# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Date: March 30, 1998 Revised: _____ _____ _____ _____

Subject: Civil Actions

| | Analyst | Staff Director | Reference | Action |
|---|---|---|---|---|
| 1. | Maclure/Wiehle | Krasovsky | RC | Favorable/CS |
| 2. | | | | |
| 3. | | | | |
| 4. | | | | |
| 5. | | | | |

## I. Summary:

This bill is an outgrowth of, and builds upon, the report and recommendations of the Senate Select Committee on Litigation Reform, which was created by the Senate President and charged with examining the impact of the civil litigation system on Florida's business climate. The measure makes a wide variety of modifications and additions to both the procedural and the substantive aspects of the civil litigation system in Florida. Some if its principal provisions include:

- Providing increased authority to impose sanctions in response to litigation activities that are frivolous in nature or that are designed to delay the process;
- Authorizing juries to take notes regarding evidence presented, discuss evidence among themselves, and direct written questions to witnesses;
- Eliminating the automatic application of joint and several liability to cases with total damages of $25,000 or less, and specifying that for joint and several liability to apply to economic damages a party's fault must not only equal or exceed that of a particular claimant but must also be 33 percent or more;
- Creating a 12-year statute of repose for products liability cases, with the period commencing from the date of delivery of the completed project to its original purchaser;
- Prescribing investigatory steps that an employer may take during the hiring process that create a presumption against a claim of negligent hiring;
- Prohibiting recovery, under specified conditions, when the influence of drugs or alcohol contributes substantially to a plaintiff's harm;
- Requiring a defendant who alleges that a non-party is at fault to affirmatively plead that defense in the answer or amended answer not later than 30 days before trial and to prove by a preponderance of the evidence that the non-party has some fault in causing the claimant's injuries;

- Providing definitions relating to liability to trespassers on real property and providing conditions for liability;
- Providing conditions under which there will be a rebuttable presumption that products, including drugs or medical devices, are not defective or unreasonably dangerous if they are in compliance with certain government standards or approvals;
- Limiting the liability of certain motor vehicle owners or rental companies for damages due to the operation of the vehicle by a person other than the owner to $100,000 per person and $300,000 per occurrence for bodily injury and $50,000 for property damage;
- Raising the standard of evidence by which a plaintiff must establish entitlement to punitive damages, providing for a portion of punitive damage awards to be shared with the state, and prohibiting repetitive awards of punitive damages under certain conditions; and
- Establishing statutory requirements on advertisements for legal services.

This bill substantially amends the following sections of the Florida Statutes: 44.102, 57.105, 90.803, 95.031, 768.075, 768.095, 768.73, 768.79, and 768.81; creates the following sections: 40.50, 47.025, 768.096, 768.098, 768.099, 768.1256, 768.36, 768.725, 768.736, 768.781, and 877.023; and repeals the following subsection: 768.81(5).

## II. Present Situation:

**Select Committee on Litigation Reform**

In August 1997, the Senate President appointed an 11-member Select Committee on Litigation Reform to conduct hearings to assess the manner and extent to which the current civil litigation environment is affecting economic development and job-creation efforts in the state. The select committee was additionally charged with ascertaining what civil litigation reforms, if any, would enhance the economic development climate of the state while continuing to preserve the rights of citizens to seek redress through the judicial system.

The select committee conducted a series of public meetings, beginning in September 1997 and continuing through early 1998, during which testimony was solicited on key litigation topics from a variety of practitioners and representatives of interests in the area of civil litigation, as well as from representatives of a judicial task force created by the Supreme Court to monitor the Legislature’s efforts on litigation reform. From the testimony, the committee developed and discussed specific issues within each topic. In February 1998, the select committee issued its report and recommendations on litigation reform to the Senate President, which included corresponding draft legislation.

Among the principal topics explored by the committee were:

- Joint and several liability;
- Statutes of limitations;
- Non-economic damages;
- Evidence;
- Vicarious liability;
- Comparative fault;
- Punitive damages;
- Attorney's fees; and
- Non-binding arbitration.

A comprehensive statutory and case-law analysis of each of the topics addressed by the committee is beyond the limited scope of this legislative staff analysis. In some places, however, the "Effect of Proposed Changes" section of the staff analysis identifies how a proposed change differs from present law. In addition, following are summary descriptions of some of the key topics considered by the select committee.

**Non-Economic Damages**

The term "non-economic damages" encompasses not only pain and suffering but also mental anguish, inconvenience, physical impairment, disfigurement, loss of capacity for enjoyment of life, and other non-pecuniary losses. There is no strict mathematical formula for calculating such damages, rather the Supreme Court has said such awards are up to the enlightened conscience of impartial jurors. Awards are subject to court review, however, and s. 768.74, F.S., which governs negligence actions, provides criteria for a court to apply in deciding whether to reduce an excessive award or add to an insufficient award, such as, for example, whether the amount awarded is indicative of prejudice, passion, or corruption on the part of the trier of fact.

As part of the Tort Reform Act of 1986, the Legislature imposed a $450,000 cap on damages for non-economic losses. In *Smith v. Dept. of Insurance*, 507 So.2d 1080 (Fla. 1987), the Florida Supreme Court held that the cap violated s. 21, Art. I, State Constitution, which provides a right of access to the courts to seek redress of injuries. The Court said legislative restrictions on rights of access to the courts are impermissible unless: 1) the statute provides a reasonable alternative remedy or commensurate benefit, or 2) there is a legislative showing of an overpowering public necessity for the abolishment of the right and no alternative method of meeting such public necessity.

**Vicarious Liability**

Vicarious liability is a long-standing, court-created doctrine that imposes indirect legal responsibility. Because of the relationship between "A" and "B," "B" can be held liable for the negligent acts of "A." The doctrine has been described as reflecting a policy decision to allocate risks associated with a business enterprise.

One of the principal ways in which vicarious liability manifests itself in Florida's civil litigation system is in holding an employer liable for the negligent acts of an employee when those acts were conducted within the scope of the employment and in furtherance of the business enterprise. A second example of the application of vicarious liability is found in the Florida Supreme Court's decision in 1920 that an automobile is a dangerous instrumentality and that an automobile owner may be held liable for injuries caused by the negligence of someone entrusted to use the automobile.

**Punitive Damages**

Florida's punitive damages statute, s. 768.73, F.S., provides that a punitive damages award in certain types of cases is capped at three times compensatory damages. A punitive damages award which exceeds the cap is presumed excessive, unless the claimant demonstrates to the court by clear and convincing evidence that the award is not excessive.

From 1986 to 1995, the statute provided that an award of punitive damages in certain cases was to be split between the claimant and the state. In 1995, the statute was repealed. During the period when the statute was in force, there was a total of 179 cases with punitive damages awarded. The total punitive damages awarded was almost $130 million, of which about $58.7 million was collectible by the state. Collections were made in 70 of the 179 cases in the total amount of about $8.8 million.

**Comparative Fault and Joint & Several Liability**

In 1986, the Florida Legislature codified the doctrine of comparative fault, which had been adopted by the Florida Supreme Court in 1973 to replace contributory negligence. Section 768.81, F.S., provides for the court to enter judgment in negligence cases against each party liable on the basis of each party's percentage of fault. Where, however, a party's percentage of fault equals or exceeds that of a claimant, the court shall enter judgment with respect to the economic damages against that party on the basis of joint and several liability. In addition, joint and several liability is automatically applied to economic and non-economic damages in those cases in which the total amount of damages is $25,000 or less.

In the significant decision of *Fabre v. Marin*, 623 So.2d 1182 (Fla.1993), the Supreme Court ruled that, in determining non-economic damages, fault must be apportioned among all responsible entities who contribute to an accident even though not all of them were joined as defendants in the lawsuit. Subsequently, the Court clarified that, in order for a non-party to be included on a jury verdict form, the defendant must have pleaded the non-party's negligence as an affirmative defense and specifically identified the non-party. In addition, the defendant bears the burden of presenting evidence that the non-party's negligence contributed to the claimant's injuries. (See *Nash v. Wells Fargo Guard Services, Inc.*, 678 So.2d 1262 (Fla.1996).) Some legal commentators have expressed concern that the *Fabre* decision has resulted in plaintiffs bringing all potentially liable actors into lawsuits, some of whom might otherwise not have been named because it is likely they would have little or no liability.

**Alternative Dispute Resolution**

Chapter 44, F.S., provides that courts may refer all or any part of a filed civil action to mediation. Mediation is a process in which a neutral third party acts to encourage and facilitate the resolution of a dispute between two or more parties. The mediator does not render a decision. Instead, the decision-making authority rests with the parties. Mediation is always non-binding. The law also provides that upon motion or request of a party, a court shall not refer any case to mediation where there has been a history of domestic violence that would compromise the mediation process.

Chapter 44, F.S., also provides for arbitration. Arbitration is a process in which a neutral third party considers the facts and arguments presented by the parties. The arbitrator renders a decision that may be binding or non-binding. Courts may refer any contested civil action filed in a circuit court or county court to non-binding arbitration. The arbitration decision is presented to the parties in writing. This decision is final if a request for a trial de novo is not filed within the time provided by the rules promulgated by the Supreme Court. The party who files for a trial de novo may be liable for legal fees and court costs of the other party if the judgment at trial is not more favorable than the arbitration decision. Two or more parties may elect to submit the controversy to voluntary *binding* arbitration.

**Attorney's Fees**

In Florida, attorney's fees are determined by a contract between the client and the attorney and such a contract is enforceable according to its terms unless it is found to be illegal, obtained through improper advertising or solicitation, prohibited or excessive. Contingency attorney fees are allowed in Florida except in certain domestic relations matters and when the attorney represents the defendant in a criminal matter. A contingent fee agreement must be in writing signed by all the parties to the contract; expressly state the calculation method, percentages, and address the payment of costs; and contain a 3-day cancellation clause and statement of client's rights. The Supreme Court of Florida has established a limit for continency fees as follows:

| **CONTINGENCY FEE BREAKDOWN: Rule 4-1.5 Florida Rules of Professional Conduct** | | | |
|---|---|---|---|
| **When matter concludes:** | **Amount up to $1 million** | **Amount between $1 million and $2 million** | **Amount over $2 million** |
| **1. Before filing of answer** | 33⅓% | 30% | 20% |
| ***2. After filing of answer*** | 40% | 30% | 20% |
| **3. If defendants admit liability at time of filing answer** | 33⅓% | 20% | 15% |
| **4. After notice of appeal is filed** | Additional 5% | Additional 5% | Additional 5% |

Numerous statutes provide for an award of attorneys' fees and determination of the amount of the fee to be awarded is governed by statute, rule, and case law.

## III. Effect of Proposed Changes:

This bill builds upon the recommended legislation submitted to the Senate President as part of the final report of the Senate Select Committee on Litigation Reform. (See *Report and Recommendations on Litigation Reform*, Senate Select Committee on Litigation Reform, February 17, 1998.) The bill makes modifications to a wide variety of procedural and substantive components of the civil litigation system in Florida. Through its principal provisions, the bill:

- Creates a Juror Bill of Rights to govern permissible activities of juries during the deliberation process, including the ability to pose questions and discuss evidence;
- Requires court-ordered mediation of all civil cases, with limited exceptions;
- Expands the availability of sanctions against litigation-related activities that are frivolous in nature;
- Establishes a 12-year statute of repose in products liability cases;
- Provides an employer with steps that may be taken to help safeguard against liability for negligence in hiring a particular employee, and provides broader protections against liability for disclosing information about employees;
- Limits the liability of certain motor vehicle owners and rental companies for damages caused by the operation of the vehicle by a person other than the owner to $100,000 per person and $300,000 per occurrence for bodily injury and $50,000 for property damage, provided there is no negligence or intentional misconduct on the owner's or the rental company's part.
- Provides for immunity from liability for injury to trespassers on real property or to a person who is committing or attempting to commit a crime;
- Establishes a government rules defense, under which there is a rebuttable presumption that a product is not defective and the manufacturer or seller is not liable if the product is in compliance with applicable government standards or was approved by the applicable government agency.
- Prohibits a plaintiff from recovering damages if he or she was under the influence of drugs or alcohol to a specified degree and the drug or alcohol use contributed substantially to the plaintiff's injuries;
- Raises the standard of evidence by which a plaintiff must establish entitlement to punitive damages;
- Eliminates any application of joint and several liability to non-economic damages and provides for application of joint and several liability to economic damages only when the defendant's fault is equal to or greater than the plaintiff's and the defendant is 33 percent or more at fault, regardless of the amount of damages in the case;
- Provides for punitive damage awards to be shared between the claimant (65 percent) and the state (35 percent); and
- Establishes statutory limitations on the advertisement of legal services.

Following is a section-by-section description of the measure.

**Section 1** creates s. 40.50, F.S., the Juror Bill of Rights, which provides detailed authority for jurors to: 1) take notes of evidence and to keep a notebook, 2) discuss the evidence among themselves, and 3) submit written questions. This section also requires judges, attorneys, and court staff to provide detailed information to jurors and to assure certain things, such as proceeding according to trial schedules and providing fair compensation for jury service.

**Section 2** amends s. 44.102, F.S., relating to court-ordered mediation, to mandate that any civil action for monetary damages be referred to mediation unless it falls within one of six exceptions. The exceptions are landlord-tenant actions not involving personal injury claims, debt collection, medical malpractice, suits governed by the Florida Small Claims Rules, actions the court determines should be referred to non-binding arbitration, and those cases in which the parties have agreed to binding arbitration. The bill states that trial may not commence in cases so referred to mediation until either an impasse has been declared, the mediator has reported to the court that no agreement has been reached, or there remains only one viable party to the lawsuit such as through the entry of a default. In all cases for which mediation is not mandatory under the proposed changes, the court would retain the current statutory discretion to refer those cases to mediation under s. 44.102, F.S.

The bill also provides that when a court refers a civil action for monetary damages based upon personal injury or wrongful death to mediation, the mediation is subject to specified conditions unless good cause is shown to vary from these requirements. First, the mediation must be scheduled within 90 days after the complaint was filed. Second, at least 15 days prior to mediation, the parties must exchange information in their possession for the purpose of allowing a thorough evaluation of the claim for liability and damages. Third, all parties to the mediation must participate in good faith with a view towards resolving all claims. Finally, both the final demand and the final offer must remain open for acceptance for a minimum of 25 days after mediation is completed.

**Section 3** creates s. 47.025, F.S., to provide for venue for actions against resident contractors, subcontractors, or sub-subcontractors. Such actions may be brought only in the State of Florida and only in either the county where the defendant resides, where the cause of action occurred, or where the property in litigation is located, unless the parties agree to the contrary after the defendant has been served.

**Section 4** amends s. 57.105, F.S., Florida's existing statute relating to frivolous lawsuits, to provide that attorney's fees shall be awarded by the court for unsupported claims or defenses rather than just in cases where there is a complete absence of a justiciable issue of law or fact. Under the proposal, if a litigant has been sanctioned in three or more actions within the 10 years immediately preceding the activity for which new sanctions are sought, the opposing party is entitled to have claims or defenses stricken unless the litigant shows that they are brought in good faith. In addition, the court shall award damages in those situations in which a party takes actions for purposes of delay.

**Section 5** amends s. 90.803, F.S., to expand the current hearsay exception that allows a party to place certain former testimony into evidence when the witness is *unavailable* to testify, to allow such former testimony to be admitted regardless of the availability of the witness. However, use of the former testimony would be allowed only if the party against whom it is offered, a predecessor in interest, or a person with a similar interest "had an opportunity and similar motive to develop the testimony" by direct, cross, or redirect examination. This section incorporates into the bill verbatim the text of SB 1830, which passed as CS/HB 1597 during the 1997 Session and was subsequently vetoed by the Governor. The House of Representatives and the Senate voted on March 4 and March 11, 1998, respectively, to override that veto.

**Section 6** amends s. 95.031, F.S., to create a statute of repose for products liability actions, thereby establishing a time period after which the manufacturer of the product cannot be sued for a defect in the product. The new statute of repose requires that an action based on products liability be brought within 12 years of the date of delivery of the completed product to the original purchaser, regardless of the date on which the defect in the product was or should have been discovered. This time limit applies only to products delivered on or after October 1, 1998. However, the provisions do not apply to such products if the manufacturer knew of a defect in the product and concealed or attempted to conceal that defect.

**Section 7** amends s. 768.075, F.S., relating to immunity from liability to trespassers on real property. It defines "implied invitation," "discovered trespasser," and "undiscovered trespasser." Under the bill, a person or organization owning or controlling an interest in real property is not liable to an undiscovered trespasser if the person or organization refrains from intentional misconduct. There is no duty to warn of dangerous conditions. A person or organization owning or controlling an interest in real property is not liable to a discovered trespasser if the person or organization refrains from gross negligence or intentional misconduct and warns the discovered trespasser of dangerous conditions known to the person or organization but not readily observable by others. The bill expressly provides that it does not alter the common law doctrine of attractive nuisance.

The bill also provides that a person or organization owning or controlling an interest in real property is not liable for civil damages to a person which arising out of the person's commission or attempt to commit a crime.

**Section 8** creates s. 768.096, F.S., to provided that an employer is presumed not to have been negligent in hiring an employee if, before hiring such employee, the employer conducted a pre-employment background investigation and the investigation did not reveal any information that reasonably demonstrated the unsuitability of the individual for the particular work to be performed or for the employment in general. The investigation must include: 1) securing a criminal background investigation, 2) making reasonable efforts to contact references and former employers, 3) requiring the prospective employee to complete an employment application that enlists information on criminal convictions and civil actions for intentional tort, 4) obtaining a complete check of the prospective employee's driver's license record, if such a check is relevant

to the type of work the employee will be conducting and the record can be reasonably obtained, and 5) conducting an interview with the prospective employee.

**Section 9** amends s. 768.095, F.S., governing protection from liability for an employer who discloses information about an employee to a prospective employer, to make clear that the coverage applies to information disclosed about former *and* current employees. The bill also expands the protection beyond solely information about an employee's job performance. Further, the provision revises the tests that a plaintiff must meet in order to overcome the employer's immunity from liability, by requiring the plaintiff to show that the information disclosed by the employer was knowingly false or violated the person's civil rights. Under current law, the employer may also be subject to liability if the information was intentionally misleading or was disclosed with a malicious purpose. These latter two grounds are eliminated.

**Section 10** creates s. 768.098, F.S., addressing the liability for intentional torts committed against invitees, to provide that the owner or person in control of business premises is not liable for such injuries caused by the acts of someone who is not an employee or agent of the business. The immunity, however, would not be available if the conduct on the part of the owner or person in control of the premises demonstrates a reckless disregard for the consequences so as to cause the injury to or death of an invitee.

**Section 11** creates s. 768.1256, F.S., to provide for a rebuttable presumption that a product is not defective or unreasonably dangerous, and that a manufacturer or seller is not liable, if at the time the product was sold or delivered to the initial purchaser or use the aspect of the product that allegedly caused harm was in compliance with applicable federal or state product design, construction, or safety standards and such standards are designed to prevent the type of harm that allegedly occurred. This same presumption arises if the product was approved by a federal or state agency responsible for reviewing its safety. Non-compliance with the applicable standards or lack of agency approval does not raise a presumption of negligence.

This section also establishes a rebuttable presumption that a drug or medical device is not defective or unreasonably dangerous, and that a manufacturer or seller is not liable, if the drug or device was approved for safety and efficacy by the Food and Drug Administration (FDA) and the product and its labeling were in compliance with the FDA's approval at the time it left the control of the manufacturer or seller. However, the presumption does not apply after the effective date of an FDA order calling for removal of the product from the market or an order withdrawing FDA approval. In addition, the presumption does not apply: 1) if the manufacturer or seller intentionally withholds from, or misrepresents to, the FDA information that is material and relevant to the claimant's harm and that is required under federal law to be submitted, or 2) if the defendant fraudulently gains FDA approval.

**Section 12** provides that a state agency or political subdivision may be held liable for failure to provide adequate security or police protection when an invitee dies or is injured as a result of an intentional tort committed by a third person on a business premises that is under the jurisdiction of

the state agency or political subdivision. The liability may be in the same manner and extent as a private individual under like circumstances.

**Section 13** creates s. 768.099, F.S., which establishes limitations on liability based on ownership of a motor vehicle. Under this section, the liability of a motor vehicle owner, or a rental company that rents or leases motor vehicles for a period less than one year, for damages to a third party due to the operation of the vehicle by a person other than the owner shall be limited to $100,000 per person and $300,000 per occurrence for bodily injury and $50,000 for property damage, unless there is a showing of negligence or intentional misconduct on the owner's part or the rental company's part. This section specifies, however, that the limitations on liability do not apply to the owner of a motor vehicle that is used for commercial activity in the owner's ordinary course of business, other than a rental company that rents or leases motor vehicles. This section has the effect of limiting the amount of damages that may be awarded under Florida's common law dangerous instrumentality doctrine, which currently allows an automobile owner to be held liable for injuries caused by the negligence of someone entrusted to use the automobile.

**Section 14** creates s. 768.36, F.S., to prohibit recovery in any civil action by a plaintiff who, at the time he or she was injured, was under the influence of any alcoholic beverage or drug, and, as a result of the influence of such alcohol or drug, was more than 50 percent at fault for his or her own harm. The section also defines the terms "alcoholic beverage" and "drug."

**Section 15** creates s. 768.725, F.S., to require that, at trial, a plaintiff must establish by clear and convincing evidence its entitlement to an award of punitive damages. The greater weight of the evidence burden of proof applies to the determination of the amount of punitive damages.

**Section 16** amends s. 768.73, F.S., to limit multiple awards of punitive damages against the same defendant and to provide that an award of punitive damages is to be divided between the claimant and the state. Under this provision, punitive damages cannot be awarded against a defendant in a tort action if that defendant establishes that punitive damages have previously been awarded against the defendant in any action alleging harm from the same act or single course of conduct for which claimant seeks damages and that the defendant's act or course of conduct has ceased. The defendant must establish the inapplicability of punitive damages before trial. A subsequent award of punitive damages may be made if the court determines by clear and convincing evidence that the amount of prior awards was insufficient to punish the defendant's behavior, with the subsequent award to be reduced by the amount of the earlier award or awards.

This section also provides that an award of punitive damages is to be divided between the claimant and the state, with 65 percent payable to the claimant and 35 percent payable to the state. If the action was based on personal injury or wrongful death, the state's 35 percent is payable to the Public Medical Assistance Trust Fund; otherwise it is payable to the General Revenue Fund. Settlement agreements are also to be divided among the claimant and the state. If claimant's attorney's fees are payable from the judgment, they are, to the extent they are based on punitive damages, to be calculated based on the entire judgment for punitive damages.

The amendments in this section apply to all civil actions pending on October 1, 1998, in which the initial trial or retrial of the action has not commenced and to all civil actions commenced on or after that date.

**Section 17** creates s. 768.736, F.S., to prohibit application of ss. 768.725 and 768.73, F.S., to any defendant who, at the time of the act or omission for which punitive damages are sought, was under the influence of any alcoholic beverage or drug to the extent that the defendant's normal faculties were impaired, or who had a blood or breath alcohol level of 0.08 percent or higher. This would mean that the provisions on burden of proof, limitation of punitive damages, and division of punitive damages among the claimant and the state do not apply in such actions.

**Section 18** amends s. 768.79, F.S., relating to offers of judgment and demands for judgment, to require the court to determine entitlement to, as well as reasonableness of, an award of attorney's fees under that section. In doing so, the bill adds "whether the proposal was reasonably rejected" to the factors the court must consider in making this determination.

**Section 19** establishes legislative findings and intent with respect to the regulation of legal advertising. The U.S. Supreme Court has declared that states must have a substantial governmental interest to justify regulation of truthful commercial speech, such as advertising. The bill declares the Florida Legislature's interest to be in protecting citizens' privacy, ensuring that advertising provides consumers with thorough information, and ensuring that advertising does not reflect poorly on the legal profession, the legal system, or the administration of justice. This section cites Florida Bar research indicating that the public views legal advertising and solicitation as being intrusive, contributing to poor images of the profession and the legal system, and, in some cases, providing inadequate information. The section includes a legislative finding that television advertising diminishes the public's respect for the fairness and integrity of the legal system. The bill declares the Legislature's intent to regulate attorney advertising to advance the state's governmental interest.

**Section 20** repeals s. 768.81(5), F.S., to eliminates automatic application of joint and several liability for actions with total damages of $25,000 or less. This repeal has the effect of eliminating joint and several liability for all non-economic damages. Joint and several liability would apply to economic damages when the fault of defendant equals or exceeds that of the claimant, which is the current status for actions in which total damages exceed $25,000. Subsection (3) is also amended to add an another requirement for joint and several liability to apply. Under the bill, for joint and several liability to apply to any party not only must the percentage of fault of that party equal or exceed that of a particular claimant, it must also be 33 percent or more. The bill also requires that, absent a showing of good cause, a defendant who alleges that a non-party is at fault must affirmatively plead that defense in the answer or amended answer not later than 30 days before trial. Additionally, the defendant has the burden of proving by a preponderance of the evidence that the non-party has some fault in causing the claimant's injuries, and without such evidence, no fault will be allocated to that non-party. This codifies *Nash*, with the addition of the time limitation of pleading the affirmative defense no later than 30 days before trial.

**Section 21** requires physicians and osteopathic physicians to obtain and maintain professional liability insurance coverage in an amount not less than $250,000 per claim, with a minimum annual aggregate of not less than $750,000 as a condition of hospital staff privileges at a hospital licensed by the state. This is required coverage notwithstanding other statutory provisions which allow a physician or osteopathic physician not to obtain such coverage if such physician otherwise demonstrates financial responsibility to cover potential claims for medical malpractice.

**Section 22** creates s. 877.023, F.S., which governs the content of legal advertising, in order to implement the legislative findings articulated in **Section 19**. Modeled in part upon current and proposed rules of The Florida Bar, the bill among other provisions prohibits visual or verbal depictions or portrayals that are not objectively relevant to the hiring of an attorney, statements characterizing the quality of an attorney's services, and information referring to past successes. In addition, the bill limits the content of television and radio advertisements, for example, by providing that visual images must consist of the lawyer in front of a plain background, set of law books, or the lawyer's own office. In a substantial difference from the current or proposed Florida Bar rules, the bill also requires, in any advertisement, additional disclosure statements, such as a statement cautioning that sanctions can be imposed for lawsuits that are not supported by the law or evidence and a statement advising whether any attorneys in the advertising law firm have been the subject of disciplinary proceedings that resulted in reprimand, suspension, or disbarment. This section provides that a violation of the provisions constitutes a first-degree misdemeanor.

**Section 23** requires the clerk of the court through the state case reporting system to report to the Office of the State Court Administrator certain information from each settlement or jury verdict and final judgment in a negligence case as defined in s. 768.81(4), F.S., as the President of the Senate and the Speaker of the House of Representatives deem necessary from time to time.

**Section 24** provides a severability clause.

**Section 25** provides that the act shall take effect October 1, 1998.

## IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

**Regulation of Advertisement of Legal Services**

The provisions of the bill establishing statutory regulations on advertisements for legal services pose federal and state constitutional considerations. The U.S. Supreme Court has extended the federal constitutional protections for commercial free speech to the realm of legal advertising. (*Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).) To uphold the constitutionality of commercial free speech regulation, the U.S. Supreme Court has generally required: 1) that there be a substantial governmental interest in the regulation, 2) that the regulation directly advance the governmental interest, and 3) that the regulations be a reasonable fit that are narrowly tailored to achieve the objective. In a notable recent decision involving The Florida Bar, the U.S. Supreme Court upheld a Bar rule imposing a 30-day ban on direct-mail solicitation to accident victims following the date of the accident. (*Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995).) Some legal commentators have suggested that this decision may signal an increased willingness of the Court to uphold restrictions on legal advertising, while others have cautioned that the decision is fairly narrow in scope.

From a state constitutional standpoint, the Legislature's regulation of legal advertising may raise separation-of-powers concerns. Section 15, Art. V, State Constitution, grants to the Florida Supreme Court exclusive jurisdiction to regulate the admission to the practice of law and the discipline of persons admitted. The Florida Supreme Court, in upholding an anti-solicitation statute against a separation-of-powers argument, has said that this constitutional provision does not necessarily preclude all legislative action affecting the legal profession. (*Pace v. State*, 368 So.2d 340, 345 (Fla. 1979), states that "[s]imply because certain conduct is subject to professional discipline is no reason why the legislature may not proscribe the conduct. Under the police power the legislature may enact penal legislation that affects the legal profession just as it can with regard to other occupations and professions.")

## V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

This bill substantially affects a wide variety of procedures and standards governing civil actions in Florida, from the perspective of both plaintiffs and defendants. The precise impact of this measure on the private sector is not known.

C. Government Sector Impact:

This bill provides for 35 percent of a punitive damage award to inure to the state. When the action is based on based on personal injury or wrongful death, the state's 35 percent is payable to the Public Medical Assistance Trust Fund; otherwise it is payable to the General Revenue Fund. Settlement agreements are also to be divided among the claimant and the state. The precise revenue impact of this provision on the state is not known. The measure requires the clerk of court, through the state case-reporting system, to report to the Office of the State Courts Administrator certain information from each settlement or jury verdict and final judgment in negligence cases, as the President of the Senate and the Speaker of the House of Representatives deem necessary from time to time.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

None.

## VIII. Amendments:

None.