

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1915 (PCB JU 04-11) Unauthorized Practice of Law
SPONSOR(S): Committee on Judiciary and Rep. Kottkamp
TIED BILLS: **IDEN./SIM. BILLS:** SB 1776

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Judiciary	16 Y, 0 N	Thomas	Havlicak
2)			
3)			
4)			
5)			

SUMMARY ANALYSIS

The bill revises current criminal penalties relating to the unauthorized practice of law. The bill increases the criminal penalty for the unauthorized practice of law from a misdemeanor of the first degree to a felony of the third degree. The bill increases the criminal penalty for persons who have been disbarred or suspended from the practice of law, who directly or indirectly practice law or hold themselves out as an attorney, from a misdemeanor of the first degree to a felony of the third degree. The bill increases the criminal penalty for a licensed attorney, who knowingly aids or assists any person in carrying out the practice of law who has been disbarred or suspended from the practice of law, from a misdemeanor of the second degree to a felony of the third degree.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

- | | | | |
|--------------------------------------|---|-----------------------------|---|
| 1. Reduce government? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. Lower taxes? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 5. Empower families? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. EFFECT OF PROPOSED CHANGES:

The bill revises current criminal penalties relating to the unauthorized practice of law. The bill increases the criminal penalty for the unauthorized practice of law from a misdemeanor of the first degree to a felony of the third degree. The bill increases the criminal penalty for persons who have been disbarred or suspended from the practice of law, who directly or indirectly practice law or hold themselves out as an attorney, from a misdemeanor of the first degree to a felony of the third degree. The bill increases the criminal penalty for a licensed attorney, who knowingly aids or assists any person in carrying out the practice of law who has been disbarred or suspended from the practice of law, from a misdemeanor of the second degree to a felony of the third degree.

A first degree misdemeanor is punishable by up to 1 year in jail and up to \$1,000 in fines.¹ A third degree felony is punishable by up to five years in prison and up to \$5,000 in fines.² The bill includes reference to the habitual felony offender statute since these penalties are being increased to felonies.³

Regulation of the Practice of Law in Florida

Pursuant to the State Constitution, the Florida Supreme Court has exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted.⁴ The Florida Bar, as an official arm of the court, is charged with the duty of investigating and prosecuting alleged offenders.⁵

In 1925, the Legislature addressed the issue of governance over the admission of lawyers and practice of law in this State.⁶ This legislation provided for a State Board of Law Examiners and prescribed their duties and responsibilities. Those already admitted to practice under the provisions of law or rules of court existing at the time of such admission were grandfathered in and subsequent to the act, those wishing to practice law in this State had to first obtain a certificate of authority from the State Board of Law Examiners. In 1955, the Legislature codified the Supreme Court's authority to govern and regulate admissions of attorneys and counselors to practice law.⁷

¹ Sections 775.082(4)(a) and 775.083(1)(d), F.S.

² Sections 775.082(3)(d) and 775.083(1)(c), F.S.

³ Section 755.084, F.S.

⁴ Article V, sec. 15, FLA. CONST.

⁵ Rules Regulating the Fla. Bar 10-1.2.

⁶ Chapter 10175, L.O.F. (1925).

⁷ Chapter 29796, ss. 1,2, and 7, L.O.F. (1955).

Unlicensed Practice of Law

An unlicensed practice of law violation can involve a disbarred or suspended attorney continuing to practice of law in Florida or a layperson engaging in the practice of law in the state.⁸ Both the Florida Statutes and the Florida Bar Rules address unlicensed practice and both authorize the imposition of sanctions.⁹ In assessing whether someone has committed an unlicensed practice of law violation, the courts generally look to whether the individual has engaged in the traditional tasks of a lawyer.¹⁰ The courts view this type of behavior by an unqualified individual as having the potential to significantly jeopardize a client's interests.¹¹ Limited oral communications to assist someone in filling in blanks on a legal form is not generally considered to rise to the level of the unlicensed practice of law, but directly providing legal services as a non-lawyer does.¹²

The Florida Bar reports that they opened 718 unauthorized practice of law cases in 2003; 640 cases in 2002; and 638 cases in 2001. Of the cases investigated by the Florida Bar in 2002, 21 were referred to the State Attorney for prosecution.

Statutory Authority for Unlicensed Practice of Law

Chapter 454, F.S., governs attorney practice. Judges are not permitted to enter into partnerships with prosecuting attorneys appearing before their court, nor is a law firm partner permitted to appear before a judge-partner.¹³ Attorneys are prohibited from being certain sureties on bonds.¹⁴ Disbarred or suspended attorneys who directly or indirectly practice law or represent themselves as attorneys are guilty of a first degree misdemeanor.¹⁵ Assisting suspended or disbarred attorneys in continuing to practice law subjects the assisting attorney to disbarment and a second degree misdemeanor charge.¹⁶ The practice of law by a person not licensed by the Supreme Court of Florida is a first degree misdemeanor.¹⁷

Florida Bar Rules on the Unlicensed Practice of Law

Chapter 10 of the Florida Bar Rules governs the investigation and prosecution of the unlicensed practice of law. Rule 1-8.2. relates to the unlicensed practice of law and provides:

The board of governors shall act as an arm of the Supreme Court of Florida for the purpose of seeking to prohibit the unlicensed practice of law by investigating, prosecuting, and reporting to this court and to appropriate authorities incidents involving the unlicensed practice of law in accordance with chapter 10.

⁸ Section 454.23, F.S.

⁹ See *State v. Palmer*, 791 So.2d 1181 (Fla. 1st DCA 2001), for the holding that legislating the unlicensed practice of law is not a constitutional violation of the separation of powers, as the state constitution grants exclusive jurisdiction to the judiciary over admission to practice, not the unlicensed practice of law.

¹⁰ See *The Florida Bar v. Rapoport*, 845 So.2d 874 (Fla. 2003), in which the court issued an injunction based on a fact situation involving an attorney licensed out-of-state who gave legal advice, prepared and submitted claims, represented clients in proceedings, and held himself out as a lawyer.

¹¹ See *The Florida Bar v. Neiman*, 816 So.2d 587 (Fla. 2002), which involved behavior by a non-lawyer that included "misleading claimants and others so they believed he was an attorney; convincing people he could adequately represent them in their legal matters; making huge personal profits, while giving the actual claimants only small portions of the settlements; and even causing one claimant to lose certain pension benefits."

¹² Rules Regulating Fla. Bar 10-2.1.

¹³ Section 454.19, F.S.

¹⁴ Section 454.20, F.S.

¹⁵ Section 454.31, F.S.

¹⁶ Section 454.32, F.S.

¹⁷ Section 454.23, F.S.

As a civil matter, the Florida Bar may petition the Supreme Court of Florida for injunctive relief¹⁸ or for indirect criminal contempt punishable by a fine not to exceed \$2,500, imprisonment of up to 5 months, or both.¹⁹ The court may also award costs.²⁰

The Florida Supreme Court is required to create one standing committee and at least one circuit committee in each judicial circuit on the unlicensed practice of law.²¹ A standing committee, consisting of 37 members, eighteen of which must be non-lawyers, is appointed by the court on the advice of the Board of Governors of the Florida Bar.²² The standing committee is charged with receiving circuit committee reports to determine whether cases warrant litigation.²³ Circuit committees are appointed by the court, on the advice of the Board of Governors, to consist of at least three members, one of whom must be a non-lawyer.²⁴ Circuit committees are charged with investigating reports of unlicensed practice of law.²⁵ If the standing committee decides to pursue the case, a petition is filed with the Supreme Court. A referee-judge is assigned to hold a hearing in the county where the respondent resides.²⁶

C. SECTION DIRECTORY:

Section 1: Amends s. 454.23, F.S., relating to penalties for the unauthorized practice of law.

Section 2: Amends s. 454.31, F.S., relating to penalties for the practice of law while disbarred or under suspension.

Section 3: Amends s. 454.32, F.S., relating to penalties for aiding or assisting the unauthorized practice of law.

Section 4: Provides that the bill takes effect October 1, 2004.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill does not appear to have any significant impact on state expenditures. While it does increase criminal penalties from misdemeanors to third degree felonies that are unranked on the offense severity chart in s. 921.0013, F.S., third degree felonies rarely result in jail or prison time. The Criminal Justice Estimating Conference routinely classifies new third degree felony penalties as having no fiscal impact or insignificant fiscal impact.

¹⁸ Rules Regulating the Fla. Bar 10-7.1.

¹⁹ Rules Regulating the Fla. Bar 10-7.2.

²⁰ Rules Regulating the Fla. Bar 10-7.2(f).

²¹ Rules Regulating the Fla. Bar 10-1.2.

²² Rules Regulating the Fla. Bar 10-3.1.

²³ Rules Regulating the Fla. Bar 10-3.2.

²⁴ Rules Regulating the Fla. Bar 10-4.1(a).

²⁵ Rules Regulating the Fla. Bar 10-4.1(e).

²⁶ Rules Regulating the Fla. Bar 10-7.1.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local governments' revenues.

2. Expenditures:

The bill does not appear to have any impact on local governments' expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any significant economic impact on the private sector. The bill is intended to reduce the prevalence of the unauthorized practice of law.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

Separation of powers: Article II, Section 3 of the State Constitution provides that "No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." A branch of government is prohibited from exercising a power only when that power has been constitutionally assigned exclusively to another branch.²⁷ Article V, section 15 of the State Constitution vests exclusive jurisdiction in the Supreme Court of Florida to regulate the admission of persons to the practice of law and the discipline of persons admitted. It can be reasoned that the legislative imposition of criminal penalties for the unlicensed practice of law does not infringe on the court's exclusive power to regulate admission and discipline of admitted persons.²⁸ Criminalizing the unlicensed practice of law does not discipline admitted persons, it disciplines persons not admitted. The Florida Supreme Court has explained that "simply because certain conduct is subject to professional discipline is no reason why the legislature may not proscribe the conduct."²⁹

²⁷ See *State v. Johnson*, 345 So.2d 1069 (Fla. 1977).

²⁸ See *State v. Palmer*, 791 So.2d 1181 (Fla. 1st DCA 2001), in which the First District Court of Appeal held that s. 454.31, F.S., which criminalizes the unlicensed practice of law by a disbarred attorney, does not violate the separation of powers doctrine. See also *Pace v. State*, 368 So.2d 340 (Fla. 1979), in which the Florida Supreme Court recognized that pursuant to its police powers, the legislature can enact penal statutes that affect the legal profession. There the Court held that the anti-solicitation statute [s. 877.02(1), F.S. (1973)], as applied to lawyers, did not violate the State Constitution by intruding upon the Supreme Court's exclusive jurisdiction over the discipline of members of the bar.

²⁹ See *Pace v. State*, 368 So.2d 340 at 345 (Fla. 1979).

B. RULE-MAKING AUTHORITY:

The bill does not create the need for rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

The Committee on Judiciary adopted a strike-all amendment to this bill in its meeting on March 31, 2004. The amendment did not make any substantive changes to the original PCB, but made changes to the wording of the bill to provide better clarity.