HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HJR 7025 PCB CVJS 11-01 Rules of Court
SPONSOR(S): Civil Justice Subcommittee, Eisnaugle
TIED BILLS: HB 7027 **IDEN./SIM. BILLS:** None

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Civil Justice Subcommittee	12 Y, 3 N	Bond	Bond
1) Judiciary Committee		Bond	Havlicak

SUMMARY ANALYSIS

Article V, s. 2(a) of the Florida Constitution provides that the Supreme Court shall adopt rules for the practice and procedure in all courts. The courts have stricken numerous substantive laws on the grounds that such laws violate the court's rulemaking power.

This joint resolution proposes to amend art. V, s. 2(a) of the Florida Constitution to provide that no court has the power, express or implied, to adopt rules for practice and procedure in any court. It provides that the court rules of practice and procedure may be recommended by the Florida Supreme Court to be adopted, amended, or rejected by the Legislature in a manner provided by general law. The joint resolution also provides that a statute will control over a court rule in the event of a conflict.

The proposed joint resolution, if passed by the Legislature, would be considered by the electorate at the November 2012 general election.

This proposed joint resolution appears to require a nonrecurring expense payable from the General Revenue Fund in FY 2012-13 for required advertising of the proposed joint resolution. Future impact on state revenues and expenditures are unknown, speculative, and contingent upon how the amendment is implemented. This proposed joint resolution does not appear to have a fiscal impact on local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Constitutional Provision to be Amended

Article V, Section 2(a) of the Florida Constitution provides, currently reads in part:

> The supreme court shall adopt rules for the practice and procedure in all courts including the time for seeking appellate review, the administrative supervision of all courts, the transfer to the court having jurisdiction of any proceeding when the jurisdiction of another court has been improvidently invoked, and a requirement that no cause shall be dismissed because an improper remedy has been sought. . . . Rules of court may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature.

History of Court Rulemaking Power in Florida Prior to Current Law

Early state constitutions did not address whether the court had any rulemaking power. An early statute on rulemaking recognized the inherent legislative power over rulemaking, providing:

> The supreme court shall have the following powers, and action taken by it thereunder shall have the force of law until otherwise provided by the legislature, to-wit: 1. To make, etc., rules of practice.[1]

It is unclear why, but just 5 years later the Legislature passed the following restriction, amended onto the end of the above law:

> To make, amend, annul or modify rules of practice or pleading of the supreme court or any other court, as it may see fit, not inconsistent with law.[2]

The limitation that court rules may not be inconsistent with general law remained in statute until 1957.

In 1940, the Florida Bar filed a petition with the Supreme Court proposing that the court enact a comprehensive set of rules of civil procedure governing the trial courts. In rejecting the petition, Chief Justice Terrell[3], writing for the majority, cautioned against the enactment of any court rule that might have the effect of encroaching on substantive law.

In the 1956 general election, the voters adopted a legislative proposal largely re-writing the judicial article of the constitution. Included in those changes was the first ever section on court rules. Effective as of 1957, the new judicial article included:

> Section 3. Practice and Procedures. The practice and procedure in all courts shall be governed by rules adopted by the supreme court.

The 1957 Legislature passed a conforming bill, substantially changing ch. 25, F.S., the statute governing the Supreme Court. Included in the changes was repeal of s. 25.03, F.S., the statute that had authorized, and limited, the court's rulemaking power.

[1] Chapter 1626, s. 3. Enacted August 1, 1868.
[2] Chapter 1938, s. 12. Enacted February 1, 1873.
[3] Former Justice William Glenn Terrell was a justice for 41 years, from 1923 through 1964. He is generally regarded as one of the court's most respected alumni.

The current language in the state constitution regarding court rulemaking was adopted by the voters in 1972 and became effective January 1, 1973.

Relevant Current Constitutional Provisions

Article V, s. 2(a) of the Florida Constitution currently reads in relevant part:

> **SECTION 2. Administration; practice and procedure.--**
>
> (a) The supreme court shall adopt rules for the practice and procedure in all courts including the time for seeking appellate review, the administrative supervision of all courts, the transfer to the court having jurisdiction of any proceeding when the jurisdiction of another court has been improvidently invoked, and a requirement that no cause shall be dismissed because an improper remedy has been sought. . . . Rules of court may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature.

Article II, s. 3 of the Florida Constitution currently reads:

> **SECTION 3. Branches of government.--**The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

The Supreme Court has found that the interplay of these two sections gives the Supreme Court exclusive power over rules of practice and procedure, while the Legislature has the exclusive power to enact substantive law. The two branches sometimes appear to disagree as to what is substantive and what is procedural.

Defining Procedure and Substance

The Florida Supreme Court has defined substantive law as follows:

> Substantive law has been defined as that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer. It includes those rules and principles which fix and declare the primary rights of individuals with respect towards their persons and property.[4]

The Florida Supreme Court has defined practice and procedure as follows:

> Practice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. "Practice and procedure" may be described as the machinery of the judicial process as opposed to the product thereof.
>
> Examination of many authorities leads me to conclude that substantive law includes those rules and principles which fix and declare the primary rights of individuals as respects their persons and their property. As to the term "procedure," I conceive it to include the administration of the remedies available in cases of invasion of primary rights of individuals. The term "rules of practice and procedure" includes all rules governing

[4] *Haven Fed. Sav. & Loan Ass'n v. Kirian*, 579 So.2d 730, 732 (Fla. 1991).

> the parties, their counsel and the Court throughout the progress of the case from the time of its initiation until final judgment and its execution.[5]

The "Twilight Zone" Between Procedure and Substance

The courts have long struggled to determine the line between rules and substantive law. In 1940, for instance, the Supreme Court set forth the difficulty in finding that line, and denied a petition to create rules of civil procedure, ruling:

> It was admitted at the bar that this court was powerless to promulgate a rule which had the effect of enacting or repealing a statute involving jurisdiction or substantive law. It is shown, however, that the proposed Rules of Civil Procedure will amend, modify, or repeal more than 350 statutes. **The limits of procedural and substantive law have not been defined and no two would agree where the one leaves off and the other begins. There is also between the two a hiatus or twilight zone that has been constantly entered by the courts and the Legislatures.** Petitioners contend that none of the proposed rules affect substantive law but suggest that if there be such, they should be discarded. We have examined the affected statutes and I think many of them go to matters of substantive law and jurisdiction.
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> Another element that lends confusion to the situation is that the current of substantive law and procedural law often coalesce. **What is regarded as substantive law today may become procedural law tomorrow, and vice versa. Conflicts on this point have given rise to powers that are said to be not strictly legislative or judicial and when this is the case, the power of the Legislature is dominant.**
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> . . .
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> **It would be impossible to separate the rules that affect procedural statutes from those which affect substantive or jurisdictional statutes and to attempt it would create confusion and uncertainty in procedure that we would be a generation construing and straightening out.**[6]

The 1940 court was not alone in being unable to find the line between procedure and substance. Thirty-two years later, Justice Adkins noted the difficulty in separating substantive law from procedural law:

> The entire area of substance and procedure may be described as a “twilight zone” and a statute or rule will be characterized as substantive or procedural according to the nature of the problem for which a characterization must be made.[7]

Just 3 years ago, the Supreme Court struggled again with how to cope with a statute which contains portions that the court deems substantive and portions that the court deems procedural:

> Of course, statutes at times may not appear to fall exclusively into either a procedural or substantive classification. We have held that where a statute contains some procedural aspects, but those provisions are so intimately intertwined with the substantive rights created by the statute, that statute will not impermissibly intrude on the practice and

[5] *Allen v. Butterworth*, 756 So.2d 52, 60 (Fla. 2000) (quoting *In re Florida Rules of Criminal Procedure* 272 So.2d 65, 66 (Fla. 1972)(Adkins, J., concurring)).
[6] *Petition of Florida State Bar Ass'n for Promulgation of New Florida Rules of Civil Procedure*, 199 So. 57 (Fla. 1940) (emphasis added).
[7] *In re Florida Rules of Criminal Procedure*, 272 So.2d 65, 66 (Fla. 1972)(Adkins, J., concurring).

procedure of the courts in a constitutional sense, causing a constitutional challenge to fail.[8]

In other cases of conflict, however, the court has declined to decide whether a statute is procedural or substantive by simply adopting the statute as a rule "to the extent it is procedural."[9] Unfortunately, there is no fixed standard by which the Legislature can know when its acts will be upheld and subsequently adopted to the extent procedural, or will be stricken as violating the court's rulemaking power.

The Difficulty in Determining the Line Between Procedure and Substance Appears to Have Affected the Balance of Power between the Legislature and the Courts

Since the 1972 change in the constitution, the courts have stricken substantive law for violating the court's rulemaking power, as will be further described below. The Supreme Court has also written rules that arguably contain substantive law.

The check and balance to stop legislative encroachment into the authority of the court system is the striking of laws. The check and balance to stop court encroachment into legislative authority is the power to repeal a court rule. In practice, some believe that these checks and balances are not equal.

The court that writes court rules is the same court and the sole judge of whether a rule controls over the statutes. On the other hand, the Legislature does not pass a law by itself, every law, including a repeal of a court rule, is subject to veto by the executive branch. Additionally, while a court striking a law is final on entry of a court opinion, a rule repeal is not actually implemented unless the court takes action. There is no apparent remedy should the court refuse to honor a repeal by refusing to either remove a repealed rule from the compiled rules or amend the rule to conform to a repeal.

This analysis will first look to a number of examples of laws stricken by the courts and at rules that perhaps have encroached on substantive law. This analysis will then examine prior repeals and how the court has reacted.

Court Rules May Conflict With Statutes

Conflicts occur when statutes and court rules attempt to address the same issues. For example, s. 57.085(7), F.S., requires a prisoner seeking to file a lawsuit without paying court costs and fees due to indigence to file a list of all other lawsuits the prisoner has participated in during the previous 5 years and copies of the pleadings commencing such lawsuits with the court. The statute appears to have been passed to prevent inmates from filing frivolous lawsuits at taxpayer expense and the copy requirement allowed the court to review the prior pleadings filed by an inmate.

In *Jackson v. Department of Corrections*, 790 So.2d 381 (Fla. 2001), the Florida Supreme Court ruled that the copy requirement infringed on the court's rulemaking authority. The court said that the "existence of a right for indigents to proceed without the payment of court costs is a substantive one and is properly provided by the Legislature."[10] However, the court said it has the exclusive authority for "formulating procedures for granting in forma pauperis status."[11] The court appears to hold that once the Legislature provides for the ability to proceed without payment of court costs, the court has the exclusive authority to implement that right.[12]

[8] *Massey v. David*, 979 So.2d 931, 937 (Fla. 2008).
[9] *See, e.g., In re Amendments to the Florida Evidence Code*, __ So.3d. __, 2011 WL 101668 (Fla. January 13, 2011)(an example of a case where the court adopts a statute as a rule of court).
[10] *Jackson*, 790 So.2d at 383.
[11] *Jackson*, 790 So.2d at 384.
[12] After allowing Jackson's litigation to proceed at taxpayer expense, the court found it frivolous, denied Jackson's claim, and required Jackson to show cause why, after initiating meritless litigation at least 24 times, he should not be barred from filing further appeals.

In *Massey v. David*, 979 So.2d 931 (Fla. 2008), the court held the Legislature could not impose requirements which a litigant must fulfill before a litigant can recover expert witness fees from the opposing party in a lawsuit. In *Massey*, the statute set forth time limits within which a party must furnish expert witness opinions and reports to the opposing party in a lawsuit. The statute gave the court discretion to adjust the time limit to meet the needs of a particular case. The statute did not preempt the court's discovery rules but rather provided that if a party did not comply with the statute, it could not recover expert witness fees. The court held that such requirements conflicted with the rules of court relating to discovery and were therefore procedural.[13]

Justice Cantero dissented:

> The Legislature's decision to condition the taxation of expert witness fees on providing a report to the opposition is a substantive one. The statutory deadline for filing this report, while procedural, is necessary to implement the substantive law and does not conflict with existing procedural rules.[14]

Another example involves postconviction DNA testing. In January of 2001, House and Senate bills were filed to create a statutory right and process for DNA testing[15] and legislation providing for DNA testing was signed by the Governor on May 31, 2001, as ch. 2001-97, L.O.F. The law created a limited right to DNA testing.

On October 18, 2001, the court first adopted Rule 3.853.[16] The rule made substantive changes to the statutory provisions, one of which greatly expanded the application of the testing program. The first change involved testing laboratories. The statute limited testing to the FDLE crime lab while the rule allowed a prisoner with enough money to employ any accredited lab. The second change was to eligibility for testing. Where the statute had limited testing to persons who had claimed innocence and gone to trial, the rule also allowed DNA testing by persons who had pled either no contest or guilty.[17] This expansion was a proposal that had been considered by the Legislature and rejected.[18] The third change provided additional grounds for DNA testing. The statute provided that a petition for DNA testing must include a statement that "identification of the defendant is a genuinely disputed issue in the case, and why it is an issue." The rule provided that a motion for DNA testing must include "a statement that identification of the movant is a genuinely disputed issue in the case and why it is an issue **or an explanation of how the DNA evidence would either exonerate the defendant or mitigate the sentence that the movant received**. (emphasis added).

In *Crow v. State*, 866 So.2d 1257, 1259 (Fla. 1st DCA 2004), the court acknowledged that the statute was more restrictive than the rule but held that the rule prevailed over the statute. The court explained:

> In the present case, the defendant qualifies for testing under the rule but not under the more restrictive terms of the statute. This brings us to the heart of the issue: whether the right to obtain scientific evidence to show that a person was wrongfully convicted is a matter for the courts or for the Legislature.
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> The state contends that eligibility for postconviction DNA testing is a matter of substantive law and therefore that the statute prevails over contrary provisions in the rule. This argument would be more appealing if we were to consider only the text of the

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The court described Jackson as a "litigating engine" and noted "in all likelihood, Jackson will have filed more petitions in this Court before this decision is published." *Jackson*, 790 So.2d at 387-388.

[13] *Massey*, 979 So.2d at 943.

[14] *Massey*, 979 So.2d at 952 (Cantero, J., dissenting).

[15] 2001 HB 147 and SB 366.

[16] *Amendment to Florida Rules of Criminal Procedure Creating Rule 3.853 (DNA Testing)*, 807 So.2d 633 (Fla. 2001).

[17] See discussion under heading of "PROPOSED RULE 3.853", 807 So.2d at 634.

[18] *See House of Representatives Committee on Crime Prevention, Corrections & Safety Final Analysis of CS/HB 147, July 11, 2001, at page 8 (*discussing floor action on the bill and noting that the language relating to testing subsequent to a plea was removed from the bill).

> statute and rule and not the underlying authority to define the rights at issue. Some separation of powers issues cannot be resolved merely by characterizing the nature of the regulation as substantive or procedural.
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> The distinction between procedural law and substantive law is controlling if the only source of authority for a rule or statute is the general power conferred by the state constitution, but this distinction is immaterial if the rule or statute is based on a specific grant of constitutional power. If a statute purports to regulate a matter that is within the exclusive control of the judiciary under a specific grant of constitutional authority, then it makes no difference whether the right created by the statute is characterized as substantive or procedural. In neither case could the statute prevail over conflicting provisions of a court rule implementing the constitutional authority in question.[19]

In *Crow*, the court held that Rule 3.853 controlled over a more restrictive statute. Similarly, in *Gonzalez v. State*, 41 So.2d 1050 (Fla. 2d DCA 2010), the court held the rule was broader than the statute.

These cases demonstrate how legislative policy objectives (limiting frivolous litigation by inmates at taxpayer expense, limiting DNA testing to specific classes of criminals, and encouraging prompt settlement of lawsuits) can be found to encroach on court rulemaking authority.

Court Rules May Create Substantive Rights Not Required by the Constitution or Statute

Florida Rule of Criminal Procedure 3.191 was enacted to implement the right to a speedy trial created in art. I, s. 16 of the state constitution. The rule provides the ability for a criminal defendant to be discharged if he or she is not brought to trial within a certain time from arrest. If the defendant is not brought to trial within the specified time, the defendant is discharged and cannot be prosecuted.

Neither the Florida Constitution nor the United States Constitution provides for a specific number of days within which a defendant must be tried.[20] The discharge remedy has become Florida law solely because it is in a court rule. The Legislature's ability to change the rule is limited. In *State el rel. Maines v. Baker*, 254 So.2d 207 (Fla. 1971), the court held the speedy trial rule was procedural and rejected a claim that it was unconstitutional. In *R.J.A. v. Foster*, 603 So.2d 1167 (Fla. 1992), the court held that Legislature's attempt to impose a shorter speedy trial period in juvenile cases infringed on the court's rulemaking authority. Justice Barkett dissented:

> Like statutes of limitations, which define when an action must be commenced, section 39.048 defines when a lawsuit must be commenced and tried. This Court has previously held that statutes of limitations create substantive rights that cannot be abrogated by rules of procedure.[21]

In *Reed v. State*, 649 So.2d 227, 229 (Fla. 1995), Justice Overton argued that the speedy trial rule had expanded to confer a substantive right:

> I write to express my belief that the majority has now crossed the line and made our speedy trial rule substantive rather than procedural by this construction and that, consequently, it is unconstitutional. *See* art. II, § 3, Fla. Const. The rule is no longer a procedural "triggering mechanism," as explained by the United States Supreme Court in *Barker v. Wingo* and by this Court in *R.J.A. v. Foster*. It is now a right granted by this Court which, as explained by Justice Wells, effectively eliminates the statutes of limitations lawfully enacted by the legislature.

[19] *Crow v. State*, 866 So.2d 1257, 1260 (Fla. 1st DCA 2004).
[20] *See Barker v. Wingo*, 407 U.S. 514 (1972); *State v. Polk*, 993 So.2d 581 (Fla. 1st DCA 2008).
[21] *R.J.A. v. Foster*, 603 So.2d 1167, 1172 (Fla. 1992)(Barkett, J., dissenting)(emphasis in original).

Section 775.15, F.S., creates statutes of limitation for criminal actions. The court has held that statutes of limitation are substantive law. However, in many cases, the limitation periods are significantly shortened by the speedy trial rule. According to statistics from the Office of State Court Administrator, 1,236 defendants in circuit court (including 12 defendants charged with murder or capital murder) and 2,638 defendants in county court were discharged by speedy trial rule dismissals from January, 1986 through June, 2009. It is possible that the resolution of other cases is delayed because the speedy trial rule could force the court to dispose of those cases before dealing with cases that do not have a court-imposed time limit for trial.

Another example of the Supreme Court apparently creating a substantive law through court rules can be found in the case of *Amendments to the Rules of Appellate Procedure*, 685 So.2d 773 (Fla. 1996). The Legislature passed the Criminal Appeals Reform Act of 1996 in an attempt to reduce the number of frivolous appeals in the appellate courts. Opponents of the legislation argued that it was procedural and could not be applied if it conflicted with court rules. The court adopted rules that were in conflict with statute and that expanded the right of defendants to appeal beyond constitutional requirements.[22]

Other cases where the court has created substantive rights are discussed elsewhere in this analysis, including limiting the ability of a juvenile to waive the right to counsel, providing counsel in cases where it is not required by the Constitution or statute, and increasing the number of cases in which DNA testing is required.

Court Rules May Cause the State to Make Expenditures

Some court rules can, or have, caused the state to expend funds. The courts can require the state to provide a service required by the constitution. However, where there is no constitutional right to a service, a court rule requiring the state to provide that service infringes upon the constitutional provision that prohibits the courts from making appropriations.[23] The Legislature is supposed to have the "power of the purse." These are a few examples of court rules that have caused, or might cause, the state to expend funds:

Adult First Appearances

In *In re Amendments to Florida Rule of Criminal Procedure 3.130*, 11 So.3d 341 (Fla. 2009), the court amended a court rule to require that the state attorney and the public defender, or their designated assistants, must attend all first appearance hearings. The opinion noted that not every county required a state attorney and public defender to attend first appearance hearings "apparently due to practical and financial obstacles."[24] The court's opinion does not indicate the cost of imposing the requirement on state attorneys and public defenders. The court did not claim that the presence of a public defender was required by the constitution. Certainly, there is no constitutional right to the presence of an assistant state attorney at a first appearance hearing. The effect of this ruling may be to increase workloads and thereby require the state to allocate additional funding to the offices of the state attorneys and public defenders.

Juvenile Waiver of Counsel in Delinquency Cases

There is no constitutional right to consult an attorney before waiving the right to an attorney. In *In re Amendments to the Florida Rules of Juvenile Procedure,* 894 So.2d 875 (Fla. 2005), the court proposed an amendment to the rules applicable to juvenile procedure requiring that a juvenile charged with a crime consult with counsel before waiving the right to be represented. The court considered the financial impact on the court system in deciding not to impose the requirement at that time:

[22] The United States Supreme Court has consistently pointed out that there is no federal constitutional right of criminal defendants to a direct appeal. *Evitts v. Lucey*, 469 U.S. 387, 393 (1985).
[23] Article V, s. 14 of the state constitution.
[24] *In re Amendments to Florida Rule of Criminal Procedure 3.130*, 11 So.3d 341 (Fla. 2009).

> Because of the potential financial impact of the amendment to rule 8.165(a) regarding consultation with attorneys and our desire to work cooperatively with the Legislature, we urge the Legislature to consider the Commission's recommendations. We also strongly urge that the voluntary practice that exists in many jurisdictions in which consultation with an attorney takes place be continued and, where possible, expanded in the interim.
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> We thus decline to adopt at this time the portion of rule 8.165(a) regarding consultation with an attorney prior to a waiver. We emphasize that we are not rejecting this proposed amendment to rule 8.165(a), but are merely deferring its consideration. We intend to readdress the adoption of the amendment to rule 8.165(a) at a future time following the conclusion of the legislative session. We further take this opportunity to reinforce that it is critical for delinquency judges to ensure that any waiver of counsel by a child is knowingly and voluntarily given, especially prior to accepting a plea of guilty or nolo contendere.[25]

Three years later, in *In re Amendment to Florida Rule of Juvenile Procedure 8.165(a)*, 981 So.2d 463 (Fla. 2008), the Supreme Court amended the rules of procedure to provide that a juvenile in a criminal proceeding could not waive his or her right to counsel without first conferring with counsel. The court acknowledged that imposing such a rule could result in "a significant increase in caseloads"[26] and acknowledged that the Legislature had considered a number of bills to implement the requirement but the bills had not passed.[27] Despite these concerns, the court adopted the rule. Three justices dissented, saying:

> Essentially, this amendment creates a *new,* unwaivable right in all juveniles to a prewaiver consultation with counsel. Such a change is clearly substantive, not procedural. And, given the complete absence of any substantive law upon which to base this new rule, I do not believe we can or should use our procedural rulemaking authority to impose such a sweeping mandate. To do so puts the proverbial cart before the horse.[28]

Justice Bell further noted that "proposed legislation supporting this substantive change in the law failed to pass during the 2006 and 2007 Florida legislative sessions" and that the failure of a bill to pass is an "insufficient basis for this Court to usurp the legislative prerogative to make this policy decision and impose the change in a rules case."[29]

Appointed Attorneys for Juveniles in Dependency Cases

In *In re Amendment to the Rules of Juvenile Procedure Fla. R. Juv. P. 8.350*, 842 So.2d 763 (Fla. 2001), the court proposed rules to require appointment of counsel for a dependent child recommended for placement in a residential mental health facility and to require a court hearing before the placement of a dependent child in a residential mental health treatment facility. Justice Wells dissented and argued the court lacked the authority to require appointment of counsel:

> In respect to the appointment of an attorney for the child, I conclude that the court cannot mandate counsel by rule. There has not been determined to be a constitutional requirement for counsel for the child. There is no statutory right to counsel for the child. Procedural rules in respect to counsel should be just that-procedures for the implementation of substantive rights having either a constitutional base or a statutory creation. It is only in this way that the other fundamental in respect to a requirement for counsel, which is the essential fundamental of funding, has a basis.

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[25] *In re Amendments to the Florida Rules of Juvenile Procedure*, 894 So.2d 875, 880-881 (Fla. 2005).
[26] *In re Amendment to Florida Rule of Juvenile Procedure 8.165(a),* 981 So.2d 463, 466 at n. 3 (Fla. 2008).
[27] *See In re Amendment to Florida Rule of Juvenile Procedure 8.165(a)*, 981 So.2d 463, 466 at n. 3 (Fla. 2008).
[28] *In re Amendment to Florida Rule of Juvenile Procedure 8.165(a),* 981 So.2d 463, 467 (Fla. 2008)(Bell, J., dissenting).
[29] *In re Amendment to Florida Rule of Juvenile Procedure 8.165(a)*, 981 So.2d 469 (Fla. 2008)(Bell, J., dissenting).

> To have rule-mandated counsel without a legislative commitment for funding serves only to create confusion. For this Court to offer a proposed rule with a requirement for such an appointment of counsel is to propose a rule which has a provision which cannot become effective and therefore proposes what the Court cannot deliver.[30]

Two years later, after receiving comments, and apparently after giving the Legislature the opportunity to pass a law and funding for the idea (which did not happen), the court in 2003 issued an opinion adopting the proposed rule. The court argued that funding could be shifted from a legislatively-created Guardian Ad Litem program to a court-created attorney program:

> Finally, regarding potential sources of funding, several commentators pointed out that during the 2002 legislative session the Florida Legislature appropriated, and Governor Bush approved, $7.5 million to Guardian Ad Litem programs for representation of children in chapter 39 proceedings. *See* Ch. 2002-394, § 7, at 4613-15, Laws of Fla. Chapter 39 governs proceedings related to children and section 39.407(5) specifically governs proceedings related to the placement of dependent children into residential treatment facilities. Thus, it is possible that a portion of the funding appropriated by the Legislature and approved by Governor Bush could be used as a source to pay those attorneys who are appointed to represent dependent children in rule 8.350 proceedings as mandated by this rule.[31]

Justice Wells dissented and noted the separation of powers concern with the majority's proposal to shift funding:

> The majority has now adopted a rule, which in material part was rejected by a vote of eighteen to seven by the committee which had the responsibility to first review this rule. As I stated in my earlier opinion, I have serious concerns about the practical ramifications of the rule that the majority now adopts in respect to the court-mandated counsel. I know of no authority for this Court to mandate the appointment of counsel by rule when there is no constitutional or statutory requirement for counsel. The majority has no evidentiary support for its statement, "There are multiple sources of experienced attorneys that can be tapped by judges to represent children in rule 8.350 proceedings." Majority op. at 767. Nor does the majority have any sources of funds to pay such attorneys. Clearly, money appropriated by the Legislature for the guardian ad litem program cannot be properly redirected from that program without legislative approval.[32]

Justice Harding also dissented from the adoption of the rule mandating appointment of counsel, noting the constitutional issue and explaining that funding was not available in statute:

> [T]he majority sets forth no constitutional or statutory basis for requiring that counsel be appointed. Absent reliance upon such a basis, I do not think this Court has the authority, by rule, to require trial judges to appoint counsel for dependent children facing commitment to treatment facilities. *Cf. State v. Garcia, 229 So.2d 236, 238 (Fla. 1969)*("The rules adopted by the Supreme Court are limited to matters of procedure, for a rule cannot abrogate or modify substantive law.").
>
> In addition, there are no statutory provisions for compensation of counsel appointed pursuant to the rule adopted by the majority. While section 39.0134, Florida Statutes, provides that counties are to pay for court-appointed counsel for dependent children, this section applies only to counsel entitled to compensation "pursuant to a court appointment in a dependency proceeding pursuant to this chapter." § 39.0134(1), Fla. Stat. (2002). The precommitment hearing required by the rule is not a "dependency

[30] *In re Amendment to the Rules of Juvenile Procedure, Fla. R. Juv. P. 8.350*, 804 So.2d 1206, 1216 (Fla. 2003) (Wells, J., dissenting).
[31] *In re Amendment to the Rules of Juvenile Procedure, Fla. R. Juv. P. 8.350*, 842 So.2d 763, 766-767 (Fla. 2003).
[32] *In re Amendment to the Rules of Juvenile Procedure, Fla. R. Juv. P. 8.350*, 842 So.2d 763, 769-770 (Fla. 2003)(Wells, J. dissenting).

> proceeding" pursuant to chapter 39, Florida Statutes (2002), nor could a court appointment pursuant to the rule be considered a court appointment pursuant to chapter 39. Thus, this section does not apply.
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> Nor does there appear to be any other applicable statutory provision for compensation of attorneys appointed pursuant to the rule adopted by the majority. Section 29.001, Florida Statutes (2002), which requires counties to fund the costs of court-appointed counsel, expressly defines court-appointed counsel as "counsel appointed to ensure due process in criminal and civil proceedings in accordance with state and federal constitutional guarantees." § 29.001(1), Fla. Stat. (2002). As noted above, the majority has identified no constitutional basis for mandating counsel in these cases; thus, this section does not apply. Nor would section 925.036, Florida Statutes (2002), apply, as it provides compensation only for counsel appointed in death cases and as special assistant public defenders.[33]

Requiring that Mental Retardation Hearings be Held Before Trial

In 2001, the Legislature created s. 921.137, F.S., to bar the imposition of the death sentence on a mentally retarded person. The statute establishes a method to determine which defendants are mentally retarded. The statute requires the defendant give notice of intent to raise the mental retardation issue during the penalty phase of the trial. After the defendant has given notice and after the advisory jury has returned a recommendation that the court impose a death sentence, the defendant may file a motion to determine if the defendant suffers from mental retardation. If the court finds, by clear and convincing evidence, that the defendant has mental retardation, it cannot impose a death sentence.[34]

In 2004, the court adopted a rule of procedure that conflicted with the statute. While the statute provides that a hearing on mental retardation is only held in the few capitol cases where a jury has recommended a sentence of death, the court rule requires that the motion be filed and the hearing be held prior to trial. Justice Cantero explained that he believed the court has the sole authority to set the time of the hearing:

> Therefore, the rule we adopt conflicts with the statute. Under the Florida Constitution, however, this Court is ultimately responsible for enacting rules of procedure. *See art. V., § 2, Fla. Const.* Once a case is filed in a court of law, the decision of when that right may be invoked is quintessentially a matter of *procedure,* over which this Court has ultimate authority. *See Haven Fed. Sav. & Loan Ass'n v. Kirian,* 579 So.2d 730, 732 (Fla.1991) (stating that this Court has the exclusive authority to regulate matters of practice and procedure); *Markert v. Johnston,* 367 So.2d 1003, 1004 (Fla.1978) (noting that procedural aspects of trial are reserved to the rulemaking authority of this Court).[35]

This opinion has the effect of taking the policy matter of when the hearing should be held away from the Legislature and placing it in the Supreme Court. While three justices asserted that the court's rule would result in increased judicial efficiency, it can be argued that the Legislature is in a better position to make such a determination. Under the statute, the time and expense of a hearing is avoided if the defendant is found not guilty or if the jury determines death is not an appropriate sentence. Under the court rule, however, a hearing on mental retardation is held in substantially more capital cases.

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[33] *In re Amendment to the Rules of Juvenile Procedure, Fla. R. Juv. P. 8.350*, 842 So.2d 763, 769 (Fla. 2003)(Harding, J., concurring in part and dissenting in part).
[34] *See* s. 921.137(3) and (4), F.S.
[35] *Amendments to Florida Ruls of Criminal Procedure and Florida Rules of Appellate Procedure*, 875 So.2d 563, 569 (Fla. 2004)(Cantero, J., concurring).

DNA Testing

DNA testing is discussed further in other parts of this analysis. The financial aspect cannot be overlooked. The courts had already determined that DNA testing was not a constitutional right, meaning that if it was to be done at state expense, that expense would be a matter of legislative grace. One factor that the Legislature considered in passing a DNA law was a limit on who could receive testing, because a limitless right to testing would lead to limitless costs incurred by the state crime lab. As shown in the DNA discussion herein, the court ignored the legislative limits in requiring testing for a far larger group of offenders.

Court Rules May Cause Private Parties to Incur Substantial Costs

It is common that may divorcing spouses decide on their marital settlement agreement before filing their divorce action. Until 1995, it was common for such spouses to file a bare petition for divorce together with a marital settlement agreement proposed for adoption by the trial judge. This simple and inexpensive procedure was upended in 1995 by *In re Family Law Rules of Procedure*, 663 So.2d 1047 (Fla. 1995). By that case, the court adopted rules in family law cases which require parties to file extensive financial affidavits in divorce cases even though the parties had agreed on a distribution of assets and responsibilities.[36] Additional time involved in gathering relevant documents and completing the forms has the effect of raising the cost of a divorce action.

In *In re Guidance Concerning Managed Mediation Programs for Residential Mortgage Foreclosure Cases*, Case No. AOSC10-57, the Florida Supreme Court issued an administrative order authorizing circuit courts to order residential foreclosure cases to mediation. While not formally labeled as a court rule, this administrative order is arguably a court rule. The administrative order requires foreclosing lenders to pay as much as $750 more in fees per case.

Rules Can Limit the Legislature from Changing Substantive Law

In 1976, the Legislature adopted the Evidence Code.[37] The Florida Supreme Court ruled that the Evidence Code contained both substantive and procedural provisions. To prevent a constitutional challenge to the Code, the Florida Supreme Court adopted the Code to the extent it was procedural before the Code's 1979 effective date.[38] The Legislature's ability to amend the Evidence Code is therefore limited. The court has explained:

> It is generally recognized that the present rules of evidence are derived from multiple sources, specifically, case opinions of this Court, the rules of this Court, and statutes enacted by the legislature. Rules of evidence may in some instances be substantive law and, therefore, the sole responsibility of the legislature. In other instances, evidentiary rules may be procedural and the responsibility of this Court.[39]

This substantive/procedural split in the Evidence Code means that every revision the Legislature enacts relating to evidence is subject to constitutional challenge on the procedure versus substance argument. In addition, the court has held some portions of the Evidence Code cannot be changed by the Legislature. An example of an evidence law that the Legislature apparently cannot amend is s. 90.610, F.S., which provides:

> (1) A party may attack the credibility of any witness, including an accused, by evidence that the witness has been convicted of a crime if the crime was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted,

[36] *See* Florida Rules of Family Law Procedure 12.105 and 12.285.
[37] Ch. 76-237, L.O.F.
[38] *See In re Florida Evidence Code,* 372 So.2d 1369 (Fla. 1979).
[39] *In re Florida Evidence Code,* 372 So.2d 1369, 1369 (Fla. 1979).

> or if the crime involved dishonesty or a false statement regardless of the punishment, with the following exceptions:
>
> (a) Evidence of any such conviction is inadmissible in a civil trial if it is so remote in time as to have no bearing on the present character of the witness.
>
> (b) Evidence of juvenile adjudications are inadmissible under this subsection.
>
> (2) The pendency of an appeal or the granting of a pardon relating to such crime does not render evidence of the conviction from which the appeal was taken or for which the pardon was granted inadmissible. Evidence of the pendency of the appeal is admissible.
>
> (3) Nothing in this section affects the admissibility of evidence under s. 90.404 or s. 90.608.

In *State v. Page*, 449 So.2d 813, 815 (Fla. 1984), the court considered whether theft was a crime of dishonesty under s. 90.610, F.S. The court ruled:

> Article V, section 2(a) of the Florida Constitution grants to this Court the power to "adopt rules for the practice and procedure in all courts." Subsection 90.610(1), dealing with the use of prior convictions for the purpose of impeachment, clearly falls within the realm of "procedure." To avoid a constitutional attack on the evidence code and recognizing that matters of court procedure are the sole responsibility of this Court, we adopted the legislatively enacted evidence code as a court rule in 1979. *In re Florida Evidence Code*, 372 So.2d 1369 (Fla. 1979). Thus, pursuant to article V of the constitution it is our sole responsibility to determine which crimes involve "dishonesty or false statement" for the purpose of impeachment.

In the same opinion, the Supreme Court ruled that legislative intent is "irrelevant" when interpreting the provisions of the Evidence Code that the court deems procedural.[40] Accordingly, any attempt by the Legislature to specify whether a crime involves dishonesty or false statement for purposes of impeachment is procedural and can only be set by court rule.

Similarly, the court has held that the Legislature cannot determine whether crimes where adjudication was withheld can be used for impeachment purposes. In *State v. McFadden*, 772 So.2d 1209, 1213 (Fla. 2000), the court asserted complete control over that determination:

> The key to our analysis is the definition to be given to the term "conviction" as used in section 90.610(1) of the Florida Evidence Code. Section 90.610 does not define the term "conviction" for purposes of impeaching a witness. As this Court has determined, section 90.610(1) involves a matter of court procedure solely within the province of this Court to enact pursuant to article V, section 2(a) of the Florida Constitution. It is therefore this Court's responsibility to determine what constitutes a prior "conviction" for purposes of impeachment under section 90.610(1) consistent with the limited purpose for which convictions have been historically admissible.

Pursuant to *McFadden*, the Legislature cannot define "conviction" for purposes of s. 90.610, F.S.

In 1998, the Legislature modified s. 90.803(22), F.S., relating to the admission of former testimony. Chapter 98-2, Laws of Florida, provides, in relevant part:

> Former testimony given by the declarant which testimony was given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in

[40] *State v. Page*, 449 So.2d 813, 815 n.2 (Fla. 1984).

> interest, or a person with a similar interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination; provided, however, the court finds that the testimony is not inadmissible pursuant to s. 90.402 or s. 90.403.

In 2000, the court declined to adopt ch. 98-2, L.O.F., as part of the Evidence Code and refused to decide whether the revision was substantive or procedural.[41] Accordingly, the Florida Statutes and the court's evidence code contain different provisions. Justice Lewis wrote a separate opinion where he argued that the statutory provision was a rule of procedure and that the court should hold that the provision violated art. V, s. 2(a), Fla. Const. He explained the problems caused by the court's failure to act:

> I see no reason to wait for or encourage a separate dispute to arise before providing guidance to the judiciary and the public concerning this provision. If the proposed change is an unacceptable rule of procedure, we should address the answer in a direct fashion to avoid any unnecessary waste of both judicial and litigation resources. The bench, bar, and public should not be required to engage in futile efforts only to face the same conclusion we announce today in a different form with simply more specifically stated reasoning.[42]

In *Grabau v. Department of Health*, 816 So.2d 701, 707-709 (Fla. 1st DCA 2002), the First District Court of Appeal held the law created by ch. 98-2, L.O.F. unconstitutional as an infringement on the Florida Supreme Court's exclusive rulemaking authority.

In addition to these examples, some other examples of statutes found to be unconstitutional for violating the court's rulemaking power include:

- A law tolling a statute of limitations while mediation is pending.[43]
- Portions of the offer of judgment law.[44]
- Restrictions on whether an insurance company may be joined as a party defendant[45] or may be referred to in trial.[46]
- Laws relating to offer of judgment in a civil action.[47]
- Limits on class actions affecting a condominium association.[48]

Effectiveness of the Power to Repeal a Court Rule as a Check and Balance

The Constitution provides that the Legislature can repeal rules of court by general law enacted by two-thirds vote of the membership of each house of the Legislature. However, the Constitution provides no remedy to the Legislature where the court ignores the repeal or even specifically readopts a repealed rule. Repealing a court rule is a rare occurrence. Since 1973, only 14 bills, repealing 21 rules, have passed. As two of those bills were identical and in the same session, it is probably fairer to say that there have been 13 bills repealing 19 rules. The results of those repeals are detailed here:

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[41] *See In re Amendments to the Florida Evidence Code*, 782 So.2d 339, 341-342 (Fla. 2000).
[42] *In re Amendments to the Florida Evidence Code*, 782 So.2d 339, 343 (Fla. 2000)(Lewis, J., specially concurring).
[43] *Ong v. Mike Guido Properties*, 668 So.2d 708 (Fla. 5th DCA 1996).
[44] *TGI Friday's, Inc. v. Dvorak*, 663 So.2d 606 (Fla. 1995).
[45] *Markert v. Johnston*, 367 So.2d 1003 (Fla. 1978).
[46] *Carter v. Sparkman*, 335 So.2d 802 (1976), cert. denied, 429 U.S. 1041.
[47] *Hanzelik v. Grottoli and Hudon Inv. of America, Inc.*, 687 So.2d 1363 (Fla. 4th DCA 1997), *review denied* 697 So.2d 510. The court has matched the offer of judgment rule to the statute so there is no current conflict, although the Legislature may be powerless at this point to amend the statute.
[48] *Avila South Condominium Ass'n, Inc. v. Kappa Corp.*, 347 So.2d 599 (Fla. 1977). The limits have been adopted as rules, but the Legislature may be powerless at this point to amend the statute.

Specific Readoption After Repeal

In total, the court has specifically readopted 5 complete rules in two separate actions, and part of another repealed rule in a 3rd instance.

In 1979, the Legislature passed ch. 79-336, L.O.F. to amend laws relating to criminal defendants suffering from mental illness. Section 4 of the act unconditionally repealed rule 3.210. The act, and the repeal, were effective October 1, 1979. On October 9, 1979, the Supreme Court adopted temporary rules regarding mentally ill defendants that specifically readopted part of the repealed rule 3.210.[49]

In 2000, the Legislature passed the Death Penalty Reform Act of 2000 ("DPRA"). The legislation was an attempt to increase efficiency in capital appellate and postconviction cases. It created a "dual-track" system so that direct appeals and postconviction proceedings could proceed at the same time and imposed time limits for the filing of postconviction pleadings. In order for the new procedure to function, the Legislature repealed two rules of court and repealed a third to the extent it was inconsistent with the DPRA. The DPRA became effective on January 14, 2000.[50] On February 7, 2000, 24 days later, the court readopted, retroactive to January 14, 2000, the repealed rules while it considered challenges to the DPRA.[51] In *Allen v. Butterworth*, 756 So.2d 52 (Fla. 2000), the court held that the DPRA was an unconstitutional encroachment on rulemaking and adopted its own rules on capital postconviction litigation. In *Allen*, the court held that it has exclusive jurisdiction to control capitol collateral proceedings:

> Based on the foregoing, we conclude that the writ of habeas corpus and other postconviction remedies are not the type of "original civil action" described in *Williams* for which the Legislature can establish deadlines pursuant to a statute of limitations. Due to the constitutional and quasi-criminal nature of habeas proceedings and the fact that such proceedings are the primary avenue through which convicted defendants are able to challenge the validity of a conviction and sentence, we hold that article V, section 2(a) of the Florida Constitution grants this Court the exclusive authority to set deadlines for postconviction motions.[52]

Another case where the court readopted a rule that had been repealed by the Legislature was in *State v. Raymond*, 906 So.2d 1045 (Fla. 2005). In 2000, the Legislature enacted ch. 2000-178 and ch. 2000-229, L.O.F., to provide that "no person charged with a dangerous crime shall be granted nonmonetary pretrial release at a first appearance hearing." Both acts repealed conflicting court rules. The rule repeal was ignored and the rules continued to be printed. Five years later, the *Raymond* court held that the statute was unconstitutional because it was procedural and not a substantive law. The court readopted the repealed rules:

> Therefore, we temporarily readopt rules 3.131 and 3.132 in their entirety and publish the rules for comment concerning whether they should be amended to reflect the Legislature's intent as demonstrated in section 907.041. We are particularly concerned that we be fully informed as to the policy concerns of the Florida Legislature before we take any final action on these rules. For that reason, we expressly invite the Legislature to file comments particularly addressing the policy concerns that the Legislature was attempting to address by enacting section 907.041(4)(b).[53]

In summary, the *Raymond* court invalidated a statute, readopted a repealed rule, and asked the Legislature to justify its policy.

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[49] *In re Transition Rule 23 Competency to Stand Trial and be Sentenced: Insanity as a Defense*, 375 So.2d 855 (Fla. 1979).
[50] The DPRA was adopted during a special session held for the purpose of considering reform to death penalty cases.
[51] *See In re Rules Governing Capital Postconviction Actions*, 763 So.2d 273 (Fla. 2000).
[52] *Allen v. Butterworth*, 756 So.2d 52, 62 (Fla. 2000).
[53] *State v. Raymond*, 906 So.2d 1045, 1051-1052 (Fla. 2005).

Results of Other Repeals

In addition to the readoptions described above, the Supreme Court has ignored 6 rule repeals[54], 3 rules were amended but not in compliance with the repealing act,[55] and in only 4 rule repeals has the court fully honored a legislative repeal of a court rule.[56] That is, in only 21% of the rules repealed by general law has the court fully implemented the will of two-thirds of the Legislature joined by the Governor.

The Theory of Inherent Power of Rulemaking

To understand the proposed constitutional amendment, one must also understand the concept of express and inherent powers. No constitution before 1957 gave the courts express rulemaking power. While early records are sparse, it appears that the courts were given some statutory authority for rulemaking as early as 1868. Before the courts had express constitutional rulemaking power, they apparently assumed an inherent power. For instance, in 1940 the court discussed inherent power before finding that this inherent power is subject to legislative amendment:

> Few subjects in the law have been bruited and discussed more than the inherent power of the courts to make rules. This court has approved the doctrine but it has never attempted to limit or define the scope of its power in that field. *Petition of the Florida State Bar Association*, 186 So. 280.
>
> If not limited in the Constitution, the great weight of authority in this country supports the view that courts have inherent power to make rules governing contempt, admissions to the bar, and for the conduct of the business brought before them. They have no power to affect substantive law or jurisdiction.
>
> In any event, the question must be approached in the light of the dominant law of the State concerned. Some of the State Constitutions are silent on the subject; some of them confer the rule-making power exclusively on the courts; some of them vest it in the Legislature while others divide it between the courts and the Legislature. Florida appears to fall in the latter class, since Section 20 of Article 3 of the Constitution, among other things, provides that the Legislature shall not pass special or local laws regulating the practice of courts of justice, except municipal courts. Section 21 of the same article requires that all such laws be general and of uniform operation throughout the State.
>
> I do not construe these provisions to be exclusive but supplemental to the power of the courts to prescribe rules regulating contempts, admissions to the bar, and for the conduct of judicial business. Certainly they authorize the Legislature to enter these fields and, when so entered, legislative acts will be respected by this court.[57]

A more recent discussion of inherent rulemaking authority is in the case of *Crow v. State*, 866 So.2d 1257 (Fla. 1st DCA 2004). In that case, a district court of appeal ruled that a court could find an inherent right to draft court rules, contrary to general law, anywhere that the court felt such was necessary to interpret some other provision of the constitution. Another judge on that same court of appeal has written an article arguing that courts have an inherent right to rulemaking in certain circumstances.[58]

[54] Repeals ignored in: ch. 77-312, L.O.F., ch. 79-69, L.O.F., ch. 80-72, L.O.F., and ch. 82-392, L.O.F.
[55] Repeals not honored in: ch. 73-84, L.O.F., ch. 98-194, L.O.F., and ch. 2006-292, L.O.F.
[56] Repeals honored in: ch. 76-138, L.O.F., ch. 2004-60, L.O.F., and ch. 2006-96, L.O.F.
[57] *Petition of Florida State Bar Ass'n for Promulgation of New Florida Rules of Civil Procedure*, 199 So. 57, 58 (Fla. 1940).
[58] Wolf, *Inherent Rulemaking Authority of an Independent Judiciary*, 56 U.Miami.L.R. 507

Effect of Joint Resolution

This proposed joint resolution repeals the Supreme Court's claim to exclusive rulemaking authority and rebuts any claim to an inherent right to rulemaking by providing that no court has the power to adopt rules for the practice and procedure in any court. The joint resolution then requires the Supreme Court to suggest rules of practice and procedure that can be adopted as provided for in general law. Additionally, the joint resolution provides that, if there a conflict between a court rule and general law, the general law prevails.

The effect of this joint resolution, should it be adopted by the voters, would be to end conflicts between the courts and the Legislature over procedure versus substance and to end private litigation over whether a particular law is procedural or substantive.

B. SECTION DIRECTORY:

n/a

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

Article XI, s. 5(d) requires that a proposed constitutional amendment must be published in one newspaper of general circulation in each county in which a newspaper is published. The Department of State has not provided an estimate of the publication cost.

The future cost to the state of this amendment is unknown and speculative, as the cost, if any, is contingent upon how the amendment is implemented.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   A mandates analysis is inapplicable as this bill is a proposed constitutional amendment.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

   None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

This is a legislative joint resolution, which is one of the methods for proposing, approving or rejecting amendments to the Florida Constitution. The joint resolution requires passage by a three-fifths vote of the membership of each house of the Legislature. The proposed constitutional amendment must be submitted to the electors at the next general election held more than 90 days after the joint resolution is filed with the custodian of state records. If approved by 60 percent of the electors voting on the question, the proposed amendment becomes effective on the Tuesday after the first Monday in January following the election, or on such other date as may be specified in the amendment.

Justice Lewis has called for a procedure in which the Legislature and the Florida Supreme Court can work cooperatively on rulemaking:

> Recognizing the importance of a cooperative effort in this matter involving both substantive and procedural areas of mutual concern, I suggest that it may be time to consider and discuss some type of formalization of a cooperative venture in an attempt to properly harmonize the elements necessarily involved in the process rather than permitting an atmosphere to exist in which unnecessary conflict may arise.[59]

The joint resolution creates a mechanism for such cooperation.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

[59] *In re Amendments to the Florida Evidence Code*, 782 So.2d 339, 343 (Fla. 2000)(Lewis, J., specially concurring).