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Confusion in Florida Offer of Judgement Practice: Resolving the Conflict Between Judicial and Legislative Enactments

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NOTES

CONFUSION IN FLORIDA OFFER OF JUDGMENT PRACTICE: RESOLVING THE CONFLICT BETWEEN JUDICIAL AND LEGISLATIVE ENACTMENTS* **

Offer of judgment laws are designed to alleviate some of the most difficult problems currently facing American courts — enormous legal expenses, crowded court dockets, and protracted litigation.[1] These laws impose a sanction against a party who refuses to accept a timely offer of settlement that is more favorable than the ultimate recovery.

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**Dedicated to my wife, Terri; my daughter, Sybil; my mother and father.

1. *See, e.g.*, Janofsky, *The "Big Case": A "Big Burden" on Our Courts*, 66 A.B.A. J. 848 (1980) (suggesting solutions to unreasonable delays and costs flowing from protracted litigation); Want, *The Caseload Monster in the Federal Courts*, 69 A.B.A. J. 612 (1983) (pointing out the extremely large number of cases filed yearly in federal district courts).

The purpose of offer of judgment laws is to encourage settlement and eliminate trials whenever possible.[2] Theoretically, the expense and delay associated with litigation are thereby significantly reduced.[3]

Both the Florida Supreme Court and the Florida Legislature have enacted offer of judgment provisions. The Florida Supreme Court's provision is Florida Rules of Civil Procedure, rule 1.442.[4] The legislature has promulgated two statutes, Florida Statutes sections 45.061[5] and 768.79.[6] Although all three of the provisions are designed to encourage settlement,[7] they differ in their procedural approaches to achieving this goal.[8] Predictably, the simultaneous existence of three offer of judgment provisions with varying procedural details has caused widespread confusion.[9]

In part I, this note addresses the history of the Florida offer of judgment provisions and the confusion flowing from the enactment of three separate provisions. Part I also discusses the inadequacy of

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2. *See* Aspen v. Bayless, 564 So. 2d 1081, 1083 (Fla. 1990); Cheek v. McGowan Elec. Supply Co., 511 So. 2d 977, 981 (Fla. 1987).

3. *But see* Simon, *The Riddle of Rule 68*, 54 GEO. WASH. L. REV. 1, 6-9 (1985) (presenting reasons why many attorneys believe that rule 68 has failed to encourage settlement); Varon, *Promoting Settlements and Limiting Litigation Costs by Means of the Offer of Judgment: Some Suggestions For Using and Revising Rule 68*, 33 AM. U.L. REV. 813, 815 (1984) (claiming that attorneys rarely use rule 68 because the language of the rule is ambiguous and courts "are unable to reconcile the rule's purposes with other basic legal principles"). *See generally* Rowe & Vidmar, *Empirical Research on Offers of Settlement: A Preliminary Report*, 51 LAW & CONTEMP. PROBS. 13, 30 (1988) (indicating that offer of settlement rules could result in "more and earlier settlements," but that more research is required to reach definite conclusions about the net impact on settlement rates).

4. FLA. R. CIV. P. 1.442.

5. FLA. STAT. § 45.061 (1989).

6. *Id.* § 768.79.

7. *Aspen*, 564 So. 2d at 1083.

8. *See* FLA. STAT. § 45.061 (1989); *id.* § 768.79; FLA. R. CIV. P. 1.442; *see also* Berman & Cole, *The New Offer of Judgment Rule in Florida: What Does One Do Now?*, FLA. B.J. 38 (Jan. 1990) (describing procedural differences among the three Florida offer of judgment provisions); Ferrante, *The Offer of Judgment Dilemma: A Defense Perspective*, 7 TRIAL ADVOC. Q. 46, 47-50 (1988) (detailing procedural variations among the three Florida offer of judgment laws); Vocelle, *Offers of Judgment, Demands for Judgment, and Offers of Settlement: Who's on First?*, FLA. B.J. 10, 10-14 (Mar. 1988) (describing procedural variations among the three Florida offer of judgment provisions).

9. *See* Berman & Cole, *supra* note 8, at 38-39 (describing the confusion created by the existence of three offer of judgment laws with differing procedures); Ferrante, *supra* note 8, at 50-51 (explaining problems caused by the varying procedures under the offer of judgment statutes and rule from the perspective of the defense bar); Vocelle, *supra* note 8, at 14 (finding that the varying procedures under the offer of judgment statutes and rule can be a trap for the unwary).

recent attempts by the Florida Supreme Court and the Florida Legislature to resolve the confusion. In part II, this note explains why the legislative offer of judgment statutes are unconstitutional invasions of the Florida Supreme Court's exclusive power to promulgate rules governing practice and procedure. Finally, in part III, this note presents practical reasons, beyond unconstitutionality, for denying the legislature authority to enact offer of judgment provisions.

I. ORIGINS OF THE CURRENT CONFUSION IN FLORIDA OFFER OF JUDGMENT PRACTICE

A. *History of the Florida Offer of Judgment Provisions*

Offer of judgment laws have their theoretical roots in the English practice of "payment into court."[10] The federal offer of judgment provision, Federal Rules of Civil Procedure, rule 68 was enacted in 1938.[11] The framers of rule 68 based the rule on offer of judgment laws already existing in a number of states.[12] Rule 68 enjoys the distinction of being the only federal rule devoted exclusively to encouraging settlement.[13]

The Florida Supreme Court adopted rule 1.442, Florida Rules of Civil Procedure, in 1972.[14] In its original form, rule 1.442 was identical to rule 68.[15] The original version required the plaintiff to pay the defendant's litigation costs if the court awarded the plaintiff a final judgment which was less than a prejudgment offer made by the defendant pursuant to rule 1.442.[16] Attorney's fees were not included in the penalty imposed, and only defendants could benefit from the rule.[17]

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10. Toran, *Settlement, Sanctions, and Attorney Fees: Comparing English Payment into Court and Proposed Rule 68*, 35 AM. U.L. REV. 301, 303 (1986). Under the payment into court system, the defendant pays to the proper officer of the court as much as the defendant acknowledges is owed to the plaintiff together with costs. *Id.* at 307. If the plaintiff chooses to go on with the litigation and fails to prove that more is due than the defendant paid into court, the plaintiff must pay the defendant's costs and fees from the date of the payment into court. *Id.* at 307, 310.

11. FED. R. CIV. P. 68.

12. *See* Varon, *supra* note 3, at 816.

13. *See* Simon, *supra* note 3, at 1-2.

14. *In re* The Florida Bar: Rules of Civil Procedure, 265 So. 2d 21, 22, 40-41 (Fla. 1972) (promulgating rule 1.442, which became effective on Jan. 1, 1973). A 1980 amendment to the rule clarified filing procedures and excluded from the rule's operation any actions or matters relating to dissolution of marriage, alimony, nonsupport, or child custody. The Florida Bar: In re Rules of Civil Procedure, 391 So. 2d 165, 173-74 (Fla. 1980). The court made the exclusion concerning domestic matters to avoid difficulties inherent in determining whether an offer is "more favorable" in connection with domestic matters. *Id.* at 174.

15. *The Florida Bar*, 265 So. 2d at 41.

16. *Id.* at 40.

17. *Id.*

Perhaps in response to the insufficient sanctions under rule 1.442,[18] the Florida Legislature enacted Florida Statutes section 768.79 as part of the Tort Reform and Insurance Act of 1986.[19] Unlike the original version of rule 1.442, section 768.79 provides for an award of attorney's fees in addition to costs.[20] Furthermore, either party can utilize section 768.79.[21] Like the original version of rule 1.442, the statute applies to all actions for damages, whether in tort or contract.[22]

Moreover, sanctions are mandatory under section 768.79 if a divergence that is greater than twenty-five percent exists between the offer made and the judgment ultimately obtained.[23] However, in all cases the statute grants the court the discretion to disallow the award of costs and attorney's fees if the court determines that the offer was not made in good faith.[24] Finally, section 768.79 prescribes six factors which courts must consider in determining the reasonableness of an award of attorney's fees.[25]

Despite the existence of section 768.79, in 1987 the legislature enacted Florida Statutes section 45.061, termed "Offers of Settlement."[26] Like section 768.79, either party may employ section 45.061 and the statute provides for attorney's fees as well as costs.[27] Section

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18. *See id.* at 41 (committee note at the rule's adoption expressed doubts about the effectiveness of rule 1.442 based upon information about the ineffectiveness of rule 68); *cf.* Palmer, *Offers of Judgment*, 92 CASE & COM. 22, 28 (1987) (describing the shortcomings of rule 68).

19. Tort Reform and Insurance Act of 1986, ch. 86-160, § 58, 1986 Fla. Laws 754 (codified as FLA. STAT. § 768.79 (1989)).

20. FLA. STAT. § 768.79(1) (Supp. 1990).

21. *Id.*

22. *Id.*

23. *Id.* § 768.79(6)(a)-(b).

24. *Id.* § 768.79(7)(a).

25. *Id.* § 768.79(7)(b). Along with "other relevant criteria," a court must consider the following factors:

> 1. The then apparent merit or lack of merit in the claim.
> 2. The number and nature of offers made by the parties.
> 3. The closeness of questions of fact and law at issue.
> 4. Whether the (person making the offer) had unreasonably refused to furnish information necessary to evaluate the reasonableness of such offer.
> 5. Whether the suit was in the nature of a test case presenting questions of far-reaching importance affecting nonparties.
> 6. The amount of the additional delay cost and expense that the (person making the offer) reasonably would be expected to incur if the litigation should be prolonged.

Id.

26. Act of July 1, 1987, ch. 87-249, §§ 1-2, 1987 Fla. Laws 1721 (codified as FLA. STAT. § 45.061 (1989)).

27. FLA. STAT. § 45.061(3)(a) (Supp. 1990).

45.061 applies to all but a few specifically enumerated civil actions.[28] As with section 768.79 sanctions, section 45.061 sanctions are mandatory if there is more than a twenty-five percent divergence between the offer made and the judgment finally obtained.[29] However, the court has the discretion to award costs and fees to the offeror even when the divergence between the offer and the judgment is less than the twenty-five percent threshold.[30]

In addition to the differences described above, other procedural variations existed among the original versions of the two statutes and rule 1.442.[31] These differences concerned the required form of offers, the timing of offers and acceptances, the requirements for service, the filing of offers and acceptances of offers, and the steps required to enforce sanctions.[32]

Given the simultaneous existence of three offer of judgment provisions with varying applicability, sanctions, and procedural requirements, it is not surprising that a great deal of confusion arose as to which offer of judgment provisions parties should utilize in a particular situation.[33] The confusion was so extensive that some commentators suggested that attorneys make offers of judgment under all three provisions in order to assure the maximum benefit for the client.[34] In response to this confusion, the Florida Supreme Court in 1988 requested that the Civil Procedure Rules Committee of The Florida Bar examine the potential conflicts among the offer of judgment rule and the statutes.[35] Thereafter, in response to a petition by the Civil Pro-

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28. *Id.* § 45.061(4) (excluding class actions, shareholder derivative suits, or matters relating to dissolution of marriage, alimony, nonsupport, eminent domain, or child custody from the statute's application).

29. *Id.* § 45.061(2).

30. *Id.*

31. *See id.* § 45.061; *id.* § 768.79; *The Florida Bar*, 265 So. 2d at 40-41 (promulgating the original version of rule 1.442).

32. *See* FLA. STAT. § 45.061 (1989); *id.* § 768.79; *The Florida Bar*, 265 So. 2d at 40-41; *see also* Ferrante, *supra* note 8, at 47-50 (describing in detail the procedural variations among the three offer of judgment laws); Vocelle, *supra* note 8, at 10-14 (explaining the procedural variations among the Florida offer of judgment provisions).

33. *See* Berman & Cole, *supra* note 8, at 38 (describing the confusion among practitioners resulting from the availability of these three materially different provisions); Ferrante, *supra* note 8, at 50-51 (describing from a defense perspective the confusion resulting from the interplay of the three offer of judgment provisions); Vocelle, *supra* note 8, at 14 (advising that procedural differences among the offer of judgment provisions can be a trap for the unwary).

34. *See* Berman & Cole, *supra* note 8, at 38.

35. The Florida Bar Re: Amendment to Rules of Civil Procedure, Rule 1.442 (Offer of Judgment), 550 So. 2d 442, 442 (Fla. 1989).

cedure Rules Committee, the Florida Supreme Court adopted a new version of rule 1.442 which became effective January 1, 1990.[36]

B. *The Supreme Court's Revision of Rule 1.442*

Undoubtedly, the supreme court's revision of rule 1.442 will enhance the rule's ability to encourage settlement.[37] Both plaintiffs and defendants can employ the revised version of rule 1.442.[38] While the old rule only imposed costs as a sanction, the new rule provides for attorney's fees and all reasonable costs of the litigation.[39] Additionally, the revised rule expressly provides that costs are not limited to taxable costs.[40]

A court may impose sanctions under the rule whenever an offer of judgment is unreasonably refused and there is more than a twenty-five percent divergence between the offer and the judgment ultimately obtained.[41] The rule also provides ten factors which courts may examine in determining both the entitlement to and amount of sanctions.[42] The Florida Supreme Court rejected a Rules Committee recom-

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36. *Id.* at 443.

37. The increase in sanctions from merely costs to include costs and attorney's fees will likely increase the rule's effectiveness. *See* Berman & Cole, *supra* note 8, at 41 (assuming that the offer of judgment laws can effectively reduce litigation, the supreme court's modifications of rule 1.442 have come a long way in strengthening the rule's effectiveness). Increased predictability as a result of the change from an unreasonable rejection standard to an unreasonable rejection plus 25% divergence standard combined with language defining what constitutes an unreasonable rejection should also increase the rule's effectiveness. *Id.*

38. *The Florida Bar*, 550 So. 2d at 443. The revised rule states that "[a]n offer of judgment may be made by any party or parties." *Id.*

39. *Id.* at 444.

40. *Id.* at 444 n.2.

41. *Id.* at 444. There must be both an unreasonable rejection and a 25% divergence between offer and judgment ultimately obtained. *Id.*

42. *Id.* Along with any other relevant factors, a court may consider the following factors:

(A) the merit of the claim that was the subject of the offer;

(B) the number, nature, and quality of offers and counteroffers made by the parties;

(C) the closeness of the questions of fact and law at issue;

(D) whether a party unreasonably refused to furnish information necessary to evaluate the reasonableness of an offer;

(E) whether the suit was in the nature of a test case presenting questions of far-reaching importance affecting nonparties;

(F) the fact that, at the time the offer was made and rejected, it was unlikely that the rejection would result in unreasonable cost or delay;

(G) the fact that a party seeking sanctions has himself unreasonably rejected an offer or counteroffer on the same issues or engaged in other unreasonable conduct;

(H) the fact that the proceeding in question essentially was equitable in nature;

mendation to base the sanction on a percentage of the rejected offer.[43] The court was concerned that a sanction calculated in this manner would be seen as a substantive fine.[44]

Although the Florida Supreme Court revised rule 1.442 to make it more effective, the court did not simultaneously resolve the conflicts between rule 1.442 and the offer of judgment statutes by addressing whether the statutes are an unconstitutional invasion of the court's procedural rulemaking power.[45] The court justified its refusal to address the constitutionality of the statutes by emphasizing the nonadversarial nature of the Rules Committee's petition.[46]

Instead, the court ruled that only the procedural details of the statutes impinge upon its exclusive rulemaking powers.[47] To the extent that the procedural aspects of rule 1.442 are inconsistent with sections 768.79 and 45.061, the court declared that the rule supersedes the statutes.[48] With one exception, the court did not specify which portions of the rule and statutes were procedural and which portions were substantive.[49] Therefore, subsequent courts are left with the task of specifying precisely which portions of the statutes the rule supersedes.[50]

(I) the lack of good faith underlying the offer; or

(J) the fact that the judgment was grossly disproportionate to the offer.

Id.

43. *Id.* at 442.

44. *Id.* The Rules Committee recommendation would have required a sanction equal to 15% of an unaccepted offer to pay when the jury verdict is less than 75% of the offer and a sanction equal to 15% of an unaccepted offer to accept when the jury verdict is more than 125% of the offer. *Id.* The court feared that such a sanction would be seen as a substantive fine, especially when a party did nothing more serious than guess wrong about a jury verdict. *Id.*

45. *Id.* at 443. The court expressly refused to address the constitutionality of the substantive aspects of the offer of judgment statutes. *Id.*

46. *Id.* Case law supports the court's refusal to address constitutionality in a nonadversarial proceeding. *See, e.g.*, Henderson v. Antonacci, 62 So. 2d 5, 8 (Fla. 1951) (recognizing the "well established principle" that courts will not declare a statute unconstitutional unless it is challenged directly by one affected by the statute). However, the court has not consistently adhered to this doctrine. *See In re* The Florida Bar — Code of Judicial Conduct, 281 So. 2d 21, 22 (Fla. 1973), *modified*, 348 So. 2d 891 (Fla. 1977) (declaring statutes unconstitutional despite the lack of an adversarial proceeding); *In re* Advisory Opinion to the Governor, 63 So. 2d 321, 326 (Fla. 1953) (declaring statutes unconstitutional in response to a nonadversarial request for an advisory opinion from the governor).

47. *The Florida Bar*, 550 So. 2d at 443.

48. *Id.*

49. *Id.* The only portions of the statutes which the court expressly classified as procedural were the time limits for accepting an offer of judgment. *Id.*

50. *See* Berman & Cole, *supra* note 8, at 40-41 (pointing out the difficulties the courts will face in attempting to determine which aspects of the statutes are procedural and which are substantive).

Even when this classification process is completed, the confusion will not end. The simultaneous existence of the rule and the substantive aspects of the statutes not superseded by the rule will continue to complicate Florida offer of judgment practice.[51] Recent amendments to the offer of judgment statutes have only served to exacerbate the problem.

C. *Recent Amendments to the Florida Offer of Judgment Statutes*

Following the supreme court's revision of rule 1.442, the Florida Legislature re-evaluated the offer of judgment statutes. Unfortunately, like the supreme court, the legislature chose not to invalidate the statutes. Instead, the legislature amended both statutes in an attempt to minimize conflicts among the three Florida offer of judgment provisions.[52]

As amended, section 45.061 is now inapplicable to causes of action which accrued subsequent to October 1, 1990.[53] The legislature made no other changes to section 45.061. Section 768.79, however, received more extensive revision.

Mindful of the supreme court's ruling that rule 1.442 supersedes inconsistent procedural portions of the offer of judgment statutes,[54] the legislature amended section 768.79 in an attempt to achieve procedural consistency with rule 1.442. More specifically, section 768.79 now conforms with rule 1.442 with respect to service and filing of offers,[55] acceptance of offers,[56] withdrawal of offers,[57] and the admissibility of evidence of an offer.[58] Additionally, the amount of sanctions under section 768.79 is now to be calculated "in accordance with the guidelines promulgated by the Supreme Court."[59] The amended version

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51. *See* J. Regan, Recent Developments in Offer of Judgment Practice 3 (Dec. 1989) (unpublished lecture materials prepared in connection with the Jacksonville Bar Association's Continuing Legal Education Seminar on Current Litigation Topics) (suggesting that even if the courts quickly develop a uniform procedure for application of the offer of judgment laws, important substantive differences between the laws will remain) (materials on file at the *Florida Law Review*).

52. Act effective Oct. 1, 1990, ch. 90-119, § 22, 1990 Fla. Laws 370, 381-82; Act effective Oct. 1, 1990, ch. 90-119, § 48, 1990 Fla. Laws 370, 400-02.

53. FLA. STAT. § 45.061(6) (Supp. 1990).

54. *See supra* notes 46-48 and accompanying text.

55. *See* FLA. STAT. § 768.79(3) (Supp. 1990); FLA. R. CIV. P. 1.442(e).

56. *See* FLA. STAT. § 768.79(4) (Supp. 1990); FLA. R. CIV. P. 1.442(f)(1).

57. *See* FLA. STAT. § 768.79(5) (Supp. 1990); FLA. R. CIV. P. 1.442(g).

58. *See* FLA. STAT. § 768.79(8) (Supp. 1990); FLA. R. CIV. P. 1.442(i).

59. FLA. STAT. § 768.79(6)(a)-(b) (Supp. 1990). Presumably, this is a reference to the ten factors which rule 1.442 requires courts to consider in determining the entitlement to and amount of sanctions. *See supra* note 41 and accompanying text.

of section 768.79 is applicable only to causes of action accruing after October 1, 1990.[60]

Despite these changes, numerous differences remain between the amended section 768.79 and rule 1.442. The legislature made no change to the basic sanction entitlement provisions of section 768.79. As before, the court imposes sanctions under section 768.79 when a twenty-five percent divergence exist between the offer and the judgment ultimately obtained.[61] Rule 1.442, on the other hand, requires both a finding that the offeree unreasonably rejected the offer and a twenty-five percent divergence between the offer and the judgment.[62] Other differences between the amended section 768.79 and rule 1.442 relate to offer time requirements,[63] form of offers,[64] and the effect of counteroffers.[65]

The legislature did not eliminate the source of the current confusion in Florida offer of judgment practice by amending the offer of judgment statutes. Significant differences continue to exist between both offer of judgment statutes and rule 1.442. As a result, courts still must determine which portions of the offer of judgment statutes are procedural.[66] Furthermore, section 45.061 and the pre-amendment version of section 768.79 are still fully applicable to causes of action which accrued prior to October 1, 1990.[67] Therefore, the legislature has further complicated offer of judgment practice. Litigants must now pinpoint when a cause of action accrued so as to determine whether section 45.061 is applicable and which version of section 768.79 is applicable. In order to efficiently resolve this problem, the Florida

60. *See* Act effective Oct. 1, 1990, ch. 90-119, § 55, 1990 Fla. Laws 370, 403. Florida courts have consistently declared that §§ 45.061 and 768.79 do not apply to causes of action which accrued before their effective dates. *See, e.g.*, Reinhardt v. Bono, 564 So. 2d 1233, 1235 (Fla. 5th D.C.A. 1990).

61. FLA. STAT. § 768.79(6)(a)-(b) (Supp. 1990).

62. FLA. R. CIV. P. 1.442(h)(1)(A)-(B).

63. Rule 1.442 requires that an offer of judgment "be served no sooner than 60 days after the offeree has filed its first paper in the action and no later than 60 days prior to trial." FLA. R. CIV. P. 1.442(b). Section 768.79 contains no such requirement. *See* FLA. STAT. § 768.79 (Supp. 1990).

64. *See* FLA. STAT. § 768.79(2)(a)-(d) (Supp. 1990); FLA. R. CIV. P. 1.442(c)(2).

65. Rule 1.442 provides that "a counteroffer operates as a rejection of an unexpired offer or an unexpired counteroffer." FLA. R. CIV. P. 1.442(f)(2). Section 768.79 contains no such provision. *See* FLA. STAT. § 768.79 (Supp. 1990).

66. *See supra* notes 48-50 and accompanying text for a discussion of the difficulties inherent in such a classification process.

67. *See supra* notes 53 & 60 and accompanying text.

Supreme Court must expressly invalidate the offer of judgment statutes. This move is justified because the correct analysis reveals that the statutes are improper procedural legislative enactments.[68]

II. UNCONSTITUTIONALITY OF THE FLORIDA OFFER OF JUDGMENT STATUTES

A. *Exclusive Rulemaking Power of the Florida Supreme Court*

The Florida Constitution grants the Florida Supreme Court the power to adopt rules governing practice and procedure in all state courts.[69] The constitutional provision bestowing this power does not explicitly state that the supreme court's rulemaking power is exclusive.[70] However, the separation of powers clause of the Florida Constitution provides that no power appertaining to one branch of government shall be exercised by any person belonging to another branch of government.[71] Therefore, the Florida Constitution implicitly denies the legislature the power to make rules governing practice and procedure in the state courts.[72] Case law construing these constitutional provisions confirms that rules governing practice and procedure are within the exclusive province of the Florida Supreme Court.[73]

The Florida Supreme Court's rulemaking power is not without limits. Court rules cannot abridge, enlarge, or modify the substantive rights of any litigant.[74] However, the Florida Constitution does not

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68. *See infra* notes 169-93 and accompanying text.

69. FLA. CONST. art. V, § 2. Rules which the court adopts may be repealed by a two-thirds vote of both houses of the Florida Legislature. *Id.*

70. *See id.* Although article V merely states that the supreme court "shall adopt rules for the practice and procedure in all courts," the constitution does not expressly deny procedural rulemaking power to the other branches of state government. *Id.*

71. *Id.* art. II, § 3.

72. *See* Wilson, Dreisbach, Brodnax & Bowden, *The Florida Appellate Rules*, 11 U. FLA. L. REV. 1, 3 (1958) (stating that "the [Florida] Supreme Court's power to promulgate rules of practice and procedure . . . impliedly denies any authority, even subordinate, for the legislature to act in this field"). *See generally* 13 FLA. JUR. 2D *Courts and Judges* § 169 (1979) (explaining that the Florida Constitution vests the sole power to prescribe rules for practice and procedure in the Florida Supreme Court (citing Bluesten v. Florida Real Estate Comm'n, 125 So. 2d 567 (Fla. 1960))).

73. *See In re* Clarification of Fla. Rules of Practice & Procedure (Fla. Const. art. V, § 2(a)), 281 So. 2d 204, 204-05 (Fla. 1973) (stating that since the supreme court is given exclusive authority to promulgate rules of practice and procedure, the legislature cannot amend or supersede a court rule, even though the legislature may repeal the rule by a two thirds vote); Bluesten v. Florida Real Estate Comm'n, 125 So. 2d 567, 568 (Fla. 1960) (holding that the constitution vests the sole power to prescribe rules for practice and procedure for courts in the supreme court).

74. *See* Benyard v. Wainwright, 322 So. 2d 473, 475 (Fla. 1975); State v. Furen, 118 So. 2d 6, 12 (Fla. 1960); Lundstrom v. Lyon, 86 So. 2d 771, 772 (Fla. 1956); *see generally* 13 FLA.

explicitly impose this limitation upon the court's rulemaking power.[75] Instead, as with the prohibition against procedural legislative enactments,[76] this limitation is implied by the separation of powers provision of the constitution.[77]

As a result of these implied constraints, the constitutionality of a court rule or statute depends upon whether the provision is substantive or procedural in character.[78] Unfortunately, the dividing line between substance and procedure often is blurry at best.[79] The most concerted efforts by the Florida courts to differentiate between substance and procedure produce mere generalizations. These efforts are of little practical assistance in distinguishing a constitutional substantive statute from an unconstitutional procedural statute.[80] Indeed, the Florida Supreme Court expressly has recognized this dilemma, referring to a "hiatus" or "twilight zone" between substance and procedure, into which the courts and the legislature constantly enter.[81]

The elusive nature of the substance/procedure distinction is reflected in the decisions of Florida courts. When a case involves a statute which is undeniably procedural, the courts have been willing

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JUR. 2D *Courts and Judges* § 169 (1979) (stating that the supreme court's authority to adopt rules governing practice and procedure is subject to the implicit limitation that the rules neither abridge, enlarge, nor modify the substantive rights of any litigant (citing *Furen*, 118 So. 2d at 12)).

75. *Furen*, 118 So. 2d at 12.

76. *See supra* notes 71 & 72 and accompanying text.

77. *Furen*, 118 So. 2d at 12.

78. *See* State v. Garcia, 229 So. 2d 236, 238 (Fla. 1969) (holding that since the court rule governing the waiver of a jury trial was procedural, the court rule superseded a conflicting statute); *Furen*, 118 So. 2d at 11-12 (holding that since the court rule making commission or board rulings appealable by certiorari was substantive, a conflicting statute superseded the court rule).

79. *See generally* Levin & Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 14-24 (exploring the difficulties of distinguishing between substance and procedure in order to determine the legislature's proper role in rulemaking).

80. *See, e.g., Benyard*, 322 So. 2d at 475 (stating that substantive law prescribes the duties and rights under our system of government, while procedural law concerns the means and method to apply and enforce those duties and rights); *Garcia*, 229 So. 2d at 238 (stating that substantive law creates, defines, and regulates rights, while procedural law is the legal machinery which effects and enforces substantive law); *Furen*, 118 So. 2d at 12 (distinguishing between procedural law which processes and enforces a legal right and substantive law which defines a legal right).

81. *See In re* Florida Rules of Criminal Procedure, 272 So. 2d 65, 66 (Fla. 1972); *In re* Florida State Bar Ass'n For Promulgation of New Fla. Rules of Civil Procedure, 145 Fla. 223, 228, 199 So. 57, 59 (1940).

to invalidate the statute.[82] However, on at least one occasion, a Florida court upheld a statute which had the primary purpose of regulating court procedure, because the statute also created a shift of attorney's fees.[83]

The Florida courts also have been unwilling to invalidate a procedural statute that conflicts with a rule of civil procedure dealing with the same subject. Instead, the courts usually prefer to avoid the question, declaring that the rule supersedes only the procedural details of the statute that conflict with the rule.[84] As previously discussed, this was the Florida Supreme Court's approach in its decision revising rule 1.442.[85]

Although statutory support for the Florida Supreme Court's solution exists,[86] the court's approach merely begs the question. It still is necessary for the courts to address individually each provision of the statutes and determine whether the provision is substantive or procedural.[87] In the case of the offer of judgment statutes, such inquiry probably will reveal that the only substantive portion of the statutes

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82. *See, e.g.*, Markert v. Johnston, 367 So. 2d 1003, 1006 (Fla. 1978) (invalidating a statute governing the timing of joinder during the course of trial which was "without question" a matter of practice or procedure exclusively within the supreme court's rulemaking power); State v. Smith, 260 So. 2d 489, 491 (Fla. 1972) (voiding a statute which purported to grant interlocutory appeals); Military Park Fire Control Tax Dist. No. 4 v. DeMarois, 407 So. 2d 1020, 1021 (Fla. 4th D.C.A. 1981) (invalidating a statute since "[t]here can be no doubt" that a rule prioritizing civil matters to be processed by the state courts was procedural rather than substantive).

83. Whitten v. Progressive Casualty Ins. Co., 410 So. 2d 501, 504 (Fla. 1982) (finding that a statute providing for an award of attorney's fees to the prevailing party in any civil action in which the court finds that the losing party failed to raise a justiciable issue of law or fact was substantive and, therefore, a proper legislative enactment). For a criticism of the basis for the *Whitten* court's holding, see *infra* note 183.

84. *See, e.g.*, *Garcia*, 229 So. 2d at 238-39 (holding that a rule of criminal procedure governing the waiver of a jury trial by a criminal defendant superseded a statute covering the same subject only to the extent that the rule and statute were in conflict); Jaworski v. City of Opa-Locka, 149 So. 2d 33, 34 (Fla. 1963) (holding that a rule of appellate procedure superseded a statute governing certification of questions to the supreme court and district courts of appeal only to the extent that the rule and statute were inconsistent); *see also* Means, *The Power to Regulate Practice and Procedure in Florida Courts*, 32 U. FLA. L. REV. 442, 482 (1980) (explaining that supreme court findings that a procedural statute merely is superseded by a conflicting rule of procedure is inconsistent with the court's position that its rulemaking power is exclusive).

85. *The Florida Bar*, 550 So. 2d at 443. *See supra* notes 35-51 and accompanying text.

86. *See* FLA. STAT. § 25.371 (1989) (declaring that "[w]hen a rule is adopted by the Supreme Court concerning practice and procedure, and such rule conflicts with a statute, the rule supersedes the statutory provision"). *But see* Means, *supra* note 84, at 481 (claiming that current wording of the constitutional grant of rulemaking authority to the supreme court renders § 25.371 superfluous).

87. *See supra* notes 50-51 and accompanying text.

are the remedies. The courts likely will determine that the balance of the statutes are procedural and superseded by the rule.[88] Because the offer of judgment statutes are overwhelmingly procedural,[89] this piecemeal approach to de facto invalidation of the statutes seems a blatant misuse of judicial resources — the very evil the offer of judgment rules were designed to prevent.[90]

B. *Constitutionality of the Florida Offer of Judgment Statutes — The DCA Split*

In the wake of the Florida Supreme Court's refusal to address the constitutionality of the offer of judgment statutes, the district courts of appeal have been left to grapple with the question. The result has been disagreement among the district courts as to whether section 45.061 is an unconstitutional invasion of the supreme court's exclusive rulemaking power.[91] Ultimately, it will be left to the Florida Supreme Court to resolve this conflict.[92]

In *Milton v. Leapai*,[93] the Fifth District Court of Appeal held that section 45.061 is an unconstitutional invasion of the Florida Supreme Court's exclusive rulemaking power.[94] The *Milton* court defined a substantive law as one which "creates, defines, and regulates rights."[95] The court defined a procedural law as one which "prescribes a method of enforcing rights or obtaining redress for their invasion."[96] Based

88. Berman & Cole, *supra* note 8, at 40.

89. *See infra* text accompanying notes 168-70.

90. *See Aspen*, 564 So. 2d at 1083 (stating that the purpose of the offer of judgment rule and statutes is to encourage parties to settle claims without going to trial); Unicare Health Facilities, Inc. v. Mort, 553 So. 2d 159, 161 (Fla. 1989) (stating that rule 1.442 was implemented to encourage settlement if possible in order to eliminate trials); *Cheek*, 511 So. 2d at 981 (stating that the purpose of rule 1.442 is to encourage settlement and eliminate trials whenever possible).

91. *See* A.G. Edwards & Sons, Inc. v. Davis, 559 So. 2d 235, 236-37 (Fla. 2d D.C.A. 1990) (holding that § 45.061 is constitutional since it creates substantive rights); Milton v. Leapai, 562 So. 2d 804, 807-08 (Fla. 5th D.C.A. 1990) (holding that § 45.061 is an unconstitutional invasion of exclusive supreme court rulemaking power).

92. Recently, the First District Court of Appeal declared § 768.79 to be unconstitutional and certified the question to the Florida Supreme Court. Hughes v. Goolsby, 578 So. 2d 348, 349 (Fla. 1st D.C.A. 1991). The *Hughes* court certified the following question: "WHETHER THE LEGISLATURE'S ENACTMENT OF SECTION 768.79, FLORIDA STATUTES, CONSTITUTED THE ADOPTION OF A RULE OF PROCEDURE IN VIOLATION OF ARTICLE V, SECTION 2(a) OF THE FLORIDA CONSTITUTION." *Id.*

93. 562 So. 2d 804 (Fla. 5th D.C.A. 1990).

94. *Id.* at 807-08. The Fifth District Court of Appeal reaffirmed its holding that § 45.061 is unconstitutional. Curenton v. Chester, 576 So. 2d 969, 970 (Fla. 5th D.C.A. 1991) (citing *Milton*, 562 So. 2d at 804).

95. *Milton*, 562 So. 2d at 807.

96. *Id.*

upon the constitutional grant of rulemaking power to the supreme court[97] and the separation of powers clause,[98] the *Milton* court declared that a statute purporting to create or modify a procedural rule of court or practice is unconstitutional.[99]

The *Milton* court reasoned that, in declaring that rule 1.442 supersedes sections 768.79 and 45.061 to the extent that the procedural aspects of the rule conflict with the statutes, the Florida Supreme Court clearly determined that section 45.061 contains both substantive and procedural elements.[100] According to the *Milton* court, the improper procedural provisions of section 45.061 could not be severed from the statute without rendering it incomplete or causing results that the legislature had not anticipated.[101] Therefore, the *Milton* court held that the entire statute was unconstitutional.[102]

In reaching this conclusion, the *Milton* court acknowledged that it was in conflict with the second district.[103] The Second District Court of Appeal determined that section 45.061 was constitutional in *A.G. Edwards & Sons, Inc. v. Davis*.[104] More specifically, the court ruled that since subsections 45.061(2) and (3) create substantive rights, the statute did not infringe upon the supreme court's exclusive rulemaking authority.[105] However, the *Milton* court reasoned that the second district's ruling was inconsistent with the supreme court's determination that section 45.061 contains procedural details.[106]

The Fourth District Court of Appeal also considered whether section 45.061 was procedural or substantive in *Hemmerle v. Bramalea, Inc.*[107] Unlike the *Milton* and *Davis* courts, the *Hemmerle* court did not consider the constitutionality of section 45.061.[108] However, the

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97. FLA. CONST. art. V, § 2(a).

98. *Id.* art. II, § 3.

99. *Milton*, 562 So. 2d at 807.

100. *Id.*

101. *Id.* at 807-08.

102. *Id.* (citing Delta Air Lines v. Department of Revenue, 455 So. 2d 317 (Fla. 1984), *appeal dismissed*, 474 U.S. 892 (1985); High Ridge Mgmt. Corp. v. State, 354 So. 2d 377 (Fla. 1977)).

103. *Id.* at 808 n.4.

104. 559 So. 2d 235, 236 (Fla. 2d D.C.A. 1990).

105. *Id.* at 236-37 (citing Richardson v. Honda Motor Co., 686 F. Supp. 303 (M.D. Fla. 1988); Hemmerle v. Bramalea, Inc., 547 So. 2d 203 (Fla. 4th D.C.A. 1989)). Subsections 45.061(2) and (3) deal with entitlement to and amount of sanctions. FLA. STAT. § 45.061(2)-(3).

106. *Milton*, 562 So. 2d at 808 n.4.

107. 547 So. 2d 203, 204 (4th D.C.A. 1989), *rev. denied*, 558 So. 2d 18 (Fla.), *cert. denied*, 110 S. Ct. 2620 (1990).

108. *See id.* at 204. The *Hemmerle* court restricted its inquiry to whether § 45.061 should be given retroactive application. *Id.*

court did rule that section 45.061 was substantive in nature and, therefore, could not be applied retroactively to causes of action accruing before the effective date of the statute.[109]

Both *Davis* and *Hemmerle* based the finding that section 45.061 is substantive[110] upon a case decided by the United States District Court for the Middle District of Florida, *Richardson v. Honda Motor Co.*[111] As a federal court sitting in diversity, the *Richardson* court applied Florida substantive law.[112] The court noted that, under Florida law, each litigant is obligated to pay its own attorney's fees unless a statute or agreement between the parties awards the right to assess fees against the opposing party.[113] The court also noted that the Florida Supreme Court had previously held that a statute which requires a nonprevailing party to pay attorney's fees constitutes a new obligation or duty and is therefore substantive in nature.[114]

Section 45.061 allows the court to assess attorney's fees against a party who unreasonably rejects an offer of judgment, a right which previously did not exist in Florida.[115] Therefore, the *Richardson* court held that section 45.061 is substantive.[116] Consequently, the court refused to apply section 45.061 to the plaintiff's cause of action which accrued prior to the effective date of the statute.[117]

C. *Fee-Shifting Statutes: Are They Substantive or Procedural?*

The *Davis* court's determination that section 45.061 is substantive, and thus constitutional, is misguided. In order to identify the flaw in

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109. *Id.* (citing *Richardson*, 686 F. Supp. at 303). The Fourth District also later declared that § 768.79 was substantive and did not apply retroactively. Mudano v. St. Paul Fire & Marine Ins. Co., 543 So. 2d 876, 877 (Fla. 4th D.C.A. 1989). A distinction between substance and procedure also determines whether a statute can be applied to a cause of action retroactively; however, the substance/procedure determination is based upon different factors in the retroactive application context than in the separation of powers context. *See infra* notes 172-77 and accompanying text.

110. *See Davis*, 559 So. 2d at 237; *Hemmerle*, 547 So. 2d at 204.

111. 686 F. Supp. 303 (M.D. Fla. 1988).

112. *See* Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938) (stating that "except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State").

113. *Id.* at 304 (citing Young v. Altenhaus, 472 So. 2d 1152, 1154 (Fla. 1985)).

114. *Id.* (citing L. Ross, Inc. v. R.W. Roberts Constr. Co., 481 So. 2d 484 (Fla. 1986); Whitten v. Progressive Casualty Ins. Co., 410 So. 2d 501 (Fla. 1982); Parrish v. Mullis, 458 So. 2d 401 (Fla. 1st D.C.A. 1984); Love v. Jacobson, 390 So. 2d 782 (Fla. 3d D.C.A. 1980)).

115. *Id.*

116. *Id.*

117. *Id.*

the court's reasoning, some general principles must be recognized. First, laws which require one litigant to pay the opposing litigant's attorney's fees may be either substantive or procedural.[118] Second, fee-shifting statutes which are procedural tend to apply to both litigants and are designed to make the litigation process more efficient for both parties, rather than to favor a particular cause of action or class of litigant.[119] Third, substantive fee-shifting statutes normally are tied directly to specific causes of action, thus encouraging such claims by making attorney's fees available to prevailing plaintiffs.[120]

A review of federal case law concerning fee-shifting statutes reveals that federal courts considering the separation of powers question have adopted these principles. For example, *Marek v. Chesny*[121] was a suit brought in federal district court pursuant to 42 U.S.C. section 1983.[122] Before trial, the petitioners made a timely offer of judgment of $100,000 under rule 68 of the Federal Rules of Civil Procedure.[123] The respondent rejected the offer and was ultimately awarded $60,000.[124] The respondent then moved for an award of attorney's fees under the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. section 1988.[125]

Section 1988 provides for an award of attorney's fees to a prevailing plaintiff in a section 1983 action.[126] Alternately, section 1988 provides for an award of attorney's fees to a prevailing defendant in cases in

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118. Parness, *Choices About Attorney Fee-Shifting Laws: Further Substance/Procedure Problems Under* Erie *and Elsewhere*, 49 U. PITT. L. REV. 393, 394 (1988) (arguing that given the existence of several different rationales underlying fee shifting statutes, a court may characterize a fee-shifting provision as either substantive or procedural).

119. *Id.* at 397, 401 (asserting that procedural fee shifting laws are "tied to the judicial processes available for resolving disputes about claims or causes of action" and "typically govern conduct during litigation, often by permitting recovery of fees from those who abuse the judicial process"); *see also* Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 281, 303 (stating that "civil rules generally are written to apply without regard to the substantive nature of the issues in dispute").

120. Parness, *supra* note 118, at 397, 401 (asserting that substantive fee-shifting laws are "tied to claims or causes of action" and often encourage "assertions of these claims by providing that prevailing complainants are entitled to recovery of fees").

121. 473 U.S. 1 (1985).

122. *Id.* at 3.

123. *Id.* at 3-4. Rule 68 of the Federal Rules of Civil Procedure governs offers of judgment. *See supra* text accompanying notes 11-13.

124. *Marek*, 473 U.S. at 4.

125. *Id.* at 9.

126. 42 U.S.C. § 1988 (1988) (providing that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs").

which the plaintiff has engaged in substantial litigation misconduct.[127] The petitioners argued that the respondent was not entitled to attorney's fees under section 1988, because the rule 68 offer of judgment had shifted attorney's fees to the respondent.[128] The district court agreed with the petitioners and refused to award the respondent costs and attorney's fees incurred after the offer of judgment.[129]

The Court of Appeals for the Seventh Circuit reversed the district court's ruling.[130] The appellate court concluded that the right to attorney's fees created by section 1988 is substantive for some purposes and procedural for others.[131] According to the court, the fee-shifting provisions of section 1988 are procedural because they govern the relationship between the parties to a lawsuit and make the litigation process more accurate and efficient by providing a prevailing defendant with fees if the plaintiff engages in litigation misconduct.[132] The same fee-shifting provisions are substantive because they are designed to achieve compliance with civil rights laws by providing a prevailing plaintiff with fees.[133] The court of appeals held that applying rule 68 to prevent respondent from recovering costs and attorney's fees incurred after the offer of judgment would abridge the substantive right to attorney's fees granted by section 1988.[134] In the court's view, such a result would be a violation of the Rules Enabling Act.[135]

On writ of certiorari, the United States Supreme Court reversed[136] and held that applying rule 68 to prevent respondent from recovering costs and fees accruing after the offer of judgment would not abridge substantive rights.[137] In reaching this conclusion, the Court considered the objectives underlying rule 68 and section 1988 sanctions.[138] Rule

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127. *Id.*

128. *Marek*, 473 U.S. at 4.

129. *Id.*

130. Chesney v. Marek, 720 F.2d 474, 480 (7th Cir. 1983), *rev'd*, 473 U.S. 1, 12 (1985).

131. *Id.* at 479 (finding that "no doubt the right is better described as both substantive and procedural, or as substantive for some purposes and procedural for others").

132. *Id.*

133. *Id.* at 478-79.

134. *Id.* at 479.

135. *Id.* The Rules Enabling Act provides the United States Supreme Court with the power to prescribe rules of practice and procedure in the United States district courts and courts of appeals. 28 U.S.C. § 2072(a) (1988). The Rules Enabling Act also provides that "such rules may not abridge, enlarge, or modify any substantive right." *Id.* § 2072(b).

136. *Marek*, 473 U.S. at 5.

137. *Id.* at 11.

138. *Id.* (stating that § 1988 has the purpose of encouraging plaintiffs to bring meritorious civil rights suits, while rule 68 has the purpose of encouraging parties to settle all suits).

68 is intended to discourage a plaintiff from continuing litigation after the defendant has made an offer of judgment.[139] The Court noted that there was no evidence indicating that Congress, in enacting rule 68, wished to favor civil rights claims over other civil claims.[140] Furthermore, rule 68's policy of encouraging settlements is neutral and favors neither plaintiffs nor defendants.[141] The Court perceived no conflict between section 1988's objective of encouraging meritorious civil rights suits and rule 68's goal of encouraging settlement.[142] Thus, the Court held that awarding attorney's fees under rule 68 did not abridge substantive rights.[143]

In *Marek*, the Supreme Court determined that rule 68 did not abridge substantive rights because the rule seeks to make the litigation process more efficient for both parties by encouraging settlement in all civil actions.[144] In addition, the Seventh Circuit Court of Appeals determined that section 1988 is substantive to the extent that it attempts to encourage civil rights actions.[145] The combination of these two decisions supports the generalizations concerning fee-shifting laws presented above.[146]

Specifically, fee-shifting statutes which directly affect a particular type of action or class of litigants are characterized as substantive, especially when the statute attempts to encourage a particular cause of action.[147] Such fee-shifting statutes are correctly seen as merely a part of the relief offered by the underlying substantive action.[148] On

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139. *Id.* at 10.

140. *Id.*

141. *Id.*

142. *Id.* at 11 (finding that, "Section 1988 encourages plaintiffs to bring meritorious civil rights suits; [r]ule 68 simply encourages settlements. There is nothing incompatible in the two objectives.").

143. *Id.*

144. *Id.* at 10 (stating that, "Civil rights plaintiffs — along with other plaintiffs — who reject an offer more favorable than what is thereafter recovered at trial will not recover attorney's fees for services performed after the offer is rejected.").

145. *Chesny*, 720 F.2d at 479 (finding that § 1988 was designed to achieve the substantive objective of compliance with the civil rights laws). The Supreme Court did not declare that the court of appeals improperly determined that § 1988 was substantive; the Court merely declared that the court of appeals incorrectly concluded that rule 68 impinged upon the substantive rights created by § 1988. *Marek*, 473 U.S. at 10-11.

146. *See supra* notes 118-20 and accompanying text.

147. *See* Parness, *supra* note 118, at 401 (reaching the same conclusion based upon a similar interpretation of the *Marek* court of appeal and Supreme Court holdings).

148. *See* Orlando Candy Co. v. New Hampshire Fire Ins. Co., 51 F.2d 392, 393 (S.D. Fla. 1931) (holding that a state statute was properly applied in federal court because "the liability imposed by the statute . . . is in effect an incident of the insurer's wrongful refusal to pay").

the other hand, fee-shifting statutes applying equally to a wide cross-section of civil cases, which have the purpose of making the litigation process more efficient for both parties and governing the relationship between the parties, are properly classified as procedural.[149]

The United States Supreme Court previously had endorsed this approach to distinguishing between substantive and procedural fee-shifting statutes in *People of Sioux County, Nebraska v. National Surety Co.*[150] In *Sioux County*, the Court considered whether a federal court could properly apply a Nebraska statute allowing recovery by a beneficiary against a surety in the amount of the surety bond plus a reasonable attorney's fee.[151] The Court declared that the issue of whether a federal court could enforce a state fee-shifting statute did not "depend on any nice distinctions which may be taken between the right created and the remedy given."[152]

Thus, the Court did not consider only whether the statute created a legal liability which did not exist under the contract prior to the enactment of the statute.[153] Rather, the Court examined the purpose underlying the fee shift.[154] The Nebraska Legislature enacted the statute to allow plaintiffs to recover attorney's fees in connection with a specific cause of action.[155] Therefore, the Court held that the federal court properly applied the statute.[156]

The implications of the *Sioux County* holding are clear. First, fee-shifting statutes may be either substantive or procedural.[157] Second, courts must distinguish substantive fee shifting laws from procedural ones based upon the purpose of the fee shift, not upon the creation of a new liability where none had existed previously.[158] Third,

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149. *See* Parness, *supra* note 118, at 401 (concluding that under the *Marek* holdings, procedural fee-shifting laws typically govern conduct during litigation by permitting recovery of fees against those abusing the judicial process).

150. 276 U.S. 238 (1928).

151. *Id.* at 242-43.

152. *Id.* at 243.

153. *Id.*

154. *See id.*

155. *Id.*

156. *Id.* The court declared that it would be anomalous if plaintiffs could thwart this clear policy of the state by removal to federal court. *Id.*

157. *See id.*

158. *See* Parness, *supra* note 118, at 405 (arguing that implicit in the *Sioux County* holding is the assertion that a liability to compensate an opponent, imposed as a procedural incident to the entry of judgment, is not substantive merely because it creates a right of recovery).

a federal court may apply only state fee-shifting statutes that are substantive.[159]

In *Orlando Candy Co. v. New Hampshire Fire Insurance Co.*,[160] the United States District Court for the Southern District of Florida further clarified the distinction between substantive and procedural fee-shifting statutes. The *Orlando Candy* court considered whether a federal court could apply a statute which shifted attorney's fees in favor of a beneficiary seeking to collect on an insurance policy.[161] The court concluded that the liability for attorney's fees imposed by the statute was "an incident of the insurer's wrongful refusal to pay, not a mere procedural incident to the entry of the judgment."[162] Therefore, the court held that the statute was substantive and properly applied in federal court.[163]

A number of basic guidelines for applying fee-shifting statutes may be distilled from the *Marek*, *Sioux County*, and *Orlando Candy* holdings. Namely, fee-shifting statutes may be either substantive or procedural.[164] A fee-shifting statute which creates a new right or remedy where none previously existed is not necessarily substantive.[165]

Instead, the purpose underlying the fee shift determines whether the statute is substantive.[166] If the fee shift is directly connected with a particular substantive cause of action, perhaps to encourage the bringing of such actions, the provision is an extension of the underlying action and creates a substantive right.[167] However, if the fee shift is designed to achieve more efficient administration of justice in a wide range of civil actions and does not encourage the bringing of a particular action, the provision is merely a procedural incident to the entry of judgment.[168]

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159. *See Sioux County*, 276 U.S. at 243; *see also* Parness, *supra* note 118, at 404 (determining that "[c]ourts can only interpret *Sioux County* as requiring federal courts hearing state law claims to apply state substantive . . . laws on fee-shifting and not all state fee-shifting laws").

160. 51 F.2d 392 (S.D. Fla. 1931).

161. *Id.* at 392.

162. *Id.* at 393.

163. *Id.*

164. *See supra* notes 118 & 144-49 and accompanying text.

165. *See supra* notes 152-58 and accompanying text.

166. *See supra* notes 138-49 & 158 and accompanying text.

167. *See id.*

168. *See id.*

D. *The Florida Offer of Judgment Statutes: Are They Substantive or Procedural?*

Based on the preceding guidelines, a federal court likely would conclude that sections 45.061 and 768.79 are procedural. As with the federal offer of judgment rule, these statutes attempt to make the litigation process more efficient for both parties by deterring non-meritorious litigation and encouraging prompt settlement.[169] Section 768.79 applies to all actions for damages, whether in tort or in contract.[170] Section 45.061 applies to all actions at law or in chancery with a few notable exceptions.[171] Therefore, neither statute encourages the filing of any particular substantive cause of action. Both statutes result in fee shifts which are merely procedural incidents to the entry of judgment, rather than substantive incidents of a plaintiff's underlying cause of action.

If federal courts have adopted these rules for distinguishing between procedural and substantive fee-shifting statutes, it is confusing why the district court in *Richardson* reached the conclusion, later relied upon by *Hemmerle* and *Davis*, that section 45.061 is substantive.[172] One explanation is that the *Richardson* court confronted an issue different than the issue confronting the other federal courts when they made the substance/procedure determination. The substance/procedure classification in *Richardson* was not made in a separation of powers context. Instead, the issue in *Richardson* was whether section 45.061 should be applied retroactively.[173]

The substance/procedure classification is not necessarily based upon the same considerations in both the separation of powers and retroactive application contexts.[174] In a case concerning retroactive application

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169. *See supra* note 90.

170. FLA. STAT. § 768.71(1) (1989).

171. *Id.* § 45.061(4). Section 45.061 does not apply to "any class action or shareholder derivative suit or to matters relating to dissolution of marriage, alimony, nonsupport, eminent domain, or child custody." *Id.*

172. *Richardson*, 686 F. Supp. at 304 (holding that § 45.061 is a substantive statute which cannot apply retroactively).

173. *Id.*

174. *See* Guaranty Trust Co. v. York, 326 U.S. 99, 108, *reh'g denied*, 326 U.S. 806 (1945) (finding that "of course, 'substance' and 'procedure' are the same key-words to very different problems" and that "[e]ach implies different variables depending upon the particular problem for which it is used"); *In re* Florida Rules of Criminal Procedure, 272 So. 2d 65, 66 (Fla. 1972) (finding that "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"); *In re* Florida State Bar Ass'n for Promulgation of New Fla. Rules of Civil Procedure, 145 Fla. 223, 228, 199 So. 57, 59 (1940) (finding that "what is regarded as substantive law today may become procedural law

of a statute, the court seeks to prevent a statute which creates or takes away vested rights from being applied to conduct which occurred before the statute was enacted and before the parties were put on notice.[175] Therefore, a substantive statute in the retroactive application context is one which establishes a new right or liability where none previously existed.[176] Conversely, in the separation of powers setting, the court seeks to prevent the legislature from improperly infringing upon the supreme court's constitutional rulemaking power.[177] Thus, in a separation of powers context, the concern focuses on the purpose underlying the fee shift.[178]

The *Hemmerle* court was addressing the question of retroactive application when it determined section 45.061 to be substantive.[179] Thus, the court's reliance upon the *Richardson* holding arguably is proper. However, the *Davis* court was confronted with a separation of powers issue when it held section 45.061 to be substantive and constitutional.[180] Therefore, the *Davis* court's reliance upon *Richardson*, which addressed the substantive/procedural nature of section 45.061 in an entirely different context, was misplaced. Although section 45.061 is conceivably substantive in the retroactive application

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tomorrow and vice versa"); Carrington, *supra* note 119, at 284 (explaining that the "characterization of a law as substantive or procedural depends on the purpose of the characterization"); *see generally* Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 YALE L.J. 333, 341 (1933) (asserting that the substance/procedure "distinction is drawn for a number of different purposes, each involving its own social, economic, or political problems").

175. *See* Young v. Altenhaus, 472 So. 2d 1152, 1154 (Fla. 1985) (finding that a statute did not apply retroactively because "[w]hen appellant's cause of action accrued, she was not burdened with the potential responsibility to pay . . . attorney's fees . . . and appellee was not entitled to that right") (quoting Parrish v. Mullis, 458 So. 2d 401, 402 (Fla. 1st D.C.A. 1984))); *Parrish*, 458 So. 2d at 402 (finding that "it would be manifestly unfair to argue that plaintiff could have filed her lawsuit earlier to avoid operation of the statute" because on the date the cause of action accrued the statute did not exist); Cook, *supra* note 174, at 343 (stating that the alteration of an individual's "vested substantive rights" by subsequent legislative enactment is not fair).

176. *See, e.g.*, L. Ross, Inc. v. R.W. Roberts Constr. Co., 481 So. 2d 484, 485 (Fla. 1986) (finding that statutes which do not create a new right or take away a vested right are merely remedial and may be given retroactive application); Love v. Jacobson, 390 So. 2d 782, 783 (Fla. 3d D.C.A. 1980) (holding that a statute was substantive because the right to attorney's fees created by the statute did not exist prior to enactment of the statute).

177. *See Markert*, 367 So. 2d at 1006 (holding that a procedural statute was an invasion of the supreme court's exclusive rulemaking authority); *Military Park*, 407 So. 2d at 1021 (recognizing that procedural statutes violate the separation of powers provision of the Florida Constitution).

178. *See supra* notes 118-63 and accompanying text.

179. *Hemmerle*, 547 So. 2d at 204.

180. *Davis*, 559 So. 2d at 236-37.

context,[181] analysis of the section 45.061 fee shift reveals that the statute is procedural in the separation of powers setting.[182] Other Florida courts also have failed to consider the context of the challenge to a statute when characterizing the statute as substantive or procedural.[183]

A Florida court did hold that section 45.061 was an unconstitutional infringement upon the Florida Supreme Court's exclusive rulemaking power in *Milton v. Leapai*.[184] Unfortunately, *Milton* reaches the correct result for the wrong reasons. The court declared that section 45.061 contains both substantive and procedural elements.[185] Because the substantive portions of the statute could not be severed from the

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181. Florida courts have universally declared that statutes incorporating fee shifts create rights and liabilities where none existed before and, therefore, are substantive enactments which may not be applied retroactively. *See supra* note 114 and accompanying text. *But see* Brady v. Hartford Fire Ins. Co., 610 F. Supp. 735, 744 (D. Md. 1985) (finding that a fee shift under rule 11 may be given retroactive application because it does not create a new substantive right or affect substantive rights previously existing).

182. *See supra* text accompanying notes 169-71.

183. *See, e.g., Whitten*, 410 So. 2d at 504. In 1982, the Florida Supreme Court determined that an award of attorney's fees under § 57.105 of the Florida Statutes was a matter of substantive law properly under the authority of the legislature. *Id.* The supreme court relied on a number of cases which declared that litigants cannot recover attorney fees unless allowed by statute or contract. *Id.* (citing Estate of Hampton v. Fairchild — Florida Constr. Co., 341 So. 2d 759 (Fla. 1976); Campbell v. Maze, 339 So. 2d 202 (Fla. 1976); Rivera v. Deauville Hotel, Employer's Serv. Corp., 277 So. 2d 265 (Fla. 1973); Codomo v. Emanuel, 91 So. 2d 653 (Fla. 1956); State *ex rel.* Royal Ins. Co. v. Barrs, 87 Fla. 168, 99 So. 668 (1924)). Therefore, the *Whitten* court also ignored the context-sensitive nature of the substance/procedure determination when it declared that § 57.105 was substantive for separation of powers purposes simply because it created new rights and liabilities. *See* Parness, *supra* note 118, at 418 n.121 (arguing that the *Whitten* court improperly declared that the statute was substantive in the separation of powers setting merely because the statute created a liability).

Federal courts have also occasionally made the substance/procedure determination without considering the context of the determination. *See Brady*, 610 F. Supp. at 744. In *Brady*, the court declared that rule 11 of the Federal Rules of Civil Procedure was substantive and could be applied retroactively. *Id.* The court declared that rule 11 was substantive because the purpose underlying the rule's fee shift was to control the conduct of litigation and counsel appearing before the court. *Id.* However, the purpose of the fee shift is relevant only in the separation of powers setting. *See supra* notes 174-78 and accompanying text. Therefore, the *Brady* court failed to recognize the significance of context in making the substance/procedure determination and declared rule 11 procedural in a retroactive application context based upon factors relevant only in a separation of powers context. *See generally* Cook, *supra* note 174, at 344-45 (generally discussing the problems inherent in using a substance/procedure determination in a context different from the context in which it was originally made).

184. 562 So. 2d 804 (Fla. 5th D.C.A. 1990).

185. *Id.* at 807.

procedural portions without defeating legislative intent, the court ruled that the entire statute was invalid.[186]

The *Milton* court based its decision on the Florida Supreme Court's earlier ruling that rule 1.442 contains both substantive and procedural details.[187] With one exception, the supreme court failed to explain which elements of the statutes were procedural.[188] Therefore, it was somewhat conclusory for the *Milton* court to hold that severing the substantive elements of section 45.061 from the procedural elements would defeat legislative intent when the procedural elements were never identified. Furthermore, under the *Milton* court's analysis, rule 1.442 is also unconstitutional because it contains substantive components which cannot be severed from the procedural portions.[189] As a result, under the *Milton* court's reasoning, both the supreme court and the legislature would be incapable of enacting an offer of judgment provision capable of withstanding constitutional evaluation.

The only effective means of eliminating the confusion currently plaguing Florida offer of judgment practice is for the Florida Supreme Court to invalidate the offer of judgment statutes. However, the court need not adopt the reasoning of *Milton* and invalidate the offer of judgment statutes based upon strained arguments of partial unconstitutionality and inseverability. Both Florida offer of judgment statutes attempt to make the litigation process more efficient for all parties by encouraging settlement and deterring frivolous litigation.[190] Both are also intended to apply in a wide range of civil actions.[191] Therefore, at least in the separation of powers context,[192] the offer of judgment

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186. *Id.* (citing Delta Air Lines v. Department of Revenue, 455 So. 2d 317 (Fla. 1984), *appeal dismissed*, 474 U.S. 892 (1985); High Ridge Mgmt. Corp. v. State, 354 So. 2d 377 (Fla. 1977)).

187. *Id.* (citing The Florida Bar Re: Amendment to Rules of Civil Procedure, Rule 1.442 (Offer of Judgment), 550 So. 2d 442 (Fla. 1989)).

188. *See The Florida Bar*, 550 So. 2d at 443 (explicitly declaring that only the time limits for acceptance of offers under the statutes are procedural).

189. *See Furen*, 118 So. 2d at 12 (holding that the rules of procedure may not abridge, modify, or enlarge substantive rights); *see also* Reinhardt v. Bono, 564 So. 2d 1233, 1235 (Fla. 5th D.C.A. 1990) (although acknowledging that the supreme court's opinion revising rule 1.442 could be construed to mean that sanctions under the rules and statutes are substantive, the *Reinhardt* court refused to uphold the trial court's ruling that rule 1.442 violates separation of powers because only the Florida Supreme Court has the authority to declare rules of civil procedure invalid).

190. *See supra* note 90.

191. *See supra* notes 170-71 and accompanying text.

192. *See supra* notes 174-83 and accompanying text for a discussion of the context-sensitive nature of the substance/procedure classification.

statutes are entirely procedural in character. As procedural enactments, the offer of judgment statutes are improper legislative promulgations of rules governing practice and procedure — a field the Florida Constitution reserves exclusively for the Florida Supreme Court.[193]

III. Additional Factors Dictating Invalidation of the Florida Offer of Judgment Statutes

In view of the procedural nature of the offer of judgment statutes, it is not only permissible, but essential that the supreme court invalidate the statutes. Complete invalidation is required to ensure that both the legislature and the supreme court perform their proper constitutional roles.[194] Indeed, the supreme court is equally bound to find a court rule designed to achieve substantive purposes unconstitutional.[195] If constitutional necessity does not persuade the court to invalidate the statutes, both public policy and jurisprudential reality should convince the court.

Simply declaring that rule 1.442 supersedes the procedural details of the statutes, without identifying which elements of the statutes are procedural, only further complicates the offer of judgment picture.[196] Florida courts will be forced to determine the substantive or procedural nature of each provision of the offer of judgment statutes on a case-by-case basis.[197] Courts making the substance/procedure determination based upon whether a new right or liability is conferred by the statute probably will determine that the rule supersedes everything except the remedies provided by the statutes.[198] Thus, litigants

193. *See supra* notes 69-73 and accompanying text for a disucssion of the origins of the Florida Supreme Court's exclusive authority over practice and procedure.

194. *See id.*; *see also* Levin & Amsterdam, *supra* note 79, at 37 (asserting that a faithful adherence to the constitutional scheme is necessary to ensure that the legislature will not usurp control of the supreme court's rulemaking power); Pound, *The Rule-Making Power of the Courts*, 12 A.B.A. J. 599, 601 (1926) (asserting that no branch of the government can work effectively if the details of its procedural operations are dictated by another branch of the government).

195. *See, e.g.*, *Benyard*, 322 So. 2d at 475-76 (finding that a rule governing the prescribed punishment for a criminal offense is substantive and must be revoked or amended to conform with the statute).

196. *See supra* notes 50-51 and accompanying text.

197. *See supra* note 50 and accompanying text.

198. *See* Berman & Cole, *supra* note 8, at 40 (interpreting the supreme court's opinion revising rule 1.442 "to infer that the only 'purely substantive aspect' of the statutes is the sanction, or what the court might characterize as a substantive right conferred by the legislature").

will have to follow the procedures dictated by the rule to gain the benefit of the statutory remedies.[199] Because the sanctions provided for under the rule and statutes are now equivalent,[200] there will be no need for a litigant to resort to these statutory remedies. Nonetheless, the validity of the statutory remedies will complicate Florida offer of judgment practice.[201] Therefore, unless the Florida Supreme Court acknowledges the constitutional infirmity of the statutes, Florida offer of judgment laws will continue to foster litigation in direct derogation of their stated purpose.[202]

Other practical considerations also dictate that the supreme court exercise its exclusive power over procedure in the offer of judgment area. As with all legislative enactments, the task of clarifying ambiguities in the offer of judgment statutes falls to the courts. Often, the courts must resolve statutory ambiguity by relying on the literal wording of a statute. Unfortunately, the literal interpretation often conflicts with the purpose behind the statute.[203]

This was the case when the courts considered the question of whether a defendant who makes an offer of judgment pursuant to section 45.061 or section 768.79, and who later prevails in the underlying action, is entitled to the statutory remedy. Based upon a strict reading of the statutes, Florida courts concluded that there must be a judgment in favor of the plaintiff in order for the defendant to benefit from the remedies under either statute.[204] Incongruously,

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199. *See id.*

200. *See The Florida Bar*, 550 So. 2d at 444 (providing that new rule 1.422 awards reasonable costs and attorney's fees); FLA. STAT. § 45.061(3)(a) (1989) (allowing recovery of costs and expenses including reasonable attorney's fees); FLA. STAT. § 768.79(1)(a) (1989) (awarding reasonable costs and attorney's fees).

201. *See supra* note 51 and accompanying text.

202. *See supra* note 2 and accompanying text for a discussion of the purposes of the offer of judgment provisions.

203. *See* Levin & Amsterdam, *supra* note 79, at 11 (explaining that even the best legislative codes are rigid and bind the courts without exception, even in situations where the codes may be inefficient or unjust); Joiner & Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making*, 55 MICH. L. REV. 623, 643 (1957) (finding that since courts must clarify ambiguities in legislative rules in cases and controversies, lawsuits turn on questions of practice); Pound, *supra* note 194, at 602 (stating that legislative rules have the disadvantage of being made by one body and then being interpreted by another body).

204. Gunn v. DePaoli, 562 So. 2d 427, 427 (Fla. 2d D.C.A. 1990) (finding that a defendant is not entitled to an award of attorney's fees and costs under § 768.79 unless a judgment is rendered in favor of the plaintiff); Coe v. B & D Transp. Servs., Inc., 561 So. 2d 469, 470 (Fla. 2d D.C.A. 1990) (holding that judgment must be rendered in favor of the plaintiff for the defendant to be entitled to fees and costs under §§ 768.79 or 45.061); Oriental Imports, Inc. v. Alilin, 559 So. 2d 442, 443 (Fla. 5th D.C.A. 1990) (stating that if the legislature had intended

therefore, a plaintiff who unreasonably continues a lawsuit after an offer of judgment and obtains a recovery less favorable than the offer is sanctioned, while the same plaintiff escapes sanctions if the case is lost completely.[205] This interpretation fails to assist the offer of judgment rules in discouraging unmerited litigation.[206]

Unlike statutes, rules of court are interpreted by the same body which promulgated them. Consequently, the court is aware of the purpose underlying the rule and is able to interpret the rule consistent with the rule's purpose.[207] Courts also are free to depart from the

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for fees to be awarded under § 768.79 when a judgment is entered for a defendant, then the legislature would have included the necessary language); Makar v. Investors Real Estate Mgmt., Inc., 553 So. 2d 298, 299 (Fla. 1st D.C.A. 1989) (holding that the language of §§ 768.79 and 45.061 clearly requires a judgment for the plaintiff as a prerequisite to recovery of attorney's fees and costs).

Furthermore, one Florida court also interpreted the previous version of rule 1.442 to require a judgment in favor of the plaintiff. B & H Constr. & Supply Co. v. District Bd. of Trustees of Tallahassee Community College, Fla., 542 So. 2d 382, 388 (Fla. 1st D.C.A. 1989). However, the *B & H Constr.* court based its interpretation of rule 1.442 on the United States Supreme Court's interpretation of rule 68 because rule 68 and the previous version of rule 1.442 were identical. *Id.* (citing Delta Air Lines v. August, 450 U.S. 346 (1981)). Therefore, the Florida courts must decide whether the same interpretation applies to the revised rule 1.442.

205. When the same result flowed from the United States Supreme Court's interpretation of rule 68 in Delta Air Lines v. August, 450 U.S. 346 (1981), the *Delta* Court's decision was criticized for requiring a judgment in favor of the plaintiff as a prerequisite to recovering attorney's fees and costs. *See* Note, Delta Air Lines v. August: *Taking the Teeth Out of Rule 68*, 43 U. PITT. L. REV. 765, 782 (1982) [hereinafter *Taking the Teeth Out*] (arguing that the *Delta* Court's conclusion that rule 68 does not apply to losing plaintiffs is "fundamentally illogical"); Case Note, *Federal Rule of Civil Procedure 68 — When it Comes Down to Costs, It's Not How You Play the Game, It's Whether You Win or Lose* — Delta Air Lines, Inc. v. August, 9 FLA. ST. U.L. REV. 671, 680-81 (1981) [hereinafter *Win or Lose*] (concluding that the Supreme Court's interpretation of rule 68 is not well supported by "the plain meaning, purpose, and history of the rule"); Comment, *Federal Rules of Civil Procedure — Offers of Judgment — Prevailing Defendants Are Not Within the Purview of Rule 68*, 51 MISS. L.J. 599, 609 (1980-81) (stating that the logic of the *Delta* Court's holding is "elusive").

206. *See Taking the Teeth Out*, *supra* note 205, at 784-85 (explaining that the Supreme Court's interpretation of rule 68 reverses the normal functioning of rule 68 by preventing any recovery when the plaintiff loses the judgment); *Win or Lose*, *supra* note 205, at 680-81 (determining that the Court's interpretation of rule 68 "restricts the scope of the rule and thus removes an incentive for some defendants to make settlement offers").

207. *See* Dean, *Rule-Making in Texas: Clarifying the Judiciary's Power to Promulgate Rules of Civil Procedure*, 20 ST. MARY'S L.J. 139, 150-51 (1988) (asserting that the consistent interpretation of rules by the body who created the rules is a virtue of judicial rulemaking); Joiner & Miller, *supra* note 203, at 644 (arguing that the interpretation of rules by the same group that promulgated the rules has resulted in an interpretation that relies less on technicalities); Pound, *Regulating Procedural Details by Rules of Court*, 13 A.B.A. J. 12, 13 (1927) (stating that the interpretation of rules by those who make and apply the rules will result in an interpretation that is consistent with the intent and purpose of the rules).

literal wording of a rule in order to do justice and accomplish the purpose of the rule.[208]

Court interpretations of the previous version of rule 1.442 support these generalizations. When faced with the issue of whether the acceptance of an offer of judgment which is silent as to attorney's fees terminates the litigation and forecloses postjudgment recovery of statutory attorney's fees, the Florida Supreme Court answered affirmatively.[209] The court emphasized that the purpose of rule 1.442 is to encourage settlement and terminate disputes.[210]

Similarly, when confronted with the issue of whether post-offer of judgment costs incurred by a nonparty on behalf of a named party may be recovered under rule 1.442,[211] the Florida Supreme Court again looked to the purpose and policies underlying the offer of judgment rule and the statutes.[212] The court ruled that the offeror could recover costs incurred after making an offer of judgment pursuant to rule 1.442, even though the offeror's insurance company advanced the costs.[213]

The court explained that a contrary ruling would subvert the purpose and intent of rule 1.442.[214] The court expressly rejected the lower court's reasoning which reached the opposite conclusion based upon a literal reading of the rule.[215] Therefore, in practice, as in theory, the supreme court's familiarity with the purpose of the offer of judgment rule and the court's ability to avoid strict adherence to the language of the rule has resulted in decisions consistent with the purpose of the rule.

When a legislatively created rule of procedure needs to be modified or revised, change must await the next legislative session.[216] Moreover,

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208. *See* FLA. R. CIV. P. 1.010 (providing that the rules of civil procedure "shall be construed to secure the just, speedy and inexpensive determination of every action").

209. Unicare Health Facilities, Inc. v. Mort, 553 So. 2d 159, 161 (Fla. 1989).

210. *Id.* (holding that "[t]he clear intent of the underlying policy of the rule was to terminate all claims, end disputes, and obviate the need for further intervention of the judicial process").

211. Aspen v. Bayless, 564 So. 2d 1081, 1082 (Fla. 1990).

212. *Id.* at 1083 (finding that the purpose of rule 1.442 and §§ 45.061 and 768.79 is "to encourage parties to settle claims without going to trial").

213. *Id.*

214. *Id.*

215. *Id.* (rejecting the reasoning that the language of the offer of judgment rule and statutes indicates that costs must be incurred by a party, as stated by the district court of appeal in Aspen v. Bayless, 552 So. 2d 298 (Fla. 2d D.C.A. 1989), *quashed*, 564 So. 2d 1081 (Fla. 1990)).

216. *See* Pound, *Procedure Under Rules of Court in New Jersey*, 66 HARV. L. REV. 28, 45 (1952) (explaining that if the legislative rule does not work well, changes cannot be made until the next meeting of the legislature); Joiner & Miller, *supra* note 203, at 643 (arguing

legislatures, in general, demonstrate an unwillingness to make minor changes in individual rules without embarking on wholesale reform.[217] This reform process often results in a more complicated legislative scheme.[218] Nowhere have these concerns been borne out more clearly than in the Florida offer of judgment area in which the legislature has enacted two overlapping offer of judgment statutes.[219]

In contrast, judicially-created procedural rules periodically are reexamined and easily revised.[220] The recent revision of rule 1.442[221] confirms this advantage. In response to a petition by the Civil Procedure Rules Committee of The Florida Bar, the Florida Supreme Court revised rule 1.442 based upon recommendations from the Rules Committee, the Board of Governors of The Florida Bar, and others.[222] Much needed revision was thereby accomplished quickly with minimal political involvement. Furthermore, the court is free to make minor adjustments to rule 1.442 in the future without resorting to complete revision.[223]

Commentators cite other advantages of judicial rulemaking. The most important of these advantages include: a process which complies with the public's expectation that the judiciary is responsible for the efficient administration of justice;[224] a process immune from political

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against legislative regulation of practice and procedure because "legislative sessions occur only at yearly intervals" and because "needed revision is [often] passed over by the legislature when no organized, effective voice is raised in its support").

217. *See* Pound, *supra* note 194, at 602 (stating that legislatures are so busy in most jurisdictions that they have difficulty acting on matters concerning the rules of procedure).

218. *See* Joiner & Miller, *supra* note 203, at 643 (arguing that legislative rulemaking often creates "cumbersome, over particularized, and complicated machinery for the administration of justice"); Pound, *supra* note 194, at 603 (determining that legislative rulemaking focuses on details and "becomes elaborate and over-grown, and is of necessity rigid and unyielding").

219. *See* FLA. STAT. § 45.061 (1989); *id.* § 768.79.

220. *See* Dean, *supra* note 207, at 150 (asserting that the courts are able to make minor changes in individual rules of procedure without wholesale reform); Joiner & Miller, *supra* note 203, at 643 (stating that the courts can periodically reexamine "the rules of procedure to eliminate inequities in the rules"); Pound, *supra* note 194, at 602 (asserting that judicial regulation of procedure by court rules assures "a simple effective procedure, attained by gradual and conservative overhauling and reshaping").

221. *The Florida Bar*, 550 So. 2d at 442-44.

222. *Id.* at 442.

223. *See, e.g., id.* at 442-44. Shortly after the Florida Supreme Court issued the original opinion revising rule 1.442, the court issued a revised opinion, on motions for rehearing, making a drafting change in the rule. *Id.*

224. *See, e.g.*, Joiner & Miller, *supra* note 203, at 643 (arguing for judicial rulemaking because "[t]he courts are responsible for the proper and efficient administration of justice").

pressures;[225] and a process which utilizes judicial expertise in procedural matters.[226] Therefore, unconstitutionality is not the sole justification for invalidation of the offer of judgment statutes. Jurisprudential realities and public policy concerns also support invalidation.

IV. CONCLUSION

Florida Statutes sections 45.061 and 768.79 are intended to make the judicial process more efficient for all litigants. These statutes allow a court to sanction a party who refuses to accept a timely offer which is more favorable than the ultimate recovery.[227] Both statutes apply to a broad cross section of civil actions without favoring a particular class of litigants or cause of action.[228] In the separation of powers context, therefore, proper analysis reveals that both statutes are procedural.[229] As such, both statutes represent improper procedural legislative enactments.[230]

The Florida Supreme Court's reluctance to address the constitutionality of the offer of judgment statutes is understandable. The substance/procedure dichotomy is confounding.[231] However, substantive and procedural statutes must be distinguished in order to ensure that the legislature occupies its proper place in the constitutional framework. To allow an almost exclusively procedural statute to pass constitutional muster merely because the statute creates a new right or liability will encourage further legislative encroachment into the procedural sphere.[232]

The Florida Supreme Court can restore order and predictability to Florida offer of judgment practice by expressly invalidating the offer of judgment statutes. To date the supreme court has merely

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225. *See, e.g.*, Wigmore, *All Legislative Rules For Judiciary Procedure Are Void Constitutionally*, 23 ILL. L. REV. 276, 278 (1928) (stating that the judiciary is politically disinterested and any bias which may exist "is counteracted by the professional opinion of the bar").

226. *See* Pound, *supra* note 194, at 602 (explaining that unlike the legislatures, the courts have the experience to make procedural changes without having to call in experts to explain the proposed change).

227. *See supra* note 2 and accompanying text.

228. *See supra* notes 170-71 and accompanying text.

229. *See supra* notes 169-71 and accompanying text.

230. *See supra* notes 69-73 and accompanying text for a discussion of the supreme court's exclusive power over matters of practice and procedure in state courts.

231. *See supra* notes 78-81 and accompanying text for a discussion of the difficulty experienced by many courts in formulating definitions of substance and procedure.

232. *See* Levin & Amsterdam, *supra* note 79, at 37-38 (arguing that the judiciary must faithfully exercise its constitutional rulemaking authority to the utmost to prevent slow encroachment by the legislature).

declared that rule 1.442 supersedes sections 768.79 and 45.061 in their procedural details. This holding fosters litigation,[233] as illustrated by the recent split among the district courts of appeal.[234] Only by expressly invalidating the offer of judgment statutes may the supreme court obtain for the State of Florida all the benefits inherent in a system of exclusive judicial rulemaking.[235]

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233. *See supra* notes 196-202 and accompanying text.

234. *See supra* notes 91-117 and accompanying text for a discussion of the split among the district courts of appeal concerning the constitutionality of § 45.061.

235. *See* Levin & Amsterdam, *supra* note 79, at 38 (determining that the main virtue of exclusive judicial rulemaking is "its ready flexibility and immediate responsiveness to current problems").