

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 7039 PCB CJS 14-03 Unlicensed Practice of Law

SPONSOR(S): Civil Justice Subcommittee; Hill

TIED BILLS: **IDEN./SIM. BILLS:** SB 1496

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Civil Justice Subcommittee	12 Y, 0 N	Cary	Bond
1) Judiciary Committee		Cary	Havlicak

SUMMARY ANALYSIS

The unlicensed practice of law is prohibited in Florida. There are two means for enforcement: civil action governed by court rules and a statutory third-degree felony criminal penalty.

The bill lists activities that are not considered a violation of the criminal statute regarding the unlicensed practice of law. Specifically, the list includes:

- Pro se representation;
- Serving as a mediator or arbitrator;
- Providing services under the supervision of a lawyer in compliance with the Rules of Professional Conduct of the Florida Bar;
- Providing services authorized by court rule;
- Acting within the lawful scope of practice of a business or profession regulated by the state;
- Giving legal notice in the form and manner required by law, except where such notice is required as part of a court proceeding or required by court rule; and
- Representation before a legislative body, committee, commission or board.

The bill does not appear to have a fiscal impact on state or local governments.

The bill provides an effective date of July 1, 2014.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

The Florida Constitution grants the Supreme Court the “exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted.”¹ The Florida Supreme Court regulates the unlicensed practice of law (UPL) by court rule. Chapter 10 of the Rules Regulating the Florida Bar (Rules) governs the investigation and prosecution of UPL. According to the Court, “pursuant to the provisions of article V, section 15, of the Florida Constitution, the Supreme Court of Florida has inherent jurisdiction to prohibit the unlicensed practice of law.”² The Supreme Court has delegated to the Florida Bar “the duty of considering, investigating, and seeking the prohibition of matters pertaining to the unlicensed practice of law and the prosecution of alleged offenders.”³

Neither court rule nor statute specifically defines the practice of law. Similarly, neither lists in general what activities constitute the unlicensed practice of law, nor activities authorized. The definition of the practice of law has developed from case law and from the few advisory opinions that examine specific businesses or professions.⁴

The seminal case regarding what is the unlicensed practice of law in Florida dates back to 1950.⁵ Leading up to the decision, the Dade County Bar Association had obtained an injunction in the Circuit Court prohibiting real estate brokers or agents from drafting or filling in blank deeds, contracts, notes, leases, rental contracts, mortgages (or satisfaction of mortgages), options and other legal instruments used in the real estate business. The Supreme Court partially reversed the Circuit Court, holding that certain activities belong within the sphere of activity of a real estate broker or agent, even if that involves the broker drafting legal instruments. However, the Court also held that certain activities belong within the sphere of the lawyer, primarily the consummation of the sale through the exchange of permanent instruments. The opinion looked to the Florida Statutes in determining the scope of activities in which real estate brokers and agents may operate.⁶

Since 1950, through case law and advisory opinions, the Court has continued to define the boundaries of the unlicensed practice of law. Whether the activities of a nonlawyer are the unlicensed practice of law is not always apparent. Some examples of activities that have been decided are:

- A real estate agent may fill out the court-approved residential lease form on behalf of a landlord.⁷
- A non-lawyer property manager may prepare an eviction notice and an uncontested residential eviction on behalf of a landlord, but may not file a complaint for eviction or motion for default in the court.⁸

¹ FLA.CONST., Art. V, Sec. 15. This section originated from the 1956 amendment to Article V of the 1885 Constitution (Art. V, Sec. 23) and provided that the Supreme Court had exclusive jurisdiction over the admission and discipline of attorneys.

² Florida Bar Rule 10-1.1. See also *The Florida Bar v. Flowers*, 320 So.2d 809, 809 (Fla. 1975).

³ Florida Bar Rule 10-1.2.

⁴ There are 9 advisory opinions covering 8 professions, the first in 1988 and the last in 1997. There are 2 pending opinions, one related to Community Association Managers (CAMs) and the other related to Medicaid Planning Activities. See

<http://www.floridabar.org/tfb/TFBLawReg.nsf/9dad7bbda218afe885257002004833c5/34fac28eda9ca382852579ac006aff21!OpenDocument#FAORequestReMedicaidPlan> (last accessed on January 21, 2014).

⁵ *Keyes Co. v. Dade County Bar Ass’n*, 46 So.2d 605 (Fla. 1950).

⁶ *Id.* at 606.

⁷ *The Florida Bar re: Advisory Opinion – Nonlawyer Preparation of Residential Leases up to One Year in Duration*, 602 So.2d 914 (Fla. 1992).

⁸ *The Florida Bar re Advisory Opinion – Nonlawyer Preparation of and Representation of Landlord in Uncontested Residential Evictions*, 627 So.2d 485 (Fla. 1993).

- A non-lawyer may not prepare a living trust document,⁹ but a non-lawyer may prepare a pension plan.¹⁰
- A title insurance agent may prepare an abstract, deed, mortgage and other real property transfer documents.¹¹

Other areas not formally decided in case law include:

- Lenders prepare liens and mortgages.¹²
- Accountants advise persons on tax and business matters.¹³

In addition to the civil penalties created in the Rules, s. 454.23, F.S., is the statutory criminal offense for the unlicensed practice of law. It provides:

Any person not licensed or otherwise authorized to practice law in this state who practices law in this state or holds himself or herself out to the public as qualified to practice law in this state, or who willfully pretends to be, or willfully takes or uses any name, title, addition, or description implying that he or she is qualified, or recognized by law as qualified, to practice law in this state, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

The offense is classified as a third-degree felony, which is punishable by up to five years imprisonment and a \$5,000 fine.¹⁴

Activities prohibited by this statute include taking a deposition¹⁵ and appearing pro se on behalf of a trust.¹⁶ According to a Florida appellate court, "the definition of the practice of law in Florida is not confined to the language in section 454.23, but, rather, is shaped by the decisional law and court rules as well as common understanding and practices."¹⁷

As of January 6, 2014, there have been 286 civil cases opened for fiscal year 2014 across the state by the Florida Bar for the unlicensed practice of law. In 2013, there were 550 cases; in 2012, there were 714 cases, and in 2011, there were 655 cases.¹⁸ While enforcement of the unlicensed practice of law by the Florida Bar is civil in nature, a court may find a person guilty of indirect criminal contempt, punishment for which is a fine of up to \$2500 and up to 5 months imprisonment, or both.¹⁹

There have been 14 people arrested in the last two years for the criminal unlicensed practice of law.²⁰

Effect of Proposed Changes:

⁹ *The Florida Bar re Advisory Opinion – Nonlawyer Preparation of Living Trusts*, 613 So.2d 426 (Fla. 1992).

¹⁰ *The Florida Bar re Advisory Opinion – Nonlawyer Preparation of Pension Plans*, 571 So.2d 430 (Fla. 1990).

¹¹ *Cooperman v. West Coast Title Co.*, 75 So.2d 818, 821 (Fla. 1954) ("So we decide that what the companies do to inform themselves about the advisability of issuing a commitment and what they do to accomplish a transfer of a title or interest of such kind that a policy of title insurance is warranted are not services the performance of which amount to unauthorized practice of law.").

¹² Whether this activity is the unlicensed practice of law is currently unresolved. See *Goldberg v. Merrill Lynch Credit Corp.*, 35 So.3d 905 (Fla. 2010).

¹³ There is no formal advisory opinion regarding the scope of practice of accountants and at what point an accountant may be engaging in the unlicensed practice of law.

¹⁴ Sections 775.082 and 775.083, F.S.

¹⁵ *State v. Foster*, 674 So.2d 747 (Fla. 1st DCA 1996).

¹⁶ *EHQF Trust v. S & A Capital Partners, Inc.*, 947 So.2d 606 (Fla. 1st DCA 2007).

¹⁷ *Foster* at 750-51.

¹⁸ Information provided by the Florida Bar by email to Civil Justice Committee staff. (On file with the Civil Justice Subcommittee.)

¹⁹ Florida Bar Rule 10-7.2.(f).

²⁰ Information provided by the Florida Department of Law Enforcement by email to Civil Justice Subcommittee staff. (On file with the Civil Justice Subcommittee.)

The bill amends s. 454.23, F.S., to better define the offense of the unlicensed practice of law by listing activities that do not constitute the unlicensed practice of law. That list includes:

- Pro se representation;
- Serving as a mediator or arbitrator;
- Providing services under the supervision of a lawyer in compliance with the Rules of Professional Conduct of the Florida Bar;
- Providing services authorized by court rule;
- Acting within the lawful scope of practice of a business or profession regulated by the state;
- Giving legal notice in the form and manner required by law, except where such notice is required as part of a court proceeding or required by court rule; and
- Representation before a legislative body, committee, commission or board.

In general, these exceptions do not constitute a substantive change to existing law. Rather, this list of exceptions is a codification of existing rules, case law, and practice already recognized by the Court.

B. SECTION DIRECTORY:

Section 1 amends s. 454.23, F.S., relating to unlicensed practice of law, definitions, and penalties.

Section 2 provides an effective date of July 1, 2014.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

A conviction under s. 454.23, F.S., may include a fine of up to \$5,000. There are very few convictions under this statute, and since the bill codifies existing court rules and/or case law, the bill is not expected to impact the number of arrests or convictions under this statute.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

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.

The bill does not affect civil enforcement by the Florida Bar. It will only affect criminal prosecutions for the unlicensed practice of law.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 5, 2014, the Civil Justice Subcommittee adopted one amendment and reported the bill favorably. The amendment made grammatical and style changes to the text. This analysis is drafted to the bill as passed by the Civil Justice Subcommittee.