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HOUSE OF REPRESENTATIVES
COUNCIL FOR SMARTER GOVERNMENT
ANALYSIS

BILL #: CS/HB 535
RELATING TO: Attorney Fees
SPONSOR(S): Committee on State Administration and Representative(s) Kallinger
TIED BILL(S): None

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

- (1) STATE ADMINISTRATION YEAS 4 NAYS 0
 - (2) FISCAL POLICY & RESOURCES YEAS 13 NAYS 0
 - (3) COUNCIL FOR SMARTER GOVERNMENT YEAS 12 NAYS 0
 - (4)
 - (5)
-

I. SUMMARY:

Current law provides, with regard to state agencies, that legal services, including attorney, paralegal, expert witness, appraisal, or mediator services are not subject to competitive sealed bid requirements. However, the state or a state agency must abide by certain regulations when seeking the services of a private attorney. With a number of exceptions, a state agency may not contract with a private attorney for services without the prior written approval of the Attorney General. As required by statute, the Attorney General has adopted a standard fee schedule for private attorney services using an hourly rate, which is \$175.00 per billable hour for "specialized attorney services", and \$125.00 per billable hour for all other attorney services. The rule also establishes a procedure for obtaining a waiver from the standard fee schedule.

The Committee Substitute limits all attorneys' fees for work done on behalf of the state. Such fees may 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 by each licensed attorney on the matter, except under a contingency fee contract.

The bill also places additional requirements on contracts for legal services or settlement agreements on behalf of the state that could result in attorney fees in excess of \$1 million, excluding expenses. The Governor or Cabinet officer, respectively, must approve of the contract or agreement for work done on behalf of the agency, for which the agency head is the Governor or Cabinet officer, respectively, that would result in the payment of attorney fees in excess of \$1 million; the Attorney General must approve these contracts or settlement agreements for cabinet agencies. All contract and settlement agreements which would result in attorney fees in excess of \$1 million are subject to legislative review by the Legislative Budget Commission.

The bill takes effect upon becoming law.

There does not appear to be a fiscal impact on state or local government.

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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"/> |

This bill requires each agency to obtain the specific approval of the Governor, Cabinet officer, or Attorney General, depending upon whether the agency is a Governor's agency, an agency headed by a Cabinet officer, or a cabinet agency, respectively, for contracts for legal services that would result in attorney fees in excess of \$1 million.

B. PRESENT SITUATION:

Section 11.066, F.S./Suits Seeking Monetary Damages Against the State

Section 11.066, F.S., relates to suits seeking monetary damages against the state or state agencies. 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.¹ 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.,² a judgment for monetary damages against the state or any of its agencies may not be enforced through execution³ or any

¹ 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."

² 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."

³ Black's Law Dictionary, 6th ed., p. 568, defines execution: "Carrying 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."

common-law remedy against property of the state or its agencies, and a writ of execution⁴ 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.

Chapter 287, F.S./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 Two⁵, 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; 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 Chapter 284, Part II, 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 the 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

⁴ *Id.* at p. 568, defines writ of execution: "Formal 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."

⁵ Section 287.017(1), F.S., states that a Category Two purchasing is at least \$25,000.

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.⁶

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. 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.⁷

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 the firm's willingness to use agency resources to minimize costs.⁸

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.⁹ 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.¹⁰ 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.¹¹

The Florida Administrative Code

Rule 2-37.030, F.A.C., establishes a standard fee schedule for private attorney services. "Specialized attorney services"¹² may be billed up to \$175.00 per billable hour.¹³ All other attorney services may be billed up to \$125.00 per billable hour. All paralegal, legal assistant, law clerk, and research assistant services may be billed up to \$40.00 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 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:

⁶ Section 287.059(4) and (5), F.S.

⁷ Section 287.059(7), F.S.

⁸ Section 287.059(9), F.S.

⁹ Section 287.059(10), F.S.

¹⁰ Section 287.059(11), F.S.

¹¹ Section 287.059(12), F.S.

¹² 2-37.030, F.A.C., states: "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).

¹³ 2-37.030, F.A.C., defines billable hour: "The term 'billable hour' means 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 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;
- 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.

American Legislative Exchange Council

On May 2, 2000, the American Legislative Exchange Council (ALEC)¹⁴ published a press release regarding a piece of legislation offered in the Pennsylvania House of Representatives by Representative Craig Dally. This legislation, called the "Private Attorney Retention Sunshine Act", was model legislation developed by ALEC. The legislation requires state agencies, including executive branch agencies, independent boards, and the Attorney General, to use an open bidding process to select private attorneys for legal services expected to exceed \$1 million dollars. It requires that once a contract is awarded, it must be filed with the General Assembly to review the contract through a public committee hearing and make recommendations to the agency. At the conclusion of any legal proceeding when a state agency is represented by a private attorney under contract, the attorney must provide the agency with information on how many hours were worked on the matter, the expenses incurred, the aggregate fee paid or to be paid to the private attorney, and the breakdown of the hourly rate. The bill additionally sets a maximum of \$1,000 an hour for legal services in these cases.¹⁵

At the time of this legislation, three other states¹⁶ had passed similar legislation, and up to 10 additional states had either introduced such legislation or had it under consideration.¹⁷ In response to this legislation, ALEC submitted its statement on the "Private Attorney Retention Sunshine Act."

The goal of this legislation is simply to promote good government by bringing legal contracts in line with other procurement practices. By requiring state agencies to accept bids for legal services above \$1 million, acquire legislative approval, and provide disclosure of all contracts,

¹⁴ The American Legislative Exchange Council is the nations' largest bipartisan individual membership association of state legislators. It is a 501(c)(3) nonprofit educational and membership organization and is headquartered in Washington, D.C. Information retrieved on-line at www.alec.org.

¹⁵ Pursuant to press release, "Dally Introduced Private Attorney Contract Sunshine Act," released on May 2, 2000, by the American Legislative Exchange Council. Retrieved on-line at www.alec.org

¹⁶ North Dakota, Texas, and Kansas; pursuant to press release, "American Legislative Exchange Council Statement on Private Attorney Retention Sunshine Act," released on May 2, 2000, by the American Legislative Exchange Council. Retrieved on-line at www.alec.org.

¹⁷ *Id.*

this legislation promotes sound business practices to which every state should adhere. In addition, it allows “sunshine” on the entire process by advocating public hearings so that no controversial contracts are signed in the dead of night or behind closed doors.¹⁸

Robert A. Levy, Ph.D., J.D., testified on behalf of ALEC before the Kansas Legislature Select Committee during Kansas’ 2000 legislative session regarding the “Private Attorney Retention Sunshine Act” being considered at that time in the Kansas Legislature. In a statement titled “Larger Implications of the Tobacco Settlement,” Dr. Levy addressed the controversy surrounding tobacco settlements and its relation to the “Private Attorney Retention Sunshine Act.”

The Medicaid recovery lawsuits that precipitated the Master Settlement Agreement (MSA) were created out of whole cloth by states filling the dual and conflicting roles of lawmaker and plaintiff. Florida set the pattern by enacting a new statute that stripped tobacco companies of their traditional rights and put in their place a shockingly simple rule of law: The state needed money; the industry had money; so the industry gave and the state took. Under the new regiment, Florida, and the other states that modeled their lawsuits after Florida’s, could sue tobacco companies directly, without stepping into the injured party’s shoes.¹⁹

Dr. Levy concluded his statement by reiterating the need for the “private attorney retention sunshine act.”

To secure the liberty of all citizens, we must resolutely defend and protect our least popular citizens, including the tobacco companies. Disputes between private parties cannot be resolved in secret negotiations involving defendants who have the boot of government resting on their necks, state attorneys general who seek to replenish their Medicaid coffers without fiscal discipline, contingency fee lawyers who wield the sword of the state while retaining a financial interest in the outcome, and advocacy groups that have subordinated the rule of law to their health concerns, however well-intentioned.²⁰

C. EFFECT OF PROPOSED CHANGES:

Committee Substitute for HB 535 amends s. 287.059, F.S., relating to private attorney services, to limit the amount of attorneys fees paid in a case. Please see the Section-by-Section Analysis, below, for details.

The CS also requires that those contracts or settlement agreements that would result in the payment of attorney’s fees in excess of \$1 million must have the approval of a state-wide elected officer. These contracts and settlement agreements are also subject to legislative review through the Legislative Budget Commission.

D. SECTION-BY-SECTION ANALYSIS:

Section One. Creates:

¹⁸ Pursuant to article, “Statement of Robert A. Levy, Ph.D., J.D. Senior Fellow in Constitutional Studies Cato Institute Washington, D.C. Testifying on Behalf of the American Legislative Exchange Council Before the Kansas Legislature Select Committee 2000; Larger Implications of the Tobacco Settlement,” retrieved on-line at www.alec.org.

¹⁹ *Id.*

²⁰ *Id.*

- A new s. 287.059(7), F.S., to provide that, unless specific approval is given, no contract or settlement agreement between a private counsel and the state or state agency will authorize or permit payment, negotiation, or collection for any attorney's fee in excess of \$1,000,000; and
 - Limits the payment, negotiation, or collection of attorney's fee by a private counsel for work performed by the state or any state agency. Fees may not exceed the LESSER of:
 - A commercially reasonable amount;
 - An amount calculated in accordance with the lodestar process²¹ approved by the Florida Supreme Court; or
 - \$1,000 per hour actually expended by each licensed attorney on the matter, except under a contingency fee contract.
- A new s. 287.059(8), F.S., to provide that specific approval is required by the Governor or a Cabinet member if an amount in excess of \$1,000,000 is necessary in a contract for private legal services for any departments, agencies, or offices that fall under the specific jurisdiction of the Governor, or a Cabinet member, as appropriate. In addition, a department that is headed by the Governor and the Cabinet requires the specific approval of the Attorney General for any contract of an amount in excess of \$1,000,000. Any contract approved under this provision is subject to legislative review under s. 216.177, F.S. That section provides for legislative review of proposed executive budgetary actions by the Legislative Budget Commission.

Section 2. Provides that the act takes effect upon becoming law.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

Not determinable, but probably positive.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

No attorney can receive more than \$1,000 per hour for legal services rendered to the state.

²¹ "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).

D. FISCAL COMMENTS:

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.

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 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:

None.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

None

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

The Committee of State Administration, at its January 24, 2002, meeting, adopted a proposed committee substitute, the provisions of which are discussed above. The bill as originally filed:

- Defined a contract for legal services where the fee could be reasonably expected to exceed \$1 million;
- Provided for the competitive bidding of contracts for legal services but did not limit that requirement to this subset of contracts for legal services;
- Provided that no agency could enter a contract for legal services where the fee could be reasonably expected to exceed \$1 million without an legislative hearing on the contract on the terms of the contract; and
- Provided for a legislative review process of review and comment and for agency response to these comments.

The committee substitute takes the idea of public review of contract for legal services where the fee could be reasonably expected to exceed \$1 million and fashions it to work within existing statutory

provisions concerning contracting for legal services. It provides for the review of these contracts by the state-wide elected officers of the executive branch, and when appropriate, for review by the Legislative Budget Commission. It also provides criteria under which negotiations for fees for legal services can be negotiated.

VII. SIGNATURES:

COMMITTEE ON STATE ADMINISTRATION:

Prepared by:

David M. Greenbaum

Staff Director:

J. Marleen Ahearn, Ph.D., J.D.

AS REVISED BY THE COMMITTEE ON FISCAL POLICY & RESOURCES:

Prepared by:

Douglas Pile

Staff Director:

Lynne Overton

AS FURTHER REVISED BY THE COUNCIL FOR SMARTER GOVERNMENT:

Prepared by:

David M. Greenbaum

Council Director:

Don Rubottom