IN THE SUPREME COURT OF FLORIDA

IN RE: REPORT AND RECOMMENDATIONS OF THE JUDICIAL COMPENSATION WORK GROUP–AMENDMENT TO THE RULES OF JUDICIAL ADMINISTRATION (JUDICIAL COMPENSATION)

Case No. SC06-1036

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COMMENTS

I, Stephen Krosschell, have the following two comments about the Report and Recommendations of the Judicial Compensation Work Group dated August 26, 2005 ("Judicial Compensation Report").

First, proposed Rule of Judicial Administration 2.190 violates the separation of powers doctrine, because this Court does not have the power to enact substantive law as a rule of procedure. This Court's authority to promulgate the Rules of Judicial Administration is

> grounded in article V, section 2(a) of the Florida Constitution, which states that the Florida Supreme Court shall adopt rules for the practice and procedure in all courts. . . . The terms practice and procedure "encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. 'Practice and procedure' may be described as the machinery of the judicial process as opposed to the product thereof." In other words, practice and procedure is the method of conducting litigation involving rights and corresponding defenses.
>
> On the other hand, matters of substantive law are within the Legislature's domain. Substantive law has been defined as that part

> of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer. It includes those rules and principles which fix and declare the primary rights of individuals with respect to their persons and property.

State v. Raymond, 906 So. 2d 1045, 1048-49 (Fla. 2005) (citations omitted)

Proposed Rule 2.190 would establish official court policy for judicial salaries and cannot reasonably "be described as the machinery of the judicial process." Rule 2.190 is not close to being a practice or procedure. Instead, it involves a substantive matter–what judges should be paid. Just as "the right of indigents to proceed without payment of court costs . . . [is] undoubtedly a substantive matter," id. at 1049, so also any rule which affects the entitlement of judges to be paid a certain salary is substantive, not procedural.

Judicial compensation policies are not properly included in court rules.

> [T]he power to appropriate state funds is expressly reserved to the legislative branch. More specifically, article VII, section 1(c) provides: "No money shall be drawn from the treasury except in pursuance of appropriation made by law." Thus, it is well settled that the power to appropriate state funds is assigned to the legislature. See Chiles v. Children A, B, C, D, E, and F, 589 So. 2d 260, 264 (Fla. 1991) (holding that power to appropriate is legislative).

Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles, 680 So. 2d 400, 408 (Fla. 1996).

Proposed Rule 2.190(a) attempts to sidestep this issue by conceding that "ultimate discretion in establishing judicial compensation is vested in the

Florida Legislature." The rule, however, gives judges the substantive right to insist that the court system follow the policy enshrined in the rule, when the court system makes budget requests to the Legislature. As such, the rule is substantive in this respect, not procedural.

More generally, the only reason I can see to promulgate a salary policy as a rule of court, rather than simply as an internal written policy of the court system, is to give the policy the force of law and thereby to give the court system greater authority when it communicates as a unified front with the Legislature. See Judicial Compensation Report at 2-3 ("The work group endorsed this concept for the purpose of establishing a unified position on judicial compensation that would govern . . . communications with the Legislature.") See also Hanzelik v. Grottoli and Hudon Inv. of America, Inc., 687 So. 2d 1363, 1365 (Fla. 4th DCA 1997) (Procedural portions of statute had "force of law . . . because these portions have been adopted by the Florida Supreme Court as [a court rule]."). I respectfully disagree that this Court can or should appropriately use its constitutional rule-making power for economic reasons in this manner.

Second, I am a member of the Rules of Judicial Administration Committee ("Committee"). Notice of Proposed Rule 2.190 was sent to the Committee members by e-mail, and the Committee decided to make no

comment because the proposal was beyond the Committee's "purview." I believe that this no-comment decision was based at least in part on this Court's proposed amendment to Rule 2.140(g), which, if this Court adopts it, would provide that some of the Rules of Judicial Administration "generally will be considered and adopted by the supreme court without reference to or proposal from the Rules of Judicial Administration Committee."

I disagree that rules such as proposed Rule 2.190 are or will be beyond the Committee's "purview." Proposed Rule 2.140(g) would streamline the rule-adoption process for some of the Rules of Judicial Administration by providing that these rules will not first be referred to or proposed by the Committee. Rule 2.140(g), however, does not prohibit or discourage the Committee from commenting on these rules. To the contrary, this Court should encourage such comments, to maintain stylistic uniformity in the rules and to obtain whatever substantive thoughts the Committee may have as a product of its rule-making expertise. Accordingly, if this Court adopts Rule 2.140(g), it may wish to provide some clarification that the rules that are the subject of Rule 2.140(g) are still within the Committee's "purview" and that the Court still desires to obtain comments from the Committee on these rules. Absent such a clarification and based on what happened in this instance, the Committee will likely continue to take the position that rules of this sort are beyond its "purview," and it will

likely seldom if ever in the future make any comments on rules such as proposed Rule 2.190.

WHEREFORE, I respectfully request the Court to consider these comments.

CERTIFICATE OF FONT SIZE

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CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished via U.S. Mail on this 14th day of August, 2006, to The Honorable Carolyn K. Fulmer, Second District Court of Appeal, Post Office Box 327, Lakeland, Florida 33802-0327.

Respectfully submitted,

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