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# **Civil Justice Subcommittee**

**Tuesday, October 8, 2013**

**1:00 PM**

**404 HOB**

**Will Weatherford  
Speaker**

**Larry Metz  
Chair**

**Committee Meeting Notice**  
**HOUSE OF REPRESENTATIVES**

**Civil Justice Subcommittee**

**Start Date and Time:** Tuesday, October 08, 2013 01:00 pm  
**End Date and Time:** Tuesday, October 08, 2013 03:00 pm  
**Location:** Sumner Hall (404 HOB)  
**Duration:** 2.00 hrs

Presentation and discussion on amendments to and repeals of outdated court system statutes

Presentation and discussion regarding limits placed on legislation by Art. I, Sec. 21, Art. II, Sec. 3 and Art. V, Sec. 2 of the State Constitution

**NOTICE FINALIZED on 10/01/2013 16:16 by Jones.Missy**

**Potential  
Repealers**

### Potential Repealers for 2014 Session

25.151	This is a 1957 law that prohibits a retired justice from engaging in the practice of law.	Likely is unconstitutional. See <i>In re The Florida Bar-Code of Judicial Conduct</i> , 281 So.2d 21 (Fla. 1973).	
25.191	Requires the Supreme Court to appoint a clerk.	Already required by state constitution.	
25.211	Provides that the office of the Clerk of the Supreme Court must be in the Supreme Court Building.	This is obvious, and there is no defined "Supreme Court Building".	
25.231	Provides that the Clerk of the Supreme Court shall perform the duties directed by the Supreme Court.	This is obvious. The state constitution provides that the clerk serves at the pleasure of the court.	
25.241(1)	Provides that the Clerk of the Supreme Court is to be paid a salary.	This is obvious.	
25.281	Provides that the Marshal of the Supreme Court is to be paid a salary.	This is obvious.	
25.351	Allows the library of the Supreme Court to purchase books and to trade them with other libraries.	This is obvious.	
26.01	Provides that there are 20 judicial circuits	Repeal in order to merge into s. 26.021, F.S. for simplicity	
27.50	Provides qualifications of public defender	Repeats what is in constitution	
27.55	Provides for budget of a newly created judicial circuit	Unnecessary. Would be part of the bill creating the circuit.	
34.021	Creates qualifications for county judge	Repeats what is in constitution	
34.131	Requires the county courts to be open for voluntary pleas of guilty at any time.	Unnecessary, and can be interpreted to require the county courts to be open 24/7.	
35.12	Provides for election of a chief judge of each district court of appeal.	Duplicates provision in state constitution.	

### Potential Repealers for 2014 Session

35.13	Requires that decisions of a district court of appeal are to be heard by panels of 3, and requires majority vote for a decision.	Duplicates provision in state constitution.	
35.19	Provides that the salary of judges of a district courts of appeal shall be as provided by law.	Duplicates provision in state constitution.	
35.21	Requires each district court of appeal to appoint a clerk to serve at the pleasure of the court.	Duplicates provision in state constitution.	
35.25	Provides that the duties of the clerk of a district court of appeal be prescribed by rules of the court.	The constitution says that the clerk serves at the pleasure of the court, so it is obvious that the clerk does what he/she is instructed. Also, the courts have never promulgated a rule specifying all of the duties of the clerk.	
35.27	Provides that the marshal of each district court of appeal is to be paid a salary.	This is obvious. Duplicates provision in state constitution.	
38.13	If a trial court judge is disqualified, the parties may select a judge ad litem.	Leftover from days when only one judge served a large area, is unnecessary today. Also, duplicative because parties can agree upon an arbitrator or trial resolution judge by other statutes.	
43.30	Allows for courts to create divisions	Duplicates provision in state constitution.	
57.101	Provides that a party cannot be made to pay for copies made by the Clerk of the Supreme Court that the party did not order.	This is obvious. Current placement taken out of context (see original enactment).	
86.081	Provides that the court in a declaratory judgment action may award costs.	Other statutes and court rules provide for taxation of costs in all actions, including declaratory judgment actions.	
92.15	Evidentiary rule on federal land grants	The federal government got out of the land grant business a long time ago.	

**Potential Items for a Court-Related PCB for 2014 Session**

26.021	Portions of statute include residency requirements for circuit judges in some circuits	Appears to create additional statutory requirements for a constitutional officer, which is likely to be found unconstitutional. <sup>1</sup>	
26.51	Requires payment of circuit judge salaries "in equal monthly installments"	Should add proration to the day for the beginning and ending months of a term of office to reflect current practice and good sense.	
26.55	Creates Conference of Circuit Court Judges	Amend to reflect current practice, as requested by the conference.	
43.20	This statute on the JQC has the wrong number of members	Amend to list correct number of members	

<sup>1</sup> See *Miller v. Mendez*, 804 So.2d 1243 (Fla. 2001); *Levey v. Dijols*, 990 So.2d 688 (Fla. 4th DCA 2008), rev. denied, 994 So.2d 304.

**Procedure  
vs. Substance**

**Procedure versus Substance**

A Separation of Powers Issue

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**Introduction**

- Definitions
- Examples
- Application

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**Judiciary Powers**

- **Art. V sec.2(a):**
- "The supreme court shall adopt rules for the practice and procedure in all courts . . ."
- **Art. V sec.3(b)(1):**
- The supreme court shall hear appeals from . . . decisions of district courts of appeal declaring invalid a state statute or a provision of the state constitution.

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### Florida Rules of Court

- Civil procedure
- Judicial administration
- Criminal procedure
- Standard jury instructions
- Involuntary commitment of predators
- Probate
- Judicial nominating committee rules
- Attorney regulation
- Traffic court
- Juvenile court
- Appellate courts
- Mediators
- Arbitrators
- Court reporters
- Court interpreters
- Family law procedure
- Local rules

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### Legislative Powers

- The lawmaking function is inherent in the legislature and not defined by the Constitution.
  - State policy
  - Plenary powers

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### Legislative Powers and Court Rules

- **Art. V § 2(a):**
- Rules of court may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature.

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### The Twilight Zone

- The entire area of substance and procedure may be described as a 'twilight zone. . .'
- Determined by certain factors

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### Per Decisions

**Substantive**

- **Primary rights of individuals with respect towards their persons and property**

**Procedural**

- **Course, form, manner, means, method, mode, order, process or steps**

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### In a Nutshell

**Substantive law**

- **Policies and privileges**

**Procedural law**

- **Machinery of the judiciary**

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### Separation of Powers

- Encroachment is a constitutional question.
- Jurisdiction of the supreme court includes deciding constitutional questions.

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### The Final Word:

- The supreme court makes rules for court procedure.
- The supreme court determines whether a statute is procedural.

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### In Practice

- A statute is challenged.
- Appeal is taken.
- The Supreme Court decides.
- A rule may be adopted.

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**Example 1: The Common Law Rule**

• Closing arguments:

• PROSECUTION – DEFENSE - PROSECUTION

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**Example 1: The Statute**

• Closing arguments:

• Prosecution – Defense – Prosecution

• S. 918.19, F.S. (2006).

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**Example 1: Conflicting Rule of Court**

• Closing arguments:

• Defense – Prosecution - Defense

Rule 3.250 of the Fla. R. Crim. Proc.

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**Example 1: Timeline**

- 1968: Court Rule adopted
- May 4, 2006 : s. 918.19, F.S., passes
- June 7, 2006: Signed by Governor
- *June 14, 2006: Grice charged*
- October 1, 2006: Effective date

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**Example 1: The Trial**

- Grice presented no evidence
- Denied the final argument
- **Prosecution – Defense - Prosecution**
- Convicted
- Appealed

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**Example 1: The Appeal**

- "... first and last closing arguments in a criminal case is a matter of procedure."
- Statute unconstitutional

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**Example 1: The Result**

- **The Legislature effectively revoked the rule.**
- **The common law prevails in absence of a statute or rule.**
- **Conviction affirmed.**

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**Example 1: In a Nutshell**

- **The Legislature may not enact a rule.**
- **The Legislature may revoke a rule.**
- **Without a rule or statute, the common law prevails.**

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**Example 1 Reprise: Rule Changed**

- **The Supreme Court adopted the common law rule on May 3, 2007.**
- **Rule 3.381. Final Arguments**
- **In all criminal trials, excluding the sentencing phase of a capital case, at the close of all the evidence, the prosecuting attorney shall be entitled to an initial closing argument and a rebuttal closing argument before the jury or the court sitting without a jury. . . .**
- **Prosecution – Defense - Prosecution**

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**Example 2: The American Rule**

- Each party pays his own costs and fees.

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**Example 2: Two Statutes**

- The Legislature changed the American Rule.
- 1986: Offers of Judgment (s. 768.79, F.S.)
- 1987: Offers of Settlement (s. 45.081, F.S.)

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**Example 2: Offers of Judgment**

- 1986: Legislature passes s. 768.79, F.S.
- Changes the American Rule

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**Example 2: Offers of Settlement**

- 1987: Legislature passes s. 45.061, F.S.  
Changes the American Rule

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**Example 2: Conflicting Rule of Court**

- 1972: RULE 1.442. OFFER OF JUDGMENT  
Changed the American Rule

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**Example 2: Result**

- Potential conflict among three legal provisions:
- S. 768.79, F.S.
- S. 45.061, F.S.
- Fla. R. Civ. Pro. 1.442

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**Example 2: TGI Friday's, Inc. v. Dvorak**

- Plaintiff made offers under all 3 provisions,  
S. 768.79, F.S.
- S. 45.061, F.S.
- Fla. R. Civ. Pro. 1.442

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**Example 2: The Trial**

- The pretrial offers ranged from \$55,000 to \$69,750.
- Defendant rejected the offers and the jury returned a verdict of \$248,000.
- The trial court found the two statutes unconstitutional.
- The offer under Rule 1.442 was not unreasonably rejected.
- The trial court denied the plaintiff fees and costs.

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**Example 2: The Appeals**

- 1990: *Dvorak* trial
- 1992: Supreme Court finds s. 45.061, F.S. constitutional
- 1994: Fourth DCA finds both statutes constitutional by logical extension
- 1995: Supreme Court affirms *Dvorak* decision.
- 1996: Rule amended to reconcile to cases and statutes

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### Example 2: The Timeline

- 1972: Court adopts Rule 1.442
- 1986: Legislature passes s. 768.79, F.S.
- 1987: Legislature passes s. 45.061, F.S.
- 1987: *Dvorak falls in TGI Friday's and breaks hip*
- 1989: Court amends rule to reconcile to statutes; rule prevails where inconsistent.
- 1990: *Dvorak trial*; Legislature repeals s. 45.061, F.S.
- 1992: Supreme Court finds s. 45.061, F.S. constitutional
- 1994: Fourth DCA finds both statutes constitutional
- 1995: *Supreme Court decides TGI Friday's v. Dvorak*
- 1996: Rule amended to reconcile to cases and statutes

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### Example 3: Military Park v. Demarois

- Public Employees Relations Commission case
- S. 447.504(5), F.S. (1979) provided that cases be expedited

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### Example 3: The Appeal

- "The statute creates a procedure.
- Procedure is the province of the Supreme Court.

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**Example 3: The Decision**

- There can be no doubt that a rule creating priorities among types of civil matters being processed by the state courts is procedural rather than substantive. Held: Unconstitutional.

• *Military Park Fire Control Tax Dist. No. 4 v. DeMarois*, 407 So.2d 1020 (Fla 4<sup>th</sup> DCA 1981).

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**Procedure to Support the Substance**

- Where a statute creates a substantive right, and the procedural provisions are directly related to the definition of those rights, there is no infringement on the court's authority.

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**Example 4: Caple v. Tuttle's Design**

- Tuttle's Design purchased a plant nursery from Caple for \$17,000,000.
- The sale was financed by four promissory notes.
- Tuttle defaulted on two notes.
- Foreclosure was filed.

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**Example 4: The Statute**

- S. 702.10(2), F.S.
- Show cause
- Interim payments pending foreclosure

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**Example 4: the order**

- The court order:
  - Pay interest
  - Post bond

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**Example 4: The Appeal**

- Tuttle claimed s. 702.10(2), F.S. unconstitutional
  - Due process
  - Rule making authority

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**Example 4: In the Supreme Court**

- Presumption in favor of the statute
- All doubts resolved in favor of the statute
- Statute creates a right
- Rule provisions directly protect the right

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**Example 4: The Result**

- Because the statute creates substantive rights and any procedural provisions are directly related to the definition of those rights, we hold that section 702.10(2) does not infringe on this Court's rulemaking authority.
- Therefore, we find that the statute is constitutional under both the United States and Florida Constitutions.

• *Cople v. Turtle's Design-Build, Inc.*, 753 So.2d 49 (Fla. 2000).

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**Another example: The Evidence Code**

- The Supreme Court has adopted the evidence code in its rules.

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### Rules May Follow Cases

- Rules may be adopted in response to cases where the Supreme Court struck a statute.
- The Supreme Court recognizes the Legislature as the policy making arm of the state.
- The Supreme Court may adopt a rule to reconcile a rule to a statute.

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### Application

- There is a strong presumption in favor of the statute.  
(Quale v. Tuttle's Design-Build, Inc., 753 So.2d 99 (Fla. 2000)).
- The court is bound to resolve all doubts in favor of constitutionality. u.
- Where any rules are integral to the rights created by statute, the statute prevails. u.
- Where a statute and rule conflict, the rule prevails.
- Where a statute can be severed, it will be.
- A means to present a rule to the court is to engage via statute.

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**Access to Courts** Civil Justice Subcommittee  
October 8, 2013

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**Introduction**

“The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.”

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**History**

- “To no one will we sell, to no one will we refuse or delay right or justice.”
- “We will sell to no man, we will not deny or defer to any man either Justice or right.”

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• 1835-1868: "That all Courts shall be open, and every person, for an injury done him, in his lands, goods, person, or reputation, shall have remedy by due course of law; and right and justice administered without sale, denial, or delay."

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• 1885-1968: All courts in the State shall be open, so that every person for any injury done him in his lands, goods, person or reputation shall have remedy, by due course of law, and right and justice shall be administered without sale, denial or delay.

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**Today**

"The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."

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**Federal**

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**In General**

- **Must have a court system**
- **Fees and cost limits**
- **Pre-suit process OK**
- **Referral**
- **Pending cases**
- **Restriction on legislation**

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**Common Law**

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### Kluger v. White

- Automobile liability law
- Legislature may not abolish a common law cause of action without providing a "reasonable alternative" unless the Legislature can show an "overpowering public necessity" and that "no alternative method of meeting such public necessity can be shown."

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### Smith v. Dept. of Insurance

- 1987 case
- Tort reform law of 1986 included a \$450,000 cap on non-economic damages
- Smith case found cap unconstitutional

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### Limitations Periods

- Statute of limitations
- Statute of repose

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**Prisoners**

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**PIP**

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**Workers Comp**

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**Medical Malpractice**

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**Wrongful Death**

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Other states

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