SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

BILL: SB 1910

SPONSOR: Senator Campbell

SUBJECT: Public Defender Conflict of Interests

DATE: March 17, 1999 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Gomez	Cannon	CJ	Favorable
2.			JU	
3.			FP	
4.				
5.				

I. Summary:

This bill amends s. 27.53(3), F.S., by providing that the trial court shall review and may inquire into the adequacy of a public defender's representations regarding a conflict of interest but shall not require the disclosure of any confidential information. The bill also requires that the circuit conflict committees assess the conflict representation system in their circuit and report its findings and any recommendations to the Legislature by February 1, 2000.

This bill encompasses some of the recommendations contained in a 1998 interim report by the Senate Criminal Justice Committee and in a separate report by the Commission on Legislative Reform of Judicial Administration.

This bill substantially amends the following section of the Florida Statutes: 27.53(3).

II. Present Situation:

In Florida's state courts, indigent criminal defendants are represented by a public defender system headed by 20 elected constitutional officers. The public defenders and their assistants represent all indigents charged in the 20 judicial circuits with felony, misdemeanor, or juvenile offenses.

As a general rule, when a public defender is unable to represent a defendant because of a conflict of interest, he or she moves to withdraw and the trial court appoints a special assistant public defender (SPD) from the private defense bar. s. 27.53(3), F.S. (1997).

Sources used to determine conflicts. Conflicts typically occur when the public defender is appointed to represent co-defendants whose defenses are adverse or hostile. Another type of conflict occurs when the public defender formerly represented a state witness or victim who will testify against the public defender's present client.

The *Rules of Professional Conduct* are found in chapter 4 of the Supreme Court's *Rules Regulating the Florida Bar*. These rules, Florida Bar ethics opinions, and court decisions are the sources used to determine conflicts and attorney ethics. The rules and comments describe what constitutes a conflict among present clients and with former clients. R.Regulating Fla.Bar 4-1.9. The rules also describe what circumstances require an attorney conflict to be imputed to other members of that attorney's firm. R.Regulating Fla.Bar 4-10. This rule, known as imputed disqualification, is the reason a public defender's office withdraws from a conflict of interest. *See Babb v. Edwards*, 412 So. 2d 859 (Fla. 1982). In 1997, responding to substantial statewide interest in the Public Defenders' policies, the Florida Public Defender Association adopted conflict case guidelines designed to assist attorneys in determining whether a conflict of interest exists. *FPDA Conflict Guidelines*, (1997).

The Guzman rule. The public defender determines what constitutes a conflict based on his or her reading of the ethical rules, decisions, and FPDA Guidelines. On trial level conflicts, the court has no discretion to review the public defender's decision and must grant any motion to withdraw and appoint private counsel. The Florida Supreme Court made it clear in *Guzman v. State*, 644 So. 2d. 966 (Fla. 1994), that the trial court "is not permitted to reweigh the facts considered by the public defender in determining that a conflict exists." The Court stated that when a public defender certifies a conflict, the trial court must permit withdrawal. *Guzman* at 644 So. 2d 999, *citing, Babb v. Edwards*, 412 So. 2d 859 (Fla. 1982).

Section 27.53(3), F.S., provides that when a public defender determines there is a conflict he or she shall "move the court to appoint other counsel." The statute then provides that "the court *may*" appoint outside counsel. Despite what appears to be statutory language giving the trial court discretion to review the public defender's motion, the *Guzman* rule prohibits review. (An older version of s. 27.53(3), F.S., seems more supportive of the *Guzman* rule since it required the public defender to "certify" a conflict to the court, rather than moving the court, and it stated that the court "shall" appoint outside counsel. Ch. 81-273, s. 2 at 1293, L.O.F.)

Recently, the Fourth District Court of Appeal held that the *Guzman* rule is limited to a conflict of interest between two clients and approved a trial court's decision to deny the public defender's motion to withdraw in a case where the alleged conflict was a hostile relationship with a particular assistant public defender. *Pena v. State*, 706 So. 2d 1378 (Fla. 4th DCA 1998). However, this decision will not significantly broaden the trial court's role since the vast majority of "ethical conflicts" involve conflicts between two clients or with former clients.

For example, in *Reardon v. State*, 715 So. 2d 348 (Fla. 1998), the public defender withdrew from the representation of a trial defendant because the victim was formerly represented by an unidentified assistant public defender at an arraignment hearing, "for just a couple of minutes." The trial court was concerned that allowing withdrawal "based on the type of limited representation that occurred" would place a heavy burden on county taxpayers. The trial court also indicated that eventually, "the public defender's office would not be able to represent anyone in Palm Beach County, since arraignments in traffic offenses for which the public defender represents defendants run into the thousands."

The *Reardon* court, found the trial court's concerns "understandable" but stated it had "no choice but to grant the petition and quash the trial court's order (denying withdrawal), as it is clear under

Guzman that the trial court has no discretion in this matter." The *Reardon* court concluded: "Any change in the manner in which a public defender's certification is treated by the trial court and reviewed will have to come from the Legislature."

A trial court inquiry is not prohibited by the federal constitution. The United States Supreme Court has held that trial judges are not precluded from "exploring the adequacy of the basis of the defense counsel's representations regarding a conflict of interest without improperly requiring disclosure of the confidential communication of the client." *Holloway v. Arkansas*, 435 U.S. 475, 487 (1978).

Interim reports address Guzman rule. During the 1998 Interim, the Senate Criminal Justice Committee and the Commission on Legislative Reform of Judicial Administration studied the public defender conflict system and made recommendations to the Legislature. FLA. S. COMM. ON CRIM. J., REVIEW OF THE PUBLIC DEFENDER SYSTEM AND APPELLATE OVERLOAD, Rep. No. 98-16 (Nov. 1998)(on file with comm.); FLA. COMM. ON LEG. REF. OF JUD. ADMIN., REPORT OF THE COMMISSION ON LEGISLATIVE REFORM OF JUDICIAL ADMINISTRATION, (Dec. 7, 1998)(on file with comm.). Among the issues that both the Committee and Commission studied was the *Guzman* rule.

An assistant county attorney participating at a Senate Criminal Justice Committee staff workshop argued that providing trial courts with the discretion to review and deny motions to withdraw would reduce the number of conflict cases. Citing to *Reardon*, this assistant county attorney stated that in Palm Beach County the public defender withdrew from a number of cases that in reality did not present an ethical conflict. The county attorney's perspective was countered by a public defender who took exception to the suggestion that public defenders would withdraw from a case where there was not an ethical reason to do so. Also, at the workshop, a district court judge expressed concern that allowing trial court's discretion would open up an avenue for appeal. *See* S. Crim. Just., Staff Workshop Tape

The Commission on Legislative Reform of Judicial Administration solicited opinions on the *Guzman* rule from criminal court circuit judges. The responses showed there does exist judicial support for amending the statute to provide trial court discretion. Nonetheless, there were some judges who were adamantly opposed to changing the *Guzman* rule.

Conflict committees. Section 925.037, F.S., creates a conflict committee in each circuit made up of the following representatives:

- the chief judge, or his or her designee,
- one representative from the board of county commissioners, and
- the public defender.

The conflict committee is responsible for selecting and approving attorneys who are eligible for appointment to a public defender conflict case.

Article V costs and Revision 7. The conflict counsel appointment system, also known as the special public defender (SPD) system, is funded by counties as part of its "Article V costs." The state funds public defender salaries. However, counties pay for conflict counsel fees and costs. In

fiscal year 1995-96, counties reported to the Justice Administrative Commission an aggregate SPD cost of just over $26 million. In recent years, the state has begun to provide counties a modest reimbursement for these costs pursuant to s. 925.037, F.S.

In November 1998, Floridians approved Revision 7, a constitutional amendment initiated by the Constitution Revision Commission to shift most of the state court system costs from counties to the state. Revision 7 provides that the state is to assume the full costs of the SPD system.

Statewide conflict statistics. In fiscal year 1997-98, the 20 public defenders reported having 82,980 conflict cases. "Ethical conflicts" most typically occur when the public defender is appointed to represent co-defendants whose defenses are adverse or hostile. "Overload conflicts" occur when a public defender moves to withdraw because his or her office is experiencing an excessive trial or appellate workload. Statewide, public defenders reported 33,630 "ethical" conflict cases, constituting 40 percent of total conflicts. "Overload" trial conflicts existed in only 6 judicial circuits in fiscal year 1997-98, yet constituted close to 60 percent (49,350 cases) of total conflicts. The vast majority of "overload" conflicts (40,686 cases) were attributable to the Eleventh Judicial Circuit (Miami-Dade County). Miami-Dade County, has provided the Eleventh Circuit Public Defender with 82 county-paid-for FTEs at a cost of $3,185,257 for fiscal year 1997-98.

Alachua County model. In 1990, the Eighth Judicial Circuit established a Court Cost Containment Office in Alachua County with the goal of reducing the costs of the SPD system to its counties. The program is run by the Eighth Circuit's Court Administrator with 3 county-paid employees and a budget of $133,000. The Court Administrator and the Court Cost Containment Office's director made presentations at the staff workshop and to the Commission on Legislative Reform of Judicial Administration.

The philosophy of the program is cost containment through conflict attorney management. The Court Cost Containment Office works with two types of conflict attorney systems:

- hourly rate: the office maintains a list of qualified attorneys who agree to take assignments pursuant to the hourly rate and terms established by the court.
- contract: counties solicit bids from local attorneys to provide legal services for specified number and types of cases.

Rather than simply assigning conflict cases to available attorneys the Court Cost Containment Office assesses each case to determine whether it would be more cost-effective for an hourly rate or a contract attorney to handle the case. For example, a case determined to settle quickly is assigned to an hourly rate attorney, but a more complex trial case is assigned to a contract attorney. In this way, the office attempts to intelligently match a case with the attorney payment systems. To ensure effectiveness, the office is able to match the case to the attorney with the appropriate experience or skill level.

Attorney assignments are only a part of the program. The office also maintains a database for all conflict attorney cases which allows for tracking and reporting on the performance of the program. The office tracks the assessments of fees, fines and costs ensuring that attorney fees and

costs are reviewed for errors and inappropriate charges. Attorneys are required to use the court reporting program, witness management program and approved forms

The office estimates that their average cost per case in 1998 was $341, excluding capital and appellate cases and $413, including capital and appellate cases. This compares to an estimated statewide average of $850 per case. The office estimates that based on the statewide average, the Eighth Judicial Circuit counties saved $1,585,000 in 1997.

Interim report recommends evaluation, pilot programs. The Senate Criminal Justice Committee's Interim Report, discussed above, analyzes the public defender conflict system and appellate overload and contains various recommendations, including that the Legislature provide funding or establish pilot programs in other circuits patterned after the Eighth Circuit's Court Cost Containment Office. Also, the report contains the following recommendation:

> The Legislature should task a circuit-based entity, like the circuit conflict committees, with assessing which conflict representation model would serve that circuit best. This assessment should consider which system would be most cost-effective, offer administrative control, and provide high quality representation. The circuit entities should also provide the Legislature with recommendations on how to improve the reliability of conflict case reporting data from its circuit.

III. Effect of Proposed Changes:

This bill amends s. 27.53(3), F.S., by providing that the trial court shall review and may inquire into the adequacy of a public defender's representations regarding a conflict of interest but shall not require the disclosure of any confidential information. The effect of the amendment is to legislatively overrule the so-called *Guzman* rule, which interprets s. 27.53(3), F.S., to preclude the trial court from reviewing public defender conflict motions.

The bill specifies that the court shall permit a public defender to withdraw from an alleged conflict, "unless the court determines that the public defender has failed to establish that a conflict of interest exists or the court is unable to make a determination because the conflict is based on confidential information."

The bill also requires that the circuit conflict committees assess the conflict representation system in their circuit and report its findings and any recommendations to the Legislature by February 1, 2000. In making this assessment, the committees are to determine whether an alternative conflict representation system would be more cost-effective, offer greater administrative control, and a higher quality representation for conflict cases in their circuit. The committee is directed to consider other conflict systems, including the attorney-management program established in the Eighth Judicial Circuit. This is designed to provide the Legislature with an evaluation of each circuit's conflict representation system as it considers implementation of Revision 7, the cost-shifting constitutional amendment.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

To the extent that this bill reduces the number of private defense attorney appointments on conflict cases, it will have a negative private sector impact.

C. Government Sector Impact:

It is uncertain whether requiring the trial court to review and inquire on public defender conflicts will result in a great reduction on the number of conflict cases, appointments, and associated costs. However, during the Senate Criminal Justice Committee study, one public defender noted that he was aware that the ethics rule concerning former clients was misinterpreted by some assistants in other circuits. Further, testimonial evidence from county attorneys suggested that at least in some circuits the conflict rules are being stretched farther than a court would allow. On the other hand, any cost-savings or gains in judicial efficiency may be offset if appeals from a trial court's conflict rulings were to increase dramatically.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.