

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 215 Contingency Fee Agreements Between the Department of Legal Affairs and Private Attorneys

SPONSOR(S): Criminal & Civil Justice Policy Council and Rep. Eisnaugle

TIED BILLS: None **IDEN./SIM. BILLS:** SB 1370

| | REFERENCE | ACTION | ANALYST | STAFF DIRECTOR |
|----|---|-----------------|----------------|-----------------------|
| 1) | Civil Justice & Courts Policy Committee | 4 Y, 3 N | DeZego | De La Paz |
| 2) | Criminal & Civil Justice Policy Council | 9 Y, 1 N, As CS | DeZego | Havlicak |
| 3) | Policy Council | | Hogge | Hogge |
| 4) | | | | |
| 5) | | | | |

SUMMARY ANALYSIS

This bill creates s. 16.0155, F.S., which prohibits the Department of Legal Affairs from entering into a contingency fee contract with a private attorney unless the Attorney General (AG) makes a written determination before entering such contract that contingency fee representation is both cost-effective and in the public interest. This bill requires the AG to request proposals from private attorneys to represent the Department on a contingency fee basis and requires attorneys to keep time records in increments of no greater than one-tenth of an hour. This bill prohibits contingency fee contracts entered into by the Department from exceeding certain specified amounts, except when the AG determines, upon consultation with the Cabinet, that there are exigent or unusual circumstances or special legal knowledge or experience is required, and provides written evidence of this. Lastly, this bill requires copies of executed contingency fee agreements, as well as payment of contingency fees, to be posted on the Department’s website.

This bill appears to have an insignificant fiscal impact.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Attorney General Transparency Code

In September 2007, the American Tort Reform Association (ATRA) proposed new voluntary standards designed to improve government transparency and accountability when state attorneys general hire outside counsel to litigate on behalf of state residents.¹ ATRA proposed various changes including contracts with vendors being posted on the Internet for public inspection, outside counsel on a contingent fee basis disclosing detailed information regarding the hours worked and fees charged, and placing all monies recovered by the Attorney General (AG) into the state treasury for appropriation by the Legislature unless stipulated otherwise.

Florida Cabinet

The Florida Cabinet is made up of three members in addition to the Governor: the AG, the chief financial officer, and the commissioner of agriculture.² Collectively, the Cabinet serves as a board of directors for several state agencies including the departments of Revenue, Highway Safety and Motor Vehicles, Veterans Affairs and the Florida Department of Law Enforcement. In addition, among its many duties, the Cabinet also acts as trustees of public lands. Each Cabinet member serves a four-year term with a two-term limit and is wholly responsible for the administration of at least one state department.³ Meetings of the Governor and Cabinet are noticed, and in the event of a tie vote of the governor and the cabinet, the side on which the governor voted is deemed to prevail.⁴

The Attorney General's Ability to Contract for Private Attorney Services

Current Law

The Department of Legal Affairs provides civil representation and legal services on behalf of the state.

¹ See <http://www.atra.org/newsroom/releases.php?id=8168>. Last accessed on February 11, 2009.

² Article IV, Section 4(a), Florida Constitution.

³ See <http://www.myflorida.com/myflorida/cabinet/cabprocess.html>. Last accessed March, 10, 2009.

⁴ Florida Constitution, *supra* note 2.

Section 287.059, F.S., provides that every state agency⁵ is required to obtain the written approval of the AG as a prerequisite to contracting for private attorney services with specified exceptions, most notably the Executive Office of the Governor.⁶

When an agency requests approval for the use of private attorney services, the agency must first offer to contract with the Department of Legal Affairs for such attorney services at a cost pursuant to mutual agreement.⁷ The AG can, by rule, ask the agency to provide the following information:

- The nature of the services to be provided and the issues involved;
- The need for use of private attorneys rather than staff attorneys;
- The criteria by which the agency selected the private attorney;
- Competitive fees for similar attorney services;
- The agency's analysis estimating the number of hours, the costs, the total contract amount, and a risk or cost-benefit analysis;
- Which partners, associates, paralegals, research associates, or other personnel will be used and how their time will be billed; and
- Any other information which the AG deems appropriate for the proper evaluation of the need for private attorney services.

Agencies are required to use the following statutory criteria when selecting outside firms:

- The magnitude or complexity of the case;
- The firm's ratings and certifications;
- The firm's minority status;
- The firm's physical proximity to the case and the agency;
- The firm's prior experience with the agency;
- The firm's prior experience with similar cases or issues;
- The firm's billing methodology and proposed rate;
- The firm's current or past adversarial position, or conflict of interest, with the agency; and
- The firm's willingness to use resources of the agency to maximize costs.⁸

If the AG declines to provide the requested services through the Department of Legal Affairs, then the AG's written approval must include a statement that the services requested cannot be provided by the office of the Attorney General or that such private attorney services are cost-effective in the opinion of the AG. Once written approval has been received from the AG, the general counsel is required to review the form and legality of the contract and indicate his or her approval by initialing the contract. The contract must also be signed and approved by the agency head, who must maintain custody of the contract.⁹

⁵ Section 287.059(1), F.S., defines "agency" or "state agency" as state officers, department, boards, commissions, divisions, bureaus, councils, and units of organization, however designated, of the executive branch of government, community and junior colleges, and multicounty special districts exclusive of those created by interlocal agreement or which have elected governing boards.

⁶ Section 287.059(2), F.S., provides that written approval from the AG is not required for private attorney services procured by the Executive Office of the Governor, offices under the jurisdiction of the Financial Services Commission, 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, procured by the university and college boards of trustees, procured by community and junior colleges, or procured by the Board of Trustees for the Florida School for the Deaf and the Blind.

⁷ Section 287.059(3), F.S.

⁸ Section 287.059(10), F.S.

⁹ Sections 287.059(4) and (5), F.S.

All agencies are required to use the standard fee schedule when contracting for private attorney services,¹⁰ which schedule has been set by the Department of Legal Affairs in administrative rule. Rule 2-37.030, F.A.C., generally provides for the following fee schedule:

- Specialized attorney¹¹ services may be billed up to \$175 per billable hour¹²;
- All other attorney services may be billed up to \$125 per billable hour;
- All paralegal, legal assistant, law clerk, and research assistant services may be billed at \$40 per billable hour;
- Costs for exhibits, transcripts, and witness fees are not considered a part of the billable hour, but will be reimbursed based upon documented third party vendor charges provided prior authorization is given by the agency;
- Expenses for travel are limited to terms and rates established in s. 112.061, F.S.; and
- Non-routine¹³ office overhead will be reimbursed based upon documented third party vendor charges provided they are justified to the agency.

Alternate billing methodologies including contingency fee contracts, may be used when it is deemed the most cost-effective or appropriate billing methodology.¹⁴ Any agency wishing to exceed the standard fee schedule must demonstrate necessity to the AG through a statement of waiver which must be signed by the agency head.¹⁵ The statement of waiver must demonstrate necessity to exceed the standard fee schedule based on one or more of the following criteria:

- The inability to obtain adequate legal representation within the confines of the standard schedule;
- The agency is unable to obtain attorney services with the special expertise necessary; or
- The waiver is necessary in order to provide attorney services as a result of an emergency, an immediate danger to public health, safety and welfare, or an opportunity for the state to preserve or enhance the public treasury and that failure to contract immediately for services in excess of the standard fee schedule will work to the detriment of the state.¹⁶

Contracts must contain a standard addendum developed by the AG, describing in detail what is expected of both the agency and the contracted attorney.¹⁷ The addendum must address the internal system of governance if multiple law firms are parties to the contract. Contracts must be originally executed for 1 year only, except that multi-year contracts may be entered into providing that they are subject to annual appropriations and annual written approval from the AG.¹⁸ The AG is required to periodically prepare and distribute to all agencies a roster by geographic location of private attorneys under contract with agencies, their fees, and their primary areas of specialization.¹⁹

Proposed Changes

This bill implements several of ATRA's proposed standards for transparency and creates s. 16.0155, F.S., which requires a special procedure regarding contingency fee contracts between the AG and private attorneys. The Department of Legal Affairs is prohibited by this bill from entering into a contingency fee contract with private attorneys unless the AG makes a written determination that

¹⁰ Section 287.059(8), F.S.

¹¹ Rule 2-37.030(1), F.A.C., limits specialized attorney services to admiralty, copyright, patent, trademark, international communications, media, and bond and securities law.

¹² Rule 2-37.030(4), F.A.C., defines "billable hour" as the actual time spent providing attorney services to the agency measured in 6 to 10 minute intervals. Office overhead is included in the billable hour and not separately compensated.

¹³ Rules 2-37.030(4), F.A.C., provides that non-routine overhead includes expenses such as long distance phone charges, facsimile transmissions, bulk mailings, bulk third party copying and computer-assisted legal research.

¹⁴ Rule 2-37.030(5), F.A.C.

¹⁵ Rule 2-37.040, F.A.C.

¹⁶ *Id.*

¹⁷ Section 287.059(11), F.S.

¹⁸ Section 287.059(12), F.S.

¹⁹ Section 287.059(13), F.S.

contingency fee representation is both cost-effective and in the public interest. This bill requires the written determination to include specific findings as to each of the following factors:

- Whether sufficient and appropriate legal and financial resources exist within the department to handle the matter;
- The time and labor required to handle the matter; the novelty, complexity, and difficulty of the questions involved; and the skills required to perform the necessary attorney services adequately;
- The geographic area in which the attorney services are to be provided; and
- The amount of experience desired for the particular kind of attorney services to be provided and the nature of the private attorney's experience with regard to similar issues or cases.

This bill also provides that, notwithstanding the exemption from competitive bidding requirements for the purchase of legal services, the AG is required to request proposals from attorneys to represent the department on a contingency fee basis, unless the AG determines in writing that requesting such proposals is not appropriate under the circumstances. This bill provides that the written determination is not final agency action subject to review or challenge under section 120.569, F.S.,²⁰ and section 120.57, F.S.,²¹ and that the department is exempt from administrative bid protest provisions under section 120.57(3), F.S.

This bill requires executed contingency fee contracts to be posted on the department's website for public inspection within 5 business days after the date of execution, and remain posted for the duration of the contract, including any extensions or amendments. The amount of payment will also be posted on the department's website within 15 days after the date on which payment is made to a private attorney and remain posted for at least 180 days after payment.

Contingency Fees

Current Law

A contingency fee contract is generally defined as an arrangement with an attorney who agrees to accept his or her fee on the contingency of a successful outcome.²² Section 287.059(7), F.S., allows the AG to enter into contingency fee contracts as long as the contract is commercially reasonable. "Commercially reasonable" is statutorily defined to mean no more than the amount permissible pursuant to rule 4-1.5 of the rules regulating The Florida Bar and case law interpreting that rule.

Rule 4-1.5 of the rules regulating The Florida Bar provides that contracts for contingency fees in an action or claim for personal injury or for property damages or for death or loss of services based upon tortious conduct of another may provide for fees as agreed between the client and the lawyer, as limited by the following provisions:

Without prior court approval as specified below, any contingent fee that exceeds the following standards shall be presumed, unless rebutted, to be clearly excessive:

a. Before the filing of an answer or the demand for appointment of arbitrators or, if no answer is filed or no demand for appointment of arbitrators is made, the expiration of the time period provided for such action:

1. 33 1/3% of any recovery up to \$1 million; plus
2. 30% of any portion of the recovery between \$1 million and \$2 million; plus
3. 20% of any portion of the recovery exceeding \$2 million.

²⁰ Section 120.569, F.S., provides an avenue for administrative review of proceedings in which the substantial interests of a party are determined by an agency.

²¹ Section 120.57, F.S., provides an avenue for administrative review of agency action that determines the substantial interests of a party and that is based on an unadopted rule.

²² Black's Law Dictionary, pg. 290, (5th Edition, 1979).

b. After the filing of an answer or the demand for appointment of arbitrators or, if no answer is filed or no demand for appointment of arbitrators is made, the expiration of the time period provided for such action, through the entry of judgment:

1. 40% of any recovery up to \$1 million; plus
2. 30% of any portion of the recovery between \$1 million and \$2 million; plus
3. 20% of any portion of the recovery exceeding \$2 million.

c. If all defendants admit liability at the time of filing their answers and request a trial only on damages:

1. 33 1/3% of any recovery up to \$1 million; plus
2. 20% of any portion of the recovery between \$1 million and \$2 million; plus
3. 15% of any portion of the recovery exceeding \$2 million.

d. An additional 5% of any recovery after institution of any appellate proceeding is filed or post-judgment relief or action is required for recovery on the judgment.

Pursuant to rule 4-1.5(4)(B)(iii) of the rules regulating The Florida Bar Article I, section 26 of the state constitution, provides that in medical liability claims involving a contingency fee, unless waived, the claimant is entitled to receive no less than 70% of the first \$250,000.00 of all damages received by the claimant, exclusive of reasonable and customary costs, whether received by judgment, settlement, or otherwise, and regardless of the number of defendants. The claimant is entitled to 90% of all damages in excess of \$250,000.00, exclusive of reasonable and customary costs and regardless of the number of defendants.

Pursuant to standard fee schedule adopted by the department, the department may contract with private attorneys on a contingency fee basis not to exceed 35% through trial and not to exceed 40% through appeal, where attorney services involve litigation, except collections litigation shall not exceed 30%. The fee schedule further provides that where contingency fees involve non-litigation attorney services, the fee shall not exceed the rate in the market in which the attorney service is being provided.²³

Proposed Changes

This bill provides that a contingency fee contract entered into by the department may not provide for the private attorney to receive an aggregate contingency fee in excess of:

- 25% of any recovery of up to \$10 million; plus
- 20% of any portion of such recovery between \$10 million and \$15 million; plus
- 15% of any portion of such recovery between \$15 million and \$20 million; plus
- 10% of any portion of such recovery between \$20 million and \$25 million; plus
- 5% of any portion of such recovery exceeding \$25 million.

The bill also prohibits an aggregate contingency fee that exceeds \$50 million, exclusive of reasonable costs and expenses, irrespective of the number of lawsuits filed or the number of private attorneys retained to achieve the recovery. However, the bill provides that the proposed contingency fee limits in the bill do not apply when the AG determines, after consulting with the Cabinet, that there are exigent or unusual circumstances or specialized legal knowledge or experience is required, and provides written evidence of this.

Record-keeping Requirements

Current Law

Section 287.059(16), F.S., requires private attorneys who are under contract to provide attorney services to the state or a state agency to maintain detailed current records, including documentation of all expenses, disbursements, charges, credits, underlying receipts and invoices, and other financial transactions that concern the provision of such attorney services. Such records are to be kept from the inception of the contract until at least 4 years after the contract terminates and are required to be available for inspection and copying upon request in accordance with chapter 119.

Proposed Changes

The bill requires that in addition to these statutory requirements, any private attorney must keep contemporaneous time records with regard to work performed on the matter by any attorneys or paralegals in increments of no greater than one-tenth of an hour. These records must be provided promptly upon request by the department.

B. SECTION DIRECTORY:

Section 1 creates s. 16.0155, F.S., regarding contingency fee agreements between state entities and private attorneys.

Section 2 provides an effective date of July 1, 2009.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The Department of Legal Affairs legislative staff indicates that the department is not currently a party to any contingency fee contracts as contemplated by this bill, nor are they aware of the department ever having approved such a contract. It appears that this bill has an insignificant fiscal impact.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to require counties or cities to: spend funds or take action requiring the expenditure of funds; reduce the authority of counties or cities to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or cities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

On March 10, 2009, the Criminal & Civil Justice Policy Council (CCJPC) adopted an amendment to the original bill and then reported the bill favorably. The amendment provided that the proposed limits on aggregate contingency fees do not apply when the AG determines, after consulting with the Cabinet, that there are exigent or unusual circumstances or specialized legal knowledge or experience is required, and provides written evidence of this. This analysis is drafted to the council substitute adopted by CCJPC.