

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: April 9, 1998 Revised: _____

Subject: Voluntary Trial Resolution

	<u>Analyst</u>	<u>Staff Director</u>	<u>Reference</u>	<u>Action</u>
1.	<u>Harkins</u>	<u>Moody</u>	<u>JU</u>	<u>Favorable/CS</u>
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

This bill addresses several areas of litigation reform by:

- Providing for an expedited civil trial upon motion of the parties which would be conducted with shortened discovery times and a 1-day trial;
- Providing for a series of jury reforms including provisions that jurors in civil cases be furnished notebooks with preliminary instructions, be allowed to take notes, be allowed to submit written questions to witnesses with approval of the court, be permitted to discuss the evidence during trial recesses, and be given final written instructions subject to the court's discretion;
- Providing for voluntary civil trial resolution, allowing for the appointment of a trial resolution judge, to be selected and compensated by the parties;
- Providing standards for the award of expert witness fees as taxable costs;
- Providing for sanctions against parties and attorneys for filing unfounded claims or defenses, and for taking actions primarily intended to delay a civil case;
- Revising the requirements of the itemized jury verdict form to eliminate the itemization of future damages and reduction to present value; and
- Revising the offer of judgment statute to address multiple party offers of judgments and allowing subsequent offers of judgment to void prior offers of judgment.

The bill substantially amends the following sections of the Florida Statutes: 57.071, 57.105, 768.77, and 768.79. The bill also creates sections 40.50 and 44.1051 of the Florida Statutes.

II. Present Situation:

A. Expedited Trials

Trials in criminal cases are governed by a speedy trial rule, Rule 3.191, Florida Rules of Criminal Procedure, which provides that criminal misdemeanor cases shall be brought to trial within 90 days, and felony cases shall be brought to trial within 175 days. Civil cases, however, are not specifically governed by a speedy trial rule. Rule 2.085, Florida Rules of Judicial Administration, provides guidelines setting forth general time standards for trial and appellate courts. The guidelines state that civil jury trials should be conducted within 18 months from filing, and civil non-jury trial should be conducted within 12 months from filing. Civil cases which are not completed within the time standards of Rule 2.085, are reported on a quarterly basis to the Chief Justice of the Florida Supreme Court. The 1997 Pending Caseload Report Summary reflected a 29.87 percent over standard for civil jury cases, and a 24.57 percent over standard for civil non-jury cases.

The Trial Lawyers Section of The Florida Bar has developed and recommended a proposal for expedited trials in civil cases upon agreement and joint motion of the parties. Under this proposal civil trials would generally be conducted within 90 days from filing. This proposal has been recommended to the courts on a voluntary basis, but has not been adopted by rule.

B. Jury Duty

Chapter 40, F.S., sets out general provisions for qualification of jurors, and jury service. Additionally, Rule 1.431, Florida Rules of Civil Procedure, provides procedures for the impanelment of the jury, and for the exercise of challenges to potential jurors. No current statute or rules specifically provide that jurors may ask questions, be provided written instructions, or discuss the evidence prior to the commencement of deliberations. In certain circuits, trial judges as a matter of discretion, permit jurors in civil cases to present written questions for witnesses which the judge reviews with counsel prior to submission to a witness.

C. Voluntary Trial Resolution

Pursuant to ss. 5 and 6, Art. V, Fla. Const., circuit and county courts have jurisdiction to conduct civil trials. The specific jurisdiction of the county courts is set forth in s. 34.01, F.S., and provides that the county courts shall have jurisdiction in civil cases in which the amount in controversy does not exceed \$15,000. Civil actions involving amounts in excess of \$15,000 are within the jurisdiction of the circuit courts. Circuit court judges and county court judges are constitutional officers whose qualifications for office are set forth in s. 8, Art. V, Fla. Const. Under current law, both circuit court judges and county court judges must have been a member in good standing of The Florida Bar for the preceding 5 years to be eligible for the office of circuit or county court judge.

Additionally, pursuant to s. 25.073, F.S., a retired Florida judge may be assigned on a temporary basis to conduct civil or criminal trials.

Florida has also adopted the Florida Arbitration Code, Ch. 682, F.S., which provides procedures for parties by agreement to submit a controversy to voluntary binding arbitration. No current Florida statutory or rule provisions authorize parties, on a voluntary basis, to select and privately compensate a trial resolution judge to conduct proceedings in a civil trial.

D. Court Costs

Section 57.041, F.S., provides that a party recovering judgment shall recover all legal costs and charges which shall be included in the judgment. Section 57.071, F.S., specifies costs which shall be taxable, including court reporting expenses, and the costs of any bonds executed. Section 92.231, F.S., provides for expert witness fees, and specifically authorizes the taxation of expert witness fees as costs. There is no current provision of law that conditions the taxation of expert witness fees as costs upon disclosure or notice to the opposing party, or parties.

E. Assertion of Unfounded Claims or Defenses

Section 57.105, F.S., provides for the award of attorneys fees to a prevailing party in any civil action in which the court finds there was a complete absence of a justiciable issue of fact or law raised by the complaint or by a defense asserted by a losing party. Under this statute, the award of attorneys fees is paid in equal amounts by the losing party and the losing party's attorney.

In federal civil cases, Rule 11, Federal Rules of Civil Procedure, provides the court with discretion to impose a wide range of sanctions, including the award of attorneys fees, upon an attorney, law firm or party for asserting a claim or defense that is not warranted by existing law, except if the court determines that the claim or defense was a nonfrivolous argument for the extension, modification, or reversal of existing law. Sanctions may also be imposed if the court determines that there was no factual basis for the assertion of a claim or defense.

F. Itemized Jury Verdicts

Section 768.77(1), F.S., requires the trier of fact (which is the jury in civil jury trials, and the court in civil non-jury trials) to itemize the amounts awarded to a claimant for economic damages, non-economic damages, and for punitive damages, if awarded. Additionally, subsection (2) of the statute requires that each category of damages other than punitive damages be further itemized into amounts which have been incurred prior to the verdict and amounts intended to compensate the claimant for future damages. The trier of fact is further required to compute itemized future damages before and after reduction to present value and to specify the period of time for which future damages are intended to provide compensation. Trial judges have reported that the complexity of the current itemized verdict form has resulted in confusion for jurors and inconsistent verdicts.

Section 768.78, F.S., provides that future damages in excess of \$250,000 shall be subject to alternative methods of payment, including either by lump sum payment reduced to present value, or by periodic payments.

G. Offer of Judgment and Demand for Judgment

Section 768.79, F.S., provides that in any civil action for damages if the defendant makes an offer of judgment that is not accepted by the plaintiff within 30 days, and the plaintiff does not prevail, or fails to obtain a judgment of at least 25 percent of the amount of the defendant's offer of judgment, then the court shall award costs and attorney's fees against the plaintiff.

Correspondingly, where a plaintiff makes a demand for judgment which is not accepted by the defendant within 30 days, and the plaintiff recovers a judgment at least 25 percent greater than the demand for judgment, the plaintiff shall be entitled to recover reasonable costs and attorney's fees from the date the demand for judgment was made. In the case of *Kaufman v. Smith*, 693 So. 2d 133 (Fla. 4th DCA 1997) the court held that a first offer of judgment remained in effect after a second offer was made and rejected.

Additionally, s. 44.102(6), F.S., provides for offers of settlement in cases under court-ordered mediation, and s. 45.061, F.S., provides generally for offers of settlement in other cases.

In the case of *Timmons v. Combs*, 608 So. 2d 1 (Fla. 1992) the Florida Supreme Court considered a challenge to the constitutionality of s. 768.79, F.S., on the grounds that the offer of judgment statute was an infringement on the court's exclusive rule-making authority. Although the court found that the statute contained procedural aspects, the court adopted the procedural aspects of the statute which are presently contained in Rule 1.442, Florida Rules of Civil Procedure. The rule reconciles the procedural aspects of the statutes providing for offers of judgment and settlement with the decisions of the Florida Supreme Court.

III. Effect of Proposed Changes:

A. Expedited Trials

The bill incorporates the recommendations of the Trial Section of The Florida Bar providing for expedited trials. Upon joint motion of the parties in a civil action or in a simplified civil action, upon motion of any party, the court would be authorized to conduct an expedited trial. Unless otherwise ordered by the court or agreed to by the parties, discovery would be completed within 60 days, and the trial would be conducted within 30 days after the completion of discovery. Expedited jury trials would be permitted; however, any trial, whether jury or non-jury, would be limited to 1 day, with each side being permitted to present its case within a 3-hour time frame. Expedited jury trials would not require a unanimous verdict; a 5-1 vote of the jurors would be sufficient to reach a verdict.

B. Jury Duty

The bill provides a number of reforms to the jury process. The bill requires that jurors be given preliminary instructions regarding their duties, and the conduct of the proceedings. The bill allows jurors to discuss the evidence prior to deliberations when all members of the jury are present. Jurors will be given notebooks with preliminary instructions, and be allowed to have access to their notes and notebooks during all proceedings. The court shall allow the jurors to submit written questions which may be asked of the witnesses after review by the court and opportunity given to counsel for objection. The court, in its discretion, may also give the jury its final instructions prior to closing arguments of counsel if the court finds the instructions would enhance the jury's ability to understand the case and perform its service.

C. Voluntary Trial Resolution

The bill provides for voluntary trial resolution. Upon agreement of the parties to a civil action in which no constitutional issues are raised, a trial resolution judge may be selected by the parties to conduct either a jury or non-jury trial. The trial resolution judge shall have the same qualifications as a circuit court or county court judge, which is membership in good standing of The Florida Bar for the preceding 5 years. Application for voluntary trial resolution and filing fees shall be filed with the clerk of the court. The parties shall be responsible for the compensation of the trial resolution judge according to their agreement. The trial resolution judge shall have the power to administer oaths, and conduct the proceedings in accordance with the Florida Rules of Civil Procedure. Subpoenas shall be enforceable under law as in any other civil matter. A party may enforce a judgment obtained in a voluntary trial resolution by filing a petition for enforcement in circuit court. Appeals may be taken from the circuit court. Factual findings determined in a voluntary trial resolution shall not be subject to appellate review. Voluntary trial resolution shall not apply to any dispute involving child custody, visitation, or child support, or any dispute involving the rights of a party not participating in voluntary trial resolution.

D. Court Costs

The bill provides that expert witness fees shall not be awarded as taxable costs to a prevailing party unless the party retaining the expert witness files a written notice within 30 days of retention of the expert witness, setting out the expertise and experience of the witness, the subjects upon which the expert is expected to render an opinion, and an estimate of the fee of the expert witness. The party retaining the expert witness must also furnish each opposing party a written report signed by the expert witness which summarizes the opinions expressed, the factual basis therefore, and the authorities relied upon in reaching such opinions.

Presently, a litigant is entitled to refuse to provide certain information from experts not expected to testify at trial. Information obtained from experts who will not testify is protected under the work product privilege. The bill would not affect a litigant's ability to preserve the privilege over the work of experts which the party does not expect to call at trial. However, not litigant would be able to recoup the costs of such non-testifying experts.

E. Assertion of Unfounded Claims or Defenses

The bill amends s. 57.105, F.S., to provide for imposing sanctions against parties and attorneys for raising unfounded claims or defenses. The current requirement that a complete absence of justiciable issues of fact or law must be found prior to the imposition of sanctions is deleted. Instead, it would be necessary to establish that a losing party or the party's attorney knew at the time the claim or defense was asserted that the claim or defense was not supported by material facts necessary to establish the claim or defense, or that the application of then existing law would not support the claim or defense asserted. The imposition of sanctions may include costs and attorneys fees to be paid by the party or the party's attorney. The section would not apply in cases where the court determined that the claim or defense was raised in a good faith attempt to change existing law. Section 5 of the bill also would allow for the imposition of sanctions against a party where the court determines by a preponderance of the evidence that any pleading, claim, or defense was asserted primarily for the purpose of delay.

F. Itemized Verdicts

The bill amends s. 768.77, F.S., relating to itemized verdicts, to repeal the requirements that the trier of fact itemize each category of future economic damages and compute such damages before and after to present value. The trier of fact would still be required to itemize damages as to economic and non-economic losses, and to itemize punitive damages when awarded.

The bill contains a conforming provision which amends s. 768.78, F.S., to conform the provisions of the alternative payment statute with the elimination of the itemization of future economic losses set forth in section 6 of the bill.

G. Offers of Judgment

The bill amends s. 768.79, F.S., relating to offers of judgment and demands for judgment, and provides that in multiple party cases, any offer of judgment must specify its applicability to each party; however, a plaintiff may continue to make a global offer for all defendants without specifying amounts applicable to each defendant. The bill also provides that a subsequent offer of judgment shall have the effect of voiding any previous offer. The court, prior to awarding costs and attorney's fees, shall determine if an offer was reasonable at the time and under the circumstances known when the offer was made.

The bill has an effective date 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.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Expedited trials and voluntary trial resolution could decrease litigation costs.

C. Government Sector Impact:

The bill could potentially reduce the number of civil cases presently on the dockets of many county and circuit courts. By providing an alternative method of dispute resolution, the results of which are binding and enforceable as between the parties to the proceedings, the bill may attract litigants away from county and circuit courtrooms. Thus, county and circuit court judges might find themselves with more time to devote to each individual case before them.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Certain language in the bill gives the impression that the voluntary trial resolution proceedings may not be construed as a civil action for purposes of statutes like s. 768.73, F.S., which provides for punitive damages limitations.

In pertinent part, the statute provides as follows:

(a) In any civil action based on negligence, strict liability, products liability, misconduct in commercial transactions, professional liability, or breach of warranty, and involving willful, wanton, or gross misconduct, the judgment for the total amount of punitive damages awarded to a claimant may not exceed three times the amount of compensatory damages awarded to each person entitled thereto by the trier of fact, except as provided in paragraph (b). However, this subsection does not apply to any class action.

(b) If any award for punitive damages exceeds the limitation specified in paragraph (a), the award is presumed to be excessive and the defendant is entitled to remittitur of the amount in excess of the limitation unless the claimant demonstrates to the court by clear and convincing evidence that the award is not excessive in light of the facts and circumstances which were presented to the trier of fact.

Id.

In *Miele v. Prudential Bache Securities, Inc.* 656 So.2d 470 (Fla. 1995), the Supreme Court held that s. 768.73, F.S. did not apply to arbitration awards. *Id.* at 473. The plaintiff urged that the Legislature never intended s. 768.73, F.S. to apply to arbitration awards, and the court agreed after contemplating the meaning of the term “civil action” as used in the statute. *Id.* The Court said that “if the Legislature determines that arbitration proceedings should be subjected to the same punitive damage limitations provisions as court actions, then it can so indicate.” *Id.*

The following provisions of the bill are particularly susceptible to the reasoning set forth in *Miele*:

- Application for voluntary trial resolution shall be filed and fees paid to the clerk of the court as if for complaints initiating civil actions;
- The trial resolution judge must be a member of The Florida Bar; and
- The clerk of the court shall handle and account for these matters *in all respects as if they were civil actions* except that the *clerk of the court shall keep separate the records of the applications for voluntary binding trial resolution from all other civil actions.*

This is not to say the bill would or should be interpreted in a manner that would exclude the application of s. 778.72, F.S. However, given the *Miele* reasoning, such an interpretation seems at least possible.

VIII. Amendments:

None.