

STORAGE NAME: h1851.go

DATE: April 16, 1999

**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
GOVERNMENTAL OPERATIONS
ANALYSIS**

BILL #: HB 1851

RELATING TO: Government Accountability

SPONSOR(S): Representative Edwards

COMPANION BILL(S): SB 1144 (similar)

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

- (1) JUDICIARY YEAS 8 NAYS 1
- (2) GOVERNMENTAL OPERATIONS
- (3) GENERAL APPROPRIATIONS
- (4)
- (5)

I. SUMMARY:

The bill asserts sovereign immunity from common law charging liens for attorney fees on the property of the state, the property of any state agency, or any monetary recovery made on behalf of the state or any state agency.

The bill provides that any contract entered into in violation of Part III of Chapter 112, F.S., which provides a code of ethics for public officers and employees, is presumed void with respect to any former employee of a state agency and is voidable with respect to any private-sector third party who employs or retains any former agency employee.

The bill clarifies that an agency employee who resigns may not hold a position in connection with any contract in which the employee participated personally or substantially.

The bill requires the general counsel of an agency to review and approve a contract for private attorney services prior to execution by the agency head. It requires a contingency fee contract to be "commercially reasonable" and defines that term. It requires that, if the amount of the fee is in dispute, the attorneys must participate in mandatory binding arbitration and it provides for forfeiture of all fees if the attorneys take a public position adverse to the state's settlement posture during the pendency of the case.

The bill also requires the standard addendum that must be part of state contracts for private attorney services to address the internal system of governance if multiple law firms are parties to the contract and to identify the member of the firm that can legally bind the firm. The bill also requires each private attorney who is under contract with the state to provide attorney services to maintain current records and to make such records available pursuant to the public records law.

This bill amends the following sections of the Florida Statutes: 11.06, 112.3175, 112.3185, 287.058, and 287.059, F.S.

Note. On April 5, 1999, the Committee on Judiciary adopted one amendment, which will travel with the bill. This amendment limits contingent private attorney fees to a contingency risk multiplier not greater than three. It also limits attorney fees for private attorneys for actions on behalf of the state to a fee of \$10,000,000 unless a higher maximum is specifically approved by the Legislature.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Judgment for monetary damages against the state

Section 11.066, F.S., relates to suits seeking monetary damages against the state or state agencies. Section (2) of the section provides that when the state or a state agency is exercising its inherent police power to protect the public health, safety, or welfare, it is presumed to be acting to prevent a public harm. A person may rebut this presumption in a suit seeking monetary damages from the state or a state agency only by clear and convincing evidence to the contrary.

Neither the state or a state agency is required to pay monetary damages under the judgment of any court except pursuant to an appropriation made by law.¹ To enforce a judgment for monetary damages against the state or a state agency in a situation in which sovereign immunity has not been waived, the sole remedy of the judgment creditor, if there has not otherwise been an appropriation made by law to pay the judgment, is to petition the Legislature in accordance with its rules to seek an appropriation to pay the judgment.

Section 11.066(4), F.S., provides that, notwithstanding Section 74.091, F.S., a judgment for monetary damages against the state or any of its agencies may not be enforced through execution or any common law remedy against property of the state or its agencies, and a writ of execution therefor may not be issued against the state or its agencies. Further, it is a defense to an alternative writ of mandamus issued to enforce a judgment for monetary damages against the state or a state agency that there is not appropriation made by law to pay the judgment.

Public Employee Code of Ethics

Chapter 112, F.S., outlines general provisions affecting public officers and employees. Part III of the chapter contains a code of ethics for public officers and employees. Under Section 112.3175, F.S., any contract which has been executed that contains provisions in violation of this code is voidable by any party to the contract or in circuit court, by any appropriate action by the Ethics Commission, the Attorney General, or any citizen materially affected by the contract and residing in the jurisdiction represented by the officer or agency entering into such contract.

Section 112.3185, F.S., prohibits any agency employee, after retirement or termination, from having or holding any employment or contractual relationship with any business entity other than an agency in connection with any contract in which the agency employee participated personally and substantially through decision, approval, disapproval, recommendation, rendering of advice, or investigation while an officer or employee.

Contracts for private attorney services

Section 287.058(1), F.S., requires every procurement of contractual service in excess of the threshold amount for Category Two,² except for provision of health and mental health services or drugs in the examination, diagnosis, or treatment of sick or injured state employees or other specified benefits, must be evidenced by a written agreement embodying all provisions and conditions of the procurement of such services. The section includes a number of specific conditions which must be included in the contract if applicable.

Section 287.059, F.S., regulates the provision of private attorney provisions by the state or state agencies. The section prohibits an agency from contracting for private attorney services without prior written approval of the Attorney General. There are, however, exceptions to obtaining prior written approval of the Attorney General. Exceptions include private attorney services:

¹ Section 11.066(1), F.S., defines "appropriation made by law" to have the same meaning as in Art. VII, s. 1(c) of the State Constitution and means money allocated for a specific purpose by the Legislature by law in a general appropriations act or a special appropriations act.

² The purchasing category thresholds, which are provided in s. 287.012, F.S. (1998 Supp.), are as follows: (a) Category One is \$5,000; (b) Category Two is \$15,000; (c) Category Three is \$20,000; (d) Category Four is \$60,000; and (e) Category Five is \$120,000.

- ▶ Procured by the Executive Office of the Governor or any department under the exclusive jurisdiction of a single cabinet officer.
- ▶ Provided by legal services organizations to indigent clients.
- ▶ Necessary to represent the state in litigation involving the Florida Casualty Insurance Risk Management Trust Fund pursuant to Part II of Chapter 284, F.S.
- ▶ Procured by the Board of Regents and the universities of the State University System.
- ▶ Procured by community and junior colleges and multi-county special districts.

Under the section, an agency requesting approval for the use of private attorney services must first offer to contract with the Department of Legal Affairs for such attorney services at a cost pursuant to mutual agreement. That office must decide on a case-by-case basis to accept or decline to provide such services. If the Attorney General's office declines to provide the requested services, the Attorney General's written approval must include a statement that the private attorney service requested cannot be provided by the Attorney General's office or that the private attorney services are cost-effective in the opinion of the Attorney General.

When written approval has been received from the Attorney General, written final approval must be obtained from the agency head (or a designee) prior to contracting for private attorney services. Where approval is not needed from the Attorney General, the agency head or a designee must give written approval prior to contracting.

The Attorney General is required by law to adopt a rule setting forth a standard fee schedule for private attorney services using hourly rates or an alternative billing methodology. In setting the fee schedule, the Attorney General is required to consider:

- ▶ The type of controversy involved and complexity of the legal service needed.
- ▶ The geographic area where the attorney services are to be provided.
- ▶ The novelty of the legal questions involved.
- ▶ The amount of experience desired for the particular kind of attorney services to be provided.
- ▶ Other factors deemed appropriate by the Attorney General.

Pursuant to the section, all agencies must use the standard fee schedule for private attorney services as established by the statute and rule unless the head of the agency or a designee waives use of the schedule and sets forth the reasons for deviating from the schedule in writing to the Attorney General. The waiver must demonstrate the necessity based upon criteria for deviation from the schedule which the Attorney General establishes in rule.

The standard fee schedule contained in Rule 2-37.030, F.A.C., permits "specialized attorney services"³ to be billed up to \$175 per hour. All other attorney services may be billed up to \$125 per hour. Costs for paralegal and other research assistants may be billed at up to \$40 per hour. Exhibits, transcripts, and witness fees are not considered a part of the billable hour, but are reimbursed based upon documented third party vendor charges to the contract attorney.

Rule 2-37.040, F.A.C., contains a procedure for obtaining an exception to the standard fee schedule. Any agency wishing to exceed the standard fee schedule for attorney services must demonstrate necessity for such action to the Attorney General through a statement of waiver which must be signed by the appropriate agency head or designee. Specified waiver criteria include:

- ▶ The inability of the agency to obtain adequate legal representation within the confines of the standard fee schedule. A detailed statement describing agency efforts at procurement must be provided.

³ "Specialized attorney services" are limited to admiralty, copyright, patent, trademark, international, communications, media, bond and securities law (including litigation and other services normally performed by such counsel).

- ▶ The agency is unable to obtain attorney services with the special expertise necessary to perform the particular legal function which the agency requires within the fee schedule. A detailed statement describing why special expertise is necessary in the agency's particular circumstance, the analysis which led it to that conclusion, and the reasons why the agency was unable to find such expertise at a price within the standard fee schedule, must be provided.
- ▶ The waiver is necessary in order to provide attorney services as a result of an emergency, an immediate danger to the public health, safety and welfare, or an opportunity for the state to preserve or enhance the public fiscal resources, and that failure to contract immediately for attorney services in excess of the standard fee schedule will work to the detriment of the state. A detailed statement describing the emergency, danger or opportunity in question, any efforts at procurement or attorney services within the standard fee schedule and the reasons why such efforts failed, or a justification why the emergency, danger or opportunity required immediate contracting in excess of the standard fee schedule, must be provided.

Standards for determining when to select outside legal firms for attorney services are also contained in the section. Included among the standards are the magnitude of the case, the firm's ratings and certifications, the firm's minority status, and the firm's prior experience with the agency.

The Attorney General is required by law to develop a standard addendum to every contract for attorney services that must be used by all agencies, unless waived by the Attorney General. The addendum must describe in detail what is expected of both the contracted private attorney and the contracting party.

Contracts for attorney services are limited to an initial period of 1 year only. Multi-year contracts may be entered into if they are subject to annual appropriations and annual written approval from the Attorney General.

Legislative appropriation of proceeds from settlements

Section 1(c), Article VII of the Florida Constitution provides: "No money shall be drawn from the treasury except in pursuance of appropriation made by law." Agencies collect proceeds from fines, forfeitures and settlements for violations of statutory provisions or administrative rules by a regulated party. Such proceeds are appropriated by the Legislature in the annual appropriations process to particular programs or activities and are based upon estimates of collected amounts submitted by the agencies. Upon collection by an agency, the proceeds are deposited into a specific trust fund as directed by law. Proceeds from fines, forfeitures, judgments and settlements collected in excess of the appropriated amount are deposited into the general revenue fund.

The Florida Administrative Procedures Act (Ch. 120, F.S.) authorizes agencies to seek enforcement through civil actions in court. "Any agency may seek enforcement of an action by filing for enforcement, as provided in this section, in the circuit court where the subject matter of the enforcement is located." Sec. 120.69 (1)(a), F.S. Agencies may also seek enforcement through informal disposition procedures. "Unless precluded by law, informal disposition may be made of any proceeding by stipulation, agreed settlement, or consent order." Sec. 120.57 (4), F.S. However, an agency may not settle such action if the settlement would obligate the state or an agency to expend funds except under certain conditions. Sec. 45.062 (1), F.S.

B. EFFECT OF PROPOSED CHANGES:

The bill adds to Section 11.066, F.S., a subsection that provides that the property of the state or a state agency, or any monetary recovery made on behalf of the state or any state agency, is not subject to a lien of any kind, and a person may not institute an action on any such lien unless expressly authorized by law. If enacted into law, this legislation will end attempts to apply the common law charging lien for attorneys fees in matters involving the state and its agencies.

The bill modifies section and paragraph numbers in Section 112.3175, F.S., and adds a new subsection (2) that provides that any contract executed in violation of the code of ethics is presumed void with respect to any former employee of the state and is voidable with respect to any private-sector third party who employs or retains in any capacity any such former agency employee.

Section 112.3185, F.S., is amended to clarify that agency employees who resign their positions with the agency are precluded from having any employment or contractual relationship with any business entity other than an agency in connection with any contract in which the agency employee participated personally and substantially through decision, approval, disapproval, recommendation, rendering of advice, or investigation while an officer or employee. Currently, only agency employees who retire or are terminated are included within the prohibition.

Section 287.058, F.S., is amended to clarify the wording of a required provision in every state contract for the procurement of services. The provision relates to the unilateral cancellation of a contract by an agency when the contractor fails to permit inspection of documents, unless the records are exempt from the provisions of s. 119 (1), F.S.

Section 287.059, F.S., is amended to require the general counsel for the agency to review the form and legality of the contract for private attorney services and to indicate his or her approval by signing the contract. The agency head is required to sign and retain custody of the contract after the general counsel has approved it.

The bill creates a new subsection (7) to 287.059, F.S., which relates to contingency fee contracts for attorney services. Under the new subsection, a contingency fee contract must be "commercially reasonable." The term "commercially reasonable" is defined to mean a reasonable fee that does not exceed:

- ▶ Thirty percent of any recovery of an amount less than \$2 million.
- ▶ Twenty percent of any recovery of an amount equal to \$2 million but less than \$10 million.
- ▶ Ten percent of any recovery of an amount equal to \$10 million or greater.

This new subsection (7) also provides that if the amount of the fee is in dispute, the counsel retained by the state is required to participate in mandatory, binding arbitration. Payment of all attorney's fees is subject to appropriation. The bill also provides that attorney's fees must be forfeited if, during the pendency of the case, the counsel retained by the state takes a public position that is adverse to the state's litigation or settlement posture. Private attorneys could still challenge the settlement to the extent it adversely impacted their fee payment.

Further, the bill modifies subsection (10) of s. 287.059, F.S., which is renumbered as subsection (11), which relates to the standard addendum to every contract for attorney services that the Attorney General has adopted for use by all agencies. The addendum is now required to address the internal system of governance if multiple law firms are parties to the contract and must, at a minimum, require that each firm identify one member who is authorized to legally bind the firm.

The bill also creates a new subsection (16) of s. 287.059, F.S., which requires each private attorney who is under contract to provide attorney services for the state to maintain detailed current records until at least four years after the expiration of the contract. The records would include documentation of all expenses, disbursements, charges, credits, underlying receipts and invoices, and other financial transactions that concern the provision of such attorney services. The section clarifies that these records are subject to the requirements of Chapter 119, F.S., the public records laws.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

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

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

Yes. The government should no longer have disputes involving attorney charging liens on the lawsuits of the state or its agencies.

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

Private organizations will need to make inquiries concerning the extent to which certain new employees participated as a state employee in a contract or in contract development between the private organization and the state agency.

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

No.

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

The bill does not eliminate or reduce an agency or program.

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

N/A

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

N/A

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

N/A

2. Lower Taxes:

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

N/A

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

N/A

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

N/A

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

N/A

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

N/A

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. The bill eliminates certain employment opportunities for current state employees.

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

Yes. The bill sets limits upon attorney contingency fee contracts, requires the creation and retention of records by private attorneys, and requires statements from law firms in lawsuits with participation by multiple firms which were not previously required.

5. Family Empowerment:

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

The bill does not purport to provide services to families or children.

- (1) Who evaluates the family's needs?

N/A

- (2) Who makes the decisions?

N/A

- (3) Are private alternatives permitted?

N/A

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

N/A

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

N/A

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

N/A

- 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:

The bill does not create or change a program providing services to families or children.

- (1) parents and guardians?

N/A

- (2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

Sections 11.06, F.S.; 112.3175, F.S.; 112.3185, F.S.; 287.058 F.S. (1998 Supp.); and 287.059., F.S.

E. SECTION-BY-SECTION ANALYSIS:

Please see Part II. B.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

Private attorney fees paid by the state in some situations will be lower in the future.

3. Long Run Effects Other Than Normal Growth:

N/A

4. Total Revenues and Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

Private attorney fees will be more limited in some actions in which private attorneys represent the State of Florida or its agencies.

2. Direct Private Sector Benefits:

N/A

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

N/A

D. FISCAL COMMENTS:

N/A

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

A. APPLICABILITY OF THE MANDATES PROVISION:

The bill does not require a city or county to expend funds or to take action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

The bill does not reduce the ability of municipalities or counties to raise revenues.

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

The bill does not reduce the state taxes shared with municipalities or counties.

V. COMMENTS:

None.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On April 5, 1999, the Committee on Judiciary adopted one amendment, which will travel with the bill. This amendment limits contingent private attorney fees to a contingency risk multiplier not greater than three. It also limits attorney fees for private attorneys for actions on behalf of the state to a fee of \$10,000,000 unless a higher maximum is specifically approved by the Legislature.

VII. SIGNATURES:

COMMITTEE ON JUDICIARY:

Prepared by:

Jo Ann Levin

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Don Rubottom

AS REVISED BY THE COMMITTEE ON GOVERNMENTAL OPERATIONS:

Prepared by:

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