



Civil Justice Subcommittee

Tuesday, January 26, 2011

2:00 PM

404 HOB

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Civil Justice Subcommittee

Start Date and Time: Wednesday, January 26, 2011 02:00 pm
End Date and Time: Wednesday, January 26, 2011 05:00 pm
Location: 404 HOB
Duration: 3.00 hrs

Workshop on Court Rulemaking

NOTICE FINALIZED on 01/19/2011 16:21 by Jones.Missy

**FLORIDA SUPREME
COURT
RULEMAKING
AUTHORITY**

Civil Justice Subcommittee

January 26, 2011

Constitutional Provisions

Art. V, Sec. 2(a)

- ☐ The supreme court shall adopt rules for the practice and procedure in all courts. . .

- ☐ Rules of court may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature.

Historical Perspective

- ☐ Initially, the Legislature had primary control.
- ☐ Statutory delegations of court rulemaking authority from 1824 to 1955 .
- ☐ Constitutional authority granted 1957.
- ☐ Legislative power to repeal in 1972.
 - To check substantive lawmaking via court rule.
- ☐ Rulemaking authority declared "exclusive"

Why Look at Court Rule Authority?

- ❑ Substantive content found in court rules.
- ❑ Deficiencies in the Legislature's power to repeal have been revealed.
- ❑ Validity of legislative acts turn on debatable distinctions of substance v. procedure
- ❑ Exclusive nature of this authority has limited the people's lawmaking power.

Separating Substantive Acts from Matters of Procedure

- "Substantive Law"**
Authority of government and rights of citizens relating to life, liberty and property.

- "Court Rules of Procedure"**
Rules governing the administration of courts, and the behavior of litigants within a court proceeding.

Substantive Content Found in Court Rules

- ❑ Substantive law changes cataloged in several court rules.
- ❑ Examples
 - Speedy Trial Rule
 - Residential Treatment of a Dependant Child
 - Juvenile Right to Counsel

Example - Speedy Trial Rule

- ❑ Requires more than the constitutional minimum.
- ❑ Permanent dismissals if defendant not tried within specific number of days.
- ❑ State can't postpone or drop formal charges after "arrest" pending completion of investigation.
- ❑ Requires dismissal for rule violation even on charges not filed.
- ❑ Can circumvent the statute of limitations.

Example - Speedy Trial Rule

- ❑ Justice Wells (dissenting in *Bulgin v. State*):
 - "... the United States Supreme Court has explicitly stated that there is 'no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months.'"
 - "... the majority applies a judicial rule of procedure in a manner that eviscerates the statute of limitations enacted by the Legislature. The majority's decision adds to a line of precedents from this Court that has created and continually expanded a substantive right which has no basis in the original language of the rule itself or in Florida's statutes and is not mandated by the State or Federal Constitutions."
- ❑ Justice Overton: (dissenting in *Reed v. State*):
 - "... 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."

Example - Speedy Trial Rule

- ❑ Toll of Speedy Trial Rule
 - Jan. 1986 to June 2009 - 1,236 circuit court dismissals
 - 3 capital murders
 - 9 non-capital murders
 - 26 sexual offenses
 - 39 robberies
 - 87 burglaries
 - 148 other crimes against persons
 - 2,600 misdemeanors from county court
- ❑ Ongoing Separation of Powers Conflict

Example: Residential Treatment of a Dependant Child

- ❑ Rule of Juvenile Procedure 8.350 adopted "effective immediately."
- ❑ Created a new substantive right to counsel.
Not Constitutionally required.
Not statutorily authorized.
Not funded by the Legislature.

Example: Residential Treatment of a Dependant Child

"We recognize the strong policy reasons raised by the comments in favor of appointment of an attorney for a dependant child in order to insure that the child has a meaningful opportunity to be heard (e.g., the importance of an attorney-client privileged relationship between the child and counsel, and the therapeutic benefits that representation would provide the child)."

Example: Residential Treatment of a Dependant Child

"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. 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."

Example: Residential Treatment of a Dependant Child

A Matter of Appropriations

- ▣ Only the Legislature appropriates funds.
- ▣ "The judiciary shall have no power to fix appropriations."
- ▣ "Funding for the state courts system, state attorneys' offices, and court appointed counsel . . . shall be provided from state revenues appropriated by general law."
- ▣ "No money shall be drawn from the treasury except in pursuance of appropriation made by law."

Example: Residential Treatment of a Dependant Child (cont)

- ▣ Justice Harding (dissenting): " . . . the majority opinion here takes the position that appointing counsel for dependent children facing involuntary commitment is a good idea . . . While I agree with this position, the 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."

Juvenile Right to Counsel

- ▣ Current statute provides right to attorney at all stages of delinquency court proceedings.
- ▣ Supreme Court: "These . . . changes in law could be made by amending statute."
- ▣ ". . . we urge the Legislature to consider the Commission's recommendations. . . .
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.*" (emphasis added).

Juvenile Right to Counsel

- ☐ 2008 - Recommendations not adopted by the Legislature.
- ☐ Court adopted the recommendation as a rule in 2008 by 4 to 3 vote.
- ☐ Justice Bell (dissenting):
"Essentially, this amendment creates a new, unwaivable right in all juvenile cases to a prewaiver consultation with counsel. Such a change is clearly substantive, not procedural. (footnote omitted). 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."

Juvenile Right to Counsel

- ☐ Question - Has the effect of this rule adoption been to declare that the representation provided by statute and funded by the Legislature is inadequate?
 - If not, on what basis does the Court adopt a rule broader than the statute?
 - If so, when was the State of Florida and the Attorney General placed on notice that the statute was in jeopardy of being nullified or overridden?

Deficiencies in the Power to Repeal

- ☐ 2/3rd votes of the membership of each house.
 - Substantive components of court rules remain law.
- ☐ Court reviews the procedural validity of its own rules.
- ☐ Supreme Court has the authority to readopt the very same rule soon after repeal.

Validity of Legislative Acts Turns on Substance v. Procedure

- ❑ Exclusive court rulemaking authority requires precision in legislative draftsmanship.
- ❑ “the distinction between substantive and procedural law is neither simple nor certain”
- ❑ Example: The Evidence Code
- ❑ Policy Questions
 - Does that level of uncertainty serve the interest of justice well?
 - Should the validity of legislation rise and fall on drawing distinctions that are “neither simple nor certain?”

Validity of Legislative Acts Turns on Substance v. Procedure

- ❑ “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 procedure of the courts in a constitutional sense, causing a constitutional challenge to fail. (citations omitted). If a statute is *clearly substantive* and “operates in an *area of legitimate legislative concern*,” this Court will not hold that it constitutes an unconstitutional encroachment on the judicial branch. (citations omitted) However, where a statute does not basically convey substantive rights, the procedural aspects of the statute cannot be deemed “*incidental*,” and that statute is unconstitutional.” (emphasis added). *Massey v. David*

Exclusive Power Limits the People’s Lawmaking Power

- ❑ Declaring a matter procedural removes it from the people’s ability to govern themselves through legislation.
 - Death Penalty Delays
 - DNA Testing Policy
- ❑ Court rules not subject to lawmaking process
 - Not subject to governor’s veto
 - Not subject to legislative process

Crow v. State
(First District Court of Appeal)

- ❑ Postconviction DNA Testing Statute
 - authorized an extra opportunity for DNA testing only “where the *identity of the defendant was a genuinely disputed issue* in the case.”
 - Cases were time barred under case law.
- ❑ Court rule expanded the right to authorize DNA testing when it would “otherwise exonerate the defendant.”
- ❑ Crow v. State – Rule allowed DNA testing to reassert a claim of self-defense.

Crow v. State
(First District Court of Appeal)

- ❑ “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. (emphasis added).”

Crow v. State
(First District Court of Appeal)

- ❑ **State v. Furen:** “. . . Section 3 of Article V, supra, failed to specify that such rules as might be promulgated by this court ‘shall neither abridge, enlarge, nor modify the substantive rights of any litigant’; however, such limitation is implicit by reason of Article II of our Constitution providing for a separation of the powers of government of this state. The rule exceeds the scope of ‘practice and procedure,’ is legislative in character and must yield to the provisions of the statute.”
- ❑ **State v. Garcia:** “The rules adopted by the Supreme Court are limited to matters of procedure, for a rule cannot abrogate or modify a substantive right.”
- ❑ **Boyd v. Becker:** “While the Florida Constitution grants this Court exclusive rule-making authority, this power is limited to rules governing procedural matters and does not extend to substantive rights.”

Comparison with Federal System

- ❑ Rules proposed by Judicial Conference to the U.S. Supreme Court.
- ❑ Congress reviews for approval.
- ❑ "Such rules shall not abridge, enlarge or modify any substantive right." U.S. Code, Title 28, Sec. 2072

ABA Support of Rules Enabling Act.

- ❑ The ABA fully supports the Rules Enabling Act process, which is based on three fundamental concepts: (1) the essential and central role of the judiciary in initiating judicial rulemaking; (2) the use of procedures that permit full public participation, including participation by members of the legal profession; and (3) provision for a Congressional review period.
- ❑ We do not question Congressional power to regulate the practice and procedure of federal courts. Congress exercised this power by delegating its rulemaking authority to the judiciary through the enactment of the Rules Enabling Act, while retaining the authority to review and amend rules prior to their taking effect.

Questions?
