



Executive Summary

The Commission on Trial Court Performance and Accountability has been charged by the Supreme Court of Florida with responsibility for describing the purpose, definition, value, and prudent use of trial court resources; the development of performance measures; the implementation of a system for collecting and analyzing data concerning performance; and reporting its findings on performance to the Supreme Court, chief judges of each judicial circuit, trial court administrators, and other interested stakeholders. This report is the first step in that process with respect to the resource that has been designated **Court Appointed Expert Witnesses**.

Purpose Statement: An expert witness is a person who, by reason of his or her special knowledge, skill, experience, training or education in a particular subject, is qualified to express an opinion or give expert testimony within that particular area of expertise.

A court appointed expert witness provides essential supports to the adjudication process by providing independent expert opinion concerning a scientific or technical matter in dispute, or concerning the physical, psychological, and or mental condition of persons affected by or subject to the dispositional orders of the court, in matters involving a fundamental interest or right.

Recommendations:

- Accept the recommended definition and purpose statement.
- Encourage Legislature to make each Article V entity responsible for its respective budget.
- Urge the Legislature to conform section 29.004, F.S. with the TCP&A and TCBC designation of expert witnesses as an essential element of the trial courts.
- Propose to the Legislature a general statute that codifies case law and clarifies the circumstances where an expert witness should be appointed at public expense.
- Create a representative group of judicial branch stakeholders and ask it to conduct a best business practices review of the court appointed expert witness essential element.
- Request the best business practices group to address each of the management, legal and procedural, and ethical concerns raised by the Expert Witnesses Workgroup.
- Approve the proposed new framework for describing, managing and tracking the resources connected with the Court Appointed Expert Witness Element.
- Immediately request the OSCA to initiate a effort to collect and analyze six month worth of data on utilization of court appointed expert witness resources organized into the proposed new framework for describing the components of the element.

Performance Measures:

- The number of cases requiring appointment of an expert witness at public expense.
- The type of expert witness used and the classification of the matter in controversy as among competency, other psychological or medical experts, other experts, and other witness expenses.
- The type of case, court and division, where applicable, and the cost per case and per witness.

Report and Recommendations on the Definition and Purpose of Court Appointed Expert Witnesses

January 28, 2003

I. INTRODUCTION

The Commission on Trial Court Performance and Accountability (TCP&A or Commission) established the Court Appointed Expert Witness Workgroup to recommend definitions and policies that address performance and accountability in the utilization of court appointed expert witness resources, including psychological evaluations, in the trial courts of Florida. This report of the Commission approves and adopts the findings and recommendations of the workgroup.

This report is important for two reasons. First, Article III, Section 19 of the Florida Constitution requires that the judicial branch establish a quality management and accountability program. The Commission is charged with responsibility for recommending to the Supreme Court a comprehensive performance measurement, improvement, and accountability system for the trial courts. Second, Revision 7 to Article V (Revision 7) of the Florida Constitution requires that the state assume responsibility for funding the essential components of the state's trial courts not later than July 1, 2004. The Trial Court Budget Commission (TCBC) is charged with responsibility for developing and overseeing the administration of trial court budgets. Both the TCBC and the TCP&A have designated Expert Witnesses and Psychological Evaluations as essential elements of trial court operations. However, some of the cost inventory elements that are not designated essential may contain expenditures that should or could be associated with those two essential elements. To put the potential fiscal burden that the state will assume under Revision 7 in some context, for state fiscal year 1999-2000, the counties reported expenditures of nearly \$37 million in support of the operations of the courts, state attorneys, public defenders, conflict and court appointed counsel relating to expert witnesses, and other related witness services.¹

Even with that level of public funding, the Commission finds that there is no commonly shared understanding of all of the cost components that should properly be incorporated into either the Expert Witness Element or the Psychological Evaluations Element, or both, nor are there comprehensive definitions in either rule or statute. Furthermore, there is no codification of the constitutional principles that dictate the circumstances where a person is entitled to a court appointed expert witness or psychological evaluation at public expense.

This report describes the effort to define a new element and to eliminate much of the ambiguity and uncertainty surrounding the funding, utilization, and accountability for these important court resources. Section II describes and documents the current statutes, rules and expenditures for the services under consideration. Section III explains the changing circumstances

¹ See Appendix D for detailed Article V Cost Inventory data.

that necessitate a reexamination of past practices and expenditures. Section IV contains recommendations that will help operationalize the mandate for improved accountability for performance and quality, provide a solid framework for the first post-Revision 7 trial court budget, and establish a foundation for the prudent stewardship of public resources by the judicial branch. Section V includes a number of Appendices that document or detail the narrative portions of the report.

II. OVERVIEW OF HISTORICAL PRACTICES

Statutes and Court Rules. Trial court judges are authorized, by provisions of no fewer than ten separate chapters of the Florida Statutes, to appoint experts for a variety of evaluations, assessments or tests. A number of civil, criminal, juvenile or family law rules of procedure also provide for the examination of the physical, emotional or mental condition of persons within the jurisdiction of the court.² Where necessary, a court also has the inherent power to appoint an expert to exercise fully its jurisdiction.³ The scope and depth of these examinations vary in their intrusiveness from a home study to an involuntary commitment to a secure mental health facility. The level of professional training and licensure needed to conduct these examinations ranges from unlicensed caseworkers to licensed and highly trained forensic psychiatrists. Some examinations are intended to address specific issues while others are more general or exploratory. In most cases, these court experts support the adjudication process by providing trial court judges with highly specialized or expert information and opinion testimony concerning a matter in dispute, and expert or opinion testimony regarding the physical, psychological, and/ or mental health conditions of persons affected by or subject to dispositional orders of the court.

A review of the various statutes and rules (Appendix A) reveals that the court appointed professionals who perform psychological evaluations are only a subset of all of the types of experts that are encompassed by their language. County expenditures for court appointed experts were sorted into two categories in the Article V Cost Inventory: Psychological Evaluations Ordered by the Court, and Expert Witnesses Ordered by the Court. These same categories are used by counties to identify their expenditures in support of state attorneys, public defenders, and conflict or court appointed counsel.

Responsibility for Payment. Several statutes specifically identify the person or entity responsible for the payment of fees and costs associated with evaluations or assessments by expert witnesses.⁴ In cases where the appointment of an expert witness is at public expense, unless there is a specific statutory provision to the contrary, the cost is borne by the county in which the case arises.⁵ Orders for the appointment of an expert witness can be entered on the court's own motion or at the request of a party. However, when a party asks the court to appoint an expert, and the court enters an

² See, Appendix A

³ A more detailed discussion of legal issues is located in Appendix B.

⁴ See, Appendix C.

⁵ See, Appendix B.

order granting such a request, it is not always clear whether it is the court, or the requesting party, that is to be deemed the entity that “ordered” the witness. Whether and how the counties deal with this type of ambiguity in accounting for their expenditures is important because the historical spending by counties is a primary source of information for the Legislature concerning the breadth and scope of the responsibilities that the state must assume with the full implementation of Revision 7.

County Accounting and Budgeting Practices. There are significant variances in the way the 67 counties and 20 circuits manage and account for expert witnesses expenditures. Some counties manage and account for them as an integral part of county government operations, while others appropriate funds for expert witnesses to the trial court administrator who is responsible for managing and accounting for the expenditures. Some circuits employ full time professional staff who conduct some of the evaluations ordered by the court, and these professionals are supported by other administrative personnel. Other circuits use contractual or fee for services arrangements with professionals who provide expert witness services. Some counties maintain, or ask trial court administrator to maintain, records concerning the types and numbers of cases in which expert witnesses are used. Other counties and circuits don't maintain such records. Some counties have historically maintained separate cost centers for expert witness expenditures incurred by the court, the state attorney, the public defender, and conflict counsel, and maintain utilization data for each of those cost centers. Other counties see the expenditures for all court entities and all case types as a generic obligation, and pay from a single cost center.

The costs of expert witnesses is one of the largest components of court-related expenditures borne by counties since the major rewrite of Article V of the Florida Constitution was approved by voters in 1972. Total reported expenditures by counties is nearly \$37 million according to the Article V Cost Inventory completed by the Office of State Court Administrator in 2000.⁶ The absence of uniformity in operational and fiscal practices and procedures complicates and confounds efforts to determine the level of state funding that will be necessary to support this aspect of court operations when Revision 7 is implemented. It also prevents the institution of any types of performance measurement or accountability.

III. CHANGING CIRCUMSTANCES COMPEL NEW APPROACHES

Revision 7 will bring changes in the way Florida trial courts operate that have not been experienced since the reforms of thirty years ago. The 1972 constitutional revisions resulted in a unified two tier trial court system. But most of the funding for those trial courts remained the responsibility of the counties. This resulted in an unequal level of funding and other supports, and 67 different types of fiscal and operational accountability. Revision 7 will change all of that. The state's assumption of responsibility for funding the trial courts will affect the practices of all three branches of government. The judicial branch's legislative budget request will radically change with the inclusion of funding for the essential elements of the trial courts. Because the state's funding obligation is tied to essential elements of the trial courts, it will be necessary to distinguish those

⁶ The data from the Article V Cost Inventory for Expert Witnesses Ordered by the Court, Psychological Evaluations Ordered by the Court; Other Witnesses Ordered by the Court, Witness Coordination and Management, and Custody Evaluations/Parenting Evaluations/Home Studies are reproduced in Appendix D.

activities that are essential for the courts to fulfill their constitutional role, those that are integral to a quality trial court system or contribute to more efficient operations, and those that are optional depending on the availability of funding.

The Commission's efforts to understand the nature of expert witnesses began with the Article V Cost Inventory, which is one of the few sources of comprehensive standardized information on trial court operations and expenditures. Two related components of the Cost Inventory – Expert Witnesses and Psychological Evaluations – previously had been designated as essential elements by the TCP&A and the TCBC, and were therefore the subject of close analysis. That analysis indicates that there also may be expenditures reported under the “Other Witnesses” and “Family Court Services” components of the inventory that are more appropriate to the expert witness category. The cost inventory also captured state attorney, public defender and conflict counsel expenditures for all but the Family Court Services components. It is probable that some of the costs reported for those stakeholders should have been allocated to the courts, and that some of the expenditures attributed to the courts should have been allocated to one of the other stakeholders. The absence of standardized definitions, coupled with the significant variance in the budgeting and accounting systems in the 67 counties and 20 circuits, contribute to these possibilities of error and the resulting uncertainty in the amount and allocation of funds that will be necessary for all of the court system stakeholders to continue their respective operations without any degradation in quality after the implementation of Revision 7.

The Commission reasoned that the best way to escape the morass of ambiguity surrounding the use and payment of court appointed expert witnesses was to construct a set of standardized definitions, building an entirely different scheme for describing and categorizing the expert witness and psychological evaluations elements of the trial courts. The new framework is the best means of achieving the goal of an adequate and equitable allocation of funds for this component of the trial courts' statewide budget. Although this report is focused the trial courts, the Commission is mindful that there probably will be parallel essential elements in the resource and performance measurement systems established for state attorneys, public defenders, and conflict and appointed counsel. The Commission believes that recommendations made by the judicial branch, and the resulting budget policies ultimately established by the Legislature, must be consistent, workable and understandable for all of the key stakeholders in Florida's trial court system.

IV. COMMISSION CHARGE AND PROCESS

When the Commission created the Expert Witness Workgroup, it gave it the following five- part charge:

- Develop standard definitions of the expert witness element that facilitates the implementation of statewide budgeting and performance and accountability processes;
- Identify the **legal criteria** for determining when the appointment of an expert witness should be at public expense;

- Identify service delivery options for expert witnesses including full or part-time employees, contract personnel, and other private sector options;
- Develop recommendations for management practices for the designation, allocation, and utilization of expert witnesses, including data collection and reporting; and
- Develop recommendations for the Trial Court Budget Commission for a funding allocation process that will address the circuit needs for expert witnesses.

Each part of the charge resulted in one or more consensus recommendations by the Workgroup, which are reported and explained separately. Each of these recommendations were reviewed and accepted by the full Commission, and it is within this context that the recommendations that follow are forwarded to the Supreme Court.

Charge 1: Standard Definitions

The Commission is very much aware of the many groups within and outside the Judicial Branch have been studying and trying to anticipate the implications of full implementation of Revision 7 from the perspective of operations, budget, and accountability. Inside the Judicial Branch, the TCBC and its Funding Methodology Committee have wrestled with these questions along with the Commission. At various times in the past year, the expert witness element and the psychological evaluation element have been cast as separate elements serving different purposes, and later, as consolidated element based on the similarity of the legal considerations that govern the use of these resources. This ambivalence is symptomatic of the ambiguity that surrounds the definition, scope and use of these resources.

The Commission believes that it is necessary to articulate some new organizing principles that will be useful to the Supreme Court, and the TCBC, and will also help prepare the trial courts for the implementation of Revision 7. A purpose or mission statement for court appointed expert witnesses that would convey descriptive information about what service is provided, who is served, and why the service is important was developed as follows:

Recommendation 1(a):

An expert witness is a person who, by reason of his or her special knowledge, skill, experience, training or education in a particular subject, is qualified to express an opinion or give expert testimony within that particular area of expertise.

An court appointed expert witness provides essential support to the adjudication process by providing independent expert opinion concerning a scientific or technical matter in dispute, or concerning the physical, psychological, and or mental condition of persons affected by or subject to the dispositional orders of the court, in matters involving a fundamental interest or right.

This statement became the foundation for the Commission's efforts to define the breadth and scope of the expert witness element. As has been noted, however, the Commission believed that more clarification was needed to address the ambiguities inherent in the cost data in the Article V Cost Inventory that sorted court related expenditures into the following functionally overlapping categories:

- ▶ Expert Witnesses Ordered by the Court;
- ▶ Psychological Evaluations Ordered By the Court; and
- ▶ Other Witnesses Ordered by the Court.⁷

New Designation for Element. The first improvement adopted by the Commission was a new designation for an essential element that would encompass all of those listed above, but sufficiently different to distinguish it from those used in the past. The title “Court Appointed Expert Witnesses” was selected because it seemed to meet those criteria. Implicit in this definition is the notion that the witness is appointed at public expense. As will be further discussed later, Revision 7 does not affect the legal requirements for the appointment of expert witnesses by the court. It merely shifts responsibility for payment of those witnesses from the counties to the state.

The Commission believes that it is important to articulate several important assumptions that influenced its recommendations on this and other issues. First among those assumptions was the identification of court related witness expenses that should not be included within the scope of the Court Appointed Expert Witnesses element. Accordingly, the workgroup assumed that the implementation of Revision 7 would result in agreement that state attorneys, public defenders and conflict counsel would each request and manage their respective resources, which would include components for expert witnesses, psychological evaluations, and other witnesses necessary for each entity to carry out their respective constitutional and statutory mandates.

The Commission also assumed that notwithstanding past custom or practice in the various circuits, each of the stakeholders would be responsible for managing and paying for all of the incidental costs associated with their respective expert witnesses, such as travel or per diem costs. In cases where court administration staff have traditionally handled the payment of these types of

⁷ Appendix D contains a comprehensive list of the Cost Inventory elements that are associated with all types witnesses used by court system stakeholders.

miscellaneous witness-related expenses for all local stakeholders, that custom should continue only if there is an agreement among the stakeholders, and procedures, for reimbursement of the direct and indirect costs of providing that service. Unless each stakeholder properly budgets for their own anticipated costs, they will not be in a position to provided the reimbursements necessary to maintain the traditional operating practices.

Recommendation 1(b):

The Judicial Branch's Court Appointed Expert Witnesses Essential Element should encompass only such resources that will be necessary to pay for expert witnesses appointed by the court at public expense and who serve as a court witness. State Attorneys, Public Defenders and Conflict Counsel will be responsible for identifying their respective resource needs for expert witnesses, psychological evaluations, and other witnesses necessary to carry out their respective constitutional and statutory mandates.

A related assumption made by the Commission is that the newly defined element includes only court appointed witnesses. Accordingly, where a witness is proffered by a party as an expert, and accepted or designated as such by the court in accordance with the rules of evidence, that witness does not thereby become a court appointed witness. In such situations, the assumption is that the party proffering the witness will be responsible for compensation and incidental expenses unless such witness costs are apportioned differently by court order. This assumption holds whether the party is a public entity, such as a State Attorney or Public Defender, or a private litigant. The only exception is a case where a litigant is indigent.

The Commission believes that the Legislature can contribute to the ongoing effort to clarify the essential elements of the trial courts by specifically adopting the proposed definition of the Court Appointed Expert Witnesses, and designating it in statute as an essential element for the trial courts. The Florida Legislature began the process of defining the essential elements with the enactment of Chapter 2000-237, Laws of Florida.⁸ It is interesting to note that that legislation designated expert witnesses as one of the essential elements for state attorneys, public defenders, and court appointed and conflict counsel, but not for the trial courts.⁹ The Commission believes that this omission was an oversight, and that this legislation was only the starting point in the Legislature's process of defining those elements of trial courts that will be the subject of state funding upon full implementation of Revision 7. Of course, the judicial branch has an important role to play in the definition of essential elements for the trial courts, and both the TCBC and the TCP&A have already designated Court Appointed Expert Witnesses as one of the ten essential elements of trial court operations.

⁸ The provision in question was codified as section 29.004, F.S.

⁹ Compare sections 29.005(3), 29.006(3) and 29.007(4), F.S. with section 29.004, F.S.

Recommendation 1(c):

The Supreme Court should recommend to the Legislature that as it moves ahead with its work on Revision 7, it should amend section 29.004, F.S., to explicitly provide that Court Appointed Expert Witnesses is one of the essential elements of trial courts that will be funded by the state within the trial courts budget.

Charge 2: Legal Criteria

The next area that the Commission examined concerned the legal criteria to be used in determining when an expert witness should be appointed by the court at public expense and paid from the court's budget. The Commission believes that there are four types of circumstances that require such appointments:

- ▶ where necessary to effectuate a constitutional right or protection; or
- ▶ where required, either expressly or by implication, in statute or court rule; or
- ▶ where deemed necessary by a court in the exercise of its inherent authority or jurisdiction; or
- ▶ where necessary to determine significant rights or issues in a case involving a party who is indigent.

An analysis of the applicable statutory and case law is included in Appendix B. Many of the court decisions that have resulted in opinions defining circumstances where the federal or state constitution requires the appointment of expert witnesses at public expense have been codified in statute.¹⁰

With the matter of court appointment of expert witnesses arising in no fewer than 14 chapters and more than 20 separate sections of the Florida Statutes, the Commission believes that all three branches of government would be in a better position to carry out their respective obligations to the trial courts of Florida if the Legislature were to adopt a general statute. Such a statute could establish a consensus legal framework for determining when there is a right to the appointment of expert witnesses at public expense. It could also specify or clarify which public entity's budget should be responsible for payment of these costs. The proposed statute would promote consistent policy decisions regarding the use, level of funding needed, and accountability for one of the costliest of all the essential elements, and provide a common point of reference for the trial courts, state attorneys, public defenders and conflict counsel.

Appendix C details some of the specific statutes that provide for the appointment of experts by the court. Many of those statutes specifically provide that the costs associated with the appointments of experts are to be paid by the county. Should the Legislature decide to act on the recommendation for legislation, it could also use it as a vehicle for amending these other statutes in situations where the

¹⁰ See Appendix A.

Legislature determines that the provision of Revision 7 have the effect of shifting funding responsibility from the county to the state.

Recommendation 2:

The Supreme Court should recommend to the Legislature that as it moves ahead with its work on Revision 7, it should consider adopting a general statute governing the appointment of expert witnesses and public expense. Such a statute should establish a consensus legal framework for determining when there is a right to the appointment of expert witnesses at public expense, and clarify which public entity's budget should be responsible for payment of these costs.

The recommended statute should establish an entitlement to appointment of an expert witness in at least the following circumstances:

- where necessary to effectuate a constitutional right or protection;
- where required, either expressly or by implication, in statute or court rule;
- where deemed necessary by a court in the exercise of its inherent authority or jurisdiction; or
- where necessary to determine significant rights or issues in a case involving a party who is indigent.

The proposed legislation should establish criteria for determining in each case whether payment of fees and costs associated with the appointment of court appointed expert witnesses should be paid from the budget of the court, the state attorney, the public defender, conflict or appointed counsel, or the county.

Charge 3: Service Delivery Options

Five of the 20 circuits currently employ staff to perform a portion of the psychological evaluations ordered by their courts. Each of those five circuits also uses contract funds for expertise beyond that possessed by their employees, or when workload exceeds the capacity of the staff. The other circuits rely entirely on temporary or contract staff for their psychological evaluations. All of the circuits use a contract model for all other types of expert witnesses. The workgroup reviewed an analysis of cost data for expert witnesses prepared by Office of State Courts Administrator (OSCA) staff. That analysis indicated the following:

- ▶ Four of the five circuits that use a staff model for psychological evaluations have the highest unit cost of all circuits, regardless of the metric used;
- ▶ Two of the circuits using the staff model reported average cost per case for psychological evaluations that exceeded the statewide average by more than 100 per cent;
- ▶ These discrepancies persist even after considering jury trial rates in civil and criminal cases;

- ▶ Wide variances in reported cost data, and the inherent ambiguity of the definitions of the elements in the cost inventory makes that data unreliable; and
- ▶ The House of Representatives survey data from the circuits that was compiled by OSCA staff is a more reliable source of cost data until such time that actual data becomes available.

The workgroup concluded that the determination of when it is cost effective to hire staff depends on a number of variables including the size and geographical configuration of the circuit, the number of filings and judges, and the cost and availability of contractual services. But there was consensus that the choice of a particular model by a circuit should never result in its receiving a disproportionate share of the total resources available to the judicial branch to fund the costs of this element. These and other factors should be carefully considered in a best business practices work shop held after the workgroup's recommendations regarding definition and scope of the court appointed expert witness element have been acted upon by the Commission. By that time, it is likely that more meaningful costs data from the circuits will be available to inform that process.

Recommendation 3:

The Commission on Trial Court Performance and Accountability should appoint a representative group of judges, court administrators, and practitioners to conduct a best business practices review of all aspects of the redefined Court Appointed Expert Witness element. This review should address the type and scope of resource utilization data necessary to support a resource management system at the circuit or the state level.

Charge 4: Management Practices

The Commission agrees with the Workgroup's determination that a major component of the recommended best business practices review for court appointed expert witness element should be management practices. The topics that should be addressed in that review include, but are not limited to, the following:

- ▶ Definition of the minimum qualifications by training and experience for each type of expert witness typically used by the trial courts;
- ▶ Development of model job descriptions of staff positions that perform some or all of the activities associated with the Court Appointed Expert Witness element;
- ▶ Development of a code of conduct for such employees;
- ▶ Development of recommended policies for recruitment and retention efforts;
- ▶ Development of a recommended fee schedule appropriate to each circuit or region of the state;

- ▶ Establishment of a list of qualified experts in the various disciplines who are willing to accept court appointments that will be compensated within the recommended fee schedule unless extraordinary circumstances justify departure from the schedule;
- ▶ Development of a mechanism for selection of experts that is fair and avoids the appearance of favoritism or other improper influence;
- ▶ Definition of the role, if any, that OSCA should play in managing the Court Appointed Expert Witness resources for some or all of the circuits;
- ▶ Recommendations for standardized forms and orders that are designed to capture all of the data elements necessary to satisfy anticipated reporting and accountability requirements; and
- ▶ Recommendations for procedures for court administrators to audit compliance with the approved local fee schedule or documenting justification for variances.

The Commission believes that sound practices in these areas will help ensure an efficient and fair expenditures of funds by the trial courts.

Legal and Procedural Questions. The workgroup members were concerned that, in some cases, questions regarding the competency of a criminal defendant might generate multiple competency evaluations when one might be sufficient to resolve the question. It was noted that this practice might be the result of ambiguities in either court rules or statute. The feasibility of revising rules or statutes to authorize a tiered system of competency evaluations, with second or additional evaluations being authorized only after the results of the first are considered by the parties, should be investigated as a part of the recommended best business practice review of the court appointed expert witnesses element.

Ethical Considerations. Some members of the workgroup expressed interest in further study of the ethical implications of a court-employee model of service delivery model for any type of expert witness service. One concern is whether a court employee can maintain independence, as well as the appearance of independence, while acting as an employee of the court system. Another is whether a party who challenges the opinions of a court appointed and court employed witness, is forced into an untenable position of challenging the qualifications credibility of a court employee. It was noted that some of the same concerns motivated the effort to seek placement of the Guardian Ad Litem Program and funding outside the judicial branch. The Commission shares these concerns, and believes that they should be investigated in connection with the best business practices review of the court appointed expert witness element.

Recommendation 4:

The Commission on Trial Court Performance and Accountability should include in its charge to the best business practices review group for court appointed expert witnesses a request that it address each one of the management, legal and procedural, and ethical issues that have been identified by the workgroup.

Charge 5: Funding Allocation Process

The final component of the workgroup's charge was to develop recommendations for the Trial Court Budget Commission for a funding allocation process that will meet the needs of each circuit for court appointed expert witnesses. The group's deliberations centered on four major topics: how to accurately determine the aggregate funding needs of branch for the redefined element; articulation of new components for the redefined element that avoids the ambiguities already noted; and circuit level flexibility in the use of funding; and data collection requirements to help document the management and utilization of resources.

Aggregate Funding. The workgroup believed that it is important for the Commission members to remember that the Court Appointed Expert Witness element includes portions of the expenditures reported in the at least three separate elements of the Cost Inventory: Expert Witnesses Ordered by the court; Psychological Evaluations Ordered by the Court; and Witnesses Ordered by the Court. Each of these elements had a parallel data element for state attorneys, public defenders, and conflict counsel. In addition to all of these, there are two more elements – Witness Coordination and Management and Custody Evaluations/Home Studies ¹¹ – that conceivably captured expenditures that fall within the parameters of the newly redefined element. Thus, in FY 1999-2000, nearly \$37 million was spent by the courts, the state attorneys, the public defenders and conflict counsel on services that are now within the ambit of the proposed court appointed expert witness element. ¹² As the courts and other justice system stakeholders develop their respective legislative budget requests for FY 2004-2005, this total should be viewed as a starting point for estimates of the total funding that will be needed, leaving aside the question of how the total might be carved up among the various budgets.

Articulation of New Components. The Workgroup recommended the following framework be used in the construction of a budget for the Court Appointed Expert Witness element.

Recommendation 5(a):

Table A ~ Recommended Budget Framework For Court Appointed Expert Witnesses

Competency Evaluations	Criminal Cases
	Civil Cases
Other Psychological or Medical Evaluations	Criminal Cases
	Civil Cases
Other Expert Witnesses	Criminal Cases
	Civil Cases
Other Witnesses or Expenses	Criminal Cases
	Civil Cases

¹¹ These are the expenditures reported for Item 19b of the Cost Inventory. Item 19 includes these and other expenditures under the broad heading of Family Court Services.

¹² See Appendix D for the expenditure detail for each justice system stakeholder.

One immediate advantage of this construction is that it very clearly isolates the expenditures relating to competency in criminal cases, which are estimated to represent 75% of the total expenditures for the element. These expenditures have become so ingrained in our law and practice that they are noncontroversial and not at risk of being deemed nonessential. Some of the other components incorporate expenditures that are also relatively free of controversy. Segmenting the new element into components that can easily be explained and defended is one of the major goals of the Workgroup, and the principal rationale for the following recommendation. If data collection efforts were begun immediately, that information might enable the TCBC to develop a budget based on actual utilization rather than estimates based on the confused cost data that has already been described.

Recommendation 5(b):

The Commission should immediately request that the OSCA implement a procedure for the collection of data from each circuit regarding the utilization and payment of court appointed expert witnesses. The test period should be for six months commencing January 1, 2003 or as soon thereafter as possible. The results of this data collection effort should be reported to the Commission on Trial Court Performance and Accountability and the Funding Methodology Committee of the Trial Court Budget .

Data Collection Requirements. The Commission also believes that it is important to understand how expenditures divide between criminal, civil, and other major categories of cases for each of the components of the element. Although this level of detail may not be necessary to construct a budget request, or to allocate funds to circuits, the recommended framework for the collection of data will be necessary to support the development of systems for reporting and analyzing the use and management of resources, and the measurement of performance. Accordingly, the utilization data for court appointed expert witnesses that is to be reported to OSCA should include, at a minimum for each case: the type of case; the statute or rule under which the appointment is made; the type of expert used; and the amount paid

Recommendation 5(c):_____

The data collected for each county and circuit should include as many as possible of the data elements specified in the chart on the following page.

Circuit Level Flexibility. The workgroup found that the staff model for providing court appointed expert witnesses is more costly than contracted models. This finding requires further investigation by the best business practices review group, aided by more accurate data that will be collected under the earlier recommendation. The workgroup also noted potential ethical issues with an employee model that deserve thoughtful consideration. The Commission believes that these questions should form a central part of the best business practices review that has been recommended. Neither the workgroup nor the Commission possess sufficient information to determine whether one model of service delivery is preferable to another, but both believe that the choice of model should not influence a particular circuit's allocation of funding. Likewise, the accountability measures that

will be established for the use of expert witness resources should be the same regardless of delivery method chosen.

Table B ~ Proposed Data Collection Elements for Court Appointed Expert Witnesses

EXPERT WITNESS COMPONENT	DIVISION	COURT	CASE TYPE
COMPETENCY	CRIMINAL	COUNTY	
		CIRCUIT	
	CIVIL	CIRCUIT	
	JUVENILE		DELINQUENCY
OTHER PSYCHOLOGICAL OR MEDICAL	CRIMINAL	COUNTY	
		CIRCUIT	
	CIVIL	COUNTY	
		CIRCUIT	FAMILY
			DOMESTIC VIOLENCE
			BAKER ACT
			MARCHMAN ACT
		OTHER-SPECIFY	
	JUVENILE		DEPENDENCY
			DELINQUENCY
			CINS/FINS
OTHER EXPERT WITNESSES	CRIMINAL	COUNTY	
		CIRCUIT	
	CIVIL	COUNTY	
		CIRCUIT	FAMILY
			DOMESTIC VIOLENCE
			BAKER ACT
			MARCHMAN ACT
		OTHER-SPECIFY	
	JUVENILE		DEPENDENCY
			DELINQUENCY
			CINS/FINS
OTHER WITNESS EXPENSES	CRIMINAL	COUNTY	
		CIRCUIT	
	CIVIL	COUNTY	
		CIRCUIT	
	JUVENILE		DEPENDENCY
			DELINQUENCY
			CINS/FINS

V. CONCLUSION

This report represents only the first step in what will become a continual process to improve the performance and accountability of trial courts with respect to the use of court appointed expert witnesses. It proposes a new way of thinking about these essential resources that will overcome the confused data from the Article V Cost Inventory, and makes a number of recommendations that, when implemented properly, will provide assurance to the Legislature and the public that the trial courts are using the resources in a prudent and efficient manner.

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Appendix F	Framework for Workgroup Deliberations
Appendix G	Components of the Redefined Court Appointed Expert Witness Element

APPENDIX A

Statutes and Court Rules

Statutes providing for evaluation, assessment or testing by experts, or payment:

- ▶ §39.407(3)(b), F.S. (Dependent children)
- ▶ §57.081, F.S. (Indigents)
- ▶ §61.20, F.S. (Child Custody)
- ▶ §92.231, F.S. (Expert Witnesses)
- ▶ §393.11, F.S. (Developmental Disability)
- ▶ §§394.463 and 394.473 F.S. (Involuntary Mental Health Examination - Baker Act)
- ▶ §397.6818, F.S. (Involuntary Substance Abuse Assessment and Stabilization)
- ▶ §367.697, F.S. (Involuntary Substance Abuse Treatment)
- ▶ §406.09, F.S. (Medical Examiners; fees)
- ▶ §744.331(3) & (7), F.S. (Guardianship)
- ▶ §916.115, F.S. (Forensic Services for Mentally Ill)
- ▶ §916.301, F.S. (Forensic Services for Retarded and Autistic)
- ▶ §921.09, F.S. (Insanity as cause for not pronouncing sentence)
- ▶ §921.12, F.S. (Pregnancy as bar to sentencing)
- ▶ §921.137(4), F.S. (Mental retardation as bar to imposition of death penalty)
- ▶ §939.07, F.S. (Indigent Defendant)
- ▶ §939.15, F.S. (When cost paid by county)
- ▶ §984.19, F.S. (Med., Psychiatric, or Psych. Examination of Child, Parent or Guardian in Children & Families In Need Of Services Cases)
- ▶ §985.224, F.S. (Med., Psychiatric, or Psych. Examination of Child Alleged to be Delinquent)
- ▶ §985.229, F.S. (Assessments for Predisposition Reports in Delinquency Cases)
- ▶ §985.231(3), F.S. (Additional assessments for Juvenile Sexual Offenders)

Rules of court providing for evaluation, assessment or testing by experts:

- ▶ Fla. R. Civ. Proc. 1.360 (Examinations of Persons)
- ▶ Fla. R. Crim. Proc. 3.210 (Incompetence to Proceed)
- ▶ Fla. R. Crim. Proc. 3.216 (Insanity At Time of Offense; Appointment of Experts)
- ▶ Fla. R. Juv. Proc. 8.250 (Examination, Evaluation and Treatment - Dependency)
- ▶ Fla. R. Juv. Proc. 8.675 (Examination, Evaluation and Treatment - F/CINS)
- ▶ Fla. Fam. Law R. Proc. 12.360 (Examination of Persons)
- ▶ Fla. Fam. Law R. Proc. 12.363 (Examination of Minor Child)

APPENDIX B

Court Appointed Expert Witnesses Legal Analysis

The United States Supreme Court made a clear statement in Ake v. Oklahoma, 105 S.Ct. 1087, (1985), that an indigent criminal defendant is entitled to an expert witness at public expense when he has demonstrated that a significant element of the defense is premised on expert testimony.

This Court has long recognized that when a state brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense. This elementary principle, grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake.

105 S.Ct. 1087, at 1092.

As the Supreme Court was presented with civil cases in which a litigant's right to full court access was more substantial than the public's monetary interest, the Court began to apply due process protections in the civil arena. In Boddie v. Connecticut, 91 S.Ct. 780, (1971), the Court found that the state could not refuse access to court to an indigent couple who did not have the fee required to file for divorce. The courts are the sole mechanism for obtaining a dissolution of marriage and denial of access to that forum on the basis of ability to pay, denies due process. The countervailing interest in protecting public resources must yield to the individuals fundamental interest in a divorce proceeding. Dissolution of marriage, termination of parental rights and paternity hearings clearly involve "fundamental interests" important enough to trigger access to courts rights for indigents. See: Little v. Streater, 452 U.S. 1, (1981) (putative father in a paternity hearing entitled to blood tests at public expense); M.L.B. v. S.L.J., 519 U.S. 102, (1996), (parent in termination of parental rights proceeding entitled to transcripts at public expense.)

Clearly, due process protections would require an expert witness at public expense if an indigent whose "fundamental interests" are being litigated can demonstrate that the expert witness is a critical part of the issue in question. Florida law has acknowledged that certain proceedings have such a substantial impact on the interests of the individual that the judge is either required to appoint an expert, or given the discretion to appoint one. (See attached statutory provisions.)

From another perspective, the judge through the inherent power of the court to do that which is necessary to fully exercise its jurisdiction, has the authority to call for an expert witness when one is necessary, even if there is no statute authorizing that appointment. (See generally: Ex parte United States, 101 F.2d 870, (7th Cir. 1939), affirmed 308 U.S. 519 (1939). As an example, if the legislature enacted a law that states that pregnant females convicted of a crime shall not be subject to imprisonment in the same way that other females are treated, a judge has the inherent authority to appoint a physician to examine the defendant to make a determination of pregnancy, even without statutory authorization, if that issue is raised.

APPENDIX C

Responsibility for Payment of Costs Associated with Expert Witnesses

§57.081, F.S. (Indigents) – The services of the courts, sheriffs, and clerks are available without charge to an indigent party or intervenor in any case. Sheriff is entitled to reimbursement from board of county commissioners. The waiver of charges includes “...any other cost or service arising out of pending litigation” which arguably includes either a court appointed attorney or expert witnesses, but the statute is silent about who pays.

§61.20, F.S. (Child Custody) – Where the custody of a minor child is in issue the court may order a social investigation and study be conducted by a licensed psychologist or certain other qualified counselors, social workers, or court staff. Fees to be taxed and paid as costs, except for indigents. In the case of indigents, either court staff or Department of Children and Family Services (DCF) staff perform the study without charge.

§39.407(3)(b), F.S. (Dependent children) – The court may order a dependent child to be evaluated by a psychiatrist or a psychologist or, if a developmental disability is suspected or alleged, by the developmental disability diagnostic and evaluation team of the DCF. Parents are responsible for the cost of medical treatment for their child if they are able to pay.

§92.231 (Expert Witnesses) – An expert witness who testifies shall be entitled to a fee in an amount deemed appropriate by the judge, which shall be taxed as costs.

§393.11, F.S. (Developmental Disabilities) – The court may appoint an examining committee to examine a person being considered for involuntary admission to residential services because of mental retardation; members of the examining team are entitled to reasonable fees to be determined by the court and paid by the county in which the person resides.

§§394.463 and 394.473, F.S. (Involuntary Mental Health Examination - Baker Act) – The court may appoint a team of three persons, including a psychiatrist or other physician, a psychologist, gerontologist, a registered nurse, nurse practitioner, or a licensed social worker to complete a physical and mental health examination and functional assessment of a person alleged to be incapacitated. Fees for indigent persons who receive services of an expert are to be paid by the county from which the person was involuntarily detained.

§§ 397.681, 397.6811 and 367.697, F.S.(Involuntary Substance Abuse Assessment and Stabilization; Treatment) – The court may order the involuntary assessment and stabilization of a person meets the criteria for substance abuse impairment, and may also order the involuntary commitment of such a person for treatment. An indigent person is entitled to appointed counsel and the benefits of s. 57.081, F.S., which means, presumably, the county in which the person was detained.

§406.09 (Medical Examiners) – District and associate medical examiners entitled to expert witness fees as provided by law.

§§916.115 and 916.301, F.S. (Forensic Services for Mentally Ill, and for Retarded and Autistic) – The court may appoint one or more qualified experts to evaluate a criminal defendant suspected of

APPENDIX C, continued

being retarded, autistic or mentally ill. Expert witness fees to be paid by the county in which the indictment or information is filed.

§921.09, F.S. (Fees for experts; insanity as cause for not pronouncing sentence) – The court shall allow reasonable fees to physicians appointed to determine the mental condition of a defendant at time of sentencing; to be paid by county)

§921.12, F.S. (Pregnancy as bar to sentencing) – Fees for expert to examine defendant when pregnancy alleged as a bar to imposition of sentence; to be paid by county.

§921.137(4), F.S. (Retardation as bar to death penalty) – Where claim is properly raised, court shall appoint two experts but the statute is silent about who pays.

§939.07, F.S. (Indigent Defendant) – County to pay legal expenses and costs of prosecution and specified cost incurred on behalf of an indigent or discharged defendant.

§939.15, F.S. (When cost paid by county) Costs allowed by law shall be paid by the county in which the crime was committed in cases of insolvent defendant, or where the defendant has been discharged or the judgement reversed.

§984.19, F.S. (Med., Psychiatric, or Psych. Examination of Child, Parent or Guardian in Children & Families In Need Of Services Cases) – A judge may order that a child in need of services be examined by a qualified expert, by a school board educational needs assessment team, or by the developmental disability diagnostic and evaluation team of the (DCF). Parents are financially responsible for cost of treatment, if able to pay.

§§985.224 and 985.231, F.S. (Med., Psychiatric, or Psych. Examination of Child Alleged to be Delinquent) – A judge may order that a child alleged to be delinquent be examined by a licensed health care professional, psychiatrist or psychologist, by a district school board educational needs assessment team, or by the developmental disability diagnostic and evaluation team of the DCF. Parents are financially responsible for reimbursing DJJ for cost of treatment, if able to pay.

§985.229, F.S. (Assessments for Predisposition Reports in Delinquency Cases) – A comprehensive evaluation for physical health, mental health, substance abuse, academic, educational, or vocational problems shall be ordered for any delinquent child for whom a residential commitment disposition is anticipated or recommended by an officer of the court or by the Department of Juvenile Justice (DJJ). Parents are financially responsible for reimbursing DJJ for cost of treatment, if able to pay.

§985.231(3), F.S. (Additional assessments for Juvenile Sexual Offenders) – Subject to appropriations, the court may order DJJ to complete an additional multi disciplinary assessment to determine whether a delinquent requires a juvenile sex offender treatment or placement. Parents are financially responsible for reimbursing DJJ for cost of treatment, if able to pay.

APPENDIX D

Article V Cost Inventory Data

ITEM NO.	INVENTORY ITEM DESCRIPTION	PART I TOTAL	PART II TOTAL	GRAND TOTAL
17	Expert Witnesses Ordered by the Court	\$1,020,630	\$390,668	\$1,385,193
15	Expert Witnesses Ordered by the State Attorney	\$710,881	\$1,068,758	\$1,762,315
16	Expert Witnesses Ordered by the Public Defender	\$605,539	\$1,021,435	\$1,609,650
18	Expert Witnesses Ordered by Conflict Counsel	\$469,535	\$102,000	\$571,535
34	Psychological Evaluations Ordered by the Court	\$5,971,662	\$391,142	\$5,777,541
32	Psychological Evaluations Ordered by the State Attorney	\$155,897	\$167,297	\$323,194
33	Psychological Evaluations Ordered by the Public Defender	\$1,362,293	\$1,527,806	\$2,890,099
35	Psychological Evaluations Ordered by Conflict Counsel	\$251,184	\$358,581	\$609,765
43	Witnesses Ordered by the Court	\$378,057	\$246,578	\$624,636
41	Witnesses Ordered by the State Attorney	\$515,449	\$1,100,057	\$1,615,506
42	Witnesses Ordered by the Public Defender	\$140,577	\$147,944	\$288,251
44	Witnesses Ordered by Conflict Counsel	\$386,603	\$4,462	\$391,065
40	Witness Coordination and Management	\$3,240,199	\$4,268,750	\$7,508,948
19b	Custody Evaluations/ Parenting Evaluations/ Home Studies	\$2,228,991	\$278,287	\$2,507,278
	GRAND TOTALS	\$24,807,845	\$12,102,154	\$36,909,998

APPENDIX E

Workgroup Proceedings

The Workgroup held one-day meetings on September 5, and November 7, 2002. At its initial meeting the members of the Workgroup reviewed its charge from the Commission on Trial Court Performance and Accountability, and discussed a preliminary overview of the statutory, operational and fiscal aspects of the expert witness element that was prepared in preparation for the implementation of Revision 7. The need for a clearer definitions, practices and procedures with respect to expert witnesses quickly became obvious. Before beginning its substantive work, the group next engaged in a conversation designed to elicit a succinct Purpose or Mission Statement for Court Appointed Expert Witnesses. Members of the Workgroup reviewed a number of analyses of expenditures for court appointed expert witnesses, court appointed psychological evaluations, and other witnesses ordered by the court. Finally, the group discussed criteria for appointment of expert witnesses at public expense, and related operational policies and practices.

At the November 7, 2002 meeting of the Workgroup the members reviewed and revised draft report and made suggestions to staff for additional changes. The workgroup also developed recommendations that were to accompany its report to the Commission on Trial Court Performance and Accountability. Specific directions were given to staff for additional legal analysis, and for revisions to the appendices. Members agreed that the draft report could be presented to the full Commission on Trial Court Performance and Accountability at its November 20, 2002 meeting even though a revised draft would probably not be ready by that date. It was further agreed that staff could circulate a proposed final draft of the report to chief judges and trial court administrators at the same time that it was circulated to the workgroup for final comments and instructions.

Workgroup Membership

- ▶ Judge Jack Cook, Fifteenth Judicial Circuit, Facilitator
- ▶ Judge Robert K. Mathis, Seventh Judicial Circuit
- ▶ Judge Elzie S. Sanders, Eighth Judicial Circuit
- ▶ Judge Tonya B. Rainwater, Eighteenth Judicial Circuit
- ▶ Judge Antoinette Plogstedt, Orange County, Ninth Judicial Circuit
- ▶ Michelle Bourrie, Deputy Court Administrator, Sixth Judicial Circuit
- ▶ Frank Rabbito, Director of Projects/Court Programs, Eleventh Judicial Circuit
- ▶ Richard Melendi, Senior Court Operations Consultant, Thirteenth Judicial Circuit

Workgroup Staff from the Office of State Courts Administrator

- ▶ Peggy Horvath, Chief of Strategic Planning
- ▶ Skip White, Senior Court Operations Consultant
- ▶ Steve Henley, Court Operations Consultant
- ▶ Greg Smith, Senior Staff Attorney
- ▶ Greg Youchock, Chief of Court Services

Framework for Workgroup Deliberations

At a joint meeting of the Trial Court Budget Commission and the Commission on Trial Court Performance and Accountability in June 2002, an extensive list of court-related functions and activities were reviewed and decisions were made concerning:

- (1) whether responsibility for funding should be at the state or local level, and
- (2) if state funding was recommended, the state entity that should have budgetary responsibility for the activity of service.

The activities and functions considered at this joint meeting included many that fell within the scope of the Workgroup's deliberations, including those listed below.

- Functions or Activities That Should Be Funded Within State Court Budget
 - Competency for Trial or Sentencing
 - Evaluations of Autism or Mental Retardation in Capital Cases
 - Other Court Appointed Expert Witnesses

- Functions or Activities That Should Be Funded Within Another State Entity Budget
 - Psychological Evaluations
 - Medical Evaluations
 - Alcohol and Substance Abuse Evaluations
 - Juvenile Sex Offender Assessments
 - Home Studies

- Functions or Activities That Should Be Funded Through A Local Requirement
 - Pre-trial Release Assessment

- Functions or Activities That Should Be Funded As A Local Option
 - Pretrial Release
 - Foster Care Citizens Review
 - Home Studies
 - Guardianship Evaluations
 - Chile Custody Evaluations
 - Forensic Interviews of Abused Children
 - Mental Health Evaluations

These decisions are tentative, and are subject to adjustment or revision by either Commission after the work of defining the essential elements for the trial courts is completed.

APPENDIX G

Components of the Redefined Court Appointed Expert Witness Element¹³

Competency Evaluations

Criminal Cases	s. 916.115	Criminal Defendant – Competency to proceed; insanity
	s. 916.301	Criminal defendant – Mental retardation or autism
	s. 921.09	Criminal defendant – Insanity as bar to imposition of sentence
Civil Cases	s. 394.463	Involuntary examination of mentally ill person
	s. 744.331	Mental incapacity
Juvenile Cases	s. 985.229	Juvenile delinquent – competency to proceed

Other Psychological or Medical Evaluations

Criminal Cases	s. 921.12	Criminal defendant – Pregnancy a bar to imposition of sentence
Civil Cases	s. 397.6818	Substance abuse impairment assessment

Other Expert Witnesses

Criminal Cases	s. 939.07	Legal fees and expenses for indigent defendant
	s. 939.15	Costs and expenses of insolvent defendant
Civil Cases	s. 57.081	Waiver of fees and costs for indigent parties

Other Witness Expenses

Criminal Cases	s. 939.07	Legal fees and expenses for indigent defendant
	s. 939.15	Costs and expenses of insolvent defendant
Civil Cases	s. 57.081	Waiver of fees and costs for indigent parties

¹³ This list is not exhaustive, but is intended to illustrate how various witness related costs would be allocated in the new framework that is proposed.