

**STORAGE NAME:** h0415a.jo.doc  
**DATE:** March 20, 2001

**HOUSE OF REPRESENTATIVES  
COMMITTEE ON  
JUDICIAL OVERSIGHT  
ANALYSIS**

**BILL #:** HB 415  
**RELATING TO:** Civil Immunity/Lawyer Assistance Programs  
**SPONSOR(S):** Representative Kyle  
**TIED BILL(S):** None

**ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:**

- (1) JUDICIAL OVERSIGHT YEAS 9 NAYS 1
  - (2) SMARTER GOVERNMENT
  - (3)
  - (4)
  - (5)
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I. SUMMARY:

HB 415 creates civil immunity for persons who report information to Florida Lawyers Assistance, Inc. or other lawyer assistance programs, provided that the information is provided in good faith and without malice. The bill creates a presumption of good faith and lack of malice and places the burden on the plaintiff to show lack of good faith and malice. The bill further provides that information provided to the lawyer assistance programs is subject to the attorney-client privilege and provides that records and proceedings of lawyer assistance programs are confidential unless they are available as business records.

The bill takes effect upon becoming law.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- |                                   |                              |                             |   |
|-----------------------------------|------------------------------|-----------------------------|---|
| 1. <u>Less Government</u>         | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u>             | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u>      | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u>      | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

Florida does not currently have a specific statute to provide civil immunity for persons who provide information about lawyers who might be impaired by drug or alcohol addiction to lawyer assistance programs. The Florida Bar has created Florida Lawyers Assistance, Inc., to help impaired lawyers in their recovery.

Florida Lawyers Assistance's website describes the corporation as follows:

Florida Lawyers Assistance, Inc. is a non-profit corporation independent of, but funded in part, by The Florida Bar in response to the Florida Supreme Court's mandate that the Bar create or fund a program to identify and offer assistance to its members. Paramount to FLA is the protection of confidentiality for those attorneys who contact FLA for help. Confidentiality in voluntary cases is protected by Bar Rule 3-7.1(o), as well as by a written contract with The Florida Bar which guarantees the confidentiality of FLA records. Judges, attorneys, law students, and support personnel who seek the assistance of FLA need not worry that FLA will report them to the Bar, the Board of Bar Examiners, or their employer. Information is shared with these entities only if the participating individual signs a waiver of confidentiality. FLA's primary purpose is to assist the impaired attorney in his or her recovery.

FLA's Mission

Florida Lawyers Assistance, Inc. takes the firm position that alcoholism, substance abuse, addictive behavior, and psychological problems are treatable illnesses rather than moral issues. Our experience has shown that the only stigma attached to these illnesses is an individual's failure to seek help. FLA believes it is the responsibility of the recovering legal community to help our colleagues who may not recognize their need for assistance.

Source: <http://www.fla-lap.org/>

Florida does have a statute to protect employers who provide employee information to an employee or former employee's potential employer. Section 768.095, F.S., provides that an employer who discloses information about a former or current employee to a prospective employer of the former or current employee upon request of the prospective employer or of the former or current employee is immune from civil liability for such disclosure or its consequences unless it is shown by clear and

convincing evidence that the information disclosed by the former or current employer was knowingly false or violated any civil right of the former or current employee protected under chapter 760.

To state a cause of action for defamation, in Florida, a plaintiff "must allege that (1) the defendant published a false statement (2) about the plaintiff (3) to a third party and (4) that the falsity of the statement caused injury to the plaintiff." Valencia v. Citibank Intern., 728 So. 2d 330, (Fla. 3<sup>rd</sup> DCA 1999). There are common law privileges, such as speech by a parent showing concern for a child, which are defenses to defamation actions. See Nodar v. Galbreath, 462 So. 2d 803 (Fla. 1984). If a statement is privileged, the plaintiff has the burden of showing malice. See Nodar, 462 So. 2d at 810-811.

The lawyer-client privilege is codified in the Florida Evidence Code in section 90.502, F.S. It gives the client the privilege to refuse to disclose, and to prevent others from disclosing, the contents of confidential communications when the person learned of the communications because they were made in the rendition of legal services to the client. The privilege can be waived by the client.

**C. EFFECT OF PROPOSED CHANGES:**

Section 1 of the bill states that a person who reports information or takes action in connection with a lawyer assistance program or a person who receives information in connection with a lawyer assistance program is immune from civil liability for reporting the information, taking the action, or taking no action provided the person acts in good faith and without malice.

Section 2 of the bill creates a presumption of good faith. A member of a lawyer assistance program or a person reporting information to a lawyer assistance program is presumed to have acted in good faith and without malice. The person alleging lack of good faith has the burden proving bad faith and malice. This section has the effect of creating a privilege if information is reported to a lawyer assistance program. In order for a plaintiff to prevail in a defamation action, the plaintiff must show lack of good faith and malice.

The bill would not completely eliminate civil actions against persons who report information to lawyer assistance programs. Under the bill, a plaintiff could prevail if the plaintiff could prove lack of good faith and prove malice.

Section 3 of the bill provides that the persons entitled to immunity include Florida Lawyers Assistance, Inc. and other lawyer assistance programs approved by the Florida Supreme Court or the Florida Bar that provide assistance to attorneys who are impaired due to alcohol or drugs or because of other physical or mental infirmities causing impairment. The bill provides civil immunity to members, employees, or agents of the programs and to persons who report information to such programs.

Section 4 of the bill provides that information provided to the lawyer assistance program, in any form, is subject to the attorney-client privilege. The bill does not specify who is permitted to claim the privilege.

Section 5 of the bill provides that the records, proceedings, and all communications of any lawyer assistance program shall be deemed confidential and shall not be available for court subpoena. However, the section shall not prevent the subpoena of business records that are otherwise available through subpoena.

**D. SECTION-BY-SECTION ANALYSIS:**

See Section II.C. Effect of Proposed Changes

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

N/A

2. Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

N/A

2. Expenditures:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

N/A

D. FISCAL COMMENTS:

N/A

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

The bill does not require counties or municipalities to spend funds or to take any action requiring the expenditure of any funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

The bill does not reduce the authority that municipalities or counties have to raise revenue in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

The bill does not reduce the percentage of state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

N/A

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B. RULE-MAKING AUTHORITY:

N/A

C. OTHER COMMENTS:

N/A

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON JUDICIAL OVERSIGHT:

Prepared by:

Staff Director:

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Lynne Overton