

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB CVJS 11-02 Court Rulemaking Process

SPONSOR(S): Civil Justice Subcommittee

TIED BILLS: None **IDEN./SIM. BILLS:** None

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Civil Justice Subcommittee		Bond	Bond

SUMMARY ANALYSIS

Article V, s. 2(a) of the state constitution has been interpreted by the Florida Supreme Court to give that court exclusive rulemaking power regarding court rules. The court relies on volunteer committees provided by the Florida Bar to assist the court in creating and amending the rules.

Pending before the legislature is a proposed amendment which would require court rules to be recommended by the Supreme Court, subject to legislative review before adoption by the legislature. This proposed committee bill is a related implementing bill that is only effective should the constitutional amendment pass the legislature and be adopted by the electorate.

This proposed committee bill creates a state court rulemaking process modeled after the federal system of court rulemaking. Proposed rule changes would be heard by appropriate committees and the Florida Supreme Court. Recommended rules would be delivered to the Legislature in December and would be effective the following July 1 unless the Legislature amends or rejects the proposed rule. If a rule conflicts with statute, the statute prevails.

This proposed committee bill also provides that administrative orders, local rules, forms and jury instructions may be adopted without legislative approval. Like rules, these cannot conflict with statute.

This proposed committee bill may require recurring funding commencing in FY 2012-13 for the administrative costs related to court rulemaking. Funding would likely be from the General Revenue Fund. This bill does not appear to have a fiscal impact on local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Law and Practice

Article V, section 2(a), of the Florida Constitution provides:

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. These rules may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature.

Pursuant to this grant of authority, the Florida Supreme Court has promulgated the following rules of court:

- Appellate Procedure
- Civil Procedure
- Criminal Procedure
- Family Law Rules of Procedure
- Judicial Administration
- Juvenile Procedure
- Probate Rules
- Small Claims Rules
- Traffic Court

In addition, there is an ongoing debate regarding the Florida Evidence Code.¹ The legislature appears to have taken the position that it is substantive, and accordingly the evidence laws have been placed into the Florida Statutes. The courts, however, believe that the evidence laws are part substance and part procedure. Accordingly, the courts review the code, and any changes to it, to determine which parts the court considers procedure and which parts are substance. The Supreme Court routinely will adopt a rule of evidence that the court agrees with as a rule of court "to the extent it is procedural."

These rules govern the practice and procedure in Florida courts and cannot be amended by the Legislature.² The Florida Rules of Judicial Administration set forth the procedure for amending court rules. The procedure for amending court rules is governed by Rule 2.140, Fla. R. Jud. Admin.

Any person may propose new rules, propose repeal of court rules, or propose amendments to court rules.³ Proposals must be submitted to the clerk of the supreme court. The clerk refers the proposals to a committee appointed by the Florida Bar to consider each proposal.⁴ The supreme court has created the following committee consider rule proposals:

- Appellate Court Rules Committee
- Civil Procedure Rules Committee
- Criminal Procedure Rules Committee

¹ Ch. 90, F.S.

² See *In re Clarification of Florida Rules of Practice and Procedure*, 281 So. 2d 204 (Fla. 1973)(" The Legislature has the constitutional right to repeal any rule of the Supreme Court by a two-thirds vote, but it has no constitutional authority to enact any law relating to practice and procedure").

³ See Rule 2.140(a)(1), *Fla. R. Jud. Admin.*

⁴ See Rule 2.140(a)(2), *Fla. R. Jud. Admin.*

- Family Law Rules Committee
- Rules of Judicial Administration Committee
- Juvenile Court Rules Committee
- Probate Rules Committee
- Small Claims Rules Committee
- Traffic Court Rules Committee
- Code and Rules of Evidence Committee.⁵

The committees meet and vote on each proposal. Committees may also originate proposals. In addition, committees regularly review the rules under committee jurisdiction and propose changes pursuant to a review/reporting cycle established by the Rules of Judicial Administration. Each committee will report once every three years pursuant to the rule.⁶

During each reporting cycle, the committees submit proposals to the Florida Bar Board of Governors and interested persons may file comments. The committee reconsiders its proposals in light of the comments and submits, if necessary, revised proposals. The Florida Bar Board of Governors meets and votes whether to accept, reject, or modify the committee proposals.⁷ Each committee files its proposals with the Florida Supreme Court and may accept the proposals of the Board of Governors or reject them.⁸

The Florida Supreme Court may set the matter for oral argument and permit written comments by any interested person. The court issues an opinion prior to January 1 so the rules can be implemented.⁹ The court can adopt the proposed rules, refuse to adopt them, or adopted amended rules.

The Rules of Judicial Administration also provide mechanisms for emergency rule amendments by the Florida Supreme Court, for emergency recommendations by the committees, and for special consideration of proposals outside the normal cycle as directed by the Florida Supreme Court.

Effect of the Bill

This bill implements the constitutional amendment in PCB CVJS 11-01. If the amendment is adopted, the Constitution would read:

(a) No court shall have the power, express or implied, to adopt rules for practice and procedure in any court. Court rules of practice and procedure may be recommended by the supreme court to be adopted, amended or rejected by the legislature in a manner prescribed by general law. If there is a conflict between general law and a court rule, the general law supersedes the court rule.

The amendment removes the authority of the Florida Supreme Court to adopt rules of court and replaces it with a procedure where the court rules of practice and procedure are recommended by the supreme court and adopted, amended, or rejected by the Legislature. This bill implements the amendment.

When a Statute and a Rules Conflict, the Statute Controls

Section 25.371, F.S., provides that when a rule is adopted by the supreme court concerning practice and procedure, and such rule conflicts with a statute, the rule supersedes the statute.¹⁰ This bill provides that if a rule conflicts with a statute, the statutory provision supersedes the rule.

⁵ See Rule 2.140(a)(3), *Fla. R. Jud. Admin.*

⁶ See Rule 2.140(b)(1), *Fla. R. Jud. Admin.*

⁷ See Rule 2.140(b)(2), (3), *Fla. R. Jud. Admin.*

⁸ See Rule 2.140(b)(4), *Fla. R. Jud. Admin.*

⁹ See Rule 2.140(b)(5), (6), (7), *Fla. R. Jud. Admin.*

The bill creates section 43.45, F.S., to provide that no court rule may abridge, enlarge or modify any substantive right.¹¹ It provides that court rules of practice and procedure shall not conflict with general law.

The bill further provides that no local rule, administrative order, form, or jury instruction may abridge, enlarge or modify any substantive right.

The Judicial Conference

The bill creates a judicial conference within the judicial branch and provides that the Chief Justice of the Florida Supreme Court is the chair of the conference. The judicial conference is administratively housed in the state courts system. The other members of the conference are the five chief judges of the district courts of appeal and one circuit judge¹² from each appellate district. The circuit judges are chosen for duty on the judicial conference by the chief judge of the appellate district where the circuit judge resides. For reference, there is a Judicial Conference of the United States that similarly has the Chief Justice as chair, and that includes the chief judges of the intermediate appellate courts and a trial court judge from each appellate district.

The judicial conference ("conference") is tasked with studying the operation and effect of rules of practice and procedure in all state courts. The conference must recommend amendments of existing rules or addition of new rules to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay." The recommended rules must not be inconsistent with general law. The conference makes its recommendations to the Florida Supreme Court.

The judicial conference must also create, revise and implement forms for use in court proceedings, approve local rules of court, approve form jury instructions, and any other task or duty prescribed by law or designated by the Chief Justice of the Florida Supreme Court.

The chief justice is required to submit an annual report to the Speaker of the House of Representatives and the President of the Senate of the proceedings of the judicial conference. The report must contain proposed rule amendments and adoptions, and recommendations for legislation respecting general rules of practice and procedure before the state courts.

The bill requires the conference to create advisory committees and subcommittees to assist the conference in performing its duties. One of the committees must be a standing committee on court rules ("rules committee"). The rules committee shall make recommendations on rule amendments and adoptions. The rules committee must have, at a minimum, advisory subcommittees in each of these areas:

- appellate court rules;
- civil procedure rules;
- code & rules of evidence;
- criminal procedure rules;
- family law rules;
- probate rules;
- juvenile court rules;
- rules of judicial administration;
- small claims rules; and

¹⁰ This statute was written in 1957 as part of an implementing bill related to the 1957 adoption of a revised art. V of the state constitution. A prior statute had provided that only rules applicable to the Supreme Court (which would only encompass the appellate rules) would control over any statute in conflict. See prior s. 25.03(5), F.S. (repealed in 1957).

¹¹ This provision is model after the federal Rules Enabling Act, 28 U.S.C. s. 2072 ("Such rules shall not abridge, enlarge or modify any substantive right").

¹² Florida is divided into five appellate districts and 20 judicial circuits. See ss. 26.01, 35.01, F.S.

- traffic court rules.

For reference, in the federal court system there is a rules advisory committee and subject matter subcommittees.

The chief justice appoints the chair and members of advisory committees and subcommittees. Advisory committees and subcommittees must be chaired by a state court judge currently in office and must include practicing attorneys, legal academics, and at least one member of the general public who is not an attorney or an academic. Any justice or judge who has been impeached by the House of Representatives or is awaiting disposition after a finding of probable cause by the Judicial Qualifications Commission is disqualified from serving on the conference or any advisory committee of the conference.

All meetings of the judicial conference, the rules committee, or a subcommittee must be open to the public.

The conference must be given a prominent link on the web page of the state courts system. The conference shall maintain a group of connected web pages on the website of the state courts system dedicated to its work, the work of the advisory committees, and the court rulemaking process. The website must include a fillable form by which any member of the public can suggest a rule adoption or change and must include contact information or forms for members of the public to comment on rule proposals. All rule proposals, subcommittee and committee agendas, and subcommittee and committee reports must be published on the website. The website must allow any person to receive email notifications relating to the work of the conference. Access to the website must be free of charge.

Creation and Amendment of Court Rules of Practice and Procedure

The bill provides a procedure for the creation and amendment of court rules. It requires the supreme court to recommend general rules¹³ of practice and procedure in all courts. Recommended rules may be adopted, amended or rejected by the legislature. Any court may create administrative orders¹⁴ and forms¹⁵ that apply in that court and in inferior courts, subject to any limitation in general law and subject to the administrative authority of the supreme court.

The bill requires the conference to prescribe and publish the procedures for the consideration of proposed rules, local rules,¹⁶ forms and jury instructions.¹⁷ The administrative process for changes to court rules must include at a minimum the following procedures:

Actions by an Advisory Subcommittee

Any member of an advisory subcommittee may sponsor a proposed rule adoption or amendment for consideration. Suggestions from the general public must be referred to the chair of the appropriate subcommittee. If the chair believes the suggestion has merit, the chair shall request a member of the subcommittee to sponsor it.

An advisory subcommittee must publish an agenda at least 20 days prior to its meeting setting forth all initial proposals scheduled by the chair for consideration. If the advisory subcommittee determines by a majority vote that a proposal has merit, the subcommittee may place the proposal on the next agenda for consideration. The subcommittee must create an explanatory note on the proposed rule, together

¹³ The bill defines "rule" or "court rule" as a rule of practice or procedure adopted to facilitate the uniform conduct of litigation applicable to all proceedings, all parties, and all attorneys. A rule has statewide impact.

¹⁴ The bill defines "administrative order" as a directive necessary to administer properly the court's affairs but not inconsistent with the constitution or with court rules.

¹⁵ The bill defines "form" as a form created for use by the parties in a court action.

¹⁶ The bill defines "local rule" as a rule of practice or procedure for circuit or county application only that, because of local conditions, supplies an omission in or facilitates application of a rule of statewide application.

¹⁷ The bill defines "jury instruction" as a standard suggested instruction to juries on the law of a case.

with a fiscal estimate of the cost of the rule to the state, the cost to local government, and to the general public before the next meeting. The explanatory note and fiscal estimate must be published on the judicial conference webpage at least 30 days prior to the subcommittee meeting at which the proposal will be considered.

At a meeting in which a proposal is up for final subcommittee consideration, the subcommittee will consider the proposal and the draft report. By majority vote, the subcommittee may reject, adopt, or amend the proposal or the explanatory note or fiscal estimates. The subcommittee may also move consideration of the proposal to the next meeting of the subcommittee.

If the subcommittee adopts the proposal, the subcommittee must prepare a report to the rules committee indicating the majority view and the fiscal estimates. Any member of the subcommittee may object to the proposal, the explanatory note, or the fiscal estimates by filing a minority report with the rules committee and sending the report rules committee within 20 days of subcommittee adoption.

Actions by the Rules Committee

The chair of the rules committee sets the agenda for the rules committees. The agenda shall be published at least 20 days prior to a meeting. No proposal may be heard unless it was passed by a subcommittee at least 60 days prior to the committee meeting. The rules committee may adopt, amend, reject, continue to another meeting, or return to the subcommittee for further consideration any proposal. Any member of the rules committee may object to a proposal, the explanatory note, or the fiscal estimates by filing a minority report with the judicial conference within 20 days of committee adoption.

Action by the Judicial Conference

The chief justice sets the agenda for the judicial conference. The agenda must be published at least 20 days prior to a meeting. No proposal may be heard unless it was passed by the rules committee at least 120 days prior to the judicial conference meeting. The judicial conference may adopt, amend, reject, continue to another meeting, or return to the rules committee for further consideration any proposal. Any member of the judicial conference may object to a proposal, the explanatory note, or the fiscal estimates by filing a minority report with the judicial conference within 20 days of judicial conference adoption. The conference must submit proposed changes to general rules of court to the supreme court annually no later than August 1.

Action by the Florida Supreme Court

The Florida Supreme Court may adopt, modify or reject any recommendation of the conference. The court must submit to the Speaker of the House of Representatives and the President of the Senate not later than the first business day of December of the year preceding the year in which a rule prescribed under this section is to become effective. Such proposed rule shall take effect July 1 of the following year unless otherwise provided by law.

Summary of the Process Created by the Bill

The bill contemplates a deliberative process by the conference, the rules committee, and the advisory subcommittees. An initial proposal must be placed on an agenda at least 20 days before the advisory subcommittee considers it. Once the subcommittee finds the proposal has merit, it must create an explanatory note and fiscal estimate. Once that report is complete, it must be placed on the internet site for 30 days before the subcommittee may consider the proposal and report. Once the subcommittee approves the proposal, the rules committee cannot consider the report until at least 60 days after subcommittee approval. The conference cannot consider the proposal from the rules committee until at least 120 days after the rules committee approves it. All proposals from the conference must be submitted to the Florida Supreme Court by August 1 in order for the court to include the proposal in its recommendation to the Legislature. The court's recommendation must be filed by December 1.

Action by the Legislature

Rules recommended to the Legislature by the supreme court do not have the force of law and are not effective unless:

the Legislature affirmatively approves the rule, with or without legislative amendment; or

the Legislature meets in regular session subsequent to the submission of the rule to the presiding offices and adjourned sine die without enacting legislation rejecting or amending the proposed rule.

The bill provides that (1) no rule of evidence shall be effective unless the Legislature affirmatively adopts the rule in general law, (2) no rule shall require the payment of any court cost or fee unless the Legislature affirmatively adopts the cost or fee in general law, and (3) if the Legislature passes a bill amending or rejecting a recommended rule and the governor vetoes the bill, the recommended rule is not adopted. If, however, the Legislature overrides the veto then the rule shall be as provided in the act.

Further, matters related to the admissibility of evidence may only be enacted by general law. However, a court may prohibit the admission of certain evidence for failure to comply with a court rule and a court may prohibit admission of certain evidence in a case for failure to comply with a court order that is specific to that case.

The bill provides that the Florida Supreme Court may fix the extent to which rules, once effective, apply to proceedings pending before courts, except that the Florida Supreme Court must not require the application of such rule to further proceedings to the extent that, in the opinion of the court in which such proceedings are pending, the application of the new rule in such proceedings would not be feasible or would work injustice. In such a case, the former rule applies to the case.

Local Rules, Administrative Orders, and Jury Instructions

The bill provides that local rules, administrative orders, forms, and jury instructions are not required to be affirmed by the Legislature, but may be repealed or amended by general law. Forms are subordinate to rules and to administrative orders, and administrative orders are subordinate to rules. Once repealed or amended, they may not be re-amended or re-adopted unless in conformity with the general law.

The bill provides that local rules may be promulgated by inferior courts if permitted by the conference and the Florida Supreme Court. No local rule may abridge, enlarge or modify any substantive right or conflict with general law. No local rule may require parties or attorneys to pay or incur any cost or fee unless such cost or fee is authorized by general law.

The bill provides that administrative orders may be promulgated by inferior courts if permitted by the conference and the Florida Supreme Court. Administrative orders are not required to be approved by the Legislature. No administrative order may abridge, enlarge or modify any substantive right or conflict with general law. No rule of court may be enacted in the form of an administrative order. No administrative order may require parties or attorneys to pay or incur any cost or fee unless such cost or fee is authorized by general law.

Advisory committees may recommend forms for use by the courts. Forms are not required to be approved by the Legislature. No form may abridge, enlarge or modify any substantive right or conflict with general law. Advisory committees may recommend jury instructions for use by the courts. Jury instructions are not required to be approved by the Legislature. No jury instruction may abridge, enlarge or modify any substantive right or conflict with general law.

By these limits, the courts will not be able to create a general rule of court under the guise of an administrative order, local rule, form, or jury instruction. By these limits, the legislature can require a change should any administrative order, local rule, form, or jury instruction violate general law.

Exceptions

The bill provides that some areas where the Florida Supreme Court currently adopts rules are not covered under the recommendation/approval process used for most procedural rules. Specifically, rules regulating the admission of persons to the practice of law and the discipline of persons admitted, provided such rules are consistent with art. V, s. 15 of the state constitution, rules related to internal operating procedures of a court, including personnel rules and personnel actions, provided such procedures and actions are consistent with general law, and administrative orders, policies and procedures related to the assignment of a case or cases to a judge or panel are not subject to the provisions relating to the judicial conference, the rules committee, the advisory subcommittees, and the legislative approval process. Similarly, rules, local rules, or administrative orders that are limited to creation of an advisory committee are not subject to provisions relating to the judicial conference, the rules committee, the advisory subcommittees, and the legislative approval process.

Adoption of Existing Rules on the Effective Date

In general, sections 6 and 7 of the bill adopt existing rules of court as of the effective date of the bill. This adoption should provide for continuity in court operations.

The bill provides explanation of legislative intent. First, it provides that the Legislature intends that court rules as they read on the effective date of the bill are presumed valid. If a court determines that the amendment to art. V, s. 2(a) of the state constitution has the effect of implied repeal of all court rules, then the Legislature provides that Rules of Judicial Administration 2.410, 2.420, 2.430, 2.440, and 2.450¹⁸ unless repealed or amended by general law. The bill further provides legislative intent that all public records laws affecting the courts, including those grandfathered in at the adoption of art. I, s. 24 of the state constitution, shall remain in effect unless amended or repealed by general law enacted after the effective date of this act. The referenced Rules of Judicial Administration are related to the possession and retention of court records and to public access to court records.

The bill further provides that the Legislature intends that all court rules as they read on the effective date of this bill are presumed valid. If a court determines that the amendment to art. V, s. 2(a) of the state constitution has the effect of implied repeal of all court rules, then the Legislature intends all court rules, local rules, administrative orders, forms and jury instructions that were in effect on the day before the effective date of this act and that are not otherwise in conflict with general law shall be deemed adopted, shall have full force and effect, and shall remain in effect unless subsequently repealed or amended by general law.

Effective Date

The bill takes effect on the effective date of the joint resolution in PCB CVJS 11-01, or a similar joint resolution if such a joint resolution is approved by the voters in the 2012 general election.

B. SECTION DIRECTORY:

Section 1 amends s. 25.371, F.S., relating to effect of rules.

Section 2 creates s. 43.45, F.S., relating to court rules of practice and procedure.

Section 3 creates s. 43.46, F.S., relating to the judicial conference.

¹⁸ These rules provide for the records of the courts, and include some of the public records exemptions applicable to the courts.

Section 4 creates s. 43.47, F.S., relating to creation and amendment of court rules of practice and procedure, local rules, administrative orders, forms, and jury instructions.

Section 5 creates s. 43.48, F.S., relating to exceptions.

Section 6 provides legislative intent.

Section 7 provides legislative intent.

Section 8 provides a conditional effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

This proposed committee bill may require recurring funding commencing in FY 2012-13 for the administrative costs related to court rulemaking. Funding would likely be from the General Revenue Fund.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

Today, much of the lower level committee work on rulemaking is done by volunteer committees associated with the Florida Bar, with assistance from existing staff of the state courts system. There is nothing in the bill prohibiting the chief justice from continuing the court's longstanding reliance on Florida Bar members for this committee work. Indeed, it is anticipated that the court would probably continue to have a close relationship with Florida Bar committees in the early stages of rulemaking. Should this reliance continue, the fiscal impact of this bill should be minimal.

By eliminating litigation over procedure versus substance, the court system might realize a positive recurring fiscal impact on expenditures. There is no measure of the current cost to the system for such litigation, and so there is no means to quantify the possible savings.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill does not provide for terms of the members of the conference or terms of the members of the advisory committee and subcommittees. It implies that the members serve at the pleasure of the chief justice by giving the chief justice the power to appoint the members.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a