

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL: CS/SB 712

INTRODUCER: Judiciary Committee and Senator Thrasher

SUBJECT: Contingency Fee Agreements/DLA & Private Attorneys

DATE: January 20, 2010

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Daniell	Maclure	JU	Fav/CS
2.			GO	
3.			JA	
4.			WPSC	
5.				
6.				

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|--|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="checked" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

This bill provides that, before the Department of Legal Affairs (department) can enter into a contingency fee contract with a private attorney, the Attorney General must make a written determination that contingency fee representation is both cost effective and in the public interest.

After the determination to enter into a contingency fee contract is made, the bill requires the Attorney General to request proposals from private attorneys to represent the department on a contingency fee basis, unless the Attorney General determines that requesting proposals is not feasible.

This bill requires private attorneys entering into contingency fee contracts with the department to keep contemporaneous time records in increments of no greater than one-tenth of an hour. The bill also provides contingency fee caps on the amount that a private attorney may be awarded, and requires copies of executed contingency fee agreements, as well as payment of contingency fees, to be posted on the department's website for specified periods of time.

Lastly, the bill requires the Attorney General to submit a report annually to the President of the Senate and to the Speaker of the House of Representatives describing the use of contingency fee contracts with private attorneys in the preceding calendar year.

This bill creates section 16.0155, Florida Statutes.

II. Present Situation:

Private Attorney Services Employed by State Agencies

The Office of the Attorney General, also known as the Department of Legal Affairs (department), provides civil representation and legal services on behalf of the state. The department is led by an elected Attorney General whose duties include attending to all suits or prosecutions in which the state is a party, acting as co-counsel in capital criminal proceedings, and publishing official opinions on questions of law.¹ Department attorneys serve as the state's primary litigators; however, private attorney services may be acquired under certain circumstances. The department is authorized by statute to provide legal representation to government agencies on a case-by-case basis.² Section 287.059, F.S., provides that every state agency³ is required to obtain the written approval of the Attorney General as a prerequisite to contracting for private attorney services. There are specified exceptions to this general rule, most notably the Executive Office of the Governor.⁴

When an agency requests approval for the use of private attorney services, the agency must first offer to contract with the department for such attorney services at a cost mutually agreed upon.⁵ The Attorney General may request the following information from the agencies:

- The nature of the services to be provided and the issues involved;
- The need for use of private attorneys rather than agency staff attorneys;⁶
- The criteria by which the agency selected the private attorney or law firm it proposes to employ;
- Competitive fees for similar attorney services;
- The agency's analysis estimating the number of hours for attorney services, the costs, the total contract amount, and a risk or cost-benefit analysis;

¹ Office of Program Policy Analysis and Government Accountability, Fla. Legislature, *Legal Affairs Provides Valuable Legal Services, But Accountability Needs to Be Strengthened*, Report No. 99-53, at 1 (May 2000), available at <http://www.opaga.state.fl.us/reports/pdf/9953rpt.pdf> (last visited Dec. 29, 2009).

² *Id.* at 9; see also s. 287.059(3), F.S.

³ Section 287.059(1), F.S., defines "agency" or "state agency" as "state officers, departments, boards, commissions, divisions, bureaus, councils, and units of organization, however designated, of the executive branch of state government, community and junior colleges, and multicounty special districts exclusive of those created by interlocal agreement or which have elected governing boards."

⁴ Section 287.059(2), F.S., provides, in part, that written approval from the Attorney General is not required for private attorney services procured by the Executive Office of the Governor, offices under the jurisdiction of the Financial Services Commission, or any department under the exclusive jurisdiction of a single Cabinet officer.

⁵ Section 287.059(3), F.S.

⁶ The Attorney General is statutorily required to develop guidelines to be used by agencies when determining whether outside counsel is necessary. See s. 287.059(9), F.S.

- Which partners, associates, paralegals, research associates, or other personnel will be used and how their time will be billed; and
- Any other information that the Attorney General deems appropriate for the proper evaluation of the need for private attorney services.⁷

Section 287.059(10), F.S., provides criteria for agencies to consider when selecting a private attorney or law firm. These criteria are as follows:

- The magnitude or complexity of the case;
- The firm's ratings and certifications;
- The firm's minority status;
- The firm's physical proximity to the case and the agency;
- The firm's prior experience with the agency;
- The firm's prior experience with similar cases or issues;
- The firm's billing methodology and proposed rate;
- The firm's current or past adversarial position, or conflict of interest, with the agency; and
- The firm's willingness to use resources of the agency to minimize costs.

If the Attorney General declines to provide the requested attorney services through the department, then the Attorney General's written approval for private attorney services must include a statement that the services requested cannot be provided by the department or that private attorney services are cost-effective.⁸ Upon receipt of the Attorney General's written approval, the general counsel for the agency must review the form and legality of the contract for private attorney services and indicate his or her approval.⁹ The contract must also be approved and signed by the agency head. Contracts are initially executed for one year, but multi-year contracts may be entered into provided that they are subject to annual appropriations and annual written approval from the Attorney General.¹⁰

Section 287.059(16), F.S., requires private attorneys under contract with a state agency to maintain detailed current records¹¹ from the inception of the contract until at least four years after the contract terminates. These records must also be available for inspection and copying upon request in accordance with ch. 119, F.S.¹²

When contracting for private attorney services, all agencies are required to use the standard fee schedule set by the department in administrative rule.¹³ The standard fee schedule adopted by the department is as follows:

⁷ Section 287.059(3), F.S.

⁸ *Id.*

⁹ Section 287.059(4), F.S.

¹⁰ Section 287.059(12), F.S.

¹¹ Section 287.059(16), F.S., provides that detailed current records include documentation of all expenses, disbursements, charges, credits, underlying receipts and invoices, and other financial transactions.

¹² The Public Records Act, ch. 119, F.S., specifies conditions under which public access must be provided to records of the executive branch and other state agencies. Unless specifically exempted, all agency records are available for public inspection.

¹³ Section 287.059(8), F.S.

- Specialized attorney services¹⁴ may be billed up to \$250 per billable hour;¹⁵
- All other attorney services may be billed up to \$200 per billable hour;
- All paralegal, legal assistant, law clerk, and research assistant services may be billed up to \$40 per billable hour;
- Costs for exhibits, transcripts, and witness fees are not considered part of the billable hour, but they will be reimbursed based upon documented third-party vendor charges to the contract attorney, provided that prior authorization is given by the agency;
- Expenses for travel are limited to terms and rates established in s. 112.061, F.S.;
- Office overhead is included in the billable hour; and
- Non-routine office overhead¹⁶ will be reimbursed based upon documented third-party vendor charges provided they are justified to the agency.¹⁷

If an agency wants to exceed the standard fee schedule, it must demonstrate necessity to the Attorney General through a statement of waiver, which must be signed by the agency head. The statement of waiver must be based on one or more of the following criteria:

- The agency is unable to obtain adequate legal representation within the confines of the standard fee schedule;
- The agency is unable to obtain attorney services with the special expertise necessary to perform the particular legal function that the agency requires within the 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 an opportunity for the state to preserve or enhance the public treasury and that failure to contract for services in excess of the standard fee schedule will work to the detriment of the state.¹⁸

Alternate billing practices, such as contingency fees, may be used when it is deemed to be the most cost-effective or appropriate billing methodology. A contingent fee is defined as “[a] fee charged for a lawyer’s services only if the lawsuit is successful or is favorably settled out of court.”¹⁹ A contingency fee contract must be “commercially reasonable,” which is statutorily defined to mean no more than the amount permissible under rule 4-1.5 of the rules regulating The Florida Bar and case law interpreting that rule.²⁰

Pursuant to the standard fee schedule adopted by the department, contingency fees may not exceed 35 percent through trial and may not exceed 40 percent through appeal where attorney services involve litigation. The fee schedule further provides that, where contingency fee

¹⁴ Specialized attorney services are limited to “admiralty, copyright, patent, trademark, international communications, media, and bond and securities law.” Fla. Admin. Code R. 2-37.030(1).

¹⁵ A “billable hour” is defined as “the actual time spent providing attorney services to the agency measured in 6 to 10 minute intervals.” Fla. Admin. Code R. 2-37.030(4).

¹⁶ Non-routine office overhead includes long distance phone calls, facsimile transmissions, bulk mailings, bulk third-party copying, and computer-assisted legal research services. *Id.*

¹⁷ Fla. Admin. Code R. 2-37.030.

¹⁸ Fla. Admin. Code R. 2-37.040.

¹⁹ BLACK’S LAW DICTIONARY (8th ed. 2004).

²⁰ Section 287.059(7), F.S.

contracts involve non-litigation attorney services, the fee cannot exceed the rate in the market in which the attorney service is being provided.²¹

Attorney General Transparency Code

In September 2007, the American Tort Reform Association (ATRA or the Association) proposed “new voluntary standards designed to improve government transparency and accountability when state attorneys general hire outside counsel to litigate on behalf of state residents.”²² The Association stated that this transparency code encompasses five principles:

- **Disclosure:** All contracts with vendors, including outside counsel, who provide services to the state or perform legal work in the name of the state, should be posted on the Internet for public inspection.
- **Value:** Every effort should be made to competitively bid contracts for outside counsel.
- **Oversight:** Contingent fee-based contracts should be subject to review by the legislature.
- **Reporting:** Outside counsel providing services to the attorney general on a contingent fee basis shall be required to disclose detailed information on the hours worked, services performed, and fees received from the state.
- **Accountability:** All monies recovered by the attorney general in excess of \$250,000 as a result of lawsuits won or settled by the state should be deposited in the state treasury for appropriation by the legislature unless a settlement with the attorney general’s office stipulates that the funds shall be allocated to a specific entity.²³

Seven states currently have enacted legislation that is similar to ATRA’s proposed code, but there is no uniform transparency code for attorneys general in all states.²⁴

III. Effect of Proposed Changes:

This bill codifies several of the American Tort Reform Association’s (ATRA) proposed standards for transparency when state attorneys general hire outside legal counsel by establishing certain procedures to be used when the Office of the Attorney General, or the Department of Legal Affairs (department), enters into contingency fee contracts with private attorneys. This bill prohibits the department from entering into a contingency fee contract with a private attorney unless the Attorney General makes a written determination that contingency fee representation is cost-effective and in the public interest. The bill requires that the written determination include specific findings for each of the following factors:

- Whether sufficient and appropriate legal and financial resources exist within the department to handle the matter;

²¹ Fla. Admin. Code R. 2-37.030(5).

²² Press Release, Am. Tort Reform Ass’n, *ATRA Proposes ‘Transparency Code’ for State AGs* (Sept. 17, 2007), available at <http://www.atra.org/newsroom/releases.php?id=8168> (last visited Dec. 29, 2009).

²³ *Id.*

²⁴ *Id.* The following states have passed reforms governing the attorney general’s ability to retain private attorneys: Colorado, Connecticut, Kansas, Minnesota, North Dakota, Texas, and Virginia. *Sunshine for Lawyers*, THE WALL STREET JOURNAL, Feb. 24, 2009, available at <http://online.wsj.com/article/SB123544259987155681.html> (last visited Dec. 30, 2009).

- The time and labor required to handle the matter; the novelty, complexity, and difficulty of the questions involved; and the skills required to perform the necessary attorney services properly;
- The geographic area in which the attorney services are to be provided; and
- The amount of experience desired for the particular kind of attorney services to be provided and the nature of the private attorney's experience with regard to similar issues or cases.

After the Attorney General makes the determination that contingency fee representation is necessary, the Attorney General must request proposals from private attorneys to represent the department on a contingency fee basis, unless the Attorney General determines in writing that requesting proposals is not feasible. The bill provides that the written determination is not considered a final agency action subject to review under ss. 120.569²⁵ and 120.57,²⁶ F.S., and that neither the request for proposals nor the contract award is subject to challenge pursuant to ss. 120.569 and 120.57, F.S.

The bill does not prescribe criteria or guidelines for the Attorney General to follow in selecting which proposal to use. The department states that it anticipates creating an internal policy that will establish guidelines for the Attorney General to follow.

The bill requires that the private attorney must keep contemporaneous time records with regard to work performed on the matter by any attorneys or paralegals in increments of no greater than one-tenth of an hour. These records must be provided to the department upon request.

Notwithstanding the current requirement that contingency fee contracts be commercially reasonable as defined by rule 4-1.5 of the rules regulating The Florida Bar,²⁷ under the bill the department may not enter into a contingency fee contract that provides for the private attorney to receive an aggregate contingency fee in excess of:

- 25 percent of any recovery up to \$10 million; plus
- 20 percent of any portion of such recovery between \$10 million and \$15 million; plus
- 15 percent of any portion of such recovery between \$15 million and \$20 million; plus
- 10 percent of any portion of such recovery between \$20 million and \$25 million; plus
- 5 percent of any portion of such recovery exceeding \$25 million.

Additionally, the bill prohibits an aggregate contingency fee in excess of \$50 million, exclusive of reasonable costs and expenses, irrespective of the number of lawsuits filed or the number of private attorneys retained to achieve the recovery.

The bill requires the Attorney General's written determination to enter into a contingency fee contract with a private attorney and the executed contingency fee contract to be posted on the department's website for public inspection within five business days after the date of execution,

²⁵ Section 120.569, F.S., provides an avenue for administrative review of proceedings in which the substantial interests of a party are determined by an agency.

²⁶ Section 120.57, F.S., provides an avenue for administrative review of agency action in particular cases.

²⁷ See s. 287.059(7), F.S.

and to remain posted for the duration of the contract, including any extensions or amendments. Also, any payment of contingency fees shall be posted on the department's website within 15 days after payment to the private attorney and shall remain posted for at least 365 days after payment is made.

Lastly, the bill requires that by February 1 of each year the Attorney General submit a report to the President of the Senate and to the Speaker of the House of Representatives describing the use of contingency fee contracts with private attorneys in the preceding calendar year. At a minimum, this report must include the following information:

- All new contingency fee contracts entered into during the year, as well as all previously executed contingency fee contracts that remain current during any part of the year. For each of these contracts, the report shall describe:
 - The name of the private attorney and the attorney's law firm name;
 - The nature and status of the legal matter;
 - The name of the parties to the legal matter;
 - The amount of any recovery; and
 - The amount of any contingency fee paid.
- Copies of any written determination made by the Attorney General during the year that contingency fee representation is necessary.

This bill applies solely to contingency fee contracts entered into by the Office of the Attorney General and does not change existing law governing other agencies' use of private legal services.

The bill shall take effect on July 1, 2010.

Other Potential Implications:

According to the Department of Legal Affairs (department), the requirements of this bill are the current practice of Attorney General Bill McCollum.²⁸ By codifying these practices, this bill will bind all future attorneys general in Florida to follow the same procedures when entering into a contingency fee contract with a private attorney or private law firm.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

²⁸ News Release, Attorney General Bill McCollum, *Attorney General Calls for Transparency, Accountability in Outside Counsel Contingency Fee Contracts* (Jan. 12, 2010), available at <http://www.myfloridalegal.com/newsrel.nsf/newsreleases/> (last visited Jan. 12, 2010).

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The fees of private attorneys entering into contingency fee contracts with the Department of Legal Affairs (department) will be capped at specified levels, rather than being based upon a “commercially reasonable” standard and the rules of The Florida Bar. The department reports, however, that the requirements of the bill are already practices of the current Attorney General. Thus, to the extent private attorneys are already contracting with the department, they will not experience new fiscal effects from the bill.

C. Government Sector Impact:

The bill requires the department to post copies of the executed contingency fee contract and the Attorney General’s written determination to enter into a contingency fee contract on the department’s website for the duration of the contract. According to the department, this is current practice and, therefore, will not create a significant impact on the department.²⁹ Additionally, the bill requires the Attorney General to submit a report annually to the President of the Senate and to the Speaker of the House of Representatives describing the use of contingency fee contracts with private attorneys. However, the fiscal impact to the department for generating the report is expected to be minimal.³⁰

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

²⁹ Conversation with Kimberly Case, Dep’t of Legal Affairs (Jan. 14, 2010).

³⁰ E-mail from Kimberly Case, Dep’t of Legal Affairs, to Senate professional staff (Jan. 20, 2010) (on file with the Senate Committee on Judiciary).

VIII. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Judiciary on January 19, 2010:

The committee substitute requires the Attorney General to file a report each year to the President of the Senate and to the Speaker of the House of Representatives describing the use of contingency fee contracts with private attorneys. The committee substitute provides minimum requirements for what is to be included in the report.

Additionally, the committee substitute changes the length of time that any payment of a contingency fee must remain on the Attorney General's website from 180 days to 365 days.

- B. **Amendments:**

None.