

# 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 1474

SPONSOR: Judiciary Committee and Senator Sanderson

SUBJECT: Attorney's Fees

DATE: March 13, 2002      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Rhea	Wilson	GO	Favorable
2.	Matthews	Johnson	JU	Favorable/CS
3.			AGG	
4.			AP	
5.				
6.				

## I. Summary:

The bill revises the law governing the payment for legal services performed by private counsel on behalf of the state or an agency thereof. Specifically, the bill caps the amount of attorney's fees that may be paid, negotiated or collected under a contract, a court order or a settlement agreement. The amount can not exceed the lesser of:

- < A commercially reasonable amount;
- < An amount calculated in accordance with the lodestar process approved by the Florida Supreme Court; or
- < \$1,000 per hour actually expended on the matter by licensed attorneys, plus reasonable expenses actually incurred for costs or services other than those of licensed attorneys (contingency fee contracts are excepted).

The bill also caps at \$1 million the amount of attorney's fees (including legal services provided by subcontractors) that may be paid, negotiated or collected under a contract or settlement agreement by private counsel in any single case or legal matter on behalf of the state or an agency thereof, excluding reimbursement for expenses, paid out of the General Revenue Fund or a trust fund. A higher amount may be approved by The Governor or a Cabinet member who is the head of the agency for whom legal service is being performed or has been performed may approve a higher amount which must then be subsequently approved by the Attorney General. Each approval of a higher maximum fee is subject to the procedures for notice, review, and objection provided in s. 216.177, F.S., relating to legislative review of proposed executive budgetary actions by the Legislative Budget Commission.

This bill amends section 287.059, Florida Statutes.

## II. Present Situation:

**Suits Seeking Monetary Damages Against the State** - Section 11.066(2), F.S., provides that the state and each state agency, when exercising its inherent power to protect the public health, safety, or welfare, 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.

Section 11.066(3), F.S., provides that neither the state nor 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 in a situation in which sovereign immunity has not been waived, 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.,<sup>2</sup> a judgment for monetary damages against the state or any of its agencies may not be enforced through execution<sup>3</sup> or any common-law remedy against property of the state or its agencies, and a writ of execution<sup>4</sup> therefore may not be issued against the state or its agencies. This means that a court, pursuant to a judgment, cannot order property of the state or a state agency to be seized and given to the plaintiff. Moreover, s. 11.066(4), F.S., states that it is a defense to a writ of mandamus issued to enforce a judgment for monetary damages against the state or a state agency that there is no appropriation made by law to pay the judgment.

**Agency Procurement of Legal Services** – Section 287.057(1), F.S., provides that all contracts for the purchase of commodities or contractual services in excess of the threshold amount provided in s. 287.017, F.S., for Category Two,<sup>5</sup> must be awarded by competitive sealed bidding. Section 287.057(3)(f), F.S., states that the following contractual services and commodities are not subject to the competitive sealed bid requirements:

- < Artistic services;
- < Academic program reviews;
- < Lectures by individuals;

<sup>1</sup> Section 11.066(1), F.S., states: “As used in this section, the term ‘appropriation made by law’ has the same meaning as in s. 1(c), Art. VII 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> Section 74.091, F.S., states: “Where an order of taking has been entered and deposit made, the failure of the petitioner to pay into the court the compensation ascertained by the jury shall not invalidate said judgment or the title of the petitioner, and such failure shall not authorize any person to molest, interfere with, enter or trespass upon said property; provided, however, persons lawfully entitled to compensation may sue out execution, in the event a timely appeal has not been filed, and such execution may be levied upon the property so condemned and any other property of the petitioner in the same manner as executions are levied in common-law actions.”

<sup>3</sup> Black’s Law Dictionary, 6<sup>th</sup> ed., p. 568, defines “execution” to mean “[c]arrying out some act or course of conduct to its completion . . . Execution upon a money judgment is the legal process of enforcing the judgment, usually by seizing and selling property of the debtor.”

<sup>4</sup> Id. At p. 568, defines “writ of execution” to mean a “[f]ormal process issued by court generally evidencing the debt of the defendant to the plaintiff and commanding the officer to take the property of the defendant in satisfaction of the debt. Unless the court directs otherwise, the process to enforce a money judgment shall be a writ of execution.”

<sup>5</sup> Section 287.017(1), F.S., establishes a Category Two purchase at a \$25,000 minimum.

- < Auditing services;
- < Legal services, including attorney, paralegal, expert witness, appraisal, or mediator services; and
- < Health services, including examination, diagnosis, treatment, prevention, medical consultation, or administration.

Section 287.059, F.S., regulates the procurement of a private attorney by the state or by a state agency. This section prohibits an agency from contracting for private attorney services without the prior written approval of the Attorney General. However, prior written approval is not required for private attorney services:

- < Procured by the Executive Office of the Governor or any department under the exclusive jurisdiction of a single Cabinet officer;
- < Provided by legal services organizations to indigent clients;
- < Necessary to represent the state in litigation involving the State Risk Management Trust Fund pursuant to Part II, 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; or
- < Procured by the Board of Trustees for the Florida School for the Deaf and Blind.

Section 287.059, F.S., requires the agency requesting approval for the use of private attorney services to offer to contract with the Department of Legal Affairs for such attorney services at a cost pursuant to mutual agreement. The Attorney General's office decides 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 and therefore approves the procurement of a private attorney, the Attorney General must file a written approval stating that the requested services cannot be provided by the Attorney General's office or that such 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 designee of the agency head, prior to contracting for private attorney services. When approval is not needed from the Attorney General, the agency head or designee is still required to give written approval.<sup>6</sup>

Section 287.059(6), F.S., requires the Attorney General to adopt, by rule, a standard fee schedule for private attorney services using hourly rates or an alternative billing methodology. The Attorney General is required to consider:

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

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<sup>6</sup> Section 287.059(4) and (5), F.S.

All agencies must use the standard fee schedule as established by statute for private attorney services unless the head of the agency or a designee waives use of the schedule and sets forth in writing to the Attorney General the reasons for deviating from the schedule.<sup>7</sup>

Section 287.059(8), F.S., requires the Attorney General to develop guidelines that may be used by agencies to determine when it is necessary and appropriate to seek the services of private attorneys. When selecting an outside attorney, agencies are encouraged to consider certain criteria; for example, the magnitude or complexity of the case, the firm's ratings and certifications, the firm's minority status, the firm's prior experience with the agency, and firm's willingness to use agency resources to minimize costs.<sup>8</sup>

The Attorney General is required to develop a standard addendum to every contract to be used by all agencies, unless waived by the Attorney General, describing in detail what is expected of both the contracted private attorney and the contracting agency.<sup>9</sup> Contracts for attorney services are originally executed for one year only; however, multiyear contracts may be awarded subject to both annual appropriations and annual written approval from the Attorney General.<sup>10</sup> The Attorney General's office must periodically prepare a roster by geographic location of private attorneys under contract with agencies, their fees, and primary area of legal specialization, and distribute this roster to all agencies.<sup>11</sup>

**Florida Administrative Code Requirements** – Rule 2.37.030, F.A.C., establishes a standard fee schedule for private attorney services. “Specialized attorney services”<sup>12</sup> may be billed up to \$175 per billable hour.<sup>13</sup> All other attorney services may be billed up to \$125 per billable hour. All paralegal, legal assistant, law clerk, and research assistant services may be billed up to \$40 per billable hour.

Rule 2-37.040, F.A.C., establishes 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 the necessity for such action to the Attorney General through a statement of waiver signed by the appropriate agency head or designee. Specified waiver criteria includes:

- < The inability of the agency to obtain adequate legal representation within the confines of the standard fee schedule. If any agency justifies its waiver of the standard fee schedule pursuant to this criterion, it must set forth in detail the efforts at procurement which the agency engaged in prior to determining that the standard fee schedule would not provide adequate attorney services;

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<sup>7</sup> Section 287.059(7), F.S.

<sup>8</sup> Section 287.059(9), F.S.

<sup>9</sup> Section 287.059(10), F.S.

<sup>10</sup> Section 287.059(11), F.S.

<sup>11</sup> Section 287.059(12), F.S.

<sup>12</sup> Rule 2-37.030, F.A.C., states that “[s]pecialized 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).

<sup>13</sup> Rule 2-37.030, F.A.C., defines billable hour to mean “. . . the actual time spent providing attorney services to the agency measured in 6 to 10 minute intervals. Costs for such items as exhibits, transcripts, and witness fees are not considered a part of the billable hour.”

- < 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. If any agency justifies its deviation from the standard fee schedule based on this criterion, it must set forth in detail the reasons why special expertise is necessary and the reasons why the agency was unable to find such expertise at a price within the standard fee schedule; or
- < 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 any 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. If any agency utilizes this criterion, it must set forth in detail the emergency, danger, or opportunity in question, why efforts failed to procure an attorney within the standard fee schedule, and why immediate attorney services are necessary.

### III. Effect of Proposed Changes:

The bill amends s. 287.059, F.S., to create subsections (7) and (8). Subsection (7) prohibits a contract, court order, or settlement agreement from authorizing the payment, negotiation, or collection by private counsel for any attorney's fees for work performed on behalf of the state or state agency in excess of the statutory caps set forth in this subsection. The amount of attorney's fees can not exceed the lesser of:

- < A commercially reasonable amount;
- < An amount calculated in accordance with the lodestar process approved by the Florida Supreme Court;<sup>14</sup> or
- < , \$1,000 per hour actually expended on the matter by licensed attorneys, plus reasonable expenses actually incurred for costs or services other than those of licensed attorneys. Contingency fee contracts are exempt from this \$1,000 hourly fee.

Subsection (8) imposes a \$1 million cap on the payment, negotiation or collection under a contract or settlement agreement by a private counsel for attorneys' fees (including legal services provided by subcontractors) for work performed on behalf of the state or state agency in a single case or legal matter excluding reimbursement for expenses and paid out of the General Revenue or Trust Fund. This statutory cap may be waived by the Governor for an office or agency under the direction of the Governor or by the Cabinet member for a department under the direction of a designated Cabinet member. The amount in excess must then be approved by the Attorney General. Each approval of a higher maximum fee is subject to the procedures for notice, review, and objection provided in s. 216.177, F.S.<sup>15</sup>

<sup>14</sup> "The number of hours reasonably expended, determined in the first step, multiplied by a reasonable hourly rate, determined in the second step, produces the lodestar, which is an objective basis for the award of attorney fees. Once the court arrives at the lodestar figure, it may add or subtract from the fee based upon a 'contingency risk' factor and the 'results obtained.'" *Fla. Patient's Compensation Fund v. Rowe*, 472 So.2d 1145, 1151 (Fla. 1985). These attorney's fees are set by determining the number of hours reasonably expended on the matter and the reasonable hourly rate for the services provided by the private attorney or, under a contingency fee contract, the lodestar figure calculated may include a contingency risk multiplier not greater than three.

<sup>15</sup> Section 216.177, F.S., establishes a process for additional explanation and direction regarding the legislative intent of the General Appropriations Act.

The act takes effect July 1, 2002.

#### 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:

This bill sets a statutory cap of \$1 million on attorneys' fees arising from contracts or settlement agreements for legal services in a single case on behalf of the state or agency thereof. The issue of fee caps was recently addressed in a Florida Supreme Court case. *See Olive v. Maas*, (27 Fla. L. Wkly S139, No. SC00-317, Fla. Feb. 14, 2002, nonfinal opinion). The Court re-affirmed the ruling and reasoning in *Makemson v. Martin County*, 491 So.2d 1109 (Fla. 1986) to hold that extraordinary circumstances may be used as a basis for exceeding the statutory fee cap. In *Makemson*, the case seemed to look to a statutory attorneys' fee cap as a "legislative guide." The Court stated that "it is within the inherent power of Florida's trial courts to allow, in extraordinary and unusual cases, departure from the statute's fee guidelines when necessary in order to ensure that an attorney who has served the public by defending the accused is not compensated in an amount which is confiscatory of his or her time, energy and talents. More precise delineation, we believe, is not necessary. Trial and appellate judges, well aware of the complexity of a given case and the attorney's effectiveness therein, know best those instances in which justice requires departure from statutory guidelines." *Id.*, at 1115.

At issue in *Olive* was the trial court's authority to grant fees in excess of the fee caps set forth in s. 27.711, F.S., relating to capital collateral cases, for a registry attorney who did not sign the services contract, contending that by agreeing to the statutory cap in the contract, the attorney would be waiving any other compensation to which he may be entitled. The Court held that where extraordinary or unusual circumstances exist in a capital collateral case, the cap may be exceeded to ensure adequate representation.

There is also pending litigation in appeals on a case involving a capital defendant with an active death warrant. *See State v. Demps, Final Order on Attorney George F. Schaefer's Reapplication for Award of Attorney's Fees*, Fla. 8th Circuit, Case No. 77-0116 CFA. A attorney was appointed outside the normal appointment process for a registry attorney (and did not enter into a contract with the Comptroller's Office) to represent Bennie Demps, a capital defendant with an active death warrant. Demps was executed on June 7,

2000. Thereafter, the attorney requested payment of attorney's fees in the amount of \$26,180.00 (130.9 hours x \$200 per hour) and reimbursement of costs in the amount of \$1,130.59. The Comptroller objected to the hourly rate because ss. 27.703 and 27.711, F.S., limit attorney's fees for Registry counsel to \$100 per hour. The Circuit Court ruled that the \$100 statutory cap as applied in the "extraordinary circumstances" of the case is unconstitutional based on the holding and reasoning in *Makemson v. Martin County*, 491 So.2d 1109 (Fla. 1986). The Comptroller was ordered to pay the attorney at the requested rate.

**V. Economic Impact and Fiscal Note:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill limits the fees that a private counsel working on behalf of the state or a state agency may be paid, negotiate or otherwise collect for attorneys fees.

C. Government Sector Impact:

To the extent this bill results in limiting state expenditure for attorney's fees then the bill would have a positive fiscal impact; however, any such fiscal impact is not determinable.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

Under the rules of statutory construction, a section of law that cross-references another section or portion thereof that is subsequently amended does not incorporate those amendments unless the section containing the cross-reference is reenacted (republished). Otherwise, the statutory cross-reference remains to the version of the section that it existed prior to the amendment. This bill amends s. 287.059, F.S., which is cross-referenced in four sections of law as follows:

- s. 455.209 and s. 455.221, F.S., relating to the legal representation by private counsel on behalf of state board members overseeing the regulation of professions within the Department of Business and Professional Regulation
- s. 456.008 and s. 456.009, F.S., relating to the legal representation by private counsel on behalf of state board members overseeing the regulation of the health professions and occupations.

**VIII. Amendments:**

None.