Governmental Operations Committee

Wednesday, March 8, 2006

1:00 - 3:00 PM

Morris Hall

Allan Bense
Speaker

David Rivera
Chairman

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Speaker Allan G. Bense

Governmental Operations Committee

Start Date and Time:	Wednesday, March 08, 2006 01:00 pm
End Date and Time:	Wednesday, March 08, 2006 03:00 pm
Location:	Morris Hall (17 HOB)
Duration:	2.00 hrs

Consideration of the following bill(s):

HB 237 Continued Employment Requirements for Law Enforcement Personnel by Berfield
HB 325 CS Commission on Capital Cases by Gelber
HB 439 CS Certificate of Birth Resulting in Stillbirth by Planas
HB 567 CS Notaries Public by Kyle
HB 581 Public Benefits by Cretul

Consideration of the following proposed committee bill(s):

PCB GO 06-15 -- OGSR Autopsy Photographs and Audio and Video Recordings

NOTICE FINALIZED on 03/06/2006 16:14 by TUCK.SHIRLEY

HB 237

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 237 Continued Employment Requirements for Law Enforcement Personnel
SPONSOR(S): Berfield and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 410

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Governmental Operations Committee		Mitchell	Williamson
2) Insurance Committee			
3) Fiscal Council			
4) State Administration Council			
5)			

SUMMARY ANALYSIS

HB 237 allows employing agencies to require law enforcement officers, as well as correctional officers and correctional probation officers who are not currently subject to this requirement, to pass a physical examination prior to or immediately upon employment in order to be eligible for the statutory presumption that total or partial disability or death, which is caused by tuberculosis, heart disease, or hypertension, is accidental and suffered in the line of duty.

HB 237 also provides specific authority for employing agencies to set tobacco-use standards for law enforcement officers, correctional officers, and correctional probation officers.

This bill does not appear to create, modify, or eliminate rulemaking authority.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Promote personal responsibility – This bill changes the entitlement that law enforcement officers, correctional officers, and correctional probation officers have to the statutory presumption that total or partial disability or death, which is caused by tuberculosis, heart disease, or hypertension, is accidental and suffered in the line of duty.

B. EFFECT OF PROPOSED CHANGES:

Disability Presumptions

Section 112.18, Florida Statutes, provides that "any condition or impairment of health" caused by tuberculosis, heart disease, or hypertension that results in total or partial disability or death is presumed to be accidental and to have been suffered in the line of duty for firefighters,[1] law enforcement officers,[2] correctional officers,[3] or correctional probation officers.[4] This presumption may be rebutted by "competent evidence."[5]

Correctional officers and correctional probation officers are entitled to this presumption without a physical examination.[6] Firefighters and law enforcement officers, however, must successfully pass a physical examination "upon entering into such service" as a firefighter or law enforcement officer.[7]

The timing of the "upon entering into such service" examination requirement generally is interpreted in one of two ways: (1) the *first* point in time when a person first begins to work as a firefighter or law enforcement officer; or (2) the point in time when a person begins to work for a particular agency or employer as a firefighter or law enforcement officer.[8]

The potential conflict between the two interpretations becomes particularly evident in light of section 943.13(6), Florida Statutes, which requires officers to pass a physical examination by a licensed physician, physician assistant, or certified advanced registered nurse practitioner. Although this section is silent as to the timing of the examination, the Criminal Justice Standards and Training Commission is authorized to establish the "specifications" for the examination, which it has done through rule 11B-27.002(1)(d), *Florida Administrative Code*, requiring the completion of a physician's assessment with each new employment or appointment of an officer. This rule also prohibits an employing agency from using a physician's assessment that was prepared for another employing agency.

HB 237 resolves the potential conflict in the timing of the examination for purposes of the presumption in section 112.18, Florida Statutes, through the creation of a new subsection (5) to section 943.135,

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[1] The firefighter must be a Florida state, municipal, county, port authority, special tax district, or fire control district firefighter.
[2] Fla. Stat. § 943.10(1) (2005).
[3] Fla. Stat. § 943.10(2) (2005).
[4] Fla. Stat. § 943.10(3) (2005).
[5] Fla. Stat. § 112.18(1) (2005).
[6] *State v. Reese*, 911 So.2d 1291 (1st DCA 2005) (holding that the plain language of the statutes does not require completion of a pre-employment physical as a condition precedent to the entitlement to the statutory presumption as is the case with firefighters and law enforcement officers).
[7] Fla. Stat. § 112.18(1) (2005).
[8] There appears to be only one case which has interpreted this examination requirement, *Cumbie v. City of Milton*, 496 So.2d 923 (1st DCA 1986). In *Cumbie*, a firefighter who did not undergo a physical examination "upon entering his employment" was not entitled to the statutory presumption in section 112.18, Florida Statutes. Yet, interpreting the phrase "upon entering into such service" as "upon entering his employment" does not resolve the two conflicting timing interpretations since both points of time were the same in *Cumbie*.

Florida Statutes. Section 943.135, Florida Statutes, sets forth requirements for continued employment for officers.[9]

The new subsection (5) permits an employing agency[10] to require law enforcement officers, correctional officers, or correctional probation officers[11], who are employed full time, to successfully pass a physical examination in order to be eligible for the presumption in section 112.18, Florida Statutes.[12] As officers are already required to have a physical examination for employment or appointment, HB 237 allows an employing agency to make this physical examination applicable to the presumption in section 112.18, Florida Statutes. This change is particularly significant for correctional officers and correctional probation officers, who are not currently required to have physical examinations in order to receive the presumption in section 112.18, Florida Statutes.

HB 237 provides that the changes to the operation of the presumption in section 112.18, Florida Statutes, do not apply to law enforcement officers, correctional officers, or correctional probation officers who are currently employed by an employing agency.[13]

Tobacco Use Standards

Section 943.137, Florida Statutes, allows employing agencies to establish qualifications and standards for employment, appointment, training, or promotion of officers that exceed certain minimum requirements. According to the Florida Department of Law Enforcement, employing agencies can establish tobacco-use policies under the authority of this section.[14] The authority to set tobacco-use policies is not, however, specifically provided.

HB 237 creates a new subsection (6) within section 943.135, Florida Statutes[15], to specifically authorize an employing agency to set tobacco-use standards for full time law enforcement officers, correctional officers, and correctional probation officers.

C. SECTION DIRECTORY:

Section 1: Adds subsections (5) and (6) to section 943.135, Florida Statutes, to allow employing agencies of law enforcement officers, correctional officers, or correctional probation officers to require certain physical examinations and to set tobacco-use standards.

Section 2: Provides an effective date of October 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

This bill does not appear to create, modify, amend, or eliminate a state revenue source.

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[9] Fla. Stat. § 943.10(14) (2005) ("any person employed or appointed as a full-time, part-time, or auxiliary law enforcement officer, correctional officer, or correctional probation officer").
[10] Fla. Stat. § 943.10(4) (2005).
[11] Fla. Stat. § 943.10(1), (2), & (3) (2005).
[12] The new subsection (5) further requires that this physical examination be performed prior to or immediately upon the employment of the officer.
[13] Amendments to statutes which affect the application of the Workers' Compensation Act in chapter 440, Florida Statutes, are either "procedural" or "substantive." Procedural amendments apply retroactively since there is no vested right in any given procedure. *Litvin v. St. Lucie County Sheriff's Dep't*, 599 So.2d 1353 (Fla. 1st DCA), rev. denied, 613 So.2d 6 (Fla.1992), cert. denied, 508 U.S. 913, 113 S.Ct. 2350, 124 L.Ed.2d 258 (1993). To the extent that this change can be characterized as a "burden of proof enactment," it would be a procedural change and apply retroactively unless otherwise limited. Yet, to the extent this change affects duties and rights or impacts benefits that may be received or the entitlement to services, it may be substantive and only apply prospectively anyway.
[14] Fla. Dep't of Law Enforcement., HB 237 (2006) Staff Analysis (Oct. 27, 2005) (on file with dep't).
[15] This section provides the requirements for continued employment for officers.

2. Expenditures:

This bill does not appear to create, modify, amend, or eliminate a state expenditure.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

This bill does not appear to create, modify, amend, or eliminate a revenue source for local governments.

2. Expenditures:

This bill does not appear to create, modify, amend, or eliminate an expenditure for local governments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill does not appear to have a direct economic impact on the private sector.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

There do not appear to be any other constitutional issues.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create, modify, or eliminate rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Drafting Issue: Changing Section 112.18, Florida Statutes, Instead

The potential effect of subsection (5) is to change the operation of the presumption provided in section 112.18, Florida Statutes. As such, the sponsor may wish to consider making these changes directly in section 112.18, Florida Statutes.

Drafting Issue: Placement in Section 943.135, Florida Statutes

Assuming a preference for making these changes in chapter 943, Florida Statutes, instead of section 112.18, Florida Statutes, it is important to note that these two new subsections are not per se "requirements for continued employment" or similar to the existing provisions in section 943.135, Florida Statutes. As such, the sponsor may wish to consider making these two changes in section 943.13(6), Florida Statutes, and section 943.137, Florida Statutes, respectively.

Drafting Issue: Scope of Prospective Operation

A provision in subsection (5) provides that the change in the operation of the presumption provided in section 112.18, Florida Statutes, does not apply for law enforcement officers, correctional officers, or correctional probation officers who are currently employed by an employing agency. This provision could be read to apply beyond the current employment of those officers, correctional officers, or correctional probation officers. If that is not the intent of the sponsor, the sponsor may wish to add a limitation to the provision: "for the period of employment with the current employing agency."

Drafting Issue: "Full Time"

The reference to "full time" in subsection (5) is duplicative as law enforcement officers, correctional officers, and correctional probation officers are full time by definition in section 943.10, Florida Statutes. The sponsor may wish to consider removing this reference.

Drafting Issue: Mirror Examination Language in Section 112.18, Florida Statutes

Given the potential effect of subsection (5) to change the operation of the presumption provided in section 112.18, Florida Statutes, the sponsor may wish to more closely mirror the examination language in that section.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

Not applicable.

1 A bill to be entitled
2 An act relating to continued employment requirements for
3 law enforcement personnel; amending s. 943.135, F.S.;
4 revising the presumption of disability for certain law
5 enforcement, correctional, and correctional probation
6 officers for purposes of workers' compensation and
7 authorizing establishment of tobacco-use standards;
8 providing an effective date.
9
10 Be It Enacted by the Legislature of the State of Florida:
11
12 Section 1. Subsections (5) and (6) are added to section
13 943.135, Florida Statutes, to read:
14 943.135 Requirements for continued employment.--
15 (5) An employing agency as defined in s. 943.10 may
16 require a law enforcement officer, correctional officer, or
17 correctional probation officer as defined in s. 943.10 who are
18 employed full time to successfully pass a physical examination
19 in order to be eligible for the presumption set forth in s.
20 112.18. The employing agency shall have the physical examination
21 performed prior to or immediately upon employment of the
22 officer. This provision shall not affect the applicability of
23 the presumption set forth in s. 112.18 for law enforcement
24 officers, correctional officers, or correctional probation
25 officers who are currently employed by an employing agency.
26 (6) An employing agency as defined in s. 943.10 may set
27 tobacco-use standards for law enforcement officers, correctional
28 officers, and correctional probation officers as defined in s.

29 943.10 who are employed full time.

30 Section 2. This act shall take effect October 1, 2006.

Bill No. **237**

COUNCIL/COMMITTEE ACTION

ADOPTED	__	(Y/N)
ADOPTED AS AMENDED	__	(Y/N)
ADOPTED W/O OBJECTION	__	(Y/N)
FAILED TO ADOPT	__	(Y/N)
WITHDRAWN	__	(Y/N)
OTHER	____	

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1 Council/Committee hearing bill: Governmental Operations
2 Representative(s) Berfield offered the following:
3
4 **Amendment (with title amendments)**
5 Remove everything after the enacting clause and insert:
6 Section 1. Subsection (6) of section 943.13, Florida
7 Statutes, is amended to read:
8 943.13 Officers' minimum qualifications for employment or
9 appointment.—On or after October 1, 1984, any person employed or
10 appointed as a full-time, part-time, or auxiliary law
11 enforcement officer or correctional officer; on or after October
12 1, 1986, any person employed as a full-time, part-time, or
13 auxiliary correctional probation officer; and on or after
14 October 1, 1986, any person employed as a full-time, part-time,
15 or auxiliary correctional officer by a private entity under
16 contract to the Department of Corrections, to a county
17 commission, or to the Department of Management Services shall:
18 (6)(a) Have passed a physical examination by a licensed
19 physician, physician assistant, or certified advanced registered
20 nurse practitioner, based on specifications established by the
21 commission.

22 (b) In order to be eligible for the presumption set forth
23 in s. 112.18 while employed with an employing agency, a law
24 enforcement officer, correctional officer, or correctional
25 probation officer shall have successfully passed the physical
26 examination required by paragraph (a) upon entering into service
27 as a law enforcement officer, correctional officer, or
28 correctional probation officer with the employing agency, which
29 examination failed to reveal any evidence of tuberculosis, heart
30 disease, or hypertension. In no event may a law enforcement
31 officer, correctional officer, or correctional probation officer
32 use a physical examination from a former employing agency for
33 purposes of claiming the presumption set forth in s. 112.18
34 against the current employing agency.
35 Section 2. Subsection (1) of section 943.137, Florida
36 Statutes, is amended to read:
37 943.137 Establishment of qualifications and standards
38 above the minimum.—
39 (1) Nothing herein may be construed to preclude an
40 employing agency from establishing qualifications and standards
41 for employment, appointment, training, or promotion of officers
42 that exceed the minimum requirements set by ss. 943.13 and
43 943.17, including establishing tobacco-use standards.
44 Section 3. This act shall take effect October 1, 2006.
45 ========== T I T L E A M E N D M E N T ==========
46 Remove the entire title and insert:
47 An act relating to employment requirements for law enforcement
48 personnel; amending s. 943.13, F.S.; revising the presumption of
49 disability for certain law enforcement, correctional, and
50 correctional probation officers; amending s. 943.137;
51 authorizing the establishment of tobacco-use standards;
52 providing an effective date.

HB 325 CS

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 325 CS Commission on Capital Cases
SPONSOR(S): Gelber
TIED BILLS: **IDEN./SIM. BILLS:** SB 360

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Criminal Justice Committee	6 Y, 0 N, w/CS	Kramer	Kramer
2) Governmental Operations Committee		Mitchell	Williamson
3) Criminal Justice Appropriations Committee			
4) Justice Council			
5)			

SUMMARY ANALYSIS

The Commission on Capital Cases, a legislative commission within the Office of Legislative Services, maintains a registry of attorneys qualified to represent defendants in capital collateral (postconviction) proceedings. Currently, a registry attorney is authorized to represent only five capital collateral defendants at one time. This bill authorizes a registry attorney to represent up to seven capital collateral defendants at one time.

The bill significantly modifies the minimum qualifications for registry attorneys. The bill requires registry attorneys to submit reports to the commission on a quarterly basis. The bill authorizes the commission to remove an attorney from the registry who has not executed a contract for postconviction representation or filed a quarterly report as required by law.

Currently, a registry attorney is entitled to payment at each stage of the postconviction process according to a statutory schedule. The bill modifies the payment schedule by authorizing payment of an attorney after the final evidentiary hearing has been held on the defendant's postconviction motion rather than requiring the attorney to wait until the judge has ruled on the postconviction motion.

The bill addresses issues with regard to the payment of fees by setting forth the Legislative finding that not all capital collateral cases are extraordinary or unusual, and requiring written findings of fact where a judge deviates upward from the statutorily authorized fee schedule.

This bill does not appear to create, modify, or eliminate rulemaking authority.

The bill does not appear to create, modify, amend, or eliminate revenues of state government or of local governments. The expenditure impact on state government is indeterminate, but expected to be minimal. The bill does not appear to create, modify, amend, or eliminate expenditures of local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government: The bill authorizes an attorney to represent 7 capital postconviction defendants, rather than 5 as under current law.

B. EFFECT OF PROPOSED CHANGES:

Commission on Capital Cases

Section 27.709, F.S. creates the Commission on Capital Cases, a legislative commission within the Office of Legislative Services which is tasked with reviewing the "administration of justice in capital collateral cases". The commission is comprised of two members appointed by the Governor,[1] two Senators appointed by the President of the Senate[2] and two members of the House of Representatives appointed by the Speaker of the House of Representatives.[3]

Overview of Postconviction Proceedings in Capital Cases: A defendant who is convicted of a crime in which the death penalty is imposed receives a direct appeal of his or her sentence and conviction to the Florida Supreme Court. At this stage, a capital defendant is represented by the public defender's office, if the defendant is indigent, or by a private attorney. Matters which are raised on direct appeal include evidentiary rulings made by the trial court during the course of the defendant's trial, and other matters objected to during the course of the trial such as the jury instructions, prosecutorial misconduct, and procedural rulings made by the trial court. If the Florida Supreme Court affirms the capital defendant's conviction and sentence, a defendant can appeal that decision to the United States Supreme Court by filing a petition for writ of certiorari. If the Supreme Court refuses to hear or rejects the defendant's appeal, a defendant is entitled to begin state postconviction proceedings.

State postconviction proceedings are controlled by rules 3.850, 3.851 and 3.852 of the Florida Rules of Criminal Procedure. Unlike a direct appeal, which challenges the legal errors apparent from the trial transcripts or record on appeal, a collateral postconviction proceeding is designed to raise claims which are "collateral" to what transpired in the trial court. Postconviction proceedings usually involve claims that the defendant's trial counsel was ineffective, claims of newly discovered evidence or claims that the prosecution failed to disclose exculpatory evidence. Since the consideration of these claims often require new fact finding, collateral postconviction motions are filed in the trial court which sentenced the defendant to death. Appeals from the grant or denial of postconviction relief are to the Florida Supreme Court.

After completion of state postconviction proceedings, a capital defendant is entitled to file a petition for writ of habeas corpus in federal court. The federal court reviews whether the conviction or sentence violates federal law. Federal habeas is limited to consideration of claims previously asserted on direct appeal or in state postconviction proceedings. The most common issue raised is whether the defendant's trial counsel was ineffective.

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[1] Judge Paul M. Hawkes, First District Court of Appeal, and Judge Leslie B. Rothenberg, Fourth District Court of Appeal, are the current appointees of the Governor. *See* Comm'n on Capital Cases, Members, available at http://www.floridacapitalcases.state.fl.us/c-members.cfm (last visited Mar. 1, 2006).

[2] Senators Walter G. "Skip" Campbell, Jr. and Victor D. Crist are the current appointees of the Senate President. *See* Comm'n on Capital Cases, Members, available at http://www.floridacapitalcases.state.fl.us/c-members.cfm (last visited Mar. 1, 2006).

[3] Representatives Dan Gelber and Juan-Carlos "J.C." Planas are the current appointees of the Speaker of the House. *See* Comm'n on Capital Cases, Members, available at http://www.floridacapitalcases.state.fl.us/c-members.cfm (last visited Mar. 1, 2006).

Finally, once the Governor signs a death warrant, a defendant will typically file a second Rule 3.850 motion and a second federal habeas petition along with motions to stay the execution.

In the middle and southern regions of Florida, the Capital Collateral Regional Counsel provide postconviction representation to indigent capital defendants.[4] In the northern region of the state, representation is provided by private attorneys appointed by the court.

Registry Attorneys

In 1998, the legislature created a registry of private attorneys to represent a death row inmate when a Capital Collateral Regional Counsel has an excessive caseload or has a conflict of interest. Since 2003 postconviction representation of all indigent capital defendants in the northern region of Florida has been provided by registry attorneys. The registry of attorneys is maintained by the Commission on Capital Cases and is comprised of lawyers who have met certain statutory criteria.[5] A registry attorney must be a member in good standing in the Florida Bar, with not less than three years experience in the practice of criminal law, and must have participated in at least five felony jury trials, five felony appeals, or five capital postconviction evidentiary hearings or any combination of at least five of these proceedings.[6] There are currently 138 registry attorneys who, along with 29 Public Defenders, are handling 412 postconviction collateral proceedings.[7]

A registry attorney is required to attend annually at least seven hours of continuing legal education specifically devoted to the defense of capital cases. A registry attorney is not permitted to represent more than five defendants in capital postconviction litigation at any one time.[8]

A registry attorney who is appointed by the court to represent a capital defendant is required to enter into a contract with the Chief Financial Officer. Section 27.711(4), F.S., provides a fee and payment schedule. Upon approval by the trial court, and after certain stages in litigation are complete, a registry attorney is entitled to payment of $100 per hour by the Chief Financial Officer, up to a maximum of:

- $2,500 upon accepting the appointment and filing the notice of appearance;
- $20,000 after timely filing in the trial court the capital defendant's complete original motion for postconviction relief;[9]
- $20,000 after the trial court issues a final order granting or denying the defendant's motion for postconviction relief;
- $20,000 after timely filing in the Florida Supreme Court the defendant's briefs that address the trial court's final order granting or denying the defendant's motion for postconviction relief and the state petition for writ of habeas corpus;
- $10,000 after the trial court issues an order, pursuant to a remand from the Florida Supreme Court, which directs the trial court to hold further proceedings on the motion for postconviction relief;

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[4] s. 27.701, F.S.
[5] s. 27.710(2), F.S
[6] s. 27.704(2), F.S
[7] *See* Comm'n on Capital Cases, Registry Attorneys, available at http://www.floridacapitalcases.state.fl.us/c-registry-attorney.cfm (last visited Feb. 24, 2006) and Comm'n on Capital Cases, Inmate Legal Status, available at http://www.floridacapitalcases.state.fl.us/c-inmate-status.cfm (last visited Feb. 24, 2006).
[8] There are, however, approximately seven registry attorneys who have caseloads above even seven cases, four more than eleven cases. *See* Comm'n on Capital Cases, Registry Attorneys, available at http://www.floridacapitalcases.state.fl.us/c-registry-attorney.cfm (last visited Feb. 24, 2006). http://www.floridacapitalcases.state.fl.us/c-members.cfm
[9] This paragraph also entitles an attorney to fees if the court schedules a hearing on a matter that makes the filing of the original motion for postconviction relief unnecessary or if the court otherwise disposes of the case; s. 27.704(4)(b), F.S.

- $4,000 after the appeal of the trial court's denial of the motion for postconviction relief and the state petition for writ of habeas corpus become final in the Florida Supreme Court;

- $2,500 at the conclusion of the defendant's postconviction capital collateral proceeding in state court and after filing a petition for writ of certiorari in the U.S. Supreme Court;

- $5,000 if at any time a death warrant is issued to compensate for attorneys fees and costs for representing the defendant throughout the proceedings before the state courts.

In addition, the attorney is authorized to hire an investigator at $40 per hour, up to a maximum of $15,000, to assist in the defendant's representation.[10] The attorney also is entitled to a maximum of $15,000 for miscellaneous expenses, such as the cost of preparing transcripts, compensating expert witnesses and copying documents, although the trial court may approve additional expenses if extraordinary circumstances exist.

The court is required to monitor the performance of assigned counsel to ensure that the capital defendant is receiving quality representation and must receive and evaluate allegations regarding the performance of assigned counsel.[11]

Fees in excess of statutory schedule

Although fees do not normally exceed the statutory schedule,[12] there have been 15 cases since the inception of the registry program where excess attorneys' fees totaling $356,755 were awarded.[13] There have been four cases where excess investigative fees totaling $21,806 were awarded.[14] There have been 20 cases where trial courts authorized additional miscellaneous expenses totaling $327,813.[15] These excess fee cases have occurred with increasing frequency over the last several years.[16]

Fees can exceed the statutory schedule based on court decisions such as the recent case of *Florida Department of Financial Services v. Freeman*[17], the Florida Supreme Court reaffirmed the holding of several prior cases that it is "within the trial judge's discretion to grant fees beyond the statutory maximum to registry counsel in capital collateral cases when 'extraordinary or unusual circumstances exist.'" In *Freeman*, the Department of Financial Services appealed an order from a circuit court granting a registry attorney, who had signed the required contract for services, fees in excess of the statutory maximum. The trial court had granted $27,940.74 in fees for services that were statutorily capped at $2,500. The *Freeman* opinion reviewed the court's prior holdings on the issue of fees in excess of statutory caps. In *Olive v. Maas*,[18] the court held that "fees in excess of the statutory cap are not always awarded to registry counsel in capital collateral cases; however, registry counsel is not foreclosed from requesting excess compensation 'should he or she establish that, given the facts and circumstances of a particular case, compensation within the statutory cap would be confiscatory of this or her time, energy and talent". The *Olive* court relied on the opinion of *Makemson v. Martin County*,[19] which related to compensation to attorneys representing capital defendants at the trial and during direct appeal.

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[10] s. 27.711(5), F.S.
[11] s. 27.711(12), F.S.
[12] Conversation, Executive Dir., Comm'n on Capital Cases (Feb. 24, 2006).
[13] Comm'n on Capital Cases, Payments in Excess of Statutory Caps Since Inception of the Registry Program (spreadsheet) (last updated Jan 31. 2006) (on file the comm'n).
[14] *Id.*
[15] *Id.*
[16] Conversation, Executive Dir., Comm'n on Capital Cases (Feb. 24, 2006).
[17] Florida Department of Financial Services v. Freeman, 2006 WL 176748 (Fla. January 26, 2006).
[18] *Olive v. Maas*, 811 So.2d 644 (Fla. 2002).
[19] 491 So.2d 1109 (Fla. 1986)

According to the *Freeman* court, the attorney requesting fees in excess of the statutory limits has the burden of establishing facts in support of the award. The Florida Supreme Court found that the record from the trial court provided "no evidence upon which the judge could rely to determine if extraordinary or unusual circumstances existed to support an award of excessive fees" and remanded the case back to the trial court for an evidentiary hearing.

Effect of HB 325

Continuing legal education: HB 325 amends s. 27.709, F.S., to authorize the Commission on Capital Cases to sponsor continuing legal education training devoted specifically to capital cases and to undertake any project recommended or approved by the commission members.

The bill also amends s. 27.710, F.S., to modify the continuing legal education (CLE) requirements for registry attorneys. Currently, the registry attorneys must attend 10 hours of CLE annually. The bill requires registry attorneys who are handling a capital case to attend at least 12 hours of CLE every two years.

Currently, an attorney who is actively representing a capital defendant is entitled to a maximum of $500 per fiscal year for tuition and expenses for continuing legal education that pertains to the representation of capital defendants. The bill amends s. 27.711, F.S., to clarify that a registry attorney is entitled to $500 for CLE expenses, regardless of how many capital defendants the attorney represents.

Qualifications: Currently, to be eligible for court appointment as counsel in postconviction proceedings, an attorney must certify that he or she satisfies the minimum experience and training requirements. As explained above, a registry attorney must have not less than three years experience in the practice of criminal law, and must have participated in at least five felony jury trials, five felony appeals, or five capital postconviction evidentiary hearings or any combination of at least five of these proceedings. These requirements are the same as those for the Capital Collateral Regional Counsel. The bill substantially modifies the minimum requirements for registry counsel in s. 27.710, F.S., by requiring that a registry attorney to certify that he or she:

1. Is an active practitioner who has at least five years' experience in the practice of criminal law;
2. Is familiar with the production of evidence and the use of expert witnesses, including psychiatric and forensic evidence;
3. Has demonstrated proficiency necessary for representation in capital cases including the investigation and presentation of mitigation evidence;
4. Has satisfied the above CLE requirements;
5. Has tried at least nine state or federal criminal jury trials to completion, two of which must have been capital cases and
    a. Three of which must have been murder trials;
    b. One of which must have been a murder trial and five of which must have been other felony trials; or
    c. One of which must have included a postconviction evidentiary hearing and five of which must have been other felony trials
6. Alternatively, the attorney can certify that he or she has appealed one capital conviction and appealed at least:
    a. Three felony convictions, one of which must have been murder;
    b. Three felony convictions and participated in one capital postconviction evidentiary hearing; or
    c. Felony convictions, two of which must have been murders.

If the trial court finds that exceptional circumstances exist requiring appointment of an attorney who does not meet the criteria set forth above, the trial court must enter a written order specifying the exceptional circumstances requiring appointment of the attorney and explicit findings that the attorney chosen will provide competent representation in accordance with the intent of the section.

Failure to comply with criterion set forth in the section may be cause to remove the attorney from the registry until the criterion is satisfied. The bill provides that satisfaction of the minimum requirements must be proven by written notification to the commission. The certification requirement can be satisfied by submission of the application by electronic mail without a signature.

These changes are consistent with rule 3.112 of the Rules of Criminal Procedure, which were promulgated by the Florida Supreme Court to set minimum standards for attorneys in capital cases. These changes also are not expected to adversely impact the number of registry attorneys.[20]

Contracting: Currently, a private attorney who is appointed by the court to represent a capital defendant must enter into a contract with the Chief Financial Officer. If an attorney fails to execute the contract within 30 days after the date the contract is mailed to the attorney, the executive director of the commission must notify the trial court. HB 325 requires the executive director to remove the attorney from the registry list.

Quarterly reporting: The bill also requires a registry attorney to agree to submit quarterly reports to the commission and provides that if an attorney fails to submit a quarterly report within 30 days following the end of the quarter, the executive director must remove the attorney from the registry and the court may impose a fine or remove the attorney from the case.

Federal representation: The bill provides that if a registry attorney does not wish to continue representation in the federal courts, the attorney must make reasonable efforts to assist the defendant in finding replacement counsel who meets the federal requirements to represent a capital defendant in federal proceedings.

Payment: The bill also amends s. 27.711, F.S., to modify the payment schedule for registry attorneys. The bill authorizes payment of $100 per hour, up to a maximum of $20,000 after the final hearing on the capital defendant's motion for postconviction relief rather than when the trial court issues a final order granting or denying the defendant's motion. In some cases, judges take an extended amount of time in ruling on a postconviction motion after the evidentiary hearing – this provision will authorize payment to the attorney sooner. The bill authorizes payment of $100 per hour, up to a maximum of $2,500 for the preparation of an initial federal pleading rather than after filing a petition for writ of certiorari in the United States Supreme Court.

The bill provides that an attorney appointed under s. 27.710, F.S., or appointed by the court to replace a capital collateral regional counsel staff attorney or capital collateral regional counsel contract attorney, who incurs costs for representing capital defendants on a pro bono basis shall be paid from registry funds by the Chief Financial Officer if approved by the trial court.

The bill provides that if a trial court judge intends to award attorney fees in excess of those outlined in statute, the judge must include written findings of fact that specifically state the extraordinary nature of the expenditures of the time, energy, and talents of the attorney in the case which are not ordinarily expended in other capital collateral cases. The bill also amends s. 27.7001, F.S., to provide that the Legislature finds that not all capital collateral cases are extraordinary or unusual.

Limitation on number of inmates represented: The bill authorizes a registry attorney to represent up to seven inmates in capital postconviction litigation at any one time rather than only five inmates. The seven-inmate-representation limit includes capital postconviction cases proceeding under contract with the capital collateral regional counsel[21], inmates represented pro bono and inmates privately retaining

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[20] Conversation, Executive Dir., Comm'n on Capital Cases (Feb. 24, 2006).

[21] Section 27.704(2), F.S. authorizes the CCRC to contact with private counsel or with public defenders to provide representation to death sentenced inmates.

the attorney. An attorney may not be appointed to additional capital postconviction cases until the attorney's representation total falls below the seven-case limit.

C. SECTION DIRECTORY:

Section 1. Amends s. 27.7001, F.S., to provide legislative findings.

Section 2. Amends s. 27.709, F.S., to authorize the Commission on Capital Cases to sponsor continuing legal education programs.

Section 3. Amends s. 27.710, F.S., to change the criteria for registry attorneys; to require quarterly reporting to commission; and to authorize executive director to remove attorney from registry in certain circumstances.

Section 4. Amends s. 27.711, F.S., to modify payment schedule for registry attorneys.

Section 5. Provides effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   This bill does not appear to create, modify, amend, or eliminate revenues of state government.

2. Expenditures:

   The impact of the bill on expenditures of state government is indeterminate. While authorizing additional cases per attorney, large changes to the number of death sentence cases are not expected.

   Also, the bill provides that if a judge intends to award attorney fees in excess of those authorized by law, the judge must make findings of fact justifying the order. Courts are already allowing for fees in excess of statutory caps in certain circumstances. To the extent that judges are currently ordering fees in excess of the statutory maximum in cases that would not qualify as extraordinary, this bill may result in a limitation on excessive fees.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   This bill does not appear to create, modify, amend, or eliminate revenues of local governments.

2. Expenditures:

   This bill does not appear to create, modify, amend, or eliminate expenditures of local government.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Court-appointed capital collateral counsel should receive certain fees more quickly than under current law, in that the bill provides for payment after the final hearing on the original motion for postconviction relief, rather than upon the issuance of the court's order on the motion. Further, costs incurred by an attorney who has taken a capital collateral case on a pro bono basis may be paid by the Chief Financial Officer, upon approval of the court.

D. FISCAL COMMENTS:

See above.

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 cities to spend funds or take an action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

   There do not appear to be any other constitutional issues.

B. RULE-MAKING AUTHORITY:

This bill does not appear to create, modify, or eliminate rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Drafting Issue (Lines 180-200): Effect and Remedy for Removal

It is not clear what effect removing an attorney from the registry (for not entering into the required contract with the Department of Financial Services or not submitting the required quarterly report) will have on the current representation of clients by the registry attorney. Most likely, it will only serve as a barrier to future representation.

There also is the issue of whether an attorney who has been removed from the registry can get back on the registry. If an attorney does not submit a quarterly report within 30 days after the end of the quarter, the bill is clear that the executive director is required to remove that attorney from the registry, even if there was a valid reason (*e.g.* illness) for not submitting the report. Yet, there is no process for a removed attorney to return the registry. The current language could be interpreted as a bar: once removed from the registry, the attorney is permanently off the registry.

The sponsor may wish to amend this language if either of these outcomes are the intended result.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

The Criminal Justice Committee adopted a strike-all amendment which:

- Changed the statutory limit on the number of inmates that a registry attorney is authorized to represent from ten to seven. [The current statutory limit is five.]
- Modified the minimum qualifications for registry attorneys.
- Authorized a judge to impose a fine or remove an attorney from the registry if the attorney does not submit a required quarterly report.

CHAMBER ACTION

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1 The Criminal Justice Committee recommends the following:
2
3 **Council/Committee Substitute**
4 Remove the entire bill and insert:
5 A bill to be entitled
6 An act relating to the Commission on Capital Cases;
7 amending s. 27.7001, F.S.; providing legislative findings;
8 amending s. 27.709, F.S.; authorizing the Commission on
9 Capital Cases to sponsor continuing legal education
10 programs devoted specifically to capital cases; amending
11 s. 27.710, F.S.; specifying criteria that a private
12 attorney must satisfy in order to be eligible to be
13 appointed as counsel in a postconviction capital
14 collateral proceeding; providing that a judge may appoint
15 an attorney who does not meet the appointment criteria if
16 exceptional circumstances exist; providing that an
17 attorney may be removed from the capital collateral
18 registry if the attorney does not meet the criteria;
19 directing the executive director of the commission to
20 remove an attorney from the registry if the attorney fails
21 to timely file an executed contract; requiring a private
22 attorney appointed by a court to represent a capital
23 defendant to submit a report each quarter to the

24 commission; requiring that the executive director remove
25 an attorney from the registry if the attorney does not
26 submit the report within a specified time; requiring that
27 an attorney make reasonable efforts to assist the person
28 under a sentence of death in finding an attorney under
29 certain circumstances; amending s. 27.711, F.S.; requiring
30 that costs incurred during pro bono representation of a
31 capital defendant be paid to the attorney; providing that
32 an attorney who is listed on the registry and representing
33 at least one capital defendant is entitled to tuition and
34 expenses for continuing legal education courses; providing
35 that an attorney may represent no more than seven inmates
36 in capital postconviction cases at any one time; requiring
37 that, if a trial court judge intends to award attorney's
38 fees in excess of those set by law, the judge must include
39 written findings of fact specifically stating the
40 extraordinary nature of the expenditures of the time,
41 energy, and talents of the attorney in the case which are
42 not ordinarily expended in other capital collateral cases;
43 providing an effective date.
44
45 Be It Enacted by the Legislature of the State of Florida:
46
47 Section 1. Section 27.7001, Florida Statutes, is amended
48 to read:
49 27.7001 Legislative intent and findings.--It is the intent
50 of the Legislature to create part IV of this chapter, consisting
51 of ss. 27.7001-27.711, inclusive, to provide for the collateral

52 representation of any person convicted and sentenced to death in
53 this state, so that collateral legal proceedings to challenge
54 any Florida capital conviction and sentence may be commenced in
55 a timely manner and so as to assure the people of this state
56 that the judgments of its courts may be regarded with the
57 finality to which they are entitled in the interests of justice.
58 It is the further intent of the Legislature that collateral
59 representation shall not include representation during retrials,
60 resentencings, proceedings commenced under chapter 940, or civil
61 litigation. The Legislature further finds that not all capital
62 collateral cases are extraordinary or unusual.
63 Section 2. Paragraph (d) is added to subsection (2) of
64 section 27.709, Florida Statutes, to read:
65 27.709 Commission on Capital Cases.--
66 (2)
67 (d) The commission may sponsor programs of continuing
68 legal education which are devoted specifically to capital cases
69 and shall undertake any project recommended or approved by the
70 commission members.
71 Section 3. Section 27.710, Florida Statutes, is amended to
72 read:
73 27.710 Registry of attorneys applying to represent persons
74 in postconviction capital collateral proceedings; certification
75 of minimum requirements; appointment by trial court.--
76 (1) The executive director of the Commission on Capital
77 Cases shall compile and maintain a statewide registry of
78 attorneys in private practice who have certified that they meet
79 the ~~minimum~~ requirements of this section and ~~s. 27.704(2),~~ who

80 are available for appointment by the court under this section to
81 represent persons convicted and sentenced to death in this state
82 in postconviction collateral proceedings~~, and who have attended~~
83 ~~within the last year a continuing legal education program of at~~
84 ~~least 10 hours' duration devoted specifically to the defense of~~
85 ~~capital cases, if available. Continuing legal education programs~~
86 ~~meeting the requirements of this rule offered by The Florida Bar~~
87 ~~or another recognized provider and approved for continuing legal~~
88 ~~education credit by The Florida Bar shall satisfy this~~
89 ~~requirement. The failure to comply with this requirement may be~~
90 ~~cause for removal from the list until the requirement is~~
91 ~~fulfilled~~. To ensure that sufficient attorneys are available for
92 appointment by the court, when the number of attorneys on the
93 registry falls below 50, the executive director shall notify the
94 chief judge of each circuit by letter and request the chief
95 judge to promptly submit the names of at least three private
96 attorneys who regularly practice criminal law in that circuit
97 and who appear to meet the minimum requirements to represent
98 persons in postconviction capital collateral proceedings. The
99 executive director shall send an application to each attorney
100 identified by the chief judge so that the attorney may register
101 for appointment as counsel in postconviction capital collateral
102 proceedings. As necessary, the executive director may also
103 advertise in legal publications and other appropriate media for
104 qualified attorneys interested in registering for appointment as
105 counsel in postconviction capital collateral proceedings. Not
106 later than September 1 of each year, and as necessary
107 thereafter, the executive director shall provide to the Chief

108 Justice of the Supreme Court, the chief judge and state attorney
109 in each judicial circuit, and the Attorney General a current
110 copy of its registry of attorneys who are available for
111 appointment as counsel in postconviction capital collateral
112 proceedings. The registry must be indexed by judicial circuit
113 and must contain the requisite information submitted by the
114 applicants in accordance with this section.
115 (2)(a) To be eligible for court appointment as counsel in
116 postconviction capital collateral proceedings, an attorney must
117 certify on an application provided by the executive director
118 that he or she is a member in good standing of The Florida Bar
119 and:
120 1. Is an active practitioner who has at least 5 years'
121 experience in the practice of criminal law, is familiar with the
122 production of evidence and the use of expert witnesses,
123 including psychiatric and forensic evidence, and has
124 demonstrated the proficiency necessary for representation in
125 capital cases, including the investigation and presentation of
126 mitigation evidence;
127 2. Has attended a minimum of 12 hours of continuing legal
128 education programs within the previous 2 years which were
129 devoted to the defense of capital cases and offered by The
130 Florida Bar or another recognized provider of continuing legal
131 education courses; and
132 3.a. Has tried at least nine state or federal jury trials
133 to completion, two of which must have been capital cases and:
134 (I) Three of which must have been murder trials;

135 (II) One of which must have been a murder trial and five
136 of which must have been other felony trials; or
137 (III) One of which must have included a postconviction
138 evidentiary hearing and five of which must have been other
139 felony trials; or
140 b. Has appealed one capital conviction and appealed:
141 (I) At least three felony convictions, one of which must
142 have been a murder;
143 (II) At least three felony convictions and participated in
144 one capital postconviction evidentiary hearing; or
145 (III) At least six felony convictions, two of which must
146 have been murders.
147 (b) If the trial court finds that exceptional
148 circumstances exist requiring appointment of an attorney who
149 does not meet the criteria set forth in paragraph (a), the trial
150 court shall enter a written order specifying the exceptional
151 circumstances requiring appointment of the attorney and explicit
152 findings that the attorney chosen will provide competent
153 representation in accordance with the intent of this section.
154 (c) A failure to comply with any criterion set forth in
155 paragraph (a) may be cause to remove the attorney from the
156 registry until the criterion is satisfied.
157 (d) Satisfaction of the criterion may be proven by
158 submitting a written certification to the commission. The
159 certification is complete upon submission of the application by
160 electronic mail without a signature ~~satisfies the minimum~~
161 ~~requirements for private counsel set forth in s. 27.704(2)~~.

162 (3) An attorney ~~who applies for registration and court~~
163 ~~appointment as counsel in postconviction capital collateral~~
164 ~~proceedings must certify that he or she is counsel of record in~~
165 ~~not more than four such proceedings and, if~~ appointed to
166 represent a person in postconviction capital collateral
167 proceedings~~,~~ shall continue the ~~such~~ representation under the
168 terms and conditions set forth in s. 27.711 until the sentence
169 is reversed, reduced, or carried out or unless permitted to
170 withdraw from representation by the trial court. The court may
171 not permit an attorney to withdraw from representation without a
172 finding of sufficient good cause. The court may impose
173 appropriate sanctions if it finds that an attorney has shown bad
174 faith with respect to continuing to represent a defendant in a
175 postconviction capital collateral proceeding. This section does
176 not preclude the court from reassigning a case to a capital
177 collateral regional counsel following discontinuation of
178 representation if a conflict of interest no longer exists with
179 respect to the case.
180 (4)(a) Each private attorney who is appointed by the court
181 to represent a capital defendant must enter into a contract with
182 the Chief Financial Officer. If the appointed attorney fails to
183 execute the contract within 30 days after the date the contract
184 is mailed to the attorney, the executive director of the
185 Commission on Capital Cases shall notify the trial court and
186 shall remove the attorney from the registry list. The Chief
187 Financial Officer shall develop the form of the contract,
188 function as contract manager, and enforce performance of the
189 terms and conditions of the contract. By signing such contract,

190 the attorney certifies that he or she intends to continue the
191 representation under the terms and conditions set forth in the
192 contract until the sentence is reversed, reduced, or carried out
193 or until released by order of the trial court.
194 (b) Each private attorney appointed by a court to
195 represent a capital defendant shall submit a report each quarter
196 to the commission in the format designated by the commission. If
197 the attorney does not submit the report within 30 days after the
198 end of the quarter, the executive director shall remove the
199 attorney from the registry and the court may impose a fine or
200 remove the attorney from the case.
201 (5)(a) Upon the motion of the capital collateral regional
202 counsel to withdraw under ~~pursuant to~~ s. 924.056(1)(a); or
203 (b) Upon notification by the state attorney or the
204 Attorney General that:
205 1. Thirty days have elapsed since appointment of the
206 capital collateral regional counsel and no entry of appearance
207 has been filed under ~~pursuant to~~ s. 924.056; or
208 2. A person under sentence of death who was previously
209 represented by private counsel is currently unrepresented in a
210 postconviction capital collateral proceeding,
211
212 the executive director shall immediately notify the trial court
213 that imposed the sentence of death that the court must
214 immediately appoint an attorney, selected from the current
215 registry, to represent the ~~such~~ person in collateral actions
216 challenging the legality of the judgment and sentence in the
217 appropriate state and federal courts. If the attorney appointed

218 to represent a person under a sentence of death does not wish to
219 continue representing the person in federal proceedings, the
220 attorney must make reasonable efforts to assist the person in
221 finding an attorney who meets the federal criteria to represent
222 the person in any federal proceedings. The court shall have the
223 authority to strike a notice of appearance filed by a Capital
224 Collateral Regional Counsel, if the court finds the notice was
225 not filed in good faith and may so notify the executive director
226 that the client is no longer represented by the Office of
227 Capital Collateral Regional Counsel. In making an assignment,
228 the court shall give priority to attorneys whose experience and
229 abilities in criminal law, especially in capital proceedings,
230 are known by the court to be commensurate with the
231 responsibility of representing a person sentenced to death. The
232 trial court must issue an order of appointment which contains
233 specific findings that the appointed counsel meets the statutory
234 requirements and has the high ethical standards necessary to
235 represent a person sentenced to death.
236 (6) More than one attorney may not be appointed and
237 compensated at any one time under s. 27.711 to represent a
238 person in postconviction capital collateral proceedings.
239 However, an attorney appointed under this section may designate
240 another attorney to assist him or her if the designated attorney
241 meets the qualifications of this section.
242 Section 4. Subsections (3), (4), (7), and (9) of section
243 27.711, Florida Statutes, are amended, and subsection (15) is
244 added to that section, to read:

245 27.711 Terms and conditions of appointment of attorneys as
246 counsel in postconviction capital collateral proceedings.--
247 (3) An attorney appointed to represent a capital defendant
248 is entitled to payment of the fees set forth in this section
249 only upon full performance by the attorney of the duties
250 specified in this section and approval of payment by the trial
251 court, and the submission of a payment request by the attorney,
252 subject to the availability of sufficient funding specifically
253 appropriated for this purpose. An attorney may not be
254 compensated under this section for work performed by the
255 attorney before July 1, 2003, while employed by the northern
256 regional office of the capital collateral counsel. The Chief
257 Financial Officer shall notify the executive director and the
258 court if it appears that sufficient funding has not been
259 specifically appropriated for this purpose to pay any fees which
260 may be incurred. The attorney shall maintain appropriate
261 documentation, including a current and detailed hourly
262 accounting of time spent representing the capital defendant. The
263 fee and payment schedule in this section is the exclusive means
264 of compensating a court-appointed attorney who represents a
265 capital defendant. When appropriate, a court-appointed attorney
266 must seek further compensation from the Federal Government, as
267 provided in 18 U.S.C. s. 3006A or other federal law, in habeas
268 corpus litigation in the federal courts. <u>An attorney appointed</u>
269 <u>under s. 27.710, or appointed by the court to replace a capital</u>
270 <u>collateral regional counsel staff attorney or capital collateral</u>
271 <u>regional counsel contract attorney, who incurs costs for</u>
272 <u>representing capital defendants on a pro bono basis shall be</u>

273 paid from registry funds by the Chief Financial Officer. These
274 payments must be approved by the trial court before payment.
275 (4) Upon approval by the trial court, an attorney
276 appointed to represent a capital defendant under s. 27.710 is
277 entitled to payment of the following fees by the Chief Financial
278 Officer:
279 (a) Regardless of the stage of postconviction capital
280 collateral proceedings, the attorney is entitled to $100 per
281 hour, up to a maximum of $2,500, after accepting appointment and
282 filing a notice of appearance.
283 (b) The attorney is entitled to $100 per hour, up to a
284 maximum of $20,000, after timely filing in the trial court the
285 capital defendant's complete original motion for postconviction
286 relief under the Florida Rules of Criminal Procedure. The motion
287 must raise all issues to be addressed by the trial court.
288 However, an attorney is entitled to fees under this paragraph if
289 the court schedules a hearing on a matter that makes the filing
290 of the original motion for postconviction relief unnecessary or
291 if the court otherwise disposes of the case.
292 (c) The attorney is entitled to $100 per hour, up to a
293 maximum of $20,000, after the final hearing on ~~trial court~~
294 ~~issues a final order granting or denying~~ the capital defendant's
295 motion for postconviction relief.
296 (d) The attorney is entitled to $100 per hour, up to a
297 maximum of $20,000, after timely filing in the Supreme Court the
298 capital defendant's brief or briefs that address the trial
299 court's final order granting or denying the capital defendant's

300 motion for postconviction relief and the state petition for writ
301 of habeas corpus.
302 (e) The attorney is entitled to $100 per hour, up to a
303 maximum of $10,000, after the trial court issues an order,
304 following ~~pursuant to~~ a remand from the Supreme Court, which
305 directs the trial court to hold further proceedings on the
306 capital defendant's motion for postconviction relief.
307 (f) The attorney is entitled to $100 per hour, up to a
308 maximum of $4,000, after the appeal of the trial court's denial
309 of the capital defendant's motion for postconviction relief and
310 the capital defendant's state petition for writ of habeas corpus
311 become final in the Supreme Court.
312 (g) At the conclusion of the capital defendant's
313 postconviction capital collateral proceedings in state court,
314 the attorney is entitled to $100 per hour, up to a maximum of
315 $2,500, for the preparation of the initial federal pleading
316 ~~after filing a petition for writ of certiorari in the Supreme~~
317 ~~Court of the United States~~.
318 (h) If, at any time, a death warrant is issued, the
319 attorney is entitled to $100 per hour, up to a maximum of
320 $5,000. This payment shall be full compensation for attorney's
321 fees and costs for representing the capital defendant throughout
322 the proceedings before the state courts of Florida.
323
324 The hours billed by a contracting attorney under this subsection
325 may include time devoted to representation of the defendant by
326 another attorney who is qualified under s. 27.710 and who has

327 been designated by the contracting attorney to assist him or
328 her.
329 (7) Each registry ~~An~~ attorney who is representing at least
330 one capital defendant ~~actively representing a capital defendant~~
331 is entitled to a maximum of $500 per fiscal year for tuition and
332 expenses for continuing legal education that pertains to the
333 representation of capital defendants, regardless of the total
334 number of capital defendants the attorney is representing. Upon
335 approval by the trial court, the attorney is entitled to payment
336 by the Chief Financial Officer for expenses for such tuition and
337 continuing legal education.
338 (9) An attorney may not represent more than seven inmates
339 ~~five defendants~~ in capital postconviction litigation at any one
340 time. The seven-inmate-representation limit includes capital
341 postconviction cases proceeding under contract with the capital
342 collateral regional counsel, inmates represented pro bono, and
343 inmates privately retaining the attorney. An attorney may not be
344 appointed to additional capital postconviction cases until the
345 attorney's representation total falls below the seven-case
346 limit.
347 (15) If a trial court judge intends to award attorney fees
348 in excess of those outlined in this section, the judge must
349 include written findings of fact that specifically state the
350 extraordinary nature of the expenditures of the time, energy,
351 and talents of the attorney in the case which are not ordinarily
352 expended in other capital collateral cases.
353 Section 5. This act shall take effect July 1, 2006.

HB 439 CS

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 439 CS
SPONSOR(S): Planas and others
TIED BILLS:

Certificate of Birth Resulting in Stillbirth

IDEN./SIM. BILLS: SB 746

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Health Care Regulation Committee	9 Y, 0 N, w/CS	Bell	Mitchell
2) Governmental Operations Committee		Ziegler/Mitchell	Williamson
3) Health Care Appropriations Committee			
4) Health & Families Council			
5)			

SUMMARY ANALYSIS

The bill allows the parent of a stillborn child to receive a "certificate of birth resulting in stillbirth." The bill specifies the information to be given the parent of a stillborn child regarding the availability of the certificate of birth resulting in stillbirth. The bill sets forth requirements for the certificate of birth resulting in stillbirth.

The bill authorizes the Department of Health to prescribe the form and content of a certificate of birth resulting in stillbirth by rule. The bill also provides a broad grant of rulemaking authority to the Department of Health for administration.

The fiscal impact on state government expenditures is estimated at $4,700 for forms and computer system modifications in the first year. The fiscal impact on state government revenues is projected to be $603 in the first year and $900 in the second year. The bill does not appear to create, modify, or eliminate revenues or expenditures of local government.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government - The bill creates a "certificate of birth resulting in stillbirth." The certificate of birth resulting in stillbirth is optional and is in addition to the certificate of fetal death. There appears to be a fiscal impact on state government expenditures which is not immediately offset by a fiscal impact on state government revenues. The bill increases the rulemaking authority of the Department of Health.

Empower Families - The certificate of birth resulting in stillbirth may help families with the grieving and healing process.

B. EFFECT OF PROPOSED CHANGES:

Vital Records and Fetal Deaths

The Florida Vital Statistics Act[1] authorizes the Department of Health to establish an Office of Vital Statistics, which is responsible for the uniform and efficient registration, compilation, storage, and preservation of all vital records[2] in Florida, including births and fetal deaths.[3]

Section 382.031, Florida Statutes, sets forth the requirements for certificates of births for live births.[4] Section 382.008, Florida Statutes, sets forth the requirements for certificates of fetal death.[5]

There currently is no separate definition, category, or certificate for a stillbirth, which is "an unintended, intrauterine fetal death after a gestational age of not less than 20 completed weeks."[6] This bill creates a definition of stillbirth[7] and creates section 382.0085, Florida Statutes, to provide for a "stillbirth registration."

The bill requires the person filing the fetal death certificate[8] to advise the parent of a stillborn child that the parent has the option to obtain a "certificate of birth resulting in stillbirth"[9] by contacting the Office of Vital Statistics. The bill provides that a certificate of birth resulting in stillbirth:

- May only be requested by a parent named on a fetal death certificate;
- May be issued regardless of the date on which the certificate of fetal death was issued;
- May be subject to a fee of not less than $3 or more than $5;

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[1] Fla. Stat. § 382.001 (2005) (provides that chapter 382, Florida Statutes, is the Florida Vital Statistics Act).
[2] Fla. Stat. § 382.002(13) (2005) (vital records include certificates or reports of birth, death, fetal death, marriage, dissolution of marriage (divorce), and name changes).
[3] Fla. Stat. § 382.003 (2005).
[4] Fla. Stat. § 382.002(9) (2005) ("the complete expulsion or extraction of a product of human conception from its mother, irrespective of the duration of pregnancy, which, after such expulsion, breathes or shows any other evidence of life such as beating of the heart, pulsation of the umbilical cord, and definite movement of the voluntary muscles, whether or not the umbilical cord has been cut or the placenta is attached").
[5] Fla. Stat. § 382.002(5) (2005) ("death prior to the complete expulsion or extraction of a product of human conception from its mother if the 20th week of gestation has been reached and the death is indicated by the fact that after such expulsion or extraction the fetus does not breathe or show any other evidence of life such as beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles").
[6] Fla. HB 439 CS (2005).
[7] The bill creates a new definition in section 382.002(14), Florida Statutes.
[8] Fla. Stat. §382.008(2) (2005) (The funeral director is responsible for filing the certificate of fetal death; in the absence of a funeral director, a physician or other person in attendance at or after the death is responsible for filing the certificate of fetal death.)
[9] The bill creates a new definition in section 382.002(1), Florida Statutes.

- Must include the state file number of the corresponding certificate of death;
- Must contain the statement: "This certificate is not proof of a live birth."
- May not be used to calculate live birth statistics;

The bill requires the parents to be told how to contact the Office of Vital Statistics and that the copy of the certificate of birth resulting in stillbirth is a public record.

The bill authorizes rulemaking by the Department of Health to prescribe the form and content of the certificate of birth resulting in death and to specify the information necessary to prepare the certificate. The bill also permits broad rulemaking "to administer" section 382.0085, Florida Statutes.

The bill provides that the Department of Health is entitled to a fee of not less than $3 or more than $5 for the certificate of birth resulting in still birth.

The bill takes effect July 1, 2006.

Stillbirth Legislation in Other States

Thirteen other states have passed legislation which provides a certificate that includes the words "Certificate of Birth" in the title to the parents of stillborn children: Arizona (2001), Indiana (2002), Louisiana (2003), Maryland (2003), Massachusetts (2002), Minnesota (2005), Missouri (2004), New Jersey (2004), South Carolina (2004), Texas (2005), Utah (2002), Virginia (2003), and Wisconsin (2004).[10]

C. SECTION DIRECTORY:

Section 1: Amends section 382.002, Florida Statutes, to provide definitions.

Section 2: Creates section 382.0085, Florida Statutes, to provide for stillbirth registration and a certificate of birth resulting in stillbirth.

Section 3: Amends section 382.0255, Florida Statutes, to provide a fee.

Section 4: Provides an effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The Department of Health estimates a $603 fiscal impact on state government revenues in year one and a $900 fiscal impact on state government revenues in year two.

2. Expenditures:

   The Department of Health estimates a $4,700 fiscal impact on state government revenues: $1,200 for form design/printing costs and $3,500 for computer system modifications.

[10] MISS Foundation, Legislative Reference Site, at http://www.missingangelsbill.org/stchart.html (last visited Mar. 6, 2006) (the MISS Foundation believes that states should record births as births, whether live or still, since

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

This bill does not appear to create, modify, amend, or eliminate revenues of local governments.

2. Expenditures:

This bill does not appear to create, modify, amend, or eliminate expenditures of local governments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The Office of Vital Statistics is authorized to charge a fee for a certificate of birth resulting in stillbirth.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill authorizes the Department of Health to prescribe the form and content of a certificate of birth resulting in stillbirth by rule. The bill also provides a broad grant of rulemaking authority to the Department of Health for administering the new provision.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Drafting Issue: Ordering a Certificate

The bill currently provides that a parent *may* provide a name for a stillborn child, the date of the event, and the county in which the event occurred on the request for a certificate of birth resulting in stillbirth. This language may be too permissive for the Department of Health to be able to require sufficient information in order to locate the fetal death certificate. That is, a parent is not required to provide *any* information, but can request a certificate of birth resulting in stillbirth. The Department of Health would then be required to do a more expansive records search or ask for additional information which the parents are not required to give. As such, the sponsor may wish to require the date of the event and the county in which the event occurred, but keep the name optional.

Drafting Issue: Public Record

In creating the certificate of birth resulting in stillbirth, the bill does not unequivocally provide whether this certificate acts as a birth certificate or a fetal death certificate. Although the bill provides duplicitous warning requirements for parents that the certificate of birth resulting in stillbirth is a public record,

section 382.025(1), Florida Statutes, provides that "all birth records of this state shall be confidential and exempt from the provisions of section 119.07(1), Florida Statutes."[11]

The sponsor may wish to specifically state how this record should operate. The sponsor may also wish to remove the duplicitous public record warning requirements.

Drafting Issue: Rulemaking Authority

The bill authorizes the Department of Health to "adopt rules...to administer this section." Because this is a very broad grant of rulemaking authority, the sponsor may wish to provide more specific guidance to the Department of Health.

Drafting Issue: Fee Placement

The authorization for the Department of Health to charge a fee for a certificate of birth resulting in stillbirth is placed in a paragraph relating to records searched and retrieved. The sponsor may wish to create a new paragraph to provide for these fees.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On February 22, 2006 the Health Care Regulation Committee adopted three amendments:

- Amendment 1 - Specified that a Certificate of Birth Resulting in Stillbirth is a public record.
- Amendment 2 - Removed a time constraint on the Department of Health development of the form and content of the Certificate of Birth Resulting in Stillbirth by rule.
- Amendment 3 - Requires the Office of Vital Statistics to inform any patient that requests a Certificate of Birth Resulting in Stillbirth that the document is an official public record.

The Heath Care Regulation Committee reported the bill favorably with committee substitute.

[11] This provision does not apply to birth records over 100 years old or those under seal pursuant to court order.

CHAMBER ACTION

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1 The Health Care Regulation Committee recommends the following:
2
3 **Council/Committee Substitute**
4 Remove the entire bill and insert:
5 A bill to be entitled
6 An act relating to certificate of birth resulting in
7 stillbirth; amending s. 382.002, F.S.; providing
8 definitions; creating s. 382.0085, F.S.; requiring that
9 the person required to file the fetal death certificate
10 advise a parent of a stillborn child about the
11 availability of a certificate of birth resulting in
12 stillbirth; requiring that the person required to file the
13 fetal death certificate inform a parent of a stillborn
14 child that copies of the birth certificate resulting in
15 stillbirth may be available as a public record;
16 authorizing the parent to name the stillborn child on a
17 certificate; requiring a state file number for the
18 certificate; requiring the Department of Health to
19 prescribe the form and content of the certificate by rule;
20 prohibiting the Office of Vital Statistics within the
21 Department of Health from using a certificate of birth
22 resulting in stillbirth to calculate certain statistics;
23 authorizing a parent to request a certificate of birth

24 resulting in stillbirth without regard to the date on
25 which the certificate of fetal death was issued;
26 authorizing certain parents to request a certificate of
27 birth resulting in stillbirth from the Office of Vital
28 Statistics; requiring the Office of Vital Statistics to
29 inform such parents that a copy of a certificate of birth
30 resulting in stillbirth may be available as a public
31 record; authorizing the Office of Vital Statistics to
32 charge a fee; requiring a certificate of birth resulting
33 in stillbirth to contain certain information; requiring
34 the department to adopt rules; amending s. 382.0255, F.S.;
35 authorizing the department to collect fees for a search or
36 retrieval of a certificate of birth resulting in
37 stillbirth; providing an effective date.
38
39 Be It Enacted by the Legislature of the State of Florida:
40
41 Section 1. Section 382.002, Florida Statutes, is amended
42 to read:
43 382.002 Definitions.--As used in this chapter, the term:
44 (1) "Certificate of birth resulting in stillbirth" means a
45 certificate issued to record the birth of a stillborn child.
46 (2) ~~(1)~~ "Certification" or "certified" means a document
47 containing all or a part of the exact information contained on
48 the original vital record, and which, when issued by the State
49 Registrar, has the full force and effect of the original vital
50 record.

51 (3) ~~(2)~~ "Dead body" means a human body or such parts of a
52 human body from the condition of which it reasonably may be
53 concluded that death recently occurred.
54 (4) ~~(3)~~ "Department" means the Department of Health.
55 (5) ~~(4)~~ "Dissolution of marriage" includes an annulment of
56 marriage.
57 (6) ~~(5)~~ "Fetal death" means death prior to the complete
58 expulsion or extraction of a product of human conception from
59 its mother if the 20th week of gestation has been reached and
60 the death is indicated by the fact that after such expulsion or
61 extraction the fetus does not breathe or show any other evidence
62 of life such as beating of the heart, pulsation of the umbilical
63 cord, or definite movement of voluntary muscles.
64 (7) ~~(6)~~ "Final disposition" means the burial, interment,
65 cremation, removal from the state, or other authorized
66 disposition of a dead body or a fetus as described in subsection
67 (6) ~~(5)~~. In the case of cremation, dispersion of ashes or
68 cremation residue is considered to occur after final
69 disposition; the cremation itself is considered final
70 disposition.
71 (8) ~~(7)~~ "Funeral director" means a licensed funeral
72 director or direct disposer licensed pursuant to chapter 497 or
73 other person who first assumes custody of or effects the final
74 disposition of a dead body or a fetus as described in subsection
75 (6) ~~(5)~~.
76 (9) ~~(8)~~ "Legal age" means a person who is not a minor, or a
77 minor who has had the disability of nonage removed as provided
78 under chapter 743.

79 (10) ~~(9)~~ "Live birth" means the complete expulsion or
80 extraction of a product of human conception from its mother,
81 irrespective of the duration of pregnancy, which, after such
82 expulsion, breathes or shows any other evidence of life such as
83 beating of the heart, pulsation of the umbilical cord, and
84 definite movement of the voluntary muscles, whether or not the
85 umbilical cord has been cut or the placenta is attached.
86 (11) ~~(10)~~ "Medical examiner" means a person appointed
87 pursuant to chapter 406.
88 (12) ~~(11)~~ "Physician" means a person authorized to practice
89 medicine, osteopathic medicine, or chiropractic medicine
90 pursuant to chapter 458, chapter 459, or chapter 460.
91 (13) ~~(12)~~ "Registrant" means the child entered on a birth
92 certificate, the deceased entered on a death certificate, and
93 the husband or wife entered on a marriage or dissolution of
94 marriage record.
95 (14) "Stillbirth" means an unintended, intrauterine fetal
96 death after a gestational age of not less than 20 completed
97 weeks.
98 (15) ~~(13)~~ "Vital records" or "records" means certificates
99 or reports of birth, death, fetal death, marriage, dissolution
100 of marriage, name change filed pursuant to s. 68.07, and data
101 related thereto.
102 (16) ~~(14)~~ "Vital statistics" means a system of
103 registration, collection, preservation, amendment, and
104 certification of vital records, the collection of other reports
105 required by this act, and activities related thereto, including

106 the tabulation, analysis, and publication of data obtained from
107 vital records.
108 Section 2. Section 382.0085, Florida Statutes, is created
109 to read:
110 382.0085 Stillbirth registration.--
111 (1) The person who is required to file a fetal death
112 certificate under this chapter shall advise the parent of a
113 stillborn child:
114 (a) That the parent may request the preparation of a
115 certificate of birth resulting in stillbirth;
116 (b) That the parent may obtain a certificate of birth
117 resulting in stillbirth by contacting the Office of Vital
118 Statistics;
119 (c) How the parent may contact the Office of Vital
120 Statistics to request a certificate of birth resulting in
121 stillbirth; and
122 (d) That a copy of the original certificate of birth
123 resulting in stillbirth is a document that is available as a
124 public record when held by an agency as defined under s.
125 119.011(2).
126 (2) To order a certificate of birth resulting in a
127 stillbirth, a parent may provide a name for a stillborn child,
128 the date of the event, and the county in which the event
129 occurred on the request for a certificate of birth resulting in
130 stillbirth. If a name does not appear on the fetal death
131 certificate and the requesting parent does not wish to provide a
132 name, the Office of Vital Statistics shall fill in the
133 certificate with the name "baby boy" or "baby girl" and the last

134 name of the parent. The name of the stillborn child provided on
135 or later added by amendment to the certificate of birth
136 resulting in stillbirth must be the same name as placed on the
137 original or amended certificate of the fetal death report
138 pursuant to s. 382.008.
139 (3) A certificate of birth resulting in stillbirth must
140 include the state file number of the corresponding certificate
141 of fetal death.
142 (4) The department shall prescribe by rule the form and
143 content of a certificate of birth resulting in stillbirth and
144 shall specify the information necessary to prepare the
145 certificate.
146 (5) The Office of Vital Statistics may not use a
147 certificate of birth resulting in stillbirth to calculate live
148 birth statistics.
149 (6) A parent may request that the Office of Vital
150 Statistics issue a certificate of birth resulting in stillbirth
151 regardless of the date on which the certificate of fetal death
152 was issued.
153 (7) Only a parent named on a fetal death certificate may
154 request that the Office of Vital Statistics issue a certificate
155 of birth resulting in stillbirth. The Office of Vital Statistics
156 must inform any parent who requests a certificate of birth
157 resulting in stillbirth that a copy of the document is available
158 as a public record when held by an agency as defined under s.
159 119.011(2). A refusal by the Office of Vital Statistics to issue
160 a certificate to a person who is not entitled to a certificate

161 of birth resulting in stillbirth constitutes final agency action
162 and is not subject to review under chapter 120.
163 (8) The Office of Vital Statistics may charge a fee for
164 the certificate of birth resulting in stillbirth pursuant to s.
165 382.0255.
166 (9) A certificate of birth resulting in stillbirth must
167 contain the statement "This certificate is not proof of a live
168 birth."
169 (10) The department shall adopt rules pursuant to ss.
170 120.536(1) and 120.54 to administer this section.
171 Section 3. Paragraph (a) of subsection (1) of section
172 382.0255, Florida Statutes, is amended to read:
173 382.0255 Fees.--
174 (1) The department is entitled to fees, as follows:
175 (a) Not less than $3 or more than $5 for the first
176 calendar year of records searched or retrieved, including a
177 certificate of birth resulting in stillbirth, and a computer
178 certification of the record, a photocopy or birth card if a
179 computer certification is not available, or, if a ~~no~~ record is
180 not located, a certified statement to that effect. An additional
181 fee of not less than $3 or more than $5 if a photocopy is
182 requested in place of or in addition to a computer
183 certification. Additional fees of not less than $1 or more than
184 $2, up to a maximum total of $50, shall be charged for
185 additional calendar years of records searched or retrieved.
186 Section 4. This act shall take effect July 1, 2006.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 567 CS Notaries Public
SPONSOR(S): Kyle
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1312

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee	6 Y, 0 N, w/CS	Shaddock	Bond
2) Governmental Operations Committee		Brown	Williamson
3) Transportation & Economic Development Appropriations Committee			
4) Justice Council			
5)			

SUMMARY ANALYSIS

A notary public is an appointed public officer, commissioned by the Governor, whose function is to administer oaths, take acknowledgments of deeds and other instruments, attest to or certify photocopies of certain documents, and perform other duties.

This bill requires a notary to maintain a journal of notarial acts. The record in the journal must include the date, time, and type of notarial act; the title or name of the document or transaction; the printed name and signature of the signer; and the signer's complete address, telephone number, and specific type of identification presented by the signer. A notary who is either an attorney licensed in this state or who is employed by an attorney licensed in this state is not required to maintain a journal.

This bill also authorizes a notary public to charge $10 dollars for each signature notarized, rather than per document. However, the bill prohibits notaries public from charging fees for services to a U.S. military veteran, firefighter, or law enforcement officer applying for a pension, allotment, allowance, compensation, insurance policy, or other benefit resulting from public service.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government -- This bill increases the regulation of notaries public.

B. EFFECT OF PROPOSED CHANGES:

Present Situation

A notary public (hereinafter "notary" or "notaries") is a "public officer appointed and commissioned by the Governor whose function is to administer oaths; to take acknowledgments of deeds and other instruments; to attest to or certify photocopies of certain documents; and to perform other duties specified by law."[1]

Chapter 117, F.S.,[2] provides for notaries and directs that the Governor is authorized to appoint as many notaries as necessary.[3] A notary must be at least 18 years of age, maintain legal residence in the state throughout the commission, and possess the ability to read, write, and understand English.

Once appointed, a notary serves a four-year term.[4] During the term of office, a notary must post and maintain a $7,500 bond payable to any individual harmed as a result of a notaries breach of duty.[5] The bond must be approved and filed with the Department of State and executed by a surety company that is authorized to transact business in Florida.[6] If a surety pays an individual harmed by the notary for breach of duty, the company must notify the Governor of the payment and the underlying circumstances.[7]

Duties of a Notary

A notary is approved to perform six functions: administer oaths or affirmations;[8] take acknowledgements;[9] attest to photocopies of certain documents;[10] solemnize marriage;[11] verify vehicle identification numbers;[12] and certify contents of a safe-deposit box.[13] With the exception of solemnizing a marriage, a notary public cannot charge more than $10 for each notarial act.[14] Any person who unlawfully possesses a notary public official seal or any papers or copies relating to notarial acts is guilty of a misdemeanor of the second degree,[15] as anyone who impersonates a notary.[16]

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[1] *Governor's Reference Manual for Notaries*, State of Florida, November 2001 ed., pg. 6 (hereinafter "*Reference Manual*").
[2] *See* 1 Fla. Jur 2d Acknowledgments s. 42 stating, "[b]ecause a notary public is generally held to be a public officer, the eligibility of a person to be a notary public is largely regulated by statutory provisions," and citing *Smith v. McEwen*, 161 So. 68 (1935) (notaries public are recognized officers of Florida).
[3] Section 117.01(1), F.S.
[4] *Id.*
[5] Section 117.01(7)(a), F.S.
[6] *Id.*
[7] Section 117.01(8), F.S.
[8] Section 117.03, F.S.
[9] Section 117.04, F.S.
[10] Section 117.05(12)(a), F.S.
[11] Section 117.045, F.S.
[12] Section 319.23(3)(a)2., F.S.
[13] Section 655.94(1), F.S.
[14] Sections 117.05(2)(a) and 117.045, F.S.
[15] Section 117.05(3)(e), F.S.
[16] Section 117.05(7), F.S.

Suspension of a Notary

The Governor can suspend a notary for any of the grounds provided in Art. 4, s. 7, Fla. Const.[17] The Governor also may suspend a notary for grounds of malfeasance, misfeasance, or neglect of duty, as specified in s. 117.01(4), F.S.[18]

Effect of Bill

The bill requires a notary to maintain a journal of notarial acts.[19] The journal is to contain each notarial act in sequential order. The record in the journal must include the date, time, and type of notarial act; the title or name of the document or transaction; the printed name and signature of the signer; and the signer's complete address, telephone number, and specific type of identification presented by the signer.[20] Moreover, the notarial journal must be maintained by a notary for at least 5 years after the date of the last entry. Should a journal be stolen, lost, misplaced, destroyed, or rendered unusable, the notary is required to immediately notify the Executive Office of the Governor in writing of the circumstances of the incident. Finally, failure by a notary to comply with these requirements could result in the suspension or non-renewal of the notary's public commission by the Executive Office of the Governor.

A notary who is either an attorney licensed in this state or who is employed by an attorney licensed in this state is not required to maintain a journal of notarial acts.

Current law allows a notary to charge up to $10 per notarial act.[21] This bill permits a notary to charge $10 per signature notarized, rather than $10 per notarial act. However, a notary may not charge fees for services to a U.S. military veteran, firefighter, or law enforcement officer who is applying for a pension, allotment, allowance, compensation, insurance policy, or other benefit resulting from public service.

C. SECTION DIRECTORY:

Section 1 amends s. 117.05, F.S., regarding notary fees.

Section 2 creates s. 117.071, F.S., requiring a notary to maintain a journal of each notarial act.

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[17] The grounds for suspension by the Governor found in Art. 4, s. 7, Fla. Const. are: "malfeasance, misfeasance, neglect of duty, drunkenness, incompetence, permanent inability to perform official duties, or commission of a felony...."

[18] Grounds of malfeasance, misfeasance, or neglect of duty, specified in section 117.01(4), F.S., include, but are not limited to: a material false statement on the application; a complaint found to have merit by the Governor; failure to cooperate or respond to an investigation by the Governor's Office or the Department of State regarding a complaint; Official misconduct as defined in s. 838.022, F.S.; false or misleading advertising relating to notary public services; unauthorized practice of law; failure to report a change in address or telephone number within the required time or failure to request an amended commission following a name change; commission of fraud, misrepresentation, or any intentional violation of ch. 117, F.S.; charging fees in excess of fees authorized by law; or failure to maintain the required bond.

[19] In 1998, the Legislature enacted a law that required all electronic notarizations to be logged in a journal. *See*, ch. 98-246, L.O.F.; s. 117.20, F.S., (1998 Supp.). Each notarial act memorialized in the journal had to include certain information and be kept at least five years. If the journal was lost or stolen, the notary had to notify the Governor's Office or the Department of State. The notary public had to let the Governor's Office or the Department of State inspect the journal at any time it requested. In 1999, the law was repealed. *See*, s. 165, ch. 99-251, L.O.F. Although Florida law does not currently require the use of a notary journal, the *Governor's Reference Manual for Notaries* recommends that notaries voluntarily maintain a journal. *Reference Manual*, at 42.

[20] The National Notary Association ("NNA") compiled the Model Notary Act of 2002, which was an attempt to modernize the notary public office. The Act was the work of a drafting committee of individuals from the legal, business and governmental spheres. *See* http://www.nationalnotary.org/UserImages/Model_Notary_Act.pdf (last visited March 2, 2006). The Model Notary Act, in ss. 7-1 and 7-2, requires a notary to maintain a journal and suggests that the journal contain a list of information for each act performed; which would include the thumbprint of each principal and witness in a notarial act. The thumbprint requirement, along with several other requirements, was considered controversial by the committee. Comment, s. 7-2(a), Model Notary Act. The instant bill contains no such provision.

[21] Section 117.05(2)(b)2., F.S.

Section 3 provides an effective date of January 1, 2007.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill does not create, modify, amend, or eliminate a state revenue source.

2. Expenditures:

   The bill does not create, modify, amend, or eliminate a state expenditure.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   The bill does not create, modify, amend, or eliminate a local revenue source.

2. Expenditures:

   The bill does not create, modify, amend, or eliminate a local expenditure.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

A notary public must purchase a journal for recording notarial acts.[22]

D. FISCAL COMMENTS:

Due to the new requirements of this bill, the amount of time necessary for a notary public to notarize a document may be increased, thereby potentially increasing the cost of businesses that rely on notary services.

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:

   None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

<u>Public Records Law</u>

Under s. 119.07(1)(a), F.S.:

[22] Journals of notarial acts can be purchased for between $11.95, with space for over 700 entries, to $34.99, which provides space for 775 notarizations.

> Every person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.

As used in s. 119.07, F.S., the term "public records" means:

> all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.[23]

As used in s. 119.07, F.S., the term "agency" means:

> any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.[24]

Because a notary public is a public officer under the State Constitution, the notary journal required by this bill may be a public record that is available for inspection and copying pursuant to Art. I, s. 24(a), Fla. Const. and ch. 119, F.S.

Journal Requirement

The *Reference Manual* drafted by the Governor's Task Force on Notaries Public in 1989 suggested the mandatory use of journals.[25] Moreover, while notary journals are not required to maintain a journal under current law, the *Reference Manual* recommends "any notary who is concerned with liability may want to consider this protective measure to provide a permanent record of his or her notarial acts."[26] Furthermore, the National Notary Association maintains that the use of a notarial journal will assist in preventing real estate fraud. It appears that the NNA's chief tool in preventing real estate fraud is the requirement that each document signer place a thumbprint in the notarial journal; a requirement absent from this bill.

Detractors of the bill point to the increased responsibility a notary would have for each signature as being unduly cumbersome. Their concern revolves around the additional time needed for a notary need to comply with the new requirements.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On February 22, 2006, the Civil Justice Committee adopted an amendment removing everything after the enacting clause. The amendment modified the bill in the following manner:

- An exception to the journal requirement was created. A notary who is either an attorney licensed in this state or who is employed by an attorney licensed in this state is not required to maintain a journal of notarial acts.

- In the event a notary's journal is stolen, lost, misplaced, destroyed, or rendered unusable, the amendment requires the notary to notify solely the Executive Office of the Governor.

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[23] Section 119.011(11), F.S.
[24] Section 119.011(2), F.S.
[25] *Reference Manual*, at 42.
[26] *Id.*, at 43.

- The title was corrected.

The bill was then reported favorably with a committee substitute.

CHAMBER ACTION

The Civil Justice Committee recommends the following:

Council/Committee Substitute

Remove the entire bill and insert:

A bill to be entitled

An act relating to notaries public; amending s. 117.05, F.S.; authorizing notaries public to charge a fee per notarized signature; requiring notaries public to provide services without charge to certain persons; creating s. 117.071, F.S.; requiring notaries public to maintain a journal and to record notarial acts; providing an exception; providing requirements for journal entries; requiring retention of the journal for a specified period after the last entry and requiring certain notice upon failure to do so; providing that failure to comply with such requirements may constitute grounds for suspension or nonrenewal of the notary public commission by the Executive Office of the Governor; providing an effective date.

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

23 Section 1. Subsection (2) of section 117.05, Florida
24 Statutes, is amended to read:
25 117.05 Use of notary commission; unlawful use; notary fee;
26 seal; duties; employer liability; name change; advertising;
27 photocopies; penalties.--
28 (2)(a) The fee of a notary public may not exceed $10 per
29 signature notarized for any one notarial act, except as provided
30 in s. 117.045.
31 (b) A notary public may not charge a fee:
32 1. For witnessing an absentee ballot in an election, and
33 must witness such a ballot upon the request of an elector,
34 provided the notarial act is in accordance with the provisions
35 of this chapter.
36 2. For any notarial act performed for a United States
37 military veteran or a firefighter or law enforcement officer
38 applying for a pension, allotment, allowance, compensation,
39 insurance policy, or other benefit resulting from public
40 service.
41 Section 2. Section 117.071, Florida Statutes, is created
42 to read:
43 117.071 Use of journal for notarial acts.--
44 (1) Each notarial act shall be recorded by the notary
45 public sequentially in a journal in accordance with the
46 provisions of this chapter. A notary who is either an attorney
47 at law licensed to practice in this state or who is employed by
48 an attorney at law licensed to practice in this state is exempt
49 from the requirement to keep a journal of notarial acts.

50 (a) For each notarial act, the notary public shall record
51 in the journal at the time of notarization:
52 1. The date and time of the notarial act.
53 2. The type of notarial act.
54 3. The title or name of the document or transaction.
55 4. The signer's printed name and signature.
56 5. The signer's complete address, telephone number, and
57 specific type of identification presented by the signer.
58 (b) The notary public must retain the journal for
59 safekeeping for at least 5 years after the date of the last
60 entry.
61 (c) If the notary public journal is stolen, lost,
62 misplaced, destroyed, or rendered unusable within the time
63 period specified in paragraph (b), the notary public must
64 immediately notify the Executive Office of the Governor in
65 writing of the circumstances of the incident.
66 (2) Failure of a notary public to comply with the
67 requirements of this section may constitute grounds for
68 suspension or nonrenewal of the notary public commission by the
69 Executive Office of the Governor.
70 Section 3. This act shall take effect January 1, 2007.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 581 Public Benefits
SPONSOR(S): Cretul and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 1796

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Governmental Operations Committee		Brown	Williamson
2) Fiscal Council			
3) State Administration Council			
4)			
5)			

SUMMARY ANALYSIS

The bill prohibits the use of state funds, under the state employee benefit program, for any program providing benefits for any individuals other than enrollees and the spouses and dependent children of enrollees. The bill repeats the prohibition as it applies to the community college board of trustees and the state university board of trustees.

The bill does not appear to have a fiscal impact on state or local government.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government – The bill creates a prohibition on certain state insurance premium contributions from state employers.

B. EFFECT OF PROPOSED CHANGES:

Background: State Employee Health Care

Chapter 110, F.S., provides the statutory authority for the implementation of health insurance and prescription drug coverage for all enrollees. Enrollees include all state officers and employees, retired state officers and employees, surviving spouses of deceased state officers and employees, as well as all state university officers and employees, retired state university officers and employees, and surviving spouses of deceased state university officers and employees.[1]

Enrollees may choose between a self-insured indemnity plan called a preferred provider organization (PPO) or an approved health management organization (HMO). Sections 110.123 and 110.12315, F.S., describe the coverage available and specify the minimum complement of benefits each approved provider must offer. An enrollee may select health insurance coverage from a number of approved provider organizations. The state-sponsored preferred provider organization provides universal access in all of Florida's 67 counties. As an alternative, the enrollee may choose to enroll in one of several managed care plans offered by participating HMOs pre-approved by the Division of State Group Insurance in the Department of Management Services. In counties not served by an HMO, this option is unavailable to enrollees.

The Department of Management Services has authority to establish a comprehensive package of insurance benefits that may include supplemental insurance products. Supplemental insurance is designed to provide coverage for certain treatments that are not included in a health insurance policy, or to provide additional benefits to those already offered in a health insurance policy. The State currently offers active employees the opportunity to purchase from private insurers various supplemental insurance plans and to have the premium payments for such plans deducted from the employee's pay on a pre-tax basis. Unlike the State sponsored PPO or HMO plans, the State does not contribute to any portion of the premium for supplemental insurance. Some of the various supplemental insurance products available to enrollees include vision insurance, dental insurance, supplemental hospitalization insurance, cancer and cancer/intensive care insurance, and accident and accident disability insurance.

Effect of Proposed Legislation

The bill addresses the state's participation in funding benefits programs under the state's insurance programs. The bill prohibits the use of state funds when a benefit is provided "for any individuals other than enrollees and the spouses and dependent children of enrollees." According to the Division of State Group Insurance, the bill "has no impact on Department of Management Services or the State Group Insurance Program as currently administered by the Division of State Group Insurance in accordance with *Florida Statutes* and *Florida Administrative Code*."[2]

If a benefits program were offered by a private provider and that program offered benefits to anyone other than the enrollee or the enrollee's spouse and children, the enrollee would be required to cover

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[1] Sec. 110.123(2)(b), F.S.

[2] Department of Management Services, 2006 Substantive Bill Analysis HB 581, February 7, 2006.

the entire contribution. The state would not be permitted to contribute to the premium as a benefit to the employee. There are currently no such programs.[3]

C. SECTION DIRECTORY:

Section 1 amends s. 110.123, F.S., to prohibit the use of state funds to provide a benefit for anyone other than an enrollee or the spouse or dependent of an enrollee.

Section 2 amends s. 1001.64, F.S., to repeat the prohibition as applied to the community college board of trustees.

Section 3 amends s. 1001.74, F.S., to repeat the prohibition as applied to the state university board of trustees.

Section 4 provides an effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill does not create, modify, amend, or eliminate a state revenue source.

2. Expenditures:

   The bill does not create, modify, amend, or eliminate a state expenditure. The bill reduces potential expenditures related to employee benefits; however the Division of State Group Insurance has advised that there are currently no programs that would be affected by this legislation.[4]

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   The bill does not create, modify, amend, or eliminate a local revenue source.

2. Expenditures:

   The bill reduces potential expenditures related to employee benefits. It is unknown whether or not any local governments currently maintain benefits programs that would be impacted by this legislation.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

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[3] *Id.*
[4] *Id.*

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:

   None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

Not applicable.

1 A bill to be entitled
2 An act relating to public benefits; amending s. 110.123,
3 F.S., relating to the state group insurance program;
4 prohibiting funding for benefits granted under the program
5 from being used to provide benefits for any individuals
6 other than enrollees and the spouses and dependent
7 children of enrollees; amending s. 1001.64, F.S.;
8 prohibiting community college boards of trustees from
9 establishing benefits programs that use state funding to
10 provide benefits for any individuals other than enrollees
11 and the spouses and dependent children of enrollees;
12 amending s. 1001.74, F.S.; prohibiting university boards
13 of trustees from establishing benefits programs that use
14 state funding to provide benefits for any individuals
15 other than enrollees and the spouses and dependent
16 children of enrollees; providing an effective date.
17
18 Be It Enacted by the Legislature of the State of Florida:
19
20 Section 1. Subsection (13) is added to section 110.123,
21 Florida Statutes, to read:
22 110.123 State group insurance program.--
23 (13) CERTAIN BENEFITS PROHIBITED.--No state funding for
24 benefits granted under this section shall be used to provide
25 benefits for any individuals other than enrollees and the
26 spouses and dependent children of enrollees.
27 Section 2. Subsection (18) of section 1001.64, Florida
28 Statutes, is amended to read:

29 1001.64 Community college boards of trustees; powers and
30 duties.--
31 (18) Each board of trustees shall establish the personnel
32 program for all employees of the community college, including
33 the president, pursuant to the provisions of chapter 1012 and
34 rules and guidelines of the State Board of Education, including:
35 compensation and other conditions of employment; recruitment and
36 selection; nonreappointment; standards for performance and
37 conduct; evaluation; benefits and hours of work; leave policies;
38 recognition; inventions and work products; travel; learning
39 opportunities; exchange programs; academic freedom and
40 responsibility; promotion; assignment; demotion; transfer;
41 ethical obligations and conflict of interest; restrictive
42 covenants; disciplinary actions; complaints; appeals and
43 grievance procedures; and separation and termination from
44 employment. <u>The boards of trustees are prohibited from</u>
45 <u>establishing benefits programs that use state funding to provide</u>
46 <u>benefits for any individuals other than enrollees and the</u>
47 <u>spouses and dependent children of enrollees.</u>
48 Section 3. Subsection (19) of section 1001.74, Florida
49 Statutes, is amended to read:
50 1001.74 Powers and duties of university boards of
51 trustees.--
52 (19) Each board of trustees shall establish the personnel
53 program for all employees of the university, including the
54 president, pursuant to the provisions of chapter 1012 and, in
55 accordance with rules and guidelines of the State Board of
56 Education, including: compensation and other conditions of

57 employment, recruitment and selection, nonreappointment,
58 standards for performance and conduct, evaluation, benefits and
59 hours of work, leave policies, recognition and awards,
60 inventions and works, travel, learning opportunities, exchange
61 programs, academic freedom and responsibility, promotion,
62 assignment, demotion, transfer, tenure and permanent status,
63 ethical obligations and conflicts of interest, restrictive
64 covenants, disciplinary actions, complaints, appeals and
65 grievance procedures, and separation and termination from
66 employment. The boards of trustees are prohibited from
67 establishing benefits programs that use state funding to provide
68 benefits for any individuals other than enrollees and the
69 spouses and dependent children of enrollees. The Department of
70 Management Services shall retain authority over state university
71 employees for programs established in ss. 110.123, 110.161,
72 110.1232, 110.1234, and 110.1238 and in chapters 121, 122, and
73 238.
74 Section 4. This act shall take effect July 1, 2006.

PCB GO 06-15

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB GO 06-15 OGSR Autopsy Photographs and Audio and Video Recordings
SPONSOR(S): Governmental Operations Committee
TIED BILLS: **IDEN./SIM. BILLS:** SB 592, SB 1052

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.: Governmental Operations Committee		Williamson	Williamson
1)			
2)			
3)			
4)			
5)			

SUMMARY ANALYSIS

The Open Government Sunset Review Act requires the Legislature to review each public records and each public meetings exemption five years after enactment. If the Legislature does not reenact the exemption, it automatically repeals on October 2nd of the fifth year after enactment.

The bill reenacts the public records exemption for photographs and video and audio recordings of an autopsy in the custody of a medical examiner. The bill reorganizes the section and makes editorial changes. The exemption will repeal on October 2, 2006, if this bill does not become law.

The bill does not appear to have a fiscal impact on state or local government.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

This bill does not appear to implicate any of the House Principles.

B. EFFECT OF PROPOSED CHANGES:

Background

District Medical Examiners

The Governor appoints a district medical examiner for each medical examiner district from nominees who are practicing physicians in pathology. The Medical Examiners Commission[1] submits the nominations to the Governor.[2]

Each district medical examiner may appoint as many physicians as necessary to serve as associate medical examiners. The associate medical examiner serves at the pleasure of the district medical examiner and, when necessary, provides "service at all times and all places within the district."[3]

The district medical examiner has the authority to perform or have performed whatever autopsies[4] or laboratory examinations he or she deems necessary and in the public interest.[5] In the absence of the medical examiner or the associate medical examiner, the state attorney of the county may appoint a competent physician to act in his or her stead.[6]

District Medical Examiner Records

The district medical examiner must maintain duplicate copies of records and the detailed findings of autopsy and laboratory investigations.[7]

Public Records Exemption

A photograph or video or audio recording of an autopsy in the custody of a medical examiner[8] is confidential and exempt[9] from public records requirements.[10] A surviving spouse may view and copy a

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[1] The Medical Examiners Commission is created within the Department of Law Enforcement (s. 406.02(1), F.S.) The commission establishes medical examiner districts within the state (s. 406.05, F.S.)
[2] Section 406.06(1)(a), F.S.
[3] Section 406.06(2), F.S.
[4] A medical examiner is required to perform an autopsy when any person dies of criminal violence; by accident; by suicide; suddenly, when in apparent good health; unattended by a practicing physician or other recognized practitioner; in any prison or penal institution; in police custody; in any suspicious or unusual circumstance; by criminal abortion; by poison; by disease constituting a threat to public health; or by disease, injury, or toxic agent resulting from employment. Section 406.11(11)(a), F.S.
[5] Section 406.11(2)(a), F.S.
[6] Section 406.15, F.S.
[7] Section 406.13, F.S.
[8] For purposes of the exemption, the term "medical examiner" means any district medical examiner, associate medical examiner, or substitute medical examiner acting pursuant to chapter 406, F.S. The term also includes any employee, deputy, or agent of a medical examiner or any other person who may obtain possession of a photograph or audio or video recording of an autopsy in the course of assisting a medical examiner in the performance of his or her official duties. Section 406.135(1), F.S.
[9] There is a difference between records that are exempt from public records requirements and those that are *confidential* and exempt. If the Legislature makes a record confidential and exempt, such record cannot be released by an agency to anyone other than to the persons or entities designated in the statute. *See* Attorney General Opinion 85-62. If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances. *See Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).
[10] Section 406.135(1), F.S.

photograph or video recording or listen to or copy the audio recording of the deceased spouse's autopsy. If there is no surviving spouse, then the surviving parents have access to such records. If there is no surviving spouse or parent, then an adult child has access to such records. The surviving relative with whom authority rests to obtain confidential and exempt autopsy records may designate in writing an agent to obtain those records.[11]

Pursuant to a written request and in the furtherance of its duties and responsibilities, a local governmental entity or a state or federal agency may view or copy a photograph or video recording or may listen to or copy an audio recording of an autopsy. The identity of the deceased must remain confidential and exempt.[12]

The custodian of such records may not permit any other person to view or copy an autopsy photograph or video recording or to listen to or copy the audio recording without a court order.[13] A person must file a petition and obtain a court order in order to view, listen to, or copy such records. A surviving spouse must receive reasonable notice of the petition and of the opportunity to be present and heard at any hearing on the matter. If there is no surviving spouse, then such notice must be provided to the deceased's parents, and if the deceased has no living parent, then to the adult child of the deceased.[14] Upon a showing of good cause,[15] the court may issue an order authorizing a person to view or copy a photograph or video recording of an autopsy or to listen to or copy the audio recording.[16]

This public records exemption does not apply to such photographs or video or audio recordings submitted as part of a criminal or administrative proceeding; however, it appears to apply to such information submitted as part of a civil proceeding.[17] In *Sarasota Herald-Tribune v. State*,[18] the Second District Court of Appeal found that the public records exemption for autopsy photographs and video and audio recordings does not apply to a criminal proceeding because the statute specifically exempts criminal court proceedings from its application.

It is a third degree felony for any:

- Custodian of such photograph or video or audio recording who willfully and knowingly violates the provisions of the exemption.[19]
- Person who willfully and knowingly violates a court order issued pursuant to s. 406.135, F.S.[20]

Pursuant to the Open Government Sunset Review Act,[21] the exemption will repeal on October 2, 2006, unless reenacted by the Legislature.

Effect of Bill

The bill removes the repeal date, thereby reenacting the public records exemption. It also reorganizes the section and makes editorial changes.

C. SECTION DIRECTORY:

Section 1 amends s. 406.135, F.S., to remove the October 2, 2006, repeal date.

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[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] Section 406.135(2)(b), F.S.
[15] In determining good cause, the court must consider whether disclosure is necessary for the public evaluation of governmental performance; the seriousness of the intrusion into the family's right to privacy and whether such disclosure is the least intrusive means available; and the availability of similar information in other public records. In all cases, the viewing, copying, or listening must be under the direct supervision of the records custodian. Section 406.135(2)(a), F.S.
[16] Section 406.135(2)(a), F.S.
[17] Section 406.135(3)(c), F.S.
[18] 2005 WL 3112545 (Fla. App. 2 Dist.)
[19] Section 406.135(3)(a), F.S.
[20] Section 406.135(3)(b), F.S.
[21] Section 119.15, F.S.

Section 2 provides an October 1, 2006, effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   This bill does not create, modify, amend, or eliminate a state revenue source.

2. Expenditures:

   This bill does not create, modify, amend, or eliminate a state expenditure.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   This bill does not create, modify, amend, or eliminate a local revenue source.

2. Expenditures:

   The bill may represent a minimal non-recurring positive impact on local government expenditures. A bill enacting or amending a public records exemption causes a non-recurring negative fiscal impact in the year of enactment because of training employees responsible for replying to public records requests. In the case of bills reviewed under the Open Government Sunset Review process, training costs are incurred if the bill does not pass or if the exemption is amended, as retraining is required. Because the bill eliminates the repeal of the exemption, local governments may recognize a minimal nonrecurring decrease in expenditures because employee-training activities are avoided.

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

2. Other:

   Overly Broad

   Article I, s. 24(c) of the State Constitution, requires that an exemption be no broader than necessary to accomplish its stated purpose.

In *Campus Communications, Inc., v. Earnhardt*,[22] the Fifth District Court of Appeal upheld the public records exemption for autopsy photographs and video and audio recordings against an unconstitutional over breadth challenge. The court found that the exemption met the constitutional requirement that the exemption be no broader than necessary to meet its public purpose. The court also found that the legislature stated with specificity the public necessity justifying the exemption.

The Fifth District Court of Appeal certified the question of constitutionality to the Florida Supreme Court. In July 2003, the Florida Supreme Court denied review of the case, leaving in place the appellate court ruling.[23]

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Other Comments

The current public records exemption does not apply to autopsy photographs or video or audio recordings submitted as part of a criminal or administrative proceeding; however, a civil proceeding is not included in the exception. In order to create uniformity, the inclusion of civil proceedings in the list of exceptions is recommended.

Open Government Sunset Review Act

The Open Government Sunset Review Act sets forth a legislative review process for newly created or substantially amended public records or public meetings exemptions. It requires an automatic repeal of the exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.

The Act provides that a public records or public meetings exemption may be created or maintained only if it serves an identifiable public purpose, and may be no broader than is necessary to meet one of the following purposes:

- Allowing the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protecting sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety. However, only the identity of an individual may be exempted under this provision; or,
- Protecting trade or business secrets.

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement and a two-thirds vote for passage are required because of the requirements of Art. 1, s. 24(c), Florida Constitution. If the exemption is reenacted with grammatical or stylistic changes that do not expand the exemption, if the exemption is narrowed, or if an exception to the exemption is created (e.g., allowing another agency access to the confidential or exempt records), then a public necessity statement and a two-thirds vote for passage are not required.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

Not applicable.

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[22] 821 So.2d 388 (Fla. 5th DCA 2002), *review denied*, 848 So.2d 1153 (Fla. 2003).
[23] 848 So.2d 1153 (Fla. 2003).

1 A bill to be entitled
2 An act relating to a review under the Open Government
3 Sunset Review Act regarding autopsy photographs and video
4 and audio recordings; amending s. 406.135, F.S., which
5 provides an exemption from public records requirements for
6 autopsy photographs and video and audio recordings in the
7 custody of a medical examiner; reorganizing the section;
8 making editorial changes; removing the scheduled repeal of
9 the exemption; providing an effective date.
10
11 Be It Enacted by the Legislature of the State of Florida:
12
13 Section 1. Section 406.135, Florida Statutes, is amended to
14 read:
15 406.135 Autopsies; confidentiality of photographs and video
16 and audio recordings; exemption.--
17 (1) For the purpose of this section, the term "medical
18 examiner" means any district medical examiner, associate medical
19 examiner, or substitute medical examiner acting pursuant to this
20 chapter, as well as any employee, deputy, or agent of a medical
21 examiner or any other person who may obtain possession of a
22 photograph or audio or video recording of an autopsy in the
23 course of assisting a medical examiner in the performance of his
24 or her official duties.
25 (2) A photograph or video or audio recording of an autopsy
26 held by ~~in the custody of~~ a medical examiner is confidential and
27 exempt from ~~the requirements of~~ s. 119.07(1) and s. 24(a), Art. I
28 of the State Constitution, except that a surviving spouse may
29 view and copy a photograph or video recording or listen to or

30 copy an audio recording of the deceased spouse's autopsy. If
31 there is no surviving spouse, then the surviving parents shall
32 have access to such records. If there is no surviving spouse or
33 parent, then an adult child shall have access to such records.
34 (3)(a) ~~However,~~ The deceased's surviving relative, with
35 whom authority rests to obtain such records, may designate in
36 writing an agent to obtain such records.
37 (b) A local governmental entity, or a state or federal
38 agency, in furtherance of its official duties, pursuant to a
39 written request, may view or copy a photograph or video recording
40 or may listen to or copy an audio recording of an autopsy, and
41 unless otherwise required in the performance of their duties, the
42 identity of the deceased shall remain confidential and exempt.
43 (c) The custodian of the record, or his or her designee,
44 may not permit any other person, except an agent designated in
45 writing by the deceased's surviving relative with whom authority
46 rests to obtain such records, to view or copy such photograph or
47 video recording or listen to or copy an audio recording without a
48 court order. ~~For the purposes of this section, the term "medical~~
49 ~~examiner" means any district medical examiner, associate medical~~
50 ~~examiner, or substitute medical examiner acting pursuant to this~~
51 ~~chapter, as well as any employee, deputy, or agent of a medical~~
52 ~~examiner or any other person who may obtain possession of a~~
53 ~~photograph or audio or video recording of an autopsy in the~~
54 ~~course of assisting a medical examiner in the performance of his~~
55 ~~or her official duties.~~
56 (4) ~~(2)~~(a) The court, upon a showing of good cause, may
57 issue an order authorizing any person to view or copy a
58 photograph or video recording of an autopsy or to listen to or

59 copy an audio recording of an autopsy and may prescribe any
60 restrictions or stipulations that the court deems appropriate.
61 (b) In determining good cause, the court shall consider
62 whether such disclosure is necessary for the public evaluation of
63 governmental performance; the seriousness of the intrusion into
64 the family's right to privacy and whether such disclosure is the
65 least intrusive means available; and the availability of similar
66 information in other public records, regardless of form.
67 (c) In all cases, the viewing, copying, listening to or
68 other handling of a photograph or video or audio recording of an
69 autopsy must be under the direct supervision of the custodian of
70 the record or his or her designee.
71 (5) ~~(b)~~ A surviving spouse shall be given reasonable notice
72 of a petition filed with the court to view or copy a photograph
73 or video recording of an autopsy or a petition to listen to or
74 copy an audio recording, a copy of such petition, and reasonable
75 notice of the opportunity to be present and heard at any hearing
76 on the matter. If there is no surviving spouse, then such notice
77 must be given to the parents of the deceased ~~deceased's parents~~,
78 and if the deceased has no living parent, then to the adult
79 children of the deceased.
80 (6) ~~(3)~~ (a) Any custodian of a photograph or video or audio
81 recording of an autopsy who willfully and knowingly violates this
82 section commits a felony of the third degree, punishable as
83 provided in s. 775.082, s. 775.083, or s. 775.084.
84 (b) Any person who willfully and knowingly violates a court
85 order issued pursuant to this section commits a felony of the
86 third degree, punishable as provided in s. 775.082, s. 775.083,
87 or s. 775.084.

88 (7) ~~(c)~~ A criminal or administrative proceeding is exempt
89 from this section, but unless otherwise exempted, is subject to
90 all other provisions of chapter 119, provided however that this
91 section does not prohibit a court in a criminal or administrative
92 proceeding upon good cause shown from restricting or otherwise
93 controlling the disclosure of an autopsy, crime scene, or similar
94 photograph or video or audio recordings in the manner prescribed
95 herein.
96 (8) ~~(4)~~ This exemption shall be given retroactive
97 application.
98 ~~(5) The exemption in this section is subject to the Open~~
99 ~~Government Sunset Review Act of 1995 in accordance with s.~~
100 ~~119.15, and shall stand repealed on October 2, 2006, unless~~
101 ~~reviewed and saved from repeal through reenactment by the~~
102 ~~Legislature.~~
103 Section 2. This act shall take effect October 1, 2006.

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

V