

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

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

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Prepared By: The Professional Staff of the Committee on Judiciary

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BILL: SB 764

INTRODUCER: Senator Detert

SUBJECT: Hearsay

DATE: March 17, 2014

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Brown</u>	<u>Cibula</u>	<u>JU</u>	<u>Pre-meeting</u>
2.	_____	_____	<u>CJ</u>	_____
3.	_____	_____	<u>RC</u>	_____

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**I. Summary:**

SB 764 expands a hearsay exception currently in law. Current law considers as non-hearsay inconsistent statements made by the declarant, provided that the declarant:

- Testifies at trial and is subject to cross-examination; and
- The declarant made the out-of-court statement under oath subject to the penalty of perjury at a trial, hearing, deposition, or other proceeding.

This bill removes the requirement that prior inconsistent statements have been made while the declarant was under oath and subject to the penalty of perjury.

In effect, the bill provides that any inconsistent statement made by a person who testifies at trial or a hearing is admissible as evidence.

**II. Present Situation:**

A declarant is a person who makes a statement.<sup>1</sup> Hearsay is an out-of-court statement that is offered into evidence to prove the truth of the matter asserted.<sup>2</sup>

Hearsay evidence is generally inadmissible as evidence in a court hearing or trial. Courts note of particular importance the questioning of hearsay in criminal cases based on the constitutional right of the accused to cross-examine all witnesses appearing against him or her.<sup>3</sup> Still, courts

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<sup>1</sup> Section 90.801(1)(b), F.S.

<sup>2</sup> Section 90.801(1)(c), F.S.

<sup>3</sup> The Confrontation Clause of the Sixth Amendment of the U.S. Constitution provides, in part “that in all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.” Section 16, Art. I, of the State Constitution, provides, in part “In all criminal prosecutions the accused ... shall have the right to have compulsory process for witnesses, to confront at trial adverse witnesses ... .” “Indeed, “the right to confront one’s accusers is a concept that dates back to Roman times.” *Crawford v. Washington*, 541 U.S. 36, 43 (2004).

permit the admission of hearsay as testimony if the statement falls under a firmly-rooted exception in law. Courts consider these exceptions to possess a circumstantial guarantee of trustworthiness.<sup>4</sup>

Florida's evidence code groups hearsay exceptions together as non-hearsay, hearsay exceptions where the availability of the declarant is immaterial, and hearsay exceptions where the declarant is unavailable.

### **Non-hearsay (s. 90.801, F.S.)**

Current law contains an exception to hearsay based on it not being hearsay.

A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination and the statement is:

- Inconsistent with the declarant's testimony and given under oath subject to perjury at a trial, hearing, or other proceedings or in a deposition;
- Consistent with the declarant's testimony and offered to rebut an express or implied charge against the declarant of improper influence, motive, or recent fabrication; or
- A statement of identification of a person made after perceiving the person.<sup>5</sup>

Before Florida adopted the Evidence Code, prior inconsistent statements were inadmissible as substantive evidence. The 1978 Legislature based the provision of s. 90.801(2)(a), F.S., in part on Federal Rule of Evidence 801(d)(1), which requires a statement to have been given under oath, subject to perjury, at a trial, hearing, or deposition.<sup>6</sup>

### **Hearsay Exceptions Where the Availability of the Declarant is Immaterial (s. 90.803, F.S.)**

This list of hearsay exceptions applies, regardless of whether the declarant is a witness.

Regardless of whether the declarant is available as a witness, current law includes the following statements as hearsay exceptions:

- 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 that indicate lack of trustworthiness;
- Excited Utterance: A statement relating to a startling event or condition made under the stress of excitement caused by the event or condition;
- Then-existing Mental, Emotional, or Physical Condition: A statement of then-existing state of mind, emotion, or physical sensation, when the state is an issue in the case;
- Statements for Purposes of Medical Diagnosis or Treatment: A statement that describes medical history, symptoms, pain or sensations reasonably pertinent to diagnosis or treatment;

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<sup>4</sup> 29 AM. JUR. 2D EVIDENCE S. 689

<sup>5</sup> Section 90.801(2), F.S.

<sup>6</sup> FRE Rule 801, 28 U.S.C.A.; *Corbett v. Wilson*, 48 So.3d 131, 134 (5th DCA 2010); *State v. Green*, 667 So.2d 756, 758-759 (1995).

- Recorded Recollection: A memorandum or record concerning a matter about which a witness once had knowledge, but now has insufficient recollection, shown to have been made when the matter was fresh;
- Records of Regularly Conducted Business Activity: A memorandum, report, record, or data compilation made at or near the time by a person with knowledge;
- Absence of Entry in Records of Regularly Conducted Activity: Evidence that a matter is not included in the memoranda, reports, records, or data compilation if the matter was of the kind regularly made and preserved; and
- Public Records and Reports: Records, reports, statements reduced to writing, or data compilations, of public officers or agencies.<sup>7</sup>

### **Hearsay Exceptions Where the Declarant is Unavailable (s. 90.804, F.S.)**

Hearsay exceptions that apply when the declarant is unavailable<sup>8</sup> for a hearing or trial include:

- Statement of Former Testimony: Testimony given as a witness at another hearing of the same or different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding if the other party had an opportunity to develop the testimony through direct, cross, or redirect examination;
- Statement under Belief of Impending Death: A statement made by a declarant while reasonably believing death was imminent, regarding the cause of what the declarant believed to be impending death;
- Statement against Interest: A statement which, at the time of its making, was so far contrary to the declarant's pecuniary or proprietary interest or tended to subject the declarant to liability or render invalid a claim by the declarant against another, that a declarant wouldn't have made the statement unless he or she believed it to be true.
- Statement of Personal or Family History: A statement about the declarant's birth, adoption, marriage, divorce, parentage, ancestry, or other similar fact, even though the declarant had no means of acquiring personal knowledge of the matter stated.
- Statement by Deceased or Ill Declarant Similar to One Previously Admitted: A statement by a deceased or ill declarant about the same subject matter as another statement made by the declarant that has previously been offered by an adverse party and admitted in evidence, in an action brought against the personal representative, heir at law, assignee, legatee, devisee, or survivor of a deceased person; and
- Statement Offered Against a Party that Wrongfully Caused the Declarant's Unavailability: A statement offered against a party that wrongfully caused, or acquiesced in wrongfully causing, the declarant's unavailability as a witness, and did so intending that result.

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<sup>7</sup> Section 90.803, F.S.

<sup>8</sup> A witness is unavailable if he or she is exempted by a court ruling based on privilege; persists in refusing to testify concerning the subject matter of the declarant's statement despite a court order; has suffered a lack of memory of the subject matter of the statement so as to destroy the declarant's effectiveness as a witness during the trial; may not attend or testify at the hearing due to death or then-existing physical or mental infirmity; or is absent from the hearing, and the proponent of the statement has been unable to procure the declarant's attendance or testimony by process or other reasonable means. Section 90.804(1), F.S.

### **Hearsay within Hearsay**

Hearsay within hearsay, also known as double hearsay, is not automatically inadmissible. Instead, these statements are admissible provided that they each and separately conform to a hearsay exception.<sup>9</sup>

### **III. Effect of Proposed Changes:**

SB 764 expands a hearsay exception currently in law. Current law provides a hearsay exception for inconsistent statements made by the declarant, provided that the declarant:

- Testifies at trial and is subject to cross-examination; and
- The declarant made the out-of-court statement under oath subject to the penalty of perjury at a trial, hearing, deposition, or other proceeding.

This bill removes the requirement that in order for a court to consider a statement as non-hearsay, the declarant be under oath and subject to perjury when they gave the inconsistent statement. This change significantly broadens the exception of non-hearsay to render admissible prior inconsistent statements made under any circumstances. These statements may be less reliable than statements given under oath.

The bill takes effect July 1, 2014.

### **IV. Constitutional Issues:**

#### **A. Municipality/County Mandates Restrictions:**

None.

#### **B. Public Records/Open Meetings Issues:**

None.

#### **C. Trust Funds Restrictions:**

None.

### **V. Fiscal Impact Statement:**

#### **A. Tax/Fee Issues:**

None.

#### **B. Private Sector Impact:**

None.

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<sup>9</sup> Section 90.805, F.S.

**C. Government Sector Impact:**

The Office of the State Courts Administrator (OSCA) indicates that the fiscal impact on expenditures cannot be accurately determined due to the unavailability of data needed to quantifiably establish the increase in judicial workload. The Office of the State Courts Administrator (OSCA) specifically noted an impact as follows:

Likely having a proportionately greater impact in relation to criminal matters, one might anticipate prosecutors will bring more cases to trial. This may be especially true of domestic violence and gang-related matters in which it is common for victim statements to change before trial.<sup>10</sup>

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

The Trial Lawyers Section of The Florida Bar expresses the following concerns about the bill:

- The requirement that a declarant be subject to perjury or oath insures that the witness understands the seriousness of the matter and guards against a lie.
- The current bill language does not contain any safeguards to ensure the reliability of an out-of-court statement. In the past, when the Legislature considered hearsay exceptions dealing with abuse of children and the elderly, those sections limited the exception to specific areas of need (child or elder abuse). The Legislature added notice requirements and limitations on use, and court review before admission.<sup>11</sup>

**VIII. Statutes Affected:**

This bill substantially amends section 90.801 of the Florida Statutes.

**IX. Additional Information:****A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

**B. Amendments:**

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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<sup>10</sup> Office of the State Courts Administrator, *2014 Judicial Impact Statement SB 764* (February 10, 2014) (on file with the Senate Judiciary Committee).

<sup>11</sup> Trial Lawyers Section of the Florida Bar, *White Paper House Bill 429 and Senate Bill 764 ("Hearsay")* (on file with the Senate Judiciary Committee).