

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Governmental Oversight and Accountability

BILL: CS/SB 352

INTRODUCER: Judiciary Committee and Senator Bradley

SUBJECT: Self-authentication of Documents

DATE: January 15, 2016 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Maida	Cibula	JU	Fav/CS
2.	Kim	McVaney	GO	Pre-meeting
3.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 352 authorizes a person to electronically file with a court a certified copy of a public or official records during legal proceedings. Under existing law and despite requirements that most documents be electronically filed, some court clerks require that self-authenticating records be filed in physical form.¹ Accordingly, the bill minimizes the need to file physical documents.

The bill provides that court filings and other public documents found on government approved websites may be submitted to a court. The bill provides a procedure for authentication of such a record.

This bill goes into effect upon becoming law.

II. Present Situation:

Authentication of Evidence

Under the Florida Evidence Code, evidence offered at trial must be authenticated or identified before it can be admitted.² Thus, the code recognizes a principle that evidence is inadmissible

¹ Real Property, Probate, and Trust Law Section of The Florida Bar, *White Paper: Proposed Changes to Fla. Stat. 90.202, Concerning Authentication of Electronic Records* (Sept. 3, 2015) (on file with the Senate Committee on Judiciary).

² Section 90.901, F.S.

unless accompanied by some showing of its genuineness—that is, there must be a showing that the evidence is, in fact, what the proponent says it is.³ Certain types of evidence, however, need no additional authenticating evidence as a condition precedent to admissibility; they are considered authentic as a matter of law.⁴ This evidence includes a copy of an “official public record, report, or entry or of a document authorized by law to be recorded or filed and actually recorded in a public office” if the copy of the record is certified by the custodian of the record or other specified authority.⁵

Electronic Filing of Court Documents

The Florida Rules of Judicial Administration require all court documents to be served and filed electronically.⁶ Facilitating this rule, all clerks of court are required to implement an electronic filing process.⁷ Nevertheless, service and filing of court documents may be made physically in addition to, and not in lieu of, electronic service.⁸ Given the requirement that documents be served and filed electronically, some clerks of court may be ill-equipped or unwilling to accept original paper certified copies of public records, rendering such records difficult to authenticate.⁹

Electronic Access to Official Records

Pursuant to s. 28.2221, F.S., the Legislature required all county recorders to place on a public website an index and location of documents recorded in the official records of the county. The index must have statewide search capabilities and contain the following: grantor and grantee names, party names, dates, book and page number, comments and type of public record. The Legislature required clerks of court and county recorders to provide electronic access to indexed documents by January 1, 2006.¹⁰ Information retrieved electronically from a public website is inadmissible in court as an authenticated document unless otherwise provided by law.¹¹

III. Effect of Proposed Changes:

This bill does four things:

- Provides that certified copies of official public records may be filed electronically;
- Expands the list of documents that are self-authenticating to include court filings or any document maintained on a government website;
- Provides process by which electronically filed copies of self-authenticating documents may be submitted to a court; and
- Provides a process for challenging the authenticity of electronically filed self-authenticating documents.

³ See, e.g., *Gosciminski v. State*, 132 So. 3d 678, 700 (Fla. 2013); *DeLong v. Williams*, 232 So. 2d 246 (Fla. 4th DCA 1970).

⁴ Section 90.902, F.S.

⁵ *Id.*

⁶ Rules 2.516, 2.520 and 2.525 Fla. R. Jud. Admin.

⁷ Section 28.22205, F.S.

⁸ Rules 2.516, 2.525(d) Fla. R. Jud. Admin.

⁹ Although a clerk may not refuse to file a document because it has not been electronically filed, a clerk may request that a document be resubmitted electronically according to Fla. R. Jud. Admin. 2.520(f).

¹⁰ Section 28.2221(5)(e), F.S.

¹¹ Section 28.2221(4), F.S. provides “[u]nless otherwise provided by law, no information retrieved electronically pursuant to this section shall be admissible in court as an authenticated document.”

First, the bill provides that copies of official public records, recorded or filed with a public office may be filed electronically with a clerk of court. The bill provides that an electronically filed copy of a public document must be certified as correct and the document will have the same admissibility as if it were an original official public record.

Second, the bill amends an existing section of law dealing with self-authenticating official public records. The bill creates a new subsection of law that provides that a copy of the following documents are self-authenticating if they are available on a public website:

- Filings of a court sitting within the U.S. or US territory; and
- Document or record entry filed with the U.S. government or any other domestic governmental unit.

The document must come from a public website operated by a governmental agency or operated by someone authorized by a governmental agency.

Third, the bill provides a method by which court filings or documents taken from public website must be authenticated. A party seeking authentication of an internet document must file a copy of the document and the document's web address with the court. The party may then request a hearing on the authenticity of the internet document. The court is authorized to dispense with the hearing altogether.

Under the bill, the authenticity of an internet document can be challenged in two ways. First, the opposing party may provide the court with a different version of the document and claim that their alternative document is the "true," or authentic document. Second, the opposing party may file an affidavit stating the electronically-filed document does not exist on the website or web address provided.

Following this initial step, the court will review the internet document and deem it authentic unless 1) the document is not filed in conformance with the requirements set out in the bill, 2) the court sustains the opposing party's objection, 3) the internet document is materially different from how it appears on the website as claimed by the filing party, or 4) the court otherwise determines the document is inauthentic.

The bill does not prohibit a party from authenticating a document using other means of proof which are permitted as an electronic filing according to this the bill or as provided by s. 90.901, F.S. Section 90.901, F.S., provides that authentication or identification of evidence is required before evidence may be admitted and that the party offering the evidence may authenticate or identify an item offering evidence to show that the item is what the party says it is.

The bill reenacts s. 90.901, F.S., in order to incorporate the changes made by this bill.

The bill takes effect upon becoming a law.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

The mandate restrictions do not apply because the bill does not require counties and municipalities to spend funds, reduce counties' or municipalities' ability to raise revenue, or reduce the percentage of a state tax shares with counties and municipalities.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

By authorizing the electronic filing of self-authenticating documents with a court, the bill appears likely to reduce costs for attorneys and their clients.¹²

C. Government Sector Impact:

The Office of the State Courts Administrator estimates that this bill will not impact revenues and is unable to provide an estimate on expenditures.¹³

The Florida Court Clerk and Comptrollers estimate that this bill will result in a loss of revenue of more than \$700,000 annually.¹⁴ Clerk staff may be required to attend more hearings when authenticity is challenged, however this will result in a minimal or insignificant increase in duties.¹⁵

VI. Technical Deficiencies:

None.

¹² See Real Property Probate and Trust Law Section of The Florida Bar, *supra* note 1.

¹³ 2016 Judicial Impact Statement, Bill Number CS/SB 352, Office of the State Court Administrator.

¹⁴ 2016 CCOC Legislative Bill Analysis for HB 225, Florida Clerks of Court Operations Corporation.

¹⁵ *Id.*

VII. Related Issues:

It is unclear why an affidavit would be necessary to support a challenge to an authentication of internet document, when a motion may be sufficient. It is also not clear who would be the most appropriate person qualified to make such an attestation.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 90.902 and 90.803.

IX. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Judiciary on November 17, 2015:

The committee substitute primarily simplifies and clarifies the language in the bill as originally filed. However, the CS provides additional leeway for a court to determine that a challenged electronically-filed document is inauthentic.

- B. **Amendments:**

None.