

STORAGE NAME: h0505s1.go

DATE: April 10, 1997

**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
GOVERNMENTAL OPERATIONS
BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

BILL #: CS/HB 505

RELATING TO: Private attorney services

SPONSOR(S): Committee on Civil Justice and Claims & Representative Bainter

STATUTE(S) AFFECTED: s. 287.059

COMPANION BILL(S): SB 0922(c)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) CIVIL JUSTICE AND CLAIMS YEAS 8 NAYS 0
- (2) GOVERNMENTAL OPERATIONS (W/D)
- (3)
- (4)
- (5)

I. SUMMARY:

CS/HB 505 requires a contracting private attorney to disclose to the contracting agency any representation by the private attorney or the attorney's firm of a client with interests adverse to a state entity. Upon such disclosure, and before representing the agency, the contracting attorney must obtain a written waiver of any potential conflict of interest from the contracting agency's head. If a contracting attorney fails to make proper disclosure or obtain a waiver, the contract between the attorney and the agency is breached and the attorney no longer is entitled to payment for services.

CS/HB 505 also exempts the Florida School for the Deaf and Blind from s. 287.059 (2), F.S. The school will no longer be required to obtain written approval from the Attorney General before contracting for private attorney services.

This bill does not appear to have a fiscal impact on state or local governments.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Section 287.059, F.S., provides that no agency may contract for private attorney services without prior approval of the Attorney General. However, written approval is not required for private attorney services (a) procured by the Executive Office of the Governor or any department under the exclusive jurisdiction of a single Cabinet Officer; (b) provided by legal services organizations to indigent clients; (c) necessary to represent the state in litigation involving the Florida Casualty Insurance Risk Management Trust Fund; (d) procured by the Board of Regents and the universities of the State University System; or (e) procured by community and junior colleges and multi-county special districts. No exception exists for the Board of Trustees for the Florida School for the Deaf and the Blind.

Agencies requesting approval of private attorney services must submit an initial offer to contract with the Department of Legal Affairs ("DLA"). If the DLA is unable to provide the requested attorney services, the Attorney General will provide a letter to such effect. At this step in the process, agencies are given written approval to contract the services of a private attorney.

In addition, the Attorney General adopts a standard fee schedule for private attorney services using an hourly rate or alternative billing methodology. All agencies utilize the fee schedule unless an agency head or the agency head's designee waives the use of the schedule. The Attorney General also develops agency guidelines used to determine the necessity and appropriateness for contracting private attorney services. Services are contracted on a yearly basis, but multi-year contracts are allowed, if annual appropriations are secured and the Attorney General provides written approval.

Section 287.059(10), F.S., requires the Attorney General to develop a standard addendum to every contract for private attorney services. The standard addendum must be used by every agency except that the Attorney General may waive the addendum requirement. The current addendum must only contain a detailed description of the expectations of the parties in such contract. Section 287.059, F.S., does not require contracting attorneys to make disclosures in state contracts regarding their interests.

Every attorney practicing in the State of Florida is governed by the Florida Rules of Court, which governs the professional, ethical, and practical conduct of lawyers. The rules address a conflict of interest with respect to client representation by directing a lawyer in the following manner:

- (a) . . . A lawyer shall not represent a client if the representation of that client will be directly adverse to the interests of another client, unless: (1) the lawyer reasonably believes the representation will not adversely affect the lawyer's responsibilities to and the relationship with the other client; and (2) each client consents after consultation.¹

¹ FLORIDA RULES OF COURT, (West Publishing Company 1996) (1968).

The Florida Rules of Court have determined that “client loyalty” is an essential element in a lawyers’ relationship to a client. An attorney should not accept any other representation which would impair the ability of the attorney to represent his or her client. In general, an attorney’s loyalty to a client prevents undertaking representation directly adverse to that client’s or another client’s interests without the affected client’s consent; moreover, client loyalty prevents undertaking representation which would impair a lawyer’s ability to consider, recommend, or carry out an appropriate course of action for the client because of the lawyer’s responsibilities or interests.²

B. EFFECT OF PROPOSED CHANGES:

CS/HB 505 introduces a conflicts of interest requirement for private attorneys contracting with a state agency to perform services for that agency (“contracting attorney”). This bill requires each contracting attorney to disclose any representation by the attorney or the attorney’s firm of a client who is suing or being sued by a state entity. It appears that this disclosure requirement must be incorporated by the Attorney General into a mandatory standard addendum that must accompany each contract between a state agency and a contracting attorney. This bill removes current language which allows the Attorney General to waive the addendum requirement for certain agencies.

Where the contracting attorney discloses such representation, the attorney must obtain a written waiver from the agency head of any potential conflict of interest prior to undertaking the agency’s representation. If a contracting attorney fails to make proper disclosure or obtain a necessary waiver, such should be considered breach of contract and the contracting attorney will no longer be entitled to payment under the contract. This bill clearly provides that the Comptroller must refuse payment to any contracting attorney who fails to obtain a waiver of potential conflict of interest. Although not clearly stated, this provision appears to authorize the Comptroller to refuse payment to a contracting attorney if the agency discovers that the attorney has failed to properly disclose. This is true because if the contracting attorney fully discloses a potential conflict of interest, then by virtue of the conflict of interest, a waiver would have been necessary as a condition of payment by the Comptroller. Where a contracting attorney fails to make the full disclosure, obviously the agency head will fail to grant such a waiver.

CS/HB 505 also exempts the Florida School for the Deaf and Blind from s. 287.059 (2), F.S. The school will no longer be required to obtain written approval from the Attorney General before contracting for private attorney services.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

² See *id.*

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

No.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

Yes. CS/HB 505 expands or creates some responsibilities for the Attorney General, agencies contracting for private attorney services, and contracting attorneys. This bill requires the Attorney General to add a disclosure provision to the standard contract addendum for state agencies. Also, contracting attorneys and their firms will be required to conduct a search of their files to determine if they have represented a party suing or being sued by the state. This bill requires agency heads to evaluate each disclosure statement for conflicts of interest and determine whether the agency should grant a waiver to the contracting attorney. Additionally, under CS/HB 505 agency personnel may have some responsibility to monitor each contracting attorney to be certain the attorney has properly made disclosure and obtained a waiver. If the agency finds that the contracting attorney failed to properly disclose and get a waiver, then the agency must contact the Comptroller which must then stop payment to the offending attorney.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

NA.

(2) what is the cost of such responsibility at the new level/agency?

NA.

(3) how is the new agency accountable to the people governed?

NA.

2. Lower Taxes:

- a. Does the bill increase anyone's taxes?

No.

- b. Does the bill require or authorize an increase in any fees?

No.

- c. Does the bill reduce total taxes, both rates and revenues?

No.

- d. Does the bill reduce total fees, both rates and revenues?

No.

- e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

- a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

- b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

No.

4. Individual Freedom:

- a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

No.

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

Maybe. Currently, contracting attorneys are not required by statute to make full disclosure to agencies they contract with regarding their representation of a client who is suing or being sued by the state. The Rules of Court, however,

provide that attorneys should generally refuse to represent a client whose interest conflicts with a current client, unless the current client consents. It appears that some contracting attorneys may fail to make full disclosure to state agencies regarding their interests. It follows that some attorneys may currently represent state agencies while at the same time representing parties with interests adverse to the state. This bill requires full disclosure by contracting attorneys.

5. Family Empowerment:

a. If the bill purports to provide services to families or children:

(1) Who evaluates the family's needs?

NA.

(2) Who makes the decisions?

NA.

(3) Are private alternatives permitted?

NA.

(4) Are families required to participate in a program?

NA.

(5) Are families penalized for not participating in a program?

NA.

b. Does the bill directly affect the legal rights and obligations between family members?

No.

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

NA.

(2) service providers?

NA.

(3) government employees/agencies?

NA.

D. SECTION-BY-SECTION ANALYSIS:

Section 1 -- Amends s. 287.059, F.S.; provides that the Board of Trustees for the Florida School for the Deaf and the Blind is not required to obtain prior written permission from the Attorney General before contracting for private attorney services; makes mandatory the Attorney General's standard addendum to each contract for attorney services; provides that every contracting attorney must fully disclose any representation of the attorney or the attorney's firm of any other representation of clients with interests adverse to the state; provides that each contracting attorney must provide sufficient information to allow the agency to determine whether a conflict of interest exists; provides that a contracting attorney must get a written waiver from the agency head upon disclosing a conflict of interest, prior to representing the agency; provides that failure to properly disclose or obtain a waiver is a breach of contract precluding payment; and further provides that the Comptroller must refuse payment to a contracting attorney without a proper waiver.

Section 2 -- Provides that this bill will take effect July 1, 1997.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

None.

2. Recurring Effects:

None.

3. Long Run Effects Other Than Normal Growth:

None.

4. Total Revenues and Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

None.

2. Recurring Effects:

None.

3. Long Run Effects Other Than Normal Growth:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

None.

2. Direct Private Sector Benefits:

None.

3. Effects on Competition, Private Enterprise and Employment Markets:

None.

D. FISCAL COMMENTS:

This bill may restrict the available private attorneys that a contracting agency may select to provide private attorney services. However, given the relatively high number of private attorneys in Florida, the fiscal ramifications of this choice restriction appear to be minimal.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill would not reduce the percentage of state tax shared with counties or municipalities.

V. COMMENTS:

None.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

HB 505 required contracting attorneys to submit a signed affidavit, included in the standard contract addendum, stating that neither the attorney nor the attorney's firm would represent any other person in a proceeding against any agency during the term of the contract with the agency in question. The bill also provided that no contracting attorney or any attorney in the contracting attorney's firm could represent any other person in a proceeding against any agency during the contract. The Attorney General was authorized to assess an administrative penalty of not more than \$500,000 if the contracting attorney or the attorney's firm violated the provisions of the bill.

Committee on Civil Justice and Claims adopted one "strike everything" amendment. The committee substitute provides that the Board of Trustees for the Florida School for the Deaf and the Blind does not have to obtain written permission in order to procure private attorney services.

This committee substitute only requires a contracting private attorney to disclose to the contracting agency in the standard contract addendum any representation by the private attorney, or the attorney's firm, of a client who is suing or being sued by a state entity. Where the contracting attorney discloses such representation, the attorney must obtain a written waiver of any potential conflict of interest from the contracting agency head prior to representing the agency. A contracting attorney who fails to properly disclose or obtain a waiver breaches the contract and forfeits the right to payment under that contract. This committee substitute contains no administrative penalties for violations of its provisions.

VII. SIGNATURES:

COMMITTEE ON CIVIL JUSTICE AND CLAIMS:

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