

# 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 2186

SPONSOR: Senator Dyer

SUBJECT: Government Accountability

DATE: April 25, 2000 REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>White</u>	<u>Wilson</u>	<u>GO</u>	<u>Fav/1 amendment</u>
2.	_____	_____	<u>EE</u>	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

## I. Summary:

The bill provides that any contract entered into in violation of Part III of ch. 112, F.S., which provides a code of ethics for public officers and employees, is presumed void with respect to any former employee of a state agency and is voidable with respect to any private-sector third party who employs or retains any former agency employee. The bill requires the general counsel of an agency to review and approve a contract for private attorney services prior to execution by the agency head. Additionally, the bill requires a contingency fee contract to be “commercially reasonable” and defines that term. The bill also requires the standard addendum that must be part of state contracts for private attorney services to address the internal system of governance if multiple law firms are parties to the contract and to identify the member of the firm that can legally bind the firm. The bill also requires each private attorney who is under contract with the state to provide attorney services to maintain current records and to make such records available pursuant to the public records law.

This bill amends the following sections of the Florida Statutes: 11.06, 112.3175, 112.3185, 287.058, and 287.059.

## II. Present Situation:

Section 11.066, F.S., relates to suits seeking monetary damages against the state or state agencies. Section (2) of the section provides that when the state or a state agency is exercising its inherent police power to protect the public health, safety, or welfare, it is presumed to be acting to prevent a public harm. A person may rebut this presumption in a suit seeking monetary damages from the state or a state agency only by clear and convincing evidence to the contrary.

Neither the state or a state agency is required to pay monetary damages under the judgment of any court except pursuant to an appropriation made by law.<sup>1</sup> To enforce a judgment for monetary damages against the state or a state agency, the sole remedy of the judgment creditor, if there has not otherwise been an appropriation made by law to pay the judgment, is to petition the Legislature in accordance with its rules to seek an appropriation to pay the judgment.

Section 11.066(4), F.S., provides that, notwithstanding s. 74.091, F.S., a judgment for monetary damages against the state or any of its agencies may not be enforced through execution or any common-law remedy against property of the state or its agencies, and a writ of execution therefor may not be issued against the state or its agencies. Further, it is a defense to an alternative writ of mandamus issued to enforce a judgment for monetary damages against the state or a state agency that there is not appropriation made by law to pay the judgment.

Chapter 112, F.S., outlines general provisions affecting public officers and employees. Part III of the chapter contains a code of ethics for public officers and employees. Under s. 112.3175, F.S., any contract which has been executed that contains provisions in violation of this code is voidable by any party to the contract or in circuit court, by any appropriate action, by the Ethics Commission, the Attorney General, or any citizen materially affected by the contract and residing in the jurisdiction represented by the officer or agency entering into such contract.

Section 112.3185, F.S., prohibits any agency employee, after retirement or termination, from having or holding any employment or contractual relationship with any business entity other than an agency in connection with any contract in which the agency employee participated personally and substantially through decision, approval, disapproval, recommendation, rendering of advice, or investigation while an officer or employee.

Section 287.058(1), F.S., requires every procurement of contractual service in excess of the threshold amount for Category Two,<sup>2</sup> except for provision of health and mental health services or drugs in the examination, diagnosis, or treatment of sick or injured state employees or other specified benefits, must be evidenced by a written agreement embodying all provisions and conditions of the procurement of such services. The section includes a number of specific conditions which must be included in the contract if applicable.

Section 287.059, F.S., regulates the provision of private attorney provisions by the state or state agencies. The section prohibits an agency from contracting for private attorney services without prior written approval of the Attorney General. There are, however, exceptions to obtaining prior written approval of the Attorney General. Exceptions include private attorney services:

- ▶ Procured by the Executive Office of the Governor or any department under the exclusive jurisdiction of a single cabinet officer.

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<sup>1</sup>Section 11.066(1), F.S., defines “appropriation made by law” to have the same meaning as in Art. VII, s. 1(c) of the State Constitution and means money allocated for a specific purpose by the Legislature by law in a general appropriations act or a special appropriations act.

<sup>2</sup>The purchasing category thresholds, which are provided in s. 287.012, F.S. (1998 Supp.), are as follows: (a) Category One is \$5,000; (b) Category Two is \$15,000; (c) Category Three is \$20,000; (d) Category Four is \$60,000; and (e) Category Five is \$120,000.

- ▶ Provided by legal services organizations to indigent clients.
- ▶ Necessary to represent the state in litigation involving the Florida Casualty Insurance Risk Management Trust Fund pursuant to part II of ch. 284, F.S.
- ▶ Procured by the Board of Regents and the universities of the State University System.
- ▶ Procured by community and junior colleges and multicounty special districts.

Under the section, an agency requesting approval for the use of private attorney services must first offer to contract with the Department of Legal Affairs for such attorney services at a cost pursuant to mutual agreement. That office must decide on a case-by-case basis to accept or decline to provide such services. If the Attorney General's office declines to provide the requested services, the Attorney General's written approval must include a statement that the private attorney service requested cannot be provided by the Attorney General's office or that the private attorney services are cost-effective in the opinion of the Attorney General.

When written approval has been received from the Attorney General, written final approval must be obtained from the agency head (or a designee) prior to contracting for private attorney services. Where approval is not needed from the Attorney General, the agency head or a designee must give written approval prior to contracting.

The Attorney General is required by law to adopt a rule setting forth a standard fee schedule for private attorney services using hourly rates or an alternative billing methodology. In setting the fee schedule, the Attorney General is required to consider:

- ▶ The type of controversy involved and complexity of the legal service needed.
- ▶ The geographic area where the attorney services are to be provided.
- ▶ The novelty of the legal questions involved.
- ▶ The amount of experience desired for the particular kind of attorney services to be provided.
- ▶ Other factors deemed appropriate by the Attorney General.

Pursuant to the section, all agencies must use the standard fee schedule for private attorney services as established by the statute and rule unless the head of the agency or a designee, waives use of the schedule and sets forth the reasons for deviating from the schedule in writing to the Attorney General. The waiver must demonstrate the necessity based upon criteria for deviation from the schedule which the Attorney General establishes in rule.

The standard fee schedule is contained in Rule 2-37.030, F.S. Section (1) of the rule permits “specialized attorney services”<sup>3</sup> to be billed up to \$175 per hour. All other attorney services may be billed up to \$125 per hour. Costs for paralegal and other research assistants may be billed at up to \$40 per hour. Exhibits, transcripts, and witness fees are not considered a part of the billable hour, but are reimbursed based upon documented third party vendor charges to the contract attorney.

Rule 2-37.040, F.A.C., contains a procedure for obtaining an exception to the standard fee schedule. Any agency wishing to exceed the standard fee schedule for attorney services must demonstrate necessity for such action to the Attorney General through a statement of waiver which must be signed by the appropriate agency head or designee. Specified waiver criteria include:

- ▶ The inability of the agency to obtain adequate legal representation within the confines of the standard fee schedule. A detailed statement describing agency efforts at procurement must be provided.
- ▶ The agency is unable to obtain attorney services with the special expertise necessary to perform the particular legal function which the agency requires within the fee schedule. A detailed statement describing why special expertise is necessary in the agency’s particular circumstance, the analysis which led it to that conclusion, and the reasons why the agency was unable to find such expertise at a price within the standard fee schedule, must be provided.
- ▶ The waiver is necessary in order to provide attorney services as a result of an emergency, an immediate danger to the public health, safety and welfare, or an opportunity for the state to preserve or enhance the public fiscal resources, and that failure to contract immediately for attorney services in excess of the standard fee schedule will work to the detriment of the state. A detailed statement describing the emergency, danger or opportunity in question, any efforts at procurement or attorney services within the standard fee schedule and the reasons why such efforts failed, or a justification why the emergency, danger or opportunity required immediate contracting in excess of the standard fee schedule, must be provided.

Standards for determining when to select outside legal firms for attorney services are also contained in the section. Included among the standards are the magnitude of the case, the firm’s ratings and certifications, the firm’s minority status, and the firm’s prior experience with the agency.

The Attorney General is required by law to develop a standard addendum to every contract for attorney services that must be used by all agencies, unless waived by the Attorney General. The addendum must describe in detail what is expected of both the contracted private attorney and the contracting party.

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<sup>3</sup>“Specialized attorney services” are limited to admiralty, copyright, patent, trademark, international, communications, media, bond and securities law (including litigation and other services normally performed by such counsel).

Contracts for attorney service are limited to an initial period of 1 year only. Multiyear contracts may be entered into if they are subject to annual appropriations and annual written approval from the Attorney General.

### III. Effect of Proposed Changes:

The bill adds to s. 11.066, F.S., a section that provides that the property of the state or a state agency, or any monetary recovery made on behalf of the state or any state agency, is not subject to a lien of any kind, and a person may not institute an action on any such lien unless expressly authorized by law.

The bill modifies section and paragraph numbers in s. 112.3175, F.S., and adds a new subsection (2) that provides that any contract executed in violation of the code of ethics is presumed void with respect to any former employee of the state and is voidable with respect to any private-sector third party who employs or retains in any capacity any such former agency employee.

Section 112.3185, F.S., is amended to provide that agency employees who resign their positions with the agency are precluded from having any employment or contractual relationship with any business entity other than an agency in connection with any contract in which the agency employee participated personally and substantially through decision, approval, disapproval, recommendation, rendering of advice, or investigation while an officer or employee. Currently, only agency employees who retire or are terminated are included within the prohibition.

Section 287.058, F.S., is amended to clarify the wording relating to unilateral cancellation by an agency when the contractor fails to permit inspection of documents subject to the provisions of ch. 119, F.S.

Section 287.059, F.S., is amended to require the general counsel for the agency to review the form and legality of the contract for private attorney services and to indicate his or her approval by signing the contract. The agency head is still required to sign the contract, but not until after the general counsel has approved it.

The bill creates a new subsection (7), which relates to contingency fee contracts for attorney services. Under the new subsection, a contingency fee contract must be “commercially reasonable.” The term “commercially reasonable” is defined to mean a reasonable fee that does not exceed:

- ▶ Thirty percent of any recovery of an amount less than \$2 million.
- ▶ Twenty percent of any recovery of an amount equal to \$2 million but less than \$10 million.
- ▶ Ten percent of any recovery of an amount equal to \$10 million or greater.

The bill provides that if the amount of the fee is in dispute, the counsel retained by the state is required to participate in mandatory, binding arbitration. Payment of all attorney’s fees is subject to appropriation. The bill also provides that attorney’s fees must be forfeited if, during the

pendency of the case, the counsel retained by the state takes a public position that is adverse to the state's litigation or settlement posture.

Further, the bill modifies subsection (10), which is renumbered as subsection (11), which relates to the standard addendum to every contract for attorney services that the Attorney General has adopted for use by all agencies. The addendum is now required to address the internal system of governance if multiple law firms are parties to the contract and must, at a minimum, require that each firm identify one member who is authorized to legally bind the firm.

The bill also creates a new subsection (16) that requires each private attorney who is under contract to provide attorney services for the state 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. The section clarifies that these records are subject to the requirements of ch. 119, F.S.

#### **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:**

Indeterminable; however, in cases where a private attorney or law firm has entered into a contract with the state or a state agency, there will be clearer standards regarding contingency fee amounts that are authorized and these fee amounts will be diminished.

##### **C. Government Sector Impact:**

Indeterminable; however, in cases where the state or a state agency enters into a contract with the state or a state agency, there will be clearer standards regarding contingency fee amounts that are authorized and a greater percentage of any monetary award should be paid to the state.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

The Attorney General publishes a roster of private law firms that lists the specialty of the firm, the hourly rate, and reference to an agency that has obtained services from the firm.

**VIII. Amendments:**

#1 by Governmental Oversight and Productivity:

Redefines “commercially reasonable” to mean a fee which does not exceed the amount permitted by Rule 4-1.5 of the Rules Regulating the Florida Bar. Instead of citing this rule, the bill specified the fee limits currently provided in that rule. Thus, under the amendment, the statute will always be current with the rule’s provisions.

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

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