

**Recommendations for
Improving Governance and Operations for
Appointed Counsel and Due Process Services**

A Report to the Florida Legislature

Submitted by the Office of the State Courts Administrator

January 31, 2007

This report was prepared for the Office of the State Courts Administrator by the Commission on Trial Court Performance and Accountability and its Workgroup on Court-Appointed Counsel and Indigent Due Process. The views and recommendations herein are the Commission's and do not necessarily represent the position of the Supreme Court of Florida.

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Recommendations for Improving the Governance and Operations for Publicly Funded Court-Appointed Counsel and Due Process Services Provided for Indigent Individuals

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I. Background of Appointed Counsel¹ in Florida

In 1963, the creation of the office of public defender effectively removed the majority of public defense services from the operational control of the judicial branch. However, Florida's trial courts continued to play a role in the appointment of counsel in cases where the public defender had a conflict or was not authorized to provide representation. Each county coordinated with the courts to create mechanisms for accountability and oversight of expenditures related to appointed counsel and most counties provided operational and administrative support for these functions. The counties required individual attorneys to file applications with a conflict committee, which included the chief judge, the public defender and a county commissioner. Some county purchasing departments utilized an RFP process to select contractors for full or part-time representation. Chief judges often cooperated by entering administrative orders outlining agreements regarding court-appointed counsel costs.

In 2004, the Legislature implemented Revision 7 of Article V of the Florida constitution to shift much of the costs of the justice system from the county to the state. For appointed counsel services, the transition resulted in a diffused governance and accountability model:

- Funding was placed within the Justice Administrative Commission (JAC),² an agency that provides administrative services related to budget, payroll, payment of invoices for goods and services received by the client agencies and assuring general adherence to all rules relative to purchasing and auditing. The JAC allocates funds for each circuit's civil appointed counsel costs (circuit criminal allocations are designated in the GAA); contracts with appointed counsel and

¹ Section 27.40(1), Florida Statutes, does not differentiate between the public defender and private counsel in describing the representation of indigents entitled to counsel. As used in this report, "appointed counsel" means the legal representation and related due process services provided to indigent individuals at state expense when the public defender is unable to provide representation due to a conflict of interest or is not authorized to provide representation. A "related due process cost" includes investigation, expert witnesses, court reporting and interpreting costs that are not otherwise provided as an element of the state court system, which are constitutionally required to be provide to an individual represented by appointed counsel or an individual declared indigent-for-costs. Depending on the model adopted, this term may need to be clarified in the statutes.

² The JAC is a commission established in section 43.16, Florida Statutes, consisting of two state attorneys and two public defenders, that oversees the work of the JAC's executive director. The JAC's client agencies include the twenty state attorneys, twenty public defenders, the Statewide Guardian ad Litem Program, two capital collateral regional councils, and the twenty circuit article V indigent services committees.

due process providers; approves uniform procedures and forms for use in support of billings; reviews appointed counsel and due process provider invoices; has statutory standing to object to a public defender's claim of conflict and an appointed attorney's requests for payment; and prepares quarterly reports on expenditures.

- Circuit Article V indigent services committees (ISC)³ were created to “manage the appointment and compensation of court-appointed counsel within a circuit.” ISCs are required to: meet once a quarter; compile and maintain a registry of attorneys eligible for court appointment; set the compensation rates of service providers in appointed counsel and indigent-for-costs cases; and develop a schedule of standard fees and expense allowances for due process services, within the amount of appropriated funds allocated by the JAC. Although created to manage appointment and compensation of appointed counsel, the members serve in this capacity as volunteers; they have no staff, and they have no operational control over the appointment process, the attorneys or due process services, contracting, invoicing, payment, or the performance of the JAC.
- Clerks of court determine eligibility for the services of the public defender or appointed counsel based on individual applications for indigent status.
- Trial judges rule on appeals from the clerks' determination of non-indigence; appoint attorneys in rotating order from the applicable registry; approve requests for payment of attorney's fees and due process costs; and rule on JAC objections.
- Trial court administrators, trial court counsel, and their staff, by default, provide staff support to the circuit Article V indigent services committees and provide the ongoing day-to-day operational and administrative support necessary to keep the appointed counsel process operating within each circuit.⁴

³ Section 27.42, Florida Statutes, provides that the committee shall consist of the chief judge or the chief judge's designee, the public defender, one private criminal defense attorney, and one civil trial attorney.

⁴ See Commission on Trial Court Performance and Accountability, Administrative and Operational Support for Court-Appointed Counsel and Indigent Due Process Costs, November 2004. (Attached)

II. Six Basic Principles

There are six central principles around which any appointed counsel model should be aligned:

1) **Appointed counsel services, and the related support functions, should not be an element of the judicial branch or included in the trial court state funding structure.**

This finding is consistent with court funding principles first set forth in the 1991 Article V Report of the Judicial Council of Florida, and subsequently used by the courts and the legislature in implementing Revision 7 to Article V of the Florida constitution. It would be inconsistent to place appointed counsel within the State Courts System budget because appointed counsel services are not under the direct administrative control of the Florida Supreme Court and the chief justice.

2) **The support services provided to appointed counsel, as well as the circuit Article V indigent services committees that select them and establish their fees, are not judicial branch functions.** It is critical that there be a local capacity to administer local appointed counsel operations. However, it is inappropriate for the chief judge, or court staff to support the day-to-day operations for appointed counsel functions.

3) **Florida's appointed counsel service model must be independent.** The appointed counsel function must be independent. Appointed counsel should not be subject to more judicial supervision than the public defender or private counsel.

4) **The appointed counsel governance system must have the policy-making and operational capacity to:**

- develop standards;
- maintain oversight and accountability;
- promote uniform quality;
- support funding needs and justify expenditures;
- consider systemic changes;
- facilitate training and innovation; and
- manage caseloads and assignments.

5) **There must be clear accountability for both the quality of representation and efficiency in operations, including:**

- appointed counsel's workload, ability, training, and experience should match the nature and complexity of the case;
- appointed counsel should be supervised and systematically reviewed for quality and efficiency according to national and local standards; and

- there should be management and oversight to determine what is reasonable with respect to investigation, expert witnesses, transcripts, and other costs related to representation.

6) **There is no acceptable alternative to proving adequate funding.** Not only must the appointed counsel system be adequately funded, but cost containment cannot be the only role of the governance entity charged with its administration. It is also crucial that the system operate in a manner that will not create a financial incentive or disincentive for the public defender to declare a bonafide conflict.

III. A Model for Delivering Appointed Counsel Services ⁵

The delivery of appointed counsel services in Florida should be restructured to ensure quality of representation and accountability for use of state funds. To this end, the supreme court should establish minimum standards for the qualification and the delivery of appointed counsel services and there should be an independent statewide office consisting of an oversight board, an executive director, and regional/local coordinators.

- 1) **Standards to be Adopted by the Supreme Court.** The supreme court, which has the authority to regulate the practice of law in Florida courts, should adopt standards for the qualification and training of appointed counsel. Standards should establish acceptable caseloads, workload monitoring protocols, and any other principles that are required to supervise and monitor the delivery of services. These standards would apply to appointed attorneys who can be full- or part-time state employees (excluding public defenders and their subordinates), contract providers, or private appointed counsel.
- 2) **Oversight.** General policy oversight of the statewide office and its executive director shall be accomplished by board of no fewer than five or more than 7 members appointed by the governor, the chief justice, and the leaders of the legislature, with no one of the three branches appointing a majority of its members.

The board should include judges, legislative representatives, criminal and civil attorneys, and members of agencies or organizations representing: the indigent; racial minorities; people with mental illness; people developmental disabilities; the elderly; or who have served people of low income in other contexts. Board members should reflect the geographic and ethnic diversity of the state and should be individuals who have a variety of backgrounds, experience, and qualifications. An essential qualification for all candidates should be a firm commitment to the principle of independence of the public defense function. At least two-thirds of the members should be attorneys, one of whom should be a public defender.

The term of office for a member of the board should be three years. However, initially, the terms of office should be staggered to ensure continuity of the board. The board's chairperson should be chosen by majority vote of the board's membership. The board's members should not be compensated for their work except for reimbursement of actual and necessary reasonable expenses in connection with their duties as members of the board.

- 3) **Executive Director.** An executive director should organize, supervise, and assume overall responsibility for the operation of Florida's appointed counsel system and pursue adequate funding necessary to accomplish these goals. The executive director should be responsible

⁵ The Commission on Trial Court Performance and Accountability and chief judges utilized the Montana model and the recommended New York state model in developing this proposal. The Commission on Trial Court Performance and Accountability and the trial court chief judges have reached unanimous agreement that this model incorporates the necessary governance and operational capacity to ensure the quality of representation and manage these costs on behalf of the state. This model could also be accommodated in an existing entity, such as the offices of the public defenders.

for ensuring that quality court-appointed indigent representation is provided on a consistent basis throughout the state, independent of parochial or private interests.

- a) Appointment. The executive director should be appointed from nominees selected by the Supreme Court Judicial Nominating Commission. Selection should be on the basis of the successful applicant's training, operational and administrative experience and other qualifications as the panel deems appropriate. The executive director shall be an attorney in good standing with The Florida Bar. The executive director's salary should be fixed to the median public defender salary.
- b) Term. The executive director's appointment should be 4 years. However, initially, the term of office should be staggered to ensure that it does not coincide with the term of the governor. Additional 4 year term reappointments should be automatic unless the governor or the board initiates the nomination process to coincide with the end of an incumbent's term.
- c) Removal. Mid-term removal by the governor should be for cause, based on similar terms of removal for state attorneys and public defenders.
- d) Vacancy. Interim appointments should be made by the governor, with the nomination process to be initiated within 30 days of a vacancy.
- e) Budgetary and Administrative Support. Budgetary and administrative support to the independent statewide office should be provided through an existing executive branch agency. However, the office and its director should not be subject to the control, supervision, or direction of said agency.
- f) Duties. The executive director should have broad powers and responsibilities for the delivery of quality appointed counsel services. He or she should:
 - i) develop a regional strategic plan for the delivery of appointed counsel services and establish regional and local offices necessary to be responsive to regional or local needs and interests.
 - ii) insure that all regional and local offices are provided with adequate support services.
 - iii) have the authority to hire attorneys as regional and deputy directors and such other staff as he or she deems necessary to effectuate the purposes of the statewide appointed counsel system and to hire appropriate staff for the administration of his or her office.
 - iv) be authorized to hire full or part-time court-appointed counsel attorneys, or enter into contract and assigned counsel plans that provide representation that meet the established standards;
 - v) ensure that supreme court standards for performance are monitored and enforced.
 - vi) implement standards for performance, hiring, training and continuing legal education.
 - vii) establish and implement permissible workload, support service, contracting, and other standards that are required to supervise and monitor the delivery of appointed counsel services.

- viii) evaluate existing service models and determine the most effective and efficient type of delivery model to implement by region or case type, including but not limited to: utilizing state employees; contracting for services with private attorneys and public defenders; and establishing assigned counsel processes. Cost-containment should not be the primary reason for selecting a particular service model.
- ix) develop a mechanism for evaluating the performance of attorney and due process services provided by state employees, contract providers, and appointed counsel.
- x) evaluate the benefits of state employee, contract and appointed counsel models.
- xi) set compensation standards designed to ensure adequate and balanced funding for attorneys providing indigent counsel services, including attorneys employed by regional and local offices and assigned counsel, and ensure that contracting is done fairly and consistently through a competitive process. Fixed fee contracts must include a maximum number of cases to be assigned.
- xii) develop standards for hourly rates to be paid to expert witnesses, investigators and interpreters and update those standards periodically.
- xiii) create a statewide database of available experts, investigators, court reporters and interpreters by region.
- xiv) establish and maintain a comprehensive data collection system designed to provide an accurate picture of the provision of court-appointed counsel services that will enable policy makers and administrators to make informed judgments concerning the administration of the court-appointed counsel system and plan for improvements.
- xv) establish auditing procedures in compliance with generally accepted governmental accounting principles and applicable laws.
- xvi) develop a process allowing for the termination of a contract or for the removal of an attorney from an appointed counsel panel.
- xvii) be authorized to receive grants and contributions for the conduct of special projects that will enhance further the delivery of indigent defense services.
- xviii) make annual recommendations to the chief justice, governor and the legislature to improve the administration of the criminal justice system and the appointed counsel system.
- xix) prepare an annual budget designed to ensure the appointed counsel system is adequately funded.

4) Regions and Local Offices.

- a) Local offices, which may include both state employees who provide appointed representation services or a conflicts coordinator, should be established as needed. The determination as to the location of such local offices should be made by the executive director. Each regional and local office should be situated to ensure that attorneys and support staff have maximum access to clients and their families, courthouses, and detention facilities.

- b) Each region established by the executive director should have sufficient staff to perform the following executive and operational functions at the regional and local level, as may be required for sufficient responsiveness and oversight:
 - i) monitor contract services and select conflict coordinators as needed and permitted by the executive director.
 - ii) determine the eligibility of attorneys seeking to participate in a appointed counsel model, consistent with the standards established by the supreme court and policies adopted by the executive director;
 - iii) ensure that appointments are fairly distributed, consistent with an individual attorney's experience and availability;
 - iv) ensure all expenditures requested by appointed counsel are in compliance with state disbursement procedures and promote sound fiscal practices, consistent with the independence of individual contract or appointed counsel;
 - v) attempt to resolve differences with the appointed counsel regarding appropriate expenditures and, where differences cannot be resolved, petition or respond on behalf of the statewide office in litigation regarding appointed counsel's fees and costs; and
 - vi) regularly consult with chief judges, trial court administrators, clerks of court, and interested community groups and individuals in each region regarding matters affecting the delivery of appointed counsel services.

5) Appellate Representation.

- a) The executive director should hire and supervise appropriate staff for court-appointed appeals who should develop a plan for the representation of indigent defendants who wish to take advantage of their constitutional right to file an appeal.
 - b) The deputy for appeals should monitor all appellate assignments to ensure compliance with court orders, ensure the assignment of cases is made promptly, that the record on appeal is obtained expeditiously, and that all appellate service providers comply with the standards for performance established by the supreme court.
 - c) The deputy for court-appointed appeals should maintain complete and accurate records of appellate services and expenses.
- 6) **Transition.** The legislative enactment of the statewide office should be followed by an expeditious phase-in schedule that sets reasonable time limits for:
- a) the appointment of all members of the board and designation of its chairperson;
 - b) the appointment of the executive director and deputy directors;
 - c) the establishment of the requisite regional and local offices;
 - d) the publication by the executive director's its initial set of employee, contract and appointed counsel procedures and guidelines; and
 - e) the effective date on which the independent statewide office shall take over the duties of the JAC and circuit Article V indigent services committees.



January 19, 2007

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Dear Ms. Suhr,

Thank you for opportunity to comment on the legislative report and white paper related to the right to counsel in conflict cases in Florida. I was very much impressed with the report and the proposed changes to the system and appreciate the committee's deference to American Bar Association (ABA) and National Legal Aid & Defender Association (NLADA) standards and guidelines. My only significant critique regards the make-up of Board being considered to provide oversight to the assigned counsel system.

First and foremost, I applaud the proposed creation of a statewide Board. As you know, all pertinent national standards call for the creation of such independent oversight commissions as a means of insulating the defense function from undue political and judicial interference.¹ Over the past twenty years there has been a slow but steady trend to the creation of statewide indigent defense commissions across the United States. Whereas in 1983, 33 states had no commission whatsoever, only 19 remain that have made no move to a commission format.

Unfortunately, the propose Board complies with most, but not all, of the national provisions for guaranteeing independence. NLADA has promulgated guidelines to assist jurisdictions in establishing independent oversight boards at either the state or local level. NLADA's *Guidelines for Legal Defense Services* (Guideline 2.10) states:

A special Defender Commission should be established for every defender system, whether public or private. The Commission should consist of from nine to thirteen members,

¹ See generally, ABA *Ten Principles* #1. NLADA has promulgated guidelines to assist jurisdictions in establishing independent oversight boards at either the state or local level. NLADA's *Guidelines for Legal Defense Services* (Guideline 2.10) states: "A special Defender Commission should be established for every defender system, whether public or private. The Commission should consist of from nine to thirteen members, depending upon the size of the community, the number of identifiable factions or components of the client population, and judgments as to which non-client groups should be represented.

depending upon the size of the community, the number of identifiable factions or components of the client population, and judgments as to which non-client groups should be represented.

Commission members should be selected under the following criteria: The primary consideration in establishing the composition of the Commission should be ensuring the independence of the Defender Director.

- a. The members of the Commission should represent a diversity of factions in order to ensure insulation from partisan politics.
- b. No single branch of government should have a majority of votes on the Commission.
- c. Organizations concerned with the problems of the client community should be represented on the Commission.
- d. A majority of the Commission should consist of practicing attorneys.
- e. The Commission should not include judges, prosecutors, or law enforcement officials.

The proposed Board would consist of “no fewer than five or more than 7 members appointed by the governor, the chief justice, and the leaders of the legislature, with no one of the three branches appointing a majority of its members.” The proposed Board lends itself to undue influence because of its limited size -- significantly less than the nine to 13 member commission suggested by the national standard.

National standards also expressly forbid active judges (as well as prosecutors, law enforcement representatives) from participation on the oversight board for the simple reason that there is a clear conflict of interest. For example, while the vast majority of judges strive to do justice in all cases, the political pressures on some judges may make important commission decisions regarding the delivery of indigent defense services difficult. In a case where the crime is particularly heinous, the defendant unpopular or even reviled, or the public interest limited, a judge standing for election may be influenced by political concerns rather than the only factor that matters: how to guarantee that a criminal defendant is given fair legal representation. State court judges also simply have other competing interests – including the desire to keeping dockets moving – that may detract from the mission of the Board. That is not too say that judges – and prosecutors and law enforcement -- do not have valid insights to offer a statewide conflict Board, but their contributions should be presented to, and evaluated by, a more neutral commission membership. You may want to reconsider the requirement to have judges serve on the Board.

Moreover, most states with commissions also expressly require appointed members to have demonstrated commitment to the rights of criminal defendants before being considered for appointment. In Louisiana, for example, statutory language states that “Persons appointed to the board shall have significant experience in the defense of criminal proceedings or shall have demonstrated a strong commitment to quality representation in indigent defense matters.” You may want to consider adding similar language to the proposal.

Finally, national experience also dictates that those people standing to financially benefit from the policies of a statewide Board should not be permitted to hold positions that form said policies. No private for-profit business enterprise would ever allow the majority of board positions to be held by staff employees because of the financial conflict of interests it presents. If one of the goals of reform is to emulate the best practices of the private sector to maximize efficiencies and accountability to the Florida tax-payers, then reform advocates should seriously debate the merits of having “criminal defense attorneys” on the Board unless they are prohibited from taking indigent cases while serving.

Currently 31 states and the District of Columbia have a statewide indigent defense commission (or 63%). Of these jurisdictions, just three of the 32 jurisdictions allow indigent defense providers to have an appointing authority (or 9%). In fact, more states (5 of 32, or 16%) specifically prohibit public defenders or private assigned counsel attorneys who take indigent defense cases from oversight commissions than allows for them to be on the commission. In the balance of the states with commissions (75%) the lack of specific exclusionary language has never been put to the test (to the best of my knowledge) of trying to put an active defense provider on the commission because of the clear conflict it would cause. In Louisiana, a member of the Louisiana Association of Criminal Defense Attorneys serves in an ex officio capacity – providing information to the commission but precluded from voting on policy.

It is my understanding that this Board would not have any authority over the 20 elected circuit public defenders. As such, a Board member who is a public defender would not create a similar conflict of interest.

Thank you again for the opportunity to comment on your work. Please feel free to contact me with any further questions.

Thank you.

Sincerely,

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The Delivery of Public Defense: A Review of Service Models and Issues

Prepared by the Strategic Planning Unit, Office of the State Court Administrator, Florida
September 2006

Introduction

This paper summarizes the three public defense models used in the United States and attempts to identify the critical issues related to their operation, incorporating both discussions of national standards and specific operational issues with Florida's court-appointed counsel model. Its purpose is to inform the Commission on Trial Court Performance and Accountability's deliberations in addressing operational and administrative concerns relating to the role of courts in the current court-appointed counsel system in Florida. This paper makes no conclusions or recommendations regarding specific ways to improve Florida's present system; these are reserved for the Commission as it works with judicial branch stakeholders to develop consensus.

The paper is organized as follows: 1) a brief summary of the historical role of courts in public defense oversight and operations; 2) a description of common service delivery systems (public defender, assigned counsel, and contract) and their application; and 3) a synopsis of the major issues related to public defense operations (independence, governance and accountability, and support for funding). Finally, Appendix A includes descriptions of several state delivery systems; Appendix B is the American Bar Association's Ten Principles of a Public Defense Delivery System; and Appendix C is the National Legal Aid and Defender Association's Standards for Assigned Counsel.

I. Public Defense and the Role of Courts

Courts have always had the ability to order attorneys to defend indigents *pro bono*.¹ As the Supreme Court established the right to counsel in a series of cases in the 1960s and 70s, the obligation to pay was placed on the government. States and counties had to develop a system to provide for this representation; they did so in a variety of ways² and courts played an important role from the beginning.

Although indigent defense is publicly funded, the legal community and courts typically control the provision of legal services. It is not uncommon to find appropriations and decisions about expenditure levels made within larger decisions about financing court

¹ The common law obligation of the profession to represent the poor without compensation has been carried forward in cases which endorse the historical concept that one who is allowed the privilege to practice law accepts a professional obligation to defend the poor without compensation. See *In the Interest of D.B. and D.S.*, 385 So.2d 83 at 91, 92 (Fla. 1980).

² Some public defense systems precede *Gideon*; the Los Angeles County Public Defender has existed since 1914, and California has had a public defender system since 1921.

operations.³ The rationale for this is understandable. First, the appropriation of public funds for indigent defense was essentially a result of the constitutional authority of judges to secure this right. Second, because the institutions involved are legal institutions, it seemed quite logical to place these oversight responsibilities with the judicial branch.

Following *Gideon*, in 1963 the Florida legislature created an elected public defender in each circuit.⁴ These offices relied heavily on supplemental county funding. While the creation of an elected public defender effectively removed the majority of public defense services from the operational control of the judicial branch, Florida's trial courts continued to play a role in the appointment of counsel in conflict cases⁵ and determination of indigent-for-costs, for which counties continued to pay.⁶ Each county worked with the courts to create mechanisms for accountability and oversight of expenditures and most counties provided operational and administrative support for the court-appointed counsel functions, either within county administration or within the court's county funding. Many counties required individual attorneys to file applications with a conflict committee, which usually included the chief judge, the public defender, and a county commissioner. Some county purchasing departments utilized an RFP process to select contractors for full or part-time representation. Chief judges often cooperated by entering administrative orders regarding court-appointed counsel costs.

In 2004, the implementation of Revision 7 to Article V of the Florida constitution created a state court funding scheme by which much of the costs of the justice system became the responsibility of the state. The state funding transition was largely a huge success. However, one of the most noteworthy failures was the lack of operational and administrative capacity to support the court-appointed counsel functions that had been previously provided by the counties.⁷

³ Mark H. Moore, *Alternative Strategies for Public Defenders and Assigned Counsel*, Executive Session on Public Defense, Malcolm Wiener Center for Social Policy, John F. Kennedy School of Government, Harvard University, April 2001, 7.

⁴ Chapter 63-409, Laws of Florida.

⁵ The right of indigent persons to representation has expanded from criminal and delinquency matters to civil proceedings such as juvenile dependency and termination of parental rights, guardianship, Marchman Act, and Jimmy Ryce Act cases.

⁶ The trial court may require the county to pay appropriate attorneys' fees for appointed representation absent any other statutory provision. See *In the Interest of D.B. and D.S.*, 385 So.2d 83 at 93 (Fla. 1980).

⁷ While acknowledging that this failure is relatively small compared to the no-less-than monumental public defense deficiencies and failures experienced in other states, these operational and administrative issues require and deserve attention to ensure performance and accountability and to avoid a more significant failure.

The Justice Administrative Commission

The Justice Administrative Commission (JAC) was created in 1965 to provide administrative services on behalf of the judicial branch, which at the time consisted of the courts, state attorneys, public defenders, and court reporters.⁸ The Commission was composed of the chief justice of the supreme court or his appointee, a district court of appeal judge, a circuit court judge, a state attorney and a public defender. In 1978, the duties of the JAC were expanded to include administrative services for the county courts and a county court judge was added to the commission.⁹

The JAC became an executive branch entity when administrative services for the state court system were transferred to the Office of the State Court Administrator in 1984. In 1985 the composition of the Commission was also amended, to its present day membership of two state attorneys and two public defenders, who are appointed by the presidents of their respective associations for two year terms. The commissioners select the executive director of the JAC.

In 2003, the circuit guardian ad litem programs were moved under a Statewide Guardian Ad Litem Office (GAL) created within the JAC; the JAC's administrative responsibilities were expanded to include the GAL office. This was done because there was a perceived conflict of interest created by the supervision of program staff by the judges before whom they appear.¹⁰ The director of the GAL is appointed by the governor and is not subject to the control, supervision, or direction of the JAC.

Originally the duties of the JAC's executive director and staff were to provide administrative services related to budget and budget preparation, personnel and payroll matters, payment of invoices for the goods and services received by the client agencies and assuring general adherence to all rules relative to purchasing and auditing. Following implementation of Revision 7 to Article V of the Florida constitution, the JAC was given new duties relating to the circuit Article V indigent services committees, including contracting with court-appointed attorneys and reviewing their invoices for the payment of attorney fees, as well as implementing a quarterly reporting system to ensure the continuation of adequate funding for court-appointed attorney costs. Revision 7 implementation also required the JAC to begin processing all state attorney, public defender, court-appointed counsel due process costs, which were previously paid by the counties.

⁸ Chapter 65-328, Laws of Florida.

⁹ Chapter 78-174, Laws of Florida.

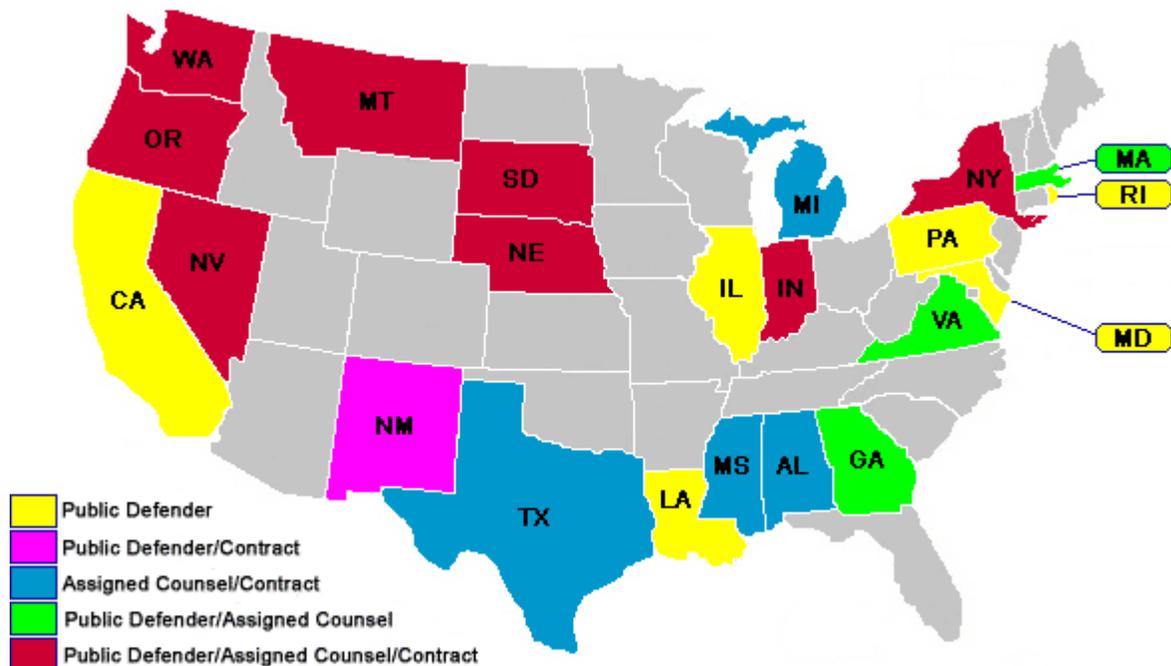
¹⁰ Subsection 39.8296(1)(b), Florida Statutes.

II. Public Defense Service Delivery Systems

Most states and localities complied with their *Gideon* responsibilities in a variety of ways, and three primary methods of providing indigent defense services have emerged – **public defender, assigned counsel and contract**. States and localities use these methods of delivering indigent defense services either separately or in combination. Contrary to the apparent simplicity reflected in the map below, many of the service models are quite complex and can include multiple variations each of these delivery methods. For example, California’s primary indigent criminal and juvenile defense is provided by a:

- **county public defender;**
- **county alternate public defender**, supplemented by **appointed counsel** to handle conflicts;
- **state contract** through the Administrative Office of the Courts within the judicial branch to handle indigent criminal and delinquency appeals;
- **state assigned counsel** program operating through AOC the within the judicial branch for dependency proceedings; and a
- **state public defender** in the executive branch to handle capital appeals.

Primary Indigent Defense Delivery System at Trial Level *



* SOURCE: The Spangenberg Group ("primary indigent defense delivery system" refers to the program appointed in more than 50% of the state's indigent defense cases at the trial level). *Gideon's Broken Promise: America's Continuing Quest for Equal Justice*, ABA Standing Committee on Legal Aid and Indigent Defendants. Copyright 2004 American Bar Association. Reprinted by permission.

An excellent description of three models is described in a 1999 Bureau of Justice Report,¹¹ a primary source of the descriptions and tables below:

A. Public Defender Model.

Public defenders are salaried staff or full or part-time attorneys that render indigent criminal defense services through a public or private nonprofit organization or as direct government paid employees. In 1999, 19 of the 21 exclusively state-funded systems used a public defender; five operated within the judicial branch (however, the chief defender was appointed by an independent board or commission) and one as an independent department of the judicial branch. The remainder operated outside the judicial branch, either within the executive branch, as an independent state agency, or as a non-profit.

Table 3. Characteristics of State-funded public defender programs, 1999

State	Governmental location of public defender programs	Oversight commission ^a	Statewide program ^b
Alaska	State executive branch	No	Yes
Colorado	Judicial branch	Yes	Yes
Connecticut ^c	Judicial branch	Yes	Yes
Delaware	Independent agency of State government	No	Yes
Hawaii	State executive branch	Yes	Yes
Iowa	State executive branch	Yes	Yes
Maryland ^d	State executive branch	Yes	Yes
Massachusetts	Independent agency of State government	Yes	Yes
Minnesota	Judicial branch	Yes	Yes
Missouri	Independent department in judicial branch	Yes	Yes
New Hampshire	Independent nonprofit organization	Yes	Yes
New Jersey	State executive branch	No	Yes
New Mexico	State executive branch	No	Yes
North Carolina	Judicial branch	No	No
Rhode Island	State executive branch	No	Yes
Vermont	State executive branch	No	Yes
Virginia ^e	Judicial branch	Yes	No
West Virginia	Independent nonprofit organization	No	No
Wisconsin	State executive branch	Yes	Yes

National standards recommend the use of public defender programs wherever the population and caseload are sufficient to support such organizations.¹² (See ABA, Appendix B.) Some states and localities use both a primary public defender and an alternate public defender system to provide indigent services. Additionally, some states use a public defender model to provide only certain types of specialty representation, such as in capital cases or termination of parental rights appeals. Principal limitations to effective public defender models appear to be related to insufficient funding, either in the first instance or by assigning costs related to conflict representation against the public defender's budget.

¹¹ *National Survey of Indigent Defense Systems, 1999*, Bureau of Justice Statistics Special Report, September 2001, NCJ 188464.

¹² American Bar Association, *The Ten Principles of a Public Defense System*, (February 2002).

B. Assigned Counsel Model.

Assigned counsel is the appointment from a list of private bar members who accept cases on a judge-by-judge, court-by-court, or case-by-case basis. This may include an administrative component and a set of rules and guidelines governing the appointment and processing of cases handled by private bar members. Assigned counsel is the primary method for delivery of defense services in about 50% of the counties in the United States.¹³ The use of assigned counsel is highly correlated with the public defender model.¹⁴

Judges are more likely to be involved in the operation of an assigned counsel model, although the lack of full independence from political and judicial influence can lead to perceived and actual conflicts. For example, judges can be accused of unfairly favoring attorneys they know, or they can be overly influenced by the need to control costs. In Indiana, an attorney complained that “the trial judge in his county was refusing to assign cases to him. When interviewed, the judge readily explained that he regarded the defense attorney as a problem because his frequent visits to his jailed clients led to complaints from other defendants whose court-appointed lawyers visited them much less frequently. The judge also stated that this same defense lawyer filed too many motions, and as a result prosecutors were less willing to plea bargain the cases of his clients. Finally, the judge noted that the defense lawyer’s reimbursement claims were higher than those submitted by other defenders, which meant that his representation was costing the county too much money.”¹⁵

Principal limitations to effective assigned counsel models appear to be related to independence and relatively low compensation rates that discourage experienced attorneys from participating. Many jurisdictions, especially those with particularly strong bar associations, often find that they must keep increasing rates to continue attracting competent and experienced attorneys.¹⁶ Failure to provide adequate compensation can result in a shortage of experienced attorneys and in ineffective representation by over-tasked attorneys. (See Appendix C for NLADA Assigned Counsel Standards.)

Table 1. Types of indigent criminal defense services in the Nation’s 100 largest counties, 1999

Type of indigent defense services	Number of counties
Total	100
Public defender	90
Assigned counsel	89
Contract	42*

Note: Detail may not sum to total because a county may have 1 or more service types available.

*Includes 2 counties with public defender programs primarily funded by awarded contract.

¹³ National Legal Aid and Defender’s Association, Assigned Counsel Standards, found at http://www.nlada.org/Defender/Defender_Standards/Standards_For_The_Administration_Of_Assigned_Counsel

¹⁴ *National Survey of Indigent Defense Systems, 1999*, Bureau of Justice Statistics Bulletin, November 2000, NCJ 184932, 2.

¹⁵ American Bar Association, *Gideon’s Broken Promise: America’s Continuing Quest for Equal Justice* (2004) 21 (testimony of Norman Lefstein, Professor of Law and Dean Emeritus, Indiana University School of Law).

¹⁶ *Contracting for Indigent Defense Services: A Special Report*, Indigent Defense Series #3. Bureau of Justice Assistance, U.S. Department of Justice Office of Justice Programs, April 2000, NCJ 181160, 17.

In 1980, the Florida Supreme Court noted that just because there is an obligation to provide representation at public expense, lawyers should not be totally relieved of their professional obligation to provide services to the poor. The Court found that in the absence of a statutory payment formula, compensation should be made at 60% of the fee a client of ordinary means would pay an attorney of modest financial success.¹⁷ Similarly, a commission in Massachusetts recently found that the state had a disproportional reliance on private counsel and that an increasing number of attorneys were relying exclusively on assigned counsel work for their livelihood, overlooking the fact that the hourly rates were never intended to sustain a private practice.¹⁸

C. Contract Model

Contract models include nonsalaried private attorneys, bar associations, law firms, consortiums or groups of attorneys, or nonprofit corporations that contract with a funding source to provide court-appointed representation. Types of contracts include: fixed-fee, all cases; fixed-fee, specific type of case; flat fee, specific number of cases; flat fee per case; hourly fee with caps; and hourly fee without caps. Contract programs that replace appointed counsel systems generally require far fewer private attorneys,¹⁹ although, contracts that do not jeopardize the quality of representation typically cost more per case than do public defender or assigned counsel programs.²⁰

When contract systems are created for the sole purpose of containing costs, they pose significant risks to the quality of representation; as such, contract systems require appropriate safeguards.²¹ One study found that a contract system costs less than the assigned counsel system for nontrial cases because the contract attorneys spent less time on each case and made fewer appearances.²²

Legal challenges to contract systems significantly influenced how contract programs have developed. In *State v. Smith* the Arizona Supreme Court, in 1984, struck down a low-bid contract system because: it did not take into account the time the attorney was expected to spend representing indigent defendants; it did not provide support costs; and it failed to take into account the complexity of each case and competency of the attorney. In *People v. Barboza*, the California Supreme Court, in 1981, found that a contract model that deducted the contract payment from the public defender created an “inherent and irreconcilable”

¹⁷ *In the Interest of D.B. and D.S.*, 385 So.2d 83 at 92 (Fla. 1980).

¹⁸ Report of the Commission to Study the Provision of Counsel to Indigent Persons in Massachusetts, April 2005, 17.

¹⁹ *Contracting*, *supra* note 16 at 5.

²⁰ *Id.* at 17, 19.

²¹ *Id.* at 2.

²² *Id.* at 10, citing Houlden, Pauline, and Steven Balkin, 1985, “Quality and Cost Comparisons of Private Bar Indigent Defense Systems: Contract vs. Ordered Assigned Counsel,” *Journal of Criminal Law and Criminology* 76: 176.

financial disincentive for the public defender to declare a conflict.²³ In Jones County, Mississippi, the contactors themselves filed suit, contending that they should be found to be ineffective in all cases as a result of the conditions under which the contract required them to provide services.²⁴

Some contract systems have been created in response to legal challenges to inadequate compensation for assigned counsel. In Mississippi and Oklahoma, successful challenges to the system for paying assigned counsel led to contract systems that nullified the impact of the court decisions.²⁵ In 1995 the Wisconsin legislature required the public defender to use fixed-fee contracts to handle conflict cases, rather than rely on court-appointed attorneys.²⁶

III. Issues in the Operation and Administration of Court-Appointed Counsel

A. Independence.

“[I]n much of the United States, defense counsel is normally dependent upon the judge who heard the case to approve the services of expert witnesses and investigators, as well as approve attorney compensation, and the judge’s discretion is not subject to effective review.”²⁷ The ABA’s recently released Florida Death Penalty Assessment Report states that “[t]he State of Florida has not removed the judiciary from the attorney appointment and monitoring process, thereby failing to protect against the appointment or retention of attorneys for reasons other than their qualifications.”²⁸ Both the ABA Standards and NLADA Guidelines²⁹ recommend that the professional independence of indigent defense systems, including contractors, be protected by creating an independent organization. Public defenders, assigned counsel, and contracts should not be subject to more judicial supervision than private counsel; they should not be selected by judges or governors, but should be selected on the basis of merit by an independent authority, agency, or administrator to qualify, appoint, and compensate counsel, including their requests for expert or investigative

²³ *Id.* at 5.

²⁴ *Id.* at 13.

²⁵ In Mississippi counties replaced assigned counsel programs with “part-time” public defender programs that in reality were fixed-price contracts. Oklahoma created a statewide agency, giving its board of director’s responsibility for providing indigent defense. In 1992 the board adopted a contract system, which, until 1995 was directed to accept the “lowest and best bid or bids.” *Id.* at 6.

²⁶ *Id.* at 7.

²⁷ American Bar Association, *Gideon’s Broken Promise: America’s Continuing Quest for Equal Justice*, 2004, 21 [hereinafter GIDEON].

²⁸ American Bar Association, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Florida Death Penalty Assessment Report*, September 2006, xxi. <http://www.abanet.org/moratorium/>

²⁹ See American Bar Association, 1990, *Standards for Criminal Justice: Providing Defense Services*, Chapter 5, Washington DC; and the National Legal Aid & Defender Association, 1984, *Guidelines for Negotiating and Awarding Indigent Defense Contracts*, Washington, DC.

services.³⁰ (See principle 1 of the Ten Principals of a Public Defense System, ABA House of Delegates, 2002 in Appendix B.)

While Florida's elected primary defender system³¹ sets it well ahead of many other states and localities in terms of an independent defense system, the public defender conflict and court-appointed civil indigent cases are currently caught in a non-system that does not safeguard independence and promote efficiency and quality of services.³² Concerns include:³³

- some chief judges are concerned that their role in determining attorney eligibility and payment rates for court-appointment is an actual or perceived conflict;³⁴
- many chief judges are concerned that the judicial branch will be blamed for court-appointed counsel deficits in their circuits;
- trial court administrators and general counsel, who must provide staff support to the circuit Article V indigent services committees by default, are concerned about the appropriateness of supporting an executive function with judicial branch employees;
- court-appointed attorneys must contract with the Justice Administrative Commission (JAC);³⁵ the executive director of the JAC, a non-attorney,³⁶ cannot be responsible for supervising the work of appointed counsel³⁷ yet has the authority to influence the representation through the contracting and payment process;
- individual judges worry that the assignment wheels³⁸ will result in a relatively inexperienced or overcommitted attorney receiving an inappropriate

³⁰ GIDEON, *supra* note 27 at 20, 39.

³¹ Pursuant to Chapter 63-410, Laws of Florida, voters have elected circuit public defenders since 1963; public defenders were deemed the chief administrators of public defender services within the circuit, whether such services are rendered by the state or county public defenders. Interestingly, the act that removed the primary public defender from the control of the judiciary required the consent of the trial judge when the public defender accepted the voluntary services of attorneys.

³² See Supreme Court of Florida Commission on Trial Court Performance and Accountability, *Administrative and Operational Support for Court-Appointed Counsel and Indigent Due Process Costs*, November 2004.

³³ Many of the operational and administrative concerns of the chief judges and court administrators have been noted in the Commission on Trial Court Performance and Accountability's November 2004 report.

³⁴ Chief judges serve as the chair of the circuit Article V indigent services committees. Section 27.42, Florida Statutes, (2006).

³⁵ Subsection 27.40(3)(a), 27.40(7)(b), and 27.5304(1), Florida Statutes, (2006).

³⁶ The present executive director is a non-attorney who serves at the pleasure of the Commissioners, two public defenders and two state attorneys. Section 43.16, Florida Statutes, (2006).

³⁷ Supervision of attorney work cannot be ethically performed by a non-attorney, ABA Model Code of Professional Responsibility and Model Rules of Professional Conduct.

³⁸ Judges are to appoint attorneys in rotating order as they appear on the registry of individual attorneys established by the circuit Article V indigent services committee. Section 27.40(3)(b), Florida Statutes.

appointment, while at the same time they are subject to criticism if they deviate from the rotation prescribed by the wheel; and

- individual judges are concerned about their role in approving court-appointed attorneys' requests for transcripts, experts, investigators and routine costs of representation,³⁹ each of which could impact the level of representation provided by the attorney.

B. Governance and Accountability.

Regardless of whether one is considering indigent defense systems or public defender offices, some particular individual, occupying a particular office, is both authorized and held accountable for developing, overseeing, and managing public defense. In widely decentralized, court-assigned systems, that "person" is the many judges in the state who have the power to commit public funds to public defense. In such systems, someone in the administrative office of the courts usually is responsible for allocating cases, overseeing the statewide budget for this activity, and reporting to the legislature about the needs and the performance of this particular indigent defense system. In more centralized systems, that person is someone who leads a statewide public defender office.⁴⁰

National standards call for a statewide structure to oversee indigent defense services, ensure uniformity in the quality of services, and provide system accountability.⁴¹ There is a clear trend among states to develop some type of statewide oversight that is typically charged with setting policy and advocating for state resources,⁴² although some are limited in scope, such as appeals, capital cases, or post-conviction.

Most indigent defense models have some capacity for selecting an attorney for a given case and determining the level of assistance to be provided based on objective standards.⁴³ However, in most assigned counsel jurisdictions, the absence of standards other than those contained in general defense service standards has resulted in an absence of structure, quality

³⁹ Specific Appropriation 878 proviso, FY 2006-07, Florida General Appropriations Act and subsection 27.5304(2), Florida Statutes.

⁴⁰ Moore, *supra* note 3 at 2.

⁴¹ GIDEON, *supra* note 27 at 21.

⁴² Spangenberg Group, *Statewide Indigent Defense Systems: 2005*, prepared for the ABA Bar Information Program, (2005), introduction.

⁴³ Calif. Rules of Court, section (d) of rule 76.5 gives the appellate court the option to contract with an administrator with substantial experience in handling criminal appeals to perform the administrative functions related to the appointment of counsel in criminal appeals. This administrator ranks experience and work quality to determine the appropriate appointments.

control, training and support services.⁴⁴ The appointment process should never be ad hoc, but should be according to a coordinated plan directed by an administrator who is also an attorney familiar with the requirements of practice in the jurisdiction.⁴⁵

For most public defense services in Florida, governance and accountability rests with the 20 elected circuit public defenders. But in public defender conflict and the various civil court-appointed counsel cases, Florida relies on a diffused governance and accountability model. In implementing Revision 7, the Florida legislature created an Article V Indigent Services Advisory Board (AVISAB)⁴⁶ for the purpose of advising the legislature about qualifications for those providing due process services, including eligibility and performance standards for court-appointed counsel. This AVISAB had a broad membership consistent with that recommended by national standards, but the board had no dedicated staff⁴⁷ and was repealed, effective July 1, 2006.⁴⁸ Today, the associated management functions in the operation of Florida's court-appointed counsel system are widely (some would say wildly) diffused among: 20 circuit Article V indigent services committees; 862 trial judges; 20 court administrators and their staff; the JAC, its executive director, and her staff; and the hundreds of contract attorneys, experts, interpreters, and court reporters.

A lawyer with an indigent defense contract since 1980 once bragged to the chief prosecutor in his Montana county that "he got out of the 1990s without a trial."⁴⁹ Integral to accountability is the capacity to measure performance, not only to ensure accountability, but because the right to the assistance of counsel means the right to the "effective assistance" of counsel.⁵⁰ While judges hearing the cases certainly have the authority and obligation to

⁴⁴ "Responsibility directly or indirectly for the quality of indigent defense services resides in part with the funding authority, the judiciary, boards or commissions, grievance processes, and the executive branch. Funders and executive officers are not in a position to judge the performance of the system. Clients have little or no say in who their attorneys will be, whether attorneys stay on the appointment list, and whether they are well paid or have their fees cut. In most jurisdictions that lack organized systems, with few exceptions, judges choose the attorneys and determine their pay. This immediate control by the judge may create the perception of patronage or concerns that the assigned lawyers chosen or paid by the judge will not willingly confront the judge who selects and pays them. Often there are complaints from the bar about too-low fees, the cutting of vouchers, or unfair denial of access to the work. Turnover is often high, training is almost nonexistent, and the quality of representation is subjective to the judge. This power far exceeds any similar power a judge has over the prosecutor or, for that matter, any other counsel in the court." James Neuhard, Discussion of The Ten Commandments of Public Defense Delivery Systems found at http://www.nlada.org/Defender/Defender_Standards/Standards_Attach6A. See also, National Legal Aid and Defender Association, Standards for Administration of Assigned Counsel Systems, (1989).

⁴⁵ See ABA Ten Principles, Number 2 in Appendix B.

⁴⁶ Section 29.014, Florida Statutes.

⁴⁷ The JAC provided staff support necessary to facilitate the board's meetings, but members relied extensively on their own agency staff for research and policy development.

⁴⁸ Ch. 2005-236, Laws of Florida.

⁴⁹ GIDEON, *supra* note 27 at 19.

⁵⁰ *McMann v. Richardson*, 397 U.S. 759, 771 n4 (1970).

ensure that an attorney's representation meets constitutional due process requirements, judges' ability to monitor an individual attorney's performance is relatively limited. "The defender office (both professional and support staff), assigned counsel, or contract defenders should be supervised and periodically evaluated for competence and efficiency."⁵¹ Many states have a more formal mechanism for reviewing court-appointed counsel performance and ensuring that representation is up to the prevailing norms of practice, for example:

- regular communication with client;
- ability to identify and evaluate issues;
- quality and completeness of legal research;
- quality of legal writing, including organization, persuasiveness, use of authority, accurate and appropriate presentation of facts; and
- responsibility, including timeliness, proper augmentation, and appropriate communications with the court, the client, the project and counsel.⁵²

C. Support for Funding.

"Is there any way we could get defendants from the jail to the prison without going to court? Because you would save a lot of money." – Michigan county commissioner⁵³

Lack of adequate funding is a significant problem in many states' systems. If the public wants to meet minimum standards for representation and minimize the cost of doing so – and attorneys want to provide zealous representation – then either the public pays for more than it wants, or attorneys will have to provide higher quality service than they are paid to provide.⁵⁴ Attorneys who do not receive sufficient compensation have a disincentive to devote the necessary time and effort or even participate in the system at all.⁵⁵ While the adequacy of funding in Florida is outside the scope of this document, issues relating to support for funding cannot be ignored.

A common weakness in the management of public defense systems is that their leaders do not reach out to enough constituencies to support them.⁵⁶ In the case of Florida's court-appointed counsel system, we are further disadvantaged by having no formal court-appointed counsel leadership capacity to support it politically and communicate with the legislature and public on its behalf.

⁵¹ See ABA Principles, Number 9 in Appendix B.

⁵² Report on the Efficiency and Effectiveness of the Court-appointed Counsel Program, California Appellate Indigent Defense Oversight Advisory Committee, February 1997, 10, 11.

⁵³ GIDEON, *supra* note 27 at 29.

⁵⁴ Moore, *supra* note 3 at 9.

⁵⁵ GIDEON, *supra* note 27 at 7.

⁵⁶ Moore, *supra* note 3 at 16.

IV. Conclusion

The involvement of the judiciary, combined with the resulting burden on trial court staff and the governance diffusion, has resulted in an unacceptable non-system in Florida, which has essentially no meaningful capacity to ensure oversight in performance and accountability in the expenditure of public funds. Each of the various entities are essentially caught up in an activity trap, where their court-appointed counsel related activities only indirectly relate to their respective roles within the justice system. The Commission on Trial Court Performance and Accountability must first determine whether the judiciary has a legal or ethical responsibility regarding court-appointed counsel policy and operations that is separate from that of individual judges who make up the judiciary. With the role of the judiciary resolved, the Commission can begin working with the JAC to develop a solution to the operational problems presently plaguing the system.

In designing a public defense service delivery system, it is important to establish the policy-making and operational capacity to develop standards, maintain oversight and accountability, support funding, consider systemic changes, facilitate training and innovation, manage caseloads, track cases, and to develop institutional knowledge across agencies.⁵⁷ These capacities must be built in a system that is both independent in providing indigent representation and accountable for the expenditure of state funds. A good place to start is to review the functions typically provided by oversight boards, with the assistance of executive directors and staff, (listed below) and begin designing a service model that will result in uniform quality services that meet the necessary standards of independence, governance and accountability, and can appropriately advocate for resources, reform, when appropriate. Functions typically performed by statewide entity include:

- establish general and specific qualifications necessary to promote uniform quality services;
- approve service models to be used;
- establish general and specific duties and obligations of appointed counsel within specific case types and phases of each case, including appellate phase;
- provide and facilitate training opportunities;
- continued management oversight with emphasis on standardizing statewide reporting system in the areas of panel management, case assignment and training; and
- advocate for resources and speak for the needs of the system.

These statewide functions are combined with a local capacity to:

⁵⁷ Moore, *supra* note 3 at 2.

- admit and remove panel members based on the quality of their work;
- match attorney skills to case needs;
- work with attorneys in assisted and independent cases;
- facilitate communication between the courts and the panel attorneys on policy and administrative matters;
- determine what is reasonable with respect to investigation, expert, transcript, and other costs of representation,
- recommend compensation on a case-by-case basis pursuant to guidelines;
- review compensation claim; examine in detail the quality of counsel's work;
- monitor the number of panel attorneys and provide for ongoing recruitment;
- monitor "rejection rates" (reflects the refusal of cases offered to attorneys who were presumably available); and
- conduct caseload evaluations and monitor attorney "saturation rates" (a high number of open cases) to control workload.

- **Appendix A. State Delivery Systems**

Information on the specifics of public defense models that were not exclusively state funded is not readily available. However, a search provided an informative picture of the variety of ways that indigent defense systems operate within three primary models (public defender, assigned counsel, and contract) regardless of funding source. Rather than attempt to completely describe every aspect of states’ public defense system, staff attempted to identify and summarize a variety of system models and issues for the Commission on Trial Court Performance and Accountability’s consideration. Should the Commission on Trial Court Performance and Accountability require further detail, such would be readily available or researched.

California

Public Defense (public defender)	Public defender for criminal and juvenile cases – although varying levels of local funding has led to disparities. ¹
Conflict Defense (alt. public defender and assigned counsel)	An alternate public defender is appointed by the county executive and uses asst. alternate public defenders and assigned counsel to provide representation in conflict cases. Ventura County has a contract with a group of attorneys, Conflict Defense Associates, who have provided the public defender conflict services for years.
Dependency (alt. public defender and assigned counsel)	The public defender represents the child; court appoints for child if public defender has a conflict; alt.pd represents parent; court appoints for other parent. Court appointments are made within court funding; the AOC is piloting a RFP process in some counties. ²

¹ ABA Standing Committee on Legal Aid and Indigent Defendants, “*Gideon’s Broken Promise: America’s Continuing Quest for Equal Justice*,” December 2004, 5; found at <http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/downloads/ca.pdf>.

² Information taken from Study of Court-Appointed Counsel in Juvenile Dependency Proceedings found at <http://www.courtinfo.ca.gov/reference/rfp/juvdeprfp.htm>.

Appeals³

(contract)

Originally, lawyers could get on an appointed counsel list by showing up in the clerk's office. In 1970 it was noted that 30-40% of appeals "fell below an acceptable level of quality." Indigent appeals are now directed to five "appellate projects," each with its own board of directors and executive director. The appellate project model is a public-private partnership in which a small office serves as a resource and quality control center for private counsel taking indigent appeals; the projects are under contract with the supreme and appellate courts. Contract billings cover personnel, operating expenses, reserves, and providing services in all cases in which the courts make an appointment of counsel. (See Calif. Rule of Court 76.5). Overall responsibility for the system is provided by the Appellate Indigent Defense Oversight Advisory Committee, whose members (1 justice from each district and 4 attorneys) are appointed by the chief justice.

Highly individual performance standards are monitored by indigent appeals project staff attorneys for each case. The attorneys with lower "rankings" are provided with more tailored assistance on more complex cases. This assistance allows inexperienced attorneys to build experience and become more capable in handling more complex cases on an independent basis. (The fee schedule is linked to the type of case [case tier] and whether the attorney can take it independently or requires assistance. The tiers are a) assisted cases; b) independent cases; and c) upper tier for violent felonies and long-record cases.)

In FY 2005-2006 there were more than 9,000 appointments for indigent appellate counsel. Projects report their hourly expenditures, as billed against the contract value. Services are billed in two categories: (1) individual case services, including assistance to counsel, evaluation, compensation review against performance, making recommendation to the state for appropriate payment; and (2) common case services including recruiting and classifying counsel, and classifying cases. It appears that the projects do what is equivalent to an *Anders* case, in-house.

³ Information taken from Report on the Efficiency and Effectiveness of the Court Appointed Counsel Program, Appellate Indigent Defense Oversight Advisory Committee, California Judicial Council, February 1997, and from http://www.lacap.com/About_Cap/about_cap.asp (comments of Jonathan B. Steiner on the 100th Anniversary Celebration of the Court of Appeal).

Colorado⁴

Public Defense A state public defender.

(public defender)

Conflict Defense The state public defender had contract authority for conflicts until 1996, when an office of alternative defense counsel was created. A nine member commission appointed by the supreme court selects alternate defense counsel and acts as advisory board to the alternate counsel office, which is authorized to contract with private attorneys.

(alternate public defender and contract)

In 1998, the governor vetoed a bill providing for public defender and state alternative defense counsel commissions – with the chief justice, governor, president of the senate and speaker of the house to select 3 candidates for their respective offices – to review performance annually; review the budgets prepared by respective offices and make recommendations to the legislature.

Georgia⁵

Public Defense In January 2005, Georgia enacted an overhaul to its indigent defense system (a system of part-time private attorneys with flat-fee contracts) and implemented 49 state-funded circuit public defender systems for representation in felony and juvenile cases, and their related appeals. Local governments contract separately with the offices for representation in lower courts, including dependency cases. Circuit public defenders are appointed by a five-member circuit public defender selection panel. (The governor, the lieutenant governor, the speaker of the house, the chief justice, and the chief judge of each circuit appoints one member to each of the 49 circuit panels.)

(public defender)

Cobb County, one of six single county circuits that were permitted to opt-out with Council approval. Cobb county has a circuit defense administrator who is selected by the court administrator. The Cobb County circuit defender's office administers a panel system. The administrator is responsible for matching each case to an appropriately qualified and available contract attorney and reviewing invoices. Extraordinary invoices are reviewed by a panel of attorneys. ⁶

⁴ Information taken from http://www.state.co.us/gov_dir/elg_dir/olls/digets_1998/STATEPUBLICDEFENDER.htm and from http://www.state.co.us/gov_dir/elg_dir/olls/digets_1996/STATEPUBLICDEFENDER.htm

⁵ Sources at: <http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/downloads/ga.pdf> and from links at <http://www.gpdsc.org/> and from discussions with Steve Nevels, GPDSC.

⁶ Cobb County information is from discussion with Randall Harris, Circuit Defender, Cobb County Superior Court Administration.

Conflict Defense

(conflict defender and assigned counsel)

The Council establishes the procedure for providing conflict representation; this may be done by assigned counsel or by establishing a conflict defender office where the volume warrants a separate office. Attorneys seeking appointment must meet qualifications and standards established by the Council. The Council has established ten conflict offices around the state in areas where volume justifies full-time conflict attorneys; these offices can serve more than one circuit. Expansion of dedicated offices is driven by analysis of case volume and cost. Where the numbers will not support a dedicated office, conflict cases are assigned to conflict case panel attorneys who are paid hourly.

Georgia Public Defenders Standards Council

The Georgia Public Defenders Standards Council is an independent agency within the judicial branch. Its mission is to ensure, independent of political considerations or private interests, that each client whose cause has been entrusted to the circuit public defender receives representation consistent with the U.S. and state constitutions and the Georgia Indigent Defense Act of 2003. (The Governor, the Lt. Gov., the Speaker of the House, the chief justice of the supreme court, and the chief judge of the court of appeals each appoint two members.)

There are four Council functions: a) policy-making to include the approval and implementation of program, services, rule, policies, etc. and determines if certain circuits may operate an alternative indigent defense delivery system; b) trustee in the enforcement of contracts, ownership of property and administration of funds and the service as the fiscal officer for circuit public defender offices; c) appointing and removing authority to include the Council's director, Mental Health Advocate, the Georgia Capital Defender, and the removal for cause of the circuit public defender; and d) assisting the public defenders to include training, continuing legal education, and assistance in trial tactics, case management and legal research.

The Council's director works with and provides support services and programs for the circuit public defenders and other attorneys representing indigent persons in criminal or juvenile cases. The director develops prepares and submits a budget, rules, policies, procedures, regulations and standards and submits them to the Council for adoption.

The Council's budget includes the budget of all circuit public defenders, conflict defender offices, and appointed attorneys. The director of the Administrative Office of the Courts provides general administrative support but cannot reduce or modify the budget.

Washington⁷

Public Defense

(contract)

Washington's 39 counties use a variety of public defense systems: a public defender that is party of county government; nonprofit agencies that specialize in public defense work; contract system with individual attorneys or firms; and assigned-counsel system in which they appoint attorneys off a list and pay them by the case or by the hour.⁸ In King County, a contract establishes specific standards for the quality of representation and caseload limits. A central administrative agency, the Office of Public Defender, contracts with 4 nonprofit defender organizations with salaried attorneys to provide primary representation; each contractor carries a mixed caseload. The King County system has been praised as among the best in major urban counties.

Conflict Defense

(assigned counsel)

The county uses assigned private counsel when the defender organizations have conflicts.

Massachusetts⁹

Committee for Public Counsel Services

(public defender and oversight of assigned counsel)

The Committee for Public Counsel Services (CPCS) was created in 1983 to be a single agency responsible for the appointment of public counsel, (chapter 211D of the Mass. General Laws). Court rules require the appointment of CPCS in all but exceptional circumstances. CPCS is divided into 2 divisions: public defender division with salaried attorneys and private counsel division with contract attorneys compensated at an hourly rate. CPCS establishes the rates and recommends a rate structure to the Legislature every two years. In response to a crisis related to low compensation rates, the Legislature created a commission in 2004 to examine all aspects of the public defense system. The Commission's 2005 report found that the CPCS system was operationally sound but found 4 areas of concern that hindered the CPCS from more effectively and efficiently providing representation:

1) The ratio of private attorneys to CPCS staff attorneys reflects a disproportionate reliance on private attorneys. The original idea was that this would allow private attorneys to supplement their income while building their private practice, with the understanding that these cases were in the nature of public service. However, increasing numbers of attorneys have come to rely almost exclusively on CPCS cases for their livelihood and thus have come to feel underpaid for their services; overlooking the fact that the hourly rates were never intended to sustain a private practice.

2) The number of non-serious misdemeanor offenses requiring counsel strained

⁷ *Contracting*, p. 19.

⁸ *Seattle Times*, An Unequal Defense, April 6, 2004.

⁹ Report of the Commission to Study the Provision of Counsel to Indigent Persons in Massachusetts, April 2005

resources. Massachusetts appoints counsel in these cases at a rate not seen in other states; many could be disposed in a non-criminal manner with fines or cost assessments.

3) Relatively low compensation rates discourage attorneys from accepting cases.

4) Procedures to verify claims of indigence have historically been hampered.

The commission recommended more equitably relying on staff versus private attorneys, including a pilot staff model for dependency cases; private attorney rate increase, phased-in over 3 years; and a cap on the total hours an attorney can bill in a year – with a procedure to allow more in order to ensure continuity of representation. The annual cap would encourage a broader and more diverse number of attorneys to accept CPCS and would encourage more attorneys to use these cases to gain experience and supplement their income without their practice coming to rely on this work

Montana

Public Defense

(public defender)

The State Public Defender System, which took effect July 1, 2006 and has been cited as a national model,¹⁰ is made up of eleven regional offices, local offices, contract attorneys, and the Office of the Appellate Defender. The Office of the Appellate Defender is independent from all trial division offices. Each local office is under the direct supervision of a regional deputy public defender solely responsible for providing guidance to and determining litigation strategy for attorneys under his or her supervision.

While the state public defender must sign off on all expenditures and coordinate in advance on certain expenditures for expert witnesses, certain other investigative assistance, and equipment purchases, these requirements are only to ensure compliance with state disbursement procedures and promote sound fiscal practices. The state public defender does not dictate trial strategy, which remains the exclusive province of the regional public defenders.

Conflict Defense

(public defender
and contract
coordinator)

A client with a conflict of interest with one regional office may be represented by another regional office. A separate and independent conflicts coordinator is retained on a contract basis by the Montana Public Defender Commission. The conflicts coordinator, under the direct oversight of the Montana Public Defender Commission, is responsible for assisting conflict attorneys in securing payment for legal services directly relating to the delivery of case resources. The coordinator files written financial reports with the Montana Public Defender Commission on a monthly basis and as directed by the State Public Defender Commission. Additionally, the coordinator provides reports to the Montana Public Defender Commission to assist the Commission in evaluating the work of attorneys

¹⁰ ACLU found at <http://www.aclu.org/crimjustice/indigent/10249prs20050608.html>

providing conflict services. The coordinator provides its own support staff, separate from those employed by any individual, office, or entity associated with the Montana Public Defender System. The coordinator and its staff handle only administrative functions unrelated to the direct provision of legal services to clients. The coordinator does not exercise control or influence over the handling of individual public defender or conflict cases, have access to client files or client confidences, have keys to any independent office, or have unsupervised access to the premises of any public defender or conflict office.

The individual conflict attorneys are solely responsible for determining litigation strategy pertaining to conflict cases, subject to the requirement that all bills for services provided or resources be submitted to, and verified by, the Conflict Coordinator. While the contract coordinator must sign off on all expenditures requested by conflict counsel, this requirement is only to ensure compliance with state disbursement procedures and promote sound fiscal practices; it does not dictate trial strategy, which remains the exclusive province of the individual conflict attorney.

New York¹¹

Public Defense

(95 plans)

In New York, prosecution is supported by state and federal governments, yet defense is primarily funded by counties. There are more than 95 different plans for providing indigent representation in the state's counties, and contrary to national standards, there is no statewide oversight to ensure uniformity. A locality could create a public defender office and appoint through its governing body; it could opt to designate a legal aid society; it could adopt a plan of a bar association wherein the services of private counsel would be provided on a rotational schedule which plan would be coordinated by an administrator; or it could adopt a combination of the options. "[T]he indigent defense system in New York State is both severely dysfunctional and structurally incapable of providing each poor defendant with the effective legal representation that he or she is guaranteed by the Constitution of the United States and the Constitution and laws of the [state]. In actuality, it is a misnomer to call it a 'system' at all."¹² Efforts are underway to create a statewide indigent defense agency to promulgate uniform standards for county programs and provide supplemental state funds to those that comply with those standards. See www.courts.state.ny.us/ip/indigent-defense-commission/index.shtml for more details.

New York City created the New York Legal Aid Society (LAS) in 1965. In 1995 New York City created an alternative to the primary defender via a RFP to nonprofit and for-profit entities to provide representation in trial and appellate cases that otherwise would have been assigned to LAS. This did not affect assigned

¹¹ *Contracting*, pp. 8-9, and <http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/downloads/ny.pdf>.

¹² Commission on the Future of Indigent Defense Services, Final Report to the Chief Judge of the State of New York, June 18, 2006, 3 (citing the interim report).

counsel in conflict cases. The purpose was to shift 20% of the LAS work to contract organizations – although the contract organizations had caseload limits while LAS, excluded from bidding, continued to operate within a fixed budget with no caseload limits. With the agreement of the city, an oversight committee¹³ was created, by court rule, to conduct an annual evaluation of LAS and of each defense contractor - although it has no staff of its own.

¹³ Members are nominated by the presidents of bar associations and justices of the Appellate Division of the Supreme Court; each member serves a 3-year term, renewable by the justices. The chair and vice chair are designated by the presiding justice from among the nominees.

New Mexico

Public Defense (public defense)	Statewide public defender maintains defender units across the state. The agency also operates specialty units (dealing with appeals, death penalty, post-conviction, and mental health cases).
Conflict Defense (contract)	Statewide public defender oversees contracts with private attorneys to provide services in conflict cases throughout the state. Contract attorneys are required to comply with state performance standards.

Oregon¹⁴

Public Defense (statewide contracts)	A statewide contract model is administered by the Indigent Defense Services Division of the State Court Administrator's Office. Four types of contracts are used: a) contracts with nonprofit public defender organizations; b) contracts with law firm consortia in which groups of attorneys or firms join together to provide defense services; c) partnerships in which individual law firms have agreed to have their attorneys provide indigent defense while continuing to service private clients; and d) contracts with individual attorneys. The RFP review process includes consultation with local courts and judicial staff. Oregon also has a process to pay extraordinary expenses outside the contract. In serious cases, funds for experts, investigators, etc., not specified in the contract are submitted to the IDSD for review. In less serious cases, such requests are reviewed by the judge. These expenses do not come from the money set aside for the contractors' basic operations.
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¹⁴ *Contracting*, pp. 16-17.

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Appendix B

Permission to electronically post the content in Appendix B was not granted. Please use the link below to access the content of Appendix B of the printed report.

“The Ten Principles of a Public Defense Delivery System,” Report of the House of Delegates, 2002, by ABA Standing Committee on Legal Aid and Indigent Defendants, published by the American Bar Association Division for Legal Services, Adopted by the House of Delegates February 5, 2002, located at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf>.
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Appendix C: NLADA Standards for Assigned Counsel

Introduction

The National Legal Aid and Defender Association (NLADA) is a private, nonprofit, national membership organization dedicated to the provision of quality legal services to poor people in both criminal and civil cases.

Since 1911, NLADA has worked to ensure that poor people have the same access to quality legal services as those who can afford to retain counsel, and since 1958 has specifically included poor persons accused of crime in that goal. Yet, access to quality legal assistance is still denied to many persons in our criminal justice system. While governments have a constitutional duty to provide counsel to poor persons charged with criminal offenses, the poor frequently receive inadequate representation from their government-supplied lawyers. In other words, there are two systems of justice: one for the poor and one for those who can afford to hire counsel.

Assigned counsel – that is, private attorneys appointed in individual cases – is the primary method for delivery of defense services in about 50% of the counties in the United States. Defense services are also provided through defender offices and contracts with law firms or private organizations. While there are national standards governing the delivery of defense services by defender offices and contract systems, the only standards for assigned counsel systems are those contained in general defense services standards or employed in a few local jurisdictions. In most assigned counsel jurisdictions, the absence of standards has resulted in an absence of structure, quality control, training and support services. In fact, some assigned counsel “systems” amount to no more than an ad hoc assignment of attorneys by individual judges.

It is to remedy these deficiencies – and thereby improve the quality of representation provided by assigned counsel – that NLADA is promulgating these Standards.

These Standards represent what NLADA believes to be the ideal system for providing representation through assigned counsel. While financial, administrative and other considerations may prevent some jurisdictions using assigned counsel from immediately achieving this ideal, the Standards provide a model for improving representation of those who cannot afford to retain private counsel, and a goal that assigned counsel systems should work to achieve.

Standard 1. Scope

These Standards apply whenever private counsel, rather than defender offices or contracting entities are being assigned to provide representation for persons who are financially unable to retain counsel (as defined in Standard 2.3) and who are entitled to representation.

Standard 2.1 Provision of Quality Representation

(a) Provision of quality representation to all persons eligible under Standard 2.3 is the overarching purpose of these Standards, and shall inform the creation and maintenance of all Assigned Counsel Programs.

(b) Assigned counsel shall provide to their clients quality representation equivalent to that provided by a skilled, knowledgeable and conscientious criminal defense lawyer to paying clients.

(c) Assigned counsel shall provide quality representation in all relevant legal proceedings involving their clients.

Standard 2.2 Independence from Judiciary and Funding Source

- (a) The Assigned Counsel Program and individual assigned counsel shall be free from political influence and shall be subject to judicial supervision only to the extent that privately retained attorneys are.
- (b) The Assigned Counsel Program shall operate under and enforce a clear policy protecting the integrity of the relationship between assigned counsel and his or her client.
- (c) Assigned counsel shall reject any attempts at interference with the conduct of a particular case.

Standard 2.3 Financial Eligibility

- (a) Any person who cannot retain private counsel without substantial hardship to that person, or to his or her family, shall be eligible to receive the assistance of assigned counsel in all situations in which a constitutional, statutory or other right to counsel exists.
- (b) Rules, regulations and procedures concerning the determination of initial eligibility and/or continuing eligibility shall not interfere with assigned counsel's independence to advocate for his or her clients on any relevant matter, including the question of their financial status.
Individual assigned counsel shall not have responsibility for determining initial or continuing eligibility of clients.
- (c) Rules, regulations and procedures concerning the determination of initial eligibility and/or continuing eligibility shall not require assigned counsel to make any disclosures of facts concerning his or her clients' financial status beyond those disclosures mandated by the binding ethical rules of the jurisdiction.

Standard 2.4 Contribution and Recoupment

- (a) Persons eligible for representation by assigned counsel (Standard 2.3) shall not be asked to contribute toward, nor to reimburse the jurisdiction for, the cost of assigned counsel.
- (b) Jurisdictions that do require payment by eligible persons of some portion of the cost of assigned counsel shall establish a procedure for determining the amount of contribution to be paid. This procedure shall be implemented prior to or early in representation by assigned counsel, and shall include a hearing on the ability of person to pay.
- (c) Any payment by or on behalf of a person represented by assigned counsel toward the cost of representation shall be made to a fund or through a mechanism established for that purpose, and not directly to assigned counsel. Assigned counsel shall not be responsible for collection of payment.
- (d) Payment toward the costs of representation by assigned counsel shall never be made a condition of probation or other sentence-related supervision.

Standard 2.5 Early Representation

- (a) It is the responsibility of the Assigned Counsel Program, along with other components of the criminal justice system, to ensure that counsel is provided to the accused at the earliest possible stage in the proceedings.
- (b) Upon request, counsel shall be appointed for persons who have not been taken into custody and who require representation for criminal proceedings.
- (c) Assigned counsel shall contact their new clients as soon as possible after appointment.

Standard 2.6 Duration and Continuity of Representation

(a) The duration of representation by counsel assigned under these Standards shall be until all appropriate avenues of relief, direct and collateral, are exhausted or until counsel is replaced by subsequent or substitute counsel.

(b) There shall be continuity of representation by assigned counsel at the trial stage. There shall be continuity of representation by assigned counsel on appeal, which shall be provided by different counsel than at the trial stage, except when the best interests of the clients dictate otherwise.

Standard 2.7 Waiver Safeguards

(a) All persons eligible for representation by assigned counsel shall be informed of that right.

(b) Any person who is represented by appointed counsel and who expresses a desire to proceed pro se shall be fully informed, on the record, of the dangers of proceeding without counsel. Eligible, unrepresented persons shall receive a renewed offer of counsel at every stage of the proceedings against them.

(c) The legal representation plan shall include a designation of responsibility for ensuring that these safeguards are implemented.

Standard 2.8 Standby Counsel

(a) If a person eligible for representation by assigned counsel waives counsel on the record, in favor of self-representation, standby counsel shall be appointed.

(b) Standby counsel shall be available to advise the pro se defendant on preparation and presentation of his or her case, and shall be prepared to represent the defendant if the waiver of counsel is withdrawn at any point.

Standard 2.9 Standards for Performance of Counsel

- (a) The Assigned Counsel Program shall identify, and enforce adherence to, minimum standards for the performance of counsel and shall assist counsel in meeting, and striving to exceed, those standards.
- (b) Assigned counsel shall meet, and strive to exceed, minimum standards for the performance of counsel.

Standard 3.1 Establishment of Legal Representation Plan

- (a) Provision of assigned counsel to eligible persons shall be made according to a written plan consistent with these Standards.
- (b) Jurisdictions that rely in whole or in part upon assigned counsel for the provision of defense services shall consider whether and how to combine assigned counsel with one or more other methods of providing representation. Three alternative systems are set out in Standards 3.1.A through 3.1.C below.

Standard 3.1.A Assigned Counsel in All Eligible Cases

Jurisdictions which have no defender office and which do not contract with any entity to provide defense services shall establish an assigned counsel plan, consistent with these Standards, for affording quality representation to all eligible persons (Standard 2.1).

Standard 3.1.B Mixed Delivery System Including Assigned Counsel

- (a) Jurisdictions which choose to utilize a defender office and/or contracting entity in conjunction with assigned counsel to provide defense services to eligible persons shall establish a coordinated plan for delivery of defense services.

(b) The plan shall delegate to assigned counsel a substantial portion of all eligible cases, as well as those cases which the defender office and/or contracting entity cannot handle due to conflicts of interest.

(c) None of the defense entities in such a system shall be precluded from providing representation in any particular classification of case.

Standard 3.1.C Assigned Counsel for Conflicts Only

Jurisdictions which choose to utilize a defender office and/or contracting entity as the primary method of providing defense services to eligible persons, and rely on assignment of private counsel for cases which pose a conflict of interest to the primary entity (or entities), shall establish a coordinated plan for the assignment of counsel in those conflict cases.

Standard 3.2.1 Creation of Board

(a) The Assigned Counsel Program shall be operated under the aegis of a general governing body, the Board.

(b) The majority of the members shall be attorneys but none shall be judges, prosecutors or law enforcement officials.

(c) Members shall not receive a salary but shall be reimbursed for reasonable, actual and necessary expenses.

(d) Terms of office shall be staggered.

Standard 3.2.2 Functions of Board

(a) The Board shall establish policy and exercise general supervision over the operations of the Assigned Counsel Program.

- (b) The Board shall also hire an Administrator (Standard 3.3.1).
- (c) The Board shall refrain from interference in the conduct of individual cases.

Standard 3.3.1 Position of Administrator

The Board shall appoint an Administrator who shall implement policy and manage the Assigned Counsel Program, except when the legal representation plan requires that the Director of the defender office also act as Administrator, and the plan provides for the independence of the Director/Administrator from the judiciary and funding source (Standard 2.2).

Standard 3.3.2 Qualifications of Administrator

(a) The Administrator shall be an attorney licensed to practice in the jurisdiction or jurisdictions in which the Assigned Counsel Program operates. The experience of the Administrator shall include extensive work in the criminal defense field and in administration. He or she shall have a reputation for integrity and commitment to program principles.

(b) The Administrator shall be appointed on merit alone and shall be dismissed only for good cause found upon a hearing before the Board.

Standard 3.3.3 Employment Status and Pay of Administrator

(a) The office of Administrator shall be a full-time position whenever feasible; a full-time Administrator shall not engage in the private practice of law.

(b) The Administrator shall be appointed for a stated term of office and shall be compensated at a rate not less than the local presiding judge, chief prosecutor and, where applicable, the chief defender.

Standard 3.3.4 Functions of Administrator

The Administrator shall implement Program policy and manage Program operations.

Standard 3.4 Budget and Funding

(a) The Board, in consultation with the Administrator, shall submit a complete and sufficient budget to the funding authority.

(b) The funding authority has a constitutional and policy-based duty to fund the Program in a manner and in an amount consistent with provision of quality representation (Standard 2.1) and sound administration.

(c) The Administrator shall maintain records and accounts of expenditures in accordance with accepted accounting practices.

Standard 3.5.1 Insurance for Board and Administrators

(a) The Program shall insure the Board and the Administrator for all insurable risks incident to the Program to a dollar amount specified by the Board.

(b) The funding agency shall indemnify the Board and the Administrator for all liability arising from their authorized activities pursuant to the Program.

Standard 3.5.2 Insurance for Program Attorneys

All attorneys seeking appointment under the Program shall provide evidence of being adequately insured for all insurable risks to the Program caused by their representation of clients under Program auspices, to a dollar amount specified by the Program.

Standard 3.6 Office Space, Equipment, Supplies

The Program shall be provided with suitable space, equipment and supplies at appropriate locations, or with the funds necessary to obtain them.

Standard 4.1 Establishment and General Operation of Assigned Counsel Roster

(a) The Board, or at its direction the Administrator, shall categorize by levels of seriousness and difficulty the types of cases in the jurisdiction.

(b) The Board, or at its direction the Administrator, shall establish standards detailing the qualifications attorneys must have before being assigned cases at each level under paragraph (a), as described in Standard 4.1.1.

(c) The Board, or at its direction the Administrator, shall establish standards and procedures relating to attorney workload, as described in Standard 4.1.2.

(d) The Administrator shall establish a roster or rosters containing the names of attorneys who have applied to receive appointments from the Program and who have been found qualified to handle a given level of cases.

(e) The Administrator shall review all incoming cases, classify them by type and level of seriousness according to the categories established under paragraph (a), and assign them to available, qualified attorneys on the appropriate roster, in rotation. Departures from assignment by rotation of the names of available attorneys shall be made when such departure

will protect the best interests of the person to be represented and may be made when efficient administration of the Program so requires.

(f) If the Board determines that the number of attorneys to be included on a roster should be limited, the Board shall establish a procedure to ensure fairness in the selection of attorneys from all qualified attorneys who apply.

Standard 4.1.1 Qualifications of Attorneys

(a) The attorney qualifications established pursuant to Standard 4.1(b) shall include criteria reflecting the experience and training required for assignment in cases of different levels of seriousness, and a requirement that attorneys have the proficiency and commitment necessary to provide the quality representation mandated by Standard 2.1.

(b) The Program may allow the substitution of equivalent experience for specific experiential requirements, but may not compromise the proficiency and commitment requirements.

(c) An attorney applying for inclusion on a Program roster, or for reclassification (Standard 4.1.(d)), shall provide to the Administrator information needed for verification of all qualifications offered in support of the application.

Standard 4.1.2 Workloads of Attorneys

(a) The Board, or at its direction the Administrator, shall develop standards relating to caseload/workload size limits for attorneys who desire to receive appointments from the Program, and procedures through which attorneys whose workloads have become excessive can be relieved of caseload responsibilities that they cannot competently meet.

(b) The Administrator shall provide notice to attorneys eligible for assignments of the caseload/workload standards and procedures established by the Board, and of the attorneys' obligation not to accept more work than they can effectively handle.

(c) The Administrator shall keep records of assignments made to individual attorneys in a manner that allows the Administrator to avoid assigning an excessive number of cases to any attorney.

Standard 4.1.3 Publicizing the Program

The Administrator shall publicize the existence and functions of the Assigned Counsel Program to the practicing bar, to the criminal justice community, and to the public.

Standard 4.2 Orientation

The Administrator shall ensure that lawyers new to the Program receive a mandatory orientation on Program policies and procedures before they are assigned cases.

Standard 4.3.1 Entry-Level Training

(a) The Administrator shall be responsible for preparing, in accordance with Board specifications, an entry-level training program.

(b) Entry-level training shall be mandatory for all attorneys unless they come under exceptions specified by the Board, or the Administrator acting at its direction.

Standard 4.3.2 In-Service Training

- (a) The Board shall establish regulations requiring attorneys to attend a specified number of training units per year in order to remain on a Program roster.
- (b) The Administrator shall be responsible for preparing, in accordance with Board directives, periodic in-service training programs to provide systematic, comprehensive instruction in substantive law and courtroom skills. He or she shall also determine, upon request, whether training offered by entities other than the Program may be counted toward the training units required by the Board.
- (c) The Administrator shall ensure that attorneys remaining on a Program roster have attended the number of training units required by the Board.
- (d) The Board and Administrator shall encourage attorneys to participate in training sessions beyond the mandatory units.

Standard 4.4 Supervision of Attorneys

- (a) The Board shall establish policies regarding supervision of assigned counsel working within the Program. These policies shall include a procedure for handling complaints from clients and others.
- (b) The Administrator shall be responsible for supervision.

Standard 4.4.1 Mentoring

- (a) The Board shall establish a policy with regard to the provision of mentors -- more experienced, competent attorneys -- to advise less experienced attorneys on a Program roster.
- (b) Mentors shall be compensated for mentoring services according to Board specifications.

Standard 4.4.2 Monitoring

- (a) The Administrator, under the direction of the Board, shall establish a system for monitoring the performance of the attorneys on the Program roster(s). Monitoring shall be done by the Administrator or his or her designee.
- (b) The standard against which Program attorneys are measured shall be that of a skilled, knowledgeable and conscientious criminal defense lawyer adhering to the performance standards established under Standard 2.9.
- (c) The Administrator shall publicize the criteria used in monitoring, and shall inform monitored attorneys of results upon request, upon the decision to impose penalties (Standard 4.5.1), or to seek removal (Standard 4.5.2) and otherwise in the Administrator's discretion.
- (d) The Administrator shall not have access to privileged work product, and shall not invade attorney-client confidentiality.

Standard 4.5 Disciplinary Policies and Procedures

- (a) The Board shall establish policies and procedures for imposition of penalties, including removal from the Program roster, on attorneys for failure to observe Program policies and rules, including failure to provide the quality representation mandated by these Standards.
- (b) No attorney shall be removed from a case in which representation has already begun except with the consent of the client and in accordance with the governing ethical and judicial rules of the jurisdiction.

Standard 4.5.1 Penalties Less than Removal

The Board may permit, and the Administrator may establish, a schedule of penalties less than removal from the Program roster(s) for failure to comply with Program rules, policies, or

required performance. Such penalties shall be coupled with a requirement that the attorney correct the deficiencies in question.

Standard 4.5.2 Removal from Program Roster(s)

(a) Where an attorney has failed to correct deficiencies for which penalties under Standard 4.5.1 have been imposed, or where egregious deficiencies in performance have occurred, the Administrator shall give the attorney notice, in writing, that removal of the attorney from the roster is contemplated. Such notice shall be given within a period of time established by the Board (or as part of the legal representation plan).

(b) Where the alleged actions or inactions of the attorney involve a pattern of failing to provide competent representation to clients, or the Administrator has cause to believe that the attorney cannot provide competent representation to new clients, the Administrator may suspend assignments to the attorney immediately.

(c) After notice has been given, the Administrator (or the Board, or a Removal Committee of the Board if the Board has so directed) shall, unless the attorney consents in writing to removal, conduct a hearing to determine whether cause exists for removal of the Attorney from the Program roster(s). The decision to remove or retain the attorney shall be made in writing.

(d) Where the decision to remove is made by the Administrator or a Removal Committee, the attorney shall have the right to appeal the decision to the Board, whose decision shall be final.

(e) Where removal has been for failure to provide competent representation to one or more clients, the Administrator may seek, in court, substitution of counsel in cases already assigned

to the attorney in question, if there is reason to believe competent representation is not being provided in those cases.

(f) Unless removed from pending cases by the court in which the cases are lodged, an attorney removed from the Program roster(s) shall complete work in cases to which he or she was already assigned at the time of removal, and shall be entitled to compensation in the usual manner. If substitution of counsel is granted, the Program shall compensate the attorney for work done up to the date of removal unless ordered by the court not to do so.

Standard 4.5.3 Reinstatement After Removal

(a) The Board shall establish a procedure for consideration of a removed attorney's application for reinstatement to the Program roster(s).

(b) The procedure should include a requirement that the attorney demonstrate that the deficiencies which led to removal will not be repeated.

Standard 4.6 Support Services

The Assigned Counsel Program shall ensure that the many support services necessary for the effective defense of clients are available to assigned counsel at every phase of the cases to which counsel are assigned.

Standard 4.7.1 Assigned Counsel Fees

Reasonable compensation shall be provided to assigned counsel, at a rate commensurate with that paid for other contracted government legal work (*e.g.* work contracted for by attorneys general, county legislatures or commissions, etc.) or with prevailing rates for similar services performed by retained counsel in the jurisdiction.

Standard 4.7.2 Method of Compensation

- (a) Attorneys shall be compensated at an hourly rate, with no distinction between rates for services performed in and outside of court.
- (b) The amount of compensation sought shall be reviewed by the Administrator and approved unless there is cause to believe the amount is unwarranted.
- (c) Maximum fee limits shall not be established. Where they exist, they shall be subject to exception, upon approval by the Administrator acting within guidelines established by the Board.
- (d) Periodic billing and payment during the course of counsel's representation shall be provided for, at least in lengthy cases.

Standard 4.7.3 Payment of Expenses

- (a) The Board shall establish policies as to expenses which will be reimbursed (including reasonable and necessary travel and long-distance and client collect telephone calls) and those which will not.
- (b) Routine office expenses and out-of-pocket expenses shall be paid for by assigned counsel without reimbursement from the Program. The Administrator, with the guidance of the Board, shall approve reimbursement of extraordinary amounts which were reasonable, actual and necessary.

4.7.4 Only Authorized Compensation

Assigned counsel shall neither seek nor accept payment from a client, or from any source on behalf of the client, that is in addition to the fees and expenses authorized by the Program.

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*Administrative and Operational
Support for Court-Appointed Counsel
and
Indigent Due Process Costs*

November 2004

Respectfully submitted:

Alice Blackwell White

Chair

Circuit Judge, Ninth Judicial Circuit

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Mike Bridenback, Court Administrator, Thirteenth Judicial Circuit

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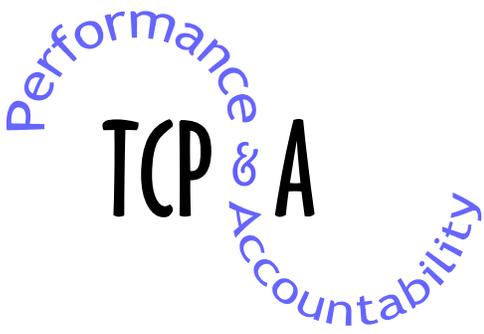
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Report on Administrative and Operational Support for Court-Appointed Counsel and Indigent Due Process Costs

Executive Summary

In 1998, an amendment to Article V of Florida's constitution provided that the state would assume a primary role in funding the state courts system. Consequently, in July 1, 2004, the state became responsible for expenditures related to the representation of indigent persons in criminal and certain civil proceedings.

Prior to the implementation of Revision 7, each county had developed various means of ensuring that these very significant expenditures were necessary and appropriate. The statutory scheme developed with the implementation of Revision 7, relies on local circuit indigent services committees to oversee these costs on behalf of the state, with the funds related to court-appointed counsel and other indigent due process service costs appropriated to the Justice Administrative Commission (JAC), an executive branch agency. In order to ensure that the justice system continued to operate in the months immediately following the implementation of Revision 7, the trial courts were forced to undertake many court-appointed counsel support activities. Continued support for these activities by trial court staff is not only inappropriate but also not feasible within existing resources.

The Commission on Trial Court Performance and Accountability has identified three critical problems following the state's assumption of court-appointed counsel costs under Revision 7. They are as follows:

- the statutes establishing and governing the local indigent services committees are inherently problematic in that the committees are not clearly created as executive branch policy-making bodies;
- an executive branch infrastructure to support court-appointed counsel operations – just as the state attorney and public defenders' offices enjoy – is necessary; and
- critical operational and administrative support for both the local committees and for the local day-to-day management of court-appointed counsel activities are urgently needed.

The Commission on Trial Court Performance and Accountability has prepared this report in order to help identify the scope of the circuit indigent services committees' tasks and the related executive branch support resources necessary to keep the system operational.

Prior to Revision 7, the counties had borne these costs and each county had developed various means of controlling them. Generally, the combined efforts of the chief judge and the county attorney (via the administrative orders of the chief judge setting forth allowable fees, costs and expenses and the county attorney reviewing and objecting to counsel's motions for fees and expenses) were sufficient to provide the counties with some assurance that their court-appointed expenditures were necessary and appropriate.

Post-Revision 7, the statutes governing the court-appointed counsel process and the appropriation of attorneys' fees and expenses in criminal and civil cases are contained in the public defenders' section of chapter 27. Specifically, section 27.42, F.S., directs the establishment of circuit Article V indigent services committees to "manage the appointment and compensation of court-appointed counsel within a circuit pursuant to ss. 27.40 and 27.5303." This section also provides that "the funding and positions for the processing of committees' fees and expenses shall be appropriated to the Justice Administrative Commission in the General Appropriations Act." (See Appendix A for statutes).

The statute establishes no express operational or administrative requirements on the circuit Article V indigent services committees (hereinafter "committee(s)"), in the conduct of their duties, other than requiring that the committees meet at least quarterly. However, the following functions, and their related activities and tasks, are arguably necessary for the successful creation and use of a court-appointed counsel registry process:

- I. Establish the operational procedures necessary to carry out committee responsibilities.
- II. Manage the court-appointed counsel (CAC) registry process.
- III. Manage due process services.
- IV. Manage the appointment of court-appointed counsel in individual cases.
- V. Manage the compensation of court-appointed counsel and due process service providers.
- VI. Manage the court-appointed counsel budget(s).

Of necessity, each committee has established its own operational and administrative mechanics, with the support of staff from the various members' agencies. **However, the circuits report that they cannot sustain their current efforts; that many of the activities and tasks related to the committee's functions are, in fact, not being addressed adequately, if at all; and that additional support from the JAC is needed this fiscal year – even if it requires accessing the working capital fund.**

The Supreme Court’s Commission on Performance and Accountability established a workgroup of judges and court professionals to compile a comprehensive description of the operational and administrative support mechanisms necessary for the circuit Article V indigent services committees to perform their duties. The workgroup began its work by creating a comprehensive list of activities and related tasks and resources necessary for the effective and accountable management of the court-appointed counsel process. This list identified necessary tasks related to the operations of the committees and the court-appointed counsel appointment and compensation process. The list did not attempt to identify all of the related tasks for: individual judges; chief judges outside their role as chair of the committee; court-appointed counsel; or clerks of court. Following the identification of tasks and necessary support resources necessary to accomplish these tasks, the workgroup identified those that should be performed by court staff and recommended that the remaining tasks be performed by an entity other than the court.

The report addresses each of the six functions necessary for the effective and accountable management of the court-appointed counsel process by:

- identifying the tasks that the committees must perform;
- describing the necessary administrative or legal tasks that must be performed by some entity in direct support of the committees or the court-appointed counsel process; and
- making recommendations for ensuring that the administrative and legal support tasks are performed.

Workgroup members:

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I. Establish the operational procedures necessary to carry out committee responsibilities

▶ **Committee Tasks:**

- a) Establish communication and notice procedures for committee members, court-appointed attorneys, the JAC, and other interested parties.
- b) Establish protocol for how meetings of the committee will be called.
- c) Establish rules of procedure for the conduct of meetings.
- d) Identify an instrument by which decisions are codified.
- e) Establish a mechanism by which decisions can be challenged.

▶ **Tasks to be performed by some entity in order to support the committee or the CAC process:**

Administrative and clerical staff support to:

- ✓ set and notice meetings;
- ✓ research, prepare, and compile meeting materials;
- ✓ coordinate meeting space logistics;
- ✓ ensure that a proper record of the meeting is taken;
- ✓ serve as custodian of committee records;
- ✓ prepare minutes;
- ✓ prepare instrument to codify decisions; and
- ✓ prepare and transmit notices of committee decisions.

Legal staff support to:

- ✓ provide legal advice to the committee as to legal and ethical questions related to the work of the committee, including public records and compliance with open meeting (sunshine) requirements.

Expense dollars for expenditures related to committee operations, including: postage, copying, binding, notices, court reporting and general office supplies.

▶ **Discussion and Recommendations:**

The Judicial Management Council's Trial Court Performance and Accountability Committee and the Trial Court Budget Commission determined that costs associated with court-appointed counsel should not be an element of the trial court budget. Subsequently, the statutory scheme developed with the implementation of Revision 7, relied on the circuit indigent services committees to manage these costs on behalf of the state, with the funds related to court-appointed counsel and other indigent due process service costs to be appropriated to the JAC, an executive branch agency. While the JAC was appropriated 50 FTE in FY 2004-05, the executive director of the JAC's position is that they have neither the statutory authority nor the staff resources to support the work of the local committees or to provide administrative support to the day-to-day management of the court-appointed counsel activities.

Recommendation: While the establishment of the local committees is critical to accommodating local practices and ensuring that fees and expenses are consistent with the local market forces, these bodies must of necessity exercise executive and not judicial branch powers. The statute establishing the local indigent services committees needs to clarify their role as executive branch agents and provide them with a mechanism for codifying their decisions.

The legal and administrative/clerical staff support necessary to facilitate the committees' meetings has generally fallen to the judicial branch, in part due to the fact that the chief judge, or his or her designee, serves as chair of the committee, pursuant to the statute. While section 27.42, Florida Statutes, provides that "the funding and positions for the processing of committees' fees and expenses shall be appropriated to the Justice Administrative Commission in the General Appropriations Act" this has not been true for the local committees' support. While the courts have an inherent interest in the court appointed counsel process operating efficiently and effectively, the present situation presents both significant policy questions and administrative questions for the trial courts.

The most significant policy question arises from concerns as to the appropriateness of the chief judge, with the assistance of court staff, managing the day-to-day support operations conducted on behalf of parties to a case. Just as the court does not manage the internal operations of the public defenders' offices or the guardian ad litem programs, court management of court-appointed counsel operations can also present a potential conflict. Legal and administrative questions, such as which entity is responsible for compiling the committees' meeting materials, maintaining the committees' records, and what retention standards apply (executive or judicial) to these records remain unanswered.

Recommendation: The chief judges and TCBC should seek appropriate legislative action to ensure that the JAC is able to provide legal and administrative support for the committees from existing resources or contingency funds. Not only do trial courts lack the capacity to provide general meeting support or legal support to these committees, it is outside their proper role in our adversarial judicial process. The JAC should be responsible for providing the legal and administrative staff support necessary for these committees to conduct their meetings and record their decisions. The JAC should also provide for any necessary committee expenses.

While the committees have been given statutory authority to manage certain components of the court-appointed counsel process, including establishing requirements, credentials, and fees, there is no statutorily prescribed mechanism by which each committee should formalize or codify its decisions. Additionally, it is not clear what statutes, rules or other procedures should apply when a committee's decision is ultimately contested by an adversely affected party.

Recommendation: Administrative orders of the chief judge and local court rules are uniquely judicial branch instruments and are not appropriate mechanisms for codifying the decisions of these committees. The committees, through the respective chairs, should jointly request a legal opinion from the JAC's general counsel as to: 1) the appropriate mechanism by which their decisions can be appropriately codified; and 2) what statutes, rules or other procedures apply when a committee's decision is contested by an adversely affected party and by what standard these decisions are to be reviewed.

II. Manage the court-appointed counsel (CAC) registry process

► Committee Tasks:

- a) Determine minimum requirements and desirable credentials and experience for CACs by case-type.
- b) Establish an application or competitive bidding process.
- c) Solicit applications.
- d) Review and evaluate applications for appointment, recertification, re-qualification, as required by statute.
- e) Approve registry of CACs by county and case category
- f) Notify the chief judge in writing if the number of attorneys on the registry in a county or circuit for a particular category of cases is inadequate.
- g) Provide registry list on a quarterly basis to chief justice, chief judge, state attorney and public defender and clerk.
- h) Monitor CAC appointment practices for performance and accountability implications.

► Tasks to be performed by some entity in order to support the committee or the CAC process:

Operational and administrative staff to:

- ✓ create registry attorney application;
- ✓ publicize, solicit, actively recruit for applicants;
- ✓ answer attorneys' questions regarding appointment process and procedures;
- ✓ compile information from applications;
- ✓ verify information on applications;
- ✓ generate and continually update registry lists by county and case category;
- ✓ regularly transmit current registry to interested parties;
- ✓ administer the registry attorney evaluation process established by the committee; and
- ✓ compile and analyze reports as requested by the committee.

Legal staff support to:

- ✓ provide legal support in the event a decision of the committee is challenged;
- ✓ provide legal support in the registry attorney evaluation process established by the committee; and
- ✓ develop a comprehensive list of cases where a party may be entitled to court appointed counsel.

Expense dollars for expenditures related to notice and advertisement costs, reproduction and copy costs, long-distance telephone charges, postage and other general office supplies.

► Discussion and Recommendations:

In addition to providing the committee with legal support in its operations, the committees will require legal support in the review of applications and in resolving challenges to its decisions or its procedures, including the quality review process required by the statute. There are numerous legal

needs, some are currently being met by trial court legal staff and some are not being met at all. Absent immediate intervention, this process will likely break down, resulting in case delay, excessive attorney fee and due costs, and increased jail costs.

A related issue of great concern relates to the likely instance where a judge needs to appoint an attorney and there are none available to serve or none qualified in the specific area of law for which the appointment is needed. The sixth circuit reports that they have found it necessary to develop and present a CLE course so that local attorneys could meet the committee's locally imposed educational requirements.

Recommendation: The current lack of legal, operational and administrative support at the local level is of paramount concern. The burden this continues to place on trial court staff is of great concern, as the trial courts were not funded adequately for this function. Following the reasoning of previous Revision 7 work by the Commission on Trial Court Performance and Accountability and the policies regarding the proper role and essential elements of the court, it is recommended that the committees and the TCBC seek legislative action to ensure that these resources are provided by the JAC. Specifically:

- a) The JAC should provide FTEs for all circuits to perform the necessary operational and administrative duties related to the creation, maintenance, and operation of the registry lists and supporting committee activities.**
- b) The JAC should provide general counsel legal support to the circuit committees on a circuit or regional basis. Depending on the level and staffing model selected, these lawyers could also represent the JAC in contesting court-appointed counsels' motions for fees and expenses (see next item).**

III. Manage due process services

▶ **Committee Tasks:**

- a) Establish rates for court reporting and court interpreting services for CAC appointments pursuant to s. 27.42(2)(c), Florida Statutes.
- b) Establish policies under which CACs will obtain due process services, including policies regarding investigative, court reporting, court interpreting, experts, and travel expenditures, etc.
- c) Review due process service utilization for performance and accountability implications.

▶ **Tasks to be performed by some entity in order to support the committee or the CAC process:**

Operational and administrative staff to:

- ✓ Identify due process service providers/vendors willing and capable of providing due process services;
- ✓ Develop the specific process by which CACs will obtain due process services;
- ✓ Execute contracts and service agreements with due process service providers/vendors; and
- ✓ Coordinate the provision of due process services to CACs.

Legal staff support to:

- ✓ review contracts, and
- ✓ provide legal support in the event a decision of the committee is challenged.

Expense dollars for expenditures related to reproduction and copy costs, long-distance telephone charges, postage, and other general office supplies.

▶ **Discussion and Recommendations:**

Court-appointed attorneys will require local support to help them procure due process services within the guidelines established by the committees. While the JAC already has a process by which it will contract with vendors or direct-pay attorney expenses, it is the local staff that must identify these vendors and respond to attorney inquiries about the local process and work with them on making certain that the specific requirements established by the chief financial officer are met. Further, absent an on-site complement of staff, JAC will not be able to provide the committees with adequate information with which they can determine whether the due process services expenditures were necessary and appropriate for the cases and will itself be hindered in its ability to identify instances where expenditures should be challenged. Because these attorneys are parties to a case, trial court staff cannot perform this function.

Recommendation: The Workgroup recommends that the committees and the TCBC seek legislative action to ensure that the JAC can perform the necessary operational and administrative duties related to the creation, maintenance, and operation of the registry lists and supporting committee activities. Additionally, the JAC should ensure that they have lawyers in each circuit to represent the JAC in contesting court-appointed counsels' motions for fees and expenses (see previous item).

IV. Manage the appointment of court-appointed counsel in individual cases

▶ Committee Tasks:

Establish the process by which the registry will be administered and monitor how successful the process is in operation.

▶ Tasks to be performed by some entity in order to support the committee or the CAC process:

Operational and administrative staff to: (parenthesis depict entity(ies) that have done it in the past)

- ✓ Maintain and operate CAC registries by county and by case category in order to identify attorneys in rotating order by the appropriate county and case category (court, county, clerk, PD);
- ✓ Select next attorney on the list; (court, clerk, PD);
- ✓ Prepare orders of appointment and orders rescinding appointments for judge's signature (court, clerk, PD, CAC);
- ✓ Forward signed orders of appointment (clerk);
- ✓ Maintain files and database of all CAC assignments by case number, defendant/respondent, and open/closed status (county, court);
- ✓ Execute contract with CAC (county);
- ✓ Copy and forward the case file to CAC (clerk or PD);
- ✓ Receive motions and orders for discharge (court);
- ✓ Verify case is closed and forward signed orders of discharge (court); and
- ✓ Review transcript for appeal for form and format and check against the invoice (court).

Legal staff support to:

- ✓ Provide legal support to individual judges in making finding that an attorney next on the list should be "skipped;" and
- ✓ Legal research for the judges as to whether the facts in a particular case require the appointment of court-appointed counsel.

Expense dollars for expenditures related to reproduction and copy costs, long-distance telephone charges, postage and other general office supplies.

▶ Discussion and Recommendations:

The operational and administrative support necessary to create and operate these registries is quite significant. The 18th Circuit reported that the trial court administrator's office provides at least 60 hours a week accommodating these first two activities alone. "This is a huge task for which we were given no resources. Staff overtime is substantial and assigned employees are stressed."

There is a misconception that the operation of these registry "wheels" will require nothing more than simply selecting names in order from a list. In reality, once the lists are created they will be subject to continuous modification, as attorneys are added and deleted from the lists. Also, at any given time on

any given morning, a circuit will likely have several judges on the bench who will be pulling names from the county's list. If all judges work from the same list simultaneously, then the attorneys at the top of the list will receive overlapping assignments from multiple judges. Preventing this will require a complex system to identify the true "next" attorney or to organize the judges to begin their selection from various starting points on the list will be required. Other complications include: tracking assignments when one attorney is on several county or case type lists within the circuit; tracking when an attorney is "skipped" and should be "next;" tracking when a court-appointed attorney is assigned a case and immediately recognizes a conflict and declines the case; tracking when an attorney withdraws and another is assigned, tracking when an attorney asks to not be assigned a case for a specific time due to unavailability, etc. Once the committees determine how these issues will be handled, it will take staff resources to fairly maintain and implement this system.

The identification of a circumstance that will require the appointment of CAC comes from many sources, including the PD, the DCF, clerks, judges and judicial assistants. How all of this information is managed to ensure that the necessary tasks are accomplished varies greatly by circuit, county and even case type. Each task identified above presents an opportunity for staff to field questions, from judges, judicial assistants, CACs and others about the process. In fact, this is the area where trial court administrative staff is spending most of their efforts, much of it in coordination and communication activities. The trial courts have a multitude of systems developed to accommodate the processes related to getting attorneys assigned to cases, including co-opting of public defenders' and clerks' staff.

Recommendation: The legal support needs described for this function are judicial and should continue to be provided by trial court law clerks. The committees and the TCBC should seek legislative action to ensure that the role of the other entities is clarified. In preparation for this, each local committee should review the clerical support needs, by case type and location, in this area and identify where the court, public defender, and JAC staff should be responsible. In some instances, this will be dictated by the type of case and the location. For example, if the registry list were properly maintained by the committees' JAC staff, then the clerks, judicial assistants or public defenders could collaborate on getting the orders of appointment prepared and forwarded, based on the type of case. For example: If the public defender withdraws from a case then the public defender could prepare an order appointing private counsel and forward a copy of the file, etc. In any case, it should be clarified that the JAC is responsible for maintaining the data base of all case appointments and related expenditures.

V. Manage the compensation for court-appointed counsel and due process service providers.

► Committee Tasks:

- a) Establish fees by case type (and, if appropriate, by county).
- b) Establish rates for due process service providers/vendors, where appropriate.
- c) Establish travel reimbursement and other policies relating to fees and costs.

► Tasks to be performed by some entity in order to support the committee or the CAC process:

Administrative staff to:

- ✓ answer attorney and due process vendor questions regarding payment process;
- ✓ answer questions regarding payment
- ✓ receive CAC motions, affidavits, supporting documentation and proposed orders for fees, costs and related expenses;
- ✓ review CAC proposed fee and expense motions;
- ✓ identify and object to CAC proposed fees and expenses outside the rates established by the committee;
- ✓ Review due process providers/vendors' invoices;
- ✓ Object to the use of a due process services, including investigators and experts;
- ✓ Object to due process service provider/vendor invoices;
- ✓ Prepare order on CACs motion for payment of fees and expenses;
- ✓ Process CAC and due process provider/vendor invoices for payment;
- ✓ Audit CAC and due process provider/vendor invoices.

Legal staff to:

- ✓ Review fees, costs, and expenses to determine if the facts in the case warrant them as necessary and appropriate.
- ✓ Appear and contest CAC proposed fee and expense motions.

Expenses related to:

- ✓ Staff expenses

► Discussion and Recommendations:

It is unclear what is expected of the individual judges in relation to managing costs in any given cases. The individual judge should be primarily concerned with the quality of representation. The duties related to managing compensation should be JACs or the court-appointed attorneys themselves. If the JAC objects to a fee or expenditure, then the judge will certainly be capable of making a ruling. In an adversarial system, judges make decisions when facts in dispute are presented in the course of a case; they are not auditors and it is not appropriate for their staff to be auditing the motions filed by a party to a case. Simply ascertaining that a due process service expense falls within the range established by the committee is not the same as determining that the expenditure was necessary and appropriate in the first

place, e.g., investigations, deposition transcripts, experts, travel to Morocco to interview witnesses, etc. If JAC pays directly for these costs, the judge will never see them. If the judge were to see them, JAC would have to develop the capacity to identify and object to unnecessary expenditures. Of course, if the objection is based on a legal analysis and argument, (i.e., something more than simply noting that a fee, cost, or expenditure exceeds the amount set forth in the committees' schedule) it will need to be prepared and presented by an attorney licensed to practice in Florida's courts. Absent an objection based on case facts and Florida case law, these fees, costs, and expenditures will likely be approved by the judges assigned to the case. Such an arrangement will leave the various committees with very little capacity to manage these costs in a manner likely to result in meaningful cost containment.

Recommendation:

- a. Because the various circuit committees are charged with managing court-appointed counsel and other indigent costs; they must rely on the JAC to critically review the appropriateness and necessity of expenditures and to challenge them as necessary within each case, the legislature should establish an office of court-appointed counsel within the JAC, with representation on the commission, and this office should deal with the court-appointed attorneys directly as to their fees. Additionally, the compensation for the court-appointed counsel should generally be accomplished without the court's participation. Only when the office for court-appointed counsel and the attorney cannot reach agreement as to the amount of fees, costs, and expenses, should the judge become involved. To accomplish this, subsection 27.40(7)(a), F.S., should be amended to delete the reference to approval of payment by the court and subsection 27.5304(2), F.S., should be amended to provide that the court retains "ultimate" authority, rather than "primary" authority, in determining the reasonableness of all billings.**
- b. The legislature should establish a mechanism by which to pay the due process costs for those individuals (both represented and pro se) who are determined to be indigent-for-costs.**

VI. Manage the court-appointed counsel budget(s)

▶ Committee Tasks:

- a) Monitor CAC aggregate expenditures and their related due process service expenditures by circuit, case and budget category.
- b) Develop a schedule of standard fees and expense allowances for the categories of cases specified in section 27.5303, F.S., consistent with the overall compensation rates in that section and within the amount of appropriated funds allocated by the JAC to the circuit for this purpose.
- c) Review JAC expenditure reports.

▶ Tasks to be performed by some entity in order to support the committee or the CAC process:

Administrative staff to:

- ✓ prepare and provide encumbrance and expenditure data to the committees;
- ✓ prepare and provide quarterly expenditure data to the legislature, as required by statute and GAA proviso;
- ✓ verify JAC expenditure reports with local appointment records;
- ✓ determine where there will be a funding deficiency;
- ✓ prepare necessary budget amendments, including accessing the contingency fund;
- ✓ prepare and submit the Legislative Budget Request;
- ✓ advance and lobby the Legislative Budget Request; and
- ✓ prepare allocations.

Legal staff to: none identified

Expenses related to: none that are not included in other activities.

▶ Discussion and Recommendations:

In order for the committees to perform their statutory functions, they will need to be provided current data as to the total expenditures and encumbrances. This information will need to be provided by case type, CAC, and expenditure type so that the committees can see where any anomalies arise. JAC staff will have to be available and prepared to explain any anomalies that may be based on due process cost trends, trends in practices, or case specific facts that resulted in a significant variance. It is unclear what role the committees will have in relation to the management of costs in cases where a person is declared indigent-for-costs.

Recommendation: The tasks related to these financial activities must be performed by JAC but could be accomplished with central staff that is available to attend committee meetings for purposes of explanation.

Appendix A

27.40 Court-appointed counsel; circuit registries; minimum requirements; appointment by court.—

(1) Counsel shall be appointed to represent any individual in a criminal or civil proceeding entitled to court-appointed counsel under the Federal or State Constitution or as authorized by general law. The court shall appoint a public defender to represent indigent persons as authorized in s. 27.51. Private counsel shall be appointed to represent indigents in those cases in which provision is made for court-appointed counsel but the public defender is unable to provide representation due to a conflict of interest or is not authorized to provide representation.

(2) No later than October 1, 2004, private counsel appointed by the court to provide representation shall be selected from a registry established by the circuit Article V indigent services committee or procured through a competitive bidding process.

(3) In utilizing a registry:

(a) Each circuit Article V indigent services committee shall compile and maintain a list of attorneys in private practice, by county and by category of cases. To be included on a registry, attorneys shall certify that they meet any minimum requirements established in general law for court appointment, are available to represent indigent defendants in cases requiring court appointment of private counsel, and are willing to abide by the terms of the contract for services. Each attorney on the registry shall be responsible for notifying the circuit Article V indigent services committee of any change in his or her status. Failure to comply with this requirement shall be cause for removal from the registry until the requirement is fulfilled.

(b) The court shall appoint attorneys in rotating order in the order in which names appear on the applicable registry, unless the court makes a finding of good cause on the record for appointing an attorney out of order. An attorney not appointed in the order in which his or her name appears on the list shall remain next in order.

(c) If it finds the number of attorneys on the registry in a county or circuit for a particular category of cases is inadequate, the circuit Article V indigent services committee shall notify the chief judge of the particular circuit in writing. The chief judge shall submit the names of at least three private attorneys with relevant experience. The clerk of court shall send an application to each of these attorneys to register for appointment.

(d) Quarterly, beginning no later than October 1, 2004, July 1, 2004, each circuit Article V indigent services committee shall provide the Chief Justice of the Supreme Court, the chief judge, the state attorney and public defender in each judicial circuit, and the clerk of court in each county with a current copy of each registry.

(4) To be eligible for court appointment, an attorney must be a member in good standing of The Florida Bar in addition to any other qualifications specified by general law.

(5) The Justice Administrative Commission shall approve uniform contract forms for use in procuring the services of private court-appointed counsel based on the recommendations of the Article V Indigent Services Advisory Board.

(6) After court appointment, the attorney must immediately file a notice of appearance with the court indicating acceptance of the appointment to represent the defendant.

(7)(a) An attorney appointed to represent a defendant or other client is entitled to payment of attorney's fees and expenses pursuant to s. 27.5304, only upon full performance by the attorney of specified duties, approval of payment by the court, and attorney submission of a payment request to the Justice Administrative Commission. If an attorney is permitted to withdraw or is otherwise removed from representation prior to full performance of the duties specified in this section for reasons other than breach of

duty, the trial court shall approve payment of attorney's fees and costs for work performed in an amount not to exceed the amounts specified in s. 27.5304.

(b) The attorney shall maintain appropriate documentation, including a current and detailed hourly accounting of time spent representing the defendant or other client.

(8) Subject to the attorney-client privilege and the, work-product privilege, an attorney who withdraws or is removed from representation shall deliver all files, notes, documents, and research to the successor attorney within 15 days after receiving notice from the successor attorney. The successor attorney shall bear the cost of transmitting all files, notes, documents, and research.

(9) A circuit Article V indigent services committee or any interested person may advise the court of any circumstance affecting the quality of representation, including, but not limited to, false or fraudulent billing, misconduct, failure to meet continuing legal education requirements, solicitation to receive compensation from the defendant or other client the attorney is appointed to represent, or failure to file appropriate motions in a timely manner.

(10) This section does not apply to attorneys appointed to represent persons in post conviction capital collateral cases pursuant to part IV of this chapter.

27.42 Circuit Article V indigent services committees; composition; staff; responsibilities; funding.--

(1) In each judicial circuit a circuit Article V indigent services committee shall be established. The committee shall consist of the following:

(a) The chief judge of the judicial circuit or the chief judge's designee, who shall serve as the chair.

(b) The public defender of the judicial circuit, or designee from within the office of the public defender.

(c) One experienced private criminal defense attorney appointed by the chief judge to serve a 2-year term. During the 2-year term, the attorney is prohibited from serving as court-appointed counsel.

(d) One experienced civil trial attorney appointed by the chief judge, to serve a 2-year term. During the 2-year term, the attorney is prohibited from serving as court-appointed counsel.

(2)(a) The responsibility of the circuit Article V indigent services committee is to manage the appointment and compensation of court-appointed counsel within a circuit pursuant to ss. 27.40 and 27.5303. The circuit Article V indigent services committee shall meet at least quarterly.

(b) No later than October 1, 2004, each circuit Article V indigent services committee shall maintain a registry pursuant to s. 27.40, even when procuring counsel through a competitive bidding process. However, if counsel is procured through a competitive bidding process, the registry shall be used only when counsel obtained through that process is unable to provide representation due to a conflict of interest or reasons beyond their control. The committee shall apply any eligibility and performance standards set by the Legislature.

(c) Each circuit Article V indigent services committee shall develop a schedule of standard fees and expense allowances for the categories of cases specified in s. 27.5303, consistent with the overall compensation rates in that section and within the amount of appropriated funds allocated by the Justice Administrative Commission to the circuit for this purpose.

(3) The Justice Administrative Commission shall prepare and issue on a quarterly basis a statewide report comparing actual year-to-date expenditures to budgeted amounts for the circuit Article V indigent services committees in each of the judicial circuits. Copies of these quarterly reports shall be distributed to each circuit Article V indigent services committee and to the Governor, the Chief Justice of the Supreme Court, the President of the Senate, and the Speaker of the House of Representatives.

(4)(a) The funding and positions for the processing of committees' fees and expenses shall be as appropriated to the Justice Administrative Commission in the General Appropriations Act.

(b) Funds for criminal conflict attorney's fees and expenses shall be appropriated by the Legislature in a separate appropriations category within the Justice Administrative Commission. These funds shall be allocated to each circuit as prescribed in the General Appropriations Act.

(c) Funds for attorney's fees and expenses for child dependency and civil conflict cases shall be appropriated by the Legislature in a separate appropriations category within the Justice Administrative Commission.

(d) Any funds the Legislature appropriates for other court-appointed counsel cases shall be as appropriated within the Justice Administrative Commission.

The Justice Administrative Commission shall separately track expenditures on private court-appointed counsel for the following categories of cases: criminal conflict, civil conflict, dependency and termination of parental rights, and guardianship.

27.5303 Public defenders; conflict of interest.--

(1)(a) If, at any time during the representation of two or more defendants, a public defender determines that the interests of those accused are so adverse or hostile that they cannot all be counseled by the public defender or his or her staff without conflict of interest, or that none can be counseled by the public defender or his or her staff because of a conflict of interest, then the public defender shall file a motion to withdraw and move the court to appoint other counsel. If requested by the Justice Administrative Commission, the public defender shall submit a copy of the motion to the Justice Administrative Commission at the time it is filed with the court. The Justice Administrative Commission shall have standing to appear before the court to contest any motion to withdraw due to a conflict of interest. The Justice Administrative Commission may contract with other public or private entities or individuals to appear before the court for the purpose of contesting any motion to withdraw due to a conflict of interest. The court shall review and may inquire or conduct a hearing into the adequacy of the public defender's representations regarding a conflict of interest without requiring the disclosure of any confidential communications. The court shall deny the motion to withdraw if the court finds the grounds for withdrawal are insufficient or the asserted conflict is not prejudicial to the indigent client. If the court grants the motion to withdraw, the court shall appoint one or more attorneys to represent the accused.

(b) Upon its own motion, the court shall appoint such other counsel when the facts developed upon the face of the record and court files in the case disclose a conflict of interest. The court shall advise the appropriate public defender and clerk of court, in writing, with a copy to the Justice Administrative Commission, if so requested by the Justice Administrative Commission, when making the motion and appointing one or more attorneys to represent the accused. The court shall specify the basis for the conflict.

(c) In no case shall the court approve a withdrawal by the public defender based solely upon inadequacy of funding or excess workload of the public defender.

(d) In determining whether or not there is a conflict of interest, the public defender and the court shall apply the standards contained in the Uniform Standards for Use in Conflict of Interest Cases found in appendix C to the Final Report of the Article V Indigent Services Advisory Board dated January 6, 2004 adopted by the Legislature after receiving recommendations from the Article V Indigent Services Advisory Board.

(2) The court shall appoint conflict counsel pursuant to s. 27.40. The appointed attorney may not be affiliated with the public defender or any assistant public defender in his or her official capacity or any other private attorney appointed to represent a codefendant. The public defender may not participate in case-related decisions, performance evaluations, or expense determinations in conflict cases.

(3) Private court-appointed counsel shall be compensated as provided in s. 27.5304 in accordance with compensation standards adopted by the Legislature after receiving recommendations from the Article V Indigent Services Advisory Board.

(4)(a) If a defendant is convicted and the death sentence is imposed, the appointed attorney shall continue representation through appeal to the Supreme Court. The attorney shall be compensated as provided in s. 27.5304. If the attorney first appointed is unable to handle the appeal, the court shall appoint another attorney and that attorney shall be compensated as provided in s. 27.5304.

(b) The public defender or an attorney appointed pursuant to this section may be appointed by the court rendering the judgment imposing the death penalty to represent an indigent defendant who has applied for executive clemency as relief from the execution of the judgment imposing the death penalty.

(c) When the appointed attorney in a capital case has completed the duties imposed by this section, the attorney shall file a written report in the trial court stating the duties performed by the attorney and apply for discharge.

27.5304 Private court-appointed counsel; compensation.--

(1) Private court-appointed counsel shall be compensated by the Justice Administrative Commission in an amount accordance with standards adopted by the Legislature after receiving recommendations from the Article V Indigent Services Advisory Board. However, compensation shall not to exceed the maximum fee limits established in by this section. The attorney also shall be reimbursed for reasonable and necessary expenses in accordance with s. 29.007. If the attorney is representing a defendant charged with more than one offense in the same case, the attorney shall be compensated at the rate provided for the most serious offense for which he or she represented the defendant. This section does not allow stacking of the fee limits established by this section.

(2) Prior to filing a motion for an order approving payment of attorney's fees, costs, or related expenses, the private court-appointed counsel shall deliver a copy of the intended billing, together with supporting affidavits and all other necessary documentation, to the Justice Administrative Commission. The Justice Administrative Commission shall review the billings, affidavit, and documentation for completeness and compliance with contractual and statutory requirements. If the Justice Administrative Commission objects to any portion of the proposed billing, the objection and reasons therefore shall be communicated to the private court-appointed counsel. The private court-appointed counsel may thereafter file his or her motion for order approving payment of attorney's fees, costs, or related expenses together with supporting affidavits and all other necessary documentation. The motion must specify whether the Justice Administrative Commission objects to any portion of the billing or the sufficiency of documentation and, if so, the reasons therefore. A copy of the motion and attachments shall be served on the Justice Administrative Commission. The Justice Administrative Commission shall have standing to appear before the court to contest any motion for order approving payment of attorney's fees, costs, or related expenses. The Justice Administrative Commission may contract with other public or private entities or individuals to appear before the court for the purpose of contesting any motion for order approving payment of attorney's fees, costs, or related expenses. The fact that the Justice Administrative Commission has not objected to any portion of the billing or to the sufficiency of the documentation is not binding on the court. The court retains primary authority and responsibility for determining the reasonableness of all billings for attorney's fees, costs, and related expenses, subject to statutory limitations. Before final disposition of a case, a private court-appointed counsel may file a motion for fees, costs, and related expenses for services completed up to the date of the motion in any case or matter in which legal services have been provided by the attorney for more than 1 year. The amount approved by the court may not exceed 80 percent of the fees earned, or costs and related expenses incurred, to date, or an amount proportionate to the maximum fees permitted under this section based on legal services provided to date, whichever is less. The court may grant the motion if counsel shows that failure to grant the motion would work a particular hardship upon counsel.

(3) The compensation for representation in a criminal proceeding shall not exceed the following:

(a)1. For misdemeanors and juveniles represented at the trial level: \$1,000.

2. For non-capital, non-life felonies represented at the trial level: \$2,500.

3. For life felonies represented at the trial level: \$3,000.
4. For capital cases represented at the trial level: \$3,500.
5. For representation on appeal: \$2,000.

(b) If a death sentence is imposed and affirmed on appeal to the Supreme Court, the appointed attorney shall be allowed compensation, not to exceed \$1,000, for attorney's fees and costs incurred in representing the defendant as to an application for executive clemency, with compensation to be paid out of general revenue from funds budgeted to the Department of Corrections.

(4) By January 1 of each year, 2004, the Article V Indigent Services Advisory Board shall recommend to the Legislature any adjustments to the existing compensation provisions of this section schedules for criminal proceedings and any proposed compensation standards for private attorneys providing representation in civil proceedings in which private court-appointed counsel is required.

(5)(a) If counsel is entitled to receive compensation for representation pursuant to court appointment in a termination of parental rights proceeding under chapter 39 s. 39.0134, such compensation shall not exceed \$1,000 at the trial level and \$2,500 at the appellate level.

(b) Counsel entitled to receive compensation for representation pursuant to court appointment in a proceeding under chapter 384 or chapter 392 shall receive reasonable compensation as fixed by the court making the appointment.

(6) A private attorney appointed in lieu of the public defender to represent an indigent defendant may not reassign or subcontract the case to another attorney or allow another attorney to appear at a critical stage of a case who is does not on the registry developed pursuant to s. 27.40 meet standards adopted by the Legislature after any recommendations from the Article V Indigent Services Advisory Board.