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# **Policy Council**

**JANUARY 21, 2010  
1:00 – 2:00 P.M.  
MORRIS HALL**

**MEETING PACKET**

**Larry Cretul  
Speaker**

**Rep. Marcelo Llorente  
Chair**

**Council Meeting Notice**  
**HOUSE OF REPRESENTATIVES**

**Policy Council**

**Start Date and Time:** Thursday, January 21, 2010 01:00 pm  
**End Date and Time:** Thursday, January 21, 2010 02:00 pm  
**Location:** Morris Hall (17 HOB)  
**Duration:** 1.00 hrs

**Consideration of the following bill(s):**

HB 1 Statutes of Limitations by Porth  
HB 11 Crimes Against Homeless Persons by Porth, Rogers  
HB 59 Athletic Coaches by Gibbons  
HB 89 Pretrial Proceedings by Thompson, N.  
HB 361 Trust Administration by Wood  
HB 449 Sanctions for Certain Court Pleadings by Steinberg

**NOTICE FINALIZED on 01/14/2010 12:44 by Glatfelter.Sukie**



HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1 Statutes of Limitations

SPONSOR(S): Porth and others

TIED BILLS: IDEN./SIM. BILLS: SB 92

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Civil Justice & Courts Policy Committee	12 Y, 0 N	De La Paz	De La Paz
2)	Policy Council		Varn <i>[Signature]</i>	Liepshutz <i>[Signature]</i>
3)	Criminal & Civil Justice Policy Council			
4)				
5)				

SUMMARY ANALYSIS

A statute of limitations is an absolute bar to the filing of a legal case after a date set by law.

HB 1 amends s. 95.11, F.S., to provide an exception to the current two year statute of limitations for wrongful death actions, to provide that wrongful death actions for intentional torts resulting in death from acts described in the murder or manslaughter statutes may be commenced at any time.

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

## HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Background

HB 1 may also be referred to as the "Jeffrey Klee Act." Jeffrey Klee disappeared on June 21, 1977 after last being seen at a lounge in Tamarac, Florida. Witnesses said he left the lounge with a friend named David Cusanelli, but he didn't return home and was never seen again. On March 26, 2008, Jeffrey Klee's remains and van were found at the bottom of a canal in Coral Springs, Florida. Police detectives obtained statements from both David Cusanelli and his brother which revealed facts that appeared sufficient to charge David Cusanelli with manslaughter. The statute of limitations applicable to manslaughter at the time was 3 years. Due to the extended period of time between the day of the Jeffrey's disappearance and the recovery of his body and the admissions of David and his brother, the statute of limitations has long since expired. As a result, a charge of manslaughter cannot be brought against David Cusanelli for the death of Jeffrey Klee.

A statute of limitations is an absolute bar to the filing of a legal case after a date set by law. The date is commonly based on the time that has elapsed since the action giving rise to the case occurred. Such laws creating statutes of limitation specify when the time period begins, how long the limitations period runs, and circumstances by which the running of the statutes may be tolled (suspended).

##### Statute of Limitations on Manslaughter

Section 775.15, F.S., provides that "[a] prosecution for a capital felony, a life felony, or a *felony that resulted in a death* may be commenced at any time." Under this provision, a prosecution for manslaughter may be commenced at any time. With respect to all homicide offenses, what is now the current statutory provision was amended into the statute in 1996.<sup>1</sup>

##### Statute of Limitations on Wrongful Death Actions

Under current law, civil actions for deaths caused by the wrongful act, negligence, default, or breach of contract or warranty of another may be brought under the Wrongful Death Act.<sup>2</sup> Section 768.21, F.S., specifies the types of damages that may be recovered under a wrongful death action. Section 95.11(4)(d) provides for a two year statute of limitations for wrongful death actions. As a result,

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<sup>1</sup> Ch. 96-145, Laws of Florida

<sup>2</sup> Section 768.19, F.S.

although under current law the state may pursue criminal charges against someone for the crimes of murder or manslaughter at any time, civil actions based on the same conduct are limited by the two year statute of limitations applicable to other wrongful death actions.

HB 1 amends s. 95.11, F.S., to provide an exception to the current two year statute of limitations for wrongful death actions, to provide that wrongful death actions for intentional torts resulting in death from acts described in the murder or manslaughter statutes may be commenced at any time. The bill also expressly states that the bringing of a civil action is not conditioned upon the criminal prosecution, arrest or conviction of the person being sued.

HB 1 contains language which limits the application of the changes to the time periods in s. 95.11, F.S., to claims that are not otherwise time barred on the effective date of the act.

The bill becomes effective upon becoming law.

**B. SECTION DIRECTORY:**

Section 1. Provides a name for the act.

Section 2. Amends s. 95.11, F.S., regarding the statute of limitations for civil actions.

Section 3. Provides for application of the changes to s. 95.11, F.S., to claims not otherwise time barred.

Section 4. Provides an effective date.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

None.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

**D. FISCAL COMMENTS:**

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

### **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 to 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/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES**

HB 1

2010

1 A bill to be entitled  
 2 An act relating to statutes of limitations; providing a  
 3 short title; amending s. 95.11, F.S.; eliminating the  
 4 statute of limitations for wrongful death actions for  
 5 intentional torts resulting in death from acts described  
 6 in s. 782.04, F.S., relating to murder, or s. 782.07,  
 7 F.S., relating to manslaughter; providing for application;  
 8 providing an effective date.

9

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

11

12 Section 1. This act may be cited as the "Jeffrey Klee  
 13 Memorial Act."

14 Section 2. Subsection (9) is added to section 95.11,  
 15 Florida Statutes, to read:

16 95.11 Limitations other than for the recovery of real  
 17 property.--Actions other than for recovery of real property  
 18 shall be commenced as follows:

19 (9) FOR INTENTIONAL TORTS RESULTING IN DEATH FROM ACTS  
 20 DESCRIBED IN S. 782.04 OR S. 782.07.--Notwithstanding paragraph  
 21 (4) (d), an action for wrongful death seeking damages authorized  
 22 under s. 768.21 brought against a natural person for an  
 23 intentional tort resulting in death from acts described in s.  
 24 782.04 or s. 782.07 may be commenced at any time. This  
 25 subsection shall not be construed to require an arrest, the  
 26 filing of formal criminal charges, or a conviction for a  
 27 violation of s. 782.04 or s. 782.07 as a condition for filing a  
 28 civil action.



HB1

2010

29           Section 3. The amendment to section 95.11, Florida  
30 Statutes, by this act applies to any claim that is not otherwise  
31 time barred on the effective date of this act.

32           Section 4. This act shall take effect upon becoming a law.



HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 11 Crimes Against Homeless Persons

SPONSOR(S): Porth and others

TIED BILLS: IDEN./SIM. BILLS:

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Public Safety & Domestic Security Policy Committee	13 Y, 0 N	Kramer	Cunningham
2)	Policy Council		Varn <i>AV</i>	Liepshutz <i>NW</i>
3)	Criminal & Civil Justice Policy Council			
4)				
5)				

SUMMARY ANALYSIS

Currently, section 775.085, F.S. provides that the penalty for any felony or misdemeanor offense must be reclassified if the commission of the offense evidences prejudice based on the race, color, ancestry, ethnicity, religion, sexual orientation, national origin, mental or physical disability or advanced age of the victim. This is commonly known as the "hate crime" statute.

HB 11 amends this statute to include offenses evidencing prejudice based on the homeless status of the victim. This will have the effect of increasing the maximum sentence that can be imposed for an offense against a homeless person where the commission of the offense evidences prejudice based on the homeless status of the victim.

## HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

*Hate Crime Statute:* Currently, section 775.085, F.S. provides that the penalty for any felony or misdemeanor offense must be reclassified if the commission of the offense evidences prejudice based on the race, color, ancestry, ethnicity, religion, sexual orientation, national origin, mental or physical disability or advanced age of the victim. This is commonly referred to as a "hate crime" statute. Offenses are reclassified as follows:

- A misdemeanor of the second degree is reclassified to a misdemeanor of the first degree.
- A misdemeanor of the first degree is reclassified to a felony of the third degree.
- A felony of the third degree is reclassified to a felony of the second degree.
- A felony of the second degree is reclassified to a felony of the first degree.

Reclassification of an offense has the effect of increasing the maximum sentence that a judge can impose for the offense. The maximum sentence for a second degree misdemeanor is 60 days in jail; for a first degree misdemeanor is one year in jail; for a third degree felony is five years imprisonment; for a second degree felony is fifteen years imprisonment and for a first degree felony is thirty years imprisonment.<sup>1</sup>

There is currently no section of statute that specifically applies to criminal offenses committed against a homeless person. In 2009, Maryland became the first state to amend their hate crime statute to specifically include homeless status.<sup>2</sup>

The bill amends section 775.085, F.S., the "hate crime" statute, to reclassify the felony or misdemeanor degree of a criminal offense if the commission of the offense evidences prejudice based on the *homeless status* of the victim.

The bill defines the term "homeless status" to mean that the victim:

1. lacks a fixed, regular, and adequate nighttime residence or
2. has a primary nighttime residence that is:

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<sup>1</sup> s. 775.082, F.S.

<sup>2</sup> Maryland Criminal Law s. 10-304

- a. A supervised publicly or privately operated shelter designed to provide temporary living accommodations; or
- b. A public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings.

**B. SECTION DIRECTORY:**

Section 1. Amends s. 775.085, F.S.; relating to evidencing prejudice while committing offenses; reclassification.

Section 2. Provides effective date of October 1, 2010..

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

On April 6, 2009, the Criminal Justice Impact Conference determined that CS/HB 909 which was identical to this bill would have an insignificant prison bed impact on the Department of Corrections.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

**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:

None.

**B. RULE-MAKING AUTHORITY:**

None.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

**IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES**

HB 11

2010

1                   A bill to be entitled  
 2           An act relating to crimes against homeless persons;  
 3           amending s. 775.085, F.S.; reclassifying offenses  
 4           evidencing prejudice based on the homeless status of the  
 5           victim; providing a definition; providing an effective  
 6           date.

7  
 8   Be It Enacted by the Legislature of the State of Florida:

9  
 10           Section 1. Subsection (1) of section 775.085, Florida  
 11   Statutes, is amended to read:

12           775.085   Evidencing prejudice while committing offense;  
 13   reclassification.--

14           (1)(a)   The penalty for any felony or misdemeanor shall be  
 15   reclassified as provided in this subsection if the commission of  
 16   such felony or misdemeanor evidences prejudice based on the  
 17   race, color, ancestry, ethnicity, religion, sexual orientation,  
 18   national origin, homeless status, mental or physical disability,  
 19   or advanced age of the victim:

20           1.   A misdemeanor of the second degree is reclassified to a  
 21   misdemeanor of the first degree.

22           2.   A misdemeanor of the first degree is reclassified to a  
 23   felony of the third degree.

24           3.   A felony of the third degree is reclassified to a  
 25   felony of the second degree.

26           4.   A felony of the second degree is reclassified to a  
 27   felony of the first degree.

28           5.   A felony of the first degree is reclassified to a life

HB 11

2010

29 felony.

30 (b) As used in paragraph (a), the term:

31 1. "Mental or physical disability" means that the victim  
 32 suffers from a condition of physical or mental incapacitation  
 33 due to a developmental disability, organic brain damage, or  
 34 mental illness, and has one or more physical or mental  
 35 limitations that restrict the victim's ability to perform the  
 36 normal activities of daily living.

37 2. "Advanced age" means that the victim is older than 65  
 38 years of age.

39 3. "Homeless status" means that the victim:

40 a. Lacks a fixed, regular, and adequate nighttime  
 41 residence; or

42 b. Has a primary nighttime residence that is:

43 (I) A supervised publicly or privately operated shelter  
 44 designed to provide temporary living accommodations; or

45 (II) A public or private place not designed for, or  
 46 ordinarily used as, a regular sleeping accommodation for human  
 47 beings.

48 Section 2. This act shall take effect October 1, 2010.







## HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

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- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### PRESENT SITUATION

###### Criminal History Screenings

According to information received from the Florida Department of Law Enforcement (FDLE), there is currently no Florida law that requires sports coaches for independent youth athletic teams to be screened against state or national sex offender registries. However, other state laws may suggest that such background screenings must occur, or may prohibit or limit a convicted sexual predator's contact with minors altogether.

###### Background Screenings for Employment at Parks, Playgrounds, and Daycare Centers

Current law provides that a state agency or governmental subdivision, prior to making any decision to appoint or employ a person to work, whether for compensation or as a volunteer, at any park, playground, day care center, or other place where children regularly congregate, must conduct a search of that person's name or other identifying information against the registration information regarding sexual predators and sexual offenders maintained by the FDLE.<sup>1</sup> The screening requirements of the bill are similar to the screening requirements of s. 943.04351, F.S., insofar as both require a search of the state sex offender registry, but different in that the bill also requires a national sex offender registry search.

###### Prohibited Employment for Registered Sexual Predators

Existing law provides that it is a third-degree felony for a registered sexual predator who has been convicted of or found to have committed, or has pled nolo contendere or guilty to, regardless of adjudication, any specified sexual offense to work, whether for compensation or as a volunteer, at any business, school, daycare center, park, playground, or other place where children regularly congregate.<sup>2</sup> Notwithstanding the bill, it appears that a person would be precluded from acting as a sports coach of an independent youth athletic team (at least to the extent of contact with children) if the person is a registered sexual predator as described in s. 775.21(10)(b), F.S.

###### Volunteer and Employee Criminal History System (VECHS)

Pertinent to the bill, the FDLE has described the Volunteer and Employee Criminal History System (VECHS) as follows:

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<sup>1</sup> Section 943.04351, F.S.

<sup>2</sup> Section 775.21(10)(b), F.S.

Through the VECHS program, FDLE and the Federal Bureau of Investigation (FBI) provide to qualified organizations (not individuals) in Florida state and national criminal history record information on applicants, employees, and volunteers. With this criminal history information, the organizations can more effectively screen out those current and prospective volunteers and employees who are not suitable for contact with children, the elderly, or the disabled.

Generally, to be qualified to participate in the VECHS program, an organization (public, private, profit, or non-profit) must provide "care"<sup>3</sup> or "care placement services" ... to children, the elderly, or the disabled.

The VECHS program is not available to organizations currently required to obtain criminal history record checks on their employees and/or volunteers under other statutory provisions, such as day care centers. Those organizations must continue to follow the statutory mandates that specifically apply to them. If, however, an organization is required to obtain state and national checks on only specific types of employees or volunteers, the VECHS program may be able to process requests for state and national checks on the organization's other employees or volunteers.<sup>4</sup>

To become a qualified organization and to obtain criminal history record information through the VECHS program at FDLE, an organization will need to do the following:

- Submit an application to FDLE explaining what functions the organization performs that serve children, elderly, or disabled persons;
- Sign an agreement that the criminal history information would be used only to screen employees and volunteers of that organization for employment purposes;
- Submit \$54.25 for each employee or \$33.25 for each volunteer fingerprint card submission; and
- Submit \$43.25 for each employee or \$33.25 for each volunteer electronic submission.

If an organization becomes qualified and provides the required information for criminal history record requests, FDLE, with the assistance of the FBI, will provide the organization with the following:

- An indication that the person has no criminal history, i.e., no serious arrests in state or national databases, if there are none;
- The criminal history record (RAP sheet) that shows arrests and/or convictions for Florida and other states, if any; and
- Notification of any warrants or domestic violence injunctions that the person may have.<sup>5</sup>

#### Sexual Predator and Offender Information

The FDLE compiles information regarding sex offenders and makes that information available to the public. The information on the FDLE's public website of sexual offenders and sexual predators comes from the following sources: the Florida Department of Corrections, the Florida Department of Highway Safety and Motor Vehicles, and various law enforcement officials.<sup>6</sup> The Dru Sjodin National Sex Offender Public Website of the United States Department of Justice allows the public to search participating state websites for public information "regarding the presence or location of offenders who, in most cases, have been convicted of sexually violent offenses against adults and children and certain sexual contact and other crimes against victims who are minors."<sup>7</sup>

<sup>3</sup> The word "care" is defined in s. 943.0542, F.S. (access to criminal history information provided by FDLE to qualified entities), to include the provision of recreation to children.

<sup>4</sup> Florida Department of Law Enforcement, *Volunteer And Employee Background Checks*, <http://www.fdle.state.fl.us/content/getdoc/9023f5ac-2c0c-465c-995c-f949db57d0dd/VECHS.aspx> (last visited March 13, 2009).

<sup>5</sup> *Id.*

<sup>6</sup> See Florida Department of Law Enforcement, <http://offender.fdle.state.fl.us> (last visited March 11, 2009).

<sup>7</sup> See United States Department of Justice, <http://www.nsopr.gov/> (last visited April 18, 2008).

### Liability for Negligent Hiring

In civil actions premised upon the death or injury of a third person as a result of intentional conduct of an employee, the employer is presumed not to have been negligent in hiring the employee if, prior to hiring, the employer conducted a background check on the employee which revealed no information that would cause an employer to conclude that the employee was unfit for work.<sup>8</sup> Pursuant to statute, the background investigation must include:

- A criminal background check obtained from the Department of Law Enforcement (FDLE);<sup>9</sup>
- Reasonable efforts to contact references and former employers;
- A job application form that includes questions requesting detailed information regarding previous criminal convictions;
- A written authorization allowing a check of the applicant's driver's license record if relevant to the work to be performed; or
- An interview of the prospective employee.<sup>10</sup>

If the employer elects not to conduct an investigation prior to hiring, there is no presumption that the employer failed to use reasonable care in hiring an employee.<sup>11</sup>

### PROPOSED CHANGES

The bill requires that an independent sanctioning authority of a youth athletic team to screen a person in this state who applies to be an athletic coach of the team, prior to hiring or recruiting the person as a athletic coach. The screening consists of a search of the state and national sex offender registries. The sanctioning authority must disqualify any athletic coach appearing in either registry.

#### Definitions

The bill defines an "independent sanctioning authority" as a private, nongovernmental entity that organizes, operates, or coordinates a youth athletic team in this state if the team includes one or more minors and is not affiliated with a private school as defined in s. 1002.01, F.S. The team must be based in this state.

Under the bill, an "athletic coach" means a person who is authorized by an independent sanctioning authority to work for 20 or more hours within a calendar year, whether for compensation or as a volunteer, for a youth athletic team based in this state and has direct contact with one or more minors on then youth athletic team.

#### Required Screenings

The bill requires an independent sanctioning authority to screen a person in this state who applies to be an athletic coach of an independent youth athletic team prior to hiring or recruiting the person as a sports coach. The screening consists of a search of the sexual offenders and predators public website of the Florida Department of Law Enforcement and the Dru Sjodin National Sex Offender Public Website of the United States Department of Justice.

The sanctioning authority must disqualify any athletic coach applicant appearing in either registry. It is the applicant's appearance in the state or national sex offender registry, rather than a conviction for any particular sexual offense, that disqualifies him or her as an athletic coach.

#### Notification of Screening Process

The bill requires the sanctioning authority to provide, within 7 business days following the background screening, written notice to the person disqualified advising of the results of the background check and

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<sup>8</sup> Section 768.096(1), F.S.

<sup>9</sup> The employer must request and obtain from FDLE a check of the information as reported in the Florida Crime Information Center system as of the date of the request. Section 768.096(2), F.S.

<sup>10</sup> Section 768.096(1)(a)-(e).

<sup>11</sup> Section 768.096(3), F.S.

of disqualification. The independent sanctioning authority must maintain documentation of the results of each person screened, and the written notice of disqualification provided to each person disqualified.

#### Civil Liability

In any civil suit brought against an independent sanctioning authority for harm caused by the intentional tort of an athletic coach that relates to alleged sexual misconduct, a rebuttable presumption<sup>12</sup> is created that the independent sanctioning authority was not negligent in authorizing the athletic coach if the sanctioning authority complied with the results of the bill prior to authorizing a person to act as a sports coach.

#### Use of the VECHS Program

Finally, this bill encourages sanctioning authorities to participate in the VECHS program authorized under the National Child Protection Act and s. 943.0542, F.S.

#### B. SECTION DIRECTORY:

Section 1: Creates an unnumbered section relating to athletic coaches for independent sanctioning authorities.

Section 2: Provides an effective date of July 1, 2010.

### II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

#### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

#### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

See fiscal comments.

#### D. FISCAL COMMENTS:

The state and federal sexual offender and sexual predator registries are available to the public via the Internet. There are no fees associated with accessing or searching the registries.

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

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<sup>12</sup> Once evidence rebutting a presumption is introduced, "the presumption does not automatically disappear; it remains in effect even after evidence rebutting the presumption has been introduced. The jury must decide if the evidence is sufficient to overcome the presumption, that is, it is not overcome until the trier of fact believes that the presumed fact has been overcome by whatever degree of persuasion is required by the substantive law of the case." 23 FLA. JUR 2D *Evidence and Witnesses* s. 100.

**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:**

The sex offender registry screening requirements of the bill should have a nominal impact on the sanctioning authorities. The state and national registries are public websites that can be accessed by persons with minimal computer skills, and searches can be conducted relatively quickly. Those sanctioning authorities electing to perform searches via a commercial consumer reporting agency may incur moderate expenses for the screening.

**B. RULE-MAKING AUTHORITY:**

None.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

**IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES**

1                   A bill to be entitled  
 2           An act relating to athletic coaches; defining the terms  
 3           "athletic coach" and "independent sanctioning authority";  
 4           requiring the independent sanctioning authority of a youth  
 5           athletic team to screen the background of current and  
 6           prospective athletic coaches through designated state and  
 7           federal sex offender registries; requiring the independent  
 8           sanctioning authority to disqualify any athletic coach  
 9           appearing on a registry; requiring the independent  
 10          sanctioning authority to provide a disqualified athletic  
 11          coach with written notice; requiring the independent  
 12          sanctioning authority to maintain documentation of  
 13          screening results and disqualification notices; providing  
 14          a rebuttable presumption that an independent sanctioning  
 15          authority did not negligently authorize an athletic coach  
 16          for purposes of a civil action for an intentional tort  
 17          relating to alleged sexual misconduct by the athletic  
 18          coach if the authority complied with the screening and  
 19          disqualification requirements; encouraging independent  
 20          sanctioning authorities for youth athletic teams to  
 21          participate in the Volunteer and Employee Criminal History  
 22          System; providing an effective date.

23  
 24   Be It Enacted by the Legislature of the State of Florida:

25  
 26           Section 1. Athletic coaches for independent sanctioning  
 27           authorities.--

28           (1) As used in this section, the term:



29        (a) "Athletic coach" means a person who:  
 30            1. Is authorized by an independent sanctioning authority  
 31 to work for 20 or more hours within a calendar year, whether for  
 32 compensation or as a volunteer, for a youth athletic team based  
 33 in this state; and  
 34            2. Has direct contact with one or more minors on the youth  
 35 athletic team.

36        (b) "Independent sanctioning authority" means a private,  
 37 nongovernmental entity that organizes, operates, or coordinates  
 38 a youth athletic team in this state if the team includes one or  
 39 more minors and is not affiliated with a private school as  
 40 defined in s. 1002.01, Florida Statutes.

41        (2) An independent sanctioning authority shall:  
 42            (a) Conduct a background screening of each current and  
 43 prospective athletic coach. No person shall be authorized by the  
 44 independent sanctioning authority to act as an athletic coach  
 45 after July 1, 2010, unless a background screening has been  
 46 conducted and did not result in disqualification under paragraph  
 47 (b). Background screenings shall be conducted annually for each  
 48 athletic coach. For purposes of this section, a background  
 49 screening shall be conducted with a search of the athletic  
 50 coach's name or other identifying information against state and  
 51 federal registries of sexual predators and sexual offenders,  
 52 which are available to the public on Internet sites provided by:  
 53            1. The Department of Law Enforcement under s. 943.043,  
 54 Florida Statutes; and  
 55            2. The Attorney General of the United States under 42  
 56 U.S.C. s. 16920.

57 | (b) Disqualify any person from acting as an athletic coach  
 58 | if he or she is identified on a registry described in paragraph  
 59 | (a).

60 | (c) Provide, within 7 business days following the  
 61 | background screening under paragraph (a), written notice to a  
 62 | person disqualified under this section advising the person of  
 63 | the results and of his or her disqualification.

64 | (d) Maintain documentation of:

65 | 1. The results for each person screened under paragraph  
 66 | (a); and

67 | 2. The written notice of disqualification provided to each  
 68 | person under paragraph (c).

69 | (3) In a civil action for the death of, or injury or  
 70 | damage to, a third person caused by the intentional tort of an  
 71 | athletic coach that relates to alleged sexual misconduct by the  
 72 | athletic coach, there is a rebuttable presumption that the  
 73 | independent sanctioning authority was not negligent in  
 74 | authorizing the athletic coach if the authority complied with  
 75 | the background screening and disqualification requirements of  
 76 | subsection (2) prior to such authorization.

77 | (4) The Legislature encourages independent sanctioning  
 78 | authorities for youth athletic teams to participate in the  
 79 | Volunteer and Employee Criminal History System, as authorized by  
 80 | the National Child Protection Act of 1993 and s. 943.0542,  
 81 | Florida Statutes.

82 | Section 2. This act shall take effect July 1, 2010.

COUNCIL/COMMITTEE AMENDMENT

Bill No. HB 59 (2010)

Amendment No.

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: Policy Council  
2 Representative Gibbons offered the following:

4       **Amendment (with title amendment)**

5       Remove lines 42-56 and insert:

6       (a)1. Conduct a background screening of each current and  
7 prospective athletic coach. No person shall be authorized by the  
8 independent sanctioning authority to act as an athletic coach  
9 after July 1, 2010, unless a background screening has been  
10 conducted and did not result in disqualification under paragraph

11 (b). Background screenings shall be conducted annually for each  
12 athletic coach. For purposes of this section, a background  
13 screening shall be conducted with a search of the athletic  
14 coach's name or other identifying information against state and  
15 federal registries of sexual predators and sexual offenders,  
16 which are available to the public on Internet sites provided by:

17       a. The Department of Law Enforcement under s. 943.043,  
18 Florida Statutes; and

Amendment No.

19 b. The Attorney General of the United States under 42  
20 U.S.C. s. 16920.

21 2. For purposes of this section, a background screening  
22 conducted by a commercial consumer reporting agency in  
23 compliance with the federal Fair Credit Reporting Act using the  
24 identifying information referenced in subparagraph 1. and that  
25 includes searching that information against the sexual predator  
26 and sexual offender Internet sites listed in sub-subparagraphs  
27 1.a. and b. shall be deemed in compliance with the requirements  
28 of this section.

29 -----

30 **T I T L E A M E N D M E N T**

31 Remove line 7 and insert:

32 federal sex offender registries; providing that a commercial  
33 consumer reporting agency screening that meets specified  
34 requirements complies with screening requirements; requiring the  
35 independent



HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 89 Pretrial Proceedings

SPONSOR(S): Thompson and others

TIED BILLS: IDEN./SIM. BILLS: SB 300

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Public Safety & Domestic Security Policy Committee	12 Y, 0 N	Padgett	Cunningham
2)	Policy Council		Varn <i>H</i>	Liepshutz <i>MLL</i>
3)	Criminal & Civil Justice Policy Council			
4)				
5)				

SUMMARY ANALYSIS

If a person sentenced to probation commits a new criminal offense, the person is in violation of the terms of probation. In such instances, the probation officer files an affidavit alleging a violation of probation with the court. The court may then issue a warrant for the probationer's arrest. Their probation is not violated until the probation officer files an affidavit and the judge signs an arrest warrant.

Generally, a judge may set any bond amount on the arrest warrant for a person who violates probation. The amount of the bond depends on the nature of the probation violation and the probationer's past history. Under certain circumstances listed in s. 903.0351, F.S., the judge must order pretrial detention without bail until the resolution of the probation violation or community control violation hearing.

The bill provides that the court may order pretrial detention or pretrial release of any person who is on probation or community control if the person commits a new criminal offense for which the court finds the existence of probable cause. If no affidavit of a violation of probation or community control is filed within 10 days, the order of pretrial detention or pretrial release relating to the violation is dismissed.

## HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Present Situation

Section 948.01, F.S. provides the circumstances for which the court can place a person on probation<sup>1</sup> or community control<sup>2</sup>. Any person who is found guilty by a jury, the court sitting without a jury, or enters a plea of guilty or nolo contendere may be placed on probation or community control; regardless of whether adjudication is withheld.<sup>3</sup> The Department of Corrections (DOC) supervises all probationers sentenced in circuit court.<sup>4</sup> Section 948.03, F.S. provides a list of standard conditions of probation. In addition to the standard conditions of probation, the court may add additional conditions to the probation that it deems proper.<sup>5</sup> A condition requiring the probationer to not commit any new criminal offenses is a standard condition.<sup>6</sup>

If a person sentenced to probation commits a new criminal offense, the person is in violation of the terms of probation. In such instances, the probation officer files an affidavit alleging a violation of probation with the court.<sup>7</sup> The court may then issue a warrant for the probationer's arrest.<sup>8</sup> Their probation is not violated until the probation officer files an affidavit and the judge signs an arrest warrant.

Generally, a judge may set any bond amount on the arrest warrant for a person who violates probation. The amount of the bond depends on the nature of the probation violation and the probationer's past history. Under certain circumstances listed in s. 903.0351, F.S.<sup>9</sup>, the judge must order pretrial

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<sup>1</sup> "Probation" is defined as a form of community supervision requiring specified contacts with parole and probation officers and other terms and conditions as provided in s. 948.03, F.S. Section 948.001(5), F.S.

<sup>2</sup> "Community control" is defined as a form of intensive, supervised custody in the community, including surveillance on weekends and holidays, administered by officers with restricted caseloads. Community control is an individualized program in which the freedom of an offender is restricted within the community, home, or noninstitutional residential placement and specific sanction and imposed and enforced. Section 948.001(3), F.S.

<sup>3</sup> Section 948.01(1), F.S.

<sup>4</sup> Id.

<sup>5</sup> Section 948.03(2), F.S.

<sup>6</sup> Fl. R. Crim. Pro. 3.790 (2010).

<sup>7</sup> Section 948.06(1)(b), F.S.

<sup>8</sup> Id.

<sup>9</sup> Circumstances include detention of a person who is a violent felony offender of special concern defined in s. 948.06, F.S.; a person on felony probation who commits a qualifying act defined in s. 948.06(8)(c), F.S.; a person on felony probation that has previously been found by the court to be a habitual violent felony offender as defined in s. 775.084(1)(b), F.S., a three-time violent offender as

detention without bail until the resolution of the probation violation or community control violation hearing.

Proposed Changes

The bill provides that the court may order pretrial detention or pretrial release of any person who is on probation or community control if the person commits a new criminal offense for which the court finds the existence of probable cause. If no affidavit of a violation of probation or community control is filed within 10 days, the order of pretrial detention or pretrial release relating to the violation is dismissed.

**B. SECTION DIRECTORY:**

Section 1: Cites the bill as the "Officer Andrew Widman Act."

Section 2: Amends s. 948.06, F.S., relating to violation of probation or community control; revocation; modification; continuance; failure to pay restitution or cost of supervision.

Section 3: Provides an effective date of October 1, 2010.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

See fiscal comments.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

See fiscal comments.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

**D. FISCAL COMMENTS:**

The bill could potentially increase the length of time a probationer arrested for a new offense must remain in jail. This could result in an increase in the local jail population.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

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defined in s. 775.084(1)(c), F.S., or a sexual predator under s. 775.21, F.S. who commits a qualifying act defined in s. 948.06(8)(c), F.S.



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:

The idea of setting pretrial detention/release conditions for a potential violation of probation case, before the violation of probation affidavit is actually filed, may raise due process concerns. In the early 1980s, sections 949.10 and 949.11, F.S., contained language that is similar to that of HB 89. These sections provided that the arrest of any person who was on probation was prima facie evidence of a violation of the terms and conditions of such probation. Upon such arrest, probation was immediately temporarily revoked and such person had to remain in custody until a hearing by the Parole and Probation Commission or the court. The statutes required the hearing to be held within 10 days from the date of the arrest, and provided that the failure of the commission or the court to hold the hearing within 10 days from the date of arrest resulted in the immediate release of such person from incarceration on the temporary revocation.

Although these sections of statute were repealed in 1982, they were analyzed by various courts. In *Miller v. Toles*, 442 So.2d 177 (Fla. 1983), an offender alleged that his due process rights were violated because he was not given a hearing until the eleventh day after being placed in custody. The Florida Supreme Court agreed and stated that:

Without provision for expedited final hearings for a parolee or a probationer arrested for alleged commission of a felony, statutes governing subsequent felony arrest of felony parolee or probationer which deny the parolee or probationer arrested a preliminary probable cause hearing would be subject to constitutional attack as imposing an automatic forfeit of liberty interests upon arrest, not conviction, for a felony.

The Court acknowledged that probationers could be afforded lesser due process rights but stated that the quid pro quo for doing so was the expedited final hearing. The Court stated that without that provision, the statute would be subject to constitutional attack as imposing an automatic forfeit of liberty interests upon *arrest*, not *conviction*, for a felony.

Unlike the provisions of ss. 949.10 and 949.11, F.S., HB 89 only requires that a violation affidavit be *filed* within ten days of an offender's arrest (it would follow that the *hearing* would be more than 10 days after the offender's arrest). As such, the bill may raise due process concerns.

Additionally, there may be an issue of separation of powers to the extent that the court is assuming the role of the state (Department) by initiating the violation of probation process. Probation officers may feel obligated to file violation of probation affidavits at the direction of the court or because the court has already made an initial determination by ordering pretrial detention/release conditions.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Section 903.046, F.S. currently provides that the court may consider the defendant's past or present conduct and record of convictions in determining the bail amount for the new criminal offense.

**IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES**

A bill to be entitled

An act relating to pretrial proceedings; providing a short title; amending s. 948.06, F.S.; providing that at the first appearance of a probationer or an offender on community control arrested for a new offense for which the court finds the existence of probable cause, the court may order pretrial detention or pretrial release of the person with or without bail to await further hearing to determine the outcome of a violation hearing; providing for dismissal if no affidavit alleging a violation of probation or community control is filed within a specified period; exempting persons subject to hearings under specified provisions; providing an effective date.

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

Section 1. This act may be cited as the "Officer Andrew Widman Act."

Section 2. Paragraphs (c) through (f) of subsection (1) of section 948.06, Florida Statutes, are redesignated as paragraphs (d) through (g), respectively, and a new paragraph (c) is added to that subsection to read:

948.06 Violation of probation or community control; revocation; modification; continuance; failure to pay restitution or cost of supervision.--

(1)

(c) Notwithstanding s. 907.041, at the first appearance of a probationer or an offender on community control arrested for a

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29 new offense for which the court finds the existence of probable  
 30 cause, the court may order pretrial detention or pretrial  
 31 release of the person with or without bail to await further  
 32 hearing to determine the outcome of a violation hearing. If no  
 33 affidavit alleging a violation of probation or community control  
 34 is filed with the court within 10 days after arrest for the new  
 35 offense, the order regarding pretrial detention or pretrial  
 36 release on the uncharged violation of probation or community  
 37 control shall be dismissed. This paragraph does not apply to a  
 38 probationer or community controllee subject to a hearing on his  
 39 or her danger to the community required under subsection (4) or  
 40 paragraph (8)(e).

41 Section 3. This act shall take effect October 1, 2010.



HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 361

Trust Administration

SPONSOR(S): Wood

TIED BILLS: None

IDEN./SIM. BILLS: SB 998

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Civil Justice & Courts Policy Committee	11 Y, 0 N	Bond	De La Paz
2)	Policy Council		Varn <i>OX</i>	Liepshutz <i>ML</i>
3)	Criminal & Civil Justice Policy Council			
4)				
5)				

SUMMARY ANALYSIS

A trust is a legal entity created by a settlor for the benefit of one or more beneficiaries. Trusts are highly regulated, and are complicated by their relationship to federal tax laws and probate laws. This bill amends trust law, and probate law related to trusts, to:

- Specify how a trust may be assessed the expenses and obligations of the estate of the settlor.
- Provide that a court may deny compensation to an expert testifying as to reasonable compensation.
- Increase the amount of property that may protected from creditors in certain trusts.

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

## HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

A trust is a legal entity created by a settlor<sup>1</sup> for the benefit of one or more beneficiaries. Trusts are highly regulated, and are complicated by their relationship to federal tax laws and probate laws. This bill amends trust law, and probate law related to trusts.

#### **Apportionment of Expenses and Obligations of an Estate**

Section 733.607(2), F.S., provides that, if a decedent's probate estate assets are insufficient to pay expenses of administering the estate and other obligations, the probate estate can request that the insufficiency be paid from the decedent's revocable trust, if one exists. Similarly, s. 733.707(3), F.S., provides that a probate estate may require a decedent's revocable trust to pay expenses and obligations of the probate estate. Section 736.05053, F.S., requires the trustee of a trust to comply with the requirement to pay expenses and obligations of the probate estate.

It is unclear from which portion of a revocable trust the payments required by ss. 733.607 and 733.707, F.S., are to be paid from. The probate law, at s. 733.805, F.S., provides a means to determine which part of an estate is required to pay for the expenses and obligations of the probate estate (known as "abatement").

This bill amends ss. 733.607(2) and 733.707(3), F.S., to specifically reference the requirement in s. 736.05053, F.S., and to provide that the abatement provisions of the probate code at s. 733.805, F.S. apply to a revocable trust when that trust must pay expenses and obligations of a probate estate. This bill also amends s. 736.05053, F.S., to specifically provide that abatement applies to a revocable trust as it applies to the probate estate. These changes conform to the provision in s. 733.805(4), F.S., that provides that a decedent's will and revocable trust be construed as one common instrument.

#### **Compensation of Trust Professionals**

The compensation of any person employed by a trust, including the trustee and professionals employed by the trustee (usually accountants and lawyers), is subject to court supervision and review. Section 736.0206(1), F.S., requires that all interested parties must be given notice of an application for compensation. This bill removes the statutory requirement that all interested persons be given notice

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<sup>1</sup> The settlor contributes the property to be managed and eventually distributed by the trust. The settlor also creates the trust instrument that names the beneficiaries of the trust and provides for management of the trust.

of an application for compensation. Current court rules require notice to all interested parties of all matters<sup>2</sup>, including an application for compensation of any person.<sup>3</sup> Unless the court rules are changed, this statutory change will have no effect.

In general, the court is not required to obtain expert testimony to justify a request for compensation. If a party objects to compensation, one or more of the parties may employ an expert witness to testify as to the reasonableness of the compensation. If an interested party objects to compensation of any person, s. 736.0206(5), F.S., requires the trust to pay an expert witness fee should an expert testify. This bill amends s. 736.0206(5), F.S., to provide that the court does not have to award compensation to an expert witness if the testimony did not assist the court.

This bill also repeals the attorney's fees provisions at ss. 736.1007(7), and 736.1007(9), F.S., that are duplicative of the provisions regarding compensation of any person at s. 736.0206, F.S.

### **Creditor Claims Against Trust Assets**

Traditionally, self-settled trusts have been treated harshly when it comes to creditors' rights. This follows from a widely accepted public policy maxim that an individual should not be permitted to put property in a trust for his or her own benefit and thereby escape creditor claims. Section 736.0505(1), F.S., provides that, whether or not a trust includes a spendthrift provision:

- While the trust is revocable, the trust property is subject to the claims of the settlor's creditors; and
- In the case of an irrevocable trust, a settlor's creditor or assignee may reach the maximum that can be distributed to or for the benefit of the settlor. Notwithstanding this ability, the assets of the trust are not subject to the creditor's or assignee's claims merely because the trustee possesses the power to pay tax liabilities of the settlor.

Additionally, s. 736.0505(2)(a), F.S., provides that a person holding a power of withdrawal (the right to demand money from the trust) is treated the same as a settlor of the trust for purposes of the claims of creditors of the person holding that power. While the power of withdrawal is available, the full amount subject to withdrawal may be garnished by a creditor of a person holding the power. Upon the lapse, release, or waiver of the power of withdrawal, however, s. 736.0505(2)(b), F.S., provides that a creditor may only claim the amount that could have been withdrawn that was in excess of the greater of the federal gift tax exclusions.

#### *Increase in Protected Amount Related to Gift Tax Exclusion*

The United States tax code imposes an estate tax on transfers of property upon the death of an individual. The most obvious tax avoidance scheme to an estate tax is for a person to, while alive, give his or her property as gifts to the future beneficiaries. The intent of the gift tax law is to impose a tax on such gifts that is roughly equal to the future estate tax, thereby discouraging tax avoidance behavior.

The creation and funding of a trust is a gift to the beneficiaries. Trusts are commonly used in estate planning, and persons of sufficient wealth craft such trusts in a manner intended to minimize tax consequences. Section 736.0505(2)(b)2., F.S., references 26 U.S.C. s. 2503(b), which contains the most commonly used and commonly know exclusion to the gift tax law. That section excludes from the gift tax gifts to any one individual in a calendar year that are less than the exclusion amount. For a long time, that amount was fixed at \$10,000. The sum has been inflation adjusted, and is currently \$13,000. It applies to a gift from one individual to another.

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<sup>2</sup> Florida Probate Rule 5.041(a).

<sup>3</sup> Florida Probate Rule 5.355.

This bill amends the reference to the gift tax exclusion at 26 U.S.C. s. 2503(b) to provide that, where the donor was married at the time of the transfer to which the power of withdrawal applies, the assumption is that both spouses made a gift and the protected amount is twice that of an individual donor.

### *Protected Amounts Related to Spousal Trusts*

It is common in estate tax planning to create certain trusts between spouses to minimize tax consequences. The bill references 26 U.S.C. s. 2523(e) and 26 U.S.C. s. 2523(f). 26 U.S.C. 2523 relates to gift tax deductions applicable to transfers between spouses. A trust described under section 2523(e) is a trust that is a life estate with a power of appointment in the donee spouse. The trust must pay all of the interest or earnings to the donee spouse to apply. Section 2523(f) relates to an election to treat a trust as a QTIP trust (qualified terminable interest property trust). A QTIP trust is a means by which a spouse can make a lifetime gift to the other spouse made for the purpose of maximizing marital deductions applicable to the estate and gift taxes, yet still maintain control of the assets in the trust, provided the donee spouse is entitled to the earnings of the trust.

Many estate planners recommend QTIP trusts to allow for the full use of the donee spouse's estate tax exemption without compromising the ability of the donor to control the disposition of the trust assets after the death of the donee spouse. However, it is argued that retaining that power of appointment makes the trust subject to continuing claims of creditors of the donor. For this reason, some donors have been unwilling to create a QTIP trust under Florida law, preferring to move such trusts to states where creditor protection has been created by statute.<sup>4</sup>

This bill adds subsection (3) to s. 736.0505, F.S., related to spousal trusts. It provides that, as to trusts under 26 U.S.C. s. 2523(e) and 26 U.S.C. s. 2523(f), upon the death of the settlor's spouse, the assets are considered to have been contributed by the settlor's spouse and not by the settlor. As the form of such trusts make them non-revocable as of the death of a spouse, this appears to have the effect of allowing certain self-settled trusts to protect assets from creditors upon the death of a spouse. The bill further provides, however, that this protection does not apply if the funding of the trust was a fraudulent conveyance, as such is defined in the fraudulent conveyance law at s. 726.105, F.S.

#### **B. SECTION DIRECTORY:**

Section 1 amends s. 733.607, F.S., related to possession of an estate.

Section 2 amends s. 733.707, F.S., related to the order of payment of expenses and obligations of an estate.

Section 3 amends s. 736.0206, F.S., related to compensation of professionals employed by a trust.

Section 4 amends s. 736.0505, F.S., related to creditor claims against the settlor of a trust.

Section 5 amends s. 736.05053, F.S., related to a trustee's duty to pay expenses and obligations of a settlor's estate.

Section 6 amends s. 736.1007, F.S., related to trustee's attorney's fees.

Section 7 provides an effective date of July 1, 2010.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

#### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

##### **1. Revenues:**

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<sup>4</sup> Real Property, Probate and Trust Law Section of the Florida Bar, *White Paper on Proposed Revision to Florida Statutes Section 736.0505*, undated, received on December 30, 2009. On file with committee staff.



None.

2. Expenditures:

None.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

**D. FISCAL COMMENTS:**

None.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

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/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES**

None.

1                                   A bill to be entitled  
 2           An act relating to trust administration; amending s.  
 3           733.607, F.S.; limiting a personal representative's  
 4           entitlement to payment from a trust of certain estate  
 5           expenses and obligations; specifying application of  
 6           certain criteria in making certain payments from a trust;  
 7           amending s. 733.707, F.S.; specifying application of  
 8           additional provisions to liability for certain estate  
 9           expense and obligation payments from a trust; amending s.  
 10          736.0206, F.S.; deleting certain notice requirements  
 11          relating to court review of a trustee's employment of  
 12          certain persons; authorizing the award of expert witness  
 13          fees from trust assets rather than requiring the award of  
 14          such fees; providing a limitation; amending s. 736.0505,  
 15          F.S.; revising a value criterion for determining the  
 16          extent of treating the holder of a power of withdrawal as  
 17          the settlor of a trust; providing criteria for determining  
 18          who contributed certain trust assets under certain  
 19          circumstances; amending s. 736.05053, F.S.; requiring  
 20          application of priorities for pro rata abatement of  
 21          nonresiduary trust dispositions together with nonresiduary  
 22          devises; amending s. 736.1007, F.S.; deleting authority  
 23          for a court to determine an attorney's compensation;  
 24          deleting certain expert testimony and fee payment  
 25          provisions; deleting requirements for certain court  
 26          compensation determination proceedings to be part of a  
 27          trust administration process and for court determination

28 and payment of certain estate costs and fees from trust  
 29 assets; providing an effective date.

30

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

32

33 Section 1. Subsection (2) of section 733.607, Florida  
 34 Statutes, is amended to read:

35 733.607 Possession of estate.—

36 (2) If, after providing for statutory entitlements and all  
 37 devises other than residuary devises, the assets of the  
 38 decedent's estate are insufficient to pay the expenses of the  
 39 administration and obligations of the decedent's estate, the  
 40 personal representative is entitled to payment from the trustee  
 41 of a trust described in s. 733.707(3), in the amount the  
 42 personal representative certifies in writing to be required to  
 43 satisfy the insufficiency, subject to the exclusions and  
 44 preferences under s. 736.05053. The provisions of s. 733.805  
 45 shall apply in determining the amount of any payment required by  
 46 this section.

47 Section 2. Subsection (3) of section 733.707, Florida  
 48 Statutes, is amended to read:

49 733.707 Order of payment of expenses and obligations.—

50 (3) Any portion of a trust with respect to which a  
 51 decedent who is the grantor has at the decedent's death a right  
 52 of revocation, as defined in paragraph (e), either alone or in  
 53 conjunction with any other person, is liable for the expenses of  
 54 the administration and obligations of the decedent's estate to

55 the extent the decedent's estate is insufficient to pay them as  
 56 provided in ss. s- 733.607(2) and 736.05053.

57 (a) For purposes of this subsection, any trusts  
 58 established as part of, and all payments from, either an  
 59 employee annuity described in s. 403 of the Internal Revenue  
 60 Code of 1986, as amended, an Individual Retirement Account, as  
 61 described in s. 408 of the Internal Revenue Code of 1986, as  
 62 amended, a Keogh (HR-10) Plan, or a retirement or other plan  
 63 established by a corporation which is qualified under s. 401 of  
 64 the Internal Revenue Code of 1986, as amended, shall not be  
 65 considered a trust over which the decedent has a right of  
 66 revocation.

67 (b) For purposes of this subsection, any trust described  
 68 in s. 664 of the Internal Revenue Code of 1986, as amended,  
 69 shall not be considered a trust over which the decedent has a  
 70 right of revocation.

71 (c) This subsection shall not impair any rights an  
 72 individual has under a qualified domestic relations order as  
 73 that term is defined in s. 414(p) of the Internal Revenue Code  
 74 of 1986, as amended.

75 (d) For purposes of this subsection, property held or  
 76 received by a trust to the extent that the property would not  
 77 have been subject to claims against the decedent's estate if it  
 78 had been paid directly to a trust created under the decedent's  
 79 will or other than to the decedent's estate, or assets received  
 80 from any trust other than a trust described in this subsection,  
 81 shall not be deemed assets of the trust available to the  
 82 decedent's estate.

83 (e) For purposes of this subsection, a "right of  
 84 revocation" is a power retained by the decedent, held in any  
 85 capacity, to:

86 1. Amend or revoke the trust and revest the principal of  
 87 the trust in the decedent; or

88 2. Withdraw or appoint the principal of the trust to or  
 89 for the decedent's benefit.

90 Section 3. Subsections (1), (5), (6), and (7) of section  
 91 736.0206, Florida Statutes, are amended to read:

92 736.0206 Proceedings for review of employment of agents  
 93 and review of compensation of trustee and employees of trust.—

94 (1) ~~After notice to all interested persons,~~ The court may  
 95 review the propriety of the employment by a trustee of any  
 96 person, including any attorney, auditor, investment adviser, or  
 97 other specialized agent or assistant, and the reasonableness of  
 98 any compensation paid to that person or to the trustee.

99 (5) The court may determine reasonable compensation for a  
 100 trustee or any person employed by a trustee without receiving  
 101 expert testimony. Any party may offer expert testimony after  
 102 notice to interested persons. If expert testimony is offered, a  
 103 reasonable expert witness fee may ~~shall~~ be awarded by the court  
 104 and paid from the assets of the trust unless the court finds  
 105 that the expert testimony did not assist the court. The court  
 106 shall direct from which part of the trust assets the fee shall  
 107 be paid.

108 ~~(6) Persons given notice as provided in this section shall~~  
 109 ~~be bound by all orders entered on the complaint.~~

110           ~~(6)-(7)~~ In a proceeding pursuant to subsection (2), the  
 111 petitioner may serve formal notice as provided in the Florida  
 112 Probate Rules, and such notice shall be sufficient for the court  
 113 to acquire jurisdiction over the person receiving the notice to  
 114 the extent of the person's interest in the trust.

115           Section 4. Paragraph (b) of subsection (2) of section  
 116 736.0505, Florida Statutes, is amended, and subsection (3) is  
 117 added to that section, to read:

118           736.0505 Creditors' claims against settlor.—

119           (2) For purposes of this section:

120           (b) Upon the lapse, release, or waiver of the power, the  
 121 holder is treated as the settlor of the trust only to the extent  
 122 the value of the property affected by the lapse, release, or  
 123 waiver exceeds the greater of the amount specified in:

124           1. Section 2041(b)(2) or s. 2514(e); or

125           2. Section 2503(b) and, if the donor was married at the  
 126 time of the transfer to which the power of withdrawal applies,  
 127 twice the amount specified in s. 2503(b),

128  
 129 of the Internal Revenue Code of 1986, as amended.

130           (3) Subject to the provisions of s. 726.105, for purposes  
 131 of this section, the assets in:

132           (a) A trust described in s. 2523(e) of the Internal  
 133 Revenue Code of 1986, as amended, or a trust for which the  
 134 election described in s. 2523(f) of the Internal Revenue Code of  
 135 1986, as amended, has been made; and

136 (b) Another trust, to the extent that the assets in the  
 137 other trust are attributable to a trust described in paragraph  
 138 (a),  
 139  
 140 shall, after the death of the settlor's spouse, be deemed to  
 141 have been contributed by the settlor's spouse and not by the  
 142 settlor.

143 Section 5. Subsection (5) is added to section 736.05053,  
 144 Florida Statutes, to read:

145 736.05053 Trustee's duty to pay expenses and obligations  
 146 of settlor's estate.—

147 (5) Nonresiduary trust dispositions shall abate pro rata  
 148 with nonresiduary devises pursuant to the priorities specified  
 149 in this section and s. 733.805, determined as if the  
 150 beneficiaries of the will and trust, other than the estate or  
 151 trust itself, were taking under a common instrument.

152 Section 6. Subsections (7) through (10) of section  
 153 736.1007, Florida Statutes, are amended to read:

154 736.1007 Trustee's attorney's fees.—

155 ~~(7) The court may determine reasonable attorney's~~  
 156 ~~compensation without receiving expert testimony. Any party may~~  
 157 ~~offer expert testimony after notice to interested persons. If~~  
 158 ~~expert testimony is offered, an expert witness fee may be~~  
 159 ~~awarded by the court and paid from the assets of the trust. The~~  
 160 ~~court shall direct from what part of the trust the fee is to be~~  
 161 ~~paid.~~

162 (7)-(8) If a separate written agreement regarding  
 163 compensation exists between the attorney and the settlor, the

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164 attorney shall furnish a copy to the trustee prior to  
165 commencement of employment and, if employed, shall promptly file  
166 and serve a copy on all interested persons. A separate agreement  
167 or a provision in the trust suggesting or directing the trustee  
168 to retain a specific attorney does not obligate the trustee to  
169 employ the attorney or obligate the attorney to accept the  
170 representation but, if the attorney who is a party to the  
171 agreement or who drafted the trust is employed, the compensation  
172 paid shall not exceed the compensation provided in the  
173 agreement.

174 ~~(9) Court proceedings to determine compensation, if~~  
175 ~~required, are a part of the trust administration process, and~~  
176 ~~the costs, including fees for the trustee's attorney, shall be~~  
177 ~~determined by the court and paid from the assets of the trust~~  
178 ~~unless the court finds the attorney's fees request to be~~  
179 ~~substantially unreasonable. The court shall direct from what~~  
180 ~~part of the trust the fees are to be paid.~~

181 (8)~~(10)~~ As used in this section, the term "initial trust  
182 administration" means administration of a revocable trust during  
183 the period that begins with the death of the settlor and ends on  
184 the final distribution of trust assets outright or to continuing  
185 trusts created under the trust agreement but, if an estate tax  
186 return is required, not until after issuance of an estate tax  
187 closing letter or other evidence of termination of the estate  
188 tax proceeding. This initial period is not intended to include  
189 continued regular administration of the trust.

190 Section 7. This act shall take effect July 1, 2010.





HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 449  
SPONSOR(S): Steinberg

Sanctions for Certain Court Pleadings

TIED BILLS: IDEN./SIM. BILLS:

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Civil Justice & Courts Policy Committee	11 Y, 0 N	De La Paz	De La Paz
2)	Policy Council		Varn <i>AV</i>	Liepshutz <i>MLL</i>
3)	Criminal & Civil Justice Policy Council			
4)				
5)				

SUMMARY ANALYSIS

Section 57.105, F.S. provides courts with authority to impose sanctions against a party or a party's lawyer for bringing a civil claim, or raising a defense in a civil cause of action, that has no genuine legal or factual basis. Currently, a court may impose sanctions if it finds that a losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented or at any time before trial was either: a) not supported by facts necessary to establish the claim or defense or, b) not supported by law. The sanctions are equally split between the party and the party's lawyer.

Currently, there may be instances where a party represented by an attorney does not in fact know that their lawyer is making a legally baseless argument but the party can still be sanctioned by the court. Under HB 449, sanctions for a lawyer's legally baseless argument would not be authorized against a represented party unless the court finds that the party actually knew that their lawyer's argument had no legal basis.

Also under the bill, a court could impose sanctions on its own initiative where the sanctions were ordered against a party before the entry of a voluntary dismissal of the case or settlement of the claim. Under the bill, however, once a party is placed on notice by the court that it may impose sanctions, a party's subsequent entry of a voluntary dismissal will not preclude a court from imposing sanctions as a matter of discretion.

This bill appears to have no fiscal impact.

## HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Current Law**

Section 57.105, F.S. provides courts with authority to impose sanctions against a party or a party's lawyer for bringing a civil claim or raising a defense in a civil cause of action that has no good faith legal or genuine factual basis. Under subsection (1) of this section, a court shall, on its own initiative or on motion of a party, award reasonable attorney's fees to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney when the court finds at any time during a civil proceeding or cause of action that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented or at any time before trial:

- (a) Was not supported by the material facts necessary to establish the claim or defense; or
- (b) Would not be supported by the application of then-existing law to those material facts.

In addition to attorney's fees, prejudgment interest shall also be awarded.

A losing party's attorney, however, is not responsible for the payment of court imposed sanctions if he or she acted in good faith, based on the representations of the client as to the existence of the facts supporting the claim. Also, sanctions will not apply if the legal argument was presented to the court as a good faith argument for an extension, modification, or reversal of existing law, or the establishment of new law as applied to the facts of the case before the court, provided such argument had a reasonable expectation of success.

Subsection (2) of s. 57.105, F.S., provides authority for the court to impose sanctions if a moving party proves by a preponderance of the evidence that any action taken by the opposing party was primarily to cause unreasonable delay.

##### **Effect of HB 449**

Under the current statute, a party who "should have known," (an objective standard) may be sanctioned by the court, along with their lawyer, if the lawyer makes an argument that lacks a good faith legal basis. Thus there may be instances where a party represented by an attorney does not actually know (a subjective standard) that their lawyer is making a legally baseless argument and the party is sanctioned by the court, splitting equally the expense of the court's sanction.

Recently, the First District Court of Appeals noted the disparity between the treatment s. 57.105 F.S. provides to a lawyer acting in good faith on the factual representations of a client, compared to the

outcome it compels when a client relies in good faith on a lawyer who presents a legally baseless argument:

Section 57.105 allows an award of fees to be paid solely by the litigant if counsel can show that he “acted in good faith, based on the representations of [the] client as to the existence” of material facts. Unfortunately, section 57.105 does not allow for an award of fees to be paid solely by an attorney when the client acts “in good faith, based on the representations of” the attorney as to the legal sufficiency of claim or defenses. If the law allowed, we would order the fees to be paid solely by counsel.<sup>1</sup>

Under HB 449, sanctions for a lawyer’s legally baseless argument would not be authorized against a represented party unless the court finds that the party actually knew that their lawyer’s argument had no legal basis. Therefore under the bill, absent such a finding, a lawyer will be solely responsible for paying the cost of court imposed sanctions for raising such arguments.

Also under the bill, a court could impose sanctions on its own initiative where the sanctions were ordered against a party before the entry of a voluntary dismissal of the case or settlement of the claim. Under the bill, however, once a party is placed on notice by the court that it may impose sanctions, a party’s subsequent entry of a voluntary dismissal will not preclude a court from imposing sanctions as a matter of discretion.

**B. SECTION DIRECTORY:**

Section 1. Amends s. 57.105 F.S., relating to sanctions for raising unsupported claims or defenses.

Section 2. Providing an effective date.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

None.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

**D. FISCAL COMMENTS:**

None.

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<sup>1</sup> Gopman v. Department of Education, 974 So.2d 1208, 1212 at n 3 (1<sup>st</sup> DCA. 2008).

### **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:**

None.

### **IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES**

1 A bill to be entitled

2 An act relating to sanctions for certain court pleadings;  
3 amending s. 57.105, F.S.; prohibiting a monetary sanction  
4 against a represented party for a claim that is presented  
5 as a good faith argument but that is found to not be  
6 supported by the application of then-existing law to  
7 material facts; prohibiting sanctions against a party or  
8 its attorneys by a court on its own initiative if the case  
9 has already been settled or voluntarily dismissed by that  
10 party; providing an effective date.

11  
12 Be It Enacted by the Legislature of the State of Florida:

13  
14 Section 1. Section 57.105, Florida Statutes, is amended to  
15 read:

16 57.105 Attorney's fee; sanctions for raising unsupported  
17 claims or defenses; exceptions; service of motions; damages for  
18 delay of litigation.—

19 (1) Upon the court's initiative or motion of any party,  
20 the court shall award a reasonable attorney's fee, including  
21 prejudgment interest, to be paid to the prevailing party in  
22 equal amounts by the losing party and the losing party's  
23 attorney on any claim or defense at any time during a civil  
24 proceeding or action in which the court finds that the losing  
25 party or the losing party's attorney knew or should have known  
26 that a claim or defense when initially presented to the court or  
27 at any time before trial:

28 (a) Was not supported by the material facts necessary to  
 29 establish the claim or defense; or

30 (b) Would not be supported by the application of then-  
 31 existing law to those material facts.

32

33 ~~However, the losing party's attorney is not personally~~  
 34 ~~responsible if he or she has acted in good faith, based on the~~  
 35 ~~representations of his or her client as to the existence of~~  
 36 ~~those material facts. If the court awards attorney's fees to a~~  
 37 ~~claimant pursuant to this subsection, the court shall also award~~  
 38 ~~prejudgment interest.~~

39 ~~(2) Paragraph (1)(b) does not apply if the court~~  
 40 ~~determines that the claim or defense was initially presented to~~  
 41 ~~the court as a good faith argument for the extension,~~  
 42 ~~modification, or reversal of existing law or the establishment~~  
 43 ~~of new law, as it applied to the material facts, with a~~  
 44 ~~reasonable expectation of success.~~

45 (2)(3) At any time in any civil proceeding or action in  
 46 which the moving party proves by a preponderance of the evidence  
 47 that any action taken by the opposing party, including, but not  
 48 limited to, the filing of any pleading or part thereof, the  
 49 assertion of or response to any discovery demand, the assertion  
 50 of any claim or defense, or the response to any request by any  
 51 other party, was taken primarily for the purpose of unreasonable  
 52 delay, the court shall award damages to the moving party for its  
 53 reasonable expenses incurred in obtaining the order, which may  
 54 include attorney's fees, and other loss resulting from the  
 55 improper delay.

56 (3) Notwithstanding subsections (1) and (2), monetary  
 57 sanctions may not be awarded:

58 (a) Under paragraph (1)(b) if the court determines that  
 59 the claim or defense was initially presented to the court as a  
 60 good faith argument for the extension, modification, or reversal  
 61 of existing law or the establishment of new law, as it applied  
 62 to the material facts, with a reasonable expectation of success.

63 (b) Under paragraph (1)(a) or paragraph (1)(b) against the  
 64 losing party's attorney if he or she has acted in good faith,  
 65 based on the representations of his or her client as to the  
 66 existence of those material facts. In cases where a voluntary  
 67 dismissal is entered after the court has placed a party on  
 68 notice that it may impose sanctions, the court has discretion to  
 69 order sanctions notwithstanding the filing of the voluntary  
 70 dismissal.

71 (c) Under paragraph (1)(b) against a represented party,  
 72 unless the court determines that the party knew of the lack of  
 73 legal basis.

74 (d) On the court's initiative under subsections (1) and  
 75 (2) unless sanctions are awarded before a voluntary dismissal or  
 76 settlement of the claims made by or against the party that is,  
 77 or whose attorneys are, to be sanctioned.

78 (4) A motion by a party seeking sanctions under this  
 79 section must be served but may not be filed with or presented to  
 80 the court unless, within 21 days after service of the motion,  
 81 the challenged paper, claim, defense, contention, allegation, or  
 82 denial is not withdrawn or appropriately corrected.



83 (5) In administrative proceedings under chapter 120, an  
 84 administrative law judge shall award a reasonable attorney's fee  
 85 and damages to be paid to the prevailing party in equal amounts  
 86 by the losing party and a losing party's attorney or qualified  
 87 representative in the same manner and upon the same basis as  
 88 provided in subsections (1)-(4). Such award shall be a final  
 89 order subject to judicial review pursuant to s. 120.68. If the  
 90 losing party is an agency as defined in s. 120.52(1), the award  
 91 to the prevailing party shall be against and paid by the agency.  
 92 A voluntary dismissal by a nonprevailing party does not divest  
 93 the administrative law judge of jurisdiction to make the award  
 94 described in this subsection.

95 (6) The provisions of this section are supplemental to  
 96 other sanctions or remedies available under law or under court  
 97 rules.

98 (7) If a contract contains a provision allowing attorney's  
 99 fees to a party when he or she is required to take any action to  
 100 enforce the contract, the court may also allow reasonable  
 101 attorney's fees to the other party when that party prevails in  
 102 any action, whether as plaintiff or defendant, with respect to  
 103 the contract. This subsection applies to any contract entered  
 104 into on or after October 1, 1988.

105 Section 2. This act shall take effect July 1, 2010.

