

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 225 Self-Authentication of Documents

**SPONSOR(S):** Civil Justice Subcommittee; Fitzenhagen

**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 352

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	13 Y, 0 N, As CS	Malcolm	Bond
2) Justice Appropriations Subcommittee			
3) Judiciary Committee			

### SUMMARY ANALYSIS

Evidence, such as a document, must be authenticated before it can be admitted in the course of litigation. Florida law currently considers a number of documents, such as a certified copy of an official public record, to be self-authenticating and thus admissible without further proof of authenticity.

The bill provides a process for the self-authentication of court filings and government records available on the internet. The party seeking to authenticate a government record available on the internet must provide notice to other parties who may object to the authenticity of the document. The process for self-authenticating online government records does not prohibit a party from authenticating a document under current law.

The bill also provides that a certified copy of a self-authenticating, official public record may be filed electronically.

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

The bill provides that it is effective upon becoming law.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Authentication of Documents**

Section 90.901, F.S., requires that potential evidence, including documents, be authenticated before it may be admitted into evidence in a court proceeding. To authenticate a document, the proponent must provide prima facie evidence showing that the proffered document is what the proponent claims.<sup>1</sup> A trial court's determination of authenticity does not mean that the court has ruled that the proffered evidence is genuine; the opposing party may challenge its genuineness, and the jury will ultimately determine as a matter of fact whether the document is genuine.<sup>2</sup> An authenticated document remains subject to inadmissibility under any exclusionary rule, such as the hearsay rule.<sup>3</sup>

##### *Authentication of Electronic Records and Websites*

Like other evidence, electronic records and website contents must be authenticated with extrinsic evidence of authenticity before being admitted into evidence.<sup>4</sup> Generally, an electronic record may be authenticated by the testimony of a person who created the record, another person who witnessed the record being composed and transmitted, or circumstantial evidence, such as appearance, contents, and distinctive characteristics of the evidence.<sup>5</sup> To authenticate a printout of a website, it is not enough to prove that the printout of the website is accurate; rather, there must be prima facie evidence that the contents of the site are authentic and that the purported contents of the website as indicated on the printout were what appeared on the website on the relevant date.<sup>6</sup> To authenticate printouts from a website, "the party proffering the evidence must produce 'some statement or affidavit from someone with knowledge of the website, for example a web master or someone else with personal knowledge would be sufficient.'"<sup>7</sup>

##### *Self-Authenticating Documents*

Section 90.902, F.S., sets forth a list of documents that are considered self-authenticating; that is, the document has sufficient guarantees of genuineness and is admissible into evidence without proof of extrinsic evidence of authenticity.<sup>8</sup> Documents considered to be self-authenticating under s. 90.902, F.S., include documents bearing official seals of governments, copies of official public records, documents issued by governmental authorities, newspapers, and commercial papers as provided in the Uniform Commercial Code.

##### **Effect of Proposed Changes**

The bill amends s. 90.902, F.S., to provide a process for the self-authentication of certain government records available on the internet. Specifically, the bill provides that a party may file a copy of any pleading, order, or other filing from any court in the United States or United States territory as well as any document or record filed with or retained by a local, state, territorial, or federal governmental agency that is available to the public from a website authorized or run by a governmental agency. The

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<sup>1</sup> Charles W. Ehrhardt, *FLORIDA EVIDENCE*, § 901.1 (2015 ed.).

<sup>2</sup> *Pace v. State*, 854 So. 2d 167, 182 (Fla. 2003) (quoting Ehrhardt at § 901.1).

<sup>3</sup> Ehrhardt at § 901.1 (citing *Acre v. Wackenhut Corp.*, 40 So. 3d 813, 816 (Fla. 3d DCA 2010); *Dollar v. State*, 685 So. 2d 901, 903 (Fla. 5th DCA 1996)).

<sup>4</sup> *Id.* at § 901.1a.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *St. Luke's Cataract & Laser Inst., P.A. v. Sanderson*, 2006 WL 1320242, 70 Fed. R. Evid. Serv. 174 (M.D. Fla. 2006).

<sup>8</sup> Ehrhardt, at § 902.1. The provisions of s. 90.902, F.S., regarding self-authentication are available as an alternative to introducing evidence to meet the authenticity requirements of s. 90.901, F.S. Therefore, if a document fails to meet the requirements of one of the requirement of s. 90.902, F.S., and cannot be self-authenticated, then it may be authenticated under other procedures for authentication. *Id.*

party seeking to authenticate the record must file a Notice of Reliance on Electronic Records (Notice) that includes a copy of the document to be authenticated, discloses the website and web address where the document can be located, and serve the Notice not less than 20 days before a hearing at which the authenticity of the document or its acceptance by a court as authentic is at issue. The court may waive or shorten the time period for filing the Notice.

A party may object to the authenticity of the document by filing and serving on every party an affidavit challenging the authenticity of the document by attaching a copy of what the challenging party asserts is the authentic document, and detailing in writing the portion of the challenged document which is not authentic; or by asserting that the document does not exist on the website as indicated in the Notice of Reliance on Electronic Records.

After the court reviews the document, the court must deem the document authentic unless:

- the Notice does not satisfy the statutory requirements;
- an objection is filed and the court sustains the objection;
- the document does not have the same content or text, in all material respects, as the document that appears on the website identified in the Notice; or
- the court otherwise determines the document is not authentic.

The process established by the bill for authenticating online government records does not prohibit a party from authenticating a document under s. 90.901, F.S., or as otherwise provided in s. 90.902(4), F.S., which are current methods of authentication.

### **Electronic Filing of Court Documents**

Section 28.22205, F.S., requires each clerk of court to implement an electronic filing process (known as e-filing). According to the Florida Bar, all clerks of court in Florida now require all court documents to be filed electronically.<sup>9</sup> Because of this e-filing requirement, some clerks will not accept a physical certified copy of a document into the court file as contemplated by s. 90.902, F.S., thus hindering a party's ability to file self-authenticating public records with the court.<sup>10</sup>

The bill amends s. 90.902(4), F.S., to provide that a certified copy of a self-authenticating, official public record may be filed electronically.

The bill also updates cross-references and provides that it is effective upon becoming law.

#### **B. SECTION DIRECTORY:**

Section 1 amends s. 90.902, F.S., related to self-authentication.

Section 2 amends s. 90.803, F.S., related to hearsay exceptions; availability of declarant is immaterial.

Section 3 provides that the bill is effective upon becoming law.

## **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:**

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<sup>9</sup> Real Property, Probate, and Trust law Section of the Florida Bar, *White Paper, Proposed changes to Fla. Stat. 90.902, concerning authentication of electronic records*, 1 (on file with the Civil Justice Subcommittee).

<sup>10</sup> *Id.*

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:**

None.

**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:

There is a balance between the powers of the Legislature and the Florida Supreme Court on matters relating to evidence. The Legislature has enacted and continues to revise ch. 90, F.S. (the Evidence Code), and the Florida Supreme Court tends to adopt these changes as rules. The Florida Supreme Court regularly adopts amendments to the Evidence Code as rules of court when it is determined that the matter is procedural rather than substantive. If the Florida Supreme Court views the changes in this bill as an infringement upon the Court's authority over practice and procedure, it may refuse to adopt the changes in the bill as a rule.<sup>11</sup>

**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 November 3, 2015, the Civil Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment provides that a party seeking to authenticate a court filing available on a government website must comply with the same notice and procedural requirements applicable to other online government documents referred to in the bill. The amendment also provides that a court may determine a document is not authentic irrespective of whether a party has filed an affidavit objecting to the document's authenticity. This analysis is drafted to the committee substitute as passed by the Civil Justice Subcommittee.

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<sup>11</sup> See, e.g., *In re Florida Evidence Code*, 782 So.2d 339 (Fla. 2000) (Florida Supreme Court adopting Evidence Code to the extent it is procedural and rejecting hearsay exception as a rule of court); compare *In re Florida Evidence Code*, 372 So.2d 1369 (Fla. 1979) (Florida Supreme Court adopting Florida Evidence Code to the extent it is procedural), clarified, *In re Florida Evidence Code*, 376 So.2d 1161 (Fla. 1979).