

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SB 172

SPONSOR: Judiciary Committee and Senator Geller

SUBJECT: Restrictions on the Practice of Law

DATE: April 15, 2003 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Herrin</u>	<u>Yeatman</u>	<u>CP</u>	<u>Fav/1 amendment</u>
2.	<u>Greenbaum</u>	<u>Roberts</u>	<u>JU</u>	<u>Fav/CS</u>
3.	_____	_____	<u>CJ</u>	_____
4.	_____	_____	<u>ACJ</u>	_____
5.	_____	_____	<u>AP</u>	_____
6.	_____	_____	_____	_____

I. Summary:

This bill deletes the prohibition against a sheriff or deputy sheriff practicing law.

This bill also increases the penalty for the unlicensed practice of law from a first degree misdemeanor to a third degree felony.

This bill amends ss. 454.18 and .23, Florida Statutes.

II. Present Situation:

In 1925, the Legislature addressed the issue of governance over the admission of lawyers and practice of law in this State.¹ This legislation provided for a State Board of Law Examiners and prescribed their duties and responsibilities. Those already admitted to practice under the provisions of law or rules of court existing at the time of such admission were grandfathered in and subsequent to the act, those wishing to practice law in this State had to first obtain a certificate of authority from the State Board of Law Examiners. Other responsibilities of this new board included prescribing rules of professional conduct and ethics, as well as investigation of any unprofessional conduct. Disbarment proceedings as a result of misconduct were the function of the state attorney. In addition to establishing the process for admitting attorneys, the legislation also created s. 454.18, F.S., which prohibits a sheriff, deputy sheriff, clerk of court or deputy clerk of court from the practice of law.² The legislation also prohibited the practice of law without license or authority of the Supreme Court.³

¹ Ch. 10175, Laws of Fla.(1925).

² Ch. 10175, s. 18, Laws of Fla. (1925).

³ Ch. 10175, s. 21, Laws of Fla. (1925).

Article V, s. 15 of the Florida Constitution, provides the Supreme Court shall have “exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted.”⁴ Recognizing these functions belonged with the judicial branch, the Legislature, in 1955, codified the Supreme Court’s authority “to govern and regulate admissions of attorneys and counselors to practice law . . .”⁵ At the same time, the State Board of Law Examiners transferred all records, equipment, and funds to the Supreme Court.⁶ Initially, the Legislature expressly reserved some authority over the admittance to and practice of law.⁷ This reservation was later repealed in 1961.⁸ This repeal, however, did not effect the statutory prohibition against certain officers from practicing law that is the subject of this bill.

Today, the Florida Bar, a state-wide professional organization of lawyers, recommends disciplinary action in grievance proceedings against attorneys and the practice of law by unauthorized persons. As part of its responsibilities, the Florida Bar also provides rules regulating the practice of law. All attorneys admitted to practice law in Florida must be members of the Florida Bar. However, the Florida Bar has no direct control over attorney admissions and does not administer the bar examination. Those functions belong to the Florida Board of Bar Examiners, a Florida Supreme Court agency responsible for admitting only qualified persons to the practice of law.

This bill would remove the prohibition on an individual elected as sheriff or employed as a deputy sheriff from the practice of law.⁹ Such an individual would have to consider whether he or she could competently represent a client and avoid a conflict of interest considering their role as a sheriff or deputy sheriff.¹⁰ A lawyer should not agree to represent a client in a matter unless “it can be performed competently, promptly, without improper conflict of interest, and to completion.”¹¹ Any conflict of interest resulting from a sheriff or deputy sheriff engaging in off-duty employment as lawyer would be governed by the rules regulating the Florida Bar. Specifically, rule 4-1.7 provides:

A lawyer shall not represent a client if the lawyer’s exercise of independent professional judgment in the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person or by the lawyer’s own interest, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

⁴ Formerly Art. V, s. 23 Fla. Const. (1968).

⁵ Ch. 29796, ss. 1, 2, and 7, Laws of Fla. (1955).

⁶ Ch. 29796, ss. 4 and 5, Laws of Fla. (1955).

⁷ S. 454.021, Fla. Stat.

⁸ Ch. 61-530, s. 10, Laws of Fla.

⁹ It should be noted that, although the prohibition on the practice of law by a sheriff or deputy sheriff is clear, rules of statutory construction for statutes attempting to restrain one’s right to engage in a profession or business will be construed in favor of the existence of the right and against the limitation. *See* Attorney General Opinion 76-0, *citing* West Virginia Bd. of Dental Exam’r v. Storch, 122 S.E. 2d 925 (W. Va. 1961); Battaglia v. Moore, 261 P.2d 1017 (Colo. 1953).

¹⁰ *See* Harich v. State, 573 So. 2d 303 (1990) (finding trial counsel’s alleged failure to reveal that he was a special deputy sheriff in an adjacent county at the same time that he acted as the senior public defender in charge of capital cases and represented a criminal defendant did not create a per se conflict and no actual conflict was demonstrated because the attorney did not act as regular deputy, remained loyal to his client, and did not betray any confidences to law enforcement).

¹¹ R. Regulating Florida Bar 4-1.16, Comment.

(2) the client consents after consultation.

A conflict could arise if a lawyer who is serving as sheriff or employed as a deputy sheriff attempted to represent an individual in a criminal, quasi-criminal, or penal matter regardless of whether it involves an administrative or judicial proceeding. Rule 4-1.11 regulating the Florida Bar states:

A lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation.

Limitations on the practice of a sheriff or deputy sheriff in some other states allow these individuals to practice while they serve as public officers or employees, but restrict their ability to appear in criminal, quasi-criminal, or penal matters and do not allow them to practice in a court within the county in which they serve. Florida's rules regulating the bar provide guidance on the issue. Rule 4-1.11 regulating the bar places limits on the participation of a public officer or employee:

A lawyer serving as a public officer or employee shall not:

(1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter

The comment for rule 4-1.11 explains this rule prevents a lawyer from using his or her public office for the advantage of a client.

III. Effect of Proposed Changes:

Section 1 amends s. 454.23 to provide that a violation on the prohibition on the unlicensed practice of law is punishable as a third degree felony.

Section 2 amends s. 454.18, F.S., removing sheriff and deputy sheriff from those officers that may not engage in the practice of law.

Section 3 provides an effective date of July 1, 2003.

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:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
