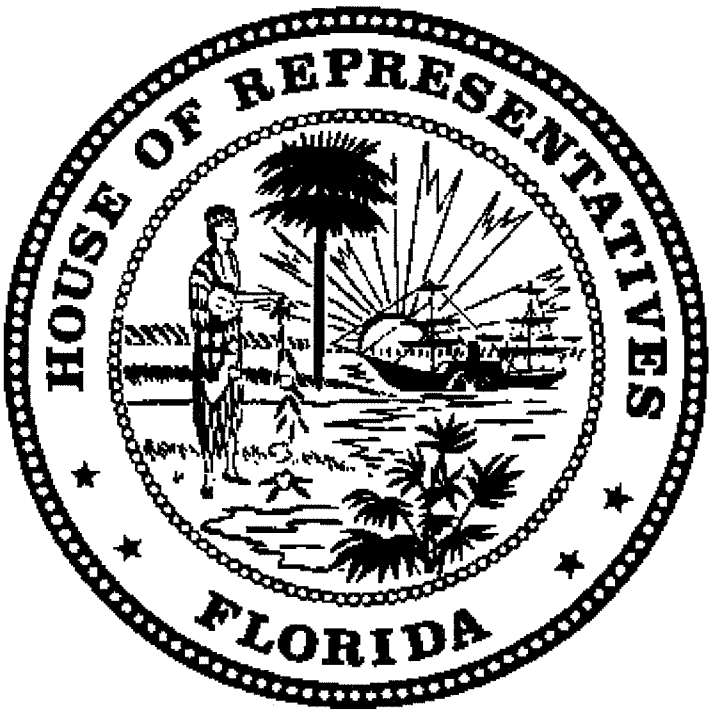

Judiciary Committee

Thursday, April 14, 2011
9:00 AM
404 HOB

Meeting Packet

Dean Cannon
Speaker

William Snyder
Chair

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Judiciary Committee

Start Date and Time: Thursday, April 14, 2011 09:00 am

End Date and Time: Thursday, April 14, 2011 01:00 pm

Location: 404 HOB
Duration: 4.00 hrs

Consideration of the following bill(s):

CS/HB 241 Wage Protection by Civil Justice Subcommittee, Goodson
HB 265 Sexual Offenders and Predators by Harrell
CS/HB 441 Scrutinized Companies by Government Operations Subcommittee, Bernard
CS/CS/CS/HB 479 Medicaid Malpractice by Health Care Appropriations Subcommittee, Health & Human Services Access Subcommittee, Civil Justice Subcommittee, Horner
CS/HB 513 Missing Adults by Criminal Justice Subcommittee, Abruzzo
CS/HB 1261 Election Ballots by State Affairs Committee, Corcoran, Legg, Young
HJR 1471 Religious Freedom by Plakon
CS/HB 1475 Alimony by Civil Justice Subcommittee, Stargel
HB 4035 Misdemeanor Pretrial Substance Abuse Programs by Waldman
CS/HB 4157 Juvenile Justice by Criminal Justice Subcommittee, Thurston
HB 7233 Background Screening by Health & Human Services Committee, Holder

NOTICE FINALIZED on 04/12/2011 16:20 by Jones.Missy

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 241 Wage Protection
SPONSOR(S): Civil Justice Subcommittee; Goodson
TIED BILLS: None **IDEN./SIM. BILLS:** SB 982

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	11 Y, 4 N, As CS	Woodburn	Bond
2) Community & Military Affairs Subcommittee	10 Y, 5 N	Shuler	Hoagland
3) Judiciary Committee		Woodburn	Havlicak RH

SUMMARY ANALYSIS

Wage theft is a term used to describe the failure of an employer to pay any portion of wages due to an employee. Federal and state laws provide extensive protection from wage theft through various acts including the Federal Fair Labor Standards Act and Florida's minimum wage laws.

Counties and municipalities have broad home rule powers that allow the local governments to enact ordinances as long as the subject matter is not preempted to the state. Preemption may either be express or implied.

The bill provides that the regulation of wage theft is expressly preempted to the state.

This bill does not appear to have a fiscal impact on state or local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Wage Theft

"Wage theft" is a general term sometimes used to describe the failure of an employer to pay any portion of wages due to an employee. Wage theft encompasses a variety of employer violations of Federal and state law resulting in lost income to an employee. Some examples of wage theft include:

- Employee is paid below the state or Federal minimum wage.
- Employee is paid partial wages or not paid at all.
- Non-exempt employee is not paid time and half for overtime hours.
- Employee is misclassified as an independent contractor.
- Employee does not receive final paycheck after employment is terminated

There are a variety of federal and state laws that protects employees from wage theft including, but not limited to, the Fair Labor Standards Act and Florida minimum wage laws.

Worker Protection: Federal and State

Both federal[1] and state laws provide protection to workers who are employed by private and governmental entities. These protections include workplace safety, anti-discrimination, anti-child labor, workers' compensation, and wage protection laws.[2] Examples of federal laws include:

- **The Davis-Bacon and Related Acts**[3] - Applies to federal or District of Columbia construction contracts or federally assisted contracts in excess of $2,000; requires all contractors and subcontractors performing work on covered contracts to pay their laborers and mechanics not less than the prevailing wage rates and fringe benefits for corresponding classes of laborers and mechanics employed on similar projects in the area.
- **The McNamara-O'Hara Service Contract Act**[4] - Applies to federal or District of Columbia contracts in excess of $2,500; requires contractors and subcontractors performing work on these contracts to pay service employees in various classes no less than the monetary wage rates and to furnish fringe benefits found prevailing in the locality, or the rates (including prospective increases) contained in a predecessor contractor's collective bargaining agreement.
- **The Migrant and Seasonal Agricultural Workers Protection Act**[5] - Covers migrant and seasonal agricultural workers who are not independent contractors; requires, among other things, disclosure of employment terms and timely payment of wages owed.
- **The Contract Work Hours and Safety Standards Act**[6] - Applies to federal service contracts and federal and federally assisted construction contracts over $100,000; requires contractors and subcontractors performing work on covered contracts to pay laborers and mechanics employed in the performance of the contracts one and one-half times their basic rate of pay for all hours worked over 40 in a workweek.
- **The Copeland "Anti-Kickback" Act**[7] - Applies to federally funded or assisted contracts for construction or repair of public buildings; prohibits contractors or subcontractors performing

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[1] A list of examples of federal laws that protect employees is located at: United States Department of Labor, Employment Laws Assistance, http://www.dol.gov/compliance/laws/main.htm (last visited Mar. 24, 2011).
[2] *See* United States Department of Labor, A Summary of Major DOL Laws, http://www.dol.gov/opa/aboutdol/lawsprog.htm (last visited Mar. 25, 2011).
[3] Pub. L. No. 107-217, 120 Stat. 1213 (codified as amended at 40 U.S.C. §§ 3141-48; the Davis-Bacon Act has also been extended to approximately 60 other acts).
[4] Pub. L. No. 89-286, 79 Stat. 1034 (codified as amended at 41 U.S.C. §§ 351-58).
[5] Pub. L. No. 97-470, 96 Stat. 2583 (codified as amended at 29 U.S.C. §§1801-72).
[6] Pub. L. No. 87-581, 76 Stat. 357 (codified as amended at 40 U.S.C. §§ 3701-08).
[7] 18 U.S.C. § 874.

work on covered contracts from inducing an employee to give up any part of the compensation to which he or she is entitled under his or her employment contract.

Fair Labor Standards Act of 1938

The Fair Labor Standards Act (FLSA)[8] establishes a federal minimum wage and requires employers to pay time and half to its employees for overtime time hours worked. The FLSA establishes standards for minimum wages,[9] overtime pay,[10] recordkeeping,[11] and child labor.[12] Over 130 million workers are covered under the act, as the FLSA applies to most classes of workers.[13] The Act entails two types of coverage:

- Enterprises engaged in interstate commerce, producing goods for interstate commerce, or handles, sells, or works on goods or materials that have been moved in or produced in interstate commerce and has an annual volume of sales or business of $500,000, as well as hospitals, schools, and public agencies;
- Individuals engaged in interstate commerce, the production of goods for interstate commerce, of in any closely-related process or occupation directly essential to such production.[14]

The FLSA provides that:

> Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.[15]

Thus, if a covered employee works more than forty hours in a week, then the employer must pay at least time and half for those hours over forty. A failure to pay is a violation of the FLSA.[16]

The FLSA also establishes a federal minimum wage in the United States.[17] The federal minimum wage is the lowest hourly wage that can be paid in the United States. A state may set the rate higher than the federal minimum, but not lower.[18]

The FLSA also provides for enforcement in three separate ways:

- Civil actions or lawsuits by the federal government;[19]
- Criminal prosecutions by the United States Department of Justice;[20] or
- Private lawsuits by employees, or workers, which includes individual lawsuits and collective actions.[21]

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[8] 29 U.S.C. Ch. 8.
[9] 29 U.S.C. § 206.
[10] 29 U.S.C. § 207.
[11] 29 U.S.C. § 211.
[12] 29 U.S.C. § 212.
[13] United States Department of Labor, Employment Law Guide – Minimum Wage and Overtime Pay, http://www.dol.gov/compliance/guide/minwage.htm (last visited Mar. 24, 2011).
[14] 29 U.S.C. § 203(r), (s); U.S. DEPT. OF LABOR, WH PUBLICATION 1282, HANDY REFERENCE GUIDE TO THE FAIR LABOR STANDARDS ACT 2-3 (2010); United States Department of Labor, *supra* note 13.
[15] 29 U.S.C. § 207(a)(1).
[16] There are several classes of exempt employees from the overtime requirement of the FLSA. For examples of exempt employees see http://www.dol.gov/compliance/guide/minwage.htm (last visited Mar. 25, 2011).
[17] 29 U.S.C. § 206.
[18] 29 U.S.C. § 218(a).
[19] 29 U.S.C. § 216(c).
[20] 29 U.S.C. § 216(a).

The FLSA provides that an employer who violates section 206 (minimum wage) or section 207 (maximum hours) is liable to the employee in the amount of the unpaid wages and liquidated damages equal to the amount of the unpaid wages.[22] The employer who fails to pay according to law is also responsible for the employee's attorney's fees and costs.[23]

State Protection of Workers

State law provides for protection of workers, including in the arenas of anti-discrimination,[24] work safety,[25] and a state minimum wage.[26] Since 2004, the state minimum wage has been established by the Florida Constitution.[27] The implementation language for the constitutional provision is embodied in the Florida Minimum Wage Act, located at s. 448.110, F.S.

Article X, section 24(c) of the state constitution provides that, "Employers shall pay Employees Wages no less than the Minimum Wage for all hours worked in Florida." If an employer does not pay the state minimum wage, the Constitution provides that an employee may bring a civil action in a court of competent jurisdiction for the amount of the wages withheld.[28] A court may also award the employee liquidated damages in the amount of the wages withheld and reasonable attorney's fees and costs.[29]

The current state minimum wage is $7.25 per hour, which is the federal rate.[30] Federal law requires the payment of the higher of the federal or state minimum wage.[31]

Home Rule and Preemption

Article VIII, ss. 1 and 2, of the state constitution, establishes two types of local governments: counties[32] and municipalities. The local governments have wide authority to enact various ordinances to accomplish their local needs.[33] Under home rule powers, a municipality or county may legislate concurrently with the Legislature on any subject which has not been preempted to the state.[34]

Preemption essentially takes a topic or field in which local government might otherwise establish appropriate local laws and reserves that topic for regulation exclusively by the state.[35] Florida law recognizes two types of preemption: express and implied.[36] Express preemption requires a specific legislative statement and cannot be implied or inferred.[37]

The absence of express preemption does not bar a court from a finding of preemption by implication, though courts are careful in imputing an intent on behalf of the legislature to preclude a local government from using its home rule powers.[38] Before finding that implied preemption exists, a court will first consider whether the Legislative scheme is so pervasive as to evidence an intent to preempt

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[21] 29 U.S.C. § 216(b).
[22] 29 U.S.C. § 216(b).
[23] 29 U.S.C. § 216(b).
[24] S. 760.10, Fla. Stat.
[25] Ss. 448.20-.26, 487.2011-.2071, F.S.
[26] Art. X, s. 24, Fla. Const.; s. 448.110, F.S.
[27] Art. X, s. 24, Fla. Const.
[28] Art. X, s. 24(e), Fla. Const.
[29] *Id.*
[30] Agency for Workforce Innovation, Florida's Minimum Wage, http://www.floridajobs.org/minimumwage/index.htm (last visited Mar. 24, 2011).
[31] 29 U.S.C. § 218(a).
[32] There are two different types of counties in Florida; a charter county and a non-charter county.
[33] Article VIII of the Florida Constitution establishes the powers of chartered counties, non-charter counties and municipalities. Chapters 125 and 166, F.S., provide the additional powers and constraints of counties and municipalities.
[34] *City of Hollywood v. Mulligan*, 934 So. 2d 1238, 1243 (Fla. 2006).
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 886 (Fla. 2010).

the particular area; and whether there are strong public policy reasons for finding an area to be preempted by the Legislature.[39] An example of an area where the courts have found implied preemption is the regulation of public records.[40]

There is no apparent express preemption of wage laws to the federal and state governments. It is unclear whether a court would find that the existing laws regarding employee wages are an implied preemption of the subject.

Local Wage Theft Ordinances

Miami-Dade County has enacted an ordinance regulating wage theft.[41] The ordinance is enforced by the county's Department of Small Business Development (SBD).[42] Between the time of the ordinance's passage in February, 2010 and November, 2010, the Miami SBD logged 423 wage complaints and collected nearly $40,000 from employers.[43] The Florida Retail Federation has filed suit to challenge the constitutionality of the Miami ordinance.[44] The Palm Beach County Commission has considered enacting a similar ordinance, but has postponed a final vote pending the outcome of the Miami-Dade Case.[45]

Effect of the Bill

The bill provides that "as a matter of public policy that it is necessary to declare the theft of wages and the denial of fair compensation for work completed to be against the law and policies of this state." The bill defines the term "wage theft." The bill also provides examples of current federal and state laws that protect employees from wage theft and provides that it is the intent of the bill to provide uniformity and to void all ordinances and regulations pertaining to wage theft that have been enacted by a governmental entity other than the state or federal government.

The bill provides that the regulation of wage theft is expressly preempted to the state.

B. SECTION DIRECTORY:

Section 1: Creates s. 448.111, F.S., providing for preemption of wage theft to the state.

Section 2: Provides an effective date of July 1, 2011.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

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[39] *Tallahassee Mem'l Reg'l Med. Ctr, Inc. v. Tallahassee Med. Ctr, Inc.*, 681 So. 2d 826, 831 (Fla. 1st DCA 1996).
[40] *See Tribune Co. v. Cannella*, 458 So.2d 1075 (Fla. 1984).
[41] Miami-Dade County Code of Ordinances, Chapter 22.
[42] CYNTHIA S. HERNANDEZ, RESEARCH INSTITUTE ON SOCIAL AND ECONOMIC POLICY, WAGE THEFT IN FLORIDA: A REAL PROBLEM WITH REAL SOLUTIONS 3 (2010).
[43] *Id.*
[44] Jennifer Sorentrue, *Palm Beach County Commission Postpones Vote on Wage Theft Law but Directs Staff to Study and Report*, THE PALM BEACH POST, Feb. 1, 2011, http://www.palmbeachpost.com/news/palm-beach-county-commission-postpones-vote-on-wage-1224613.html.
[45] *Id.*

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

One local government is known to have enacted a wage theft ordinance.[46] This bill may invalidate that ordinance.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 7, 2011, the Civil Justice Subcommittee adopted one amendment. The amendment:

- Defined the term "wage theft" to mean the underpayment or nonpayment of wages earned through lawful employment.
- Removed an unnecessary reference to the payment of "fair compensation."

The bill was then reported favorably.

[46] Miami-Dade County Code of Ordinances, Chapter 22.

A bill to be entitled

An act relating to wage protection; creating s. 448.111, F.S.; providing a short title; providing a definition; providing legislative findings and intent; preempting regulation of wage theft to the state, except as otherwise provided by federal law, and superseding any municipal or county ordinance or other local regulation on the subject; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 448.111, Florida Statutes, is created to read:

448.111 Florida Wage Protection Law.—

(1) This section may be cited as the "Florida Wage Protection Law."

(2) For purposes of this section, the term "wage theft" means the underpayment or nonpayment of wages earned through lawful employment.

(3) The Legislature finds as a matter of public policy that it is necessary to declare the theft of wages and the denial of compensation for work completed to be against the laws and policies of the state.

(4) The Legislature finds that employers and employees benefit from consistent and established standards of laws relating to wage theft and that existing federal and state laws, including the federal Fair Labor Standards Act of 1938, the Davis-Bacon Act, the McNamara-O'Hara Service Contract Act of

1965, the Migrant and Seasonal Agricultural Worker Protection Act, the Contract Work Hours and Safety Standards Act, the Copeland "Anti-kickback" Act, this chapter, and s. 24, Art. X of the State Constitution protect employees from predatory and unfair wage practices while also providing appropriate due process to employers.

(5) It is the intent of this section to provide uniform wage theft laws in the state, to void all ordinances and regulations relating to wage theft that have been enacted by a governmental entity other than the state or the Federal Government, and to prohibit the enactment of any future ordinance or other local regulation relating to wage theft.

(6) This section hereby expressly preempts regulation of wage theft to the state and supersedes any municipal or county ordinance or other local regulation on the subject.

Section 2. This act shall take effect July 1, 2011.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 265 Sexual Offenders and Predators
SPONSOR(S): Harrell and others
TIED BILLS: None **IDEN./SIM. BILLS:** SB 494

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	13 Y, 1 N	Cunningham	Cunningham
2) Justice Appropriations Subcommittee	14 Y, 0 N	McAuliffe	Jones Darity
3) Judiciary Committee		Cunningham	Havlicak RH

SUMMARY ANALYSIS

Pretrial release is an alternative to incarceration that allows arrested defendants to be released from jail while they await disposition of their criminal charges. Article I, section 14, of the Florida Constitution provides that unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great, every person charged with a crime or violation of a municipal or county ordinance is entitled to pretrial release on reasonable conditions.

Bail, one of the most common forms of pretrial release, requires an accused to pay a set sum of money to the sheriff. If a defendant released on bail fails to appear before the court at the appointed place and time, the bail is forfeited.

Section 903.046, F.S., currently states that the purpose of a bail determination in criminal proceedings is to ensure the appearance of the criminal defendant at subsequent proceedings and to protect the community against unreasonable danger from the criminal defendant. The statute contains an extensive list of factors a court must consider when determining whether to release a defendant on bail or other conditions, including, but not limited to, the defendant's criminal history, family ties, danger to the community, and whether the defendant is on probation or parole.

HB 265 adds the following to the list of factors a court must consider when determining whether to release a defendant on bail or other conditions:

- Whether the defendant is required to register as a sexual offender under s. 943.0435, F.S.; and, if so, he or she is not eligible for release on bail or surety bond until the first appearance on the case in order to ensure the full participation of the prosecutor and the protection of the public.
- Whether the defendant is required to register as a sexual predator under s. 775.21, F.S.; and, if so, he or she is not eligible for release on bail or surety bond until the first appearance on the case in order to ensure the full participation of the prosecutor and the protection of the public.

In January, 2011, there were 32,692 registered sexual offenders and 7,743 registered sexual predators in Florida. It is unknown how many of these persons are arrested each year. The bill prohibits such persons from being released on bail or surety bond until first appearance. However, since first appearance must occur within 24 hours of arrest, the impact on local jails will be insignificant.

This bill takes effect July 1, 2011.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Pretrial Release

Pretrial release is an alternative to incarceration that allows arrested defendants to be released from jail while they await disposition of their criminal charges.[1] Generally, pretrial release is granted by releasing a defendant on their own recognizance, by requiring the defendant to post bail, and/or by requiring the defendant to participate in a pretrial release program.[2]

Article I, section 14, of the Florida Constitution provides that unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great, every person charged with a crime or violation of a municipal or county ordinance is entitled to pretrial release on reasonable conditions. The accused may be detained if no conditions of release can reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process.[3]

Bail, one of the most common forms of pretrial release, requires an accused to pay a set sum of money to the sheriff. If a defendant released on bail fails to appear before the court at the appointed place and time, the bail is forfeited.

Section 903.046, F.S., currently states that the purpose of a bail determination in criminal proceedings is to ensure the appearance of the criminal defendant at subsequent proceedings and to protect the community against unreasonable danger from the criminal defendant. The statute further specifies that when determining whether to release a defendant on bail or other conditions, and what that bail or those conditions may be, courts must consider the following:

- The nature and circumstances of the offense charged.
- The weight of the evidence against the defendant.
- The defendant's family ties, length of residence in the community, employment history, financial resources, and mental condition.
- The defendant's past and present conduct, including any record of convictions, previous flight to avoid prosecution, or failure to appear at court proceedings.[4]
- The nature and probability of danger which the defendant's release poses to the community.
- The source of funds used to post bail.
- Whether the defendant is already on release pending resolution of another criminal proceeding or on probation, parole, or other release pending completion of a sentence.
- The street value of any drug or controlled substance connected to or involved in the criminal charge.[5]

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[1] Report No. 10-08, *"Pretrial Release Programs' Compliance with New Reporting Requirements is Mixed,"* Office of Program Policy Analysis & Government Accountability, January 2010.

[2] *Id.*

[3] Art. I, s. 14, Fla. Const.

[4] Section 903.046(2)(d), F.S., specifies that any defendant who failed to appear on the day of any required court proceeding in the case at issue, but who later voluntarily appeared or surrendered, is not eligible for a recognizance bond; and any defendant who failed to appear on the day of any required court proceeding in the case at issue and who was later arrested is not eligible for a recognizance bond or for any form of bond which does not require a monetary undertaking or commitment equal to or greater than $2,000 or twice the value of the monetary commitment or undertaking of the original bond, whichever is greater. Section 903.046(2)(d), F.S., also specifies that notwithstanding anything in s. 903.046, F.S., the court has discretion in determining conditions of release if the defendant proves circumstances beyond his or her control for the failure to appear; and that s. 903.046, F.S., may not be construed as imposing additional duties or obligations on a governmental entity related to monetary bonds.

[5] Section 903.046(2)(d), F.S., specifies that it is the finding and intent of the Legislature that crimes involving drugs and other controlled substances are of serious social concern, that the flight of defendants to avoid prosecution is of similar serious social

- The nature and probability of intimidation and danger to victims.
- Whether there is probable cause to believe that the defendant committed a new crime while on pretrial release.
- Any other facts that the court considers relevant.
- Whether the crime charged is a violation of ch. 874, F.S.,[6] or alleged to be subject to enhanced punishment under ch. 874, F.S. If any such violation is charged against a defendant or if the defendant is charged with a crime that is alleged to be subject to such enhancement, he or she shall not be eligible for release on bail or surety bond until the first appearance on the case in order to ensure the full participation of the prosecutor and the protection of the public.[7]

Pretrial Release – Offenders on Community Supervision

Section 948.06, F.S., sets forth the procedures used when an offender on probation[8] or community control[9] violates the terms and conditions of their supervision. Offenders arrested for violating the terms and conditions of community supervision are arrested and brought before the sentencing court.[10] Generally, if the offender denies having violated the terms of supervision, the court has the option to commit the offender to jail, release the offender with or without bail to await further hearing, or dismiss the charge.[11]

In certain instances, courts are limited or prohibited from granting pretrial release to offenders arrested for violating their terms of supervision. Section 948.06(4), F.S., requires the court to make a finding that the following offenders are not a danger to the public before releasing the offender on bail:

- Offenders who are under supervision for any offense prescribed in ch. 794., s. 800.04(4), (5), and (6), s. 827.071, or s. 847.0145, F.S.[12]
- Offenders are registered sexual offenders or sexual predators.[13]
- Offenders who are under supervision for a criminal offense for which the offender would meet the sexual predator or sexual offender registration requirements in ss. 775.21, 943.0435, or 944.607, F.S., but for the effective date of those sections.

The statute also prohibits a court from granting pretrial release to an offender arrested for violating their terms of supervision (other than violations related to a failure to pay costs) and who is:

- A violent felony offender of special concern;[14]
- On supervision for any offense committed on or after March 12, 2007, and who is arrested for any qualifying offense; or[15]
- On supervision, has previously been found by a court to be a habitual violent felony offender as defined in s. 775.084(1)(b), F.S., a three-time violent felony offender as defined in s.

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concern, and that frequently such defendants are able to post monetary bail using the proceeds of their unlawful enterprises to defeat the social utility of pretrial bail. Therefore, the courts should carefully consider the utility and necessity of substantial bail in relation to the street value of the drugs or controlled substances involved.

[6] Chapter 874, F.S., relates to criminal gang enforcement and prevention.

[7] s. 903.046, F.S.

[8] Section 948.001, F.S., defines the term "probation" as a form of community supervision requiring specified contacts with parole and probation officers and other terms and conditions as provided in s. 948.03, F.S.

[9] Section 948.001, F.S., defines the term "community control" as a form of intensive, supervised custody in the community, including surveillance on weekends and holidays, administered by officers with restricted caseloads. Community control is an individualized program in which the freedom of an offender is restricted within the community, home, or non-institutional residential placement and specific sanctions are imposed and enforced.

[10] s. 948.06, F.S.

[11] *Id.*

[12] Chapter 794, F.S., relates to sexual battery. Section 800.04, F.S., relates to lewd and lascivious offenses upon or in the presence of a person less than 16 years of age. Section 827.071, F.S., relates to sexual performance by a child. Section 847.0145, F.S., relates to selling or buying of minors.

[13] Sections 775.21, 943.0435, and 944.607, F.S., set forth the criteria one must meet to be considered a sexual offender or sexual offenders. The statutes also provide registration requirements for sexual offenders and sexual predators.

[14] The term "violent felony offender of special concern" is defined in s. 948.06(8)(b), F.S.

[15] The term "qualifying offense" is defined in s. 948.06(8)(c), F.S., and includes offenses that qualify someone as a sexual offender.

775.084(1)(c), F.S., or a sexual predator under s. 775.21, F.S., and who is arrested for committing a qualifying offense on or after March 12, 2007.

Such persons must remain in custody pending the resolution of the violation.[16]

Effect of the Bill

HB 265 amends s. 903.046, F.S., to add the following to the list of factors a court must consider when determining whether to release a defendant on bail or other conditions:

- Whether the defendant is required to register as a sexual offender under s. 943.0435, F.S.; and, if so, he or she is not eligible for release on bail or surety bond until the first appearance[17] on the case in order to ensure the full participation of the prosecutor and the protection of the public.
- Whether the defendant is required to register as a sexual predator[18] under s. 775.21, F.S.; and, if so, he or she is not eligible for release on bail or surety bond until the first appearance on the case in order to ensure the full participation of the prosecutor and the protection of the public.

B. SECTION DIRECTORY:

Section 1. Amends s. 903.046, F.S., relating to purpose of and criteria for bail determination.

Section 2. This bill takes effect July 1, 2011.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   In January, 2011, there were 32,692 registered sexual offenders and 7,743 registered sexual predators in Florida. It is unknown how many of these persons are arrested each year. The bill prohibits such persons from being released on bail or surety bond until first appearance. However, since first appearance must occur within 24 hours of arrest, the impact on local jails will be insignificant.

[16] s. 948.06(8)(d), F.S.

[17] *See* Rule 3.130, Fla. R. Crim. Proc.

[18] In very general terms, the distinction between a sexual predator and a sexual offender depends on what offense the person has been convicted of, whether the person has previously been convicted of a sexual offense, and the date the offense occurred.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to: require the counties or municipalities to spend funds or take an action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

A bill to be entitled

An act relating to sexual offenders and predators; amending s. 903.046, F.S.; requiring a court considering whether to release a defendant on bail to determine whether the defendant is subject to registration as a sexual offender or predator and, if so, to hold the defendant without bail until the first appearance on the case; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraphs (m) and (n) are added to subsection (2) of section 903.046, Florida Statutes, to read:

903.046 Purpose of and criteria for bail determination.—

(2) When determining whether to release a defendant on bail or other conditions, and what that bail or those conditions may be, the court shall consider:

(m) Whether the defendant is required to register as a sexual offender under s. 943.0435; and, if so, he or she is not eligible for release on bail or surety bond until the first appearance on the case in order to ensure the full participation of the prosecutor and the protection of the public.

(n) Whether the defendant is required to register as a sexual predator under s. 775.21; and, if so, he or she is not eligible for release on bail or surety bond until the first appearance on the case in order to ensure the full participation of the prosecutor and the protection of the public.

Section 2. This act shall take effect July 1, 2011.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 441 Scrutinized Companies
SPONSOR(S): Government Operations Subcommittee; Bernard and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 444

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Government Operations Subcommittee	15 Y, 0 N, As CS	McDonald	Williamson
2) Judiciary Committee		De La Paz	Havlicak
3) State Affairs Committee			

SUMMARY ANALYSIS

This bill prohibits a company on the Scrutinized Companies with Activities in Sudan List or on the Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List from bidding on, submitting a proposal for, or entering into or renewing a contract with an agency or local governmental entity for goods or services of $1 million or more.

The bill also does the following:

- Requires public entities to have a contract provision that allows contracts to be terminated if the company submitted a false certification or is placed on either of the Scrutinized Companies lists.
- Provides an exception to the prohibition.
- Requires a company seeking to enter into a contract of $1 million or more to certify that it is not a scrutinized business operation.
- Provides a process by which an agency or local governmental entity can report a false certification and by which the relevant government attorney may bring civil suit.
- Specifies penalties for a company that makes a false certification.
- Preempts an ordinance or rule of any local governmental entity involving public contracts for goods or services of $1 million or more with a company engaged in scrutinized business operations.
- Requires the Department of Management Services to submit a written notice describing the act to the Attorney General of the United States, within 30 days after the effective date of the bill.
- Provides that the act becomes inoperative on the date that federal law ceases to authorize the state to adopt and enforce the contracting prohibitions of the type provided for in the bill.

The bill has an indeterminate fiscal impact on state and local governments. The bill will adversely affect companies on the Scrutinized Companies with Activities in Sudan List or on the Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List that seek to enter into contracts with Florida governmental entities.

The bill takes effect July 1, 2011.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

PRESENT SITUATION

Federal Law

State Sponsors of Terrorism

Countries that are determined by the United States Secretary of State to have repeatedly provided support for acts of international terrorism are designated as "State Sponsors of Terrorism" and are subject to sanctions under the Export Administration Act,[1] the Arms Export Control Act,[2] and the Foreign Assistance Act.[3] The four main categories of sanctions resulting from designations under these acts are: restrictions on U.S. foreign assistance, a ban on defense exports and sales, certain controls over exports of dual use items, and miscellaneous financial and other restrictions.[4] Some of the miscellaneous restrictions include opposition to loans by the World Bank and other financial institutions, removal of diplomatic immunity to allow victims of terrorism to file civil lawsuits, denial of tax credits to companies and individuals for income earned in named countries, authority to prohibit U.S. citizens from engaging in transactions without a Treasury Department license, and prohibition of Department of Defense contracts above $100,000 with companies controlled by terrorist-list states.[5]

The four countries currently designated by the U.S. Secretary of State as "State Sponsors of Terrorism" are Cuba, Iran, Sudan, and Syria.[6]

United States Sanctions against Iran

The United States has instituted a number of sanctions against Iran as a result of its state support of terrorism, human rights violations, and pursuit of a policy of nuclear development. The situation is summarized in the following excerpt from a recent Congressional Research Service report:

> Iran is subject to a wide range of U.S. sanctions, restricting trade with, investment, and U.S. foreign aid to Iran, and requiring the United States to vote against international lending to Iran.
>
> Several laws and Executive Orders authorize the imposition of U.S. penalties against foreign companies that do business with Iran, as part of an effort to persuade foreign firms to choose between the Iranian market and the much larger U.S. market. Most notable among these sanctions is a ban, imposed in 1995, on U.S. trade with and investment in Iran. That ban has since been modified slightly to allow for some bilateral trade in luxury and humanitarian-related goods. Foreign subsidiaries of U.S. firms remain generally exempt from the trade ban since they are under the laws of the countries where they are incorporated. Since 1995, several U.S. laws and regulations that seek to pressure Iran's economy, curb Iran's support for militant groups, and curtail supplies to Iran of advanced technology have been enacted. Since 2006, the United Nations Security Council has imposed some sanctions primarily attempting to curtail supply to Iran of weapons-related technology but also sanctioning some Iranian banks.

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[1] Section 6(j), U.S. Export Administration Act.
[2] Section 40, U.S. Arms Export Control Act.
[3] Section 620A, U.S. Foreign Assistance Act.
[4] U.S. Department of State website, http://www.state.gov/s/ct/c14151.htm, Office of Coordinator for Counterterrorism, State Sponsors of Terrorism, last viewed on February 21, 2011.
[5] U.S. Department of State website, http://www.state.gov/s/ct, Country Reports on Terrorism, last viewed on February 21, 2011.
[6] *Id.*

U.S. officials have identified Iran's energy sector as a key Iranian vulnerability because Iran's government revenues are approximately 80% dependent on oil revenues and in need of substantial foreign investment. A U.S. effort to curb international energy investment in Iran began in 1996 with the Iran Sanctions Act (ISA), but no firms have been sanctioned under it and the precise effects of ISA, as distinct from other factors affecting international firms' decisions on whether to invest in Iran, have been unclear. International pressure on Iran to curb its nuclear program has increased the hesitation of many major foreign firms to invest in Iran's energy sector, hindering Iran's efforts to expand oil production beyond 4.1 million barrels per day, but some firms continue to see opportunity in Iran.

Some in Congress express concern about the reticence of U.S. allies, of Russia, and of China, to impose U.N. sanctions that would target Iran's civilian economy. In an attempt to strengthen U.S. leverage with its allies to back such international sanctions, several bills in the 111th Congress would add U.S. sanctions on Iran. For example, H.R. 2194 (which passed the House on December 15, 2009), H.R. 1985, H.R. 1208, and S. 908 would include as ISA violations selling refined gasoline to Iran; providing shipping insurance or other services to deliver gasoline to Iran; or supplying equipment to or performing the construction of oil refineries in Iran. Several of these bills would also expand the menu of available sanctions against violators. A bill passed by the Senate on January 28, 2010 (S. 2799), contains these sanctions as well as a broad range of other measures against Iran, including reversing previous easing of the U.S. ban on trade with Iran.

In light of the strength of the democratic opposition in Iran, one trend in Congress is to alter some U.S. sanctions laws in order to facilitate the democracy movement's access to information, and to target those persons or institutions in the regime who are committing human rights abuses against protesters.[7]

The Voice Act[8]

In the Voice Act, Congress directed the President of the United States to submit a report on non-Iranian persons, including corporations with U.S. subsidiaries, who have knowingly or negligently provided hardware, software, or other forms of assistance to the government of Iran, which has furthered Iran's efforts to filter online political content, disrupt cell phone and Internet communications, and monitor the online activities of Iranian citizens.

State Law

Foreign Trade

Florida prohibits the export or sale for export of any goods, products, or services to a foreign country in violation of any federal law. Additionally, Florida law specifically restricts any interference with foreign exports except as prohibited by federal law.[9]

State Agency Procurement of Commodities and Services

The process for the procurement of commodities and contractual services by state agencies[10] provides requirements for fair and open competition among vendors, agency maintenance of written documentation that supports procurement decisions, and implementation of monitoring mechanisms.[11]

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[7] Congressional Research Service Report RS20871, *Iran Sanctions*, February 2, 2010.

[8] P.L. 111-84, October 28, 2009.

[9] *See* s. 288.855, F.S.

[10] Section 287.012(1), F.S., defines "agency" to mean "any of the various state officers, departments, boards, commissions, divisions, bureaus, and councils and any other unit of organization, however designated, of the executive branch of state government." The term "does not include the university and college boards of trustees or the state universities and colleges."

[11] *See* part I of chapter 287, F.S.

Legislative intent for chapter 287, F.S., states the process provided in the chapter is necessary in order to:

- Reduce improprieties and opportunities for favoritism;
- Ensure the equitable and economical award of public contracts; and
- Inspire public confidence in state procurement.[12]

The Department of Management Services (DMS) is statutorily designated as the central executive agency procurement authority and its responsibilities include overseeing agency implementation of the procurement process,[13] creating uniform agency procurement rules,[14] implementing the online procurement program,[15] and establishing state term contracts.[16] The agency procurement process is partly decentralized in that agencies, except in the case of state term contracts, may procure goods and services themselves in accordance with requirements set forth in statute and rule, rather than placing orders through DMS.

Protecting Florida's Investments Act: Scrutinized Companies[17]

The Protecting Florida's Investments Act (PFIA), enacted in 2008, requires the State Board of Administration (SBA), acting on behalf of the Florida Retirement System Trust Fund (FRSTF), to assemble and publish a list of scrutinized companies that have prohibited business operations in Sudan and Iran.[18] Once placed on a list, the SBA and its investment managers are prohibited from acquiring those companies' securities and must divest those securities if the companies do not cease prohibited activities or take certain specified actions. PFIA does not affect FRSTF investments in U.S. companies. PFIA only affects foreign companies with certain operations in Sudan and Iran involving the petroleum or energy sector, oil or mineral extraction, power production, or military support activities.

The criteria used in defining what constitute a scrutinized company in Sudan or Iran is in PFIA.[19] A scrutinized company is judged according to whether it meets the following criteria:

Sudan:

1. Has a material business relationship with the government of Sudan or a government-created project involving oil related, mineral extraction, or power generation activities;
2. Has a material business relationship involving the supply of military equipment;
3. Imparts minimal benefit to disadvantaged citizens that are typically located in the geographic periphery of Sudan; or
4. Is complicit in the genocidal campaign in Darfur.[20]

Iran:

1. Has a material business relationship with the government of Iran or a government-created project involving oil related or mineral extraction activities; or
2. Has made material investments with the effect of significantly enhancing Iran's petroleum sector.[21]

Authority to Prohibit Contracts

State and local governments have proposed or enacted measures restricting agencies having economic ties with firms that transact business with or in foreign countries of whose conduct the state or local government finds objectionable. Case law, however, indicates that in the absence of federal

[12] Section 287.001, F.S.
[13] *See* ss. 287.032 and 287.042, F.S.
[14] *See* ss. 287.032(2) and 287.042(3), (4), and (12), F.S.
[15] *See* s. 287.057(23), F.S
[16] *See* ss. 287.042(2), 287.056, and 287.1345, F.S.
[17] Section 215.473, F.S.
[18] A complete list of scrutinized companies and companies that are under continuing examination by the SBA can be found on the SBA website.
[19] *See* s. 215.473(1)(t), F.S.
[20] Section 215.473(1)(t)1.-3., F.S.
[21] Section 215.473(1)(t)4., F.S.

authority being granted for such action, those statutes may be preempted by the dormant federal foreign affairs powers.[22]

The federal government has expressly given state and local governments authority to divest from companies directly invested in certain Sudanese or Iranian sectors.[23] The laws define an "investment" to include the entry into or the renewal of a contract for goods or services. The federal laws require that the state or local government provide written notice to each person to which a measure is applied, provide an opportunity to each person to comment in writing on the applicability of the measures, and provide that the application of the measure cannot occur earlier than 90 days after the written notice date. The government enacting the measure is required to send notice to the U.S. Attorney General within 30 days after adopting a measure.

EFFECT OF PROPOSED CHANGES

The bill creates a prohibition against contracting with scrutinized companies for goods or services. It creates definitions for the terms "awarding body"[24] and "local governmental entity,"[25] and definitions contained in s. 287.012, F.S., and s. 215.473, F.S., are included by reference.

The bill prohibits a company on the Scrutinized Companies with Activities in Sudan List or on the Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List from bidding on, submitting a proposal for, or entering into or renewing a contract with an agency or local governmental entity for goods or services of $1 million or more.

The bill requires that any contract with an agency or local governmental entity for goods or services of $1 million or more, entered into or renewed on or after July 1, 2011, contain a provision that allows for the termination of the contract, at the option of the awarding body, if the company is found to have submitted a false certification or has been placed on the Scrutinized Companies with Activities in Sudan List or the Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List.

The bill allows an agency or local governmental entity to make a case-by-case exception to the prohibition if all of the following conditions are met:

- The scrutinized business operations[26]were made before July 1, 2010;
- The scrutinized business operations have not been expanded or renewed after July 1, 2010;
- The agency or local governmental entity determines that it is in the best interest of the state or local community to contract with the company; or
- The company has adopted, has publicized, and is implementing a formal plan to cease scrutinized business operations and to refrain from engaging in any new scrutinized business operations.

An exception may also be granted if one of the following conditions is met:

- The local governmental entity makes a public finding that, absent such an exemption, the local governmental entity would be unable to obtain the goods or services for which the contract is offered.

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[22] In 2000, the U.S. Supreme Court unanimously held in *Crosby v. National Foreign Trade Council* that a Massachusetts law restricting state transactions with firms doing business in Burma was preempted by a federal Burma statute. *See* 530 U.S. 363(2003); *but see Faculty Senate of Fla. Int'l Univ. v. Winn*, 616 F.3d 1206 (11th Cir. 2010) (upholding a university prohibition on using state or nonstate funds on activities related to travel to a terrorist state).

[23] The Sudan Accountability and Divestment Act of 2007, Pub. L. No. 110-174, ss. 1 to 12, Dec. 31, 2007, 121 Stat. 2516, as amended Pub. L. No. 111-195, Title II, s. 205(a), July 1, 2010, 124 Stat. 1344.; 22 U.S.C. s. 8532.

[24] "Awarding body" means, for purposes of state contracts, an agency or department, and for purposes of local contracts, means the governing body of the local governmental entity.

[25] "Local governmental entity" means "a county, municipality, special district, or other political subdivision of the state."

[26] Section 215.473(1)(s), F.S., defines "scrutinized business operations" to mean "business operations that have resulted in a company becoming a scrutinized company."

- For a contract with an executive agency, the Governor makes a public finding that, absent such an exemption, the agency would be unable to obtain the goods or services for which the contract is offered.
- For a contract with an office of a state constitutional officer other than the Governor, the state constitutional officer makes a public finding that, absent such an exception, the office would be unable to obtain the goods or services for which the contract is offered.

An agency or local governmental entity must require a company that submits a bid or proposal for, or that otherwise proposes to enter into or renew, a contract with the agency or local governmental entity for goods or services of $1 million or more to certify that the company is not a scrutinized business operation under s. 215.473, F.S. The certification must be submitted at the time a bid or proposal is submitted or before a contract is executed or renewed.

When an agency or local governmental entity determines that a company has submitted a false certification that it is not a scrutinized business operation, it must provide the company with written notice and 90 days to respond in writing to the determination. If the company fails to demonstrate that it has ceased its engagement in scrutinized business operations, then:

- The awarding body *must* report the company to the Attorney General and provide information demonstrating the false certification. The Attorney General must determine whether to bring a civil action against the company. Additionally, the awarding body *may* report the company to the municipal attorney, county attorney, or district attorney who may determine whether to bring a civil action against the company.
- If a civil action is brought and the court determines that the company submitted a false certification, the company is required to pay all reasonable attorney's fees and costs (including costs for investigations that led to the finding of false certification) and a civil penalty equal to the greater of $2 million or twice the amount of the contract for which the false certification was submitted. A civil action to collect the penalties must commence within 3 years after the date the false certification is made.
    - The bill specifies that only the awarding body may cause a civil action to be brought, and that the section does not create or authorize a private right of action or enforcement of the provided penalties. An unsuccessful bidder, or any other person other than the awarding body, may not protest the award or contract renewal on the basis of a false certification.
- An existing contract with the company must be terminated at the option of the awarding body.
- The company is ineligible to bid on any contract with an agency or a local governmental entity for 3 years after the date of determining that the company submitted a false certification.

The bill specifies that its provisions preempt any ordinance or rule of any local governmental entity involving public contracts for goods or services of $1 million or more with a company engaged in scrutinized business operations.

Within 30 days after the effective date of the bill, the Department of Management Services must submit a written notice describing the act to the Attorney General of the United States.

Finally, the act becomes inoperative on the date that federal law ceases to authorize the state to adopt and enforce the contracting prohibitions of the type provided.

B. SECTION DIRECTORY:

Section 1. Creates s. 287.135, F.S., to create prohibitions against contracting with scrutinized companies.

Section 2. Provides an effective date of July 1, 2011.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   Indeterminate.

2. Expenditures:

   Indeterminate.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   Indeterminate.

2. Expenditures:

   Indeterminate.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The impact on the private sector is indeterminate; however, there will likely be an adverse affect on companies on the Scrutinized Companies with Activities in Sudan List or the Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List that seek to enter into contracts with governmental entities in the state.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. This bill does not reduce the percentage of a state tax shared with counties or municipalities. This bill does not reduce the authority that municipalities have to raise revenue

2. Other:

Under the Supremacy Clause of the United States Constitution,[27] where the federal government and a state government legislates on the same subject, the federal law is supreme and will, in general, have the effect of voiding the conflicting state law.[28] The Supremacy Clause applies when state law is inconsistent with federal law. If state law attempts to invalidate the substance of a federal law or treaty, the state law cannot stand. Similarly, state law which encourages conduct inconsistent with that required by federal law is invalid. The same result holds if state law forbids conduct that federal law allows, or interferes with the achievement of a federal objective.[29] However, states are generally free to legislate in areas not controlled by federal law.

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[27] U.S. Const. art. VI, cl. 2.

[28] See, *Northwest Central Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 509 (1989).

[29] *Perez v. Campbell*, 402 U.S. 637 (1971); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

Congress, however, has authorized the type of contractual restrictions included in this bill and the bill contains a provision that specifically makes it inoperative if Congress ever rescinds that authority. Therefore, this bill should not violate the Supremacy Clause of the U.S. Constitution.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On April 8, 2011, the Government Operations Subcommittee adopted a strike-all amendment and reported the bill favorably with committee substitute. The committee substitute addresses the drafting issues noted in the original bill analysis. Additionally, it requires public entities to have a contract provision that allows contracts to be terminated if the company submits a false certification or is placed on either of the Scrutinized Companies list.

A bill to be entitled

An act relating to scrutinized companies; creating s. 287.135, F.S.; providing definitions; prohibiting a state agency or local governmental entity from contracting for goods and services of more than a certain amount with a company that is on the Scrutinized Companies with Activities in Sudan List or the Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List; providing for a contract provision that allows for termination of the contract if the company is found to have been placed on such list; providing exceptions; providing for civil action; providing penalties; providing a statute of repose; prohibiting a private right of action; requiring the Department of Management Services to notify the Attorney General after the act becomes law; providing that the act becomes inoperative if federal law ceases to authorize states to enact such contracting prohibitions; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 287.135, Florida Statutes, is created to read:

287.135 Prohibition against contracting with scrutinized companies.—

(1) In addition to the terms defined in ss. 287.012 and 215.473, as used in this section, the term:

(a) "Awarding body" means, for purposes of state

contracts, an agency or the department, and for purposes of local contracts, the governing body of the local governmental entity.

(b) "Local governmental entity" means a county, municipality, special district, or other political subdivision of the state.

(2) A company that, at the time of bidding or submitting a proposal for a new contract or renewal of an existing contract, is on the Scrutinized Companies with Activities in Sudan List or the Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List, created pursuant to s. 215.473, is ineligible for, and may not bid on, submit a proposal for, or enter into or renew a contract with an agency or local governmental entity for goods or services of $1 million or more.

(3) Any contract with an agency or local governmental entity for goods or services of $1 million or more entered into or renewed on or after July 1, 2011, must contain a provision that allows for the termination of such contract at the option of the awarding body if the company is found to have submitted a false certification as provided under subsection (5) or been placed on the Scrutinized Companies with Activities in Sudan List or the Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List.

(4) Notwithstanding subsection (2) or subsection (3), an agency or local governmental entity, on a case-by-case basis, may permit a company on the Scrutinized Companies with Activities in Sudan List or the Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List to be

eligible for, bid on, submit a proposal for, or enter into or renew a contract for goods or services of $1 million or more under either of the following conditions:

(a) All of the following occur:

1. The scrutinized business operations were made before July 1, 2011.

2. The scrutinized business operations have not been expanded or renewed after July 1, 2011.

3. The agency or local governmental entity determines that it is in the best interest of the state or local community to contract with the company.

4. The company has adopted, has publicized, and is implementing a formal plan to cease scrutinized business operations and to refrain from engaging in any new scrutinized business operations.

(b) One of the following occurs:

1. The local governmental entity makes a public finding that, absent such an exemption, the local governmental entity would be unable to obtain the goods or services for which the contract is offered.

2. For a contract with an executive agency, the Governor makes a public finding that, absent such an exemption, the agency would be unable to obtain the goods or services for which the contract is offered.

3. For a contract with an office of a state constitutional officer other than the Governor, the state constitutional officer makes a public finding that, absent such an exemption, the office would be unable to obtain the goods or services for

which the contract is offered.

(5) At the time a company submits a bid or proposal for a contract or before the company enters into or renews a contract with an agency or governmental entity for goods or services of $1 million or more, the company must certify that the company is not on the Scrutinized Companies with Activities in Sudan List or the Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List.

(a) If, after the agency or the local governmental entity determines, using credible information available to the public, that the company has submitted a false certification, the agency or local governmental entity shall provide the company with written notice of its determination. The company shall have 90 days following receipt of the notice to respond in writing and to demonstrate that the determination of false certification was made in error. If the company does not make such demonstration within 90 days after receipt of the notice, the agency or the local governmental entity shall bring a civil action against the company. If a civil action is brought and the court determines that the company submitted a false certification, the company shall pay the penalty described in subparagraph 1. and all reasonable attorneys' fees and costs, including any costs for investigations that led to the finding of false certification.

1. A civil penalty equal to the greater of $2 million or twice the amount of the contract for which the false certification was submitted shall be imposed.

2. The company is ineligible to bid on any contract with an agency or local governmental entity for 3 years after the

date the agency or local governmental entity determined that the company submitted a false certification.

(b) A civil action to collect the penalties described in paragraph (a) must commence within 3 years after the date the false certification is submitted.

(6) Only the agency or local governmental entity that is a party to the contract may cause a civil action to be brought under this section. This section does not create or authorize a private right of action or enforcement of the penalties provided in this section. An unsuccessful bidder, or any other person other than the agency or local governmental entity, may not protest the award of a contract or contract renewal on the basis of a false certification.

(7) This section preempts any ordinance or rule of any agency or local governmental entity involving public contracts for goods or services of $1 million or more with a company engaged in scrutinized business operations.

(8) The department shall submit to the Attorney General of the United States a written notice describing this section within 30 days after July 1, 2011. This section becomes inoperative on the date that federal law ceases to authorize the states to adopt and enforce the contracting prohibitions of the type provided for in this section.

Section 2. This act shall take effect July 1, 2011.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/CS/HB 479 Medicaid Malpractice
SPONSOR(S): Heatlh Care Appropriations Subcommittee; Health & Human Services Access Subcommittee; Civil Justice Subcommittee; Horner and others
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 1590, SB 1892

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	12 Y, 3 N, As CS	Billmeier	Bond
2) Health & Human Services Access Subcommittee	12 Y, 3 N, As CS	Poche	Schoolfield
3) Health Care Appropriations Subcommittee	11 Y, 3 N, As CS	Clark	Pridgeon
4) Judiciary Committee		Billmeier LMB	Havlicak RH

SUMMARY ANALYSIS

This bill makes numerous changes to affect medical malpractice litigation in Florida.

This bill creates an "expert witness certificate" that an expert witness who is licensed in another jurisdiction must obtain before testifying in a medical negligence case or providing an affidavit in the presuit portion of a medical negligence case.

This bill provides for discipline against the license of a physician, osteopathic physician or dentist that provides misleading, deceptive, or fraudulent expert witness testimony related to the practice of medicine or the practice of dentistry.

This bill provides for the creation of an informed consent form related to cataract surgery. Such a form is admissible in evidence and its use creates a rebuttable presumption that the physician properly disclosed the risks of cataract surgery.

This bill provides that medical malpractice insurance contracts must contain a clause stating whether the physician or dentist has a right to "veto" any admission of liability or offer of judgment made within policy limits by the insurer. Current law prohibits such provisions in medical malpractice insurance contracts.

This bill provides that records, policies, or testimony of an insurer's reimbursement policies or reimbursement decisions relating to the care provided to the plaintiff are not admissible in any civil action and provides that a health care provider's failure to comply with, or breach of, any federal requirement is not admissible in any medical negligence case.

This bill provides that a plaintiff in a medical negligence action must prove by clear and convincing evidence that the failure of a health care provider to order, perform, or administer supplemental diagnostic tests is a breach of the standard of care.

This bill provides that a hospital is not liable for the negligence of a health care provider with whom the hospital has entered into a contract unless the hospital expressly directs or exercises actual control over the specific conduct which caused the injury.

The bill has an insignificant fiscal impact associated with implementation of the bill, however, the Department of Health can absorb these costs within existing resources.

The bill provides an effective date of July 1, 2011.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Overview of Medical Malpractice Litigation

This bill makes changes to numerous statutes relating to medical malpractice litigation. In general, a medical malpractice action proceeds as follows.

- Prior to the filing of a lawsuit, the claimant (the person injured by medical negligence or a party bringing a wrongful death action arising from an incidence of medical malpractice) and defendant (a physician, other medical professional, hospital, or other healthcare facility) are required to conduct "presuit" investigations to determine whether medical negligence occurred and what damages, if any, are appropriate.[1]

- Upon completion of its presuit investigation, the claimant must provide each prospective defendant with a notice of intent to initiate litigation ("presuit notice").[2]

- For a period of 90 days after the presuit notice is mailed to each potential defendant, no lawsuit can be filed and the statute of limitations is tolled.[3] During that time, the parties are required to conduct informal discovery, including the taking of unsworn statements, the exchange of relevant documents, written questions, and an examination of the claimant.[4]

- Upon completion of the presuit investigation and informal discovery process, each potential defendant is required to respond to the claimant and either (1) reject the claim; (2) make a settlement offer; or (3) offer to admit liability and proceed to arbitration to determine damages.[5] At that point, the claimant can either accept the defendant's offer or proceed with the filing of a lawsuit.[6]

- If the case proceeds to trial, economic damages are not capped and noneconomic damages are capped at $1 million recoverable from practitioners and $1.5 million recoverable from nonpractitioners.[7] Damages are apportioned based on comparative fault.[8]

The 2003 Legislation

In 2003, the Legislature adopted ch. 2003-416, L.O.F., in response to dramatic increases in medical malpractice liability insurance premiums and the "functional unavailability" of malpractice insurance for some physicians.[9] The legislation, among other things, created a cap on noneconomic damages, created requirements for expert witness testimony, provided for additional presuit discovery, and required the Office of Insurance Regulation to report yearly on the medical malpractice insurance market in Florida. The reports[10] show the number of closed claims, the amount of damages paid, and

[1] Section 766.203, F.S.
[2] Section 766.106, F.S.
[3] Section 766.106, F.S.
[4] Section 766.205, F.S.
[5] Section 766.106, F.S.
[6] Section 766.106, F.S.
[7] Section 766.118, F.S.
[8] Section 766.112, F.S.
[9] Section 766.201(1), F.S.
[10] Information compiled from the Medical Malpractice Closed Claim Database and Rate Filing Annual Reports created by the Office of Insurance Regulation, 2005-2010. The closed claim and damages information are contained in the "Executive Summary" of each report. These reports can be accessed at http://www.floir.com/DataReports/datareports.aspx

the total gross medical malpractice insurance premium reported to the Office of Insurance Regulation since the enactment of ch. 2003-416, L.O.F.:

Claims, Damages and Insurance Premiums			
Year	Closed Claims	Total Damages	Total Premiums
2004	3,574	$664 million	$860 million
2005	3,753	$677 million	$850 million
2006	3,811	$602 million	$847 million
2007	3,553	$523 million	$663 million
2008	3,336	$519 million	$596 million
2009	3,087	$570 million	$550 million

The Office of Insurance Regulation report summarized the insurance rate filings in 2009:

> On average, rates for companies writing physicians and surgeons' malpractice insurance in the admitted market decreased 8.2%.[11]

The report noted, regarding the decrease in premium:

> This represents a dramatic decrease (36%) in the overall medical malpractice premium reported in Florida in 2009 from what was reported in 2004. This is attributable to the lowering of rates. However, it may also be due to new arrangements by physicians including the use of individual bonding, purchasing malpractice insurance through hospitals/employers as well as utilization of self-insurance funds, or other non-traditional insurance mechanisms.[12]

The report summarized the growth of Florida's medical malpractice insurance market since 2004. In 2009, the Office of Insurance Regulation reported that 22 companies wrote 80% of the direct written premium in medical malpractice insurance and compared that number to prior years:

> This year, achieving the 80% market share requirement again required the inclusion of 22 insurers as in the previous year; 17 were required in the 2007 report, 15 insurers for the 2006 annual report, 12 in the 2005 annual report, and only 11 for the 2004 report.[13]

According to information provided by the Office of State Court Administrator, 1,248 medical malpractice cases were filed in Florida in 2010.

Issues Addressed by the Bill

Presuit Investigation, Presuit Notice, and Presuit Discovery

Background

Section 766.203(2), F.S., requires a claimant to investigate whether there are any reasonable grounds to believe whether any named defendant was negligent in the care and treatment of the claimant and whether such injury resulted in injury to the claimant prior to issuing a presuit notice. The claimant must corroborate reasonable grounds to initiate medical negligence litigation by submitting an affidavit from a medical expert.[14] After completion of presuit investigation, a claimant must send a presuit notice

[11] Florida Office of Insurance Regulation, "2010 Annual Report – October 1, 2010 - Medical Malpractice Financial Information Closed Claim Database and Rate Filings" at page 4.
[12] Florida Office of Insurance Regulation, "2010 Annual Report – October 1, 2010 - Medical Malpractice Financial Information Closed Claim Database and Rate Filings" at page 12.
[13] Florida Office of Insurance Regulation, "2010 Annual Report – October 1, 2010 - Medical Malpractice Financial Information Closed Claim Database and Rate Filings" at page 11.
[14] Section 766.203(2), F.S.

to each prospective defendant.[15] The presuit notice must include a list of all known health care providers seen by the claimant for the injuries complained of subsequent to the alleged act of negligence, all known health care providers during the 2-year period prior to the alleged act of negligence who treated or evaluated the claimant, and copies of all of the medical records relied upon by the expert in signing the affidavit.[16] However, the requirement of providing the list of known health care providers may not serve as grounds for imposing sanctions[17] for failure to provide presuit discovery.[18]

Once the presuit notice is provided, no suit may be filed for a period of 90 days. During the 90-day period, the statute of limitations is tolled and the prospective defendant must conduct an investigation to determine the liability of the defendant.[19] Once the presuit notice is received, the parties must make discoverable information available without formal discovery.[20] Informal discovery includes:

1. Unsworn statements - Any party may require other parties to appear for the taking of an unsworn statement.

2. Documents or things - Any party may request discovery of documents or things.

3. Physical and mental examinations - A prospective defendant may require an injured claimant to appear for examination by an appropriate health care provider. Unless otherwise impractical, a claimant is required to submit to only one examination on behalf of all potential defendants.

4. Written questions - Any party may request answers to written questions.

5. Medical information release - The claimant must execute a medical information release that allows a prospective defendant to take unsworn statements of the claimant's treating physicians. The claimant or claimant's legal representative has the right to attend the taking of such unsworn statements.[21]

Section 766.106(7), F.S., provides that a failure to cooperate during the presuit investigation may be grounds to strike claims made or defenses raised. Statements, discussions, documents, reports, or work product generated during the presuit process are not admissible in any civil action and participants in the presuit process are immune from civil liability arising from participation in the presuit process.[22]

At or before the end of the 90 days, the prospective defendant must respond by rejecting the claim, making a settlement offer, or making an offer to arbitrate in which liability is deemed admitted, at which point arbitration will be held only on the issue of damages.[23] Failure to respond constitutes a rejection of the claim.[24] If the defendant rejects the claim, the claimant can file a lawsuit.

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[15] Section 766.166(2)(a), F.S.
[16] Section 766.106(2)(a), F.S.
[17] Sanctions can include the striking of pleadings, claims, or defenses, the exclusion of evidence, or, in extreme cases, dismissal of the case.
[18] Section 766.106(2)(a), F.S.
[19] Section 766.106(3), (4), F.S.
[20] Section 766.106(6)(a), F.S. The statute also provides that failure to make information available is grounds for dismissal of claims or defenses.
[21] Section 766.106(6), F.S.
[22] Section 766.106(5), F.S.
[23] Section 766.106(3)(b), F.S.
[24] Section 766.106(3)(c), F.S.

Expert Witness Qualifications

Background

Florida law requires expert witnesses in medical negligence cases to meet certain qualifications. The witness must be a licensed health care provider. If the health care provider against whom or on whose behalf the testimony[25] is offered is a specialist, the expert witness must:

> (1) Specialize in the same or similar specialty as the health care provider against whom or on whose behalf the testimony is offered and
>
> (2) Have devoted professional time during the 3 years immediately preceding the date of the occurrence that is the basis for the action to:
>
> > a. The active clinical practice of, or consulting with respect to, the same or similar specialty that includes the evaluation, diagnosis, or treatment of the medical condition that is the subject of the claim and have prior experience treating similar patients;
> >
> > b. Instruction of students in an accredited health professional school or accredited residency or clinical research program in the same or similar specialty; or
> >
> > c. A clinical research program that is affiliated with an accredited health professional school or accredited residency or clinical research program in the same or similar specialty.[26]

If the health care provider against whom or on whose behalf the testimony is offered is a general practitioner, the expert witness must:

> (1) Have devoted professional time during the 5 years immediately preceding the date of the occurrence that is the basis for the action to:
>
> > a. The active clinical practice or consultation as a general practitioner;
> >
> > b. The instruction of students in an accredited health professional school or accredited residency program in the general practice of medicine; or
> >
> > c. A clinical research program that is affiliated with an accredited medical school or teaching hospital and that is in the general practice of medicine.[27]

If the health care provider against whom or on whose behalf the testimony is offered is a health care provider other than a specialist or a general practitioner, the expert witness must:

> (1) Have devoted professional time during the 3 years immediately preceding the date of the occurrence that is the basis for the action to:
>
> > a. The active clinical practice of, or consulting with respect to, the same or similar health profession as the health care provider against whom or on whose behalf the testimony is offered;

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[25] Section 766.102, F.S., provides qualifications for expert witnesses testifying at trial. Sections 766.202(6) and 766.203, F.S., provide qualifications for expert witnesses that must provide presuit corroboration of negligence claims. The qualifications for trial experts and presuit experts are the same.

[26] Section 766.102(5), F.S.

[27] Section 766.102(5), F.S.

b. The instruction of students in an accredited health professional school or accredited residency program in the same or similar health profession in which the health care provider against whom or on whose behalf the testimony is offered; or

c. A clinical research program that is affiliated with an accredited medical school or teaching hospital and that is in the same or similar health profession as the health care provider against whom or on whose behalf the testimony is offered.[28]

Chapter 458, F.S., governs the regulation of medical practice. Chapter 459, F.S., governs the regulation of osteopathic medicine. Chapter 466, F.S., governs the regulation of dentists. Each chapter creates a board to deal with issues relating to licensing and discipline of physicians, osteopathic physicians and dentists. Under current law, an expert witness is not required to possess a Florida license to practice medicine, osteopathic medicine or dentistry.[29]

Effect of the Bill

The bill requires the Department of Health to issue an "expert witness certificate" to a physician or dentist licensed in another state or Canada to provide expert witness testimony in this state. The bill requires the Department to issue the certificate if the physician, osteopathic physician or dentist submits a completed application, pays an application fee of $50, and has not had a previous expert witness certificate revoked by the appropriate board. The application must contain the physician's or dentist's legal name; mailing address, telephone number, and business locations; the names of jurisdictions where the physician or dentist holds an active and valid license; and the license numbers issued to the physician or dentist by other jurisdictions.

The department must approve or deny the certificate within seven business days after receipt of the application and payment of the fee or the application is approved by default. A physician or dentist must notify the appropriate department of his or her intent to rely on a certificate approved by default. The certificate is valid for two years.

The certificate authorizes a physician, osteopathic physician or dentist to provide a verified expert opinion in the presuit stage of a medical malpractice case and to provide testimony about the standard of care in medical negligence litigation. The certificate does not authorize the physician, osteopathic physician or dentist to practice medicine or dentistry and does not require the certificate holder to obtain a license to practice medicine or dentistry.

This bill amends s. 766.102, F.S., relating to the qualifications of expert witness in cases against physicians licensed under ch. 458 or ch. 459, F.S, or dentists licensed under ch. 466, F.S. The bill requires that the expert witness testifying about the standard of care in such cases must be licensed under ch. 458, F.S., ch. 459, F.S., or ch. 466, F.S., or possess a valid expert witness certificate.

This bill also amends s. 766.102(5), F.S., to require that an expert witness conduct a complete review of the pertinent medical records before the witness can give expert testimony.

License Disciplinary Actions

Background

Chapter 458, F.S., regulates medical practice. Chapter 459, F.S., regulates the practice of osteopathic medicine. Chapter 466, F.S., regulates the practice of dentistry. Each chapter creates a board to deal

[28] Section 766.102(5), F.S.

[29] *See Baptist Medical Center of the Beaches, Inc. v. Rhodin*, 40 So. 3d 112, 117 (Fla. 1st DCA 2010)(noting that Florida's expert witness statute "does not encompass a universe limited only to Florida licensees").

with issues relating to discipline of physicians, osteopathic physicians and dentists. In general, the discipline process under ch. 458, F.S., ch. 459, F.S., and ch. 466, F.S., begins when a complaint is filed against a health care provider alleging a violation of the disciplinary statutes. The Department of Health reviews the case and a department prosecutor presents the case to the appropriate board or probable cause panel of the appropriate board. If probable cause is found, the Department of Health files an administrative complaint. If the health care provider disputes the allegations of the complaint, the provider can request a hearing before an administrative law judge. An attorney for the Department of Health prosecutes the case and the provider may be represented by counsel. The administrative law judge issues a recommended order upon the conclusion of the hearing. The recommended order and any exceptions filed by the parties are considered by the appropriate board and the board determines the appropriate discipline which can include a fine, suspension of the license, or revocation of the license.[30]

Sections 456.072, 458.331, 459.015 and 466.028, F.S., create grounds for which disciplinary action may be taken against a licensee.[31] It is not clear from those statutes whether the boards can impose discipline against a licensee for providing misleading, deceptive, or fraudulent expert witness testimony related to the practice of medicine, osteopathic medicine or dentistry. "Statutes providing for the revocation or suspension of a license to practice are deemed penal in nature and must be strictly construed, with any ambiguity interpreted in favor of the licensee."[32] Section 458.331(1)(k), F.S., provides the following ground for discipline:

> Making deceptive, untrue, or fraudulent representations in or related to the practice of medicine or employing a trick or scheme in the practice of medicine.[33]

Section 466.028(1)(l), F.S., provides the following ground for discipline:

> Making deceptive, untrue, or fraudulent representations in or related to the practice of dentistry.

It is not clear whether a court would find deceptive or untrue expert testimony in a medical negligence case to be "related to the practice" of medicine, osteopathic medicine or dentistry.[34]

Current law allows discipline against a licensee for "being found by any court in this state to have provided corroborating written medical expert opinion attached to any statutorily required notice of claim or intent or to any statutorily required response rejecting a claim, without reasonable investigation."[35]

Effect of the Bill

The bill amends ss. 458.331, 459.015 and 466.028, F.S., to provide that the appropriate board may impose discipline on a physician or osteopathic physician who provides "misleading, deceptive, or fraudulent expert witness testimony related to the practice of medicine" or on a dentist who provides "misleading, deceptive, or fraudulent expert witness testimony related to the practice of dentistry." The disciplinary statutes allow the board to impose discipline against licensees who violate the statutes. The bill provides that an expert witness certificate shall be treated as a license in any disciplinary action and that the holder of an expert witness certificate is subject to discipline by the appropriate board.

The bill also amends ss. 458.331, 459.015 and 466.028, F.S., to provide that the purpose of the disciplinary sections is to "facilitate uniform discipline for those acts made punishable under this section

[30] *See* ss. 456.072 and 456.073, F.S.
[31] Section 456.072(2), F.S., deals with discipline against licensees.
[32] *Elmariah v. Board of Medicine*, 574 So. 2d 164, 165 (Fla. 1st DCA 1990).
[33] Section 459.015(1)(m), F.S., contains the same language related to osteopathic physicians.
[34] In *Elmariah*, 574 So. 2d at 165, the court held that a deceptive application for staff privileges at a hospital was not made "in" the practice of medicine but noted that such an application might be "related" to the practice of medicine. The case demonstrates how a court will construe a statute very strictly in favor of the licensee.
[35] *See* ss. 458.331(1)(jj) and 459.015(1)(mm), F.S.

and, to this end, a reference to this section constitutes a general reference under the doctrine of incorporation by reference."

Incorporation by Reference

Background

Current law allows for one section of statute to reference another, or "incorporation by reference." This is commonly done to prevent the repetition of a particular text. There are two kinds of references. A "specific reference" incorporates the language of the statute referenced and becomes a part of the new statute even if the referenced statute is later altered or repealed. The law presumes that the Legislature intends to incorporate the text of the current law as it existed when the reference was created. A law review article explained:

> From a very early time, it has been generally agreed that the legal effect of a specific statutory cross reference is to incorporate the language of the referenced statute into the adopting statute as though set out verbatim, and that in the absence of express legislative intent to the contrary, the Legislature intends that the incorporation by reference shall not be affected by a subsequent change to the referenced law – even its repeal. In other words, each referenced provision has two separate existences – as substantive provision and as an incorporation by reference – and neither is thereafter affected by anything that happens to the other.[36]

The second type of referenced statute is a "general reference." The general reference differs from the specific reference in that it presumes that the referenced section may be amended in the future, and any such changes are permitted to be incorporated into the meaning of the adopting statute. Again, Means explained in his article that "when the reference is not to a specific statute, but to the law in general as it applies to a specified subject, the reference takes the law as it exists at the time the law is applied. Thus, in cases of general references, the incorporation does include subsequent changes to the referenced law."[37]

Currently, other provisions of statutes provide statutory intent which allow for references to that statute to be construed as a general reference under the doctrine of incorporation by reference. For example, the statutes which deal with the punishments for criminal offenses contain clauses which allow for any reference to them to constitute a general reference.[38] This means that any time the Legislature amends a criminal offense, these punishment statutes do not have to be reenacted within the text of a bill because it is understood that their text or interpretation may change in the future.

Effect of the Bill

This bill contains a provision providing that the changes to the disciplinary statutes constitute a general reference under the doctrine of incorporation by reference. The incorporation by reference language in this bill could be interpreted to allow amendments to statutes which reference the disciplinary statute so that the reference takes the law as it exists at the time the law is applied.

Informed Consent

Background

The Mayo Clinic website describes cataract surgery as follows:

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[36] Earnest Means, "Statutory Cross References - The "Loose Cannon" of Statutory Construction," Florida State University Law Review, Vol. 9, p. 3 (1981).
[37] Earnest Means, "Statutory Cross References - The "Loose Cannon" of Statutory Construction," Florida State University Law Review, Vol. 9, p. 3 (1981).
[38] *See* ss. 775.082, 775.083, and 775.084, F.S.

> Cataract surgery is a procedure to remove the lens of your eye and, in most cases, replace it with an artificial lens. Cataract surgery is used to treat a cataract — the clouding of the normally clear lens of your eye.[39]

Complications after cataract surgery are uncommon and risks include inflammation, infection, bleeding, swelling, retinal detachment, glaucoma, or a secondary cataract.[40]

The doctrine of informed consent requires a physician to advise his or her patient of the material risks of undergoing a medical procedure.[41] Physicians and osteopathic physicians are required to obtain informed consent of patients before performing procedures and are subject to discipline for failing to do so.[42] Florida has codified informed consent in the "Florida Medical Consent Law," s. 766.103, F.S. Section 766.103(3), F.S., provides:

> (3) No recovery shall be allowed in any court in this state against [specified health care providers including physicians and osteopathic physicians] in an action brought for treating, examining, or operating on a patient without his or her informed consent when:
>
> (a)1. The action of the [health care provider] in obtaining the consent of the patient or another person authorized to give consent for the patient was in accordance with an accepted standard of medical practice among members of the medical profession with similar training and experience in the same or similar medical community as that of the person treating, examining, or operating on the patient for whom the consent is obtained; and
>
> 2. A reasonable individual, from the information provided by the [health care provider], under the circumstances, would have a general understanding of the procedure, the medically acceptable alternative procedures or treatments, and the substantial risks and hazards inherent in the proposed treatment or procedures, which are recognized among other [health care providers] in the same or similar community who perform similar treatments or procedures; or
>
> (b) The patient would reasonably, under all the surrounding circumstances, have undergone such treatment or procedure had he or she been advised by the [health care provider] in accordance with the provisions of paragraph (a).

Section 766.103(4), F.S., provides:

> (4)(a) **A consent which** is evidenced in writing and **meets the requirements of subsection (3) shall**, if validly signed by the patient or another authorized person, **raise a rebuttable presumption of a valid consent.**
>
> (b) A valid signature is one which is given by a person who under all the surrounding circumstances is mentally and physically competent to give consent. (emphasis added).

The Florida Supreme Court discussed the effect of the rebuttable presumption in the Medical Consent Law in *Pub. Health Trust of Dade County v. Valcin*, 507 So. 2d 596 (Fla. 1987). In that case, the patient signed two consent forms, one acknowledging that no guarantees had been made concerning the results of the operation and one stating that the surgery had been explained to her.[43] The patient argued that the doctor made oral representations that contradicted the consent forms and made other

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[39] http://www.mayoclinic.com/health/cataract-surgery/MY00164 (accessed February 19, 2011).
[40] http://www.mayoclinic.com/health/cataract-surgery/MY00164/DSECTION=risks (accessed February 19, 2011).
[41] *See State v. Presidential Women's Center*, 937 So. 2d 114, 116 (Fla. 2006)("The doctrine of informed consent is well recognized, has a long history, and is grounded in the common law and based in the concepts of bodily integrity and patient autonomy").
[42] *See* s. 458.331, F.S., and 459.015, F.S.
[43] *See Pub. Health Trust of Dade County v. Valcin*, 507 So. 2d 596, 598 (Fla. 1987).

statements that were not addressed by the consent forms. The court found that such claims could overcome the presumption:

> [W]e note that no conclusive presumption of valid consent, rebuttable only upon a showing of fraud, will apply to the case. The alleged oral warranties, of course, if accepted by the jury may properly rebut a finding of valid informed consent.[44]

A second issue in Valcin was not related to informed consent but was which type of presumption should apply when surgical records related to the surgery at issue were lost. The *Valcin* court discussed the two types of presumptions created under the Evidence Code:

> At this point, we should clarify the type of rebuttable presumption necessitated under this decision. The instant problem should be resolved either by applying a shift in the burden of producing evidence, section 90.302(1), Florida Statutes (1985), or a shift in the burden of proof. § 90.302(2), Fla.Stat. (1985). While the distinction sounds merely technical, it is not. In the former, as applied to this case, the hospital would bear the initial burden of going forward with the evidence establishing its nonnegligence. If it met this burden by the greater weight of the evidence, the presumption would vanish, requiring resolution of the issues as in a typical case. *See Gulle v. Boggs,* 174 So.2d 26 (Fla.1965); C. Ehrhardt, *Florida Evidence* § 302.1 (2d ed. 1984). The jury is never told of the presumption.
>
> In contrast, once the burden of proof is shifted under section 90.302(2), the presumption remains in effect even after the party to whom it has been shifted introduces evidence tending to disprove the presumed fact, and "the jury must decide whether the evidence introduced is sufficient to meet the burden of proving that the presumed fact did not exist." Ehrhardt at § 302.2, citing *Caldwell v. Division of Retirement,* 372 So. 2d 438 (Fla. 1979).[45]

The *Valcin* court discussed the second kind of rebuttable presumption:

> The second type of rebuttable presumption, as recognized in s. 90.302(2), F.S., affects the burden of proof, shifting the burden to the party against whom the presumption operates to prove the nonexistence of the fact presumed. "When evidence rebutting such a presumption is introduced, the presumption does not automatically disappear. It is not overcome until the trier of fact believes that the presumed fact has been overcome by whatever degree of persuasion is required by the substantive law of the case." Rebuttable presumptions which shift the burden of proof are "expressions of social policy," rather than mere procedural devices employed "to facilitate the determination of the particular action."
>
> A section 90.302(2) presumption shifts the burden of proof, ensuring that the issue of negligence goes to the jury.[46] (internal citations omitted).

Effect of the Bill

The bill requires that the Boards of Medicine and Osteopathic Medicine to adopt rules establishing a standard informed consent form setting forth recognized specific risks relating to cataract surgery. The boards must consider information from physicians and osteopathic physicians regarding specific recognized risks of cataract surgery and must consider informed consent forms used in other states.

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[44] *Pub. Health Trust of Dade County v. Valcin*, 507 So. 2d 596, 599 (Fla. 1987).
[45] *Pub. Health Trust of Dade County v. Valcin*, 507 So. 2d 596, 600 (Fla. 1987).
[46] *Pub. Health Trust of Dade County v. Valcin*, 507 So. 2d 596, 600-601 (Fla. 1987).

The rule must be proposed within 90 days of the effective date of the bill and the provisions of s. 120.541, F.S., relating to adverse impacts, estimated regulatory costs, and legislative ratification of rules do not apply.

The bill provides that in a civil action or administrative proceeding against a physician or osteopathic physician based on the failure to properly disclose the risks of cataract surgery, a properly executed informed consent form is admissible and creates a rebuttable presumption that the physician or osteopathic physician properly disclosed the risks. The bill requires that the rebuttable presumption be included in the jury instruction in a civil action.

Reports of Adverse Incidents

Current Law

Sections 458.351 and 459.026, F.S., require health care providers practicing in an office setting to report "adverse incidents" to the Department of Health and requires the Department of Health to review such incidents to determine whether disciplinary action is appropriate. Hospitals and other facilities licensed under s. 395.0197, F.S., also have adverse incident reporting requirements. In general, adverse incidents are incidents resulting in death, brain or spinal damage, wrong site surgical procedures, or cases of performing the wrong surgical procedure.[47]

Effect of the Bill

The bill provides that incidents resulting from recognized specific risks described in the signed consent forms (discussed elsewhere in this analysis) related to cataract surgery are not considered adverse incidents for purposes of ss. 458.351, 459.026, and 395.0197, F.S.

"Consent to Settle" Clauses in Medical Malpractice Insurance Contracts

Background

Section 627.4147, F.S., contains provisions relating to medical malpractice insurance contracts. Among other things, medical malpractice insurance contracts must include a clause requiring the insured to cooperate fully in the presuit review process if a notice of intent to file a claim for medical malpractice is made against the insured.

In addition, the insurance contract must include a clause authorizing the insurer or self-insurer to "determine, to make, and to conclude, without the permission of the insured, any offer of admission of liability and for arbitration pursuant to s. 766.106, settlement offer, or offer of judgment, if the offer is within the policy limits."[48] The statute further provides that it is against public policy for any insurance policy to contain a clause giving the insured the exclusive right to veto any offer for admission of liability and for arbitration, settlement offer, or offer of judgment, when such offer is within the policy limits. However, the statute provides that the insurer must act in good faith and in the best interests of the insured.[49]

The provision giving insurers the exclusive right to settle claims within policy limits was enacted in 1985.[50] Subsequent to that legislation, there have been causes where physicians argued that insurance companies improperly settled claims.[51] In *Rogers v. Chicago Insurance Company*, 964 So. 2d 280 (Fla. 4th DCA 2007), a physician sued his malpractice carrier for failing to exercise good faith in settling a claim. He argued that the claim was completely defensible and he was damaged by the

[47] *See generally* s. 458.351, F.S., for examples of incidents required to be reported. Sections 459.026 and 395.0197, F.S., contain reporting requirements for osteopathic physicians and hospitals.
[48] Section 627.4147(1)(b)1., F.S.
[49] Section 627.4147(1)(b)1., F.S.
[50] *See Shuster v. South Broward Hosp. Dist. Physicians' Professional Liability Ins. Trust*, 591 So. 2d 174, 176 n. 1 (Fla. 1992).
[51] In addition to the case discussed in this analysis, see *Freeman v. Cohen*, 969 So. 2d 1150 (Fla. 4th DCA 2008).

settlement because of, among other things, his inability to obtain medical malpractice insurance.[52] The court held that the statute did not create a cause of action for the physician and explained:

> Roger's interpretation of the statute would make its primary purpose, which is not to allow insured's to veto malpractice settlements, meaningless. We say that because, if an insurer did settle with the claimant over the objection of the insured, the insurer would then be exposed to unlimited damages for increased insurance premiums, inability to get insurance, or other far removed and unknown collateral damages. No insurer would take that risk and the objecting insured would thus have the veto which the statute purports to eliminate.
>
> We conclude that the statutory language, requiring that any settlement be in the best interests of the insured, means the interests of the insured's rights under the policy, not some collateral effect unconnected with the claim. For example, the insured may have a counterclaim in the malpractice lawsuit for services rendered, which should not be ignored. Nor should the insurer be able to settle with the claimant and leave the doctor exposed to a personal judgment for contribution by another defendant in the same case. By including the language that any settlement must be in the best interest of the insured, the legislature was merely making it clear that, although it was providing that an insured cannot veto a settlement, the power to settle is not absolute and must still be in the best interests of the insured[.][53]

In dissent, Judge Warner argued that the majority effectively writes the "good faith" provision out of the statute:

> The majority suggests that Rogers's interpretation would render meaningless part of the statute in that an insured could veto malpractice settlements by objecting. I do not agree. If the insurer has fulfilled its obligation of good faith in investigating and evaluating the case, and it has considered the best interests of the insured, then it can settle the case. The insured cannot veto the settlement...
>
> The statutory obligation of good faith and best interest provides the only protection to a doctor against insurance companies who may settle unfounded cases simply because it is cheaper to settle than to defend. That is a decision in the insurer's own interests, which it could do under *Shuster* but is not consistent, in my view, with its duties under section 627.4147. The majority opinion takes this statutory protection away from the physician. I would read the statute as written and allow Dr. Rogers's cause of action to proceed[.][54]

Effect of the Bill

This bill allows medical malpractice insurance policies to contain provisions allowing physicians to "veto" settlement offers made to the insurance company that are within policy limits. Instead of not allowing such provisions, the bill would require that policies "clearly" state whether the physician has the exclusive right to veto settlements.

Standard of Proof in Cases Relating to Supplemental Diagnostic Tests

Background

Section 766.102(4), F.S., provides that the "failure of a health care provider to order, perform, or administer supplemental diagnostic tests shall not be actionable if the health care provider acted in good faith and with due regard for the prevailing professional standard of care."

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[52] *See Rogers v. Chicago Ins. Co.*, 964 So. 2d 280, 281 (Fla. 4th DCA 2007).
[53] *Rogers v. Chicago Ins. Co.*, 964 So. 2d 280, 284 (Fla. 4th DCA 2007).
[54] *Rogers v. Chicago Ins. Co.*, 964 So. 2d 280, 285-286 (Fla. 4th DCA 2007)(Warner, J., dissenting).

Section 766.102, F.S., provides that a claimant in a medical negligence action must prove by "the greater weight of the evidence" that actions of the health care provider represented a breach of the prevailing professional standard of care. Greater weight of the evidence means the "more persuasive and convincing force and effect of the entire evidence in the case."[55]

Other statutes, such as license disciplinary statutes, require a heightened standard of proof called "clear and convincing evidence." Clear and convincing evidence has been described as follows:

> [C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.[56]

Section 766.111, F.S., prohibits a health care provider from ordering, procuring, providing, or administering unnecessary diagnostic tests.

Effect of the Bill

The bill provides that the claimant in a medical negligence case where the death or injury resulted from a failure of a health care provider to order, perform, or administer supplemental diagnostic tests must prove that the health care provider breached the standard of care by clear and convincing evidence. This bill would have the effect of making such claims more difficult to prove. Standards of proof in other medical negligence cases would remain unchanged.

Exclusion of Evidence

Background

Section 90.402, F.S., provides that all relevant evidence is admissible, except as a provided by law. Section 90.401, F.S, defines "relevant evidence" as evidence tending to prove or disprove a material fact. The trial court judge determines whether evidence is admissible at trial and a decision on the admissibility is reviewable for an abuse of discretion.

Currently, information about whether an insurer reimbursed a physician for performing a particular procedure or test is subject to admission as evidence during a trial based on whether it is relevant. The trial judge makes an individual determination as to whether such evidence is admissible.

Effect of the Bill

The bill amends s. 766.102, F.S., to provide that records, policies, or testimony of an insurer's[57] reimbursement policies[58] or reimbursement determination regarding the care provided to the plaintiff are not admissible as evidence in medical negligence actions.

The bill amends s. 766.102, F.S., to provide that a health care provider's failure to comply with, or breach of, any federal requirement is not admissible as evidence in any medical negligence case. Evidence of a health care provider's compliance with federal requirements could be admissible if the trial judge found it to be relevant.

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[55] *Castillo v. E.I. Du Pont De Nemours & Co., Inc.*, 854 So. 2d 1264, 1277 (Fla. 2003)

[56] *Inquiry Concerning Davey*, 645 So. 2d 398, 404 (Fla. 1994)(quoting *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

[57] The bill defines "insurer" as "any public or private insurer, including the Centers for Medicare and Medicaid Services."

[58] The bill defines "reimbursement policies" as "an insurer's policies and procedures

Hospital Liability for Independent Contractors

Background

The Florida Supreme Court has described the doctrine of vicarious liability:

> The concept of vicarious liability can be described as follows: "A person whose liability is imputed based on the tortuous acts of another is liable for the entire share of comparative responsibility assigned to the other." Vicarious liability is often justified on the policy grounds that it ensures that a financially responsible party will cover damages. Thus, the vicariously liable party is liable for the entire share of the fault assigned to the active tortfeasor. The vicariously liable party has not breached any duty to the plaintiff; its liability is based solely on the legal imputation of responsibility for another party's tortuous acts. The vicariously liable party is liable only for the amount of liability apportioned to the tortfeasor. In sum, the doctrine of vicarious liability takes a party that is free of legal fault and visits upon that party the negligence of another.[59]

Generally, a hospital may not be held liable for the negligence of independent contractor physicians to whom it grants staff privileges.[60] "Vicarious liability does not therefore necessarily attach to the hospital for the doctors' acts or omissions."[61] One court has explained:

> While some hospitals employ their own staff of physicians, others enter into contractual arrangements with legal entities made up of an association of physicians to provide medical services as independent contractors with the expectation that vicarious liability will not attach to the hospital for the negligent acts of those physicians.[62]

However, a hospital may be held vicariously liable for the acts of independent contractor physicians if the physicians act with the apparent authority of the hospital.[63] Apparent authority exists only if all three of the following elements are present: (a) a representation by the purported principal; (b) a reliance on that representation by a third party; and (c) a change in position by the third party in reliance on the representation.[64]

There are numerous cases in Florida appellate courts where courts have struggled over the issue of whether the hospital should be liable for the negligence of an independent contractor physician. Some cases involve the apparent authority issue. Others involve the issue of whether the hospital has a nondelegable duty to provide certain medical services. One court found:

> Even where a physician is an independent contractor, however, a hospital that "undertakes by [express or implied] contract to do for another a given thing" is not allowed to "escape [its] contractual liability [to the patient] by delegating performance under a contract to an independent contractor."[65]

One argument in favor of imposing such a duty on hospitals is:

> This trend suggests that hospitals should be vicariously liable as a general rule for activities within the hospital where the patient cannot and does not realistically have the ability to shop on the open market for another provider. Given modern marketing approaches in which hospitals aggressively advertise the quality and safety of the

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[59] *American Home Assur. Co. v. National Railroad Passenger Corp.*, 908 So. 2d 459, 467-468 (Fla. 2005)(internal citations omitted).
[60] *See Insinga v. LaBella*, 543 So. 2d 209 (Fla. 1989).
[61] *Pub. Health Trust of Dade County v. Valcin*, 507 So. 2d 596, 601 (Fla. 1987).
[62] *Roessler v. Novak*, 858 So. 2d 1158, 1162 (Fla. 2d DCA 2003).
[63] *See Stone v. Palms West Hosp.*, 941 So. 2d 514 (Fla. 4th DCA 2006).
[64] *See Roessler v. Novak*, 858 So. 2d 1158, 1161 (Fla. 2d DCA 2003).
[65] *Shands Teaching Hosp. and Clinic, Inc. v. Juliana*, 863 So. 2d 343, 349 n. 9 (Fla. 1st DCA 2003). *But see Jones v. Tallahassee Memorial Regional Healthcare, Inc.* 923 So. 2d 1245 (Fla. 1st DCA 2006)(refusing to extend the nondelegable duty doctrine to physicians).

> services provided within their hospitals, it is quite arguable that hospitals should have a nondelegable duty to provide adequate radiology departments, pathology laboratories, emergency rooms, and other professional services necessary to the ordinary and usual functioning of the hospital. The patient does not usually have the option to pick among several independent contractors at the hospital and has little ability to negotiate and bargain in this market to select a preferred radiology department. The hospital, on the other hand, has great ability to assure that competent radiologists work within an independent radiology department and to bargain with those radiologists to provide adequate malpractice protections for their mutual customers. I suspect that medical economics would work better if the general rule placed general vicarious liability upon the hospital for these activities.[66]

In March 2003, the Florida Supreme Court issued its opinion in *Villazon v. Prudential Health Care Plan*, 843 So. 2d 842 (Fla. 2003). In *Villazon*, the court considered whether vicarious liability theories could make an HMO liable for the negligence of a physician who had a contract with the HMO. The court held that the HMO Act did not provide a cause of action against the HMO for negligence of the physician but that a suit could proceed under common law theories of negligence under certain circumstances.[67] It noted that the "existence of an agency relationship is normally one for the trier of fact to decide."[68] The court explained that the physician's contractual independent contractor status does not alone preclude a finding of agency and remanded the case for consideration of whether the insurer exercised sufficient control over the physician's actions such that an agency relationship existed or whether agency could be established under an apparent agency theory.[69]

Subsequent to *Villazon*, the Legislature passed ch. 2003-416, L.O.F., which created s. 768.0981, F.S. Section 768.0981, F.S., provides:

> An entity licensed or certified under chapter 624, chapter 636, or chapter 641[70] shall not be liable for the medical negligence of a health care provider with whom the licensed or certified entity has entered into a contract, other than an employee of such licensed or certified entity, unless the licensed or certified entity expressly directs or exercises actual control over the specific conduct that caused injury.

The statute provides that insurers, HMOs, prepaid limited health service organizations, and prepaid health clinics are not liable for the negligence of health care providers with whom the entity has a contract unless the entity expressly directed or exercised actual control over the specific conduct that caused the injury.

Appellate courts in Florida have more recently examined the nondelegable duty issue, with differing opinions. As a result, the law is unsettled across the state regarding the liability of hospitals for the negligent acts or omissions of medical providers with whom they contract to provide medical services within the hospital, but over whom they do not have direct control of the manner in which the services are provided.

In *Wax v. Tenet Health System Hospitals, Inc.*, 955 So.2d 1 (Fla. 4th DCA 2006)[71], the wife of a deceased patient brought a medical malpractice action against the surgeon who operated on her husband, the hospital where the surgery was completed and others. The husband underwent elective

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[66] *Roessler v. Novak*, 858 So. 2d 1158, 1164-1165 (Fla. 2d DCA 2003)(Altenbernd, C.J., concurring).
[67] *See Villazon v. Prudential Health Care Plan, Inc.*, 843 So. 2d 842, 852 (Fla. 2003).
[68] *Villazon v. Prudential Health Care Plan, Inc.*, 843 So. 2d 842, 853 (Fla. 2003).
[69] *See Villazon v. Prudential Health Care Plan, Inc.*, 843 So. 2d 842, 855-856 (Fla. 2003).
[70] Chapter 624, F.S., provides for licensing of health insurers under the Florida Insurance Code. Chapter 636, F.S., provides for licensing of prepaid limited health service organizations and discount medical plan organizations. Chapter 641, F.S., provides for licensing of health maintenance organizations and prepaid health clinics.
[71] The case was originally heard in 2006. Following the filing of a Motion for Rehearing and a Motion for Rehearing En Banc by appellees, both of which were denied, the Court realized that it failed to resolve all issues and delivered an opinion regarding the hospital's liability for the alleged negligence of the anesthesiologist. The opinion was issued on May 7, 2007. *See* Wax, 955 So.2d at 6.

hernia surgery, during which he suffered respiratory failure and died. The wife's wrongful death claim alleged negligence in the pre-surgical assessment, in the administration and management of anesthesia during surgery, and in the failed attempts to resuscitate the husband after he stopped breathing.[72] Specifically, for purposes of this analysis, the wife alleged that the hospital had a nondelegable duty to provide anesthesiology services and was directly liable for the negligence of the anesthesiologist with whom the hospital had contracted to provide services.[73]

The *Wax* court agreed with the plaintiff that the statutory definition of "hospital"[74] and a specific regulation of hospitals established under statutory authority by the Agency for Health Care Administration (AHCA)[75] established that the hospital had an express legal duty to furnish anesthesia services to patients that were "consistent with established standards."[76] The court found that the imposition of this duty on all surgical hospitals to provide non-negligent anesthesia services was important enough to be nondelegable without the express consent to the contrary of the patient.[77] The hospital was found liable for the negligence of the anesthesiologist that caused the death of Wax under the theory of nondelegable duty.

In *Tarpon Springs Hospital Foundation, Inc. v. Reth,* 40 So.3d 823 (Fla. 2nd DCA 2010), the personal representative of a deceased patient filed a medical negligence claim against the anesthesiologist, nurse anesthetists, the anesthesia practice, and the hospital, alleging that negligent anesthesia services were provided to the patient, causing his death.[78] The hospital and other defendants appealed the trial court's order granting the plaintiff's amended motion for new trial and the denial of the hospital's motion for directed verdict.[79] The 2nd District Court of Appeal considered the same argument of the plaintiff related to the identical statutes and rules as were presented to the 4th District Court of Appeal in *Wax.* However, the court in *Reth* concluded that, while the hospital had a statutory obligation to maintain an anesthesia department within the hospital that is directed by a physician member of the hospital's professional staff, the statutes and rules do not impose a nondelegable duty to provide non-negligent anesthesia services to surgical patients of the hospital.[80] The court reversed the denial of the hospital's motion for directed verdict and remanded this case to the trial court with instructions that it enter a judgment in favor of the hospital.[81]

Noting the conflict among the District Courts of Appeal regarding the applicability of the theory of nondelegable duty to the contractual relationship between hospital and medical provider in medical negligence claims, the Second District certified the conflict to the Florida Supreme Court for further review.[82] However, as of the date of this analysis, the Florida Supreme Court has not resolved the conflict.

Effect of the Bill

The bill amends s. 768.0981, F.S. to provide that a hospital is not liable for the medical negligence of a health care provider with whom the hospital has entered into a contract, other than an employee of the hospital, unless the hospital expressly directs or exercises actual control over the specific conduct that caused injury. This bill would limit the inquiry as to whether the hospital "expressly" directed or exercised actual control over the conduct that caused the injury.

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[72] *See* Wax v. Tenet Health System Hospitals, Inc., 955 So.2d 1, 3 (Fla. 4th DCA 2006).
[73] *See id.* at 6.
[74] S. 395.002(13)(b), F.S. (2005) defines "hospital" as an establishment that, among other things, regularly makes available "treatment facilities for surgery."
[75] Rule 59A-3.2085(4), F.A.C. states "[e]ach Class I and Class II hospital, and each Class III hospital providing surgical or obstetrical services, shall have an anesthesia department, service or similarly titled unit directed by a physician member of the organized professional staff."
[76] *See* Wax, 955 So.2d at 8.
[77] *See id.* at 9.
[78] *See* Reth, 40 So.3d at 823.
[79] *See id.* at 824.
[80] *See id.*
[81] *See id.*
[82] *See* Tarpon Springs Hospital Foundation, Inc. v. Reth, 40 So.3d 823, 824 (Fla. 2nd DCA 2010).

B. SECTION DIRECTORY:

Section 1: Creates s. 458.3175, F.S., relating to expert witness certificates.

Section 2: Amends s. 458.331, F.S., relating to grounds for disciplinary action and action by the board and department.

Section 3: Amends s. 458.351, F.S., relating to reports of adverse incidents in office practice settings.

Section 4: Creates s. 459.0066, F.S., relating to expert witness certificates.

Section 5: Amends s. 459.015, F.S., relating to grounds for disciplinary action and action by the board and department.

Section 6: Creates s. 466.005, F.S., relating to expert witness certificates.

Section 7: Amends s. 466.028, F.S., relating to grounds for disciplinary action or action by the board.

Section 8: Amends s. 459.026, F.S., relating to reports of adverse incidents in office practice settings.

Section 9: Amends s. 627.4147, F.S., relating to medical malpractice insurance contracts.

Section 10: Amends s. 766.102, F.S., relating to medical negligence, standards of recovery, and expert witnesses.

Section 11: Amends s. 768.0981, F.S., relating to limitations on actions against insurers, prepaid limited health service organizations, health maintenance organizations, hospitals, or prepaid health clinics.

Section 12: Provides an effective date of July 1, 2011.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill requires physicians and dentists licensed in another state or Canada to pay a fee of not more than $50 to obtain an expert witness certificate in order to provide an expert witness opinion or provide expert testimony relating to the standard of care in a medical malpractice case involving a physician or dentist. The department estimates that during the first year there will be approximately 2,478 expert witness certificates applied for, thereby resulting in revenues of $123,900 to be deposited within the Medical Quality Assurance Trust Fund.

2. Expenditures:

   The Department of Health will require additional budget authority in contracted services for application processing and one OPS position to implement the provisions of the bill. The estimated cost will be less than $58,000 and will be absorbed within existing department resources.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill requires physicians and dentists licensed in another state or Canada to pay a fee of not more than $50 to obtain an expert witness certificate in order to provide an expert witness opinion or provide expert testimony relating to the standard of care in a medical malpractice case involving a physician or dentist.

D. FISCAL COMMENTS:

The fiscal impact on private parties is speculative.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Access to Courts

Section 10 of the bill contains a provision that increases the standard of proof in certain medical negligence actions from preponderance of the evidence to clear and convincing evidence. Section 11 of the bill provides that a hospital is not liable, with some exceptions, for the medical negligence of a health care provider with whom the hospital has entered into a contract. Article 1, s. 21, Fla. Const., provides that the "courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." In *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1983), the Florida Supreme Court explained the constitutional limitation on the ability of the Legislature to abolish a civil cause of action:

> We hold, therefore, that where a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to Fla. Stat. s. 2.01, F.S.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.

In *Eller v. Shova*, 630 So. 2d 537, 540 (Fla. 1993), the court applied *Kluger* to a case that changed the standard of proof from simple negligence to gross negligence in some workers compensation actions:

> In analyzing [the standard quoted above] in *Kluger*, we stated that a statute that merely changed the degree of negligence necessary to maintain a tort action did not abolish a right to redress for an injury.

Justice Kogan warned that the ability to change the standard of proof is not unlimited:

> [F]ew would question that access to the courts is being denied if the legislature purports to preserve a cause of action but then insulates defendants with conclusive, irrebuttable

presumptions. Such a "cause of action" would be little more than a legal sham used to circumvent article 1, section 21.[83]

Rules of Practice and Procedure in the Courts

This bill changes provisions relating to expert witnesses and the admissibility of evidence during a civil trial. Article V, s. 2(a), Fla. Const., provides that the Florida Supreme Court "shall adopt rules for the practice and procedure" in all courts. The Florida Supreme Court has interpreted this provision to mean that the court has the exclusive power to create rules of practice and procedure. Sections 1 and 4 provide requirements for expert witnesses who do not possess a Florida license. Section 3 and 6 provide for admissibility of informed consent forms. Section 8 provides for exclusion of certain evidence even if the evidence is otherwise relevant. If a court were to find that any of these requirements encroached on the court's rulemaking power, it could hold the provisions invalid.

This bill provides that certain documents are admissible in evidence. The Florida Supreme Court has held that some portions of the Evidence Code are substantive and can be set by the Legislature and some portions are procedural and can only be set by the rules of court. If a court were to find that the provisions in this bill related to admission of evidence are procedural, it could hold the provisions invalid pursuant to art. V, s. 2, Fla. Const.

B. RULE-MAKING AUTHORITY:

This bill requires that the Boards of Medicine and Osteopathic Medicine adopt rules establishing a standard informed consent form setting forth recognized specific risks relating to cataract surgery. The boards must consider information from physicians and osteopathic physicians regarding specific recognized risks of cataract surgery and must consider informed consent forms used in other states.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

The Civil Justice Subcommittee considered the bill on March 8, 2011, and adopted six amendments. The amendments:

- List the specific information that must be provided to the Department of Health in order for an out-of-state physician to receive an expert witness certificate and remove the requirement that boards make rules to implement the expert witness certificate program;
- Provide that the Department of Health will have the duty of issuing the expert witness certificates and give the Department 7 business days rather than 5 business days to issue the certificates;
- Provide that the Board of Medicine and the Board of Osteopathic Medicine will have the authority to discipline holders of expert witness certificates;
- Provide that the provision of the bill relating that limits the admission of evidence relating to insurer reimbursement policies and practices only applies in medical negligence actions;
- Provide that a prospective defendant may interview a claimant's health care providers if the health care providers agree to be interviewed;
- Remove the provisions of the bill that exempt the rule requiring the creation of a new informed consent form for cataract surgery from possible legislative review; and
- Remove the requirement that the trial judge include a rebuttable presumption in the jury instructions.

This bill, as amended, was reported favorably as a committee substitute.

On March 23, 2011, the Health and Human Services Access Subcommittee adopted a strike-all amendment and an amendment to the strike-all amendment. The strike-all amendment:

[83] *Eller v. Shova*, 630 So. 2d 537, 543 (Fla. 1993)(Kogan, J., concurring in result only).

- Requires an expert witness testifying for or against a dentist to be a licensed dentist under ch. 466, F.S., or possess an expert witness certificate issued under s. 466.005, F.S.
- Subjects a dentist licensed under chapter 466, F.S., to denial of a license or disciplinary action under s. 466.028(1)(ll) related to the submission of a verified written expert medical opinion.
- Creates s. 466.005, F.S., requiring the Department of Health to issue an expert witness certificate to a dentist licensed out-of-state or in Canada upon the satisfaction of requirements established by statute and payment of an application fee of $50.
- Makes an expert witness certificate issued under s. 466.005, F.S., valid for 2 years from the date of issuance.
- Allows the holder of an expert witness certificate issued under s. 466.005, F.S., to provide a verified written medical expert opinion as provided in s. 766.203, F.S., and provide expert testimony in pending medical negligence actions against a dentist regarding the prevailing standard of care.
- Clarifies that an expert witness certificate issued under s. 466.005, F.S., does not authorize a dentist to engage in the practice of dentistry and does not require a dentist, not otherwise licensed to practice dentistry in Florida, to obtain a license to practice dentistry or to pay license fees.
- Requires an expert witness certificate to be considered a license for purpose of disciplinary action and subjects the holder of the certificate to discipline to the Board of Dentistry.
- Renders as ground for denial of a license or disciplinary action the provision of misleading, deceptive, or fraudulent expert witness testimony related to the practice of dentistry.

The amendment to the strike-all amendment changed the number of years of professional time required to be devoted to active clinical practice, student instruction or clinical research on the part of an expert witness testifying against a health care provider from five to three years.

The bill was reported favorably as a Committee Substitute. The analysis reflects the Committee Substitute.

On April 8, 2011, the Health Care Appropriations Subcommittee considered the bill and adopted one amendment. The amendment:

- Removes the provision that allows a defendant or defense counsel in a medical negligence case to interview a claimant's treating health care providers without notice to the claimant or claimant's counsel;
- Removes the provision that allows a defendant or defense counsel to take unsworn statements of the claimant's health care providers without having to complete a medical information release; and
- Removes the requirement that the claimant execute an "authorization of release of protected health information" to be included with the presuit notice of intent to initiate litigation that allows the defendant access to a claimant's health care providers and medical records.

The bill was reported favorably as a Committee Substitute. The analysis reflects the Committee Substitute.

A bill to be entitled

An act relating to medical malpractice; creating ss. 458.3175, 459.0066, and 466.005, F.S.; requiring the Department of Health to issue expert witness certificates to certain physicians and dentists licensed outside of the state; providing application and certification requirements; establishing application fees; providing for the validity and use of certifications; exempting physicians and dentists issued certifications from certain licensure and fee requirements; amending ss. 458.331, 459.015, and 466.028, F.S.; providing additional acts that constitute grounds for denial of a license or disciplinary action to which penalties apply; providing construction with respect to the doctrine of incorporation by reference; amending ss. 458.351 and 459.026, F.S.; requiring the Board of Medicine and the Board of Osteopathic Medicine to adopt within a specified period certain patient forms specifying cataract surgery risks; specifying that an incident resulting from risks disclosed in the patient form is not an adverse incident; providing for the execution and admissibility of the patient forms in civil and administrative proceedings; creating a rebuttable presumption that a physician disclosed cataract surgery risks if the patient form is executed; amending s. 627.4147, F.S.; deleting a requirement that medical malpractice insurance contracts contain a clause authorizing the insurer to make and conclude certain offers within policy limits over the insured's veto;

amending s. 766.102, F.S.; defining terms; providing that certain insurance information is not admissible as evidence in medical negligence actions; establishing the burden of proof that a claimant must meet in certain damage claims against health care providers based on death or personal injury; requiring that certain expert witnesses who provide certain expert testimony meet certain licensure or certification requirements; excluding a health care provider's failure to comply with or breach of federal requirements from evidence in medical negligence cases in the state; amending s. 768.0981, F.S.; limiting the liability of hospitals related to certain medical negligence claims; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 458.3175, Florida Statutes, is created to read:

458.3175 Expert witness certificate.—

(1)(a) The department shall issue a certificate authorizing a physician who holds an active and valid license to practice medicine in another state or a province of Canada to provide expert testimony in this state, if the physician submits to the department:

1. A complete registration application containing the physician's legal name, mailing address, telephone number, business locations, the names of the jurisdictions where the physician holds an active and valid license to practice

medicine, and the license number or other identifying number issued to the physician by the jurisdiction's licensing entity; and

2. An application fee of $50.

(b) The department shall approve an application for an expert witness certificate within 7 business days after receipt of the completed application and payment of the application fee if the applicant holds an active and valid license to practice medicine in another state or a province of Canada and has not had a previous expert witness certificate revoked by the board. An application is approved by default if the department does not act upon the application within the required period. A physician must notify the department in writing of his or her intent to rely on a certificate approved by default.

(c) An expert witness certificate is valid for 2 years after the date of issuance.

(2) An expert witness certificate authorizes the physician to whom the certificate is issued to do only the following:

(a) Provide a verified written medical expert opinion as provided in s. 766.203.

(b) Provide expert testimony about the prevailing professional standard of care in connection with medical negligence litigation pending in this state against a physician licensed under this chapter or chapter 459.

(3) An expert witness certificate does not authorize a physician to engage in the practice of medicine as defined in s. 458.305. A physician issued a certificate under this section who does not otherwise practice medicine in this state is not

required to obtain a license under this chapter or pay any license fees, including, but not limited to, a neurological injury compensation assessment. An expert witness certificate shall be treated as a license in any disciplinary action, and the holder of an expert witness certificate shall be subject to discipline by the board.

Section 2. Subsection (11) is added to section 458.331, Florida Statutes, paragraphs (oo) through (qq) of subsection (1) of that section are redesignated as paragraphs (pp) through (rr), respectively, and a new paragraph (oo) is added to that subsection, to read:

458.331 Grounds for disciplinary action; action by the board and department.—

(1) The following acts constitute grounds for denial of a license or disciplinary action, as specified in s. 456.072(2):

(oo) Providing misleading, deceptive, or fraudulent expert witness testimony related to the practice of medicine.

(11) The purpose of this section is to facilitate uniform discipline for those acts made punishable under this section and, to this end, a reference to this section constitutes a general reference under the doctrine of incorporation by reference.

Section 3. Subsection (6) of section 458.351, Florida Statutes, is renumbered as subsection (7), and a new subsection (6) is added to that section to read:

458.351 Reports of adverse incidents in office practice settings.—

(6)(a) The board shall adopt rules establishing a standard

informed consent form that sets forth the recognized specific risks related to cataract surgery. The board must propose such rules within 90 days after the effective date of this subsection.

(b) Before formally proposing the rule, the board must consider information from physicians licensed under this chapter or chapter 459 regarding recognized specific risks related to cataract surgery and the standard informed consent forms adopted for use in the medical field by other states.

(c) A patient's informed consent is not executed until the patient, or a person authorized by the patient to give consent, and a competent witness sign the form adopted by the board.

(d) An incident resulting from recognized specific risks described in the signed consent form is not considered an adverse incident for purposes of s. 395.0197 and this section.

(e) In a civil action or administrative proceeding against a physician based on his or her alleged failure to properly disclose the risks of cataract surgery, a patient's informed consent executed as provided in paragraph (c) on the form adopted by the board is admissible as evidence and creates a rebuttable presumption that the physician properly disclosed the risks.

Section 4. Section 459.0066, Florida Statutes, is created to read:

459.0066 Expert witness certificate.—

(1)(a) The department shall issue a certificate authorizing a physician who holds an active and valid license to practice osteopathic medicine in another state or a province of

Canada to provide expert testimony in this state, if the physician submits to the department:

1. A complete registration application containing the physician's legal name, mailing address, telephone number, business locations, the names of the jurisdictions where the physician holds an active and valid license to practice osteopathic medicine, and the license number or other identifying number issued to the physician by the jurisdiction's licensing entity; and

2. An application fee of $50.

(b) The department shall approve an application for an expert witness certificate within 7 business days after receipt of the completed application and payment of the application fee if the applicant holds an active and valid license to practice osteopathic medicine in another state or a province of Canada and has not had a previous expert witness certificate revoked by the board. An application is approved by default if the department does not act upon the application within the required period. A physician must notify the department in writing of his or her intent to rely on a certificate approved by default.

(c) An expert witness certificate is valid for 2 years after the date of issuance.

(2) An expert witness certificate authorizes the physician to whom the certificate is issued to do only the following:

(a) Provide a verified written medical expert opinion as provided in s. 766.203.

(b) Provide expert testimony about the prevailing professional standard of care in connection with medical

negligence litigation pending in this state against a physician licensed under chapter 458 or this chapter.

(3) An expert witness certificate does not authorize a physician to engage in the practice of osteopathic medicine as defined in s. 459.003. A physician issued a certificate under this section who does not otherwise practice osteopathic medicine in this state is not required to obtain a license under this chapter or pay any license fees, including, but not limited to, a neurological injury compensation assessment. An expert witness certificate shall be treated as a license in any disciplinary action, and the holder of an expert witness certificate shall be subject to discipline by the board.

Section 5. Subsection (11) is added to section 459.015, Florida Statutes, paragraphs (qq) through (ss) of subsection (1) of that section are redesignated as paragraphs (rr) through (tt), respectively, and a new paragraph (qq) is added to that subsection, to read:

459.015 Grounds for disciplinary action; action by the board and department.—

(1) The following acts constitute grounds for denial of a license or disciplinary action, as specified in s. 456.072(2):

(qq) Providing misleading, deceptive, or fraudulent expert witness testimony related to the practice of osteopathic medicine.

(11) The purpose of this section is to facilitate uniform discipline for those acts made punishable under this section and, to this end, a reference to this section constitutes a

general reference under the doctrine of incorporation by reference.

Section 6. Section 466.005, Florida Statutes, is created to read:

466.005 Expert witness certificate.—

(1)(a) The department shall issue a certificate authorizing a dentist who holds an active and valid license to practice dentistry in another state or a province of Canada to provide expert testimony in this state, if the dentist submits to the department:

1. A complete registration application containing the dentist's legal name, mailing address, telephone number, business locations, the names of the jurisdictions where the dentist holds an active and valid license to practice dentistry, and the license number or other identifying number issued to the dentist by the jurisdiction's licensing entity; and

2. An application fee of $50.

(b) The department shall approve an application for an expert witness certificate within 7 business days after receipt of the completed application and payment of the application fee if the applicant holds an active and valid license to practice dentistry in another state or a province of Canada and has not had a previous expert witness certificate revoked by the board. An application is approved by default if the department does not act upon the application within the required period. A dentist must notify the department in writing of his or her intent to rely on a certificate approved by default.

(c) An expert witness certificate is valid for 2 years

after the date of issuance.

(2) An expert witness certificate authorizes the dentist to whom the certificate is issued to do only the following:

(a) Provide a verified written medical expert opinion as provided in s. 766.203.

(b) Provide expert testimony about the prevailing professional standard of care in connection with medical negligence litigation pending in this state against a dentist licensed under this chapter.

(3) An expert witness certificate does not authorize a dentist to engage in the practice of dentistry as defined in s. 466.003. A dentist issued a certificate under this section who does not otherwise practice dentistry in this state is not required to obtain a license under this chapter or pay any license fees. An expert witness certificate shall be treated as a license in any disciplinary action, and the holder of an expert witness certificate shall be subject to discipline by the board.

Section 7. Subsection (8) is added to section 466.028, Florida Statutes, paragraph (ll) of subsection (1) of that section is redesignated as paragraph (mm), and a new paragraph (ll) is added to that subsection, to read:

466.028 Grounds for disciplinary action; action by the board.—

(1) The following acts constitute grounds for denial of a license or disciplinary action, as specified in s. 456.072(2):

(ll) Providing misleading, deceptive, or fraudulent expert witness testimony related to the practice of dentistry.

(8) The purpose of this section is to facilitate uniform discipline for those acts made punishable under this section and, to this end, a reference to this section constitutes a general reference under the doctrine of incorporation by reference.

Section 8. Subsection (6) of section 459.026, Florida Statutes, is renumbered as subsection (7), and a new subsection (6) is added to that section to read:

459.026 Reports of adverse incidents in office practice settings.—

(6)(a) The board shall adopt rules establishing a standard informed consent form that sets forth the recognized specific risks related to cataract surgery. The board must propose such rules within 90 days after the effective date of this subsection.

(b) Before formally proposing the rule, the board must consider information from physicians licensed under chapter 458 or this chapter regarding recognized specific risks related to cataract surgery and the standard informed consent forms adopted for use in the medical field by other states.

(c) A patient's informed consent is not executed until the patient, or a person authorized by the patient to give consent, and a competent witness sign the form adopted by the board.

(d) An incident resulting from recognized specific risks described in the signed consent form is not considered an adverse incident for purposes of s. 395.0197 and this section.

(e) In a civil action or administrative proceeding against a physician based on his or her alleged failure to properly

disclose the risks of cataract surgery, a patient's informed consent executed as provided in paragraph (c) on the form adopted by the board is admissible as evidence and creates a rebuttable presumption that the physician properly disclosed the risks.

Section 9. Paragraph (b) of subsection (1) of section 627.4147, Florida Statutes, is amended to read:

627.4147 Medical malpractice insurance contracts.—

(1) In addition to any other requirements imposed by law, each self-insurance policy as authorized under s. 627.357 or s. 624.462 or insurance policy providing coverage for claims arising out of the rendering of, or the failure to render, medical care or services, including those of the Florida Medical Malpractice Joint Underwriting Association, shall include:

(b)1. ~~Except as provided in subparagraph 2., a clause authorizing the insurer or self-insurer to determine, to make, and to conclude, without the permission of the insured, any offer of admission of liability and for arbitration pursuant to s. 766.106, settlement offer, or offer of judgment, if the offer is within the policy limits. It is against public policy for any insurance or self-insurance policy to contain a clause giving the insured the exclusive right to veto any offer for admission of liability and for arbitration made pursuant to s. 766.106, settlement offer, or offer of judgment, when such offer is within the policy limits. However, any offer of admission of liability, settlement offer, or offer of judgment made by an insurer or self-insurer shall be made in good faith and in the best interests of the insured.~~

~~2.a. With respect to dentists licensed under chapter 466,~~ A clause clearly stating whether or not the insured has the exclusive right to veto any offer of admission of liability and for arbitration pursuant to s. 766.106, settlement offer, or offer of judgment if the offer is within policy limits. An insurer or self-insurer shall not make or conclude, without the permission of the insured, any offer of admission of liability and for arbitration pursuant to s. 766.106, settlement offer, or offer of judgment, if such offer is outside the policy limits. However, any offer for admission of liability and for arbitration made under s. 766.106, settlement offer, or offer of judgment made by an insurer or self-insurer shall be made in good faith and in the best interest of the insured.

2.~~b.~~ If the policy contains a clause stating the insured does not have the exclusive right to veto any offer or admission of liability and for arbitration made pursuant to s. 766.106, settlement offer or offer of judgment, the insurer or self-insurer shall provide to the insured or the insured's legal representative by certified mail, return receipt requested, a copy of the final offer of admission of liability and for arbitration made pursuant to s. 766.106, settlement offer or offer of judgment and at the same time such offer is provided to the claimant. A copy of any final agreement reached between the insurer and claimant shall also be provided to the insurer or his or her legal representative by certified mail, return receipt requested not more than 10 days after affecting such agreement.

Section 10. Subsections (3), (4), and (5) of section 766.102, Florida Statutes, are amended, subsection (12) of that section is renumbered as subsection (14), and new subsections (12) and (13) are added to that section, to read:

766.102 Medical negligence; standards of recovery; expert witness.—

(3)(a) As used in this subsection, the term:

1. "Insurer" means any public or private insurer, including the Centers for Medicare and Medicaid Services.

2. "Reimbursement determination" means an insurer's determination of the amount that the insurer will reimburse a health care provider for health care services.

3. "Reimbursement policies" means an insurer's policies and procedures governing its decisions regarding health insurance coverage and method of payment and the data upon which such policies and procedures are based, including, but not limited to, data from national research groups and other patient safety data as defined in s. 766.1016.

(b) The existence of a medical injury does ~~shall~~ not create any inference or presumption of negligence against a health care provider, and the claimant must maintain the burden of proving that an injury was proximately caused by a breach of the prevailing professional standard of care by the health care provider. Any records, policies, or testimony of an insurer's reimbursement policies or reimbursement determination regarding the care provided to the plaintiff are not admissible as evidence in any medical negligence action. However, the discovery of the presence of a foreign body, such as a sponge,

clamp, forceps, surgical needle, or other paraphernalia commonly used in surgical, examination, or diagnostic procedures, shall be prima facie evidence of negligence on the part of the health care provider.

(4)(a) The Legislature is cognizant of the changing trends and techniques for the delivery of health care in this state and the discretion that is inherent in the diagnosis, care, and treatment of patients by different health care providers. The failure of a health care provider to order, perform, or administer supplemental diagnostic tests is ~~shall~~ not ~~be~~ actionable if the health care provider acted in good faith and with due regard for the prevailing professional standard of care.

(b) In an action for damages based on death or personal injury which alleges that such death or injury resulted from the failure of a health care provider to order, perform, or administer supplemental diagnostic tests, the claimant has the burden of proving by clear and convincing evidence that the alleged actions of the health care provider represented a breach of the prevailing professional standard of care.

(5) A person may not give expert testimony concerning the prevailing professional standard of care unless the ~~that~~ person is a ~~licensed~~ health care provider who holds an active and valid license and conducts a complete review of the pertinent medical records and meets the following criteria:

(a) If the health care provider against whom or on whose behalf the testimony is offered is a specialist, the expert witness must:

1. Specialize in the same specialty as the health care provider against whom or on whose behalf the testimony is offered; or specialize in a similar specialty that includes the evaluation, diagnosis, or treatment of the medical condition that is the subject of the claim and have prior experience treating similar patients; and

2. Have devoted professional time during the 3 years immediately preceding the date of the occurrence that is the basis for the action to:

a. The active clinical practice of, or consulting with respect to, the same or similar specialty that includes the evaluation, diagnosis, or treatment of the medical condition that is the subject of the claim and have prior experience treating similar patients;

b. Instruction of students in an accredited health professional school or accredited residency or clinical research program in the same or similar specialty; or

c. A clinical research program that is affiliated with an accredited health professional school or accredited residency or clinical research program in the same or similar specialty.

(b) If the health care provider against whom or on whose behalf the testimony is offered is a general practitioner, the expert witness must have devoted professional time during the 5 years immediately preceding the date of the occurrence that is the basis for the action to:

1. The active clinical practice or consultation as a general practitioner;

2. The instruction of students in an accredited health

professional school or accredited residency program in the general practice of medicine; or

3. A clinical research program that is affiliated with an accredited medical school or teaching hospital and that is in the general practice of medicine.

(c) If the health care provider against whom or on whose behalf the testimony is offered is a health care provider other than a specialist or a general practitioner, the expert witness must have devoted professional time during the 3 years immediately preceding the date of the occurrence that is the basis for the action to:

1. The active clinical practice of, or consulting with respect to, the same or similar health profession as the health care provider against whom or on whose behalf the testimony is offered;

2. The instruction of students in an accredited health professional school or accredited residency program in the same or similar health profession in which the health care provider against whom or on whose behalf the testimony is offered; or

3. A clinical research program that is affiliated with an accredited medical school or teaching hospital and that is in the same or similar health profession as the health care provider against whom or on whose behalf the testimony is offered.

(12) If a physician licensed under chapter 458 or chapter 459 or a dentist licensed under chapter 466 is the party against whom, or on whose behalf, expert testimony about the prevailing professional standard of care is offered, the expert witness

must be licensed under chapter 458, chapter 459, or chapter 466 or possess a valid expert witness certificate issued under s. 458.3175, s. 459.0066, or s. 466.005.

(13) A health care provider's failure to comply with or breach of any federal requirement is not admissible as evidence in any medical negligence case in this state.

Section 11. Section 768.0981, Florida Statutes, is amended to read:

768.0981 Limitation on actions against insurers, prepaid limited health service organizations, health maintenance organizations, hospitals, or prepaid health clinics.—An entity licensed or certified under chapter 395, chapter 624, chapter 636, or chapter 641 is ~~shall~~ not ~~be~~ liable for the medical negligence of a health care provider with whom the licensed or certified entity has entered into a contract, other than an employee of such licensed or certified entity, unless the licensed or certified entity expressly directs or exercises actual control over the specific conduct that caused injury.

Section 12. This act shall take effect July 1, 2011.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 513 Missing Adults
SPONSOR(S): Criminal Justice Subcommittee; Abruzzo and others
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 664

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	13 Y, 0 N, As CS	Krol	Cunningham
2) Justice Appropriations Subcommittee	10 Y, 0 N	McAuliffe	Jones Darity
3) Judiciary Committee		Krol TK	Havlicak RH

SUMMARY ANALYSIS

In October 2008, Governor Charlie Crist signed an Executive Order establishing the Florida Silver Alert Plan. The Silver Alert Plan was developed to broadcast information in a timely manner to the general public about a missing elderly person who suffers from irreversible deterioration of intellectual faculties.

Section 937.022, F.S., creates the Missing Endangered Persons Information Clearinghouse (MEPIC) within the Florida Department of Law Enforcement (FDLE) which serves as a central repository of information regarding missing endangered persons. Upon receiving information about a missing endangered person, MEPIC disseminates the information in an effort to locate the missing endangered person. A "missing endangered person" is defined as a missing child, a missing adult younger than 26 years of age, or a missing adult 26 years of age or older who is suspected by a law enforcement agency of being endangered or the victim of criminal activity.

Although not specifically included in the definition, FDLE considers a person who meets the criteria for a state Silver Alert to be a "missing endangered person" as defined by s. 937.021, F.S.

CS/HB 513 amends the definition of "missing endangered person" in s. 937.0201, F.S., to specifically include a missing adult who meets the criteria for activation of a Silver Alert. The bill also provides that only the law enforcement agency having jurisdiction over the case may make a request to MEPIC for the activation of a state Silver Alert involving a missing adult if circumstances regarding the disappearance have met the criteria for activation of the Silver Alert Plan.

The bill provides immunity from civil liability to entities who act in good faith when requested to record, report, transmit, display, or release information pertaining to a Silver Alert.

FDLE reports that the bill will have no fiscal impact as statewide Silver Alerts have been issued since October 2008 and FDLE has historically considered a person who meets the criteria for a state Silver Alert to be a "missing endangered person" as defined by s. 937.0201, F.S.

The bill provides an effective date of July 1, 2011 and is estimated to have no fiscal impact.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background Information

Silver Alert Plan

In October 2008, Governor Charlie Crist signed an Executive Order establishing the Florida Silver Alert Plan (plan.)[1] The plan was developed to broadcast information in a timely manner to the general public about a missing elderly person who suffers from irreversible deterioration of intellectual faculties.[2]

A law enforcement agency can issue a *local or regional* Silver Alert[3] when a missing person meets the following criteria:

- The missing person must be age 60 or older and there must be a clear indication that the individual has an irreversible deterioration of intellectual faculties, which must be verified[4] by law enforcement, or
- Under extraordinary circumstances when a person age 18 to 59 has irreversible deterioration of intellectual faculties and law enforcement has determined the individual lacks the capacity to consent and where the use of dynamic message signs may be the only possible way to rescue the missing person.[5]

FDLE's Missing Endangered Person Information Clearinghouse (MEPIC) will activate[6] a *statewide* Silver Alert, including the Florida Department of Transportation, the Florida Highway Patrol, and FDLE Dynamic Message Sign activation,[7] if a case meets all of the above criteria, in addition to the following:

- Local law enforcement has already activated a local and regional alert by contacting media outlets.[8]
- The local law enforcement agency's investigation has concluded that the disappearance poses a credible threat to the person's safety.
- A description of the missing person's vehicle and a license plate number is available and has been verified by local law enforcement.
- The local law enforcement agency has entered the missing person into the Florida Crime Information Center and issued a statewide "Be On the Look Out" (BOLO) to other law enforcement and 911 centers.[9]

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[1] Office of the Governor, Executive Order Number 08-211.

[2] Missing/Endangered Persons (AMBER & Silver Alert.) Florida Department of Law Enforcement, Revised 6/24/10. (On file with Criminal Justice Subcommittee staff.)

[3] Local law enforcement will take a report of a missing person, issue a Silver Alert if the criteria are met, and notify FDLE if the person is driving a vehicle. The local law enforcement agency determines how long a Silver Alert remains activated. "Florida's Silver Alert Plan Frequently Asked Questions." FDLE. http://www.fdle.state.fl.us/MCICSearch/Documents/SilverAlertFAQ.pdf (Last accessed on March 11, 2011.)

[4] Law enforcement requires the parent, spouse, guardian, legal custodian, or person responsible for the supervision of the missing person to provide specific information which may include documentation from a medical or mental health professional of the person's condition. Missing Endangered Persons Information Clearinghouse Policies and Procedures Manual. FDLE. July 2010. (On file with Criminal Justice Subcommittee staff.)

[5] *Id.*

[6] *Id.*

[7] Dynamic message signs are activated regionally or statewide when criteria are met. If road signs are used, they remain activated for a maximum of 6 hours, unless the missing elderly person is rescued or the Florida Department of Transportation is otherwise instructed. *Supra* "Florida's Silver Alert Plan Frequently Asked Questions."

[8] However, media outlets have the option on whether or not to broadcast Silver Alert information. *Id.*

According to FDLE, since the program's inception, the department has issued 282 statewide Silver Alerts with 42 direct recoveries as a result of the alerts.[10]

Missing Person Investigations

Chapter 937, F.S., relates to missing person investigations. Section 937.021, F.S., requires a law enforcement agency, upon receiving a report that a child is missing,[11] to immediately inform all on-duty law enforcement officers of the missing child report, communicate the report to every other law enforcement agency having jurisdiction in the county, and within 2 hours after receipt of the report, transmit the report for inclusion within the Florida Crime Information Center and the National Crime Information Center (FCIC/NCIC) databases. Upon the filing of a report that an adult is missing,[12] the law enforcement agency receiving the report must, within 2 hours after receipt of the report, transmit the report for inclusion within the FCIC/NCIC databases.[13]

Section 937.021, F.S., also provides immunity from civil liability for damages to specified entities who have been requested by law enforcement to record, report, transmit, display, or release information pertaining to a missing child or adult if they complied with the request in good faith. These entities include:

- FDLE as the state Amber Alert coordinator, any state or local law enforcement agency, and the personnel of these agencies;
- Any radio or television network, broadcaster, or other media representative;
- Any dealer of communications services as defined in s. 202.11, F.S.; or
- Any agency, employee, individual, or entity.[14]

Entities who report, transmit, display, or release information pertaining to a missing child or adult are presumed to have acted in good faith.[15] The presumption of good faith is not overcome if a technical or clerical error is made by any agency, employee, individual, or entity acting at the request of the local law enforcement agency having jurisdiction or if the missing child or adult information is incomplete or incorrect because the information received from the local law enforcement agency was incomplete or incorrect.[16]

Nothing in s. 937.021, F.S., or any other provision of law creates a duty of the agency, employee, individual, or entity to record, report, transmit, display, or release the Amber Alert, Missing Child Alert, or missing adult information received from the local law enforcement agency having jurisdiction. The decision to record, report, transmit, display, or release information is discretionary with the agency, employee, individual, or entity receiving the information.[17]

Section 937.0201, F.S., defines a "missing endangered person" as a missing child, a missing adult younger than 26 years of age, or a missing adult 26 years of age or older who is suspected by a law enforcement agency of being endangered or the victim of criminal activity. Every state, county, and municipal law enforcement agency is required to submit to MEPIC information concerning missing

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[9] *Supra* Missing Endangered Persons Information Clearinghouse Policies and Procedures Manual.

[10] Silver Alert Monthly Report. FDLE. February 2011. http://www.fdle.state.fl.us/Content/getdoc/25c645e1-c20a-47bc-9b69-d23fb4f0c408/SilverAlertReport.aspx (Last accessed on March 11, 2011.)

[11] Section 937.021(3), F.S., defines a "missing child" as "a person younger than 18 years of age whose temporary or permanent residence is in, or is believed to be in, this state, whose location has not been determined, and who has been reported as missing to a law enforcement agency."

[12] Section 937.021(2), F.S., defines a "missing adult" as "a person 18 years of age or older whose temporary or permanent residence is in, or is believed to be in, this state, whose location has not been determined, and who has been reported as missing to a law enforcement agency."

[13] Section 937.021(4), F.S.

[14] Section 937.021(5)(a) and (b), F.S.

[15] Section 937.021(5)(c), F.S.

[16] *Id.*

[17] Section 937.021(5)(d), F.S.

endangered persons.[18] MEPIC serves as the central repository of information regarding missing endangered persons.[19] Upon receiving information about a missing endangered person, MEPIC disseminates the information in an effort to locate the missing endangered person.

Under current law, FDLE considers a person who meets the criteria for a Silver Alert to be a "missing endangered person,"[20] although the definition of that term does not specifically include a person who meets the Silver Alert criteria.

Effect of Proposed Bill

CS/HB 513 amends the definition of "missing endangered person" in s. 937.0201, F.S., to specifically include a missing adult who meets the criteria for activation of a Silver Alert. The bill also provides that only the law enforcement agency having jurisdiction over the case may make a request to MEPIC for the activation of a state Silver Alert involving a missing adult if circumstances regarding the disappearance have met the criteria for activation of the Silver Alert Plan.

The bill amends s. 937.021, F.S., to provide the same immunity from civil liability as described above to entities who act in good faith when requested to record, report, transmit, display, or release information pertaining to a Silver Alert.

The bill also provides entities who have been requested to record, report, transmit, display, or release Silver Alert information the same presumption of good faith given to those who have been requested to record, report, transmit, display, or release information related to missing children and adults. The bill also specifies that this presumption is not overcome if the law enforcement agency submitting the Silver Alert information made technical or clerical errors or provided incomplete or incorrect information.

The bill specifies that agencies, employees, and individuals do not have a duty to record, report, transmit, display, or release Silver Alert information received from a law enforcement agency. Such decision is discretionary with the entity receiving the information.

B. SECTION DIRECTORY:

Section 1. Amends s. 937.0201, F.S., relating to definitions.

Section 2. Amends s. 937.021, F.S., relating to missing child and missing adult reports.

Section 3. Amends s. 937.022, F.S., relating to Missing Endangered Persons Information Clearinghouse.

Section 4. Provides an effective date of July 1, 2011.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   FDLE reports that the bill will have no fiscal impact as statewide Silver Alerts have been issued since October 2008 and FDLE has historically considered a person who meets the criteria for a state Silver Alert to be a "missing endangered person" as defined by s. 937.0201, F.S.[21]

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[18] Section 937.022(3)(b), F.S.
[19] *See* ss. 937.0201 and 937.022, F.S.
[20] FDLE 2011 Analysis of HB 513.
[21] FDLE 2011 Analysis of HB 513.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

It appears the bill would have no fiscal impact on local governments as local Silver Alerts have been issued since October 2008 and a person who meets the criteria for a state Silver Alert has been historically considered to be a "missing endangered person" as defined by s. 937.0201, F.S.[22]

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to spend funds or take any action requiring the expenditure of funds; reduce the authority that municipalities or counties have to raise revenue in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:
None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 15, 2011, the Criminal Justice Subcommittee adopted an amendment to the bill and reported the bill favorably as a Committee Substitute. The amendment provides that only a law enforcement agency having jurisdiction over the case may make a request to the Missing Endangered Persons Information Clearinghouse for activation of a state Silver Alert if criteria for activation are met.

This analysis is drafted to the Committee Substitute.

[22] *Id.*

A bill to be entitled

An act relating to missing adults; amending s. 937.0201, F.S.; revising the definition of the term "missing endangered person" to include a missing adult who meets the criteria for activation of the Silver Alert Plan; amending s. 937.021, F.S.; providing immunity from civil liability for certain persons providing Silver Alert information pertaining to the missing adult in good faith; amending s. 937.022, F.S.; providing that only the law enforcement agency having jurisdiction over the case may request that the clearinghouse activate a state Silver Alert; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (4) of section 937.0201, Florida Statutes, is amended to read:

937.0201 Definitions.—As used in this chapter, the term:

(4) "Missing endangered person" means:

(a) A missing child;

(b) A missing adult younger than 26 years of age; ~~or~~

(c) A missing adult 26 years of age or older who is suspected by a law enforcement agency of being endangered or the victim of criminal activity; or

(d) A missing adult who meets the criteria for activation of the Silver Alert Plan.

Section 2. Subsection (5) of section 937.021, Florida

Statutes, is amended to read:

937.021 Missing child and missing adult reports.—

(5)(a) Upon receiving a request to record, report, transmit, display, or release Amber Alert or Missing Child Alert information from the law enforcement agency having jurisdiction over the missing child, the department ~~of Law Enforcement~~ as the state Amber Alert coordinator, any state or local law enforcement agency, and the personnel of these agencies; any radio or television network, broadcaster, or other media representative; any dealer of communications services as defined in s. 202.11; or any agency, employee, individual, or entity is immune from civil liability for damages for complying in good faith with the request and is presumed to have acted in good faith in recording, reporting, transmitting, displaying, or releasing Amber Alert or Missing Child Alert information pertaining to such child.

(b) Upon receiving a request to record, report, transmit, display, or release information and photographs pertaining to a missing adult from the law enforcement agency having jurisdiction over the missing adult, the department, a state or local law enforcement agency, and the personnel of these agencies; any radio or television network, broadcaster, or other media representative; any dealer of communications services as defined in s. 202.11; or any agency, employee, individual, or person is immune from civil liability for damages for complying in good faith with the request to provide information and is presumed to have acted in good faith in recording, reporting, transmitting, displaying, or releasing information or

photographs pertaining to the missing adult.

(c) Upon receiving a request to record, report, transmit, display, or release Silver Alert information from the law enforcement agency having jurisdiction over the missing adult, the department as the state Silver Alert coordinator, any state or local law enforcement agency, and the personnel of these agencies; any radio or television network, broadcaster, or other media representative; any dealer of communications services as defined in s. 202.11; or any agency, employee, individual, or entity is immune from civil liability for damages for complying in good faith with the request and is presumed to have acted in good faith in recording, reporting, transmitting, displaying, or releasing Silver Alert information pertaining to the missing adult.

(d) ~~(c)~~ The presumption of good faith is not overcome if a technical or clerical error is made by any agency, employee, individual, or entity acting at the request of the local law enforcement agency having jurisdiction, or if the Amber Alert, Missing Child Alert, ~~or~~ missing adult, or Silver Alert information is incomplete or incorrect because the information received from the local law enforcement agency was incomplete or incorrect.

(e) ~~(d)~~ Neither this subsection nor any other provision of law creates a duty of the agency, employee, individual, or entity to record, report, transmit, display, or release the Amber Alert, Missing Child Alert, ~~or~~ missing adult, or Silver Alert information received from the local law enforcement agency having jurisdiction. The decision to record, report, transmit,

display, or release information is discretionary with the agency, employee, individual, or entity receiving the information.

Section 3. Paragraph (b) of subsection (3) of section 937.022, Florida Statutes, is amended to read:

937.022 Missing Endangered Persons Information Clearinghouse.—

(3) The clearinghouse shall:

(b) Provide a centralized file for the exchange of information on missing endangered persons.

1. Every state, county, or municipal law enforcement agency shall submit to the clearinghouse information concerning missing endangered persons.

2. Any person having knowledge may submit a missing endangered person report to the clearinghouse concerning a child or adult younger than 26 years of age whose whereabouts is unknown, regardless of the circumstances, subsequent to reporting such child or adult missing to the appropriate law enforcement agency within the county in which the child or adult became missing, and subsequent to entry by the law enforcement agency of the child or person into the Florida Crime Information Center and the National Crime Information Center databases. The missing endangered person report shall be included in the clearinghouse database.

3. Only the law enforcement agency having jurisdiction over the case may submit a missing endangered person report to the clearinghouse involving a missing adult age 26 years or older who is suspected by a law enforcement agency of being

endangered or the victim of criminal activity.

4. Only the law enforcement agency having jurisdiction over the case may make a request to the clearinghouse for the activation of a state Silver Alert involving a missing adult if circumstances regarding the disappearance have met the criteria for activation of the Silver Alert Plan.

Section 4. This act shall take effect July 1, 2011.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1261 Election Ballots
SPONSOR(S): State Affairs Committee, Corcoran, Legg and Young
TIED BILLS: None **IDEN./SIM. BILLS:** SPB 7220

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) State Affairs Committee	11 Y, 5 N, As CS	Camechis	Hamby
2) Judiciary Committee		De La Paz	Havlicak

SUMMARY ANALYSIS

The Florida Constitution (constitution) authorizes the Legislature to propose amendments or revisions to the constitution by a joint resolution approved by a 3/5 vote of the membership of each house. Joint resolutions may specify that the full text of a proposed amendment *or* a ballot summary describing the proposed amendment be printed on the ballot (this is referred to as "ballot language"). Typically, joint resolutions require placement of a title and ballot summary on the ballot. The ballot language of legislatively proposed amendments is subject to legal challenge in the courts. Generally, challengers' claim the ballot title or ballot summary proposed by the Legislature is inaccurate, misleading, or otherwise defective in violation of s. 101.161, F.S., or the implicit constitutional accuracy requirement applied by the Florida Supreme Court (Court) since 2000. From 2000 to date, 9 legislatively proposed amendments have been reviewed by the judiciary. Of those, the Court removed 4 from the ballot and invalidated 1 after approval by voters, all due to defective ballot titles or summaries. On several occasions since 1982, Justices of the Court have asked the Legislature to amend the statute and create a process to address ballot deficiencies in order to avoid removal of proposed amendments from the ballot.

In summary, the bill amends s. 101.161, F.S., the statute governing the form of the ballot and manner in which the ballot is presented to the electors, in order to:

- Conform statutory terminology to actual practice and judicial decisions and consolidate requirements related to joint resolutions into one provision;
- Codify the implicit authority of the Legislature to specify inclusion of either a ballot summary or the full text of an amendment on the ballot;
- Codify the current judicial requirement that ballot summaries proposed by the Legislature describe the chief purpose of the amendment in clear and unambiguous language;
- Explicitly authorize joint resolutions to include more than one ballot summary for consideration by the courts in the event the first ballot summary is found deficient;
- Specify that, if a joint resolution specifies that the full text of an amendment must be printed on the ballot, and the text delineates current constitutional language that will be removed or replaced, the text must be considered a clear and unambiguous statement of the substance and effect of the proposal, providing fair notice to the voters;
- Require legal challenges to ballot language proposed by a joint resolution to be filed within 30 days after the joint resolution is submitted to the Secretary of State;
- Specify that the full text of the proposed amendment must be placed on the ballot if a court finds each proposed ballot summary defective, and if the full text of the amendment delineates current constitutional language that will be removed or replaced, the text must be considered a clear and unambiguous statement of the substance and effect of the proposal, providing fair notice to the voters
- Provide for retroactive application of the bill to joint resolutions passed during the 2011 regular session and provide a specific period of time within which to file legal challenges of joint resolutions passed during that session.

The bill does not:

- Alter the manner in which courts review ballot titles or ballot summaries to determine accuracy;
- Alter or eliminate the implicit accuracy requirement applied by the courts since the 2000 decision in the Armstrong case; or
- Alter the manner in which amendments are proposed by initiative petition, the Constitution Revision Commission, the Taxation and Budget Reform Commission, or a constitutional convention.

This bill may result in an indeterminate negative fiscal impact on the Department of State if multiple ballot summaries are published in newspapers throughout the state. The cost is $106.14 per word. The bill may also result in an indeterminate negative fiscal impact on local supervisors of elections, who will bear the cost of printing lengthier ballots if the full text of amendments must be included on the ballot.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

PRESENT SITUATION

Introduction

The ballot language of a legislatively proposed amendment is subject to legal challenge in the courts. Generally, challengers' claim the ballot title or ballot summary proposed by the Legislature is inaccurate, misleading, or otherwise defective in violation of s. 101.161, F.S., or the implicit constitutional accuracy requirement applied by the Florida Supreme Court (Court) since 2000. From 2000 to date, 9 legislatively proposed amendments have been reviewed by the judiciary. Of those, the Court permitted 4 to be placed on the ballot for a vote of the electors.[1] Of the remainder, the Court removed 4 from the ballot prior to the election and invalidated 1 following its approval by the voters, based upon the Court's finding that the ballot summaries or titles were defective.[2] In 2010, the Court removed 3 legislative proposals due to defective titles or ballot summaries, noting in one decision that, "we have previously asked the Legislature to establish a procedure that would avoid this problem."[3] The first suggestion for revising the process was made in 1982, when Justice Overton authored a concurring opinion in the Askew v. Firestone case, the first in which the Court removed a legislatively proposed amendment from the ballot due to a deficient ballot title and summary. In his opinion, Justice Overton said,

> Because of the defective ballot language, the public is now prohibited from voting on this amendment. Infringing on the people's right to vote on an amendment is a power this Court should use only where the record clearly and convincingly establishes that the public is being misled on material elements of the amendment. It concerns me that the public is being denied the opportunity to vote because no process has been established to correct misleading ballot language in sufficient time to change the language.
>
> To avoid future situations in which this Court may again have to exercise this extraordinary power of striking an amendment from the ballot due to misleading ballot language, the legislature and this Court should devise a process whereby misleading language can be challenged and corrected in sufficient time to allow a vote on the proposal.
>
> Since our constitution requires that amendments and revisions be filed with the secretary of state at least ninety days prior to the designated election date, I suggest that a process be established by the legislature to afford those who desire to challenge the ballot language to be able to do so within *thirty days* of the filing of the amendment or revision. This Court should then create an expedited process whereby such challenges can be settled within thirty days of the filing of the challenge. In this process a means should be provided for the correction of defective ballot language so that the election on the proposal may proceed.[4]

Since 1982, at least 7 decisions issued by the Court contained opinions suggesting the Legislature provide a remedial process for ballot summaries found defective by the courts.[5]

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[1] Sancho v Smith, 830 So.2d 856, (Fla. 1st DCA 2002); rev. den., 828 So.2d 389 (Fla. 2002); ACLU v. Hood, 888 So.2d 621 (Fla. 2004)(The court rejected the ballot summary and ordered the full amendment text placed on the ballot); Fl. Hometown Democracy v Cobb, 953 So.2d 666 (Fla. 1st DCA 2007)(The court approved the summary after the amendment was approved by the voters); Fl. Education Assoc. v. State, 48 So.3d 694 (Fla. 2010).

[2] Armstrong v Harris, 773 So.2d 7 (Fla. 2000)(Invalidating the amendment after approval by voters); Fl. Assoc of Realtors v. Smith, 825 So.2d 532 (Fla. 1st DCA 2002), rev. den., 826 So.2d 991 (Fla. 2002); Roberts v Doyle, 43 So.3d 654 (Fla. 2010); State v Mangat, 43 So.3d 642 (Fla. 2010); Fl. Dept. of State v. Fl. State Conference of NAACP Branches, 43 So.3d 662 (Fla. 2010).

[3] State v. Mangat, 43 So.3d 642, 651 (Fla. 2010).

[4] Askew, 421 So.2d at 157 (emphasis added).

[5] Askew v. Firestone, 421 So.2d 151, 157 (Fla. 1982)(Overton, J., concurring) (Suggesting a process whereby misleading ballot language can be challenged and corrected in sufficient time to allow the people to vote on the proposal); Evans v. Firestone, 457 So.2d 1351 (Fla. 1984)(Overton, J., concurring); Fl. League of Cities v. Smith; 607 So.2d 397 (Fla. 1992)(Overton, J., concurring); Smith v. American Airlines, Inc., 606 So. 2d 618, 622 (Fla. 1992) ("In order to prevent this problem from recurring in the future, we urge the legislature to consider amending the statute to empower this Court to fix fatal problems with ballot summaries, at least with respect to those amendments proposed by revision commissions or the legislature."); Advisory Op. to the Att'y Gen. re Tax Limitation; 644 So.2d 486 (Fla. 1994)(Overton, J., concurring); Armstrong, 773 So.2d at 24-26 (Fla. 2000), (Pariente, J., specially concurring) (Agreeing with Justice Overton's concerns in Askew); State v. Mangat, 43 So.3d 642, 651 (Fla. 2010).

Substantive changes to s. 101.161, F.S., the statute governing the form and manner in which proposed amendments are placed on the ballot, have been proposed since 1984, but the only relevant change was adopted in 2000 when the Legislature exempted legislatively proposed amendments from the statutory requirement for a 75-word limit ballot summary explaining the chief purpose of a proposed amendment.

State Constitution

Article XI of the Florida Constitution provides the following methods for amending the State Constitution:

1) Joint resolution passed by 3/5 of the membership of each house of the Legislature;
2) Initiative petition;
3) Proposal by the Constitution Revision Commission;
4) Proposal by the Taxation and Budget Reform Commission; or
5) Proposal by a constitutional convention.

A proposed amendment to or revision[6] of the constitution, or any part of it, must be submitted to the electors at the next general election held more than ninety days after the joint resolution or report of the revision commission, constitutional convention or taxation and budget reform commission proposing it is filed with the Secretary of State, unless, pursuant to law enacted by 3/4 of the membership of each house of the Legislature and limited to a single amendment, it is submitted at an earlier special election held more than ninety days after such filing.[7]

Once in the tenth week, and once in the sixth week immediately preceding the week in which the election is held, each proposed amendment, with notice of the date of election at which it will be submitted to the electors, must be published in one newspaper of general circulation in each county in which a newspaper is published.[8] The Department of State ensures compliance with this constitutional requirement by overseeing publication of the ballot title, ballot summary, and amendment text in newspapers throughout the state.

Unless otherwise specifically provided for elsewhere in the constitution, if the proposed amendment is approved by vote of at least 60% of the electors voting on the measure, it is effective as an amendment to the constitution on the first Tuesday after the first Monday in January following the election, or on such other date as may be specified in the amendment or revision.[9]

With respect to joint resolutions of the Legislature that propose an amendment, the constitution:

1) Does not contain explicit requirements governing the form or manner in which amendments proposed by joint resolution appear on the ballot. Specifically, the constitution does not require a joint resolution proposing an amendment or revision to contain a title or ballot summary, nor does the constitution contain an explicit requirement regarding the accuracy or content of ballot titles, summaries, or the text of proposed amendments;
2) Does not limit proposed amendments to a single-subject;
3) Does not limit the subject matter of a proposed amendment;[10]
4) Does not authorize the Governor to approve or disapprove legislatively proposed amendments.

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[6] An "amendment" amends one section of the constitution, while a "revision" amends one or more articles of the constitution. Art. XI, s. 1, Fla. Const. For ease of reading, this analysis will refer to "amendment" when referring to any proposed change to the constitution, including by a proposed revision. "The function of a section amendment is to alter, modify or change the substance of a single section of the Constitution containing particularized statements of organic law....The function of an article revision is to restructure an entire class of governmental powers or rights, such as legislative powers, taxation powers, or individual rights." Smathers v. Smith, 338 So. 2d 825, 829 (Fla. 1976).

[7] Art. XI, s. 5(a), Fla. Const.

[8] Art, XI, s. 5(d), Fla. Const.

[9] Art. XI, s. 5(e), Fla. Const.

[10] Collier v. Gray, 116 Fla. 845, 858 (Fla. 1934)(Constitutional provisions derive their force from people, who have inherent power, practically unlimited except by Federal Constitution, to make changes in the constitution when proposed in a prescribed manner.); Gray v. Golden, 89 So.2d 785, 790 (Fla. 1956)(The people have a right to change, abrogate, or modify the constitution in any manner they see fit, so long as they keep within the confines of the federal constitution).

State Statutes

The Florida Elections Code governs the manner in which proposed amendments are presented to the voters. Specifically, s. 101.161, F.S., establishes requirements regarding the form and manner in which amendments appear on the ballot.

Section 101.161, F.S., requires that whenever a constitutional amendment is submitted to the vote of the people, the "substance" of the amendment must be printed in clear and unambiguous language on the ballot after the list of candidates, followed by the word "yes" and also by the word "no," and must be styled in such a manner that a "yes" vote will indicate approval of the proposal and a "no" vote will indicate rejection. The wording of the substance of the amendment and the ballot title to appear on the ballot must be embodied in the joint resolution or other proposal.

The "substance" of the amendment must be an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure. In actual practice, the "explanatory statement" is commonly referred to as the "ballot summary." Amendments and ballot language proposed by joint resolution of the legislature are exempt from the requirement for a ballot summary of 75 or less words.

The heading appearing above the ballot summary is the "ballot title." The ballot title must consist of a caption, not exceeding 15 words in length, by which the measure is commonly referred to or spoken of.

In addition, for every amendment proposed by initiative, the ballot must include, following the ballot summary, a separate financial impact statement concerning the measure prepared by the Financial Impact Estimating Conference.

The ballot summary and ballot title of a constitutional amendment proposed by initiative must be prepared by the sponsor and approved by the Secretary of State. The Department of State (department) must give each proposed constitutional amendment a designating number for convenient reference, and this number must appear on the ballot. Designating numbers must be assigned in the order of filing or certification and in accordance with rules adopted by the department. The department must furnish the designating number, the ballot title, and the substance of each amendment to the supervisor of elections of each county in which such amendment is to be voted on.

EFFECT OF PROPOSED CHANGES

The bill amends s. 101.161, F.S., the statute governing the form of the ballot and manner in which the ballot is presented to the electors. The bill does not:

- Alter the manner in which courts review ballot titles or ballot summaries to determine accuracy;
- Alter or eliminate the implicit accuracy requirement applied by the courts since the 2000 decision in the Armstrong case; or
- Alter the manner in which amendments are proposed by initiative petition, the Constitution Revision Commission, the Taxation and Budget Reform Commission, or a constitutional convention.

Rather, the bill:

- Revises terminology in s. 101.161(1) and (2), F.S., to replace references to "substance" with "ballot summary" so that statutory terminology is consistent with actual practice and judicial decisions;
- Transfers the requirements for amendments and revisions proposed by joint resolution from existing subsection (1) to a new subsection (4), so that the requirements for legislative proposals are separate from all other proposals for purposes of clarity and ease of application;
- Requires the Secretary of State to provide the designating number and, *as directed by joint resolution,* the ballot title, ballot summary, *or full text of an amendment* to the Supervisors of Elections. This is consistent with the Legislature's current implicit authority to include either a ballot summary or the full amendment text on the ballot;
- Requires each joint resolution to include a ballot title consisting of a caption, of 15 words or less, by which the proposal is commonly referred to or spoken of (this requirement is in current law);

- Specifies that a joint resolution *may* include a ballot summary or alternative ballot summaries that describe the chief purpose of the proposal in clear and unambiguous language;
- Requires the title and ballot summary, or title and amendment text, *whichever is required by the joint resolution*, to be printed on the ballot. This provision reiterates current implicit legislative discretion to include a ballot summary *or* the full text, and incorporates current technical language from subsection (1) regarding assignment of designating numbers by the Secretary of State and the style of the question.

- For joint resolutions specifying placement of the full text of the amendment on the ballot:
    - Specifies that, if a joint resolution requires placement on the ballot of the full text of a proposed amendment, and the full text of the proposed amendment delineates existing text in the constitution that will be removed or replaced if approved by the electors, the full text of the proposed amendment must be considered a clear and unambiguous statement of the proposal, providing fair notice to the electors of the content of the proposed amendment and sufficiently advising electors of the issue upon which they are voting.
    - Requires any judicial action challenging placement of the full text of an amendment on the ballot to be filed within 30 days after the joint resolution is submitted to the Secretary of State.

- For joint resolutions requiring placement of a ballot summary on the ballot:
    - Requires any legal action challenging a legislative ballot title or ballot summary based upon a claim that the title or summary is inaccurate, misleading, or otherwise defective to be filed within 30 days after the joint resolution is submitted to the Secretary of State.
    - Requires placement on the ballot of the full text of an amendment if the courts find each ballot summary in a joint resolution defective.
    - Specifies that if the full text of the proposed amendment delineates existing text in the constitution that will be removed or replaced if approved by the electors, the full text of the proposed amendment must be considered a clear and unambiguous statement of the proposal, providing fair notice to the electors of the content of the proposed amendment and sufficiently advising electors of the issue upon which they are voting.
    - If the courts find a ballot summary defective, and place the full text of the amendment on the ballot, subsequent legal challenges must be filed within 15 days after the final court order is issued.

- Requires the courts, including any appellate court, to accord cases challenging the ballot language in joint resolutions priority over other pending cases and render decisions as expeditiously as possible.

Lastly, the bill specifies that its provisions apply retroactively to joint resolutions passed during the 2011 regular session, and that legal challenges to ballot language in joint resolutions passed during the session must be filed within 30 days after this bill becomes law or within 30 days after the joint resolution being challenged is filed with the Secretary of State, whichever is later.

BACKGROUND

Federal Limitations on Legislative Ballot Language

In the early 1990s, a Georgia citizen and two organizations brought a legal action in federal court against Georgia and Georgia officials challenging the constitutionality of ballot language selected by Georgia's legislature for a proposed amendment to the Georgia Constitution affecting the ability of citizens to sue Georgia, its departments, agencies, officers, and employees. The challengers asked the federal courts to invalidate the outcome of a state referendum and alleged dilution of their right to vote on that one occasion, but did not allege systematically discriminatory election procedures. The federal Eleventh Circuit Court of Appeals, whose decisions are applicable in Florida, concluded that the challengers could

prevail only "if the election process itself reaches the point of *patent and fundamental unfairness*.... Such a situation must go well beyond the ordinary dispute over the counting and marking of ballots."[11]

In order for a court to invalidate a referendum due to a defective ballot summary, the court found that challengers must demonstrate that the state's choice of ballot language so upset the evenhandedness of the referendum that it worked a "patent and fundamental unfairness" on the voters. Such an exceptional case can arise only when the ballot language is so misleading that voters cannot recognize the subject of the amendment at issue. In such a case, the voters would be deceived, in a concrete and fundamental way, about "'what they are voting for or against.'"[12]

The court explained that, "[a]s long as citizens are afforded reasonable opportunity to examine the full text of the proposed amendment, broad-gauged unfairness is avoided if the ballot language identifies for the voter the amendment to be voted upon. Therefore, substantive due process requires no more than that the voter not be deceived about what amendment is at issue."

As to ballot summaries proposed by a state legislature, the court said,

> The question is complicated somewhat when a state chooses to identify an amendment on a ballot by briefly summarizing the amendment's text - the approach adopted by the state of Georgia here. The same analysis applies, however.
>
> When the ballot language purports to identify the proposed amendment by briefly summarizing its text, then substantive due process is satisfied - and the election is not 'patently and fundamentally unfair' - so long as the summary does not so plainly mislead voters about the text of the amendment that 'they do not know what they are voting for or against'; that is, they do not know which or what amendment is before them.
>
> We cannot accept the proposition that substantive due process imposes an affirmative obligation on states to explain - some might say speculate - in ballot language the potential legal effect of proposed amendments to the state constitution. Such future effects are almost impossible to predict with accuracy, and the constitutionality of a state referendum ought not to be contingent on events that may occur long after the referendum, such as, judicial decisions construing or applying the amendment at issue.
>
> * * *
>
> We see no "patent and fundamental unfairness" inherent in the state's failure, if any, to convey the legal effect of Amendment One - that is, to explain the current state of Georgia immunity law and the changes that Amendment One would likely bring about if adopted. The ballot language is intended only to identify for the voters the amendment to be passed upon; voters must inspect the text of the amendment itself to determine, for themselves, the legal effect of its passage. In this respect, the language identifying proposed constitutional amendments serves much the same role on the ballot as a candidate's name in an election for political office. In general, voters presumably do not select officials on the basis of their names, but on the policies and programs those names represent.
>
> So long as the election process is not so impaired that it is "patently and fundamentally unfair," substantive due process is satisfied. It is not for federal courts to decide whether the state General Assembly could have selected some other language, or some other approach, that might have better informed the voters of Amendment One's content. "[I]t is, by now, absolutely clear that the Due Process Clause does not empower the judiciary 'to sit as a superlegislature to weigh the wisdom of legislation.'"[13]

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[11] Burton v. Georgia, 953 F. 2d. 1266, 1269 (emphasis added) (quoting Duncan v. Poythress, 657 F.2d 691, 703 (5th Cir. Unit B 1981)); "And, as we noted in Curry, 'there are no bright lines distinguishing 'patent and fundamental unfairness' from 'garden variety election disputes.' " Id. (citing Welch v. McKenzie, 765 F.2d 1311, 1317 (5th Cir.1985)).

[12] Id. at 1269.

[13] Id. at 1270-1271.

Current Status of Judicial Decisions Interpreting the State Constitution and Statutes

In a 2010 decision invalidating a legislative ballot summary, the Court acknowledged that the Legislature is not required to provide a ballot summary at all. Instead, the Legislature may resolve to place the exact text of a proposed amendment on a voter ballot.[14] However, if the Legislature chooses to include a ballot summary, it must be an "explanatory statement . . . of the chief purpose of the measure" consistent with s.101.161 (1), F.S. The Court further explained that, "[a]lthough the Legislature may place the full text of an amendment on a ballot without a ballot summary, the amendment text must still meet the accuracy requirements of article XI, section 5 of the Florida Constitution, as codified in section 101.161(1), Florida Statutes. Under these circumstances, the text of the amendment must serve the purpose of the ballot summary, i.e., advise the electorate of "the true meaning, and ramifications, of an amendment."[15] In a dissenting opinion, Chief Justice Canady, with Justice Polston concurring, opined that "[o]rdinarily, the text of a proposed amendment will necessarily contain the most direct and accurate expression of the substance and effect of the amendment. The [amendment] text itself may, however, be inadequate to sufficiently inform the voters if the text does not disclose that it will effect the repeal of an existing constitutional provision."[16]

"Although the constitution does not expressly authorize judicial review of amendments proposed by the Legislature, [the] Court long ago explained that the courts are the proper forum in which to litigate the validity of such amendments."[17] Specifically, the Court has stated:

> Under our system of constitutional government regulated by law, a determination of whether an amendment to the Constitution has been validly proposed and agreed to by the Legislature depends upon the fact of substantial compliance or noncompliance with the mandatory provisions of the existing Constitution as to how such amendments shall be proposed and agreed to, and such determination is necessarily required to be in a judicial forum where the Constitution provides no other means of authoritatively determining such questions.[18]

In 1956, the Court expressed the following view regarding the judiciary's role in reviewing legislative proposals:

> Another thing we should keep in mind is that we are dealing with a constitutional democracy in which sovereignty resides in the people. It is their Constitution that we are construing. They have a right to change, abrogate or modify it in any manner they see fit so long as they deep within the confines of the Federal Constitution. The legislature which approved and submitted the proposed amendment took the same oath to protect and defend the Constitution that we did and our first duty is to uphold their action if there is any reasonable theory under which it can be done. This is the first rule we are required to observe when considering acts of the legislature and it is even more impelling when considering a proposed constitutional amendment which goes to the people for their approval or disapproval.[19]

Today, judicial review of ballot language for proposed constitutional amendments is governed by the Florida Supreme Court's 2000 decision in the landmark case of Armstrong v. Harris, 773 So.2d 7 (Fla. 2000). In that case, the Court invalidated a legislatively proposed constitutional amendment after the amendment was approved by the voters. In doing so, the Court relied, for the first time, on an implicit constitutional accuracy requirement to find the ballot title and summary defective.

According to the Armstrong court, while the courts have traditionally "accorded a measure of deference to constitutional amendments proposed by the Legislature,"[20] that deference "is not boundless, for the constitution imposes strict minimum requirements that apply across-the-board to all constitutional

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[14] Mangat, 43 So.3d at 649.
[15] Id. at 649, FN 2 and 3, citing Askew, 421 So.2d at 156.
[16] Id. at 653 (Fla. 2010).
[17] Armstrong, 773 So.2d at 13-14.
[18] Id. at 14, citing Crawford v. Gilchrist, 59 So. 963, 966 (Fla. 1912).
[19] Gray v. Golden, 89 So.2d 785, 790 (Fla. 1956).
[20] Armstrong, 773 So.2d at 21.

amendments, including those arising in the Legislature."[21] With respect to the implicit constitutional accuracy requirement, the Court concluded that

> The accuracy requirement in article XI, section 5, imposes a strict minimum standard for ballot clarity. This requirement plays no favorites - it applies across-the-board to all constitutional amendments, including those proposed by the Legislature. The purpose of this requirement is above reproach - it is to ensure that each voter will cast a ballot based on the full truth. To function effectively - and to remain viable - a constitutional democracy must require no less."[22]

In reviewing legislatively proposed amendments, the courts have acknowledged that they "must act with extreme care, caution, and restraint before [they remove] a constitutional amendment from the vote of the people" and that courts "may declare a proposed constitutional amendment invalid only if the record shows that the proposal is clearly and conclusively defective...."[23] When asked to review ballot language, the courts do not consider or review the substantive merits or wisdom of a proposed amendment; rather, the courts consider their task to be determining whether the ballot language itself sets forth the substance of the amendment in clear and unambiguous language as required by s. 101.161, F.S., and by the implicit constitutional requirement that the proposed amendment be accurately represented on the ballot.[24]

According to the Court, s. 101.161(1), F.S., is a "codification of the accuracy requirement implicit in article XI, section 5 of the Florida Constitution,"[25] and requires the ballot language of every proposed amendment to state the amendment's chief purpose in clear and unambiguous language.[26] While the ballot title and summary must state in clear and unambiguous language the chief purpose of the measure, the Court has said that every detail or ramification of the proposed amendment need not be explained.[27] However, the Court has also said that a ballot title and summary must "provide fair notice of the content of the proposed amendment so that the voter will not be misled as to its purpose, and can cast an intelligent and informed ballot."[28]

When assessing a ballot title and summary, the reviewing courts ask two questions: First, whether the ballot title and summary "fairly inform the voter of the chief purpose of the amendment," and second, "whether the language of the title and summary, as written, misleads the public."[29] This evaluation also includes consideration of the amendment's "true meaning, and ramifications."[30] According to the Court, "lawmakers who are asked to consider constitutional changes, and the people who are asked to approve them, must be able to comprehend the sweep of each proposal from a fair notification in the proposition itself that it is neither less nor more extensive than it appears to be."[31] "A ballot title and summary cannot either 'fly under false colors' or 'hide the ball' as to the amendment's true effect,"[32] nor may the summary contain political rhetoric or editorial comment that invites an emotional response from the voter by materially misstating the substance of the amendment.[33]

In addition, the courts have said that:

- The accuracy requirement for ballot summaries is rooted in the Florida Constitution itself and does not depend on legislation.[34]

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[21] Id at 14.
[22] Id at 21 (emphasis omitted).
[23] Fl. Dept. of State v. Fl. State Conference of NAACP Branches, 43 So.3d 662, 667 (Fla. 2010); Armstrong, 773 So.2d at 11.
[24] Id.
[25] Id. at 700 (Fla. 2010), citing Advisory Op. to Att'y Gen. re Referenda Required for Adoption & Amend. of Local Gov't Comprehensive Land Use Plans, 902 So.2d 763, 770 (Fla. 2005).
[26] Id.
[27] Id.
[28] Id.; Advisory Op. to the Att'y Gen. re Right of Citizens to Choose Health Care Providers, 705 So.2d 563, 566 (Fla. 1998) (quoting Advisory Op. to Att'y Gen.– Fee on Everglades Sugar Prod., 681 So. 2d 1124, 1127 (Fla. 1996)).
[29] Fl. Education Assoc. v. State, 48 So.3d at 701., citing State v. Slough, 992 So.2d 142, 147 (Fla. 2008) (quoting Advisory Op. to Att'y Gen. re Prohibiting State Spending for Experimentation that Involves the Destruction of a Live Human Embryo, 959 So. 2d 210, 213-14 (Fla. 2007)).
[30] Armstrong, 773 So.2d at 16, quoting Askew, 421 So. 2d at 156.
[31] Smathers v. Smith, 338 So. 2d 825, 829 (Fla. 1976); Fl. Education Assoc. v. State, 48 So.3d at 700 (Fla. 2010).
[32] Armstrong, 773 So.2d at 16.
[33] Advisory Op. to the Att'y Gen. re Additional Homestead Tax Exemption, 880 So.2d 646, 653 (Fla. 2004); Evans v. Firestone, 457 So.2d 1351, 1355 (Fla. 1984).
[34] Sancho v Smith, 830 So.2d 856, 861 (Fla. 1st DCA 2002).

- Because voters will not have the actual text of the amendment before them in the voting booth when they enter their votes, the accuracy requirement is of paramount importance for the ballot title and summary.[35]
- When a defect goes to the very heart of the amendment, it is impossible to say with any certainty what the vote of the electorate would have been "if the voting public had been given the whole truth" instead of a part-truth.[36]
- A proposed amendment must be removed from the ballot when the title and summary do not accurately describe the scope of the text of the amendment, because it has failed in its purpose.[37]
- An unnecessary statement that is false or misleading might render a ballot summary invalid.[38]
- A proposed amendment "must stand on its own merits and not be disguised as something else."[39]
- The burden of informing the public should not fall only on the press and opponents of the measure - the ballot title and summary must do this.[40]
- Where a proposed constitutional revision results in the loss or restriction of an independent fundamental state right, the loss must be made known to each participating voter at the time of the general election. This is especially true if the ballot language gives the appearance of creating new rights or protections, when the actual effect is to reduce or eliminate rights or protections already in existence.[41]
- The court must look not to subjective criteria espoused by the amendment's sponsor but to objective criteria inherent in the amendment itself, such as the amendment's main effect.[42]
- The ballot summary should tell the voter the legal effect of the amendment.[43]
- Ballot summaries are misleading if they contain factual inaccuracies.[44]
- A ballot title and summary cannot "hide the ball" from the voter by giving "no hint of the radical change in state constitutional law that the text actually foments."[45]
- The ballot title and summary may not be read in isolation, but must be read together in determining whether the ballot information properly informs the voters."[46]

In a 2008 decision finding the ballot title and summary of a proposal by the Taxation and Budget Reform Commission misleading, the Court made the following observations:

> In recent years, advantageous but misleading "wordsmithing" has been employed in the crafting of ballot titles and summaries. Sponsors attempt to use phrases and wording techniques in an attempt to persuade voters to vote in favor of the proposal. When such wording selections render a ballot title and summary deceptive or misleading to voters, the law requires that such proposal be removed from the ballot - regardless of the substantive merit of the proposed changes. Indeed, the use or omission of words and phrases by sponsors, which become misleading, in an attempt to enhance the chance of passage, may actually cause the demise of proposed changes that might otherwise be of substantive merit. If a sponsor - whether it be a citizen-initiative group, commission, or otherwise-wishes to guard a proposed amendment from such a fate, it need only draft a ballot title and summary that is straightforward, direct, accurate and does not fail to disclose significant effects of the amendment merely because they may not be perceived by some voters as advantageous. The voters of Florida deserve nothing less than clarity when faced with the decision of whether to amend our state constitution, for it is the foundational document that embodies the fundamental principles through which organized government functions.[47]

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[35] Armstrong, 773 So.2d at 13.
[36] Armstrong, 773 So.2d at 21.
[37] Roberts v Doyle, 43 So.3d at 659 (Fla. 2010).
[38] Sancho, 830 So.2d at 863.
[39] Askew, 421 So.2d at 156.
[40] Id.
[41] Armstrong, 773 So.2d at 17.
[42] Armstrong, 773 So.2d at 18.
[43] Armstrong, 773 So.2d, citing Evans v. Firestone, 457 So.2d at 1355 (Fla.1984).
[44] Armstrong, 773 So.2d at 21.
[45] Armstrong, 773 So.2d at 21.
[46] Advisory Opinion to the Attorney Gen. re Fla.'s Amendment to Reduce Class Size, 816 So.2d 580, 585 (Fla.2002).
[47] Slough, 992 So.2d at 149.

Justices of the Court have authored several dissents in decisions where the Court removed proposed legislative amendments from the ballot due to defective ballot titles or summaries. Of particular note is Chief Justice Wells' dissent in the 2000 Armstrong case.[48] In his dissent, Chief Justice Wells strongly disagreed with the Court's fundamental ruling, stating that in order for the court to exercise the extraordinary power of striking a legislatively proposed amendment from the ballot,

> the majority writes into article XI, section 5, an 'accuracy requirement' and then holds that the judicially-created requirement provides a basis for this Court to review legislatively-proposed amendments to the Constitution. Language to support this is simply nonexistent in the express language of article XI, section 5. Next, relying upon the created language, the majority finds that this judicially-grafted requirement is breached by coming to the subjective conclusion that the ballot summary (also unmentioned in article XI, section 5) does not meet this requirement.

Chief Justice Wells explained that there is not "any language in article XI, section 5, that gives the Court the power to make subjective judgments as to whether language appearing on a ballot is 'misleading' for the purposes of assuring accuracy," and that the majority opinion "appears to concede there is no express constitutional basis for this by saying that this is 'implicit in this provision.'" He also asserted that "it is illogical and contradictory for the Court to conclude that a legislatively proposed amendment fails because it violates a statute. Obviously, a legislatively proposed amendment would supersede a prior legislative enactment with which it did not comply." He further argued that "it is contrary to the separation of powers requirements of article II, section 3, for the Court to strike a provision from the Constitution because the Court concluded that the Legislature's presentation of the amendment to the voters was 'misleading.'"

Chief Justice Wells concluded that, if the Legislature misled the voters, the remedy is at the ballot box - not in the Court. "There is simply no constitutional authority for a judicial veto of a legislatively proposed amendment, just as there is no gubernatorial veto. I believe it is crucial to always keep in mind that the very first sentence of article 1, section 1, of the Florida Constitution is, 'All political power is inherent in the people.' I do not find in article V, which is the article of the Constitution which provides to the Court its power, any basis to conclude that the people have given to the Court the power to intercede between the people and their elected representatives when the Legislature proposes amending the Constitution by the constitutionally required supermajority."

In 2010, Chief Justice Canady and Justice Polston dissented in the three decisions of the Court that removed legislatively proposed amendments from the ballot; however, the dissents did not explicitly question the existence or propriety of the implicit constitutional accuracy requirement imposed by majority of the current court or by the Armstrong and subsequent courts. Rather, the Justices argued that the ballot summaries for two proposals, and the full text of one proposal, adequately informed the voters of the substance of the proposed amendments.[49]

B. SECTION DIRECTORY:

Section 1 amends s. 101.161, F.S., transferring and revising requirements applicable to ballot language for amendments or revisions proposed by joint resolution and establishing deadlines for filing legal challenges to those joint resolutions.

Section 2 provides applicability of the bill to joint resolutions passed during the 2011 regular session.

Section 3 provides an effective date of upon becoming law.

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[48] Armstrong, 773 So.2d at 26-27.

[49] Roberts v Doyle, 43 So.3d 654, 661 (Fla. 2010); State v Mangat, 43 So.3d 642, 653 (Fla. 2010); Fl. Dept. of State v. Fl. State Conference of NAACP Branches, 43 So.3d 662, 670 (Fla. 2010).

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues: None.

2. Expenditures: Section 5(d), Art. XI of the State Constitution, requires proposed amendments or constitutional revisions to be published in a newspaper of general circulation in each county where a newspaper is published. The amendment or revision must be published once in the 10th week and again in the 6th week immediately preceding the week the election is held. The Division of Elections within the Department of State estimated that the average cost to advertise an amendment to the State Constitution is $106.14 per word for this fiscal year.

If the Legislature provides multiple ballot summaries in future joint resolutions, the Department of State will incur additional expenditures due to the cost of publishing those multiple ballot summaries in newspapers throughout the state as required by the State Constitution.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues: None.

2. Expenditures: The bill may result in an indeterminate negative fiscal impact on local supervisors of elections who bear the cost of printing ballots, and whose costs may increase if ballots are lengthier due to placement of the full text of amendments on the ballot.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR: None.

D. FISCAL COMMENTS: None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision: The county/municipality mandates provision of Art. VII, section 18, of the Florida Constitution may apply because this bill may result in additional expenditures by the supervisors of elections; however, laws adopted to require funding of election laws are exempt from the requirements of the mandates provision.

2. Other: None.

B. RULE-MAKING AUTHORITY: None.

C. DRAFTING ISSUES OR OTHER COMMENTS: None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None

A bill to be entitled

An act relating to election ballots; amending s. 101.161, F.S.; revising terminology; transferring to a new subsection requirements applicable to joint resolutions; providing that a joint resolution may include a ballot summary and alternate ballot summaries; providing that a joint resolution must specify placement on the ballot of a ballot summary or the full text of an amendment or revision; creating a presumption that the full text of an amendment or revision must be considered a clear and unambiguous statement of the substance and effect of an amendment or revision proposed by joint resolution and sufficient notice to the electors under certain circumstances; requiring legal challenges to ballot language specified by joint resolution to be filed within certain time periods; requiring placement on the ballot of the full text of an amendment or revision proposed by joint resolution if the courts find the ballot summary defective; requiring the courts to accord actions challenging ballot language specified by a joint resolution priority over other pending cases and issue orders as expeditiously as possible; providing retroactive applicability to joint resolutions passed during the 2011 regular session; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsections (1) and (2) of section 101.161,

Florida Statutes, are amended, and subsection (4) is added to that section, to read:

101.161 Referenda; ballots.—

(1) Whenever a constitutional amendment or other public measure is submitted to the vote of the people, a ballot summary ~~the substance~~ of such amendment or other public measure shall be printed in clear and unambiguous language on the ballot after the list of candidates, followed by the word "yes" and also by the word "no," and shall be styled in such a manner that a "yes" vote will indicate approval of the proposal and a "no" vote will indicate rejection. The ballot summary ~~wording of the substance~~ of the amendment or other public measure and the ballot title to appear on the ballot shall be embodied in the ~~joint resolution,~~ constitutional revision commission proposal, constitutional convention proposal, taxation and budget reform commission proposal, or enabling resolution or ordinance. ~~Except for amendments and ballot language proposed by joint resolution,~~ The ballot summary ~~substance~~ of the amendment or other public measure shall be an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure. In addition, for every amendment proposed by initiative, the ballot shall include, following the ballot summary, a separate financial impact statement concerning the measure prepared by the Financial Impact Estimating Conference in accordance with s. 100.371(5). The ballot title shall consist of a caption, not exceeding 15 words in length, by which the measure is commonly referred to or spoken of. This subsection does not apply to constitutional amendments or revisions proposed by joint

resolution.

(2) The ballot summary ~~substance~~ and ballot title of a constitutional amendment proposed by initiative shall be prepared by the sponsor and approved by the Secretary of State in accordance with rules adopted pursuant to s. 120.54. The Department of State shall give each proposed constitutional amendment a designating number for convenient reference. This number designation shall appear on the ballot. Designating numbers shall be assigned in the order of filing or certification and in accordance with rules adopted by the Department of State. The Department of State shall furnish the designating number, the ballot title, and the ballot summary ~~substance~~ of each amendment, unless otherwise specified in a joint resolution, to the supervisor of elections of each county in which such amendment is to be voted on.

(4)(a) Whenever a constitutional amendment or revision is proposed by joint resolution, the joint resolution shall include a ballot title consisting of a caption, not exceeding 15 words in length, by which the measure is commonly referred to or spoken of. The joint resolution may include a ballot summary and alternate ballot summaries that describe the chief purpose of the amendment or revision in clear and unambiguous language. The joint resolution shall specify placement on the ballot of a ballot title and either a ballot summary embodied in the joint resolution or the full text of the proposed amendment or revision. As specified by the joint resolution, the ballot title and ballot summary, or the ballot title and the full text of the proposed amendment or revision, shall be printed on the ballot,

with a designating number assigned by the Secretary of State pursuant to subsection (2), after the list of candidates, followed by the word "yes" and also by the word "no," and shall be styled in such a manner that a "yes" vote will indicate approval of the proposal and a "no" vote will indicate rejection. The Department of State shall furnish the designating number and, as specified by the joint resolution proposing an amendment or revision, the ballot title and a ballot summary or the full text of the amendment or revision to the supervisor of elections of each county in which the amendment or revision is to be voted on.

(b) If a joint resolution specifies placement on the ballot of the full text of a proposed amendment or revision, and the full text of the proposed amendment or revision delineates existing text in the State Constitution that will be removed or replaced if approved by the electors, the full text shall be considered a clear and unambiguous statement of the substance and effect of the amendment or revision, providing fair notice to the electors of the content of the proposed amendment or revision and sufficiently advising electors of the issue upon which they are voting. Any judicial action challenging placement on the ballot of the full text of a proposed amendment or revision must be commenced within 30 days after the joint resolution is filed with the Secretary of State.

(c) Any action for a judicial determination that the ballot title, ballot summary, or alternate ballot summaries embodied in a joint resolution are inaccurate, misleading, or otherwise defective must be commenced within 30 days after the

joint resolution is filed with the Secretary of State. If the court determines that each ballot summary embodied in a joint resolution is defective, the full text of the proposed amendment or revision shall appear on the ballot in lieu of a ballot summary. If the full text of the proposed amendment or revision delineates existing text in the State Constitution that will be removed or replaced if approved by the electors, the full text shall be considered a clear and unambiguous statement of the substance and effect of the amendment or revision, providing fair notice to the electors of the content of the proposal and sufficiently advising electors of the issue upon which they are voting. Any subsequent judicial action challenging placement on the ballot of the full text of a proposed amendment or revision must be commenced within 15 days after issuance of the final order in the matter.

(d) Legal actions challenging ballot language specified by a joint resolution proposing an amendment or revision to the State Constitution shall be accorded priority over other pending cases by the courts, including any appellate court, and the courts shall render decisions in such actions as expeditiously as possible.

Section 2. This act applies retroactively to all joint resolutions adopted by the Legislature during the 2011 Regular Session, except that any legal action challenging a ballot title or ballot summary embodied in such joint resolution or challenging placement on the ballot of the full text of the proposed amendment or revision to the State Constitution as specified in such joint resolution must be commenced within 30

days after the effective date of this act or within 30 days after the joint resolution to which a challenge relates is filed with the Secretary of State, whichever occurs later.

Section 3. This act shall take effect upon becoming a law.

HJR 1471

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HJR 1471 Religious Freedom
SPONSOR(S): Plakon and others
TIED BILLS: None **IDEN./SIM. BILLS:** SJR 1218

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	8 Y, 4 N	Thomas	Bond
2) Judiciary Committee		Thomas	Havlicak

SUMMARY ANALYSIS

The Joint Resolution amends the Florida Constitution relating to religious freedom. The resolution:

- Repeals a limit on the power of the state and its subdivisions to spend funds "directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution."
- Provides that an individual or entity may not be discriminated against or barred from receiving public funding on the basis of religious identity or belief.

The joint resolution must be adopted by a three-fifths vote of the membership of each house of the Legislature. If approved by the Legislature, the proposed amendment would be placed on the ballot at the November 6, 2012, general election. Sixty percent voter approval is required for adoption. If adopted by the voters, the amendment will take effect on January 4, 2013.

This bill requires an estimated nonrecurring expenditure for publication in FY 2012-2013 of $29,400.78 payable from the General Revenue Fund. The bill does not appear to have a fiscal impact on local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

The U.S. Constitution and the Florida Constitution both contain an Establishment Clause and a Free Exercise Clause. The Establishment Clauses are based on the clause including the words "establishment of religion." The Free Exercise Clauses are based on the clause including the words "free exercise."

The First Amendment to the U.S. Constitution states:

> Congress shall make no law respecting an **establishment of religion**, or prohibiting the **free exercise thereof**; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances (emphasis added).

Similarly, Article I, Section 3 of the Florida Constitution states:

> There shall be no law respecting the **establishment of religion** or prohibiting or penalizing the **free exercise thereof**. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. **No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution** (emphasis added).

Blaine Amendments

The last sentence of Article I, Section 3 of the Florida Constitution is known as the "Blaine Amendment" or "no-aid" provision.[1] The U.S. Constitution **does not** contain a similar provision. "Blaine Amendments" are provisions adopted in the latter part of the nineteenth century as part of many state constitutions in an attempt to restrict the use of state funds at "sectarian" schools. Florida's "Blaine Amendment" imposes "further restrictions on the state's involvement with religious institutions than the Establishment Clause" of the Florida or U.S. Constitutions.[2] Florida's Blaine Amendment reads:

> No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.[3]

In 1875, President Ulysses S. Grant, in his State of the Union Address, called for an amendment to the U.S. Constitution to mandate free public schools and prohibit the use of public money for sectarian schools. President Grant laid out his agenda for "good common school education." He attacked government support for "sectarian schools" run by religious organizations, and called for the defense of public education "unmixed with sectarian, pagan or atheistical dogmas." President Grant declared that "Church and State" should be "forever separate." Religion, he said, should be left to families, churches, and private schools devoid of public funds.[4]

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[1] *Bush v. Holmes*, 886 So.2d 340, 344, 348-349 (Fla. 1st DCA 2004).
[2] *Holmes*, at 344.
[3] Article I, s. 3, FLA. CONST.
[4] Deforrest; Mark Edward. "*An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*," Harvard Journal of Law and Public Policy, Vol. 26, 2003.

After President Grant's speech, Congressman James G. Blaine proposed the President's suggested amendment to the U.S. Constitution. In 1875, the proposed amendment passed by a vote of 180 to 7 in the House of Representatives, but failed by four votes to achieve the necessary two-thirds vote in the U.S. Senate. The proposed text of Blaine's amendment was:

> No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefore, nor any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects and denominations.[5]

While the amendment failed at the federal level, in the following years a majority of states adopted amendments similar to that of Blaine's and such amendments became known as "Blaine Amendments."[6] During this time period, there was a large increase in Catholic immigration to the United States. Catholic families resisted sending their children to public schools where the Protestant bible was read and Protestant prayers were used. This led many Catholic organizations to organize their own school systems, and created concern among Protestants that the government would begin funding Catholic schools. Some commentators believe the "Blaine Amendments" were a reaction to this fear.[7] Today, 37 states have provisions placing some form of restriction on government aid to "sectarian" schools that goes beyond any limits in the U.S. Constitution.[8]

Florida adopted its "Blaine Amendment" in 1885, later than most other states.[9] It was readopted in the 1968 rewrite of the Florida Constitution as part of Article I, Section 3. It has been reported that:

> As elsewhere in the United States, the history of Florida's Blaine Amendment is irrevocably linked to the progress of the common school movement and immigration, urbanization, and industrialization. The common school movement, in Florida and elsewhere, taught a "common religion" that was essentially Protestant in character, requiring until the 1960s, daily reading from the King James Bible, prayer, and other Protestant religious observances in the public schools.[10]

Florida Court Cases

Bush v. Homes

Taxpayers challenged the constitutionality of a school voucher program entitled the Opportunity Scholarship Program (OSP). The trial court found the OSP in violation of the free public school system provision in Article IX, Section 1 of the Florida Constitution, relying on the principle of "expressio unius est exclusio alterius"[11] in finding that the expression in the Florida Constitution of a public school system prohibits the Legislature from funding private schools.[12] On appeal, the First District Court of

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[5] *Id.*

[6] *The Blaine Game: Controversy Over the Blaine Amendments and Public Funding of Religion.* Pew Forum on Religious and Public Life. July 24, 2008. Available at: http://pewforum.org/Church-State-Law/The-Blaine-Game-Controversy-Over-the-Blaine-Amendments-and-Public-Funding-of-Religion.aspx (last visited March 25, 2011).

[7] *Id.*

[8] The Becket Fund for Religious Liberty, What are Blaine Amendments? http://www.blaineamendments.org/Intro/whatis.html (last visited March 25, 2011).

[9] *Holmes* at 351-352.

[10] Adams, Nathan. *Pedigree of an Unusual Blaine Amendment: Article I, Section 3 Interpreted and Implemented in Florida Education.* 30 Nova L. Rev. 1, Fall 2005.

[11] "A canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative." BLACK'S LAW DICTIONARY (9th edition 2009).

[12] *Bush v. Holmes*, 767 So.2d 668, 672 (Fla. 1st DCA 2000).

Appeal reversed and remanded, holding that the OSP was not unconstitutional on its face under this provision.[13]

On remand, the circuit court found the OSP unconstitutional again, this time based on the State Constitution's "no-aid" provision ("Blaine Amendment") in Article I, Section 3. On appeal, a divided 3-judge panel of the First District Court of Appeal affirmed the trial court's order.[14] The First District subsequently withdrew the panel opinion and issued an en banc decision in which a majority of the First District again affirmed the trial court's order.[15] The Court found that the "no-aid" provision involves three elements:

> (1) the prohibited state action must involve the use of state tax revenues;
> (2) the prohibited use of state revenues is broadly defined, in that state revenues cannot be used "directly or indirectly in aid of" the prohibited beneficiaries; and
> (3) the prohibited beneficiaries of the use of state revenues are "any church, sect or religious denomination" or "any sectarian institution."[16]

In interpreting the "no-aid" provision, the Court commented that:

> [W]e cannot read the entirety of article I, section 3 of the Florida Constitution to be substantively synonymous with the federal Establishment Clause... For a court to interpret the no-aid provision of article I, section 3 as imposing no further restrictions on the state's involvement with religious institutions than the Establishment Clause, it would have to ignore both the clear meaning and intent of the text and the unambiguous history of the no-aid provision... Finally, based upon the recent United States Supreme Court decision in *Locke v. Davey*, 540 U.S. 712 (2004), we hold that the no-aid provision does not violate the Free Exercise clause of the United States Constitution.[17]

On appeal of the First District's 2004 opinion interpreting the "no-aid" provision, the Supreme Court struck the OSP on other grounds.[18] The Court found "it unnecessary to address whether the OSP is a violation of the "no aid" provision in article I, section 3 of the Constitution, as held by the First District."[19]

Council for Secular Humanism, Inc. v. McNeil, Florida 1st DCA 2010

The Council for Secular Humanism (CSH) brought suit against the Department of Corrections (DOC) challenging the use of state funds to support the faith-based substance abuse transitional housing programs of Prisoners of Christ, Inc. (Prisoners) and Lamb of God Ministries, Inc. (Lamb of God). The Council for Secular Humanism (CSH) alleged that payments to these organizations by DOC constituted payments to sectarian institutions contrary to the "no-aid" provision in Article I, Section 3 of the Florida Constitution. The trial court found in favor of DOC.[20]

On appeal, the First District Court of Appeal found:

> As this court explained in *Holmes*, Article I, section 3 of the Florida Constitution is not "substantively synonymous with the federal Establishment Clause." While the first

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[13] *Id.*
[14] *Bush v. Holmes*, 29 Fla. L. Weekly D1877 (Fla. 1st DCA Aug.16, 2004).
[15] *Bush v. Holmes*, 886 So.2d 340 (Fla. 1st DCA 2004).
[16] *Id.* at 352.
[17] *Id.* at 344.
[18] *Bush v. Holmes*, 919 So.2d 392, 399 (Fla. 2006). The Florida Supreme Court agreed with the original trial court's opinion that the OSP was in violation of the free public school system provision in Article IX, Section 1 of the Florida Constitution, thus overturning the First District's opinion to the contrary.
[19] *Id.* at 398.
[20] *Council for Secular Humanism, Inc. v. McNeil*, 44 So.3d 112 (Fla.1st DCA 2010).

> sentence of Article I, section 3 is consistent with the federal Establishment Clause by "generally prohibiting laws respecting the establishment of religion," the no-aid provision of Article I, section 3 **imposes "further restrictions on the state's involvement with religious institutions than [imposed by] the Establishment Clause**." Specifically, the state may not use tax revenues to "directly or **indirectly**" aid "any church, sect, or religious denomination or any sectarian institution." As we noted in *Holmes*, the United States Supreme Court has recognized that state constitutional provisions such as Florida's no-aid provision are "far stricter" than the Establishment Clause and "draw [ ] a more stringent line than that drawn by the United States Constitution." [Citations omitted; emphasis added].[21]

Because the Court recognized that their decision was one of first impression in which the Florida no-aid provision was applied outside the school context and was important to how the state could contract for social services, it certified the question to the Florida Supreme Court as one of great public importance under rule 9.330, Florida Rules of Appellate Procedure.[22] The certified question was:

> WHETHER THE NO-AID PROVISION IN ARTICLE I, SECTION 3 OF THE FLORIDA CONSTITUTION PROHIBITS THE STATE FROM CONTRACTING FOR THE PROVISION OF NECESSARY SOCIAL SERVICES BY RELIGIOUS OR SECTARIAN ENTITIES?[23]

The Supreme Court did not accept the certified question,[24] so the case was remanded to the trial court for a hearing on whether Prisoners and Lamb of God are sectarian institutions and a determination if the DOC contracts are in violation of Article I, Section 3 of the Florida Constitution. The remanded case is on the circuit court's docket as of March 25, 2011.

Effect of Proposed Changes

The bill repeals a limit on the power of the state to spend funds directly or indirectly in aid of sectarian institutions. Specifically, the measure repeals the "Blaine Amendment" or "no-aid" provision of Article I, Section 3 of the Florida Constitution.

The bill replaces the "Blaine Amendment" with the following statement:

> No individual or entity may be discriminated against or barred from receiving funding on the basis of religious identity or belief.

The bill includes numerous "whereas clauses" that provide statements regarding the importance of religious freedoms, tolerance, and diversity; the history of the Blaine Amendment; the legal history of Blaine Amendment challenges; the abundance and role of private religious affiliated hospitals, schools, adoption agencies, and other benevolent institutions; and discussion regarding the Establishment Clause.

The joint resolution is silent regarding an effective date for the constitutional amendment. Therefore, in accordance with section 5, Article XI, of the Florida Constitution, it would take effect on the first Tuesday after the first Monday in January following the election at which it was approved by the electorate, which is January 8, 2013.

B. SECTION DIRECTORY:

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[21] *Id.* at 119.
[22] *Id.* at 121.
[23] *Id.* at 121.
[24] *McNeil v. Council for Secular Humanism, Inc.*, 41 So.3d 215 (Fla. 2010).

As this legislation is a joint resolution proposing a constitutional amendment, it does not contain bill sections.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The joint resolution does not appear to have a fiscal impact on state revenues.

2. Expenditures:

   The State Constitution requires the proposed amendment to be published, once in the tenth week and once in the sixth week immediately preceding the week of the election, in one newspaper of general circulation in each county where a newspaper is published.[25] The Department of State executes the publication of the Joint Resolution if placed on the ballot. The Florida Department of State estimates that required publication of a proposed constitutional amendment costs $106.14 per word. At approximately 277 words, the amendment would require an estimated expenditure of $29,400.78. These funds must be spent regardless of whether the amendment passes, and would be payable in FY 2012-2013 from the General Revenue Fund.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   The joint resolution does not appear to have a fiscal impact on local revenues.

2. Expenditures:

   The joint resolution does not appear to have a fiscal impact on local expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Private religious institutions could benefit from receiving public funds.

D. FISCAL COMMENTS:

The cost to publish the amendment is estimated at $29,400.78.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not applicable.

2. Other:

   Article XI, Section 1 of the State Constitution provides for proposed changes to the Constitution by the Legislature:

> SECTION 1: **Proposal by legislature.** – Amendment of a section or revision of one or more articles, or the whole, of this constitution may be proposed by joint resolution agreed to by three-fifths of the membership of each house of the legislature. The full text of the joint resolution and the vote of each member voting shall be entered on the journal of each house.

[25] Article XI, s. 5(d), FLA. CONST.

If passed by the Legislature, the proposed amendment must be submitted to the electors at the next general election held more than 90 days after the joint resolution is filed with the custodian of state records.[26] The proposed amendment must be published, once in the tenth week and once in the sixth week immediately preceding the week of the election, in one newspaper of general circulation in each county where a newspaper is published.[27] Submission of a proposed amendment at an earlier special election requires the affirmative vote of three-fourths of the membership of each house of the Legislature and is limited to a single amendment or revision.[28]

Article XI, Section 5(e) of the State Constitution requires 60 percent voter approval for a proposed constitutional amendment to pass.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

N/A

[26] Article XI, s. 5(a), FLA. CONST.
[27] Article XI, s. 5(d), FLA. CONST.
[28] Article XI, s. 5(a), FLA. CONST.

House Joint Resolution

A joint resolution proposing an amendment to Section 3 of Article I of the State Constitution to eradicate remnants of anti-religious bigotry from the State Constitution and to end exclusionary funding practices that discriminate on the basis of religious belief or identity.

WHEREAS, Floridians highly value tolerance and liberty in all forms, and

WHEREAS, Floridians strongly support the right of each person to practice religion according to the dictates of his or her own conscience, and

WHEREAS, Florida is a religiously diverse state with over a quarter of its population identifying as Roman Catholic and with the largest Jewish population in the Southern United States, and

WHEREAS, the public policy of the State of Florida is to support the protection and advancement of religious liberty, and

WHEREAS, Florida's Blaine Amendment language, the last sentence of Article I, Section 3, of the current State Constitution, was originally adopted in 1885 following a failed attempt to adopt similar language in the United States Constitution, and

WHEREAS, Florida's Blaine Amendment language was borne in an atmosphere of, and exists as a result of, anti-Catholic bigotry and animus, and

WHEREAS, the genesis of Florida's Blaine Amendment language reflects an attempt to stifle and disrupt the constitutional

rights and development of the emerging Catholic minority community in America, and

WHEREAS, the Constitutional Convention that adopted the Constitution of 1885 created a more religiously and racially discriminatory document than its predecessor, with the first inclusion of the Blaine Amendment language alongside the racist separate-but-equal doctrine, and

WHEREAS, the racist separate-but-equal doctrine has been duly abolished and all vestiges thereof rightfully removed from the State Constitution, and the people of Florida should now be given the opportunity to remove the discriminatory Blaine Amendment language, a lasting stain upon the state's history that stands in opposition to the people's will and counter to our time-honored traditions of religious liberty and freedom, and

WHEREAS, religiously affiliated hospitals, schools, adoption agencies, and other benevolent institutions have been of longstanding service to the people of Florida and have provided numerous services to those in need, and

WHEREAS, until 2004, no Florida court had ever applied the State Constitution in a reported case in a manner more restrictive of the use of state funds than have federal courts applying the Establishment Clause of the First Amendment to the United States Constitution, and

WHEREAS, Florida's Blaine Amendment is currently being enforced against religious groups and organizations of all denominations, stifling their development and inhibiting the free exercise of religious liberty, and

WHEREAS, courts have prohibited religiously affiliated schools from participating in state-funded education programs and religious organizations from participating in state-funded services to incarcerated persons, and

WHEREAS, such application of the Blaine Amendment language jeopardizes the participation of religiously affiliated hospitals and other benevolent institutions in Medicaid and other public programs, and

WHEREAS, those institutionalized in hospitals and prisons are among those most in need of spiritual nurture and encouragement as well as being often dependent on state-subsidized human services, and

WHEREAS, the enforcement of the Blaine Amendment language, barring religious organizations access to state funding and state-funded business on an equal basis with nonreligious organizations, violates the founding principles of the United States and this state as contained in the Declaration of Independence and the Preamble to the State Constitution, and

WHEREAS, the Establishment Clause of the First Amendment to the United States Constitution does not require any such absolute restrictions on the use of public funds, and

WHEREAS, the Establishment Clause permits the use of public funds in religious hospitals, schools, and other benevolent institutions, and

WHEREAS, the Establishment Clause and the religion clauses of the State Constitution, other than the Blaine Amendment, are intended to protect the religious liberties and sentiments of Floridians without inhibiting the free exercise of religion, and

WHEREAS, their religious convictions motivate some Floridians to establish religiously affiliated schools, hospitals, adoption agencies, and other benevolent institutions that provide valuable services to society and to receive or utilize such valuable services from these benevolent providers, which could be subsidized by the state through public programs, and

WHEREAS, it is not necessary to prohibit all economic relations with religious organizations and providers in order to prevent an establishment of religion that would infringe on the religious liberties of Floridians, and

WHEREAS, in 2000, a plurality of the United States Supreme Court acknowledged that this "doctrine, born of bigotry, should be buried now," and

WHEREAS, it is necessary to amend the State Constitution to correct the aforementioned disconnect between the true sentiments and principles of Floridians and the discriminatory origins, intentions, and present application of the Blaine Amendment, in furtherance of a deeply rooted commitment to freedom and liberty, where rights and restrictions ought to be based on the merits of one's words and actions rather than on religious affiliation or identity, NOW, THEREFORE,

Be It Resolved by the Legislature of the State of Florida:

That the following amendment to Section 3 of Article I of the State Constitution is agreed to and shall be submitted to the electors of this state for approval or rejection at the next

general election or at an earlier special election specifically authorized by law for that purpose:

ARTICLE I

DECLARATION OF RIGHTS

SECTION 3. Religious freedom.—There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace, or safety. No individual or entity may be discriminated against or barred from receiving funding on the basis of religious identity or belief. ~~No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.~~

BE IT FURTHER RESOLVED that the following statement be placed on the ballot:

CONSTITUTIONAL AMENDMENT

ARTICLE I, SECTION 3

RELIGIOUS FREEDOM.—Proposing an amendment to the State Constitution to provide that no individual or entity may be discriminated against or barred from receiving funding on the basis of religious identity or belief and to delete the prohibition against using revenues from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1475 Alimony
SPONSOR(S): Civil Justice Subcommittee; Stargel
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1978

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	15 Y, 0 N, As CS	Woodburn	Bond
2) Judiciary Committee		Woodburn SW	Havlicak RH

SUMMARY ANALYSIS

Alimony is used to provide financial support to a financially dependent former spouse. The primary basis for determining alimony is whether there is need and ability to pay; alimony is not appropriate when the requesting spouse has no need for support or when the other spouse does not have the ability to pay. By statute, there are four different types of alimony: bridge-the-gap alimony, rehabilitative alimony, durational alimony, and permanent alimony. The bill provides that a court must consider the four types of alimony listed by statute when deciding which type of alimony is appropriate.

By statute, a marriage is either short-term, moderate-term, or long-term based on the length of the marriage. The length of the marriage is one factor a court considers when determining which type of alimony is appropriate. Current law provides that only short-term and moderate-term marriages may have an award of durational alimony. The bill provides that a long-term marriage may have an award of durational alimony. The bill also provides that an alimony award may not leave the payor with significantly less net income then the net income of the recipient unless there are written findings of exceptional circumstances.

The bill provides an effective date of July 1, 2011 and applies to all initial awards of alimony entered after that date and to all modifications of those initial awards.

This bill does not appear to have a fiscal impact on state or local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Alimony

Alimony is used to provide financial support to a financially dependent former spouse.[1] In Florida, the primary basis for determining alimony is whether there is need and ability to pay; alimony is not appropriate when the requesting spouse has no need for support or when the other spouse does not have the ability to pay.[2] Before a court can make an award of alimony, equitable distribution of the former spouse's assets must occur.[3]

Section 61.08(2), F.S., provides factors that a court must consider in awarding alimony in a dissolution of marriage case. These factors include:

- The standard of living established during the marriage;
- The duration of the marriage;
- The age and the physical and emotional condition of each party;
- The financial resources of each party, including the nonmarital and the marital assets and liabilities distributed to each;
- The earning capacities, educational levels, vocational skills, and employability of the parties and, when applicable, the time necessary for either party to acquire sufficient education or training to enable such party to find appropriate employment;
- The contribution of each party to the marriage, including, but not limited, services rendered in homemaking, child care, education, and career building of the other party;
- The responsibilities each party will have with regard to any minor children they have in common;
- The tax treatment and consequences to both parties of any alimony award, including the designation of all or a portion of the payment as a nontaxable nondeductible payment;
- All sources of income available to either party, including income available to either party through investments of any asset held by that party; and
- Any other factor necessary to do equity and justice between the parties.

In addition, the trial court is given broad discretion to consider any other factor necessary to do equity and justice between the parties.[4] A court may also consider the adultery of either party and the circumstances surrounding that adultery in determining an award of alimony.[5]

For purposes of determining alimony, there is a rebuttable presumption that:

- A short-term marriage is a marriage having a duration of less than seven years;
- A moderate-term marriage is a marriage having a duration of greater than seven years but less than seventeen years; and
- A long-term marriage is a marriage having a duration of seventeen years or greater.[6]

Florida law provides for four types of alimony; bridge-the-gap alimony,[7] rehabilitative alimony,[8] durational alimony,[9] and permanent alimony.[10]

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[1] Victoria Ho & Jennifer Johnson, *Overview of Florida Alimony Law*, 78 Fla.B.J. 71, 71 (Oct. 2004).
[2] *Id.*
[3] *Id.*
[4] Section 61.08(2), F.S.
[5] Section 61.08(1), F.S.
[6] Section 61.08(4), F.S.
[7] Section 61.08(5), F.S.
[8] Section 61.08(6), F.S.
[9] Section 61.08(7), F.S.
[10] Section 61.08(8), F.S.

Bridge-the-Gap Alimony

Bridge-the-gap alimony may be awarded to assist a party by providing support to allow the party to make a transition from being married to being single. Bridge-the-gap alimony is designed to assist a party with legitimate identifiable short-term needs, and the length of an award may not exceed 2 years. An award of bridge-the-gap alimony terminates upon the death of either party or upon the remarriage of the party receiving alimony. An award of bridge-the-gap alimony is not modifiable in amount or duration.[11]

Rehabilitative Alimony

Rehabilitative alimony may be awarded to assist a party in establishing the capacity for self-support through either the redevelopment of previous skills or credentials; or the acquisition of education, training, or work experience necessary to develop appropriate employment skills or credentials.[12] In order to award rehabilitative alimony, there must be a specific and defined rehabilitative plan which shall be included as a part of any order awarding rehabilitative alimony.[13] An award of rehabilitative alimony may be modified or terminated in accordance with s. 61.14, F.S., based upon a substantial change in circumstances, upon noncompliance with the rehabilitative plan, or upon completion of the rehabilitative plan.[14]

Durational Alimony

Durational alimony may be awarded when permanent periodic alimony is inappropriate. The purpose of durational alimony is to provide a party with economic assistance for a set period of time following a marriage of short or moderate duration. An award of durational alimony terminates upon the death of either party or upon the remarriage of the party receiving alimony. The amount of an award of durational alimony may be modified or terminated based upon a substantial change in circumstances in accordance with s. 61.14, F.S. However, the length of an award of durational alimony may not be modified except under exceptional circumstances and may not exceed the length of the marriage.[15]

Effect of the Bill: Durational Alimony

The bill amends s. 61.08(7), F.S., to provide that durational alimony may be awarded after a marriage of long duration if there no ongoing need for support on a permanent basis.

Permanent Alimony

Permanent alimony may be awarded to provide for the needs and necessities of life as they were established during the marriage of the parties for a party who lacks the financial ability to meet his or her needs and necessities of life following dissolution of marriage. Permanent alimony may be awarded following a marriage of long duration, following a marriage of moderate duration if such an award is appropriate upon consideration of the factors set forth in subsection (2), or following a marriage of short duration if there are exceptional circumstances. An award of permanent alimony terminates upon the death of either party or upon the remarriage of the party receiving alimony. An award may be modified or terminated based upon a substantial change in circumstances or upon the existence of a supportive relationship in accordance with s. 61.14, F.S.[16]

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[11] Section 60.08(5), F.S.
[12] Section 60.08(6)(a), F.S.
[13] Section 60.08(6)(b), F.S.
[14] Section 60.08(6)(c), F.S.
[15] Section 60.08(7), F.S.
[16] See s. 61.14, F.S., Enforcement and modification of support, maintenance, or alimony agreements or orders.

Effect of the Bill: Permanent Alimony

The bill amends s. 61.08(8), F.S., to require written findings of exceptional circumstances for the award of permanent alimony for a marriage of short duration. The bill provides that the awarding of permanent alimony for a marriage of moderate duration must be based upon clear and convincing evidence. The bill also provides that in awarding permanent alimony, the court must include a finding that no other form of alimony is fair and reasonable under the circumstances of the party.

Effect of the Bill: Limit on Alimony

The bill creates s. 61.08(9), F.S., to provide that an alimony award may not leave the payor with significantly less net income than the net income of the recipient unless there are written findings of exceptional circumstances.

Effect of the Bill: Effective Date and Applicability

The bill provides that the amendments to s. 61.08, F.S., apply to all initial awards of alimony entered after the effective date of the act and to all modifications of those initial alimony.

B. SECTION DIRECTORY:

Section 1 amends s. 61.08, F.S., regarding alimony.

Section 2 provides to which alimony awards the amendments to s. 61.08, F.S., are applicable.

Section 3 provides an effective date of July 1, 2011.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not Applicable. This bill does not appear to affect county or municipal governments.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

   None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

   None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On April 1, 2011, the Civil Justice Subcommittee adopted one amendment. The amendment:

- Provides that durational alimony may be awarded to a marriage of long duration if there is no ongoing need for support on a permanent basis;
- Provides that an award of permanent alimony may be made for a marriage of moderate duration based on clear and convincing evidence;
- Provides that in awarding permanent alimony, the court shall include a finding that no other form of alimony is fair and reasonable under the circumstances of the party;
- Provides that the award of alimony may not leave the payor with significantly less net income then the net income of the recipient unless there are written findings of exceptional circumstances;
- Provides that the amendments are only applicable to awards of alimony made after the effective date of the act and to modifications of those awards.

The bill was then reported favorably. This bill analysis is drafted to the committee substitute.

A bill to be entitled

An act relating to alimony; amending s. 61.08, F.S.; revising provisions relating to factors to be considered for alimony awards; revising provisions relating to awards of durational alimony; revising provisions relating to awards of permanent alimony; providing that the award of alimony may not leave the payor with significantly less net income than the net income of the recipient unless there are written findings of exceptional circumstances; providing for applicability of the act; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (9) of section 61.08, Florida Statutes, is renumbered as subsection (10), a new subsection (9) is added to that section, and subsections (2), (7), and (8) of that section are amended, to read:

61.08 Alimony.—

(2) In determining whether to award alimony or maintenance, the court shall first make a specific factual determination as to whether either party has an actual need for alimony or maintenance and whether either party has the ability to pay alimony or maintenance. If the court finds that a party has a need for alimony or maintenance and that the other party has the ability to pay alimony or maintenance, then in determining the proper type and amount of alimony or maintenance under subsections (5)-(8), the court shall consider all relevant

factors, including, but not limited to:

(a) The standard of living established during the marriage.

(b) The duration of the marriage.

(c) The age and the physical and emotional condition of each party.

(d) The financial resources of each party, including the nonmarital and the marital assets and liabilities distributed to each.

(e) The earning capacities, educational levels, vocational skills, and employability of the parties and, when applicable, the time necessary for either party to acquire sufficient education or training to enable such party to find appropriate employment.

(f) The contribution of each party to the marriage, including, but not limited to, services rendered in homemaking, child care, education, and career building of the other party.

(g) The responsibilities each party will have with regard to any minor children they have in common.

(h) The tax treatment and consequences to both parties of any alimony award, including the designation of all or a portion of the payment as a nontaxable, nondeductible payment.

(i) All sources of income available to either party, including income available to either party through investments of any asset held by that party.

(j) Any other factor necessary to do equity and justice between the parties.

(7) Durational alimony may be awarded when permanent

periodic alimony is inappropriate. The purpose of durational alimony is to provide a party with economic assistance for a set period of time following a marriage of short or moderate duration, or following a marriage of long duration if there is no ongoing need for support on a permanent basis. An award of durational alimony terminates upon the death of either party or upon the remarriage of the party receiving alimony. The amount of an award of durational alimony may be modified or terminated based upon a substantial change in circumstances in accordance with s. 61.14. However, the length of an award of durational alimony may not be modified except under exceptional circumstances and may not exceed the length of the marriage.

(8) Permanent alimony may be awarded to provide for the needs and necessities of life as they were established during the marriage of the parties for a party who lacks the financial ability to meet his or her needs and necessities of life following a dissolution of marriage. Permanent alimony may be awarded following a marriage of long duration if such an award is appropriate upon consideration of the factors set forth in subsection (2), following a marriage of moderate duration if such an award is appropriate based upon clear and convincing evidence after consideration of the factors set forth in subsection (2), or following a marriage of short duration if there are written findings of exceptional circumstances. In awarding permanent alimony, the court shall include a finding that no other form of alimony is fair and reasonable under the circumstances of the parties. An award of permanent alimony terminates upon the death of either party or upon the remarriage

of the party receiving alimony. An award may be modified or terminated based upon a substantial change in circumstances or upon the existence of a supportive relationship in accordance with s. 61.14.

(9) The award of alimony award may not leave the payor with significantly less net income than the net income of the recipient unless there are written findings of exceptional circumstances.

Section 2. The amendments to s. 61.08, Florida Statutes, by this act apply to all initial awards of alimony entered after July 1, 2011, and to all modifications of alimony of such awards made after July 1, 2011. Such amendments may not serve as a basis to modify awards entered before July 1, 2011, or as a basis to change amounts or duration of awards existing before July 1, 2011. The amendments to s. 61.08, Florida Statutes, by this act are applicable to all cases pending on or filed after July 1, 2011.

Section 3. This act shall take effect July 1, 2011.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 4035 Misdemeanor Pretrial Substance Abuse Programs
SPONSOR(S): Waldman and others
TIED BILLS: None **IDEN./SIM. BILLS:** SB 104

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	13 Y, 1 N	Cunningham	Cunningham
2) Justice Appropriations Subcommittee	12 Y, 1 N	McAuliffe	Jones Darity
3) Judiciary Committee		Cunningham	Havlicak

SUMMARY ANALYSIS

Section 948.16, F.S., specifies that a person who is charged with a misdemeanor for possession of a controlled substance or drug paraphernalia under chapter 893, F.S., and who has not previously been convicted of a felony nor been admitted to a pretrial program, is eligible for voluntary admission into a misdemeanor pretrial substance abuse education and treatment intervention program.

HB 4035 expands the pool of people who are eligible for admission into a misdemeanor pretrial substance abuse education and treatment intervention program by removing the requirement that a person not have previously been admitted into a pretrial program in order to participate in such programs.

This may have a positive fiscal impact on local governments because persons who successfully complete such programs have their criminal charges dismissed and may not be sentenced to time in local jails. However, counties may need to expend funds to expand their misdemeanor pretrial substance abuse education and treatment programs if more people are eligible to participate.

This bill takes effect July 1, 2011.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Section 948.16, F.S., specifies that a person who is charged with a misdemeanor for possession of a controlled substance or drug paraphernalia under ch. 893, F.S.,[1] and who has not previously been convicted of a felony nor been admitted to a pretrial program, is eligible for voluntary admission into a misdemeanor pretrial substance abuse education and treatment intervention program, including a treatment-based drug court program,[2] for a period based on the program requirements and the treatment plan for the offender. Admission to such a program may be based upon the motion of either party or the court's own motion.[3]

Participants in the program are subject to a coordinated strategy[4] developed by a drug court team under s. 397.334(4), F.S., which may include a protocol of sanctions that may be imposed upon the participant for noncompliance with program rules. The protocol of sanctions may include, but is not limited to, placement in a substance abuse treatment program offered by a licensed service provider or in a jail-based treatment program or serving a period of incarceration within the time limits established for contempt of court.[5]

At the end of the pretrial intervention period, the court must:

- Consider the recommendation of the treatment program;
- Consider the recommendation of the state attorney as to disposition of the pending charges; and
- Determine, by written finding, whether the defendant successfully completed the pretrial intervention program.[6]

If the court finds that the defendant has not successfully completed the pretrial intervention program, the court may order the person to continue in education and treatment or return the charges to the criminal docket for prosecution.[7] The court must dismiss the charges upon finding that the defendant has successfully completed the pretrial intervention program.[8]

Effect of the Bill

As noted above, only persons who have been charged with a misdemeanor for possession of a controlled substance or drug paraphernalia under ch. 893, F.S., and who have not previously been convicted of a felony *nor been admitted to a pretrial program*, are eligible for voluntary admission into a misdemeanor pretrial substance abuse education and treatment intervention program.

The bill expands the pool of people who are eligible for admission into a misdemeanor pretrial substance abuse education and treatment intervention program by removing the requirement that a person not have previously been admitted into a pretrial program in order to participate in such programs.

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[1] Chapter 893, F.S., is the Florida Comprehensive Drug Abuse Prevention and Control Act.

[2] Section 397.334, F.S., authorizes counties to fund treatment-based drug court programs and sets criteria for such programs.

[3] Admission may be based upon motion of either party or the court except, if the state attorney believes the facts and circumstances of the case suggest the defendant is involved in dealing and selling controlled substances, the court shall hold a preadmission hearing. If the state attorney establishes, by a preponderance of the evidence at such hearing, that the defendant was involved in dealing or selling controlled substances, the court shall deny the defendant's admission into the pretrial intervention program. s. 948.16(10(a), F.S.

[4] The coordinated strategy must be provided in writing to the participant before the participant agrees to enter into a pretrial treatment-based drug court program or other pretrial intervention program. s. 948.16(1)(b), F.S.

[5] Section 948.16(1)(b), F.S.

[6] Section 948.16(2), F.S.

[7] *Id.*

[8] Any person whose charges are dismissed after successful completion of the treatment-based drug court program, if otherwise eligible, may have his or her arrest record and plea of nolo contendere to the dismissed charges expunged under s. 943.0585, F.S. *See* Section 948.16(1)(b), F.S.

B. SECTION DIRECTORY:

Section 1. Amends s. 948.16, F.S., relating to misdemeanor pretrial substance abuse education and treatment intervention program.

Section 2. This bill takes effect July 1, 2011.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

See "Fiscal Comments."

2. Expenditures:

See "Fiscal Comments."

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill expands the pool of people who are eligible for admission into a misdemeanor pretrial substance abuse education and treatment intervention program. There may be a positive fiscal impact on treatment providers if more people are eligible to participate in such programs.

D. FISCAL COMMENTS:

The bill expands the pool of people who are eligible for admission into a misdemeanor pretrial substance abuse education and treatment intervention program. Persons who successfully complete such programs have their criminal charges dismissed and may not be sentenced to time in local jails. This may have a positive fiscal impact on local governments. However, counties may need to expend funds to expand their misdemeanor pretrial substance abuse education and treatment programs if more people are eligible to participate.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

A bill to be entitled

An act relating to misdemeanor pretrial substance abuse programs; amending s. 948.16, F.S.; providing that a person who has previously been admitted to a pretrial program may still qualify for voluntary admission to a program; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraph (a) of subsection (1) of section 948.16, Florida Statutes, is amended to read:

948.16 Misdemeanor pretrial substance abuse education and treatment intervention program.—

(1)(a) A person who is charged with a misdemeanor for possession of a controlled substance or drug paraphernalia under chapter 893, and who has not previously been convicted of a felony ~~nor been admitted to a pretrial program~~, is eligible for voluntary admission into a misdemeanor pretrial substance abuse education and treatment intervention program, including a treatment-based drug court program established pursuant to s. 397.334, approved by the chief judge of the circuit, for a period based on the program requirements and the treatment plan for the offender, upon motion of either party or the court's own motion, except, if the state attorney believes the facts and circumstances of the case suggest the defendant is involved in dealing and selling controlled substances, the court shall hold a preadmission hearing. If the state attorney establishes, by a preponderance of the evidence at such hearing, that the

defendant was involved in dealing or selling controlled substances, the court shall deny the defendant's admission into the pretrial intervention program.

Section 2. This act shall take effect July 1, 2011.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 4157 Juvenile Justice
SPONSOR(S): Criminal Justice Subcommittee; Thurston
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 618

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	15 Y, 0 N, As CS	Williams	Cunningham
2) Judiciary Committee		Williams	Havlicak

SUMMARY ANALYSIS

HB 4157 repeals and amends numerous sections of ch. 985, F.S., to remove obsolete language and to more accurately reflect current practices of the Department of Juvenile Justice (DJJ). Specifically the bill:

- Repeals the definition of "serious or habitual juvenile offender program" (SHOP) in s. 985.03(48), F.S., the legislative intent language relating to SHOP in s. 985.02(5), F.S., the statute implementing this program in s. 985.47, F.S., and references to juvenile placement in SHOPs in ss. 985.14 and 985.441, F.S.

- Repeals two statutes implementing the intensive residential treatment program for offenders under 13 years of age (JR.SHOP) in ss. 985.483 and 985.486, F.S.

- Deletes references in s. 985.494, F.S., to the SHOPs, JR. SHOPs, the early delinquency intervention program, and the STAR programs and provides that a child adjudicated delinquent for committing a felony must complete two different high risk residential commitment programs as a prerequisite to being placed in a maximum risk residential program.

- Repeals s. 985.445, F.S., relating to cases involving grand theft of a motor vehicle, to delete the obsolete references to the sheriff's training and respect program.

- Repeals the definition of "training school" from s. 985.03, F.S.

- Repeals s. 985.636, F.S., which authorizes the Secretary of the DJJ to designate inspectors holding a law enforcement certification as law enforcement officers within the Inspector General's Office.

- Amends ss. 985.48 and 985.66, F.S., to delete obsolete references to the Juvenile Justice Standards and Training Commission, and to authorize the DJJ to continue providing staff development and training to department program staff.

DJJ has reported that this bill will have no fiscal impact to the department.

The effective date of the bill is July 1, 2011.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

CS/HB 4157 repeals and amends numerous sections of ch. 985, F.S., to remove obsolete language and to more accurately reflect current practices of the Department of Juvenile Justice (DJJ or department). The specific provisions which the bill repeals and amends are as follows:

Serious or Habitual Juvenile Offender Program (SHOP) and Sheriff's Training and Respect (STAR) Program

SHOPs are residential treatment programs for serious or habitual juvenile offenders that were established in the 1990's. Section 985.03(48), F.S., defines SHOP as the program created in s. 985.47, F.S.[1] Section 985.47, F.S., specifies the requirements of a SHOP program. Moreover, legislative intent language relating to SHOP exists in s. 985.02(5), F.S.[2] Similarly, ss. 985.483 and 985.486, F.S., implement JR.SHOPs, the intensive residential treatment program for offenders under 13 years of age. According to DJJ, SHOPs have a long history of being underutilized.[3]

Section 985.14, F.S, requires DJJ's intake and case management system to facilitate consistency in the recommended placement, assessment, classification, and placement process of each child. The process for a serious or habitual delinquent child must include the assessment for placement in a SHOP.[4]

Section 985.441, F.S., authorizes a court that has jurisdiction of an adjudicated delinquent child to, by an order stating the facts upon which a determination of a sanction and rehabilitative program is made at a disposition hearing, commit the child to the DJJ for placement in a SHOP.

In 2006, the legislature passed HB 5019, creating to Martin Lee Anderson Act of 2006.[5] This bill repealed s. 985.309, F.S., which authorized boot camps for juvenile offenders and created s. 985.3091, F.S., which authorized a county or municipal law enforcement agency, under contract with DJJ, to implement and operate a STAR program. The purposes of these programs were to provide intensive education, physical training, and rehabilitation for children between 14 and 18 years of age who met certain eligibility requirements.[6] Only one STAR program became effective in 2006, and on June 30,

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[1] A "serious or habitual juvenile offender," for purposes of commitment to a residential facility and for purposes of records retention, means a child who has been found to have committed a delinquent act or a violation of law, in the case currently before the court, and who meets at least one of the following criteria: (a) The child is at least 13 years of age at the time of the disposition for the current offense and has been adjudicated on the current offense for: arson; sexual battery; robbery; kidnapping; aggravated child abuse; aggravated assault; aggravated stalking; murder; manslaughter; unlawful throwing, placing, or discharging of a destructive device or bomb; armed burglary; aggravated battery; any lewd or lascivious offense committed upon or in the presence of a person less than 16 years of age; or carrying, displaying, using, threatening, or attempting to use a weapon or firearm during the commission of a felony. (b) The child is at least 13 years of age at the time of the disposition, the current offense is a felony, and the child has previously been committed at least two times to a delinquency commitment program. (c) The child is at least 13 years of age and is currently committed for a felony offense and transferred from a moderate-risk or high-risk residential commitment placement. s. 985.47, F.S.

[2] The Legislature finds that fighting crime effectively requires a multipronged effort focusing on particular classes of delinquent children and the development of particular programs. This state's juvenile justice system has an inadequate number of beds for serious or habitual juvenile offenders and an inadequate number of community and residential programs for a significant number of children whose delinquent behavior is due to or connected with illicit substance abuse. In addition, a significant number of children have been adjudicated in adult criminal court and placed in this state's prisons where programs are inadequate to meet their rehabilitative needs and where space is needed for adult offenders. Recidivism rates for each of these classes of offenders exceed those tolerated by the Legislature and by the citizens of this state. S. 985.02(5), F.S.

[3] Department of Juvenile Justice 2011 Agency Proposal (on file with the House Criminal Justice Subcommittee staff).

[4] Section 985.14(3)(a), F.S.

[5] Ch. 2006-62, L.O.F.

[6] *Id.*

2008, the Sherriff terminated the contract.[7] According to the DJJ, there have been no operational STAR programs since 2008.[8] Section 985.3091, F.S., was repealed in 2010.[9]

Section 985.445, F.S., authorizes the court to place a child adjudicated for a grand theft of a motor vehicle offense into a STAR program.[10]

Section 985.494, F.S., provides that a child adjudicated delinquent for a felony (or a child who has an adjudication of delinquency withheld for a felony) must be committed to a SHOP or a JR. SHOP, if such child has participated in an early delinquency intervention program (EDIP) and has completed a sheriff's training and respect (STAR) program (formerly known as juvenile boot camp). Additionally, such child must be committed to a maximum risk residential program, if he or she has participated in an EDIP, has completed a STAR program and a SHOP or JR. SHOP. The length of stay in a maximum risk commitment program is for an indeterminate period of time; however, it may not exceed the maximum imprisonment that an adult would serve for that offense.[11] This section of law also allows the court to consider an equivalent program of similar intensity as being comparable to one of these specified programs when committing a child to an appropriate program under this statute.[12]

Effect of the Bill
The bill repeals the following provisions relating to SHOPs: the definition of a SHOP in s. 985.03(48), F.S., the SHOP legislative intent language in s. 985.02(5), F.S., the statute implementing SHOPs in s. 985.47, F.S.; and references to juvenile placement in SHOPs in ss. 985.14 and 985.441, F.S. The bill also repeals ss. 985.483 and 985.486, F.S., which implement the intensive residential treatment program for offenders under 13 years of age (JR.SHOP).

The bill deletes references in s. 985.494, F.S., to the SHOPs, JR. SHOPs, EDIPs, and the STAR programs (formerly known as juvenile boot camp). Instead of listing these specific programs, the bill provides that a child adjudicated delinquent for committing a felony (or a child who has a withheld felony adjudication) must complete two different high risk residential commitment programs as a prerequisite to being placed in a maximum risk residential program.

The bill also deletes references to the STAR program in s. 985.445, F.S., which authorizes a residential commitment to a STAR program if a child is adjudicated delinquent for committing grand theft of a motor vehicle.

The bill also makes conforming changes to ss. 985.0301, F.S., (Jurisdiction), and 985.565, F.S., (Sentencing powers; procedures; alternatives for juveniles prosecuted as adults) to delete references to s. 985.445, F.S.

Training Schools
Section 985.03(56), F.S. defines "training school" as the Arthur G. Dozier School or the Eckerd Youth Develop Center. The Arthur G. Dozier School for Boys (currently known as North Florida Youth

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[7] 2011 Department of Juvenile Justice Legislative Priority Paper, updated on March 4, 2011 (on file with the House Criminal Justice Subcommittee staff).
[8] *Id.*
[9] Ch. 2010-113, L.O.F. (prior to its repeal, s. 985.3091, F.S., was renumbered as s. 985.4891, F.S.)
[10] Upon a first adjudication for a grand theft of a motor vehicle, the court *may place the child in a sheriff's training and respect program* and shall order the child to complete a minimum of 50 hours of community service. Upon a second adjudication for grand theft of a motor vehicle which is separate and unrelated to the previous adjudication, the court *may place the child in a sheriff's training and respect program* and shall order the child to complete a minimum of 100 hours of community service. Upon a third adjudication for grand theft of a motor vehicle which is separate and unrelated to the previous adjudications, the court *shall place the child in a sheriff's training and respect program* or other treatment program and shall order the child to complete a minimum of 250 hours of community service. s. 985.445, F.S.
[11] Section 985.494(1)(b), F.S.
[12] Section 985.494(2), F.S.

Development Center)[13] and Eckerd Youth Develop Center (currently known as Okeechobee Youth Development Center),[14] are residential programs that serve male youths who are 13-20 years of age. According to the DJJ, residential programs are no longer classified as training schools, but by restrictiveness levels.[15]

Effect of the Bill
CS/HB 4157 repeals s. 985.03(56), F.S., which provides the definition of training school.

Inspector General
Section 985.636, F.S., authorizes the Secretary of the DJJ to designate inspectors holding a law enforcement certification as law enforcement officers within the Inspector General's Office. This designation is only for the purpose of enforcing any criminal law and conducting any investigation involving a state-operated program or facility that falls under the department's jurisdiction. However, according to the DJJ, this law is unnecessary and duplicative to provisions provided in s. 20.055(6)(c), F.S.[16,17] Currently, none of the inspectors in DJJ's Office of Inspector General have been designated as law enforcement officers.[18]

Effect of the Bill
CS/HB 4157 repeals s. 985.636, F.S., which allows certain inspectors within the DJJ's Inspector General's Office to be designated as certified law enforcement officers by DJJ's Secretary.

Juvenile Justice Standards and Training Commission (Commission)
Section 985.66, F.S., prescribes standards for the juvenile justice training academies, establishes the Juvenile Justice Training Trust Fund, and creates the Juvenile Justice Standards and Training Commission (Commission) under the DJJ. The legislative purpose of the statute is to provide a systematic approach to staff development and training for judges, state attorneys, public defenders, law enforcement officers, school district personnel, and juvenile justice program staff.[19] Section 985.48(8), F.S., also requires the Commission to establish a training program to manage and provide services to juvenile sexual offenders in juvenile sexual offender programs. However, the Commission expired on June 30, 2001 because it was not reenacted by the Legislature.[20] After that, the DJJ took over the training duties of the Commission.[21]

Effect of the Bill
CS/HB 4157 amends s. 985.66, F.S., to delete obsolete references to the Commission, and to authorize the DJJ to continue providing staff development and training to department program staff and repeals s. 985.48(8), F.S.

B. SECTION DIRECTORY:

Section 1. Repeals s. 985.02(5), F.S., relating to legislative intent for the juvenile justice system.

Section 2. Repeals s. 985.03(48), F.S., relating to definitions.

Section 3. Repeals s. 985.03(56), F.S., relating to definitions.

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[13] http://www.djj.state.fl.us/Residential/facilities/north_facilities/North_Florida_Youth_Development_Center.html
[14] http://www.djj.state.fl.us/Residential/facilities/south_facilities/Okeechobee_Youth_Development_Center.html
[15] Department of Juvenile Justice 2011 Agency Proposal (on file with the House Criminal Justice Subcommittee staff).
[16] Section 20.055(6), F.S. provides that each inspector general shall initiate, conduct, supervise, and coordinate investigations designed to detect, deter, prevent, and eradicate fraud, waste, mismanagement, misconduct, and other abuses in state government. Each inspector general shall report expeditiously to the Department of Law Enforcement or other law enforcement agencies, as appropriate, whenever the inspector general has reasonable grounds to believe there has been a violation of criminal law shall. s. 20.055(6)(c), F.S.
[17] Department of Juvenile Justice 2011 Agency Proposal (on file with the House Criminal Justice Subcommittee staff).
[18] 2011 Department of Juvenile Justice Legislative Priority Paper, updated on March 4, 2011 (on file with the House Criminal Justice Subcommittee staff).
[19] Section 985.66(1), F.S.
[20] Section 985.66(9), F.S.
[21] Department of Juvenile Justice 2011Agency Proposal (on file with the House Criminal Justice Subcommittee).

Section 4. Repeals s. 985.47, F.S., relating to serious or habitual juvenile offender.

Section 5. Repeals s. 985.483, F.S., relating to intensive residential treatment program for offenders less than 13 years of age.

Section 6. Repeals s. 985.486, F.S., relating to intensive residential treatment programs for offenders less than 13 years of age; prerequisite for commitment.

Section 7. Repeals s. 985.636, F.S., relating to inspector general; inspectors.

Section 8. Amends s. 985.494, F.S., relating to commitment programs for juvenile felony offenders.

Section 9. Repeals s. 985.445, F.S., relating to cases involving grand theft of a motor vehicle.

Section 10. Amends s. 985.0301, F.S., relating to jurisdiction.

Section 11. Amends s. 985.14, F.S., relating to intake and case management system.

Section 12. Amends s. 985.441, F.S., relating to commitment.

Section 13. Amends s. 985.565, F.S., relating to sentencing powers; procedures; alternatives for juveniles prosecuted as adults.

Section 14. Amends s. 985.66, F.S., relating to juvenile justice training academies; Juvenile Justice Standards and Training Commission; Juvenile Justice Training Trust Fund.

Section 15. Repeals s. 985.48(8), F.S., relating to juvenile sexual offender commitment programs; sexual abuse intervention networks.

Section 16. Provides an effective date of July 1, 2011.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   DJJ has reported that this bill will have no fiscal impact to the department.[22]

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

[22] Department of Juvenile Justice 2011Agency Proposal (on file with the House Criminal Justice Subcommittee staff).

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because the bill does not appear to: require the counties or municipalities to spend funds or take an action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties and municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

CS/HB 4157 amends s. 985.03, F.S., to remove the definition of "training school". However, s. 985.652, F.S., relating to participation of certain programs in the state risk management trust fund, references a training school. This reference may need to be deleted from this statute.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 29, 2011, the Criminal Justice Subcommittee adopted a strike-all amendment to the bill and reported the bill favorably as a Committee Substitute. The amendment repeals and amends additional sections of ch. 985, F.S., to remove obsolete language relating to SHOP and to more accurately reflect current practices of the Department of Juvenile Justice.

This analysis is drafted to the Committee Substitute.

A bill to be entitled

An act relating to juvenile justice; repealing ss. 985.02(5), 985.03(48), 985.03(56), 985.47, 985.483, 985.486, and 985.636, F.S., relating to, respectively, legislative intent for serious or habitual juvenile offenders in the juvenile justice system, definitions of terms for a training school and the serious or habitual juvenile offender program, the serious or habitual juvenile offender program in the juvenile justice system, the intensive residential treatment program for offenders less than 13 years of age, and the designation of persons holding law enforcement certification within the Office of the Inspector General to act as law enforcement officers; amending s. 985.494, F.S.; requiring a child who is adjudicated delinquent, or for whom adjudication is withheld, to be committed to a maximum-risk residential program for an act that would be a felony if committed by an adult if the child has completed two different high-risk residential commitment programs; repealing s. 985.445, F.S., relating to cases involving grand theft of a motor vehicle committed by a child; amending ss. 985.0301, 985.14, 985.441, and 985.565, F.S.; conforming references to changes made by the act; amending s. 985.66, F.S.; removing all references to the Juvenile Justice Standards and Training Commission; requiring the Department of Juvenile Justice to be responsible for staff development and training; specifying the duties and responsibilities of the department for staff development

and training; removing obsolete provisions to conform to changes made by the act; repealing s. 985.48(8), F.S., relating to activities of the Juvenile Justice Standards and Training Commission with respect to training and treatment services for juvenile sexual offenders; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (5) of section 985.02, Florida Statutes, is repealed.

Section 2. Subsection (48) of section 985.03, Florida Statutes, is repealed.

Section 3. Subsection (56) of section 985.03, Florida Statutes, is repealed.

Section 4. Section 985.47, Florida Statutes, is repealed.

Section 5. Section 985.483, Florida Statutes, is repealed.

Section 6. Section 985.486, Florida Statutes, is repealed.

Section 7. Section 985.636, Florida Statutes, is repealed.

Section 8. Section 985.494, Florida Statutes, is amended to read:

985.494 Commitment programs for juvenile felony offenders.—

(1) Notwithstanding any other law and regardless of the child's age, a child who is adjudicated delinquent, or for whom adjudication is withheld, for an act that would be a felony if committed by an adult, shall be committed to:

~~(a) A program for serious or habitual juvenile offenders under s. 985.47 or an intensive residential treatment program for offenders less than 13 years of age under s. 985.483, if the child has participated in an early delinquency intervention program and has completed a sheriff's training and respect program.~~

~~(b)~~ a maximum-risk residential program~~,~~ if the child has completed two different high-risk residential commitment programs ~~participated in an early delinquency intervention program, has completed a sheriff's training and respect program, and has completed a program for serious or habitual juvenile offenders or an intensive residential treatment program for offenders less than 13 years of age~~. The commitment of a child to a maximum-risk residential program must be for an indeterminate period, but may not exceed the maximum term of imprisonment that an adult may serve for the same offense.

(2) In committing a child to the appropriate program, the court may consider an equivalent program of similar intensity as being comparable to a program required under subsection (1).

Section 9. Section 985.445, Florida Statutes, is repealed.

Section 10. Paragraphs (a), (b), (c), (e), and (g) of subsection (5) of section 985.0301, Florida Statutes, are amended to read:

985.0301 Jurisdiction.—

(5)(a) Notwithstanding ss. 743.07, 985.43, 985.433, 985.435, 985.439, and 985.441, and except as provided in ss. 985.465 ~~and 985.47~~ and paragraph (f), when the jurisdiction of any child who is alleged to have committed a delinquent act or

violation of law is obtained, the court shall retain jurisdiction, unless relinquished by its order, until the child reaches 19 years of age, with the same power over the child that the court had prior to the child becoming an adult.

(b) Notwithstanding ss. 743.07 and 985.455(3), ~~and except as provided in s. 985.47,~~ the term of any order placing a child in a probation program must be until the child's 19th birthday unless he or she is released by the court on the motion of an interested party or on his or her own motion.

(c) Notwithstanding ss. 743.07 and 985.455(3), ~~and except as provided in s. 985.47,~~ the term of the commitment must be until the child is discharged by the department or until he or she reaches the age of 21 years. Notwithstanding ss. 743.07, 985.435, 985.437, 985.439, 985.441, ~~985.445,~~ 985.455, and 985.513, and except as provided in this section ~~and s. 985.47~~, a child may not be held under a commitment from a court under s. 985.439, s. 985.441(1)(a) or (b), ~~s. 985.445,~~ or s. 985.455 after becoming 21 years of age.

(e) The court may retain jurisdiction over a child committed to the department for placement in an intensive residential treatment program for 10-year-old to 13-year-old offenders, in the residential commitment program in a juvenile prison, or in a residential sex offender program~~, or in a program for serious or habitual juvenile offenders as provided in s. 985.47 or s. 985.483~~ until the child reaches the age of 21. If the court exercises this jurisdiction retention, it shall do so solely for the purpose of the child completing the intensive residential treatment program for 10-year-old to 13-

year-old offenders, in the residential commitment program in a juvenile prison, in a residential sex offender program, or the program for serious or habitual juvenile offenders. Such jurisdiction retention does not apply for other programs, other purposes, or new offenses.

(g)1. Notwithstanding ss. 743.07 and 985.455(3), a serious or habitual juvenile offender shall not be held under commitment from a court under s. 985.441(1)(c), ~~s. 985.47,~~ or s. 985.565 after becoming 21 years of age. This subparagraph shall apply only for the purpose of completing the serious or habitual juvenile offender program under this chapter and shall be used solely for the purpose of treatment.

2. The court may retain jurisdiction over a child who has been placed in a program or facility for serious or habitual juvenile offenders until the child reaches the age of 21, specifically for the purpose of the child completing the program.

Section 11. Paragraph (a) of subsection (3) of section 985.14, Florida Statutes, is amended to read:

985.14 Intake and case management system.—

(3) The intake and case management system shall facilitate consistency in the recommended placement of each child, and in the assessment, classification, and placement process, with the following purposes:

(a) An individualized, multidisciplinary assessment process that identifies the priority needs of each individual child for rehabilitation and treatment and identifies any needs of the child's parents or guardians for services that would

enhance their ability to provide adequate support, guidance, and supervision for the child. This process shall begin with the detention risk assessment instrument and decision, shall include the intake preliminary screening and comprehensive assessment for substance abuse treatment services, mental health services, retardation services, literacy services, and other educational and treatment services as components, additional assessment of the child's treatment needs, and classification regarding the child's risks to the community ~~and, for a serious or habitual delinquent child, shall include the assessment for placement in a serious or habitual delinquent children program under s. 985.47~~. The completed multidisciplinary assessment process shall result in the predisposition report.

Section 12. Paragraphs (c) and (d) of subsection (1) of section 985.441, Florida Statutes, are amended to read:

985.441 Commitment.—

(1) The court that has jurisdiction of an adjudicated delinquent child may, by an order stating the facts upon which a determination of a sanction and rehabilitative program was made at the disposition hearing:

~~(c) Commit the child to the department for placement in a program or facility for serious or habitual juvenile offenders in accordance with s. 985.47.~~

~~1. Following a delinquency adjudicatory hearing under s. 985.35 and a delinquency disposition hearing under s. 985.433 that results in a commitment determination, the court shall, on its own or upon request by the state or the department, determine whether the protection of the public requires that the~~

~~child be placed in a program for serious or habitual juvenile offenders and whether the particular needs of the child would be best served by a program for serious or habitual juvenile offenders as provided in s. 985.47. The determination shall be made under ss. 985.47(1) and 985.433(7).~~

~~2. Any commitment of a child to a program or facility for serious or habitual juvenile offenders must be for an indeterminate period of time, but the time may not exceed the maximum term of imprisonment that an adult may serve for the same offense.~~

(c) ~~(d)~~ Commit the child to the department for placement in a program or facility for juvenile sexual offenders in accordance with s. 985.48, subject to specific appropriation for such a program or facility.

1. The child may only be committed for such placement pursuant to determination that the child is a juvenile sexual offender under the criteria specified in s. 985.475.

2. Any commitment of a juvenile sexual offender to a program or facility for juvenile sexual offenders must be for an indeterminate period of time, but the time may not exceed the maximum term of imprisonment that an adult may serve for the same offense.

Section 13. Paragraph (b) of subsection (4) of section 985.565, Florida Statutes, is amended to read:

985.565 Sentencing powers; procedures; alternatives for juveniles prosecuted as adults.—

(4) SENTENCING ALTERNATIVES.—

(b) *Juvenile sanctions.*—For juveniles transferred to adult court but who do not qualify for such transfer under s. 985.556(3) or s. 985.557(2)(a) or (b), the court may impose juvenile sanctions under this paragraph. If juvenile sentences are imposed, the court shall, under this paragraph, adjudge the child to have committed a delinquent act. Adjudication of delinquency shall not be deemed a conviction, nor shall it operate to impose any of the civil disabilities ordinarily resulting from a conviction. The court shall impose an adult sanction or a juvenile sanction and may not sentence the child to a combination of adult and juvenile punishments. An adult sanction or a juvenile sanction may include enforcement of an order of restitution or probation previously ordered in any juvenile proceeding. However, if the court imposes a juvenile sanction and the department determines that the sanction is unsuitable for the child, the department shall return custody of the child to the sentencing court for further proceedings, including the imposition of adult sanctions. Upon adjudicating a child delinquent under subsection (1), the court may:

1. Place the child in a probation program under the supervision of the department for an indeterminate period of time until the child reaches the age of 19 years or sooner if discharged by order of the court.

2. Commit the child to the department for treatment in an appropriate program for children for an indeterminate period of time until the child is 21 or sooner if discharged by the department. The department shall notify the court of its intent to discharge no later than 14 days prior to discharge. Failure

of the court to timely respond to the department's notice shall be considered approval for discharge.

3. Order disposition under ss. 985.435, 985.437, 985.439, 985.441, ~~985.445,~~ 985.45, and 985.455 as an alternative to youthful offender or adult sentencing if the court determines not to impose youthful offender or adult sanctions.

It is the intent of the Legislature that the criteria and guidelines in this subsection are mandatory and that a determination of disposition under this subsection is subject to the right of the child to appellate review under s. 985.534.

Section 14. Section 985.66, Florida Statutes, is amended to read:

985.66 Juvenile justice training academies; staff development and training; ~~Juvenile Justice Standards and Training Commission;~~ Juvenile Justice Training Trust Fund.—

(1) LEGISLATIVE PURPOSE.—In order to enable the state to provide a systematic approach to staff development and training for judges, state attorneys, public defenders, law enforcement officers, school district personnel, and juvenile justice program staff that will meet the needs of such persons in their discharge of duties while at the same time meeting the requirements for the American Correction Association accreditation by the Commission on Accreditation for Corrections, it is the purpose of the Legislature to require the department to establish, maintain, and oversee the operation of juvenile justice training academies in the state. The purpose of the Legislature in establishing staff development and training

programs is to foster better staff morale and reduce mistreatment and aggressive and abusive behavior in delinquency programs; to positively impact the recidivism of children in the juvenile justice system; and to afford greater protection of the public through an improved level of services delivered by a professionally trained juvenile justice program staff to children who are alleged to be or who have been found to be delinquent.

(2) STAFF DEVELOPMENT ~~JUVENILE JUSTICE STANDARDS~~ AND TRAINING ~~COMMISSION~~.—

~~(a) There is created under the Department of Juvenile Justice the Juvenile Justice Standards and Training Commission, hereinafter referred to as the commission. The 17-member commission shall consist of the Attorney General or designee, the Commissioner of Education or designee, a member of the juvenile court judiciary to be appointed by the Chief Justice of the Supreme Court, and 14 members to be appointed by the Secretary of Juvenile Justice as follows:~~

~~1. Seven members shall be juvenile justice professionals: a superintendent or a direct care staff member from an institution; a director from a contracted community-based program; a superintendent and a direct care staff member from a regional detention center or facility; a juvenile probation officer supervisor and a juvenile probation officer; and a director of a day treatment or conditional release program. No fewer than three of these members shall be contract providers.~~

~~2. Two members shall be representatives of local law enforcement agencies.~~

~~3. One member shall be an educator from the state's university and community college program of criminology, criminal justice administration, social work, psychology, sociology, or other field of study pertinent to the training of juvenile justice program staff.~~

~~4. One member shall be a member of the public.~~

~~5. One member shall be a state attorney, or assistant state attorney, who has juvenile court experience.~~

~~6. One member shall be a public defender, or assistant public defender, who has juvenile court experience.~~

~~7. One member shall be a representative of the business community.~~

~~All appointed members shall be appointed to serve terms of 2 years.~~

~~(b) The composition of the commission shall be broadly reflective of the public and shall include minorities and women. The term "minorities" as used in this paragraph means a member of a socially or economically disadvantaged group that includes blacks, Hispanics, and American Indians.~~

~~(c) The Department of Juvenile Justice shall provide the commission with staff necessary to assist the commission in the performance of its duties.~~

~~(d) The commission shall annually elect its chairperson and other officers. The commission shall hold at least four regular meetings each year at the call of the chairperson or upon the written request of three members of the commission. A majority of the members of the commission constitutes a quorum.~~

~~Members of the commission shall serve without compensation but are entitled to be reimbursed for per diem and travel expenses as provided by s. 112.061 and these expenses shall be paid from the Juvenile Justice Training Trust Fund.~~

~~(e)~~ The department ~~powers, duties, and functions of the commission~~ shall ~~be to~~:

(a)~~1.~~ Designate the location of the training academies; develop, implement, maintain, and update the curriculum to be used in the training of juvenile justice program staff; establish timeframes for participation in and completion of training by juvenile justice program staff; develop, implement, maintain, and update job-related examinations; develop, implement, and update the types and frequencies of evaluations of the training academies; approve, modify, or disapprove the budget for the training academies, and the contractor to be selected to organize and operate the training academies and to provide the training curriculum.

(b)~~2.~~ Establish uniform minimum job-related training courses and examinations for juvenile justice program staff.

(c)~~3.~~ Consult and cooperate with the state or any political subdivision; any private entity or contractor; and with private and public universities, colleges, community colleges, and other educational institutions concerning the development of juvenile justice training and programs or courses of instruction, including, but not limited to, education and training in the areas of juvenile justice.

(d)~~4.~~ Enter into ~~With the approval of the department, make and enter into such~~ contracts and agreements with other

agencies, organizations, associations, corporations, individuals, or federal agencies as ~~the commission determines are~~ necessary in the execution of the ~~its~~ powers of the department or the performance of its duties.

~~5. Make recommendations to the Department of Juvenile Justice concerning any matter within the purview of this section.~~

(3) JUVENILE JUSTICE TRAINING PROGRAM.—The department ~~commission~~ shall establish a certifiable program for juvenile justice training pursuant to this section, and all department program staff and providers who deliver direct care services pursuant to contract with the department shall be required to participate in and successfully complete the department-approved ~~commission approved~~ program of training pertinent to their areas of responsibility. Judges, state attorneys, and public defenders, law enforcement officers, and school district personnel may participate in such training program. For the juvenile justice program staff, the department ~~commission~~ shall, based on a job-task analysis:

(a) Design, implement, maintain, evaluate, and revise a basic training program, including a competency-based examination, for the purpose of providing minimum employment training qualifications for all juvenile justice personnel. All program staff of the department and providers who deliver direct-care services who are hired after October 1, 1999, must meet the following minimum requirements:

1. Be at least 19 years of age.

2. Be a high school graduate or its equivalent as determined by the department ~~commission~~.

3. Not have been convicted of any felony or a misdemeanor involving perjury or a false statement, or have received a dishonorable discharge from any of the Armed Forces of the United States. Any person who, after September 30, 1999, pleads guilty or nolo contendere to or is found guilty of any felony or a misdemeanor involving perjury or false statement is not eligible for employment, notwithstanding suspension of sentence or withholding of adjudication. Notwithstanding this subparagraph, any person who pled nolo contendere to a misdemeanor involving a false statement before October 1, 1999, and who has had such record of that plea sealed or expunged is not ineligible for employment for that reason.

4. Abide by all the provisions of s. 985.644(1) regarding fingerprinting and background investigations and other screening requirements for personnel.

5. Execute and submit to the department an affidavit-of-application form, adopted by the department, attesting to his or her compliance with subparagraphs 1.-4. The affidavit must be executed under oath and constitutes an official statement under s. 837.06. The affidavit must include conspicuous language that the intentional false execution of the affidavit constitutes a misdemeanor of the second degree. The employing agency shall retain the affidavit.

(b) Design, implement, maintain, evaluate, and revise an advanced training program, including a competency-based examination for each training course, which is intended to

enhance knowledge, skills, and abilities related to job performance.

(c) Design, implement, maintain, evaluate, and revise a career development training program, including a competency-based examination for each training course. Career development courses are intended to prepare personnel for promotion.

(d) The department ~~commission~~ is encouraged to design, implement, maintain, evaluate, and revise juvenile justice training courses, or to enter into contracts for such training courses, that are intended to provide for the safety and well-being of both citizens and juvenile offenders.

(4) JUVENILE JUSTICE TRAINING TRUST FUND.—

(a) There is created within the State Treasury a Juvenile Justice Training Trust Fund to be used by the department ~~of Juvenile Justice~~ for the purpose of funding the development and updating of a job-task analysis of juvenile justice personnel; the development, implementation, and updating of job-related training courses and examinations; and the cost of ~~commission-approved~~ juvenile justice training courses~~; and reimbursement for expenses as provided in s. 112.061 for members of the commission and staff~~.

(b) One dollar from every noncriminal traffic infraction collected pursuant to ss. 318.14(10)(b) and 318.18 shall be deposited into the Juvenile Justice Training Trust Fund.

(c) In addition to the funds generated by paragraph (b), the trust fund may receive funds from any other public or private source.

(d) Funds that are not expended by the end of the budget cycle or through a supplemental budget approved by the department shall revert to the trust fund.

(5) ESTABLISHMENT OF JUVENILE JUSTICE TRAINING ACADEMIES.—The number, location, and establishment of juvenile justice training academies shall be determined by the department ~~commission~~.

(6) SCHOLARSHIPS AND STIPENDS.—

(a) By rule, the department ~~commission~~ shall establish criteria to award scholarships or stipends to qualified juvenile justice personnel who are residents of the state who want to pursue a bachelor's or associate in arts degree in juvenile justice or a related field. The department shall handle the administration of the scholarship or stipend. The Department of Education shall handle the notes issued for the payment of the scholarships or stipends. All scholarship and stipend awards shall be paid from the Juvenile Justice Training Trust Fund upon vouchers approved by the Department of Education and properly certified by the Chief Financial Officer. Prior to the award of a scholarship or stipend, the juvenile justice employee must agree in writing to practice her or his profession in juvenile justice or a related field for 1 month for each month of grant or to repay the full amount of the scholarship or stipend together with interest at the rate of 5 percent per annum over a period not to exceed 10 years. Repayment shall be made payable to the state for deposit into the Juvenile Justice Training Trust Fund.

(b) The department ~~commission~~ may establish the scholarship program by rule ~~and implement the program on or after July 1, 1996~~.

(7) ADOPTION OF RULES.—The department ~~commission~~ shall adopt rules as necessary to carry out the provisions of this section.

(8) PARTICIPATION OF CERTAIN PROGRAMS IN THE STATE RISK MANAGEMENT TRUST FUND.—Pursuant to s. 284.30, the Division of Risk Management of the Department of Financial Services is authorized to insure a private agency, individual, or corporation operating a state-owned training school under a contract to carry out the purposes and responsibilities of any program of the department. The coverage authorized herein shall be under the same general terms and conditions as the department is insured for its responsibilities under chapter 284.

~~(9) The Juvenile Justice Standards and Training Commission is terminated on June 30, 2001, and such termination shall be reviewed by the Legislature prior to that date.~~

Section 15. Subsection (8) of section 985.48, Florida Statutes, is repealed.

Section 16. This act shall take effect July 1, 2011.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 7233 PCB HHSC 11-08 Background Screening
SPONSOR(S): Health & Human Services Committee, Holder
TIED BILLS: **IDEN./SIM. BILLS:** SB 1992

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Health & Human Services Committee	16 Y, 0 N	Shaw	Gormley
1) Judiciary Committee		Thomas	Havlicak

SUMMARY ANALYSIS

In 2010, the Legislature substantially rewrote the requirements and procedures for background screening of the individuals and businesses that deal primarily with vulnerable populations. A Level 2 background screening requirement was created for direct services providers who provide services through a contractual relationship with the Department of Elderly Affairs (DOEA). A direct service provider is defined as a person who pursuant to a program to provide services to the elderly, has direct, face-to-face contact with a client while providing services to the client or has access to the client's living areas or to the client's funds or personal property. Volunteers are specifically included as "direct service providers".

This bill amends the definition of direct service provider to include individuals who have direct, face-to-face contact with a client and have access to the client's living areas or to the client's funds or personal property.

The bill creates an exemption from background screening for the following direct care providers:

- Volunteers who assist on an intermittent basis for less than 20 hours of direct, face-to-face contact with a client per month.
- Individuals who are related by blood to the client.
- The client's spouse.

The bill also creates an exemption from additional screening for an individual who becomes a direct care provider who has previously been screened as a condition of licensure by the Agency for Health Care Administration.

The bill provides time frames for DOEA to stagger the implementation of the background screening requirements. The bill also provides that direct care providers must be screened every 5 years unless their fingerprints are continuously retained and monitored by the Department of Law Enforcement in the federal fingerprint retention program.

Rule-making authority is granted to DOEA to establish the staggered implementation schedule.

The bill provides that if an applicant for certification as a Certified Nursing Assistant (CNA) has successfully passed the required Level 2 background screening within 90 days of applying for certification, the Board of Nursing shall waive the requirement that the applicant pass another background screening.

The bill has no fiscal impact on state or local government.

The bill has an effective date of July 1, 2011.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background Screening

Currently, Florida has one of the largest vulnerable populations in the country with over 25% of the state's population over the age of 65, and many more children and disabled adults. These vulnerable populations require special care because they are at an increased risk of abuse.

In 1995, the Legislature created standard procedures for the screening of prospective employees where the Legislature had determined it necessary to conduct criminal history background screenings to protect vulnerable persons. Chapter 435, F.S., outlines the employment screening requirements. The Florida Department of Law Enforcement (FDLE) processes criminal history checks for the employer.

In 2010, the Legislature substantially rewrote the requirements and procedures for background screening of the persons and businesses that deal primarily with vulnerable populations.[1] Major changes made by the act include:

- No person who is required to be screened may begin work until the screening has been completed.
- All Level 1[2] screenings were increased to Level 2[3] screenings.
- By August 1, 2012, all fingerprints submitted to FDLE must be submitted electronically.
- Certain personnel that were not being screened were required to begin Level 2 screening.
- The addition of serious crimes that disqualify an individual from employment working with vulnerable populations.
- Agencies were authorized to request the retention of fingerprints by the Florida Department of Law Enforcement.
- An exemption for a disqualifying felony may not be granted until at least three years after the completion of all sentencing sanctions for that felony.
- All exemptions from disqualification may be granted only by the agency head.

Level 2 background screenings cost $43.25 (the $24 state fee, plus an additional $19.25 for electronic fingerprints) or $30.25 ($24 plus $6.25 for hard copy fingerprints).[4]

The Department of Elderly Affairs

In 1988, the Department of Elderly Affairs ("DOEA" or "the department") was created by the passage of a constitutional amendment. In 1991, the department was codified in s. 40.41, F.S., and organized pursuant to Chapter 430, F.S. The department began operation in January 1992.

The department is the designated state unit on aging as defined in the Older Americans Act (OAA) of 1965.[5] As such, the department's role is to administer the state's OAA allotment and grants, and to

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[1] Ch. 2010-114, L.O.F.

[2] Section 435.03, F.S. Level 1 screenings are name-based demographic screenings that must include, but are not limited to, employment history checks and statewide criminal correspondence checks through FDLE. Level 1 screenings may also include local criminal records checks through local law enforcement agencies. A person undergoing a Level 1 screening must not have been found guity of any of the listed offenses.

[3] Section 435.04, F.S. A Level 2 screening consists of a fingerprint-based search of FDLE and the Federal Bureau of Investigations (FBI) databases for state and national criminal arrest records. Any person undergoing a Level 2 screening must not have been found guilty of any of the listed offenses.

[4] *Criminal History Record Checks/Background Checks Fact Sheet* January 4, 2011. Available at http://www.fdle.state.fl.us/Content/getdoc/39b8f116-6d8b-4024-9a70-5d8cd2e34aa5/FAQ.aspx (last visited April 1, 2011).

advocate, coordinate, and plan all elder services.[6] The OAA requires states to provide elder services through a coordinated service delivery system through designated Area Agencies on Aging (AAAs). There are 11 AAAs – 1 in each of the state's 11 planning and service areas—that are responsible to the department to provide services.

In addition, ch. 430, F.S., requires that the department fund service delivery "lead agencies" that coordinate and provide a variety of oversight and elder support services at the consumer level in the counties within each planning and service area.

The department is 94 percent privatized through contracts with local entities and utilizes over 45,000 volunteers to deliver information and services to elders.[7] Many of the volunteers are elders themselves.[8]

Direct Service Providers

The 2010 revision of the background screening laws created s. 430.0402, F.S., requiring Level 2 background screenings for direct services providers who provide services through a contractual relationship with the Department of Elderly Affairs. A direct service provider is defined as a person who pursuant to a program to provide services to the elderly, has direct, face-to-face contact with a client while providing services to the client or has access to the client's living areas or to the client's funds or personal property. Volunteers are specifically included as "direct service providers".

The statute contains no exception from background screenings for a volunteer who has occasional or limited hours. There are exceptions for volunteers who are in brief or occasional contact with vulnerable populations other than elders. For example, s. 393.0655(1), F.S., exempts from screening a volunteer who assist with persons with developmental disabilities if the volunteer assists less than 10 hours per month and a person who has been screened is always present and has the volunteer within his or her line of sight.[9]

Section 430.0402, F.S., also provides that in addition to the offenses listed in s.435.04, F.S., direct service provides must also be screened for offenses prohibited under the following:

- Any authorizing statutes, if the offense was a felony.
- Section 409.920, relating to Medicaid provider fraud.
- Section 409.9201, relating to Medicaid fraud.
- Section 817.034, relating to fraudulent acts through mail, wire, radio, electromagnetic, photoelectronic, or photooptical systems.
- Section 817.234, relating to false and fraudulent insurance claims.
- Section 817.505, relating to patient brokering.
- Section 817.568, relating to criminal use of personal identification information.
- Section 817.60, relating to obtaining a credit card through fraudulent means.
- Section 817.61, relating to fraudulent use of credit cards, if the offense was a felony.
- Section 831.01, relating to forgery.
- Section 831.02, relating to uttering forged instruments.
- Section 831.07, relating to forging bank bills, checks, drafts, or promissory notes.
- Section 831.09, relating to uttering forged bank bills, checks, drafts, or promissory notes.

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[5] Section 305(a)(1)(C), Older Americans Act.
[6] Section 430.04(1), F.S.
[7] Department of Elder Affairs, Summary of Programs and Services (2010).
[8] *Id.*
[9] *See e.g.* s. 394.4572(1)(a), F.S. (contact with persons held for mental health treatment) and s. 409.175(2), F.S. (contact with children).

Area Agencies on Aging and Elder Care Services are entities who contract with the Department of Elderly Affairs to provide services to elders. Representatives of several of these entities report that the requirement of Level 2 background screening of volunteers has dramatically reduced the number of volunteers potentially impacting the availability of services to elders.[10] The Meals on Wheels program is dependent on volunteers, and the program is currently losing volunteers who cannot afford to pay for the cost of a level 2 background screening. Senior centers, congregate meal sites, and health and wellness programs are also dependent on volunteers.

The provisions of the 2010 legislation also impacts Home Care for the Elderly (HCE)[11] caregivers. Many HCE caregivers are family members. These family members receive a monthly stipend of $106 to help care for a family member at home. The stipend is used to pay for incontinence products, nutritional supplements, respite care, and other needed products and services. The new Level 2 background screening requirement is applicable to these family members who act as caregivers.

Certified Nursing Assistants

Certified Nursing Assistants (CNAs) provide care and assistance to persons with their activities of daily living.[12] To become a CNA an individual must:

- Demonstrate a minimum competency to read and write.
- Successfully pass the Level 2 background screening described in s. 400.215, F.S.[13]
- Meet one of the following requirements:
    - Successfully complete an approved training program and achieve a minimum score, on the nursing assistant competency examination.
    - Achieve a minimum score, on the nursing assistant competency examination, be 18 years old, and have a high school degree or the equitant.

Only CNAs may be employed in nursing homes to provide nursing assistance.[14] However, there are limited exceptions for a person to begin working as a CNA for up to four months prior to certification when the person is enrolled in a CNA program, is a CNA in another state, or has preliminary passed the CNA exam.[15] Such individuals must be background screened pursuant to s. 400.215, F.S., before beginning work as a CNA in a nursing home.

Effect of the Bill

The bill amends the definition of direct service provider to include individuals who have direct, face-to-face contact with a client and have access to the client's living areas or to the client's funds or personal property. Current law defines a direct services provider as having client contact or living area/property access.

The bill creates an exemption from background screening for the following:

- Volunteers who assist on an intermittent basis for less than 20 hours of direct, face-to-face contact with a client per month.
- Individuals who are related by blood to the client.
- The client's spouse.

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[10] Meetings with Health and Human Services Committee staff in November and December of 2010, and correspondence on file with the Committee.
[11] Department of Elder Affairs, Summary of Programs and Services (2010).
[12] Section 464.201(5), F.S.
[13] The background screening required by s. 400.215, F.S., refers to the screening described in s. 408.809, F.S., and is identical to the background screening required by s. 430.0402, F.S., except that the following are also disqualifying offenses: s. 741.28, relating to domestic violence, s. 831.30, relating to fraud in obtaining medicinal drugs, and s. 831.31, relating to the sale, manufacture, delivery, or possession with the intent to sell, manufacture, or deliver any counterfeit controlled substance, if the offense was a felony.
[14] Section 400.211, F.S.
[15] *Id.*

The bill provides an exemption from additional background screening for an individual who becomes a direct care provider and provides services within the scope of his or her license. The exemption applies to a person who was previously screened by the Agency for Health Care Administration as a condition of licensure. Such individuals would include owners, administrators, and employees of such entities as nursing homes, assisted living facilities, home health agencies, and adult day cares.[16]

The bill provides time frames for screenings by the Department of Elderly Affairs:

- Individuals serving as direct service providers on July 31, 2010, must be screened by July 1, 2012.
- DOEA may adopt rules to establish a schedule to stagger the implementation of the required screenings over a 1-year period, beginning July 1, 2011, through July 1, 2012.
- Individuals shall be rescreened every 5 years following the date of his or her last background screening unless the individual's fingerprints are continuously retained and monitored by the Department of Law Enforcement in the federal fingerprint retention program.

The bill removes "any authorizing statutes, if the offense was a felony" for the list of disqualifying offenses for direct services providers. The term "authorizing statute" is not defined by Chapter 430, F.S. The term is defined in s. 408.803, F.S., and relates to entities regulated by the Agency for Health Care Administration. Its inclusion in s. 430.0402, F.S., appears to be a scrivener's error.

The bill provides that if an applicant for CNA certification has successfully passed the background screening required by s. 400.215, F.S., or s. 408.809, F.S., within 90 days of applying for the certification, the Board of Nursing shall waive the requirement that the applicant pass another background screening.

B. SECTION DIRECTORY:

Section 1: Amends s. 430.0402, F.S., relating to screening of direct service providers.
Section 2: Amends s. 464.203, F.S., relating to certified nursing assistants; certification requirements.
Section 3: Provides an effective date of July 1, 2011.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill will reduce the number of persons who will need to undergo background screening prior to working with vulnerable persons. The bill will reduce the number of Certified Nursing Assistants who

[16] For a complete list of entities see s. 408.802, F.S.

are required to have two background screenings within a 90 day period. The Level 2 screenings cost $43.25 (the $24 state fee, plus an additional $19.25 for electronic fingerprints) or $30.25 ($24 plus $6.25 for hard copy fingerprints).[17]

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The Department of Elderly Affairs is given rule-making authority to establish a schedule to stagger the implementation of the required background screenings over a 1-year period, beginning July 1, 2011, through July 1, 2012.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On April 5, 2011, the Health and Human Services Committee adopted one amendment which provided that if an applicant for certification as a Certified Nursing Assistant (CNA) has successfully passed the Level 2 background screening required by s. 400.215, F.S., or s. 408.809, F.S., within 90 days of applying for the certification, the Board of Nursing shall waive the requirement that the applicant pass another background screening.

The Proposed Committee Bill was reported favorably. This analysis reflects the bill as amended.

[17] See note 4, supra.

A bill to be entitled

An act relating to background screening; amending s. 430.0402, F.S.; revising the definition of the term "direct service provider" for purposes of required background screening; exempting a volunteer who meets certain criteria and a client's relative or spouse from the screening requirement; exempting persons screened as a licensure requirement from further screening under certain circumstances; requiring direct service providers working as of a certain date to be screened within a specified period; providing a phase-in for screening direct service providers; providing rulemaking authority to the Department of Elderly Affairs to implement the phase-in; requiring that employers of direct service providers and certain other individuals be rescreened every 5 years unless fingerprints are retained electronically by the Department of Law Enforcement; removing an offense from the list of disqualifying offenses for purposes of background screening; amending s. 464.203, F.S.; requiring the Board of Nursing to waive background screening requirements for certain certified nursing assistants; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 430.0402, Florida Statutes, is amended to read:

430.0402 Screening of direct service providers.—

(1)(a) Level 2 background screening pursuant to chapter 435 is required for direct service providers. Background screening includes employment history checks as provided in s. 435.03(1) and local criminal records checks through local law enforcement agencies.

(b) For purposes of this section, the term "direct service provider" means a person 18 years of age or older, including a volunteer, who, pursuant to a program to provide services to the elderly, has direct, face-to-face contact with a client while providing services to the client and ~~or~~ has access to the client's living areas or to the client's funds or personal property. The term does not include a volunteer who assists on an intermittent basis for less than 20 hours per month of direct, face-to-face contact with a client, an individual who is related by blood to a client, or a client's spouse ~~includes coordinators, managers, and supervisors of residential facilities and volunteers~~.

(2) Licensed physicians, nurses, or other professionals licensed by the Department of Health are not subject to background screening if they are providing a service that is within the scope of their licensed practice.

(3) Individuals qualified for employment by the Agency for Health Care Administration pursuant to the agency's background screening standards for licensure or employment contained in s. 408.809 are not subject to subsequent or additional level 2 screening pursuant to chapter 435, or to the unique screening requirements of this section, by virtue of their employment as direct service providers if they are providing a service that is

within the scope of their licensed practice.

(4) ~~(3)~~ Refusal on the part of an employer to dismiss a manager, supervisor, or direct service provider who has been found to be in noncompliance with standards of this section shall result in the automatic denial, termination, or revocation of the license or certification, rate agreement, purchase order, or contract, in addition to any other remedies authorized by law.

(5) Individuals serving as direct service providers on July 31, 2010, must be screened by July 1, 2012. The department may adopt rules to establish a schedule to stagger the implementation of the required screening over a 1-year period, beginning July 1, 2011, through July 1, 2012.

(6) An employer of a direct service provider who previously qualified for employment or volunteer work under level 1 screening standards or an individual who is required to be screened according to level 2 screening standards contained in chapter 435, pursuant to this section, shall be rescreened every 5 years following the date of his or her last background screening or exemption, unless such individual's fingerprints are continuously retained and monitored by the Department of Law Enforcement in the federal fingerprint retention program according to the procedures specified in s. 943.05.

(7) ~~(4)~~ The background screening conducted pursuant to this section must ensure that, in addition to the disqualifying offenses listed in s. 435.04, no person subject to the provisions of this section has an arrest awaiting final disposition for, has been found guilty of, regardless of

adjudication, or entered a plea of nolo contendere or guilty to, or has been adjudicated delinquent and the record has not been sealed or expunged for, any offense prohibited under any of the following provisions of state law or similar law of another jurisdiction:

~~(a) Any authorizing statutes, if the offense was a felony.~~

(a) ~~(b)~~ Section 409.920, relating to Medicaid provider fraud.

(b) ~~(c)~~ Section 409.9201, relating to Medicaid fraud.

(c) ~~(d)~~ Section 817.034, relating to fraudulent acts through mail, wire, radio, electromagnetic, photoelectronic, or photooptical systems.

(d) ~~(e)~~ Section 817.234, relating to false and fraudulent insurance claims.

(e) ~~(f)~~ Section 817.505, relating to patient brokering.

(f) ~~(g)~~ Section 817.568, relating to criminal use of personal identification information.

(g) ~~(h)~~ Section 817.60, relating to obtaining a credit card through fraudulent means.

(h) ~~(i)~~ Section 817.61, relating to fraudulent use of credit cards, if the offense was a felony.

(i) ~~(j)~~ Section 831.01, relating to forgery.

(j) ~~(k)~~ Section 831.02, relating to uttering forged instruments.

(k) ~~(l)~~ Section 831.07, relating to forging bank bills, checks, drafts, or promissory notes.

(l) ~~(m)~~ Section 831.09, relating to uttering forged bank bills, checks, drafts, or promissory notes.

Section 2. Subsection (1) of section 464.203, Florida Statutes, is amended to read:

464.203 Certified nursing assistants; certification requirement.—

(1) The board shall issue a certificate to practice as a certified nursing assistant to any person who demonstrates a minimum competency to read and write and successfully passes the required background screening pursuant to s. 400.215. If the person has successfully passed the required background screening pursuant to s. 400.215 or s. 408.809 within 90 days before the application for a certificate to practice, the board shall waive the requirement that the applicant successfully pass an additional background screening pursuant to s. 400.215. The person must also meet ~~and meets~~ one of the following requirements:

(a) Has successfully completed an approved training program and achieved a minimum score, established by rule of the board, on the nursing assistant competency examination, which consists of a written portion and skills-demonstration portion approved by the board and administered at a site and by personnel approved by the department.

(b) Has achieved a minimum score, established by rule of the board, on the nursing assistant competency examination, which consists of a written portion and skills-demonstration portion, approved by the board and administered at a site and by personnel approved by the department and:

1. Has a high school diploma, or its equivalent; or

2. Is at least 18 years of age.

(c) Is currently certified in another state; is listed on that state's certified nursing assistant registry; and has not been found to have committed abuse, neglect, or exploitation in that state.

(d) Has completed the curriculum developed under the Enterprise Florida Jobs and Education Partnership Grant and achieved a minimum score, established by rule of the board, on the nursing assistant competency examination, which consists of a written portion and skills-demonstration portion, approved by the board and administered at a site and by personnel approved by the department.

Section 3. This act shall take effect July 1, 2011.