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Conflict attorney pay in dispute

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A new law that limited payment for private conflict attorneys in criminal cases has resulted in several legal challenges to the law around the state, amid claims it all but guarantees ineffective assistance of counsel.



The same law has also caused concern among court officials because it mandates that if court-approved payments above the minimum fees exceed \$3 million, then those payments must come from trial court due process funds.

“I really believe that it sets up ineffective assistance of counsel on its face,” said Derek Byrd, president of the Florida Association of Criminal Defense Lawyers, which has been involved in the

challenges to the law. “You’re willfully setting up a system that woefully underpays the attorney and encourages him not to do the work.”

The changes came in last-minute amendments to SB 1960 and amended F. S.

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\$27,5304.

The law already had circuits setting up a registry of private attorneys to accept appointments to criminal cases when the public defender and regional conflict counsel had conflicts. But attorneys in that registry could petition for extraordinary fees above the flat fees specified in the statute.

The revised law allows circuits to set up a second registry of conflict attorneys for most first, second, and third degree felonies with the same fixed fees. However, unlike the older "general" registry, lawyers in the new "limited" registry have to pledge not to seek higher fees, no matter how difficult or long the case.

The law allowed the general registry to continue, but requires judges in counties that have the newer limited registry to pick attorneys from that list before turning to the older list. However, capital and RICO cases will still use attorneys from the older list, and those attorneys are allowed to petition the court for higher fees in extraordinary cases.

The Legislature, unhappy with the costs of those excessive fees, mandated in the bill that the state pay the first \$3 million of those fees, and any amount over that would have to come from trial court budgets. At the start of the budget year, it was estimated that shortfall would be around \$3 million. Some circuits are reporting — with less than half of the budget year completed — that they are close to or over the limit for paying excessive fees.

Virtually all of the excessive fees are in RICO and capital cases.

Byrd said the registry fees are too low and completely unrealistic.

According to the Justice Administrative Commission (JAC), which oversees payment of private conflict attorneys, the fees are \$750 for a third degree felony, \$1,000 for a second degree felony, and \$2,500 for a first degree felony carrying a life sentence or a nondeath penalty capital case. Felonies that carry up to a life sentence get \$2,000, as do capital sexual battery cases. Death penalty cases are \$15,000 each for the lead attorney and co-counsel. RICO and death penalty cases are handled under the old registry, which allow attorneys to apply for extraordinary fees.

FACDL, Byrd said, doesn't like taking excess fees for RICO and capital cases from the courts' operating budget. That system sets up a conflict of interest for judges considering such fee requests.

"They've created an incentive for the court to appoint a potentially ineffective counsel at the outset, or the courts risk losing some of their own money," he said. "The court has an incentive not to award any unusual fees."

"Those fees are shockingly low," said Judge Faccidomo, president of the Miami FACDL branch who has worked on some of the legal challenges. "There are all sorts of issues on whether you can actually provide effective assistance of counsel."

He noted payment for a nondeath penalty first degree murder case, which could result in a multi-week, multi-defendant trial, is all of \$2,500. Faccidomo said he knew one lawyer who took a felony case who calculated her flat fee to be a bit over \$3 an hour — less than half of minimum wage.

Like Bryd, Faccidomo said the Legislature created an intolerable situation by requiring judges to find money from the court budgets once extraordinary payments reach \$3 million.

"The court is being asked, 'Should I pay my interpreters . . . or should I pay the lawyer so that they [defendants] actually get representation?'" he said. "It's a lose-lose situation. There's no real answer. The Legislature has given the judiciary the job of balancing the budget."

State Courts Administrator Lisa Goodner said the Trial Court Budget Commission has held funds in reserve to help pay the extraordinary fees once the \$3 million appropriation is exhausted. However, "We are concerned that they are not sufficient to cover these costs, which could cause further disruption in the circuits' operating budgets," she said.

Both Byrd and Faccidomo questioned the propriety of not informing defendants of the small fee being paid to their lawyers — especially when co-defendants are represented by public defenders and regional conflict counsel who may have tight budgets but still have fewer restrictions than the private registry attorneys.

In a noncapital first degree murder case, "The defendants are not really being told," Faccidomo said. "The judge does not say, 'By the way, your lawyer is being paid \$2,500. Good luck to you, sir.'"

"It really, truly impacts a lot of criminal defendants," Byrd said. "It's a tough economic market out there, and there are a lot of lawyers who may not have a choice. They've got to pay the bills."

He added: "There are opinions that this gives rise to ineffective assistance of counsel prospectively, because the system as a whole creates the atmosphere for ineffective assistance of counsel."

Faccidomo predicted the new law will cost the state more due to a flood of ineffective assistance of counsel claims.

Goodner said her office has been charged to report to the Legislature by January 15 on the reasonableness of fees paid to conflict counsel under F.S. §27.5304. "The report is still in development," she said.

There are thousands of cases affected by the fee dispute.

According to Cris Martinez, general counsel of the JAC, in the 2011-12 fiscal year JAC paid 27,546 invoices to private conflict attorneys, and a total of 27,998 invoices were filed.

Martinez said a couple months were needed to set up the new, limited registries. She said claims have been paid, although it was uncertain how many had been made.

In 1986, Martinez noted, the Florida Supreme Court in *Makemson v. Martin County*, 491 So. 2d 1109, held that in extraordinary circumstances court-appointed attorneys could apply to the judge and be granted higher fees than set in state law. Because that remains guiding law, JAC is including in the contracts for attorneys in the limited registry that under *Makemson* they can petition the trial judge for higher fees.

There is the risk that the trial judge will deny the claim, noting the new law, Martinez said.

So far, the JAC has not learned of any attorneys from the limited registry who have completed cases and filed for higher fees, she said.

The new registry system has attracted its share of litigation. According to the JAC, 27 legal challenges have been filed around the state attacking the statute on various legal

Court Appointed Attorney Flat Rates by Case Type

REGISTRY CATEGORY	CASES INCLUDED IN CATEGORY	FLAT FEE FY 2007-2013
	1 st Degree Murder (Lead Counsel)	\$15,000
	1 st Degree Murder (Co-Counsel)	\$15,000
	Capital Sexual Battery	\$2,000
	Capital (Non-Death other than Capital Sexual Battery)	\$2,500
	Felony - Life	\$2,500
	Felony - Punishable by Life	\$2,000
	Felony - 1 st Degree	\$1,500
	Felony - 2 nd Degree	\$1,000
	Felony - 3 rd Degree	\$750
	Violation of Probation - Felony (include VOCC)	\$500
	Misdemeanor	\$400
	Criminal Traffic	\$400
	Felony or Misdemeanor (No Information filed)	\$400

grounds.

Most of those cases, according to Martinez, are constitutional challenges brought by privately appointed attorneys. These include requests for the judge to recuse himself or herself because of a potential conflict of interest; assertion the law provides ineffective assistance of counsel; claims that SB 1960 enacting the new registry violated the single-subject requirement for legislative bills; and other constitutional challenges.

Another legal action challenges the administrative order in the 11th Circuit creating the new, limited fee registry, and another action in that circuit seeks a declaratory judgment finding the law unconstitutional.

Finally, identical actions were filed in the Third and Fourth district courts of appeal seeking writs of certiorari, quo warranto, and prohibition challenging the law and administrative orders implementing it in the 11th and 17th circuits. The Fourth DCA has dismissed the action on the merits, without an opinion, while it remains pending in the Third DCA.

Challenges to the 11th Circuit administrative order and the declaratory action are still pending, as are challenges in other cases, but there have been several rulings in which all but one have upheld the law or denied the challenges.

The exception came in a case pending before 11th Circuit Judge Victoria Sigler. An attorney appointed to represent a death penalty defendant challenged the new registry law on constitutional grounds. In an October 24 ruling, Judge Sigler agreed that the law violated the constitution's single-subject requirement and the separation of powers, because, in effect, it transferred legislative budgeting authority to the courts when lawmakers required the judicial system to find money to pay excess costs in capital cases over the \$3 million limit.

Judge Sigler declined to address whether the law was unconstitutional because in some cases it could decline fair remuneration for defense attorneys, but said that issue should be decided in a declaratory action filed in the Second Judicial Circuit. She also denied that it created a conflict of interest for judges, because the funds for extraordinary fees could come out of their budgets. She noted the 11th Circuit has not reached that point, although the judge noted, "This issue might be ripe for consideration at a later date."

As of *Bar News* deadline, the state had not appealed Sigler's ruling.

However, in the 20th Circuit, Judge Bruce Kyle agreed with the arguments of the JAC, including that the law did not violate the

single-subject provision and that the subject was not ripe since the case was not over and the appointed lawyer had not sought payment. Kyle also found that there was no conflict of interest for judges, because the Office of the State Courts Administrator and the Trial Court Budget Commission have created a separate fund for the trial court budgets to pay excess fees when the \$3 million of state funds is expended.

One challenge grew from the notification to lawyers in the Fourth Circuit that requests for initial fees would not likely be approved for the remainder of this fiscal year. Any that were awarded would be "extremely conservative."

An October 12 memo to registry attorneys from court counsel Caroline C. Emery, on behalf of Fourth Circuit Chief Judge Donald Moran, warned the circuit had almost depleted its state budget for excess fees and soon would turn to court funds.

"Therefore, please be on notice that, because the Chief Judge has no choice but to protect the best interests of this circuit at all costs to run an effective, functional administration of justice, he is forced to deny almost all motions for excess fees effective today," Emery wrote. "If any motions are granted, the awards will have to be extremely conservative. Evidently, based on the attached report, this is not an unreasonable position, and will actually be in line with practically all of the other circuits' current awards."

Two attorneys appointed in a murder case filed a petition for Moran to recuse himself from their case, saying he had a conflict of interest and that the law improperly allows the judge to appropriate funds for county-appointed attorneys.

Moran, in a two-line order, denied the recusal motion, and denied a separate motion to find the new registry law unconstitutional.

In another case from the Fifth Circuit, Judge Sandra Edwards-Stephens denied a motion on behalf of the defendant challenging the registry law. Edwards-Stephens — as did Kyle in the 20th Circuit — said the defendant lacked standing. She found, among other things, that the "defendant has no direct and articulable stake in the outcome of whether Fla. Stat. 27.5304 is determined to be unconstitutional. . . . It is the attorney who would seek compensation, not the defendant."

According to JAC figures, most circuits now have both general and limited registries for the conflict cases. The Third and 13th circuits have not set up limited registries, while the Fourth, Seventh, and Ninth circuits no longer have the general registry.