STORAGE NAME: h0365.jo.doc
DATE: January 22, 2002

HOUSE OF REPRESENTATIVES
COMMITTEE ON
JUDICIAL OVERSIGHT
ANALYSIS

BILL #: HB 365

RELATING TO: Claims/Engineers/Architects/Mappers

SPONSOR(S): Representative Paul & Others

TIED BILL(S): None

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

(1) JUDICIAL OVERSIGHT
(2) BUSINESS REGULATION
(3) COUNCIL FOR SMARTER GOVERNMENT
(4)
(5)

I. SUMMARY:

This bill provides that a party to a lawsuit that files a claim against an engineer, architect, surveyor, or mapper, must certify in writing that an expert opinion will or will not be necessary to determine the standard of care or liability for the civil claim presented against such engineer, architect, surveyor, or mapper.

If the party certifies that an expert opinion is necessary, that party has 60 days in which to file and serve a preliminary expert opinion affidavit. If the party certifies that an expert opinion is not necessary, but the engineer, architect, surveyor, or mapper, can show that such an opinion is necessary to the claim, the court must order the party to obtain and serve a preliminary expert opinion on the standard of care or liability. The court may dismiss a case for failure to comply with the requirement to furnish a preliminary expert opinion affidavit.

This bill does not appear to have any fiscal impact on state or local government.

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 [x]	No []	N/A []
5.	Family Empowerment	Yes []	No []	N/A [x]

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

B. PRESENT SITUATION:

Except where the statutes provides otherwise, the basic timeframes that parties to a lawsuit are required to follow are determined pursuant to the Florida Rules of Civil Procedure. There is no statutory timeframe specific to a claim for professional negligence against an engineer, architect, surveyor, or mapper.

A plaintiff commences a civil action in Florida upon the filing of a complaint with the clerk of the court.[1] The complaint must be formally served upon the defendant, who has 20 days from the date of service in which to file an answer.[2]

Any party to a lawsuit may commence the discovery process. The forms or methods of discovery include written interrogatories, depositions, requests for production of documents, and requests for admissions. A deposition may be scheduled upon reasonable notice. The party upon whom interrogatories, a request for production of documents, or a request for admissions is served upon has 30 days in which to reply, except that 45 days is allowed to reply to a discovery request served with the complaint.[3] A typical early discovery request in a claim for professional negligence is a request that the opposing party identify any expert witness that the opposing party intends to call as a witness at trial; and, if any such expert is named, a request for a copy of any written opinion by that expert.

Any party to a lawsuit may request a case management conference, or the court may call a case management conference on the court's own initiative. Fla.R.Civ.P. 1.200(a), regarding case management conferences, provides, in part: "At such a conference the court may: . . . (5) schedule disclosure of expert witnesses and the discovery of facts know and opinions held by such experts."

Fla.R.Civ.P. 1.390 specifically addresses depositions of expert witnesses. It provides:

> The testimony of an expert or skilled witness may be taken at any time before the trial in accordance with the rules for taking depositions and may be used at trial, regardless of the place of residence of the witness or whether the witness is within the distance prescribed by rule

---

[1] Fla.R.Civ.P., Rule1.050.
[2] *Id*. Rule 1.140(a)(1).
[3] *Id.* Rule 1.340(a). Five days is added to the response time if the discovery request was served by mail.

1.330(a)(3). No special form of notice need be given that the deposition will be used for trial.

C. EFFECT OF PROPOSED CHANGES:

This bill creates s. 45.08, F.S., regarding claims against engineers, architects, and licensed professional surveyors and mappers. This new statute defines the following terms:

- "Claim" means a legal cause of action or an affirmative defense to which all of the following apply: The claim must be asserted against a licensed professional in a complaint, answer, cross claim, counterclaim, or third-party complaint; the claim must be based on the alleged breach of contract, negligence, misconduct, errors, or omissions of the licensed professional in rendering professional services; and expert testimony must be necessary to prove the licensed professional's standard of care or liability for the claim.

- "Claimant" means any person who has a claim against a licensed professional.[4]

- "Expert" means a person who is qualified by knowledge, skill, experience, training, or education to express an opinion regarding a licensed professional's standard of care or liability for the claim.

- "Licensed professional" means a person, corporation, professional corporation, partnership, limited liability company, limited liability partnership, or other entity that is licensed by this state to practice in the profession of engineering, architecture, or surveyor and mapper pursuant to chapter 471, chapter 481, or chapter 472, respectively.

A claimant filing a claim against a licensed professional must certify whether an expert opinion will be necessary to determine the licensed professional's standard of care or liability for the claim. The certification must be in writing and attached to the initial pleading making the claim. If the claimant has certified that expert opinion testimony is necessary, the plaintiff must serve a preliminary expert opinion affidavit within 60 days after filing the initial pleading. The parties may stipulate to a longer period of time, or a claimant may ask the court for an extension of the time to comply. A preliminary expert opinion affidavit must contain at least the following information:

- The expert's qualifications to express an opinion on the licensed professional's standard of care or liability for the claim.

- The factual basis for each claim against the licensed professional.

- The licensed professional's acts, errors, or omissions that the expert considers to be a violation of the applicable standard of care resulting in liability.

- The manner in which the licensed professional's acts, errors, or omissions caused or contributed to the damages or other relief sought by the plaintiff.

If the claimant certifies that an expert opinion is unnecessary to the claim, the licensed professional can request that the court order the plaintiff to obtain and serve the preliminary expert opinion regarding the licensed professional's standard of care or liability for civil claims against the licensed professional.

---

[4] In most cases, a "claimant" will be a plaintiff filing a lawsuit.

The court must dismiss a claim against a licensed professional if the plaintiff fails to timely file and serve a preliminary expert opinion affidavit.

A claimant may supplement a claim or preliminary expert opinion affidavit with additional claims, evidence, or expert opinions.

D. SECTION-BY-SECTION ANALYSIS:

See "Present Situation" and "Effect of Proposed Changes".

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. 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 expend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties 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.

IV. COMMENTS:

A. CONSTITUTIONAL ISSUES:

Court Rules

Article V, section 2(a), of the Florida Constitution, provides that the "Supreme Court shall adopt rules for the practice and procedure in all courts". A court rule may be repealed by general law enacted by a two-thirds vote of each house of the Legislature.

The Florida Supreme Court promulgates the Florida Rules of Civil Procedure and Rule 1.010 provides:

> "These rules apply to all actions of a civil nature and all special statutory proceedings in the circuit courts and county courts except those to which the Florida Probate Rules, the Florida Family Law Rules of Procedure, or the Small Claims Rules apply. The form, content, procedure, and time for pleadings in all special statutory proceedings shall be as prescribed by the statutes governing the proceeding unless these rules specifically provide to the contrary. These rules shall be construed to secure the just, speedy, and inexpensive determination of every action."

Florida law is substantially different from federal law on the issue of court rules. "It has long been settled that Congress has the authority to regulate matters of practice and procedure in the federal courts."[5] Federal law provides the that United States Supreme Court has "the power to prescribe general rules of practice and procedure," which "rules shall not abridge, enlarge or modify any substantive right."[6] No rule is in effect until Congress has had seven months within which to review the rule.

The Florida Supreme Court has affirmed the general proposition that a court rule may not abridge, enlarge or modify any substantive right, stating:

> Unlike the Act of Congress in providing that the Supreme Court of the United States may promulgate rules for the district courts, Section 3 of Article V, supra, failed to specify that such rules as might be promulgated by this court 'shall neither abridge, enlarge, nor modify the substantive rights of any litigant'; however, such limitation is implicit by reason of Article II of our Constitution providing for a separation of the powers of government of this state. The rule [at issue in this case] exceeds the scope of 'practice and procedure,' is legislative in character and must yield to the provisions of the statute.[7]

[5] *Allen v. Butterworth*, 756 So.2d 52, 63 (Fla. 2000).
[6] 28 U.S.C. § 2072.
[7] *State v. Furen*, 118 So.2d 6, 12 (Fla. 1960).

The Florida Supreme Court has "consistently held that a special grant of power or a special act of the legislature takes precedence over a general grant or law on the same subject,"[8] yet Florida courts protect their rulemaking power by striking down laws that conflict with their rules. For example, the Florida Supreme Court held a statute unconstitutional regarding the state mental hospital because it was in conflict with a previously passed criminal rule of procedure regarding persons found not guilty by reason of insanity.[9] A statute requiring mandatory severance of a mortgage foreclosure trial from a trial on any counterclaims in the action was also held unconstitutional by the Florida Supreme Court because it conflicted with an existing rule of civil procedure.[10]

Accordingly, in Florida, if a matter is substantive in nature it is for the legislature to address; if procedural it is for the Florida Supreme Court to attend. However, determining the difference between the two is not simple or clear. In 1973, former Justice Adkins described the difference between substance and procedure:

> The entire area of substance and procedure may be described as a "twilight zone" and a statute or rule will be characterized as substantive or procedural according to the nature of the problem for which a characterization must be made. From extensive research, I have gleaned the following general tests as to what may be encompassed by the term "practice and procedure." Practice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. "Practice and procedure" may be described as the machinery of the judicial process as opposed to the product thereof. Examination of many authorities leads me to conclude that substantive law includes those rules and principles which fix and declare the primary rights of individuals as respects their persons and their property. As to the term "procedure," I conceive it to include the administration of the remedies available in cases of invasion of primary rights of individuals. The term "rules of practice and procedure" includes all rules governing the parties, their counsel and the Court throughout the progress of the case from the time of its initiation until final judgment and its execution. [11]

In addition to the often-difficult task of determining procedure versus substance, the courts have provided inconsistent treatment of the issue. While there have been numerous instances where the Florida Supreme Court has struck down a statute because it was procedural, there are numerous examples where the Court has accepted procedure found in the statutes. For example, In *Harley v Board of Public Instruction of Duval County,* the Florida Supreme Court determined that an act by the legislature dealing with specificity concerning time frame of pleadings, control over general statutes covering the general rules, as well as, the rules of civil procedure put forth by the Supreme Court.[12] As well, the current Probate Code, passed in 1974, is rife with procedural matters. In 1984, however, the Court adopted the procedural aspects of the Probate Code as "temporary rules of procedure."[13] In 1988, the Probate Rules Committee, organized by the Court, announced its intention to review the Probate Code and identify procedural matters to be removed[14] -- a task that

---

[8] *Harley .v Bd. of Public Instruction of Duval County*, 103 So.2d 111 (Fla. 1958), *quoting,* City of St. Petersburg v. Carter, Fla,. 39 So.2d 804, 806 (Fla. 1949).
[9] *In re Connors*, 332 So.2d 336 (Fla. 1976).
[10] *Haven Federal Saving & Loan Association v. Kirian*, 579 So.2d 730 (Fla. 1991).
[11] *In re Florida Rules Of Criminal Procedure*, 272 So.2d 65, 66 (Fla. 1973).
[12] *Harley,* 103 So.2d 111 (Fla. 1958).
[13] *The Florida Bar Re Emergency Amendments To Florida Rules Of Probate And Guardianship Procedure*, 460 So.2d 906 (Fla. 1984).
[14] *The Florida Bar, In re Rules Of Probate And Guardianship Procedure*, 531 So.2d 1261, 1263 (Fla. 1988)

was not completed until 2001. Other statutes that include substantial amounts of unchallenged procedure include chapters 51, F.S. (Summary Procedure); 61, F.S. (Dissolution of Marriage; Support; Custody); 63, F.S. (Adoption); 73, F.S. (Eminent Domain); 744, F.S. (Guardianship); and 900-985 (Criminal Procedure and Corrections).

Two recent Florida Supreme Court opinions have addressed the distinction between substantive law and procedure. In *Kalway v. Singletary,*[15] the Court upheld a thirty-day statute of limitations for filing an action challenging a prisoner disciplinary proceeding. In discussing the separation of powers issue, the Court said:

> As a practical matter, the Court on occasion has deferred to the expertise of the legislature in implementing its rules of procedure. *See, e.g.*, *Amendment to Florida Rule of Juvenile Procedure 8.100(a)*, 667 So.2d 195, 195 (Fla.1996) (noting that the need for juvenile detention shall be made "according to the criteria provided by law" and explaining that these "include those requirements set out in section 39.042, Florida Statutes (1995)"); *In re Family Law Rules of Procedure*, 663 So.2d 1049, 1086 (Fla.1995) (setting forth amended rule 12.740, which provides that all contested family matters may be referred to mediation, "[e]xcept as provided by law"). The setting of an interim time frame for challenging the Department's disciplinary action following the exhaustion of intra-departmental proceedings is a technical matter not outside the purview of the legislature. We do not view such action as an intrusion on this Court's jurisdiction over the practice and procedure in Florida courts.[16]

Two years later, the Legislature passed a statute of limitations applicable to post-conviction death penalty cases as part of the Death Penalty Reform Act (DPRA).[17] Post-conviction actions are deemed civil in nature, not criminal. In holding that the statute of limitations unconstitutional, the Florida Supreme Court declared: “We find that the DPRA is an unconstitutional encroachment on this Court's exclusive power to ‘adopt rules for the practice and procedure in all courts.’"[18] The Court found that it has “exclusive authority to set deadlines for post conviction motions” under its rulemaking authority pursuant to Article V, section 2(a), of the Florida Constitution.[19]

It is unclear whether the courts would find that the provisions of this bill constitute permissible substantive law, permissive court procedure, or an unconstitutional infringement upon the court’s rulemaking authority.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

This bill creates s. 45.08, F.S. A former s. 45.08 was repealed in 1955. Traditionally, Florida statute writers have avoided using the number of a formerly repealed section.

Chapter 45, F.S., is entitled ‘Civil Procedure; General Provisions”. Although placement in this chapter is appropriate for the subject matter, it would also be appropriate for placement in ch. 768, F.S., entitled “Negligence”.

---

[15] 708 So.2d 267 (Fla. 1998).
[16] *Kalway* at 269.
[17] Post-conviction actions are civil in nature and not criminal procedures.
[18] *Allen v. Butterworth*, 756 So.2d 52, 54 (Fla. 2000).
[19] *Allen* at 62 (rejecting a comparison to the holding in Kalaway).

An expert would typically need to review the plans, specifications, and other papers under the control of the licensed professional in order to furnish the opinion required by this bill. Under the rules of civil procedure, the earliest that a claimant could receive copies of those documents from the licensed professional is 45 days after the filing of the claim. Thus, barring an extension, an expert will have a maximum of 15 days within which to review the documents, form an opinion, and put that opinion into the form of an affidavit. It is possible that, given this timeframe, motions by claimant for an extension of time will be frequently filed.

Florida negligence law contains a somewhat analogous procedure for medical malpractice actions. In a medical malpractice action, a claimant must secure an expert opinion finding negligence as a prerequisite to the filing of an action for professional negligence against a medical professional.[20] However, that same statute also provides for pre-suit discovery of the records that an expert would typically review before the expert could form an opinion of professional negligence.[21]

Bill proponents, the Florida Engineering Society, advocate that this bill will reduce unnecessary and non-meritorious litigation filed against professional architects, engineers, surveyors and mappers by requiring plaintiffs to evaluate a claim early in the process.

Bill opponents, The Academy of Florida Trial Lawyers, advocate that this bill will reduce a plaintiff's access to redress for injuries suffered.

V. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VI. SIGNATURES:

COMMITTEE ON JUDICIAL OVERSIGHT:

Prepared by:	Staff Director:
Noelle Melanson	Nathan Bond, J.D.

[20] See ss. 766.203 and 766.106, F.S.
[21] See s. 766.204, F.S.