

STORAGE NAME: h0491s1.sgc.doc
DATE: March 4, 2002

HOUSE OF REPRESENTATIVES
COUNCIL FOR SMARTER GOVERNMENT
ANALYSIS

BILL #: CS/HB 491
RELATING TO: Civil Legal Assistance Act
SPONSOR(S): Council for Smarter Government, Representative(s) Goodlette and others
TIED BILL(S):

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

- (1) JUDICIAL OVERSIGHT YEAS 10 NAYS 0
- (2) HEALTH & HUMAN SERVICES APPROPRIATIONS YEAS 13 NAYS 0
- (3) COUNCIL FOR SMARTER GOVERNMENT YEAS 13 NAYS 0
- (4)
- (5)

THIS DOCUMENT IS NOT INTENDED TO BE USED FOR THE PURPOSE OF CONSTRUING STATUTES, OR TO BE CONSTRUED AS AFFECTING, DEFINING, LIMITING, CONTROLLING, SPECIFYING, CLARIFYING, OR MODIFYING ANY LEGISLATION OR STATUTE.

I. SUMMARY:

This bill creates the "Florida Access to Civil Legal Assistance Act" (Act). The stated intent of the bill is to "establish an administrative framework whereby public funds may be used in an effective and efficient manner to enhance the availability of civil legal assistance to the poor in this state." Funds received through the Act may be used to secure the legal rights of eligible clients relating to family law, juvenile law, entitlements to federal government benefits, protections from domestic violence, elder and child abuse, and immigration.

The Department of Community Affairs (DCA) will administer the program. The DCA is to contract with a statewide not-for-profit organization that provides funding for civil legal assistance to the poor to allocate funds to not-for-profit legal aid organizations. This bill provides a funding formula to be used in the contract.

This bill places limits on how funds can be used, including restrictions of use of the funds for lobbying, in criminal or postconviction proceedings, in noncriminal traffic infractions, in actions against the state, or in class actions. This bill provides that if any part of the Act is declared unconstitutional or otherwise unenforceable, the entire Act is null and void and provides that appropriations under the bill must be returned.

This bill requires the DCA to ensure that the funds are spent according to the intent of the Act and to conduct an annual audit.

Recent court decisions raise concerns about this bill. See "Constitutional Issues" and "Other Issues".

The fiscal impact of this bill on state government is unknown. The bill does not provide a specific appropriation. This bill does not appear to have a fiscal impact on local governments.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|--|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input 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:

This bill creates a new program within the Department of Community Affairs.

B. PRESENT SITUATION:

Article I, s. 16, Fla. Const., gives criminal defendants in Florida the right to be represented by counsel. If a criminal defendant cannot afford counsel, an attorney is appointed to represent the defendant at public expense. Under Art. V, s. 18, Fla. Const., public defenders in each judicial circuit, funded by the state, provide these services. In most cases, there is no right to a publicly-funded attorney in civil cases.

Individual attorneys assist in providing legal assistance to the poor in civil cases. Members of the Florida Bar "should (1) render pro bono legal services to the poor and (2) participate, to the extent possible, in other pro bono service activities that directly relate to the legal needs of the poor." Rule 4-6.1, Rules Regulating the Florida Bar. Members of the Florida Bar can fulfill their professional responsibility to provide pro bono legal service by performing 20 hours of pro bono legal services or donating \$350 to a legal aid organization, and are required to report such activity to the Bar. See Rule 4-6.1, Rules Regulating the Florida Bar. According to the Florida Bar, lawyers donated 989,333 pro bono hours and contributed \$1,861,627 to legal aid organizations from July 1, 1997, through June 30, 1998, the last year which statistics were available.¹ Some local bar associations have pro bono requirements for their members.

Legal aid organizations have staff attorneys who provide legal aid to the poor. Some organizations also provide referral services so low income persons can find an attorney to handle a case on a pro bono basis. The Florida Bar Foundation awarded almost \$10 million in grants to legal aid organizations in 2001.²

According to the President of The Florida Bar, there are 14,000 legal aid cases turned away each year despite the work done by pro bono attorneys and legal aid organizations.³

¹ See Pro Bono Publico, a background issue paper, at www.flabar.org (downloaded 1/3/2002).

² See www.flabarfdn.org (downloaded 1/3/2002).

³ See "Bar Backs Civil Legal Assistance Act", *Florida Bar News*, January 1, 2002, page 3.

C. EFFECT OF PROPOSED CHANGES:

This bill is titled the "Florida Access to Civil Legal Assistance Act" ("Act"). The stated intent of the legislation is to "establish an administrative framework whereby public funds may be used in an effective and efficient manner to enhance the availability of civil legal assistance to the poor in this state."

This bill gives the Department of Community Affairs (DCA) the powers necessary to carry out the provisions of the Act. These powers include the power to contract with a statewide not-for-profit organization that provides funding for civil legal assistance to the poor to allocate funds to not-for-profit legal aid organizations.⁴ The statewide not-for-profit organization must meet the qualifications of s. 501(c)(3) of the United States Internal Revenue Code, as amended. The contract between the DCA and the legal aid organization "shall provide that distribution of at least 80 percent of such funds shall be based annually by county on a per capita basis upon the number of persons in the county whose income is 125 percent or less of the then-current federal poverty guidelines of the United States Department of Health and Human Services." The contract must provide that no more than 15 percent of such funds will be distributed annually to statewide and regional not-for-profit legal aid organizations and that no more than 5 percent of the funds will be provided for administrative costs.

Funds received through the Act may be used to secure the legal rights of eligible clients relating to family law, juvenile law, entitlements to federal government benefits, protections from domestic violence, elder and child abuse, and immigration.

This bill places certain limits on how funds can be used. No funds received or allocated through the Act may be used to lobby state or local government or to sue the state, any of its agencies or political subdivisions, or colleges or universities. Funds may not be used to provide legal assistance in criminal proceedings or federal or state postconviction proceedings. The term "criminal proceedings" is defined as, "an adversary judicial process prosecuted by a public officer and initiated by formal complaint, information, or indictment charging a person with an offense classified or denominated as criminal by applicable law and punishable by death, imprisonment, jail sentence, or criminal fine." Funds received or allocated through the Act may not be used to initiate or participate in class action suits. Finally, funds may not be used to provide legal assistance with respect to noncriminal infractions under chapters 316, 318, 320, or 322, Florida Statutes.

This bill contains a provision which makes the entire Act null and void if any of the limitations on the use of funds is found to be unconstitutional or otherwise unenforceable. In such a case, all appropriations made under the Act that have not been expended are repealed and all unspent funds received by any entity under the Act must be returned to the Department of Community Affairs for transfer back to the treasury.

This bill provides that it does not create a statutory right to counsel in any proceeding or create any right accruing to any attorney.

This bill makes programs funded pursuant to the Act eligible for state support including access to SUNCOM services.

⁴ The bill defines "not-for-profit legal aid organization" as a not-for-profit organization operated in this state that provides as its primary purpose civil legal services without charge to eligible clients." The bill defines "eligible client" as a person whose "income is equal to or below 150 percent of the then-current federal poverty guidelines" or "a person who is receiving poverty-related veterans' benefits or supplemental security income."

This bill requires the DCA to ensure that the funds are spent according to the intent of the Act and to conduct an annual audit.

This bill takes effect upon becoming law.

D. SECTION-BY-SECTION ANALYSIS:

See "Present Situation" and "Effect of Proposed Changes."

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

2. Expenditures:

This bill does not provide a specific appropriation to fund the Act. The President of the Florida Bar estimates a \$10 million cost and believes that the necessary funding can be obtained from unused federal welfare funds.⁵ There may be costs incurred by the DCA in creating the necessary contracts and performing audits.

The Committee on Transportation & Economic Development Appropriations has allocated in its FY 2002-03 budget \$500,000.00 to DCA for this program.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

If this bill were to lead to more cases, then the Local Governments would receive more revenues from the increased number of cases paying court filing fees.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

⁵ See "Bar Backs Civil Legal Assistance Act", Florida Bar News, January 1, 2002, page 3.

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

A. APPLICABILITY OF THE MANDATES PROVISION:

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

B. REDUCTION OF REVENUE RAISING AUTHORITY:

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

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

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

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

This bill's restrictions on how funds received or allocated through the Act could raise constitutional concerns. In Legal Services Corporation v. Velazquez, 531 U.S. 533 (2001), the United States Supreme Court considered whether a statute that prevented attorneys for the Legal Services Corporation from raising certain challenges to a welfare statute violated the First Amendment. In 1996, Congress had added language to an appropriations act which prohibited funding any organization:

"that initiates legal representation or participates in any other way, in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system, except that this paragraph shall not be construed to preclude a recipient from representing an individual eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation."

Legal Services Corp., 531 U.S. at 538.

The court found that the statute violates the First Amendment because it allows attorneys to represent individual clients in welfare cases but limits what those attorneys could argue during that representation. Id., at 544. The court explained:

Congress was not required to fund an LSC attorney to represent indigent clients; and when it did so, it was not required to fund the whole range of legal representations or relationships. The LSC and the United States, however, in effect ask us to permit Congress to define the scope of the litigation it funds to exclude certain vital theories and ideas. The attempted restriction is designed to insulate the Government's interpretation of the Constitution from judicial challenge. The Constitution does not permit the Government to confine litigants and their attorneys in this manner. We must be vigilant when Congress imposes rules and conditions which in effect insulate its own laws from legitimate judicial challenge. Where private speech is involved, even Congress' antecedent funding decision cannot be aimed at the suppression of ideas thought inimical to the Government's own interest.

Id., at 548-549.

However, the court did not address claims that other restrictions on the use of funding that were contained in the statute were unconstitutional. The United States Court of Appeal for the Second Circuit held that the statute's prohibition on lobbying for the passage or defeat of legislature did not violate the Constitution. Velazquez v. Legal Services Corp., 164 F.3d 757, 768 (2d Cir. 1999). Since the Supreme Court refused to disturb that holding, the Second Circuit's decision on that point remains good law.

It can be argued that this bill is distinguishable from the statute at issue in Legal Services Corp. because this bill does not restrict attorneys in the same manner as the restriction in that statute. This bill can be said to only prohibit certain types of activities, such as lobbying or representation in a criminal proceeding. Prohibiting an entire class of activities, like representation in criminal proceedings, appears to be acceptable under Legal Services Corp. The statute in Legal Services Corp. prohibited an attorney from making arguments during a case while this bill does not prohibit advancing a theory or argument if that argument arises during representation. It can be argued that while this bill prohibits funding to be used in representing certain classes of clients, it does not limit argument once the representation is undertaken.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

Two issues were raised by earlier versions of this bill. These issues were addressed by amendments adopted in committee and council.

Olive v. Maas

On February 14, 2002, the Florida Supreme Court issued an opinion in Olive v. Maas, SC00-317 (Fla. February 14, 2002), that raises concerns about the fiscal impact of the original version of this bill. Section 27.710, F.S., creates a registry of private attorneys to represent capital defendants in postconviction cases. Section 27.711, F.S., provides a fee and payment schedule for attorneys who work pursuant to the registry. Under s. 27.711, F.S., attorneys can receive up to \$84,000 for such representation plus expenses and investigative costs. Section 27.711(3), F.S., provides, in pertinent part:

The fee and payment schedule in this section is the exclusive means of compensating a court-appointed attorney who represents a capital defendant.

In Olive, attorney Olive placed his name on the registry to represent death row inmates, was appointed to represent an inmate, and refused to sign a representation contract. Olive's concern was "based on a series of cases from this Court which, in short, provide that statutory maximum fees may be unconstitutional when they are inflexibly imposed in cases involving unusual or extraordinary circumstances because these caps interfere with the trial court's inherent power to ensure adequate representation and the defendant's Sixth Amendment right to assistance of counsel." Olive, Slip Op. at 15. Based on these concerns, Olive sought a declaratory judgment that trial courts could grant fees in excess of the statutory cap.

The court ignored the plain language of the statute, and relied on "the legislative history and staff analysis" to conclude that:

the legislative history of section 27.711, and respondents' concessions, that trial courts are authorized to grant fees in excess of the statutory schedule where extraordinary or unusual circumstances exist in capital collateral cases.

Olive, Slip Op. at 20.

Under Olive, the state can apparently be bound to pay registry counsel any fee decided upon by a court if "unusual" circumstances exist. Given the court's holding in Olive, it is possible that a court could order payment for legal services not authorized by statute or payment of legal fees in excess of the amount appropriated by the Legislature. If a court were to extend the holding in Olive to programs funded by this bill, it is unclear what the fiscal impact of the original version of the bill would have been or what legislative restrictions might be ignored.

The Council for Smarter Government adopted an amendment to repeal the Act if any restriction was found to be unconstitutional or otherwise unenforceable. The amendment addresses the concern that the state could be liable for legal fees in situations where a restriction is found invalid.

Criminal v. Postconviction Proceedings

This bill provides that no funds received or allocated pursuant to the Act may be used to provide legal assistance or advice with respect to any "criminal proceeding." "Criminal proceeding" is defined as "an adversary judicial process prosecuted by a public officer and initiated by formal complaint, information, or indictment charging a person with an offense classified or denominated as criminal by applicable law and punishable by death, imprisonment, jail sentence, or criminal fine." The original version of this bill did not make clear whether "criminal proceeding" includes federal and state post-conviction proceedings.⁶ It appears under the definition of "criminal proceeding" that funds from the Act could be used in post-conviction proceedings under the original version of the bill. In Saucer v. State, 779 So. 2d 261, 262 (Fla. 2001), the court discussed "civil" actions versus "criminal" actions:

On the other hand, perhaps the only true *criminal* proceeding is the one the State initiates against a defendant charging her with committing a criminal act. Accordingly, when a person other than the State brings an action, it cannot be considered purely criminal, if for no other reason than that ordinarily only the State can initiate a criminal action.

(footnote omitted; italics in original).

It could be argued that the definition in the original version of this bill would allow funds from the Act to be used in state or federal post-conviction proceedings. However, this bill clearly states for what purposes the funds received or allocated pursuant to the Act may be used:

Funds received or allocated pursuant to this act may be used to secure the legal rights of eligible clients relating to family law, juvenile law, entitlements to federal government benefits, protection from domestic violence, elder and child abuse, and immigration by providing legal assistance and education regarding legal rights and duties under the law.

⁶ Post-conviction proceedings are attacks on a criminal conviction after the direct appeal process is complete. In Florida, post-conviction challenges are raised pursuant to Florida Rules of Criminal Procedure 3.850 (non-death penalty cases) and 3.851 (death penalty cases). Post-conviction challenges in the federal system are raised by filing a petition for writ of habeas corpus. In a post-conviction action, a criminal raises issues, such as ineffective assistance of counsel or newly discovered evidence, that generally cannot be raised on direct appeal.

An amendment adopted by the Committee on Judicial Oversight and included in the committee substitute made clear that funds cannot be used in state or federal post-conviction proceedings. See “Amendments or Committee Substitute Changes.”

The Florida Bar supports this bill. See www.flabar.org, Master List of Positions, June 28, 2001 (downloaded 1/3/2001).

North Florida Legal Services supports the bill.⁷

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On January 8, 2002, the Committee on Judicial Oversight adopted four amendments to this bill. The first amendment clarifies that funds allocated pursuant to the Act cannot be used in federal or state post-conviction proceedings. The second amendment bill removes unclear language and adds “disabled veterans who are in receipt of, or eligible to receive, Veteran’s Administration pension benefits” to the class of persons defined as “eligible client[s].” The third amendment prohibits the use of funds allocated pursuant to the Act from being used to sue any political subdivision of the state. The fourth amendment prohibits the use of funds allocated pursuant to the Act from being used to sue colleges or universities.

On February 26, 2002, the Council for Smarter Government adopted two amendments to this bill. The amendments added language to repeal the Act if any of the restrictions are found unconstitutional or otherwise unenforceable and required that funds from the Act could not be used relating to enforcement actions under chapters 316, 318, 320, or 322, F.S.

VII. SIGNATURES:

COMMITTEE ON JUDICIAL OVERSIGHT:

Prepared by:

L. Michael Billmeier, Jr., J.D.

Staff Director:

Nathan L. Bond

AS REVISED BY THE COMMITTEE ON HEALTH & HUMAN SERVICES APPROPRIATIONS:

Prepared by:

Bill Speir

Staff Director:

Cynthia Kelly

AS FURTHER REVISED BY THE COUNCIL FOR SMARTER GOVERNMENT:

Prepared by:

L. Michael Billmeier, Jr., J.D.

Council Director:

Don Rubottom

⁷ Telephone conversation with North Florida Legal Services Executive Director Kent Spuhler, January 4, 2002.