLEM
THAT DOES NOT EXIST.
THERE IS ABSOLUTELY NO FINDING

IN ANY OF THE STATUTORY LANGUAGE
THAT YOU CAN FIND THAT THIS IS A
PROBLEM.
THIS CERTAINLY ISN'T COMING UP
FROM THE JUDGES WHO ARE ON THE
GROUND TRYING CASES SAYING,
GOING TO THE LEGISLATURE SAYING
WE ARE HAVING DIFFICULTY WITH
FRAUDULENT TESTIMONY IN THESE
CASES OR SAYING TO THE COURT
THAT WE'RE HAVING TROUBLE IN
EXERCISING THE INHERENT
AUTHORITY OF THE COURT IN ORDER
TO DO THIS TYPE OF DISCIPLINE.
THEY ARE MORE THAN CAPABLE OF
POLICING THEMSELVES IN THE
COURTS, AND THEY HAVE DONE A
GOOD JOB OF IT.
AND, JUSTICE LEWIS, YOU HAD
ASKED A QUESTION EARLIER.
WHEN YOU WERE SERVING AS CHIEF
JUSTICE, YOU SENT AROUND A
LETTER BACK IN NOVEMBER OF 2007

THAT SAID, ASKING THE COMMITTEES
TO MAKE AN INDEPENDENT
DETERMINATION AS TO WHETHER A
PROCEDURAL RULE CHANGE IS NEEDED
IN RESPONSE TO THE NEW
LEGISLATION.
AND IF THE COMMITTEE DETERMINES
A RULE CHANGE IS NECESSARY, THE
COMMITTEE'S PROPOSAL TO THE
COURT SHOULD NOT MERELY RESTATE
THE LEGISLATION IN THE FORM OF A
RULE.
YOU ATTEMPTED TO GIVE GUIDANCE
TO THE COMMITTEE.
THAT CLEARLY HAS NOT HAPPENED IN
THIS CIRCUMSTANCE --
>> WAIT.
YOU'RE MISINTERPRETING THE
PURPOSE OF THE LETTER.
AND THOSE ARE STANDARD LETTERS.
THERE'S NO MAGIC TO A LETTER I
MAY HAVE SENT OUT AND WHAT IT
WAS DESIGNED FOR SO THAT WE

DON'T FILL OUR BOOKS WITH A NEW

RULE FOR EVERY STATUTE THAT'S

PASSED.

I MEAN, WE COULD CERTAINLY DO

THAT.

SO, PLEASE, DON'T TAKE THAT

LETTER AS, I MEAN, A STANDARD --

EVERY CHIEF JUSTICE HAS SENT OUT

THOSE KINDS OF LETTERS; DO WE

NEED A CHANGE, THIS IS THE

NEW -- THAT'S THE PURPOSE OF

THAT LETTER.

>> CORRECT.

>> SO I DON'T THINK YOU SHOULD

TAKE THAT AND TRY TO RUN WITH

THAT AS AN ARGUMENT.

>> I APOLOGIZE.

>> OKAY.

>> MY POINT IS SIMPLY THAT WHEN,

IF YOU LOOK AT THE MINUTES OF

THE MEETING WHERE THE

SUBCOMMITTEE ADDRESSED THIS

ISSUE, I THINK AS MR. SHULTS

SAID, THE PURPOSE OF WHAT THEY
WERE TRYING TO DO WAS TO AVOID
ARTICLE V ISSUES.
AND RATHER THAN LOOKING AT A
PROCEDURAL ASPECT OF IT, ARE
THERE PROCEDURAL ASPECTS OF IT,
IT IS LET'S JUST ADOPT THIS TO
THE EXTENT THAT IT'S PROCEDURAL
LEAVING SOME VAGUENESS FOR US AS
PRACTITIONERS TO KNOW WHAT IS
SUBSTANTIVE WITH REGARD TO THAT.
THAT'S THE PRIMARY PURPOSE.
WHEN IT WENDED ITS WAY ITS WAY
THROUGH THE SYSTEM, THE TRIAL
LAWYER SECTION OF THE FLORIDA
BAR WHICH IS MADE UP OF 50/50
PLAINTIFFS AND DEFENSE LAWYERS
APPROXIMATELY VOTED AGAINST THE
COURT ADOPTING THIS AS A RULE,
THE BOARD OF GOVERNORS VOTED
AGAINST ADOPTING THIS AS A RULE.
AND WITH PRESIDENT-ELECT PETTIS
WHOSE FIRM DOES BOTH PLAINTIFFS

AND DEFENSE ACKNOWLEDGING IN THE
MINUTES THE DIFFICULTIES THAT
PLAINTIFFS HAVE IN OBTAINING
EXPERT WITNESSES VERSUS THE
DIFFICULTIES THAT DEFENDANTS
HAVE --
>> COULD I ASK ONE QUESTION?
>> CERTAINLY.
>> IN THIS MIX, IT APPEARS --
AND WE'VE HAD RECENT CASES WHERE
IT'S BEEN AN ISSUE, IN EVIDENCE
AT THE TRIAL COURT PROFFERED OF
DEFENSE LAWYERS IN THIS ARENA
SENDING, FOR LACK OF A BETTER
TERM, A MEDICAL EXAMINER OR
OTHER MEDICAL PROFESSIONALS TO
THEIR RESPECTIVE BOARDS FOR
DISCIPLINE BASED UPON THEIR
TESTIMONY IN MALPRACTICE CASES.
SO IS THIS, IS THIS AN ATTEMPT
TO SOMEHOW JUST CREATE ANOTHER,
ANOTHER POSSIBILITY SO NOW WE
CAN SEND EVERYBODY TO MEDICAL

BOARDS WHO'S GOING TO BE A

WITNESS IN A CASE IN FLORIDA?

I'M --

>> YES.

I DON'T THINK THERE IS ANY

DOUBT, JUSTICE LEWIS, THAT THE

PURPOSE OF THIS IS TO MAKE IT

MORE DIFFICULT FOR PLAINTIFFS TO

GET EXPERTS, DESPITE THE FACT

THAT WE KNOW FROM THE TESTIMONY

IN FRONT OF THE LEGISLATURE ON

SOME OF THE OTHER BILLS THAT

HAVE BEEN COMING UP OVER THE

LAST FEW YEARS THAT, FOR

EXAMPLE, FROM BOB WHITE WHO'S

THE HEAD OF ONE OF THE LARGE

MEDICAL MALPRACTICE INSURERS

HERE THAT SINCE THE ADVENT OF

THE AFFIDAVIT REQUIREMENT IN

CASES THAT FRIVOLOUS LAWSUITS

AND MEDICAL MALPRACTICE CASES

ARE NOT AN ISSUE OUT THERE.

BUT IT IS, NEVERTHELESS, AN

EFFORT TO PREVENT AND MAKE IT
MORE DIFFICULT FOR PLAINTIFFS TO
HAVE ACCESS TO THE COURT.
SO THERE IS A REAL ACCESS TO THE
COURT ISSUE THAT WE HAVE HERE,
AND THERE'S ANOTHER INTERESTING
THING --
>> BUT IS YOUR BASIC POSITION
THAT THIS, THAT THE STATUTE IS
PROCEDURAL?
>> NO.
I THINK THAT THE STATUTE HAS, IS
SUBSTANTIVE.
AND I'M NOT --
>> WELL, WHAT IS YOUR POSITION
ON WHETHER THE STATUTE IS
PROCEDURAL?
IT'S NOT PROCEDURAL?
>> I THINK THAT THE VAST
MAJORITY OF THE STATUTE IS
SUBSTANTIVE.
THERE MAY BE SOME PROCEDURAL
PARTS OF IT, BUT I'M NOT SURE

WHAT THEY WERE.

THEY WEREN'T DEFINED IN HERE,

AND THAT'S PART OF THE PROBLEM.

THAT WHEN, IN MY OPINION,

JUSTICE CANADY, THAT WE ARE

LOOKING AT THIS TO TRY AND MAKE

A DETERMINATION OF WHAT MIGHT BE

PROCEDURAL AND WHAT MIGHT NOT BE

PROCEDURAL MOVING FORWARD --

>> OKAY, THE STRONGEST ARGUMENT

IN A CONTEXT LIKE THIS IS THAT

THIS REALLY IS PROCEDURAL.

AND THE COURT NEEDS TO MAKE A

POLICY JUDGMENT ABOUT WHETHER

IT'S THE RIGHT THING TO DO OR

NOT.

AND THAT, BUT THAT'S DIFFERENT

THAN WHAT YOU'RE -- YOU'RE NOT

REALLY ARGUING THAT.

>> WELL, I THINK THAT IT'S

OBVIOUSLY A HYBRID STATUTE.

I THINK THERE ARE PROCEDURAL

ASPECTS TO IT.

ONE COULD LOOK AT SUCH AS
CHECKING ON THE LICENSE, THINGS
LIKE THAT.
AND THAT DOES CLEARLY INVADE IN
THE TYPICAL PROVINCE OF THE
COURT'S RIGHTS AS OPPOSED TO THE
LEGISLATURE.
>> WHAT ABOUT THE UNDERLYING
STATUTE HERE THAT REQUIRES THAT
THE EXPERTS BE LICENSED
MEDICAL -- IS THAT PROCEDURAL OR
SUBSTANTIVE?
>> UM --
>> IS A CASE DECIDED --
>> I'M NOT AWARE OF A CASE
THAT'S DECIDED IT, AND I HAVEN'T
REALLY ANALYZED THAT.
I'M NOT AWARE OF A CASE THAT'S
OUT THERE.
I REALLY THINK IN PRACTICAL
TERMS THE VAST, VAST MAJORITY OF
EXPERTS THAT WE GO OUT THERE AND
LOOK AT WITH REGARD TO THESE

CASES ARE LICENSED, SO IT'S

NOT -- IT DOESN'T HAVE THE

PRACTICAL IMPLICATIONS AND

OBSTACLES IN ACCESS TO THE COURT

THAT THIS DOES.

AND IF YOU LOOK AT .3175 WHICH

IS THE EXPERT WITNESS

CERTIFICATE RULE, INTERESTINGLY,

IT TALKS ABOUT LICENSE TO

PRACTICE MEDICINE IN ANOTHER

STATE OR PROVINCE OF CANADA TO

PROVIDE EXPERT TESTIMONY.

WHAT ABOUT THE REST OF THE

WORLD?

WHAT ABOUT EXPERTS WHO ARE

LEADING IN THE WORLD IN ITALY OR

ENGLAND OR WHEREVER IT IS THAT

THEY MIGHT BE?

WHAT LIMBO ARE THEY IN?

>> WELL, THIS, AS I UNDERSTOOD

IT, WAS A STANDARD OF CARE

ISSUE.

>> CORRECT.

>> SO BY DEFINITION, IT BECOMES

SELF-LIMITING.

WE'VE EXPANDED.

IT USED TO BE STANDARD OF CARE

LOCAL ARGUMENTS, NATIONAL

EXPANDING.

WHY WOULD THAT NOT BE THE CASE

IS THAT THIS IS NOT A WORLD

STANDARD.

I'VE NOT SEEN A JURY INSTRUCTION

ON THAT ISSUE TO UPHOLD YOUR

POSITION.

>> WELL, AS YOU RECOGNIZE, WE

ARE NOW A MUCH BROADER SOCIETY

THAN WE WERE MANY YEARS AGO, AND

PARTICULARLY HERE IN FLORIDA WE

HAVE A LARGE INFLUX OF DOCTORS

THAT WERE TRAINED OUTSIDE OF THE

STATE OF FLORIDA AND, INDEED,

OUTSIDE OF THE UNITED STATES.

AND WE HAVE DOCTORS WHO WERE

TRAINED HERE WHO GO AND STUDY

ABROAD, AND THE STANDARD OF CARE

IS NO LONGER THIS ISOLATED
CIRCUMSTANCE.
AND THERE ARE EXPERTS OUTSIDE OF
FLORIDA AND, INDEED, OUTSIDE OF
THE UNITED STATES THAT ARE ABLE
TO TESTIFY ABOUT THE STANDARD OF
CARE BECAUSE THEY'RE THE ONES
THAT ARE TRAINING THE DOCTORS
WHO ARE COMING BACK HERE TO
PRACTICE MEDICINE.
AND THAT IS WHY THE WAY THAT THE
RULES ARE NOW IT'S INHERENTLY UP
TO THE COURT TO BE ABLE TO VET
THROUGH THAT AND GO THROUGH THE
STANDARDS AND SEE WHETHER OR NOT
THAT PARTICULAR EXPERT HAS THE
PARTICULAR KNOWLEDGE TO BE ABLE
TO TESTIFY WITH REGARD TO THE
STANDARD OF CARE.
BUT THIS CERTIFICATE
CIRCUMSTANCE IS ENTIRELY SILENT
ABOUT THESE TYPES OF DOCTORS.
DOES THAT MEAN -- AND ESPECIALLY

WITH THE ABOLITION OF SUBSECTION 14 FROM 766.102, WHERE DOES THAT LEAVE US WITH THESE TYPES OF DOCTORS?

ARE WE ALLOWED TO USE THEM?

DOES THAT MEAN, NO, WE'RE NOT GOING TO DO IT WHICH THEN GOES EXACTLY TO WHAT MR. BUCKNER WAS TALKING ABOUT, THE RULES OF EVIDENCE ARE DESIGNED TO ENHANCE THE QUALITY OF TESTIMONY AS OPPOSED TO DETRACT FROM IT?

NOW WE CAN'T BRING IN THE BEST OF THE BEST SO THAT THE JURY CAN BE THE MOST INFORMED THEY CAN POSSIBLY --

>> WHAT WE DO HERE DOESN'T REALLY AFFECT ALL THOSE QUESTIONS.

THOSE QUESTIONS ARE STILL GOING TO EXIST.

WHAT WE WOULD DO IN THIS PROCEEDING IS ONLY GOING TO

AFFECT ONE THING SO FAR AS I CAN SEE, AND THAT WOULD BE YOUR ABILITY TO CLAIM THAT THIS STATUTE VIOLATES THE CONSTITUTION BECAUSE IT IS A PROCEDURAL PROVISION AND NOT A SUBSTANTIVE PROVISION.

ISN'T THAT CORRECT?

>> WELL, I THINK THAT THAT'S CLEARLY ONE OF THE MAIN THINGS THAT'S OUT THERE WITH REGARD TO THIS, BUT I ALSO THINK THAT --

>> I THOUGHT YOU SAID THAT REALLY WASN'T YOUR THEORY?

>> WHAT'S --

>> THAT IT'S PROCEDURAL.

>> NO, NO, NO.

MY THEORY IS THAT THERE ARE SUBSTANTIVE PORTIONS TO IT THAT ARE BAD, BUT THEY'RE PROCEDURAL TO THE EXTENT THAT THE COURT IS ADOPTING IT AS A PROCEDURAL MATTER.

THE SUBSTANTIVE ISSUES, AS
JUSTICE PARIENTE ACKNOWLEDGED,
THOSE ARE AWAITING A CASE IN
CONTROVERSY UNDER THE COURT'S
PRIOR RULINGS.
BUT THE QUESTION IS, ONE, DO YOU
WANT TO DO AWAY WITH THE ARTICLE
V TO THE EXTENT THAT IT'S
PROCEDURAL?
IF THERE ARE PROCEDURAL ASPECTS
TO IT, THEN EVERYTHING HERE IS
KIND OF BECOMING A MOOT POINT
FOR US, AND WHY ARE ANY OF US
HERE AT THE MOMENT?
I DON'T THINK THAT WE CAN JUST
BLITHELY MOVE OVER THAT.
BUT I THINK THIS COURT HAS AN
OBLIGATION IN MAKING ITS
DETERMINATIONS AS TO WHETHER OR
NOT IT'S GOING TO ADOPT A RULE
OF PROCEDURE TO CONSIDER THESE
OTHER IMPLICATIONS IN,
ESSENTIALLY, A BALANCING TEST

WHICH IS WHAT YOU DID WITH
REGARD TO THE PRIOR TESTIMONY
RULE.
AND IN A CIRCUMSTANCE WHERE
THERE'S REALLY NOT A COMPELLING
PURPOSE OR NEED FOR THAT
PROCEDURAL RULE AND BALANCED
AGAINST THE NUMEROUS
CONSTITUTIONAL INFIRMITIES, THIS
COURT SHOULD NOT ADOPT THAT AS
THIS IS A RULE OF PROCEDURE AND
SHOULD ALLOW FOR IT TO WORK ITS
WAY THROUGH THE NORMAL COURSE OF
LITIGATION TO ADDRESS.
THANK YOU.
>> THANK YOU FOR YOUR ARGUMENTS.
REBUTTAL?
>> YOUR HONORS, I WOULD LIKE TO
CITE ONE STATISTIC, AND THAT
STATISTIC IS 1,226.
THAT'S THE NUMBER OF EXPERT
WITNESS CERTIFICATES THAT HAVE
BEEN ISSUED BY THE DEPARTMENT OF

HEALTH AS OF FRIDAY MORNING

LAST.

THE ARGUMENTS THAT THIS IS

HAVING A CHILLING EFFECT ON

EXPERTS COMING TO FLORIDA TO

QUALIFY TO TESTIFY, UM, DOES NOT

BEAR THE WEIGHT OF THAT NUMBER.

JUSTICE LEWIS, IF YOU CHECK OUT

THE DEPARTMENT OF HEALTH'S WEB

SITE THAT ACTUALLY LISTS THE

NUMBER OF CERTIFICATES, IT ALSO

TELLS YOU WHERE THEY RESIDE.

MANY OF THESE CERTIFICATES HAVE

BEEN ISSUED TO FLORIDA RESIDENTS

WHO ARE, IN FACT, LICENSED IN

OTHER STATES OTHER THAN FLORIDA.

THE PURPOSE OF --

>> BUT WE DON'T REALLY, DO WE

KNOW IF THOSE WERE ISSUED TO

DOCTORS WHO ARE TESTIFYING FOR

DEFENDANTS?

WE REALLY DON'T KNOW THAT.

>> WE DON'T KNOW THAT.

>> OKAY.

AND SO WHAT WAS BEING SAID IS

THAT THERE ARE MAJOR

INSTITUTIONS IN FLORIDA WHOSE

PROFESSORS MAY NOT BE LICENSED

IN FLORIDA, BUT WHOSE MANDATE IS

TO TESTIFY FOR DEFENDANTS.

YOU KNOW, AGAIN, IT'S SO

SPECULATIVE.

I THINK -- AREN'T WE REALLY

LOOKING HERE AT A PROVISION THAT

WE WOULD BE PICKING OUT ABOVE

ALL OTHERS, INCLUDING THE ONE

THAT SAYS THAT THEY MUST DEVOTE

THREE YEARS IMMEDIATELY

PRECEDING THE DATE OF THE

OCCURRENCE TO THE PRACTICE OF

MEDICINE IN THAT AREA WHICH, IF

I UNDERSTOOD IT, WAS MEANT TO

ELIMINATE THE PROFESSORS THAT,

YOU KNOW, HAD DONE SOMETHING 20

YEARS AGO AND NOW WE'RE OPINING

ON IT.

AND WE'RE ELEVATING THAT ONE,
THE CERTIFICATE, TO BE THE BE
ALL OR END ALL AS A PROCEDURAL
BASIS FOR ALLOWING OR NOT
ALLOWING A EXPERT TO TESTIFY.
AND THAT'S MY CONCERN, AMONG
OTHERS.
>> I UNDERSTAND THAT, YOUR
HONOR.
BUT, HOWEVER, THIS PARTICULAR
STATUTE GIVES AN EXCELLENT
OPPORTUNITY FOR THIS COURT TO
DEFINE WHETHER THEY WANT TO
CHANGE THE CRITERIA AS VIEWED BY
THE COMMITTEE UNDER THE 2000
OPINION.
BECAUSE GIVEN ALL OF THE
ARGUMENTS THAT HAVE BEEN MADE
AGAINST THIS RULE, I THINK WHAT
HAS COME OUT OF THIS PROCESS IS
LIKELY A NEED FOR A DEFINED
CRITERIA TO BE ESTABLISHED BY
THIS COURT, TO BE APPLIED BY THE

COMMITTEE IN TERMS OF EVALUATING

EVIDENTIARY STATUTES.

OUR CALL TO DUTY IN THE

THREE-YEAR PROCESS HAS ALWAYS

BEEN PRIMARILY AVOID CONFLICT

WITH ARTICLE V --

>> YEAH.

BUT THE PROBLEM IS THAT THE

COMITY ISSUE WHICH WAS RAISED

WHEN THE RULES OF EVIDENCE WERE

ADOPTED WHICH IS NO HARM, NO

FOUL.

WE'LL MAKE IT PROCEDURAL.

IF IT'S PROCEDURAL, TO THE

EXTENT IT'S PROCEDURAL, NOBODY

SEEMS TO REALLY BE CLEAR FOR

THIS STATUTE WHAT'S PROCEDURAL

AND WHAT'S SUBSTANTIVE.

BUT WHEN THE LEGISLATURE STEPS

IN AND THEN SAYS YOU NEED THE

CERTIFICATE AND THE COURT CAN'T

DO ANYTHING ABOUT IT, IT SEEMS

LIKE THEY ARE VIOLATING THAT

SAME PRINCIPLE OF COMITY.

SO WE'VE GOT TO JUST BE CAREFUL

IF WE'RE GOING TO SAY WE'RE

GOING TO ADOPT ONE SUBSECTION OF

AN ENTIRE STATUTE THAT'S NOT

EVEN WITHIN THE EVIDENCE CODE OF

THE LEGISLATURE AND GIVE THAT

OUR SEAL OF APPROVAL.

THAT'S MY CONCERN.

>> I UNDERSTAND.

AND IN TERMS OF COMITY, YOUR

HONOR, AS YOU'RE PROBABLY AWARE

BACK IN '76 WE HAD A LAW

REVISION COUNCIL WHERE THE

LEGISLATURE AND THE BAR AND THE

COURT WORKED TOGETHER TO

FORMULATE THE RULES OF EVIDENCE.

JUSTICE LEWIS IN HIS 2000

CONCURRENCE NOTED AND CALLED FOR

A CONTINUED COOPERATIVE EFFORT

BETWEEN THE LEGISLATURE, THE

COURTS AND THE BAR IN TERMS OF

ADOPTING EVIDENTIARY STATUTES,

AND THAT IS A CALL THAT THE
COMMITTEE WOULD HOPE WOULD BE
TAKEN UP SO WE COULD GET BACK TO
A MORE COOPERATIVE EFFORT
BETWEEN THE LEGISLATURE, THE
COURT AND THE BAR IN TERMS OF
EVALUATING THESE STATUTES BEFORE
THEY'RE ACTUALLY PASSED AND
BECOME LAW.
I WILL NOTE --
>> IT TAKES TWO TO TANGO,
THOUGH, DOESN'T IT?
>> WE, IT DOES.
>> IT'S LIKE SAYING WE'RE IN THE
MIDDLE OF A WAR, AND WE'RE GOING
TO DECLARE PEACE, BUT THE OTHER
SIDE DOES NOT, AND THAT'S CALLED
SURRENDER, NOT --
>> JUSTICE LEWIS, IN MOST CASES
IT'S IMPOSSIBLE TO HAVE A CODE
OF EVIDENCE UNLESS THERE'S
COOPERATION BETWEEN THE COURT
AND THE LEGISLATURE BECAUSE IT

DOESN'T COME INTO EFFECT UNLESS

IT'S ADOPTED AS A RULE OF

PROCEDURE.

AND WE HAVE RIGHT AROUND THE

CORNER RECENT EVIDENTIARY

LEGISLATION THAT I'M SURE YOU'RE

AWARE OF THAT HAS JUST BEEN

PASSED THAT BOTH THE COMMITTEE

IS GOING TO HAVE TO DEAL WITH

AND THE COURT IS GOING TO HAVE

TO DEAL WITH.

>> THANK YOU FOR YOUR ARGUMENTS.

WE'RE OUT OF TIME.

WE APPRECIATE THE WORK OF THE

EVIDENCE COMMITTEE, ALL THOSE

WHO HAVE COMMENTED AND ARGUED

BEFORE THE COURT.

THANK YOU VERY MUCH.

>> THANK YOU.

>> THANK YOU, YOUR HONOR.