SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: SB 174

SPONSOR: Senator Grant

SUBJECT: Political advertising

DATE: January 6, 1999 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Fox	Bradshaw	EE	Favorable
2.			CJ	
3.				
4.				
5.				

I. Summary:

This bill provides that any person who willfully charges a candidate with a violation of the election code, when the person knows that such charge is false or malicious, commits a felony of the third degree. Such person is disqualified from holding office until the restoration of the person's civil rights.

Senate Bill 174 also provides that any person who, in any election, makes or causes to be made any statement about a candidate which:

- he or she knows, or reasonably should know, is false; or,
- was made in *negligent disregard* for the truth,

commits a violation of the election code, and is personally liable for damages.

This bill substantially amends section 104.271 of the Florida Statutes.

II. Present Situation:

Subsection (1) of s. 104.271, F.S., currently provides that a *candidate* who willfully charges an opposing candidate with a violation of the election code, which charge is known by the candidate making the charge to be false or malicious, is guilty of a felony of the third degree.

Subsection (2) of s. 104.271, F.S., currently provides that a *candidate* who, in any election, with *actual malice*, makes or causes to be made any statement about an opposing candidate which is false commits a violation of the election code, subject to a civil penalty of up to $5,000.

III. Effect of Proposed Changes:

The bill expands the scope of coverage of subsection (1) of s. 104.271, F.S., to provide that any *person* who willfully charges a candidate with a violation of the election code, which charge is known by the person making such charge to be false or malicious, commits a felony of the third degree.

Senate Bill 174 also expands the scope of subsection (2) of s. 104.271, F.S., to provide that any *person* who makes or causes to be made any statement about a candidate which he or she knows, or reasonably should know, is false, or which was made in *negligent disregard* for the truth, commits a violation of the election code. The bill makes the violator personally liable for civil damages up to $5,000 per violation.

Expanding the scope of coverage to subject all persons, not just candidates, to liability for "political defamation," and making violators personally liable for civil fines are both recommendations contained in a Report by the Florida House of Representatives Ethics and Elections Committee, entitled *Deceptive and False Advertising in the Political Process* (December 1995).

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Senate Bill 174 reduces the culpability requirement applicable to so-called "political defamation" and speech involving public figures. There is a well-established body of federal case law on this issue grounded on the free speech clause of the U.S. Constitution.

The landmark defamation case in regulating the content of political speech is *New York Times v. Sullivan*, 376 U.S. 254 (1964). In *New York Times*, an elected official brought a libel suit against the *New York Times* for publishing an article which allegedly misrepresented the official's activities. The Court held that in order to establish libel or slander against a public figure the plaintiff must not only prove that a false statement was made, but also that such statement was made with "actual malice." In order to show "actual malice," the public figure must prove that the defendant *knew* that his or her statement was false, or that the statement was made with *reckless disregard* as to its truth or falsity.

In 1968, the Supreme Court elaborated on the "reckless disregard" component of the actual malice standard. In *St. Amant v. Thompson*, 390 U.S. 727 (1968), a candidate for political office falsely charged another public official with criminal conduct during a television interview. The Court ruled that "reckless disregard cannot be shown by proof of mere negligence." To find reckless disregard, "there must be sufficient evidence to permit the conclusion that the defendant *in fact* entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for the truth and demonstrates actual malice." (emphasis added)

"[A]ny state regulation of campaign speech must be premised on proof and application of a [*New York*] *Times* 'actual malice' standard." *See Vanasco v. Schwartz*, 401 F.Supp. 87, 92 (S.D.N.Y. 1975), *summarily aff'd*., 423 U.S. 1041 (1976) (invalidating New York statute which prohibited any attacks on a candidate's race, sex, religion, or ethnic background, as well as misrepresentations of any candidate's qualifications, position, or party affiliation); *but see, State of Washington v. 119 Vote No! Committee*, 957 P.2d 691, 695 (Wash. 1998) (State possesses *no independent right* to determine truth or falsity in political debate; the First Amendment insures that the public decide what is true or false with respect to governance).

The U.S. Supreme Court has consistently applied the *New York Times* actual malice standard in defamation cases since its creation in 1964. See, e.g., *Garrison v. Louisiana*, 379 U.S. 64 (1964), *overruled on other grounds sub nom., Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Herbert v. Lando*, 441 U.S. 153 (1979); *Bose Corp. v. Consumers Union of the U.S., Inc.*, 466 U.S. 485 (1984); *McDonald v. Smith*, 472 U.S. 479 (1985); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989); and, *Masson v. New Yorker Magazine*, 501 U.S. 496 (1991).

Senate bill 174 seeks to modify the "actual malice" standard found in *New York Times v. Sullivan*, and progeny.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The changes contemplated in this bill will likely result in additional cases being brought by the Florida Elections Commission; however, the precise number and costs of additional cases are indeterminate.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.