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HOUSE OF REPRESENTATIVES
COMMITTEE ON
STATE ADMINISTRATION
ANALYSIS

BILL #: HB 1383

RELATING TO: Reasonable Attorney Fees/Taxpayers

SPONSOR(S): Representative(s) Kallinger

TIED BILL(S): None

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

(1) STATE ADMINISTRATION YEAS 5 NAYS 0
(2) FISCAL POLICY & RESOURCES
(3) COUNCIL FOR SMARTER GOVERNMENT
(4)
(5)

I. SUMMARY:

Current law provides, with regard to state agencies, that legal services, including attorney, paralegal, expert witness, appraisal, or mediator services are not subject to competitive sealed bid requirements. However, the state or a state agency must abide by certain regulations when seeking the services of a private attorney. With a number of exceptions, a state agency may not contract with a private attorney for services without the prior written approval of the Attorney General. As required by statute, the Attorney General has adopted a standard fee schedule for private attorney services using an hourly rate, which is $175.00 per billable hour for "specialized attorney services", and $125.00 per billable hour for all other attorney services. The rule also establishes a procedure for obtaining a waiver from the standard fee schedule.

The American Legislative Exchange Council (ALEC) has developed model legislation for a "Private Attorney Retention Sunshine Act."

HB 1383 utilizes the model legislation developed by ALEC to form the "Reasonable Attorney Fees for Taxpayers Act." HB 1383 provides that a state agency or agent may not enter into a contract in excess of $1 million for private legal services without first utilizing a competitive bid process. Additionally, no state agency or agent may enter into a contract for legal services exceeding $1 million without the opportunity for at least one hearing before the Legislature on the terms of the contract. The state agency or agent does not have to adopt the changes proposed by the legislative committee, but the state agency or agent must justify the reasons for not including the changes in the final contract. HB 1383 provides time limitations on the committee hearing process and the awarding of the final contract.

HB 1383 requires the state to obtain from any outside counsel a statement of the hours worked on the case, expenses occurred, the aggregate fee amount, and a breakdown of the hourly rate. This bill creates a statutory cap of no more than "$1000 per hour for legal services." There are no exceptions or waivers. It is unclear, however, as to what must be included in that per hour rate.

HB 1383 does not appear to have a fiscal impact on local governments. See "Fiscal Impact on State Government" section.

See "Other Comments" section for technical problems with the bill.

The Committee on State Administration adopted a strike-all amendment which is traveling with the bill. The amendment is substantially different from the bill. See the "Amendments or Committee Substitute Changes" section of this analysis.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

1.	Less Government	Yes []	No []	N/A [X]
2.	Lower Taxes	Yes []	No []	N/A [X]
3.	Individual Freedom	Yes []	No []	N/A [X]
4.	Personal Responsibility	Yes []	No []	N/A [X]
5.	Family Empowerment	Yes []	No []	N/A [X]

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

Section 11.066, F.S./Suits Seeking Monetary Damages Against the State

Section 11.066, F.S., relates to suits seeking monetary damages against the state or state agencies. Section 11.066(2), F.S., provides that the state and each state agency, when exercising its inherent power to protect the public health, safety, or welfare, 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.

Section 11.066(3), F.S., provides that neither the state nor 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 s. 74.091, F.S.,[2] a judgment for monetary damages against the state or any of its agencies may not be enforced through execution[3] or any common-law remedy against property of the state or its agencies, and a writ of execution[4] therefore may not be issued against the state or its agencies. This means that a court, pursuant to a judgment, cannot order property of the state or a state agency to be seized and given to the plaintiff. Moreover, s. 11.066(4), F.S., states

[1] Section 11.066(1), F.S., states: "As used in this section, the term "appropriation made by law" has the same meaning as in s. 1(c), Art. VII 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] Section 74.091, F.S., states: "Where an order of taking has been entered and deposit made, the failure of the petitioner to pay into the court the compensation ascertained by the jury shall not invalidate said judgment or the title of the petitioner, and such failure shall not authorize any person to molest, interfere with, enter or trespass upon said property; provided, however, persons lawfully entitled to compensation may sue out execution, in the event a timely appeal has not been filed, and such execution may be levied upon the property so condemned and any other property of the petitioner in the same manner as executions are levied in common-law actions."

[3] Black's Law Dictionary, 6th ed., p. 568, defines "execution": "Carrying out some act or course of conduct to its completion . . . Execution upon a money judgment is the legal process of enforcing the judgment, usually by seizing and selling property of the debtor."

[4] *Id*. at p. 568, defines "writ of execution": "Formal process issued by court generally evidencing the debt of the defendant to the plaintiff and commanding the officer to take the property of the defendant in satisfaction of the debt. Unless the court directs otherwise, the process to enforce a money judgment shall be a write of execution."

that it is a defense to a writ of mandamus issued to enforce a judgment for monetary damages against the state or a state agency that there is no appropriation made by law to pay the judgment.

Chapter 287, F.S./Procurement of Legal Services

Section 287.057(1), F.S., provides that all contracts for the purchase of commodities or contractual services in excess of the threshold amount provided in s. 287.017, F.S., for Category Two[5], must be awarded by competitive sealed bidding. Section 287.057(3)(f), F.S., states that the following contractual services and commodities are not subject to the competitive sealed bid requirements: artistic services; academic program reviews; lectures by individuals; auditing services; *legal services*, including attorney, paralegal, expert witness, appraisal, or mediator services; and health services including examination, diagnosis, treatment, prevention, medical consultation, or administration.

Section 287.059, F.S., regulates the procurement of a private attorney by the state or by a state agency. This section prohibits an agency from contracting for private attorney services without the prior written approval of the Attorney General. However, prior written approval is not required for private attorney services:

- 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 State Risk Management Trust Fund pursuant to Chapter 284, Part II, F.S.;
- Procured by the Board of Regents and the universities of the State University System;
- Procured by community and junior colleges and multicounty special districts; or
- Procured by the Board of Trustee for the Florida School for the Deaf and the Blind.

Section 287.059, F.S., requires the agency requesting approval for the use of private attorney services to offer to contract with the Department of Legal Affairs for such attorney services at a cost pursuant to mutual agreement. The Attorney General's office decides 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 and therefore approves the procurement of a private attorney, the Attorney General must file a written approval stating that the requested services cannot be provided by the Attorney General's office or that such 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 designee of the agency head, prior to contracting for private attorney services. When approval is not needed from the Attorney General, the agency head or designee is still required to give written approval.[6]

Section 287.059(6), F.S., requires the Attorney General to adopt, by rule, a standard fee schedule for private attorney services using hourly rates or an alternative billing methodology. The Attorney General is required to consider: the type of controversy involved and the level of complexity; the geographic area where the services are to be provided; the novelty of the legal questions involved; the amount of experience desired for the particular kind of attorney services; and other factors deemed appropriate by the Attorney General. All agencies must use the standard fee schedule as established by statute for

[5] Section 287.017(1), F.S., states that a Category Two purchasing is at least $25,000.
[6] Section 287.059(4) and (5), F.S.

private attorney services unless the head of the agency or a designee waives use of the schedule and sets forth in writing to the Attorney General the reasons for deviating from the schedule.[7]

Section 287.059(8), F.S., requires the Attorney General to develop guidelines that may be used by agencies to determine when it is necessary and appropriate to seek the services of private attorneys. When selecting an outside attorney, agencies are encouraged to consider certain criteria; for example, the magnitude or complexity of the case, the firm's ratings and certifications, the firm's minority status, the firm's prior experience with the agency, and the firm's willingness to use agency resources to minimize costs.[8]

The Attorney General is required to develop a standard addendum to every contract to be used by all agencies, unless waived by the Attorney General, describing in detail what is expected of both the contracted private attorney and the contracting agency.[9] Contracts for attorney services are originally executed for one year only; however, multiyear contracts may be awarded subject to both annual appropriations and annual written approval from the Attorney General.[10] The Attorney General's office must periodically prepare a roster by geographic location of private attorneys under contract with agencies, their fees, and primary area of legal specialization, and distribute this roster to all agencies.[11]

The Florida Administrative Code

Rule 2-37.030, F.A.C., establishes a standard fee schedule for private attorney services. "Specialized attorney services"[12] may be billed up to $175.00 per billable hour.[13] All other attorney services may be billed up to $125.00 per billable hour. All paralegal, legal assistant, law clerk, and research assistant services may be billed up to $40.00 per billable hour.

Rule 2-37.040, F.A.C., establishes 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 signed by the appropriate agency head or designee. Specified waiver criteria includes:

- The inability of the agency to obtain adequate legal representation within the confines of the standard fee schedule. If any agency justifies its waiver of the standard fee schedule pursuant to this criterion, it must set forth in detail the efforts at procurement which the agency engaged in prior to determining that the standard fee schedule would not provide adequate attorney services;

- 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. If any agency justifies its deviation from the standard fee schedule based on this criterion, it must set forth in detail the reasons why special expertise is necessary and the reasons why the agency was unable to find such expertise at a price within the standard fee schedule; or

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[7] Section 287.059(7), F.S.
[8] Section 287.059(9), F.S.
[9] Section 287.059(10), F.S.
[10] Section 287.059(11), F.S.
[11] Section 287.059(12), F.S.
[12] 2-37.030, F.A.C., states: "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).
[13] 2-37.030, F.A.C., defines "billable hour": "The term 'billable hour' means the actual time spent providing attorney services to the agency measured in 6 to 10 minute intervals. Costs for such items as exhibits, transcripts, and witness fees are not considered a part of the billable hour."

- 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 any 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. If any agency utilizes this criterion, it must set forth in detail the emergency, danger, or opportunity in question, why efforts failed to procure an attorney within the standard fee schedule, and why immediate attorney services are necessary.

American Legislative Exchange Council

On May 2, 2000, the American Legislative Exchange Council (ALEC)[14] published a press release regarding a piece of legislation offered in the Pennsylvania House of Representatives by Representative Craig Dally. This legislation, called the "Private Attorney Retention Sunshine Act", was model legislation developed by ALEC. The legislation requires state agencies, including executive branch agencies, independent boards, and the Attorney General, to use an open bidding process to select private attorneys for legal services expected to exceed $1 million dollars. It requires that once a contract is awarded, it must be filed with the General Assembly to review the contract through a public committee hearing and make recommendations to the agency. At the conclusion of any legal proceeding where a state agency is represented by a private attorney under contract, the attorney must provide the agency with information on how many hours were worked on the matter, the expenses incurred, the aggregate fee paid or to be paid to the private attorney, and the breakdown of the hourly rate. The bill additionally sets a maximum of $1000 an hour for legal services in these cases.[15]

At the time of this legislation, three other states[16] had passed similar legislation, and up to 10 additional states had either introduced such legislation or had it under consideration.[17] In response to this legislation, ALEC submitted its statement on the "Private Attorney Retention Sunshine Act."

> The goal of this legislation is simply to promote good government by bringing legal contracts in line with other procurement practices. By requiring state agencies to accept bids for legal services above $1 million, acquire legislative approval, and provide disclosure of all contracts, this legislation promotes sound business practices to which every state should adhere. In addition, it allows "sunshine" on the entire process by advocating public hearings so that no controversial contracts are signed in the dead of night or behind closed doors.[18]

Robert A. Levy, Ph.D., J.D., testified on behalf of ALEC before the Kansas Legislature Select Committee during Kansas' 2000 legislative session regarding the "Private Attorney Retention Sunshine Act" being considered at that time in the Kansas Legislature. In a statement titled "Larger Implications of the Tobacco Settlement," Dr. Levy addressed the controversy surrounding tobacco settlements and its relation to the "Private Attorney Retention Sunshine Act."

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[14] The American Legislative Exchange Council is the nations' largest bipartisan individual membership association of state legislators. It is a 501(c)(3) nonprofit educational and membership organization and is headquartered in Washington, D.C. Information retrieved on-line at www.alec.org.

[15] Pursuant to press release, "Dally Introduced Private Attorney Contract Sunshine Act," released on May 2, 2000 by the American Legislative Exchange Council. Retrieved on-line at www.alec.org

[16] North Dakota, Texas, and Kansas; pursuant to press release, "American Legislative Exchange Council Statement on Private Attorney Retention Sunshine Act," released on May 2, 2000 by the American Legislative Exchange Council. Retrieved on-line at www.alec.org.

[17] *Id.*

[18] Pursuant to article, "Statement of Robert A. Levy, Ph.D., J.D. Senior Fellow in Constitutional Studies Cato Institute Washington, D.C. Testifying on Behalf of the American Legislative Exchange Council Before the Kansas Legislature Select Committee 2000; Larger Implications of the Tobacco Settlement," retrieved on-line at www.alec.org.

> The Medicaid recovery lawsuits that precipitated the Master Settlement Agreement (MSA) were created out of whole cloth by states filling the dual and conflicting roles of lawmaker and plaintiff. Florida set the pattern by enacting a new statute that stripped tobacco companies of their traditional rights and put in their place a shockingly simple rule of law: The state needed money; the industry had money; so the industry gave and the state took. Under the new regiment, Florida, and the other states that modeled their lawsuits after Florida's, could sue tobacco companies directly, without stepping into the injured party's shoes.[19]

Dr. Levy concluded his statement by reiterating the need for the "private attorney retention sunshine act."

> To secure the library of all citizens, we must resolutely defend and protect our least popular citizens, including the tobacco companies. Disputes between private parties cannot be resolved in secret negotiations involving defendants who have the boot of government resting on their necks, state attorneys general who seek to replenish their Medicaid coffers without fiscal discipline contingency fee lawyers who wield the sword of the state while retaining a financial interest in the outcome, and advocacy groups that have subordinated the rule of law to their health concerns, however well-intentioned.[20]

C. EFFECT OF PROPOSED CHANGES:

HB 1383 creates the "Reasonable Attorney Fees for Taxpayers Act," modeled after the American Legislative Exchange Council's "Private Attorney Retention Sunshine Act." This bill provides that a contract in excess of $1 million is one in which the fee paid to an attorney or group of attorneys, whether as a flat hourly fee, or a contingent fee, and their expenses, exceeds or can be reasonably expected to exceed $1 million.

HB 1383 requires that any state agency or agent that wishes to retain a lawyer or law firm to perform legal services on behalf of this state must first undergo an open and competitive bidding process for such services. Additionally, no state agency or agent may enter into a contract for legal services exceeding $1 million without the opportunity for at least one hearing before the Legislature regarding the terms of the contract. The state agency or agent must file a copy of the proposed contract with the Clerk of the House of Representatives (Clerk), who, with the approval of both the President of the Senate and the Speaker of the House, must refer such contract to the appropriate legislative committee.

HB 1383 states that within 30 days after the referral, the legislative committee may hold a public hearing on the contract, and subsequently issue a report to the referring agency or state agent. The report includes any proposed changes voted on by the committee. The state agency or agent is not required to adopt the proposed changes. If, however, the contract does not contain the proposed changes, the state agency or agent must send a letter to the Clerk accompanied by a copy of the final contract, stating the reasons why the proposed committee changes were not adopted. The Clerk then refers this letter to the committee that held the hearing. The bill requires that the committee have 45 days to review the final contract before the state agency or agent is allowed to enter into the final contract.

HB 1383 further provides that if no proposed changes to the proposed contract are made to the state agency or agent within 60 days after the initial filing of the "proposed regulation", or any amendment or repeal of such "regulations" with the Clerk, the state agency or agent may enter into the contract. This is a technical problem in the bill. The term "proposed regulation" should read "proposed contract," and the term "regulations" should read "contract."

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[19] *Id.*
[20] *Id.*

HB 1383 states that nothing in this legislation can be construed to expand the authority of the state agency or agent to enter into contracts.

If the Legislature is not in session when the state agency or agent is seeking legal services, HB 1383 provides that the Governor, with the unanimous consent of the Speaker of the House and the President of the Senate, may establish a five-member interim committee. The committee will consist of one member appointed by the Governor, one by the Speaker of the House, one by the President of the Senate, and the final two members being the minority leader of each respective chamber. This interim committee must abide by the same requirements and time restrictions as the standing committee.

HB 1383 provides that at the conclusion of any legal proceeding for which a state agency or agent retained outside legal counsel on a contingent fee basis, the state must receive from the counsel a statement of the hours worked on the case, expenses incurred, the aggregate fee amount, and a breakdown as to the hourly rate, based on hours worked divided into fee recovered, less expenses. This bill provides that in no case will the state incur "fees and expenses in excess of $1,000 per hour for legal services." If the state incurs fees and expenses in excess of this amount, the fee amount will be reduced to an amount "equivalent to" $1,000 per hour. The bill does not state what "fees and expenses" are to be included in calculating the hourly rate for "legal services." Nonetheless, this amount appears far in excess of what current Florida Administrative Code rule allows. There are, however, a significant number of entities not subject to the Florida Administrative Rule fee cap, and those entities that are subject to the rule have the authority to request a fee cap waiver.

D. SECTION-BY-SECTION ANALYSIS:

See "Effect of Proposed Changes."

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

To the extent this bill results in limiting state expenditure for attorney's fees then the bill would have a positive fiscal impact; however, any such fiscal impact is not determinable.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Indeterminate.

D. FISCAL COMMENTS:

None.

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 action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that counties or municipalities have to raise revenues in the aggregate.

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

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

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

None.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

There are a number of concerns regarding the bill.

1. On page 2, lines 19 and 26, there is the use of the term “regulations.” This should read “contract.” On page 2, line 25, there is the use of the expression “proposed regulation.” This should read “proposed contract.” This suggested language is consistent with other sections in the bill.

2. On page 1, line 30 thru page 2, line 4, the bill does not provide any time parameters as to when the Clerk must refer the contract to the appropriate committee. Due to the fact that the bill establishes a 60-day period for proposed changes to be offered on the proposed contract, it seems necessary to place a time restriction on the Clerk regarding the initial referral of the contract to the appropriate legislative committee.
3. On page 2, lines 14 thru 22, it is unclear how the Clerk or the committee will know whether the state agency or agent adopted the changes proposed by the committee. The bill requires the state agency or agent to send a letter to the Clerk if the proposed contract does not contain the proposed changes, but the bill places no time restrictions on the Clerk when referring the letter to the appropriate committee. Moreover, there is no requirement for a letter to be sent if the state agency or agent does incorporate such changes in the final contract. Additionally, the 45-day waiting period seems unnecessary. The bill does not allow the committee any further action after recommending changes to the proposed contract, therefore it is unclear why the state agency or agent must wait 45 days after sending the required letter to enter into the final contract.

Additionally, the bill appears to require, after the 45-day waiting period, that the state agency or agent finalize the contract, instead of simply authorizing finalization.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On April 23, 2001, the Committee on State Administration heard HB 1383, and adopted a strike-all amendment. The strike-all amendment differs substantially from the original bill in that it does not address competitive bidding and it does not require a legislative hearing on large contracts.

Additionally, the strike-all amendment includes the following provisions:

- Provides that, unless specific approval is given, no contract or settlement agreement between a private counsel and the state or state agency will authorize or permit payment, negotiation, or collection for any attorney's fee in excess of $1,000,000.
- Provides that specific approval is required by the Governor or a Cabinet member if an amount in excess of $1,000,000 is necessary in a contract for private legal services for any departments, agencies, or offices that fall under the specific jurisdiction of the Governor, or a Cabinet member, as appropriate. In addition, a department that is headed by the Governor and the Cabinet requires the specific approval of the Attorney General for any contract of an amount in excess of $1,000,000.
- Provides limitations on the payment, negotiation, or collection of attorney's fee by a private counsel for work performed by the state or any state agency. Fees may not exceed the LESSER of: a commercially reasonable amount; an amount calculated in accordance with the lodestar process approved by the Florida Supreme Court; or "$1,000 per hour actually expended on the matter by licensed attorneys"[21], except under a contingency fee contract.

The bill, as amended, was reported favorably.

VII. SIGNATURES:

COMMITTEE ON STATE ADMINISTRATION:

Prepared by:	Staff Director:
Lauren Cyran	J. Marleen Ahearn, Ph.D., J.D.

[21] The use of the plural "attorneys" with regard to the $1,000 per hour fee cap, literally construed means no more than $1,000 per hour for all attorney services provided. This probably is not the intent of the drafter and could be easily clarified by amendment.