

CRIMINAL CONFLICT AND DEPENDENCY REPRESENTATION: POSITION OF THE FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

INTRODUCTION

The voters adopted Revision 7 to Article V of the Florida Constitution to standardize the method of funding the delivery of legal services to indigent citizens in three circumstances. Those charged with crimes who could not be represented by our Public Defenders, indigent persons who were the subject of involuntary civil commitments and those accused of causing their children to be dependent. The Florida Association of Criminal Defense Lawyers (FACDL) welcomes the opportunity to comment on the criminal justice component of this system.

The new system is in crisis, both immediate and long-term. This crisis results from several factors, but chief among them is the persistent refusal of the Executive and Legislative branches to commit to adequately fund necessary levels of service delivery. Despite competent, accurate evidence about what it costs to deliver services, they have insisted on under-funding the program, by ten million dollars (\$10,000,000.00) in the second fiscal year, and by as much as twenty-five million dollars (\$25,000,000.00) in this, the third full year.¹

When this under-funding crisis boiled over in November, Governor Bush's response was to "stay the course". He, in effect, told the JAC to pay service providers until funds ran out, and then stop paying, a response that is guaranteed to create far bigger problems in the future.

Another cause of this crisis is that the structure of the legislation that implemented Revision 7 hampers JAC efficiency, and it cannot properly plan for, nor respond to, funding issues that affect only individual circuits, and not the state as a whole. Funding must not only be increased, but the funding mechanism must be structured to allow the JAC to be responsive to "budget busting" cases, without having to rob Peter to pay Paul.

Finally, when Revision 7 was implemented, insufficient attention was devoted to the "front end" of the system. Rather than investing time and effort in designing uniform statewide guidelines that established minimum qualifications for court-appointed counsel, imposed reasonable caseload restrictions, and determined fair compensation, the most daunting task, that of finding lawyers, determining

¹ These increases are primarily the result of continued shifting of fiscal responsibility from the counties to the state, as cases subject to pre-Revision 7 funding are concluded.

how to assign cases and deciding how much they should be paid, was left to the circuit Indigent Services Committees (ISCs). The resulting inconsistency in performance among the circuits has highlighted the need for a more coordinated statewide approach. There have been accusations of excessive spending and judicial disregard for legislatively mandated cost controls.

Although they exist, the instances of excess appear to be the exception rather than the rule. Regardless, the service delivery system should be retooled to eliminate abuse if we are to have credibility when we ask the Legislature for sufficient appropriations to properly operate. We cannot continue to provide those people who are more interested in cost containment than competent representation with a convenient excuse to ignore the larger and more serious problem, the continued lack of adequate funding.

The Workgroup on Court-Appointed Counsel and Indigent Due Process of the Supreme Court Commission on Trial Court Performance and Accountability (Workgroup), chaired by The Honorable Alice Blackwell White, has sought to address these problems with a new service delivery model. While the members of the Workgroup have demonstrated a sincere and genuine concern for the delivery of legal services to the poor, the focus of their Executive Model is regrettably, the creation of a huge, expensive bureaucracy that will not enhance that goal. The creation of such a bureaucracy will result in more spending, more government, and less funds for delivering competent representation to poor people accused of crimes.²

It took several years of planning to put together the initial Revision 7 legislation that passed in 2003 and adjusting legislation in 2004.³ This system is only 30 months young, and, while we acknowledge that problems exist, we must not lose sight of the fact that the current model has succeeded in its primary goal. That is, *there has been no measurable drop-off in the quality of the representation of the indigent accused since the conversion from a county-based to a statewide compensation system.* If we do not address the current crisis, we will not be able to say that with confidence much longer.

FACDL is focused on finding solutions while maintaining the delivery of competent representation to the indigent criminally accused. Any new system must be designed to insure that court-appointed counsel have the resources necessary to provide zealous representation and that they be fairly compensated for their efforts. To that end, we offer the following analysis of the existing shortcomings in the service delivery system, as well as our critique of the proposals to rectify them.

² "Less taxing, less spending, and less government will be the cornerstones of this administration."

Governor-Elect Charlie Crist

³ The "Glitch Bill"

THE SERVICE DELIVERY SYSTEM MUST BE ADEQUATELY FUNDED.

Each fiscal year, the Legislature has been provided with cost projections for service delivery, but has appropriated substantially smaller amounts. While we are mindful of the many demands on state dollars and the Legislature's reluctance to over-fund programs, the fact remains that the shortfalls have or are expected to almost precisely match the amount by which the system was projected to cost. It is clear that the projections have been accurate, and more funds are needed.

This fiscal year, the JAC exhausted second quarter funds less than six weeks into the second quarter. They sought the release of third quarter funds to pay for work that had already been performed. The outgoing Governor's response was, in a word, disappointing. Although the release of funds was approved, the Governor's response, dated December 1, 2006, put court appointed lawyers on notice that they should not expect to be paid in full, or not expect to be paid at all, in the future. The Governor's Budget Policy Coordinator, Randy Ball, writing for the Governor, said,

However, the Governor will not approve the early release of fourth quarter funds unless the circuit indigent services committees, in collaboration with the Justice Administrative Commission, develop a plan to re-adjust compensation rates in a manner that will assure remaining due process funds are not exhausted prior to the end of the fiscal year.

It appears that the Governor's approach is grounded in the idea that, if the state provides less money than is necessary, it will force the service delivery system to become more efficient. That approach is shortsighted. We wonder if the Governor would be saying "make do with what you've got" if he learned that the Legislature had paid for only seventy-five percent of the avian flu vaccine the citizens of Florida needed. Starvation has never been an effective method of losing weight.

This is precisely what the Department of Children and Families did with its budget for mental health services for criminal defendants who are incompetent to stand trial. The result? Dozens, if not hundreds, of severely mentally ill people are warehoused in county jails, the Secretary of DCF is facing a jail sentence for contempt, *and the cost of fixing the problem created by this budgetary shortsightedness will be at least 300 per cent more than it would have cost to do it right in the first place.*⁴

⁴ Albert Einstein said that insanity is defined as doing the same thing over and over, and expecting a different result.

The long-term negative effect of continuing to shortchange adequate representation of the indigent accused is already beginning to be felt. There are growing reports of experts refusing to agree to assist defense counsel unless they are guaranteed payment or paid in advance. Counsel are seeking to continue trials because experts are unavailable or funds have not been provided for deposition transcripts. This has resulted in defendants languishing in jail for much longer than appropriate or necessary, creating a financial burden for their families and county governments, alike.

The reaction of those attorneys on the conflict lists to the recent payment processing delay has been almost unanimous. Court-appointed counsel are refusing to make themselves available to take new conflict appointments until they are paid for work already done. Many are considering canceling their JAC contracts.

FACDL, Public Defenders and the Courts can use all of their influence to try to prevent this from happening. Our members who accept court appointments have made a commitment to represent their clients to the best of their abilities. However, there is an ugly truth that we must face. If the JAC stops paying lawyers when the money runs out, honest lawyers will stop taking cases. If the JAC arbitrarily starts cutting hourly bills by ten, twenty or thirty percent, the very few disreputable lawyers, may, regrettably, respond by reducing their efforts until they are putting in only the amount of effort they are being paid for. Some clients may feel forced to plead guilty and some lawyers may go to trial unprepared. The ultimate outcome will be that innocent people will go to prison.

There is a cynical minority among our membership who believe that this is part of a calculated campaign to undermine the quality of the representation which our poor receive. We choose to reject that belief. Rather, we prefer to attribute this attitude on the part of the Executive and the Legislature to a lack of understanding of the needs of the system, and an exaggerated focus on the relatively few abuses taking place. We suggest that the focus should be on the vast majority of conflict lawyers who are willing to recognize that they are doing a public service, and work hard, provide their clients with competent representation and are paid a fair, albeit reduced, fee.

We are willing to tackle the challenge of reducing any abuses that do exist, and are prepared to accept the task of joining with other stakeholders to, in the words of Mr. Ball, conduct "...a careful review..." of the current system "...to determine whether current due process appropriations are sufficient..." and "...to determine the sources of the current cost increases and whether additional cost controls or funding is needed." In the interim, we ask that funding be preserved at levels which ensure that good lawyers continue to represent their clients well.

THE JAC MUST BE GIVEN MORE FLEXIBILITY

The JAC is experiencing great difficulty in responding to the individualized needs of the various circuits, and in addressing the propriety of requests for due process expenditures in individual cases. These difficulties arise largely because of the statutory restrictions imposed upon the JAC. For instance, the JAC has no effective way to plan or pay for “budget buster” cases, such as the X-Box murder case in the Seventh Circuit, or the Danny Rolling case in the Eighth.

These cases require an enormous expenditure of resources, because of the number of defense lawyers who must be appointed, the additional expenses incurred when high profile cases draw great media attention, and the substantial increase in the amount expended for due process services.⁵ Conversely, these cases occur infrequently, so it is not prudent to budget for these expenditures as part of an individual circuit’s regular needs.

Currently, when a case of this nature arises, the JAC has no option but to exhaust all of the funds available to it, depriving the other circuits, and then request additional funding. This system must be changed.

We propose that current funding levels for unremarkable cases be maintained, and that, *in addition*, the Due Process Contingency Fund be earmarked to be used to pay the attorneys fees and due process costs for these extraordinary cases. The JAC should be authorized to expend these funds when appropriate, according to defined standards. These standards for determining when a case qualifies as “extraordinary” should be established as part of the overall restructuring of the service delivery model.

Consideration should also be given to providing sufficient additional monies to include the due process costs incurred in the defense of capital cases in the Due Process Contingency Fund, as well. Death penalty cases are “extraordinary” by definition, and grouping the costs associated with defending these cases together with other similarly unusual cases will improve record keeping and present a much clearer picture of both the cost and the quality of defending capital cases. Qualified capital defense experts will be more easily identified, and accurate measurement of the costs associated with these experts will be

⁵ Sensational multi-defendant cases, by their very nature, require longer and more intense pre-trial preparation and litigation, take longer to try, and require defense counsel to retain a greater number and variety of experts, to counter those retained by the State. For instance, media attention alone often doubles or triples the time necessary to select a jury. Recently, a sensational murder case from central Florida was relocated twice, ending up in the Eleventh Circuit for trial, because of repeated problems in selecting a jury.

facilitated.⁶

In addition to providing the JAC with necessary flexibility, this system would achieve several additional important goals. By removing these costs from the standard budget formula, it becomes much easier to gauge the reasonable cost of defending less serious cases, which make up the vast majority of conflict appointments. As a result, budgeting for these less serious cases, both with regard to attorneys' fees and due process expenditures, becomes more precise and it becomes much easier to measure the year-to-year fluctuations in the cost of defending the great majority of conflict cases.

THE SYSTEM MUST BE MADE TO RUN EFFICIENTLY, WITHOUT SACRIFICING THE QUALITY OF REPRESENTATION.

Establishing the specific form and function of the model for delivery of services by conflict counsel was, without question, the most difficult aspect of the transition from a county-based to a statewide system. Unfortunately, it was the aspect of the transition that was given the least amount of attention. The existing county committees and practices were essentially grafted onto the JAC disbursement and audit function. In many cases, they changed little or not at all. Circuit addenda to the JAC contract were written from a parochial perspective. The flawed JAC funding mechanism often pitted circuit against circuit in disputes over funding.

In hindsight, it seems foolish to have assumed that a system (or more precisely a group of disparate systems) that was not working well before Revision 7 would transform itself into a viable model afterward. The parties who have a commitment to the delivery of representation to the indigent must now redesign the system to work more efficiently, without compromising quality. FACDL is willing to undertake this effort in collaboration with other interested stakeholders.

There are two simple prerequisites to success. First, the core concept of any model implemented must be high quality representation at fair rates of compensation. Second, adequate funding must be provided on an ad hoc basis while this restructuring is undertaken, so that good lawyers who are participating now do not abandon the system before the improvements can take shape.

We agree with the Public Defenders Association that hourly fees pose a substantial budgetary challenge, and that they may not be necessary in the

⁶ As has been said many times, "Death is Different". This is particularly true in the case of death penalty due process costs. Death cases require a unique range and type of expert assistance that is not usually necessary in other cases. Experts such as forensic pathologists, criminalists and mitigation specialists are commonly required in capital cases, but rarely seen in other, more commonplace prosecutions.

majority of cases. However, we believe that it is necessary to preserve an hourly fee payment system for capital cases, and other cases deemed extraordinary, to insure the highest level of representation.

Flat fees or a tiered hourly fee system may be appropriate in routine non-capital cases, but only if safeguards are in place to insure that there is not an incentive to plead guilty instead of proceeding to trial, a disincentive inherent in flat fee appointments. If a circuit adopts a flat fee system, it must include a provision for a reasonable fee for cases that are resolved pre-trial, but also provide for a reasonable additional fee if the case goes to trial. The better alternative may be the tiered hourly system employed in the Eleventh Circuit, which encourages competent representation while protecting against many of the abuses possible in straight hourly fee cases.

We agree with the Public Defenders, that workload standards for court-appointed attorneys must be established in light of their private practices. Indigent defendants cannot receive effective representation if court-appointed counsel are allowed to carry full conflict caseloads in addition to their private cases. Meaningful caseload standards are the most direct and effective way to prevent conflict defendants from being neglected. As part of these standards, some mechanism must be adopted, to insure that the blind rotation of appointments required by state law actually takes place.

The same group tasked with the redesign of the system should form the nucleus of the team that provides ongoing management of the model established. The Public Defenders Association proposes two alternatives. We believe their idea of a statewide cost containment board charged with the responsibility of reviewing contested bills, setting guidelines for fees and costs, and auditing the expenditures may create an unnecessarily cumbersome bureaucracy whose function would overlap the mandate of the JAC.

We prefer their other alternative, revival of the Statewide Indigent Services Advisory Board to assist with establishing qualifications for conflict attorneys, workload standards, setting guidelines for fees and costs, and resolving fee disputes that are not resolved on the local level.

However, we strongly urge that an element of local control be preserved. While minimum standards should be established statewide, local screening committees should be permitted to adopt higher standards to address local quality assurance issues. For instance, in Miami-Dade County attorneys handling life felonies are required to have had 20 jury trials of first degree felony or higher to qualify. Attorney qualifications should be subject to review by peer attorneys who work in the same community and not by a uniform standard that applies in every part of the State. Likewise, fee disputes should first be addressed at the local level.

IS THE PROPOSED EXECUTIVE MODEL A VIABLE SOLUTION?

The Florida Association of Criminal Defense Lawyers has become involved in the search for solutions at the invitation of The Workgroup on Court-Appointed Counsel and Indigent Due Process of the Supreme Court Commission on Trial Court Performance and Accountability (Workgroup), chaired by The Honorable Alice Blackwell White. Specifically, we have been invited to comment on the Workgroup's proposal to revamp the system, known as "The Executive Model". We have two overriding concerns about the proposal, which we believe severely limit its viability.

First and foremost among those concerns is the enormous cost of the bureaucracy that would have to be created. While there is insufficient data available upon which to base any reasonable determination of the fiscal impact of the Workgroup proposal itself, we can examine the budgets of similar agencies. For example, the Medical Quality Assurance Task Force of the Florida Department of Health has budgeted more than three million dollars for administrative expenses alone, *excluding salaries and benefits*, for fiscal year '07-'08. That level of administrative overhead simply cannot be justified in a delivery model that is already risking compromised quality of representation because of budgetary limitations.

The Executive Model is further flawed by making this new bureaucracy the responsibility of the JAC. The core function of the JAC is the disbursement and tracking of state funds to various components of the justice system. It disburses funds to forty-three different entities, and court-appointed counsel disbursements make up only a small part of the overall responsibilities of the JAC. It is not designed to assume total responsibility for establishing and reviewing qualifications for court-appointed counsel, promulgating workload standards, and the other myriad functions attendant to overseeing that indigent defendants receive adequate representation. It should be allowed to concentrate on making sure that court appointed counsel receive fair compensation, and that funding is administered fairly and expeditiously.

Many of the components of the Executive Model place the quality of service that the current system provides at grave risk. For instance, the Executive Model seeks to revive the idea of Public Defender Cross-Circuit Conflict representation. There are many reasons why this idea is unworkable, and those reasons have been exhaustively outlined in the Public Defenders Association response, as well as a White Paper on the subject, prepared by FACDL several years ago.

FACDL joins the Florida Public Defenders Association in opposing any attempt to implement a Public Defender Cross-Circuit Conflict policy.

For all of these many reasons, FACDL cannot endorse the Executive Model

proposed by the Workgroup on Court-Appointed Counsel and Indigent Due Process. We propose, instead, a more conservative, limited approach, designed to identify and correct shortcomings in the current system, while preserving its many effective components. The Florida Public Defenders Association has proposed two alternatives, either of which we believe addresses the immediate crisis and the long range challenges facing the conflict counsel system, better than the Executive Model.

BETTER ALTERNATIVES

FACDL believes that primary responsibility for the delivery of legal services to *all* of the criminally accused is best entrusted to those who are constitutionally mandated and best equipped to provide those services, Florida's Public Defenders. We are mindful of their concerns about ethical conflicts. However, those conflicts arise in individual cases and do not create an insurmountable impediment to placing the Public Defenders Association in a leadership role in creating and maintaining the overall conflict counsel system.

The FPDA has proposed two models, either of which provides a better management alternative than the Executive Model proposed by the Workgroup.

The Florida Public Defender Association (FPDA) Model

The first of these models would require the Florida Public Defender Association to manage indigent defense services. The 20 elected public defenders would hire a conflict and dependency coordinator and staff who would oversee the implementation of minimum competency and workload standards, the management of fees and costs, the establishment of a formula for each circuit's appropriation, and resolve fee disputes. It would utilize the private bar and many of the resources currently in place.

This model would create a statewide bureaucracy, but would achieve significant costs savings by utilizing the existing resources of the FPDA to oversee the conflict counsel system. It is the most similar to the Executive Model.

Revised ISC Model With Statewide Advisory Board

FACDL favors the second of the models proposed by the FPDA. This model would place the elected Public Defender in the position of chair of each local ISC, together with two members of the private bar, removing the courts from any influence in the management of indigent defense services.

We also support reviving the Statewide Indigent Services Advisory Board, provided it had significant participation by Public Defenders and private criminal defense counsel, to implement guidelines for fees and costs and resolve fee

disputes that are not resolved on the local level. We believe this model could be enhanced by making the decisions of the local ISCs subject to minimum standards established by Statewide Indigent Services Advisory Board, with regard to attorney qualifications and workload limitations, in addition to insuring fair administration of the rotational assignments or contract systems. It would also be the role of the statewide advisory board to determine circuit specific allocations and to advocate for adequate funding.

The primary benefit of this system is that it allows the local Indigent Services Committees to address the myriad of conditions that exist throughout a state as diverse as Florida, and provides necessary statewide oversight and review which is critical to the provision of high quality services and fiscal responsibility, while minimizing the cost of administering the system.

CONCLUSION

The Florida Association of Criminal Defense Lawyers appreciates the opportunity to join with others, to face the current crisis in conflict counsel funding, and to build a viable model for the delivery of these services in the future.

However, the crisis will worsen unless we focus on insuring that the quality of services be preserved. Adequate funding must be provided on an ad hoc basis while restructuring is undertaken, so that the good lawyers who are participating now do not abandon the system before the improvements can take shape. Any new system must be designed to insure that court-appointed counsel have the resources necessary to provide zealous representation and that they are fairly compensated for their efforts.