

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SB 778

SPONSOR: Judiciary Committee and Senator Rossin

SUBJECT: Lawyer Assistance Programs

DATE: March 20, 2001 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Matthews	Johnson	JU	Favorable/CS
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This bill creates provisions for civil immunity from liability, attorney-client privilege and confidentiality of records relating to lawyer assistance programs and its employees, agents and members, volunteers and other persons who report to or otherwise participate with the programs.

This bill creates a yet unnumbered section of the Florida Statutes.

II. Present Situation:

Lawyer assistance programs¹ are programs established for the treatment and recovery of lawyers and judges impaired by mental, substance abuse and other behavioral problems. All fifty states have lawyer assistance programs.

In Florida, there is the Florida Lawyers Assistance, Inc. a non-profit program partially funded by the Florida Bar. The program was created in response to the Florida Supreme Court's mandate to the Florida Bar to create or fund a program to identify and offer assistance for recovery to its members who are psychologically impaired or chemically dependent. *See Fla. Bar R., Bylaw 2-9.11.* The Florida Lawyers Assistance program cooperates with but operates independently of the Supreme Court and the Florida Bar. The program consists of an executive director and a small employee staff. However, the program, with the exception of a few volunteer health care professionals, functions primarily on an extensive network of volunteers consisting of attorneys who offer to work with other attorneys to address their substance and mental health issues.

¹ The American Bar Association created a 10-member commission in 1988 to assist impaired lawyers through established programs. The ABA's Commission on Lawyer Assistance Programs (CoLAP) introduced and has assisted in the support of lawyer assistance programs in both state and local bar organizations. In 1995, the ABA adopted a Model Lawyer Assistance program.

There are currently no express statutory provisions governing the confidentiality of the program's records, a privilege for communications between the program and other persons involved with the program, or civil immunity for the activities of the program's employees and volunteers for actions taken or not taken in conjunction with the program.² The program and its activities have limited protection of its records and information pursuant to the confidentiality of alcohol or other substance abuse patient records under specified circumstances as provided under federal law and state law. *See* 42 C.F.R. 2, Part II³, and "The Marchman Alcohol and Substance Abuse Protection Act", *see specifically*, s. 397.501(7), F.S.

In addition, the Florida Bar rules provide for limited confidentiality of the program's records and information maintained in the disciplinary proceedings. Through Florida Bar Rule 3-7.1(o), and pursuant to a written contract with the Florida Bar, there is confidentiality as to the fact and evidence that an attorney has voluntarily sought, received or accepted treatment for alcohol or drug abuse (not as a requirement or condition of court order, rule, admission to the Bar or disciplinary action).⁴ The rule also prohibits the admission of such evidence in disciplinary proceedings. A participating individual may waive the confidentiality provision if he or she wants the information to be shared with these entities.

There is concern that the Florida Lawyer Assistance, Inc. and its records, its activities and the persons who work, volunteer or otherwise participate in the program are not sufficiently protected under existing law governing confidentiality, immunity from civil liability and privileges of communications which may be deterring participation or contact with the program. All fifty states have adopted court rules governing legal professional conduct that provide confidentiality of lawyer assistance programs under specified circumstances. As of 1999, over 22 states had adopted either court rules or enacted legislation providing limited immunity for employees, volunteers or other persons for conduct in connection with their duties, participation or contact with the lawyer assistance programs.⁵

²Chapter 455, F.S., provides limited confidentiality under specified circumstances for records and information in conjunction with impaired health care professionals programs approved by the Department of Health. *See* s. 455.046, F.S., and s. 455.076, F.S.

³*See* s. 408 of the Drug Abuse Prevention, Treatment and Rehabilitation Act (21 U.S.C. 1175) which was subsequently amended, transferred and codified as a part of the Public Health Service Act at 42 U.S.C. 290ee-3.

⁴ Formerly, the Florida Bar rule was more specific and provided specific confidentiality language as follows: information given to a qualified person furnishing treatment, advisory, consultative, other service or who offered such services, or with whom an attorney has consulted for the purpose of considering or securing treatment, advisory, consultative or other services relating to alcoholism or alcohol abuse may give evidence with respect to the consultation or treatment by such attorney in any disciplinary proceeding with the written consent of the attorney (affected).

⁵ Information derived from a 1999 compendium of state's confidentiality and immunity provisions relating to lawyer assistance programs, courtesy of the ABA CoLAP.

III. Effect of Proposed Changes:⁶

A person, acting in good faith and without malice, is immune from civil liability for: 1) reporting information to the program, 2) intaking information reported to the program, 3) taking action in a lawyer assistance program, and 4) refusing to take action in a lawyer assistance program. There is a rebuttable presumption that the person acted in good faith and without malice.

For purposes of who is immune from liability, a person is defined as 1) the Florida Lawyer's Assistance, Inc. or other similar program or association approved by the Florida Supreme Court or the Florida Bar, 2) the program's members, employees or other agents and 3) a person who reports or provides information to the program regarding an impaired legal professional, including a person who monitors or supervises the treatment or rehabilitation of an impaired legal professional.

In addition, any information provided to a person pursuant to this act is a privileged communication and the applicability of the privilege is to be governed by the laws pertaining to attorney-client privilege. Under current law, the attorney-client privilege is a privilege asserted by a client or his or her attorney on behalf of the client to protect from disclosure or discovery the content of confidential communications made during the rendition of legal services. *See s. 90.502, F.S.* The privilege can only be waived by the client. Volunteers with the lawyer assistance program may offer legal advice as well as offer consultative assistance to legal professionals relating to mental health and substance abuse issues.

The bill also provides that all the records, proceedings, and communications of the Florida Lawyer's Assistance, Inc., or other qualifying program are confidential and not subject to court subpoena. Business records may be subpoenaed. Presumably, this would not totally preclude disclosure, access or use of these records, proceedings and communications in any civil, criminal, or administrative proceeding provided a court order was secured.

The act becomes effective upon becoming law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

⁶ The proposed bill is identical to legislation enacted by the State of Tennessee governing confidentiality and immunity for lawyer assistance programs. *See Tenn. Code Ann. s. 23-4-101 (1993).*

V. Economic Impact and Fiscal Note:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

This bill may encourage more voluntary participation and give assurance to affected judges, attorneys, law students, and support personnel that they will not be reported to the Bar, the Board of Bar Examiners or their employer. It also provides greater liability protections to the F.L.A. and its agents or employees and other similar programs and other participating parties for actions taken in good faith. In order to encourage voluntary participation and alleviate the fears of affected judges, attorneys, law students, and support personnel that they will be reported to the Bar, the Board of Bar Examiners or their employer or otherwise be liable for their actions,

C. Government Sector Impact:

This bill requires that the Florida Lawyer's Assistance, Inc. or other program be approved by the Florida Supreme Court or the Florida Bar, if not already approved.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

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