



State of Florida  
Office of the Public Defender

Fifteenth Judicial Circuit of Florida

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December 1, 2006

Honorable Alice Blackwell-White  
Circuit Court Judge  
425 N. Orange Avenue  
Suite 2030  
Orlando, FL 32801

Dear Judge Blackwell-White:

Attached please find the report from the Florida Public Defender Association. I look forward to seeing your draft and hope that our report is helpful. Please don't hesitate to contact me with any questions or concerns.

Sincerely,

A handwritten signature in cursive script that reads "Carey Haughwout".

Carey Haughwout

CSH:kmm

Enclosure

cc Rick Parker, President, FPDA  
Sheldon Gusky, Executive Director, FPDA  
Bernie McCabe, State Attorney

## **FLORIDA PUBLIC DEFENDER ASSOCIATION POSITION PAPER ON CONFLICT AND DEPENDENCY REPRESENTATION**

November, 2006

Prior to the full implementation of Revision 7 of Article V, conflict and dependency representation was funded by the counties and managed by the circuit conflict committees of which the Public Defender was a member. The county attorneys actively supervised and reviewed expenditures, proposing cost-effective models, and implementing cost-savings when appropriate. However, the county's concern with cost-effectiveness was balanced by the committee's overall concern for quality representation. The county's active involvement in conflict and dependency representation and costs assisted in insuring adequate funding in most cases.

In 2004 the Legislature created the 4-person Circuit Indigent Services Committees (ISC), headed by the judiciary, with Public Defenders and private attorneys as members, and assigned the bill-paying function to the Justice Administrative Commission (JAC). Minimum experience standards were placed in statute, and a private registry system was mandated (with some exceptions). The Clerks of Court were given the responsibility of determining indigency.

Unfortunately, the General Appropriation Act funding for conflicts and dependency representation was inadequate from the beginning and inconsistent across circuits. It was significantly less than conflict and dependency representation had been costing the counties previously. This became very clear in '05-'06 when there was a substantial shortfall in the appropriation. Nonetheless, the funding for '06-'07 remained constant and was not adjusted based upon circuit requirements or overall need. It is anticipated that there will be an even greater shortfall this year as a result of increased costs and delayed billing from the prior fiscal year. We have already seen the effects of the inadequate funding: the funds for the first half of the fiscal year were exhausted one month into the second quarter. **Given the inadequate funding, it is impossible to construct a system that will adhere to the basic principles required of any indigent defense system: independence, client-centered representation, private bar involvement, accountability and consideration of local factors.** Therefore, any consideration of the various models must assume increased funding for these services.

This is not to say there are not cost-savings which could occur. However, it is the general consensus of the Public Defenders, after extensive review of the JAC

reports, that cost-savings efforts alone will not solve the financial problems created by the original inadequate funding. There are some problems which are inherent in the current system and there are certainly isolated instances of abuse. However, the isolated instances of abuse do not explain the substantial shortfall; rather, it is the result of substantial underfunding. This paper will attempt to address the positives and negatives of various models, including possible cost-savings or increases. **However, the success of any of the models will be dependent upon significantly increased funding.**

## **THE CURRENT ISC MODEL**

Two years of experience with the current model have revealed a number of problem areas. There are wide disparities in costs and quality of services around the state. The fees and costs of conflict attorneys are not monitored effectively. The statutory requirement of a rotating private attorney registry has not been adhered to in some areas; some courts are appointing conflict counsel even when the Public Defender has not requested withdrawal. The ISCs have generally increased private attorney compensation rates in order to attract quality representation. There is no entity with a local presence to control and negotiate fees and expert costs. The ISCs have not been staffed. The ISCs have four members, two of whom are elected officials and two of whom are private bar members with no incentive to control attorney fees and costs. In fact there are disincentives: political pressure, lack of knowledge of the criminal process or appropriate fees and costs, no staff, and no understanding of budgetary constraints. There is no uniform mechanism for evaluation, discipline, and removal of incompetent attorneys or attorneys who over-bill. There are threatened lawsuits against the members of the ISC in at least one jurisdiction by private attorneys who object to the current system.

The current system does not provide enforceable controls for cost containment. JAC does not appear to have the authority to control fee structures, excessive billing or unnecessary or excessive costs. JAC is confined to reviewing the appropriateness of the bills based upon the individual circuit rates. Further, JAC has met with little success in challenging the attorneys' bills in court. JAC has a "bird's eye view" of the problems and anomalies from circuit to circuit, but it has no authority to require greater uniformity. As currently structured, the local ISCs set the rates and policies.

The courts often order the payment of bills, even when they exceed prior authorizations or approved rates. The courts are in a difficult position: they want to attract quality representation and therefore feel forced to approve requested costs and fees. They also are not in the best position to review the merits of any claimed costs or fees without reviewing confidential information. Finally, the courts simply do not have the time or staff to adequately review the appropriateness of the bills submitted.

**There is a general consensus among the Public Defenders that the current ISC structure is ineffective. There is no defined power to insure quality, or enforce, control, or contain costs. There is no staffing to control costs, as there was previously when county representatives sat on the circuit conflict committees. Having the judiciary as Chair, with the judiciary appointees as majority members, undermines the important principle of an independent bar for indigent representation.**

Perhaps one of the biggest concerns is that under the current model there is no entity responsible for advocating for adequate funding. The public defenders have attempted to advocate for appropriate overall funding but certainly their main concern is the adequate funding for the public defender offices. There needs to be a voice for the indigent not represented by public defenders.

It is possible that an increased role for JAC, particularly on the local level, could assist in controlling costs. In many jurisdictions under the county-funded system, the county attorneys played an active role in negotiating contracts and controlling costs. The question is whether JAC, if it were able to staff on a local level, could perform this function.

## **THE EXECUTIVE MODEL**

The idea of a state agency, such as a statewide conflict defender and dependency agency has been debated. **The general consensus is that this would not be a workable solution because it would require a very large state office, duplicated bureaucracies, and the possibility of policy differences with the elected Public Defenders who are the chief providers of indigent legal services. Furthermore, the local control necessary to provide flexibility, accountability, and rapid problem solving would be removed completely.**

The biggest concern with this structure is that it would become a cost-containment office for political reasons and as a result could not adhere to the principles of indigent representation as outlined above. Accountability would be solely to the political appointing body rather than to the principles of effective representation. The professional independence necessary for an indigent defense system would be seriously compromised.

The Court suggestion for cross-circuit representation would require public defenders in one circuit to handle the conflicts in another circuit. This is a proposal which has surfaced and been debated for years. The consensus of most public defenders and private practitioners is that this is unworkable. **While the State Attorneys are called upon on occasion to take cases outside their jurisdictions, the numbers are minuscule compared to the conflict cases.** Furthermore, public defenders would have clients in jail in other jurisdictions, and clients not in custody would have difficulty traveling to the other circuit's office because of the time and expenses involved. This would severely impact the ability to provide appropriate representations. Staffing is a constant challenge for many offices; the additional staffing necessary to handle cross-circuit conflicts could be insurmountable. The counties would be called upon to greatly increase the facilities, technology and communication support as required by Chapter 29 for the additional staff necessary in all the public defender offices to handle these cases. The benefits derived from having the private bar involved in indigent defense would be lost. Finally, the Public Defenders are elected in a particular circuit; handling numerous cases in circuits other than those from which the Public Defender is elected would undermine the accountability inherent in the elected system, and may be found to be unconstitutional.

Cross-circuit representation may be workable on a volunteer basis, where the Public Defender is able to obtain reasonable compensation for the service. The ability to do this would vary from office to office and time to time. **In order to be cost-effective and provide appropriate representation, cross-circuit representation would have to be dependent upon the individual office's ability to serve and the funds available to compensate the office properly.**

## **PUBLIC DEFENDERS AS MANAGERS OF ALL INDIGENT REPRESENTATION**

We have recently debated whether Public Defenders should offer to directly administer conflict and civil dependency representation. Some Public Defenders are in favor of this proposal, if adequately funded, for several reasons. The dissatisfaction and frustration with the ISCs would be eliminated. Cost control mechanisms which already exist in our offices could better administer the system. Public Defenders have more accountability to the public and the Legislature and Courts. Public Defenders could provide the training, guidance and oversight necessary to insure quality representation.

The main argument against this model is the ethical jeopardy inherent in Public Defender involvement in conflict cases. By definition conflict means that clients have a conflict of interest with public defender involvement in their representation. The Florida Bar has never clearly sanctioned the idea. Some Public Defenders do not view this as insurmountable; others do. However, it is sure to generate extensive litigation which would not be settled for years to come.

Inadequate funding of conflict and dependency representation is a major concern. The Public Defenders simply cannot administer the system with the current funding. It is difficult, if not impossible in some circuits, to find attorneys willing to take the cases. There are risks that an unusual and extraordinary case could "break the bank" in a particular circuit. Some Public Defenders believe that addressing the cost overruns from this year and creating a new system of conflict and dependency representation would be a difficult, if not impossible, task that would distract them from their core duties as Public Defenders for years to come.

It is generally agreed that in order to supervise all indigent services, numerous precautions would have to be in place. Adequate, separate funding would have to be provided; additional administrative support to Public Defender administrative staff would be necessary; the Public Defender would have to be insulated from many of the administrative decisions and all of the legal decisions in the conflict cases; funding of each service would have to be held harmless from overruns in the other services.

## COURT MANAGEMENT OF INDIGENT SERVICES

This model requires Court Administration to take over control and management of criminal conflict and dependency representation. Understandably, the Courts do not want this role. However, since the courts appoint the lawyers and approve the costs, it may appear to be appropriate for the funding and oversight to fall within the court system's responsibilities. The courts do not have adequate staffing for these duties. It would require extensive additional staff, with expertise in indigent defense, to properly carry out this role. **The greatest concern with this proposal is that it would compromise the neutrality of the courts and the independence of the lawyers who may view themselves as working for the courts. An independent bar must be a cornerstone of any indigent defense service delivery model.** This is an important principle recognized in all the national standards promulgated on proper delivery of indigent defense services and it is a principle that must not be sacrificed for efficiency.

## FLORIDA PUBLIC DEFENDER ASSOCIATION (FPDA) MODEL

This model would require the Florida Public Defender Association to manage indigent defense services. The 20 elected public defenders would hire a conflict and dependency coordinator and staff who would oversee the management of fees and costs, devise a formula for each circuit's appropriation, and resolve fee disputes. It is similar to the executive model except that instead of creating a new bureaucracy it would utilize the private bar and many of the resources currently in place. However, additional staffing would be necessary in the Florida Public Defenders Coordination Office (FPDCO).

**The benefits of this model are that it would utilize the expertise of the Public Defenders in managing indigent defense services while removing some of the local pressures and variations.** Cost-savings could be realized through the setting of statewide guidelines for fees and costs; accountability could be achieved through circuit specific appropriations.

The concerns with this model are the same as the concerns generated by a Public Defender managing all conflict cases. There may be ethical implications; there are sure to be budget competitions. Additionally, administration of another statewide function would require substantial additional staffing in the FPDCO office.

## **REVISED ISC MODEL WITH STATEWIDE ADVISORY BOARD**

This model would place the Public Defender in the position of chair of the ISC, together with two members of the private bar. This would remove the courts from any influence in the management of indigent defense services, thereby insuring the necessary independence of the bar. It would also revive the Statewide Indigent Services Advisory Board to assist with setting guidelines for fees and costs and resolving fee disputes that could not be resolved on the local level. A necessary component of this model would be additional administrative staff in each Public Defender's Office, proportionate to the number of indigent services provided, to administer the system.

The primary benefit of this system is that it allows the local committees to address the myriad conditions that exist throughout a state as diverse as Florida and provides statewide oversight and review which is critical to the provision of high quality services and fiscal responsibility. The system would have to be designed to insure that the Public Defender is not responsible for any case-specific decisions such as the authorization of fees or costs in cases in which a conflict exists.

The local ISCs would set the qualifications, decide who should receive court appointments, and administer the rotational assignments or contract systems. It would be the role of the statewide advisory board to determine circuit specific allocations and to advocate for adequate funding. Any statewide advisory board should have strong representation from the Public Defenders given their expertise in the delivery of indigent defense services.

The difficulties with this model are that inadequate funding would jeopardize the Public Defenders' limited funds, the political pressures from the private bar could impact decision making on a local level, and the additional workload on the various offices and the statewide advisory board would require substantial additional administrative support. There are also ethical issues which would have to be resolved before such a system would be workable.

## **OTHER CONCERNS**

**Cost-containment strategies must not sacrifice effective representation.**  
In reviewing models and proposals to alter the current system, the foremost concern



must be effective representation. Models which solely tout cost-savings at the expense of adequate representation should not be considered.

There are very strong feelings by all Public Defenders that the **PD budgets should be held harmless for costs over which we have no control—whether in our own circuits or in other areas of the state.** This year the shortfalls were funded in large part by PD trust funds. **Using these funds runs counter to notions of accountability (since we have no control over these costs in our own circuits, let alone in other circuits), and punishes those who have been successful in their efforts at collection of these funds.** We believe this should be prohibited by statute.

**The unanimous position of the Public Defenders is that the employee court reporter model should be fully funded through the courts— and not through the public defender due process appropriations.** Public Defender due process budgets were inadequately funded from the beginning, and no Public Defender should have the obligation to use its funds to pay the salaries of court employees.

**Workload standards for court-appointed attorneys must be considered in light of their private practice.** There is concern that in some circuits, private attorneys are exceeding American Bar Association (ABA) workload standards (dependency (60), felony (150), misdemeanor (400) or juvenile (250) cases) without consideration of their private practice. The result is that the indigent defendants cannot receive effective representation. Florida law prohibits public defenders from handling private criminal cases because of the concern that these cases would take precedence over the representation of indigent defendants. A similar concern exists for the private attorneys handling court-appointments which can only be monitored through meaningful caseload standards.

## **THE ROLE OF JAC**

With adequate support, the JAC could play a more active role in the setting of statewide fees, while accounting for local conditions, and recommending proper appropriations. Further, the JAC should be staffed sufficiently to have a strong, local presence in fee and cost reviews and disputes. **The JAC is a valuable resource for centralized payment of fees and costs and for the generation of data for study and comparison.** The JAC has been hampered in its efforts due to variations among circuits and the unwieldy nature of hourly billing. It is believed that hourly billing

should be eliminated in all but the most rare and unusual cases. A committee (appointed by the Governor and/or the Legislature with at least one criminal defense lawyer) could assist JAC in reviewing fee and cost disputes.

The JAC could administer the attorney rotation wheel in each circuit to insure fairness and consistency. In addition, JAC should receive all orders of withdrawal via electronic transmission in order to insure adequate and consistent record keeping and to correct the problem of judges appointing conflict lawyers even though the Public Defender has not moved to withdraw.

A variation on the above might be a statewide cost containment board charged with the responsibility of reviewing contested bills, setting guidelines for fees and costs, and auditing the expenditures. The board could be comprised of appointees of the Governor, the legislature, FPDA, Florida law schools, Chief Justice of the Supreme Court, The Florida Bar, and the Florida Association of Criminal Defense Lawyers (FACDL).

## **CONCLUSION**

In conclusion, the Public Defenders have studied the issue of conflict and dependency representation for several years. We have identified many pros and cons of various proposals. We have identified some specific proposals which we believe would assist in controlling the costs. Many of our recommendations today are consistent with recommendations we have made in the past. Whatever new system of providing conflict representation may be created, the Public Defenders' ethical obligation to identify and withdraw from the cases of clients with conflicts of interest must not be compromised. In addition, adequate state funding must be provided for all aspects of conflict representation, including attorney fees and necessary due process costs.