

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Appropriations

BILL: SPB 7098

INTRODUCER: For consideration by the Appropriations Committee

SUBJECT: Court-appointed Counsel

DATE: March 26, 2014

REVISED: _____

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. Harkness	Kynoch		Pre-Meeting

I. Summary:

SPB 7098 modifies compensation limits of fees paid to court-appointed attorneys for certain types of criminal cases, establishes a cross-circuit conflict representation pilot project, and repeals provisions which permit the courts to establish limited registries of court-appointed attorneys. The bill conforms the statutes, relating to court-appointed counsel, to the Senate Proposed General Appropriation, SPB 7090, for Fiscal Year 2014-2015.

The bill has no fiscal impact per se; it permits the Legislature to increase the maximum fees currently paid to court-appointed attorneys for certain types of cases.

The bill provides an effective date of July 1, 2014.

II. Present Situation:

Court Appointed Counsel

Pursuant to section 27.51, F.S., the Office of the Public Defender in each judicial circuit is primarily responsible for representing indigent defendants who have been charged or arrested for criminal offenses. If the Office of the Public Defender has a conflict of interest, then the judge appoints the Office of Criminal Conflict and Civil Regional Counsel to provide legal services.¹ If the Office of Criminal Conflict and Civil Regional Counsel has a conflict, then the judge appoints counsel from a registry of private attorneys willing to take these conflict cases.²

Private court-appointed attorneys are compensated according to a schedule of flat fees listed each year in the General Appropriations Act (GAA). Section 27.5304(1), F.S., requires that the GAA annually sets out the actual specific attorney fee. The specific attorney fees listed in the GAA annually may not exceed limits set out in section 27.5304(5), F.S.

In addition, the Legislature has created a statutory scheme requiring an evidentiary hearing to allow conflict counsel on "rare occasions" to move that the court allow the payment of attorney

¹ Section 27.511(5), F.S.

² Section 27.40(2)(a), F.S.

fees which exceed the flat fees in cases that have required “extraordinary and unusual effort”.³ If the court finds that counsel has proved by “competent and substantial evidence” that the case required extraordinary and unusual effort, the court must order compensation at a percentage above the flat fee rate.⁴ The percentage may not exceed 200 percent of the applicable flat fee rate unless the court finds that the 200 percent rate would be confiscatory. If the court finds such a rate to be confiscatory, the court may order compensation to be paid using an hourly rate not to exceed \$75 per hour for a noncapital case and \$100 per hour for a capital case.⁵

The costs of court-appointed counsel, including court-ordered payments over the flat fee, have exceeded appropriations in the last several years. In Fiscal Year 2012-2013, for example, the Legislature appropriated \$3 million to cover payments above the flat fees in the GAA; expenditures were over \$6 million. The Justice Administrative Commission reported that the entire Fiscal Year 2013-14 appropriation for payments above the flat fee were expended by February 2014. To resolve past deficits, the Legislature has transferred funds from other due process categories in the Justice Administrative Commission’s budget to pay conflict counsel fees.

Office of the State Courts Administrator (OSCA) Flat Fee Study

In response to escalating due process costs, the 2012 Legislature included proviso language in the 2012-2013 GAA directing the Office of the State Courts Administrator (OSCA) to conduct a study of the adequacy and reasonableness of the current flat fee limits and the statutory hourly rates listed in section 27.5304(12), F.S.⁶ With the exception of fees for capital cases, the OSCA noted that the flat fee rates have not been adjusted since 1981. As part of the study, the OSCA conducted a comparative analysis of the flat fees using four different methodologies: 1) using actual historical data of payments made at and over the flat fee by case type; 2) adjusting rates based on the Consumer Price Index (CPI); (3) adjusting rates based on the Bureau of Labor Statistics (BLS) growth rate in attorney earnings from 1981 to 2010; and, (4) comparing to rates charged by private attorneys for non-court appointed cases (obtained from an OSCA survey). Using the calculations derived from the four methodologies, the OSCA found that the current flat fee rates for capital/capital appeals, felony life, and Racketeer Influenced and Corrupt Organizations (RICO) cases were appreciably lower than the results derived from the four methods (see chart below).

³ Section 27.5304(12), F.S.

⁴ Section 27.5304(12)(d), F.S.

⁵ Id.

⁶ Chapter 2012-118, Laws of Fla., specific appropriation 828.

**Criminal Conflict Attorney Case Payments
Comparative Analysis of Rates Derived by Four Methodologies**

Case Description	Current Flat Fee	Statutory Cap	Method 1: Median Amt. Paid Over the Flat Fee	Method 2: Adjusted for CPI	Method 3: Adjusted based on BLS growth rate in attorneys' earnings	Method 4: Percent of attorneys indicating they charge a higher rate for non-court appointed representation than the flat fee
Capital – 1 st Degree Murder (Lead/Co-counsel)	\$15,000	\$15,000	\$34,890	\$16,734	\$16,560	90.8%
Capital – 1 st Degree – Death Penalty Waived (Lead Counsel)	\$2,500	\$3,000	\$12,990	\$7,634	\$9,654	84.1%
Felony Life	\$2,500	\$3,000	\$8,215	\$7,634	\$9,654	100.0%
Felony Life - RICO	\$2,500	\$3,000	\$17,423	\$7,634	\$9,654	84.1%
Capital Appeals	\$2,000	\$2,500	\$40,710	\$5,089	\$6,436	93.9%
Capital Sexual Battery	\$2,000	\$3,000	\$6,962	\$7,634	\$9,654	100.0%
Felony Punishable by Life – RICO	\$2,000	\$2,500	\$12,015	\$6,362	\$8,045	96.9%
Felony – 1 st Degree - RICO	\$1,500	\$2,500	\$10,950	\$6,362	\$8,045	98.8%

Source: Office of the State Court Administrator

The OSCA concluded that the current flat fee rates “call into question whether the current fees are adequate or reasonable. A meta-analysis of the four methodologies would indicate that rate adjustments [for these eight case types] are warranted.”⁷ As shown below, when the court awarded fees above the flat fee rates for capital, felony life, and RICO case types, the amounts were, on average, significantly higher than the flat fee rates. According to the OSCA, the courts award amounts higher than the established flat fees for these types of cases because they involve more complex legal and factual issues.

**Criminal Conflict Attorney Cases Paid Over the Flat Fee
Average and Median Amounts Paid Per Closed Case
Fiscal Year 2007-08 through September of Fiscal Year 2012-13**

Case Description	Flat Fee	Total Cases	Cases Paid Over the Flat Fee	% Paid Over the Flat Fee	Average Paid per Closed Case Over the Flat Fee	Median Paid per Closed Case Over the Flat Fee
Capital – 1 st Degree Murder (Lead/Co-counsel)	\$15,000	643	203	31.6%	\$43,947	\$34,890
Capital – 1 st Degree Murder – Death Penalty Waived (Lead Counsel)	\$2,500	38	29	76.3%	\$13,815	\$12,990
Felony Life	\$2,500	1,246	194	15.6%	\$12,196	\$8,215
Felony Life - RICO	\$2,500	12	9	75.0%	\$28,438	\$17,423
Capital Appeals	\$2,000	14	7	50.0%	\$47,385	\$40,710
Capital Sexual Battery	\$2,000	108	24	22.2%	\$8,312	\$6,962
Felony Punishable by Life – RICO	\$2,000	6	6	100.0%	\$11,252	\$12,015
Felony – 1 st Degree - RICO	\$1,500	83	80	96.4%	\$16,455	\$10,950

Source: Office of the State Court Administrator analysis of Justice Administrative Commission data

⁷ Office of the State Court Administrator, *A Study of the Compensation of Private Court-Appointed Conflict Counsel in Criminal Cases in Florida*, January 15, 2013.

Limited Registry

The 2012 Legislature passed SB 1960 which, in part, gave the chief judge in each circuit the authority to establish a limited registry of court-appointed attorneys to assign to conflict cases. The law requires attorneys who want to be on the limited registry to certify that they are willing to accept, as full payment, the prescribed flat fees in all cases except RICO and capital cases. This provision was designed to give the court more authority to control due process costs over the flat fee and curb increases in due process expenditures. Attorneys on the limited registry are assigned to cases first and attorneys on the court's general registry are appointed if no attorneys are available on the limited registry. The law aimed to award more cases to attorneys willing to accept the flat fees. While an individual conflict case arguably provides limited compensation, attorneys may earn reasonable compensation overall if given the opportunity to accept a greater volume of cases.

Since its passage into law, the provisions of SB 1960 related to the limited registry have been the subject of litigation.⁸ Litigants have challenged the constitutionality of the limited registry arguing that it interferes with adequate representation and the defendant's Sixth Amendment right to assistance of counsel. In other words, an attorney's right to fair compensation is linked to the defendant's right to effective representation. If an attorney is not fairly compensated for his/her time, energy, and talent, a defendant's Sixth Amendment rights are not protected. These cases note that a similar issue was raised in *Olive v. Maas*, 811 So.2d 644 (Fla. 2002) in which an attorney selected to represent a defendant in postconviction proceedings would not sign the contract agreeing to the capped fee schedule. In that case, the Florida Supreme Court relied upon *Makemson v. Martin County*, 491 Sp.2d 1109 (Fla. 1986) which found that while the statute was not unconstitutional on its face, the statute was "unconstitutional when applied in such a manner as to curtail the court's inherent power to ensure the adequate representation of the criminally accused."⁹ In *Olive*, the Court opined that a mandatory cap interferes with the right to counsel in that:

- (1) It creates an economic disincentive for appointed counsel to spend more than a minimum amount of time on the case; and (2) it discourages competent attorneys from agreeing to a court appointment, thereby diminishing the pool of experienced talent available to the trial court.¹⁰

In October 2013, a circuit judge in the 11th Judicial Circuit dismissed a challenge to the limited registry in that circuit pursuant to the parties' stipulation that "members of the limited registry may properly seek, and the courts may properly award, fees in excess of those flat fees" and the law does not "bar members of the limited registries from seeking additional compensation under

⁸ In Re: Administrative File 12-254(60); Brent Del Gaizo v. Honorable Peter M. Weinstein, Chief Judge of the 17th Judicial Circuit, Melodee A. Smith, member of the 17th Judicial Circuit Limited Registry and Honorable Howard Forman, Clerk of the 17th Judicial Circuit, Case No. 4D122-2548 (4th DCA); David S. Markus v. Honorable Joel H. Brown, Chief Judge of the 11th Judicial Circuit, Robert L. White, III, and Honorable Harvey Ruvlin, Clerk of the 11th Judicial Circuit, Case No. 3D12-2034 (3rd DCA).

⁹ *Makemson*, 491 So.2d at 1112.

¹⁰ *Olive*, 811 So.2d at 652.

constitutional principles as delineated in *Makemson v. Martin County*, 491 Sp.2d 1109 (Fla. 1986).”¹¹

III. Effect of Proposed Changes:

This bill eliminates the limited registry provisions from SB 1960, creates a cross-circuit conflict representation pilot project, and modifies the cap on certain flat fees.

Section 1 removes language in s. 27.40(3), F.S., added by SB 1960 (2012) that permitted the chief judge in each circuit to create limited registry. As a result of this bill, Florida law would once again permit only one registry from which to select court-appointed attorneys to represent indigent clients.

Section 2 creates a cross-circuit conflict representation pilot project in the Sixth, Ninth, Tenth, and Thirteenth Judicial Circuits. Currently when a public defender and a regional counsel both claim a conflict of interest, the judge will assign a private attorney to provide representation to an indigent client. This legislation creates a new process in four pilot circuits for indigent clients charged with non-capital murder, pursuant to sections 782.04(2) - (4), Florida Statutes. In these circuits, when a public defender and a regional counsel both claim a conflict of interest, the judge may refer the case to a neighboring circuit instead of private counsel. If the public defender and regional counsel in the neighboring circuit both claim a conflict of interest, the judge may then appoint private counsel to represent the client. Under the pilot, the Sixth Circuit (Pasco, Pinellas) and Thirteenth Judicial Circuit (Hillsborough) will cross refer cases. The Tenth Circuit (Hardee, Highlands, Polk) and the Ninth Circuit (Orange, Osceola) will cross refer cases. The goal of the pilot project is to save money by reducing the number of cases referred to the private counsel registry. According to the Justice Administrative Commission, in Fiscal Year 2012-2013, for the 121 cases reaching final disposition, the commission paid private counsel, on average, \$79,547 to represent indigent defendants charged with murder.¹² Attorney fees represented 73 percent of those costs.

Section 3 revises the statutory maximum compensation for court-appointed attorneys handling life felony cases, capital cases, and appeals cases. The changes provide higher compensation maximums for four classes of cases:

Case Type	Current Maximum Fee	Proposed Maximum Fee
Noncapital, nonlife felonies	\$2,500	\$6,000
Life felony cases	\$3,000	\$9,000
Capital cases	\$15,000	\$25,000
Appeals cases	\$2,000	\$9,000

These changes permit the Legislature to increase the actual flat fee compensation for these types of cases which must be set annually in the GAA.

¹¹ *Wasson v. Soto, et al.*, Case No. 2012–25606CA23 (Fla. 11th Cir. Court 2014).

¹² These costs represent payments to private counsel for capital 1st degree murder cases. The Justice Administrative Commission could not identify costs associated with non-capital murder cases, which are estimated to be lower than capital case costs. For example, for the 224 life felony cases that reached final disposition in Fiscal Year 2012-2013, the average private counsel payment was \$7,282. Attorney fees represented 75 percent of these costs.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Section 1 of SPB 7098 repeals the limited registry provisions in law, which were designed to contain due process costs. Since the passage of the bill in June 2012, the impact that the limited registries have had on due process costs is unclear. Accordingly, the fiscal impact of eliminating the limited registries is indeterminate.

Section 2 of the bill creates the cross-circuit conflict representation pilot. The pilot will likely will save money by reducing the number of murder cases appointed to private registry counsel. These cases will be handled by assistant public defenders in a neighboring circuit. Neither the Florida Public Defender Association nor the Justice Administrative Commission could estimate the magnitude of the cost savings.

Section 3 of the bill increases the statutory maximum compensation for court-appointed attorneys handling selected case types. However, since the actual flat fee rates are established in the GAA, this section does not have a fiscal impact.

SPB 7098 will only have a fiscal impact if the Legislature changes the flat fee rates in the GAA. For example, the OSCA proposed a modification of flat fees in the GAA for eight critical case types, as shown below:

Case Description	Current Flat Fee	Statutory Cap	Proposed Flat Fee
Capital – 1 st Degree Murder (Lead/Co-counsel)	\$15,000	\$15,000	\$25,000
Capital – 1 st Degree – Death Penalty Waived (Lead Counsel)	\$2,500	\$3,000	\$9,000
Felony Life	\$2,500	\$3,000	\$5,000
Felony Life - RICO	\$2,500	\$3,000	\$9,000
Capital Appeals	\$2,000	\$2,500	\$9,000
Capital Sexual Battery	\$2,000	\$3,000	\$4,000
Felony Punishable by Life – RICO	\$2,000	\$2,500	\$6,000
Felony – 1 st Degree - RICO	\$1,500	\$2,500	\$5,000

Source: Office of the State Court Administrator

OSCA’s proposed flat fee was derived by first calculating the median amounts paid in excess of the flat fees. Next, the OSCA calculated new median amounts based on data that removed the highest 25 percent of the cases which had attorney fees that were paid in excess of the flat fees. Finally, the OSCA reduced the new median amounts by an additional 25 percent to arrive at the proposed flat fees, with the exception of fees for *Capital – 1st Degree Murder (Lead/Co-Counsel)*; the new amount for such cases was reduced to \$25,000. Due to limited data available for *Felony – Life RICO*, *Capital Appeals*, and *Felony Punishable by Life –RICO* cases paid in excess of the flat fees, the OSCA reduced the proposed flat fees for these categories to more reasonable amounts. The OSCA calculated a fiscal impact of approximately \$1.97 million, if the Legislature adopted the proposed flat fee rates for the eight cases types shown in the table above.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: section 27.40 and section 27.5304.

This bill creates the following section of the Florida Statutes: section 27.401.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.