



## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government -- This bill is designed to contain costs of providing indigent legal representation in the future.

#### B. EFFECT OF PROPOSED CHANGES:

##### **Background**

In the 1998 general election, the electorate amended the constitution to require a shift from county to state funding of certain parts of the court system by 2004. Included in that shift was a requirement that the state pay for court-appointed attorneys that were formerly paid by the counties. The primary reasons that a court may appoint a private attorney to represent an indigent person are to represent a defendant in a criminal proceeding when the Public Defender encounters a conflict of interest or to represent a parent of a child involved in certain dependency proceedings where the parent is at risk for termination of parental rights. There are a number of other instances in civil law where constitutional concepts of due process or the Florida statutes require appointment of an attorney to represent an indigent person.

In addition to appointment of an attorney for an indigent person, there are often court-related expenses for various services that must also be paid. Such services include court reporters, investigators, expert witnesses, and mental health evaluations.

Funding for court-appointed counsel was set at the annual amount that the Legislature estimated had been spent by counties prior to state assumption of responsibility. In setting the amount, the Legislature relied heavily on a survey conducted by the Chief Financial Officer of the state which sent detailed questionnaires to each of the 67 counties. The counties were required to respond and to provide a written attestation that the data were complete and accurate.

Effective July 2004, the Legislature created indigent services committees in each of the twenty judicial circuits. The committees were charged with the task of setting local reimbursement rates for attorneys and related service providers and for managing lists of attorneys qualified for appointment to represent indigent defendants and litigants when the state is responsible for paying for the service. In fulfilling this responsibility, the committees are charged with establishing payment rates "...such that the total amount expended does not exceed the amount budgeted in the General Appropriations Act for the particular due process service." See s. 27.42 (2)(a), F.S.

Expenditures for court appointed counsel services, however, has substantially exceeded the amount budgeted in the General Appropriations Act for two of the three years that the state has provided funding for these services. In FY 2005-06, the second year of implementation, the Legislature initially appropriated \$61 million, but expenditures were \$68 million. During the current fiscal year, total appropriations are \$70 million but actual expenditures are projected to be approximately \$90 million. If current trends continue, larger deficits are likely to occur in the future.

During February and March, 2007, the Safety and Security Council of the Florida House held two workshops to better understand this problem and identify potential solutions. Among the issues raised were the lack of a single point of accountability, the failure of the indigent services committees to set rates within budget constraints, widely disparate payment rates and rate structures, the lack of financial incentive to contain expenditures to budgeted amounts, and the lack of effective oversight of private attorneys and vendors who bill the state for services.

## Effect of Bill

This bill eliminates:

- Circuit Article V Indigent Services Committees
- Mandatory rotation lists
- Court appointment of attorneys for indigent persons
- Court supervision over expenses for related services

This bill replaces court appointment of attorneys for indigent persons with appointment by the Public Defender of the circuit. Each Public Defender will have the duty to make some arrangement for representation of criminal defendants where a conflict of interest arises, and likewise arrange for representation for civil attorneys for indigent persons entitled to representation under federal or state law. Each Public Defender will likewise have the duty to manage and pay for related service providers necessary to representation.

## Divisions

This bill requires each Public Defender to create at least four separate divisions:

- A criminal and delinquency program
- A dependency and termination of parental rights program
- A civil program representing the mentally ill
- A conflict program for cases in which the Public Defender determines that a conflict of interest exists

## How Services Provided

This bill gives the Public Defenders great flexibility in determining the means for providing due process services within these divisions. Public Defenders are given the flexibility to provide services by any means, so long as they stay within their budgetary authority. The Public Defender is not limited to one method; the Public Defender may select different means of providing services in different situations. The bill specifically identifies the following as options for providing representation:

- Use of state employees
- Cross-circuit conflict representation
- Assigned attorney registries
- Contractual agreements with individual attorneys, law firms, or groups of attorneys or law firms.

## Limits on Expenditures

This bill makes it clear that no Public Defender may obligate the state to pay for attorney's fees or other services in excess of the monies appropriated to such Public Defender for due process services. No court may appoint an attorney at state expense in any case. The Justice Administrative Commission may only make payment for appointed counsel and other due process services authorized by a State Attorney or Public Defender. This would include situations where a defendant or litigant may request payment for costs under the concept of "indigent for costs."<sup>1</sup> The state courts system is financially responsible for the portion of any payment ordered that is not authorized by a Public Defender or State Attorney, is in excess of payment rates established by the contract, or is in excess of limits provided for by law.

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<sup>1</sup> Under current law, a person may pay a private attorney for legal representation, but then claim to be indigent and unable to pay for due process services (such as expert witnesses, investigators, court reporters).

## Fee Limits

Should a Public Defender employ an attorney or law firm on a per case basis, this bill keeps the per-case limit provided for in current law and adds that such attorneys must submit invoices within 60 days of termination of the representation. The General Appropriations Act may amend the general limits per case provided for in this section.

A Public Defender may, in extraordinary circumstances, approve a fee in excess of the general limits per case provided for in this section. Extraordinary circumstances will not authorize the Public Defender to expend monies in excess of the total appropriation for indigent services provided in the General Appropriations Act. The Public Defenders of the state are required to jointly establish criteria for determining the criteria for extraordinary circumstances. No court shall have jurisdiction to determine extraordinary circumstances, nor may any court directly or indirectly order that a Public Defender find that extraordinary circumstances exist. The question of whether a case or cases present extraordinary circumstances is one of discretion within the limited budgetary authority of a Public Defender.

## Conflict of Interest

Current law requires the public defender to file a motion to withdraw as attorney for a criminal defendant when the public defender believes that a conflict of interest exists. The defendant remains a client of the Public Defender until the court sets a hearing and grants the motion. If the court approves withdrawal, the court appoints conflict counsel.

This bill provides that a Public Defender that believes a conflict of interest exists must file a notice of conflict. If the court does not enter an order within five days<sup>2</sup> finding that no conflict exists, the Public Defender may reassign the defendant to the conflict unit of the office.

Current law prohibits a Public Defender from withdrawing on the grounds of inadequacy of funding or excess workload. This bill eliminates this restriction.

## Effect of Ineffective Assistance by an Appointed Attorney

If any court finds that an appointed attorney has provided ineffective assistance, the appointed attorney is not entitled to further appointments, is not entitled to payment of costs and fees for the case, must repay all costs and fees already paid for the representation, must reimburse the Public Defender for the cost of replacement counsel at all subsequent hearings or trials, and may be subject to a malpractice action by the client pursuant to law.

## Effect of Cost Savings

A Public Defender that achieves cost savings in the provision of appointed counsel services may request that up to 50% of the amount of savings that would otherwise revert back to the state be used for priorities identified by the Public Defender. Such requests are subject to review and approval of the Legislative Budget Commission.

## Contingency Fund

This bill creates a contingency fund that may be funded by an appropriation in the General Appropriations Act. A Public Defender seeking payment from the contingency fund must ask a peer review committee of at least three circuit court judges to review and approve each expenditure from a contingency fund.

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<sup>2</sup> Under court rules, any period of time of less than seven days does not include intervening weekends and holidays. See Rule 3.040 of the Florida Rules of Criminal Procedure.

## Role of the Justice Administration Commission

The Justice Administrative Commission (JAC) is a part of the executive branch. It was created to administratively manage budgets and pay the lawful expenses of the State Attorneys and Public Defenders. The JAC is also responsible for processing payments owed to related service providers for State Attorneys and Public Defenders.<sup>3</sup> In 2004, the duties of the JAC were expanded to include the administrative duties related to contracting with court-appointed attorneys and related service providers in cooperation with the Indigent Services Committees. Fees and expenses ordered by a court are submitted to the JAC for payment. The JAC also may review motions to withdraw filed by a Public Defender when the Public Defender believes that there is a conflict of interest, and may object to the motion.

This bill eliminates the JAC role in contracting with private attorneys. This bill also eliminates JAC involvement in motions to withdraw filed by a Public Defender. Attorneys and providers of due process services will be paid only upon when authorized by the Public Defender responsible for contracting for such services.

## Capital Case Costs

Indigent criminal defendants not sentenced to death are entitled to legal representation at state expense at trial and on direct appeal. All criminal defendants can file for postconviction relief, but only those sentenced to death are entitled to legal representation at state expense when seeking postconviction relief. Such postconviction representation is provided for in Part IV of chapter 27, F.S., and administered through the Commission on Capital Cases. Some defendants are represented by state employees, others through an attorney appointed from a panel of attorneys who have agreed to take such cases. Similar to the budgetary problems that have plagued the current conflict counsel system for ordinary criminal cases, the private attorneys appointed in postconviction proceedings have sought payment for monies in excess of statutory maximums and consequently in excess of the funds provided for in the state budget. Such overpayments were sanctioned by the holding in *Olive v. Maas*, 811 So.2d 644 (Fla. 2002), which held that such private attorneys may seek compensation in excess of the statutory maximums. This bill amends Part IV of chapter 27, F.S., to:

- End the authority of the executive director of the Commission on Capital Cases to remove a registry attorney.
- Require a registry attorney to decline to take a case if the attorney will not agree to accept the statutory maximum fee.
- Provide a system for the payment of compensation to a registry attorney fees and costs for additional unforeseeable work in representing capital defendants. Unforeseeability is defined as: that the additional work was due to an unanticipated change in circumstances that occurred after the signing of the contract; that the change in circumstances was extraordinary and unusual; that the additional work was for the purpose of raising a meritorious claim that could not otherwise have been raised; and the additional work claimed is not because the lawyer failed to review the case before accepting the appointment.
- Provide that if excess fees are awarded by a court for unforeseeable work, the statutory rate applies.
- Provide that the Chief Financial Officer must represent the state in proceedings for excess fees.

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<sup>3</sup> Such due process costs include services such as investigators, court reporters, and expert witnesses.

## Transition Rules

Effective upon becoming law, this bill provides that no Indigent Services Committee may authorize, and the Justice Administration may not pay, any payment to an appointed attorney at a rate higher than the statutory maximum or the applicable local rate, whichever is lower; and that any court that orders payment to an appointed attorney in excess of those limits must pay such excess from the budget of the state courts system.

As to any contract for legal services pursuant to current law, which contract was in existence on or before August 1, 2007, the following shall apply: Attorneys appointed under such contracts shall complete the representation of clients assigned to them as of August 1, 2007, through completion of the case; however, no such appointment shall extend beyond June 30, 2008. As of July 1, 2008, representation of any person shall only be through a contract with the appropriate Public Defender. The Justice Administration Commission shall pay fees earned by attorneys under contracts for appointments that commenced prior to August 1, 2007, subject to a specific appropriation in the FY 2007-2008 General Appropriations Act for payment of such representation. All provisions of said part III as they exist on August 1, 2007, shall control such contracts, notwithstanding the amendment or repeal of any applicable provision by this bill.

If funds appropriated to the Justice Administrative Commission for payment of cases prior to August 1, 2007, are exhausted, any remaining required payments shall be made from funds appropriated to the Public Defender of the circuit in which the case was appointed except for the portion of payment in excess of payment rates established by the contract, in excess of limits provided for by law, or for goods or services not specifically authorized by law which shall be paid from funds appropriated to the state courts system. The state courts system and the Public Defender may reduce non-essential travel, other non-essential expenses and non-essential personnel costs in order to eliminate a deficit that would otherwise result from payments required by this section.

This bill also requires each Public Defender to file a transition plan by June 1, 2007, which plan is subject to approval by the Legislative Budget Commission.

### C. SECTION DIRECTORY:

Section 1 amends s. 27.40, F.S., regarding appointed counsel.

Section 2 repeals s. 27.42, F.S., eliminating the Circuit Article V indigent services committees.

Section 3 amends s. 27.51, F.S., regarding duties of the Public Defender.

Section 4 amends s. 27.512, F.S., regarding orders of no imprisonment.

Section 5 amends s. 27.52, F.S., regarding determination of indigent status.

Section 6 amends s. 27.525, F.S., regarding the Indigent Criminal Defense Trust Fund.

Section 7 amends s. 27.53, F.S., regarding appointment of assistants.

Section 8 amends s. 27.5303, F.S., regarding conflicts of interest of Public Defenders.

Section 9 amends s. 27.5304, F.S., regarding private appointed counsel.

Section 10 amends s. 27.561, F.S., regarding effect of non-payment of fees owed for indigent representation.

Section 11 amends s. 27.562, F.S., regarding disposition of funds collected for indigent services application fees.

Section 12 amends s. 27.58, F.S., regarding the administration of Public Defender services.

Section 13 amends s. 27.59, F.S., regarding access to prisoners.

Section 14 amends s. 27.7001, F.S., regarding legislative intent applicable to Part IV of ch. 27, F.S.

Section 15 amends s. 27.7002, F.S., regarding fee limits on collateral representation.

Section 16 creates s. 27.7003, F.S., regarding excess fees in collateral representation.

Section 17 amends s. 27.711, F.S., regarding terms and conditions of appointment of attorneys for collateral representation.

Section 18 amends s. 29.007, F.S., regarding funding for appointed counsel.

Section 19 amends s. 29.015, F.S., regarding contingency fund for due process services.

Section 20 amends s. 29.018, F.S., regarding cost sharing of due process services.

Section 21 amends s. 29.0185, F.S., regarding provision of state-funded due process services.

Section 22 amends s. 39.815, F.S., regarding appeals in dependency cases.

Section 23 amends s. 125.69, F.S., regarding appointed counsel in county ordinance cases.

Section 24 amends s. s. 215.20, F.S., regarding trust funds.

Section 25 amends s. 744.331, F.S., regarding procedure to determine incapacity in guardianship cases.

Section 26 repeals s. 914.11, F.S., regarding indigent for costs.

Section 27 amends s. 938.29, F.S., regarding liens for the value of due process services provided.

Section 28 creates a fiscal transitional plan regarding existing cases and for funding of prior deficits.

Section 29 requires the public defenders to individually create a transition plan.

Section 30 provides an effective date of August 1, 2007, except for the sections that are effective upon becoming law.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

#### **1. Revenues:**

None.

#### **2. Expenditures:**

See fiscal comments.

### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The direct impact on the private sector is unknown and dependent upon the management decisions of the different Public Defenders. It is anticipated that many of the current private providers of services will continue to be employed by the Public Defenders, although that is not required. This bill may have a negative fiscal impact on a small number of attorneys and law firms.

D. FISCAL COMMENTS:

This bill is designed to provide for future cost containment for court-appointed counsel and associated due process expenditures so that expenditures will not exceed the amounts appropriated in the General Appropriations Act.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

The Fourteenth Amendment's due process guarantee of fundamental fairness leads to "the belief that justice cannot be equal where, simply as a result of his poverty, a defendant [accused of a crime] is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake. . . . [M]ere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense." *Ake v. Oklahoma*, 470 U.S. 68, 76-77 (1985). In recognition of this right, courts have found that the state must provide an indigent defendant:

- A trial transcript if the transcript is necessary to a decision on the merits of the appeal. *Griffin v. Illinois*, 351 U.S. 12 (1956).
- A waiver of an appellate filing fee. *Burns v. Ohio*, 360 U.S. 252 (1959)
- Assistance of counsel at trial. *Gideon v. Wainwright*, 372 U.S. 335 (1963)
- Assistance of counsel on the first direct appeal. *Douglas v. California*, 372 U.S. 353 (1963)
- Effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984)
- Mental health evaluation where mental health or capacity is an issue. *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985)



The right to such assistance is not unlimited. "[W]hile the Court has not held that a State must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy, see *Ross v. Moffitt*, 417 U.S. 600 (1974), it has often reaffirmed that fundamental fairness entitles indigent defendants to 'an adequate opportunity to present their claims fairly within the adversary system,' *id.*, at 612. To implement this principle, we have focused on identifying the 'basic tools of an adequate defense or appeal,' *Britt v. North Carolina*, 404 U.S. 226, 227 (1971), and we have required that such tools be provided to those defendants who cannot afford to pay for them." *Ake* at 77.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

D. STATEMENT OF THE SPONSOR

The chair of the Safety & Security Council chose not to submit any further comments regarding the council substitute.

#### IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

On March 23, 2007, the Safety & Security Council adopted three technical amendments to this bill, which was then reported favorably by the council.

On March 30, 2007, the Policy & Budget Council adopted three amendments to the bill. The amendments:

- Removed the periodic reporting requirements that were to be imposed on the public defenders.
- Provided for court oversight over a public defender declaring a conflict of interest by requiring a 5 day notice of withdrawal and an opportunity during those 5 days for the court to review the grounds for withdrawal.
- Amended statutory provisions regarding appointed counsel in capital postconviction proceedings to limit such counsel to statutory fee schedules unless the attorney proves unexpected circumstances.
- Moved the transition date for public defenders to take over the system from July 1, 2007 to August 1, 2007.
- Amended s. 27.5304, F.S., effective upon this bill becoming law, to provide that no payment can be made to any appointed attorney that is in excess of the statutory fee schedule or the local fee schedule set by the Indigent Services Committee, whichever is lower.
- Required that each Public Defender publish a transition plan by June 1, 2007, and submit it to the Legislative Budget Commission for approval.

The bill was then reported favorably with a council substitute.