

STAY THE COURSE

A Proposal to the Conference Committee on CS/HB 7083 and CS/SB 1088

By: The Florida Association of Criminal Defense Lawyers

The Conference Committee is considering two bills, both of which seek to make major revisions to the way legal services are delivered to indigent citizens who have been accused of a crime, or because the Department of Children and Families has alleged that their children have been abandoned, abused or neglected.¹

The House Bill seeks to shift responsibility for the provision of legal services to the elected Public Defenders. The Senate version would create a new independent bureaucracy to provide those services. Both bills focus on cost containment instead of the delivery of competent legal representation to poor people accused of crime. That focus is misguided, and is based upon an erroneous assumption, i.e.: There is substantial waste and inefficiency in the current system and the new models will save tax dollars by eliminating that waste and inefficiency.

An examination of the data reveals how wrong that assumption is. Statistics compiled by the Justice Administrative Commission establish that, although the current statutory caps on fees paid to appointed attorneys were set more than 25 years ago, *only nine percent (9%) of the \$75,555,510.38 in payments made during fiscal year 2005-2006 represented monies paid in excess of those caps. \$3,501,766.10 or more than half of the excess payments were in death penalty cases. When those payments are excluded, payments in excess of the statutory caps represented only four percent (4%) of all payments in non-capital cases.*² Victoria Montanaro, Executive Director of the Justice Administrative Commission, has testified that *less than one percent (1%) of all court-appointed bills submitted to JAC contain overreaching or improper claims for payment.*

These numbers represent statewide averages, and FACDL recognizes that fees paid to court-appointed counsel vary widely from region to region. We understand that there are areas of the state where fees in excess of the statutory caps are routinely awarded. We believe that court-appointed counsel statewide can benefit from a uniform set of guidelines for payment of court-appointed fees, both below and above the caps, and our proposal contains such guidelines.

However, the more important message made obvious by these hard numbers cannot be ignored. The House and Senate are setting out to fix a problem that simply

¹ There are other circumstances under which citizens are appointed counsel at state expense, but those numbers make up such a small portion of the overall cases, that they are not addressed here.

² FACDL would like to thank JAC Director Victoria Montanaro and JAC staff for furnishing the data and statistical analysis employed herein.

does not exist. Moreover, each proposal is a cure which is likely to do more harm than the perceived disease.

If waste and inefficiency in the current system are not the causes of the increase in costs to the taxpayer, then what are? The answer, as is most often the case, is complex and not fully understood. However, there are several root causes that stand out.

- **THE EXPLOSION OF DEPENDENCY FILINGS BY D.C.F.** Since the disappearance and presumed death of Rilya Wilson, there has been a substantial increase in the number of dependency petitions filed statewide. Each time a dependency petition is filed, each parent is entitled to counsel. Many circuits also appoint counsel to the children and, sometimes, custodial relatives. This has resulted in a corresponding increase in the cost of providing court-appointed dependency counsel.³
- **THE CRIMINALIZATION OF MORE CONDUCT AND THE ESCALATION OF THE PUNISHMENTS IMPOSED FOR EXISTING CRIMES.** For the last ten or more years, there has been a clear trend in the Legislature, to expand the scope of behavior considered criminal, and to increase the punishments for crimes previously considered relatively minor. The unintended (and under-funded) consequence of this trend has been a *forty percent (40%) increase in the number of persons who are appointed a lawyer in criminal court over the last five (5) years.*⁴ Every time a misdemeanor is made a felony or a mandatory minimum sentence is imposed for a crime, the accused becomes entitled to either a court-appointed Assistant Public Defender, or a conflict lawyer. Unfortunately, the costs of providing counsel have rarely, if ever, been addressed when this “tough on crime” legislation is proposed and adopted.
- **INCREASES IN COSTS OF LITIGATION, MOST NOTABLY IN EXPERT WITNESS FEES.** Experts who used to charge \$150-\$175/hr are now charging \$250-\$300/hr. In addition, the escalation in minimum mandatory sentences, especially PRR sentences, has resulted in an increase in the number of trials overall.
- **THE EASE WITH WHICH THE STATE MAY SEEK THE DEATH PENALTY.** Florida is the only state that allows a simple majority of the jury to impose the death penalty, and allows a judge to override a jury recommendation for a life sentence, and impose death, as well. As a result, the State often seeks the death penalty in cases where it is only marginally appropriate or where there

³ Many more of these dependency petitions are also later dismissed. However, by then counsel have usually been appointed, and are entitled to be paid. By contrast, when D.C.F. declined to file a dependency petition in the past, usually no counsel were appointed.

⁴ From 626,089 in 2001-02 to 875,284 in 2005-06. Some of this increase is attributable to increases in population, but these increases are, likewise, ignored at budget time.

would be virtually no likelihood of a unanimous jury verdict for death. The result is an artificially increased number of the most expensive, budget-busting cases in the court-appointed counsel system, death penalty defenses.

FACDL recognizes that these causes for the cost of the current system will not be addressed now, if ever, but they demonstrate the inefficacy of the proposed solutions. Both the Senate and House bills are deeply flawed, and neither is likely to improve the quality of the legal services to which the poor are entitled, or likely to save any substantial tax dollars.

The Senate bill would require poor citizens accused of offenses to obtain legal services from five regional offices. The North Florida office alone would cover 32 counties, each with misdemeanor, felony and juvenile divisions that would require lawyers to be present in court. Clients would be located across a region of over 1000 square miles. Lawyers would have to travel hours each day to be in court in different counties, and the task of meeting with clients, taking depositions, interviewing witnesses and examining the evidence would be overwhelming. Even minimal coverage would require the hiring approximately 25 lawyers, as well as secretaries, investigators and other staff. The payroll for this office could easily approach 75 people, and this office would not even serve any of the state's four largest population centers.

The cost of this bureaucracy statewide cannot accurately be estimated. However, even if we assume that lawyer salaries would be at the lower end of the scale, the cost would exceed \$5,000,000.00 *per year* for every one hundred lawyers hired. Moreover, this assumption is highly speculative, because each office would have to hire experienced lawyers to handle serious felonies, and capital defense-qualified lawyers to handle death penalty cases. These lawyers would be likely to command salaries substantially higher than \$50,000.00 per year. Support staff would add another \$3,000,000.00 *per year*, for each one hundred employees.⁵

In addition, there would be travel expenses, mileage, infrastructure expenses, and administrative expenses, as well as due process costs and the costs of contracting with additional private lawyers to handle multiple-conflict cases. Derivative costs would include per diem for food and lodging for attorneys, investigators and support staff traveling to a jurisdiction and staying there for a trial and/or multi-day hearings, depositions and investigations.

Not only do these logistical problems result in an administrative overhead not now borne by the state, but they also make it less likely that conflict counsel will regularly meet with clients, or otherwise provide the level of legal representation the current system provides. This will result in the conviction of innocent defendants more often, and more claims of ineffective assistance of counsel. It bears repeating that it costs the state \$8.00 to relitigate a case, for every dollar that should have been spent to do it right the first time.

⁵ These estimates include benefits and the employer contributions for payroll taxes, and so are the equivalent of entry-level positions in most state offices.

The House Bill presents a completely different set of concerns. Administrative costs would be minimized by utilizing the existing elected Public Defender system. Flexibility would be built into the system by allowing individual Public Defenders to try various ways of providing services at reduced costs. The House Bill also safeguards the quality of legal services to a much greater degree than the Senate bill, by placing responsibility for those services with elected officials who are already committed to insure that the poor receive competent representation.

However, the bill creates severe and irreconcilable ethical conflicts which compromise the ability of the Public Defenders to carry out the bill's mandate, and which will deny the indigent accused conflict-free, focused representation. For that reason, it presents no better solution to the funding crisis than the Senate bill.

FACDL reiterates the much simpler alternative we originally proposed. Keep the current system for the upcoming fiscal year, until we can construct a different model that will increase the quality of representation, be more economical, and which has none of the shortcomings of either the House or Senate proposals. The Association believes that there are some modest modifications that can be implemented, which will help determine, over the next fiscal year, whether there is "fat" in the current system, and if so, how much.

The key components of this alternative are:

- Implement the "Eleventh Circuit Short Form Plan" of tiered flat fees statewide. This plan provides for flat fees to be paid in increments, based upon the number of hours the attorney spends in the course of representing the client. Statewide implementation of this payment model will standardize reporting, and improve quality assurance review by permitting JAC to track the numbers of hours attorneys in each jurisdiction are expending, according to the following standardized scale.

Eleventh Circuit - Short Form

1st Deg Felony / Life Felony/3.850's

5 hours or less	\$340
over 5 to 10 hours	\$675
over 10 to 20 hours	\$1,015
over 20 to 30 hours	\$1,350
over 30 to 40 hours	\$1,690
over 40 to 50 hours	\$2,025

2nd Deg Felony/3.850's

5 hours or less	\$340
over 5 to 10 hours	\$675
over 10 to 20 hours	\$1,015

Over 20 to 33 hours \$1,350

3rd Deg Felony/3.850's/Contempt/Extradition/Violation of Probation

5 hours or less \$340
over 5 to 10 hours \$675
over 10 to 25 hours \$1,015

Misdemeanor/Criminal Traffic/3.850's

5 hours or less \$340
over 5 to 10 hours \$675
over 10 to 25 hours \$1,000

Misdemeanor - Appeal

25 hours or less \$1,015
over 25 to 40 hours \$1,350

Juvenile Delinquency – Felony, Misdemeanor, Violation of Probation

5 hours or less \$340
over 5 to 10 hours \$675
over 10 to 25 hours \$1,000

Juvenile Delinquency - Appeal

25 hours or less \$1,015
over 25 to 40 hours \$1,350

- Recognize that capital cases are, by definition, unusual and extraordinary, and provide for payment in those cases should be governed by the *Makemson* standard. Capital qualification involves years of experience and a substantial investment of time and effort. Lawyers agreeing to accept these types of court appointments should not have to be concerned that the court will arbitrarily limit their fees to \$3,500.00.
- Provide for a set of criteria that apply the *Makemson* standard for complex cases in the same manner statewide. We would suggest the following language:

“In the event that the delivery of competent and effective representation, regardless of the degree of the offense or the designation of the case as criminal or civil, involves unusual and/or extraordinary circumstances that merit a fee in excess of the statutory cap, the attorney may request relief from the cap by submitting to the Court (or peer review committee) a motion and supporting documentation delineating the reasons for relief. At a minimum, such request must demonstrate that (a) it is necessary and reasonable to pay such fees in order to insure competent and effective representation, and; (b) the attorney has been required to spend more than fifty (50) hours representing the client, or the attorney was

required to interview or depose more than fifteen (15) State witnesses. The Court may consider any other criteria reasonably necessary to evaluate the claim, including the overall complexity of the case and the length of time that was required to complete the representation. The case need not go to trial and the unusual and/or extraordinary circumstances need not be unforeseen.” See, Makemson v. Martin County, 491 So. 2d 1109 (1986)”⁶

- Maintain current funding levels. Participation by the attorneys currently accepting conflict appointments must be preserved, and the quality of representation must be maintained or enhanced. The only way that can be accomplished, is to provide those lawyers with assurances that funding will be available.
- Finally, some provision must be made for those defendants who may have sufficient resources to hire counsel, but are indigent for costs. To insure that these costs are reasonable, counsel for any defendant found to be indigent for costs should be required to use those experts, court reporters, etc who are already under contract to the Office of the Public Defender.

FACDL believes that the current service delivery system, with these additional features, will standardize the delivery of services to the indigent statewide, and permit the collection of data that will permit a reasoned evaluation of its effectiveness, over time.

Florida has a Constitutional mandate to provide competent representation to poor people accused of offenses. The current system appears, overall, to perform that task effectively. Any system can be made better, but there is simply no empirical data to justify the complete abandonment of a service delivery model that has worked as well as the current one, to take a chance on an unproven alternative that may, or may not, save a few dollars.

However, FACDL recognizes that there is tremendous momentum for change in both houses, whether that momentum is justified, or not. If one of the two proposed models must be adopted, the House bill is preferable, although it requires the following amendments, to attempt to correct the most egregious ethical conflicts it contains:

§ 27.5303(1)(a)

FACDL opposes the “unit” language that would allow a Public Defender to represent codefendants. The “Law Firm Rule” should be preserved.

⁶ FACDL recognizes that CS/SB 1088 employs a different standard, which was apparently developed by the Ninth Circuit. We believe that standard is unworkable for several reasons. Foremost, it requires the case to go to trial for the attorney to be fairly compensated. For instance, It is unfair to deny adequate compensation to a court-appointed lawyer who works tirelessly to defend an innocent man accused of rape, when he or she prevails, and the State drops the charges just before trial. Also, there are many cases that are exceedingly complex, but do not involve a great number of state witnesses, such as cases involving experts, document fraud cases, or cases involving alibi defenses.

§ 27.5304

(2) Reimbursement. from “ineffective” counsel is bad policy. This provision will discourage good lawyers from taking conflicts and encourage bad lawyers to lie under oath about making mistakes. Ineffective assistance claims are filed in virtually every capital case. No smart death penalty lawyer will accept court appointments, if this provision remains.

(8) Compensation issues should be resolved fairly in this bill, not deferred to a General Appropriations bill.

(9) We urge that our *Makemson* language be adopted.

(10) This provision creates an irreconcilable conflict. To suggest that a Public Defender could increase his or her budget by shortchanging a conflict defendant invites lawsuits and ineffective assistance claims. This provision must be stricken.

(11) Clarify that the section only applies in the interim.

The bill should also contain adequate provisions for indigent for costs clients.

FACDL continues to urge the Conference Committee to reject both the House and the Senate bills as bad policy, based upon inadequate data. They are also fiscally impractical, if not impossible to implement, within the strictures of the current appropriations legislation. We urge a more conservative, “go slow” approach, which collects the necessary information, evaluates prospective solutions, and only then seeks to effect change, if necessary. We thank the Conference Committee for giving us to opportunity to offer our input to this process.