

Due Process Services

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OPPAGA

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Due Process Services

EXECUTIVE SUMMARY

In the United States, due process is afforded to every party in a legal action, both civil and criminal. If a criminal defendant is found to be indigent, the state has an obligation to provide certain services to ensure that the defendant receives due process of the law. The state must also provide due process services to indigent parties facing certain civil actions, such as guardianships, termination of parental rights, and involuntary commitments. Due process services include providing and paying for court reporters, interpreters, expert witnesses, and in certain instances, private court-appointed attorneys for indigent defendants.

In comparison to other states, Florida has a uniform system of indigent defense representation, as both funding and defense counsel are provided by the state. Additionally, Florida has a three-tier indigent defense model, which includes the Offices of the Public Defender, the Offices of Criminal Conflict and Civil Regional Counsel (regional conflict counsel), and private court-appointed attorneys. Florida has taken several steps to manage due process costs. First, each agency that receives due process funding has established internal accountability mechanisms. Second, the Justice Administrative Commission is statutorily authorized to oversee attorney and vendor contracts and payments and can challenge billing irregularities when they occur. Third, the judicial branch has created commissions and workgroups to develop policies related to the efficient and effective functioning of Florida's trial courts. Fourth, the Legislature created regional conflict counsel to provide predictability and contain court-appointed counsel costs. Finally, to preempt shortfalls, the Legislature established budget protocols that detail funding contingencies both within an agency's budget categories as well as across agencies.

Despite these mechanisms, due process costs can be high and often unpredictable, resulting in funding shortfalls. While due process costs are increasing overall, the vast majority of cases do not incur due process costs beyond defense counsel. By case type, death penalty cases are the most expensive because they require a multi-person legal team and can involve multiple expert witnesses. Recent cases decided by the U.S. Supreme Court led to resentencing for a number of offenders sentenced to death or life without parole, resulting in increased due process costs associated with these cases. Looking to other states, options exist to contain costs while preserving the constitutional rights of indigent defendants.

REPORT SCOPE

As directed by the Legislature, OPPAGA reviewed other states' due process and court-appointed counsel cost containment approaches to identify options for cost containment while preserving the constitutional rights of indigent defendants accused of crimes.

BACKGROUND

The procedural due process rights of individuals in the United States are enumerated as guaranteed in the Bill of Rights and the U.S. Constitution, and they have been upheld by the U.S. Supreme Court. Procedural due process refers to the constitutional requirement that when the federal government acts in such a way that denies a citizen life, liberty, or property interest, the person must be given notice, the opportunity to be heard, and a decision by a neutral decision-maker. The Court has held that almost all of the criminal procedural guarantees of the Bill of Rights are fundamental to state criminal justice systems and that the absence of one or the other particular guarantees is unconstitutional, as it denies a suspect or a defendant due process of law. In addition, the Court has held that due process protects against practices and policies that violate precepts of fundamental fairness, even if they do not violate specific guarantees of the Bill of Rights.

In Florida, due process is afforded to parties in legal actions. If a defendant in a criminal action is facing incarceration and is found to be indigent, the state has an obligation to provide certain services to ensure that the defendant receives due process of the law. The state must also provide due process services to indigent parties facing certain civil actions, such as guardianships, termination of parental rights, and involuntary commitments. Due process services include providing and paying for court reporters and interpreters utilized by the prosecution, the defense, and the courts; expert witnesses utilized by the prosecution and the defense; and, in certain instances, private court-appointed attorneys, mitigation specialists, and private investigators for indigent individuals.

In criminal matters, a person seeking indigent status must submit an application to the clerk of the court, who makes a determination.¹ The application form requires the applicant to report information such as net income, assets, liabilities, and debts. The clerk determines an applicant to be indigent if their income is equal to or below 200% of the federal poverty guidelines or if they receive Temporary Assistance for Needy Families-Cash Assistance, poverty-related veterans' benefits, or Supplemental Security Income.² There is a presumption that the applicant is not indigent if they own any personal or real property with a value of \$2,500 or more, excluding the value of the person's home and one vehicle having a value of \$5,000 or less. The duty of the clerk in determining whether an applicant is indigent is limited to receiving the application and comparing the information provided in the application to the criteria prescribed in statute.³ The determination of indigency is a ministerial act of the clerk and not a decision based on further investigation or independent judgment.

Representation of indigent defendants in criminal matters is provided by the state through a three-tier model that includes the public defender, regional conflict counsel, and private court-appointed attorneys.⁴ (See Exhibit 1.)

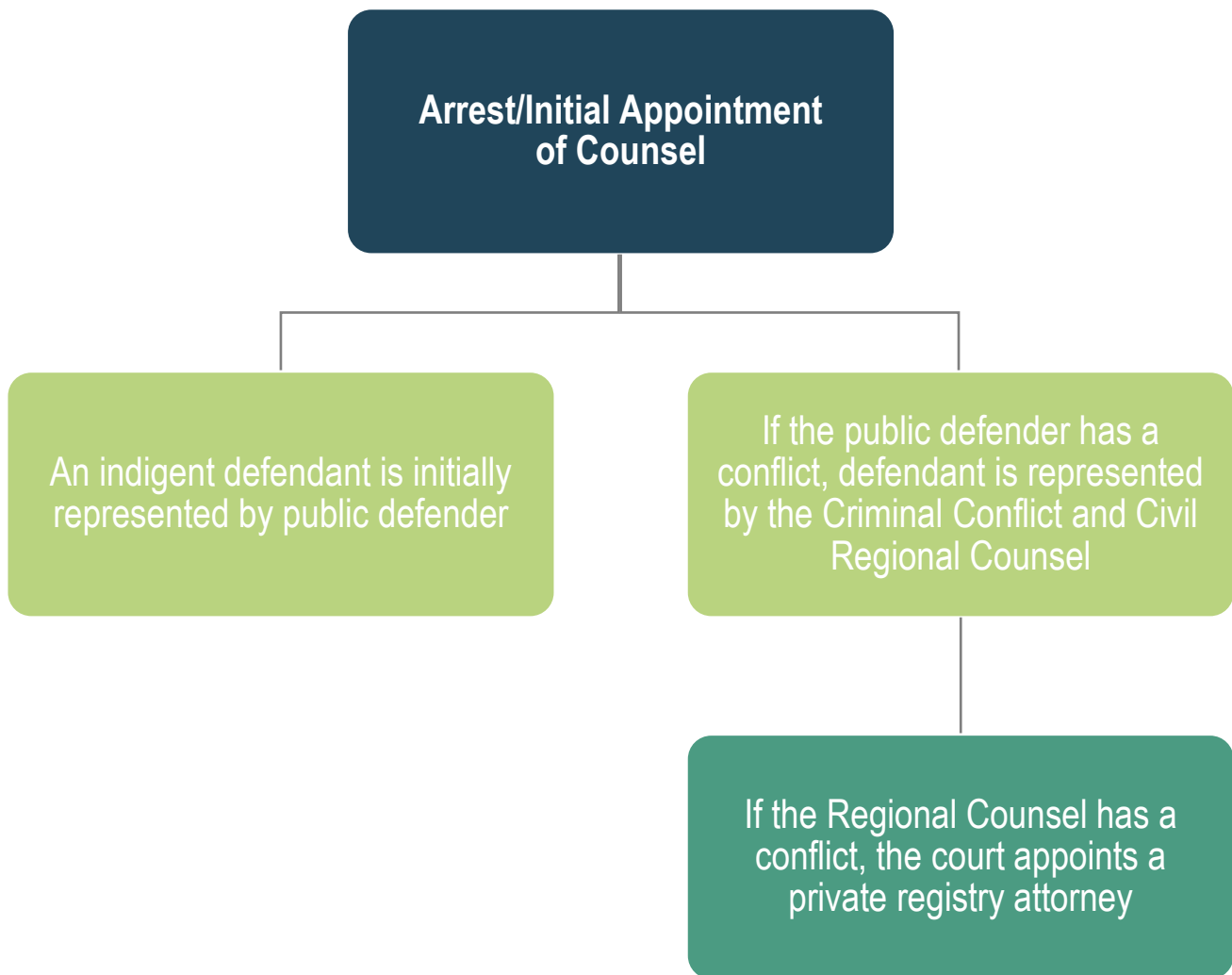
¹ Section 27.52, *F.S.*

² In 2019, the income amount to meet 200% of federal poverty guidelines for a one-person household was \$24,980 and \$51,500 for a four-person household.

³ If the clerk determines that an applicant is not indigent, the applicant may seek review of the determination in a court hearing. The court shall make a final determination of indigent status by reviewing the information provided in the application and by considering additional factors, which include whether the applicant has been released on bail of \$5,000 or more, whether a bond has been posted and information about the bond, whether paying for private counsel creates a substantial hardship for the applicant, and any other relevant financial circumstances of the applicant.

⁴ The regional conflict counsel and private court-appointed attorneys also represent indigent parties in civil matters.

Exhibit 1
Three-Tiered Indigent Criminal Defense



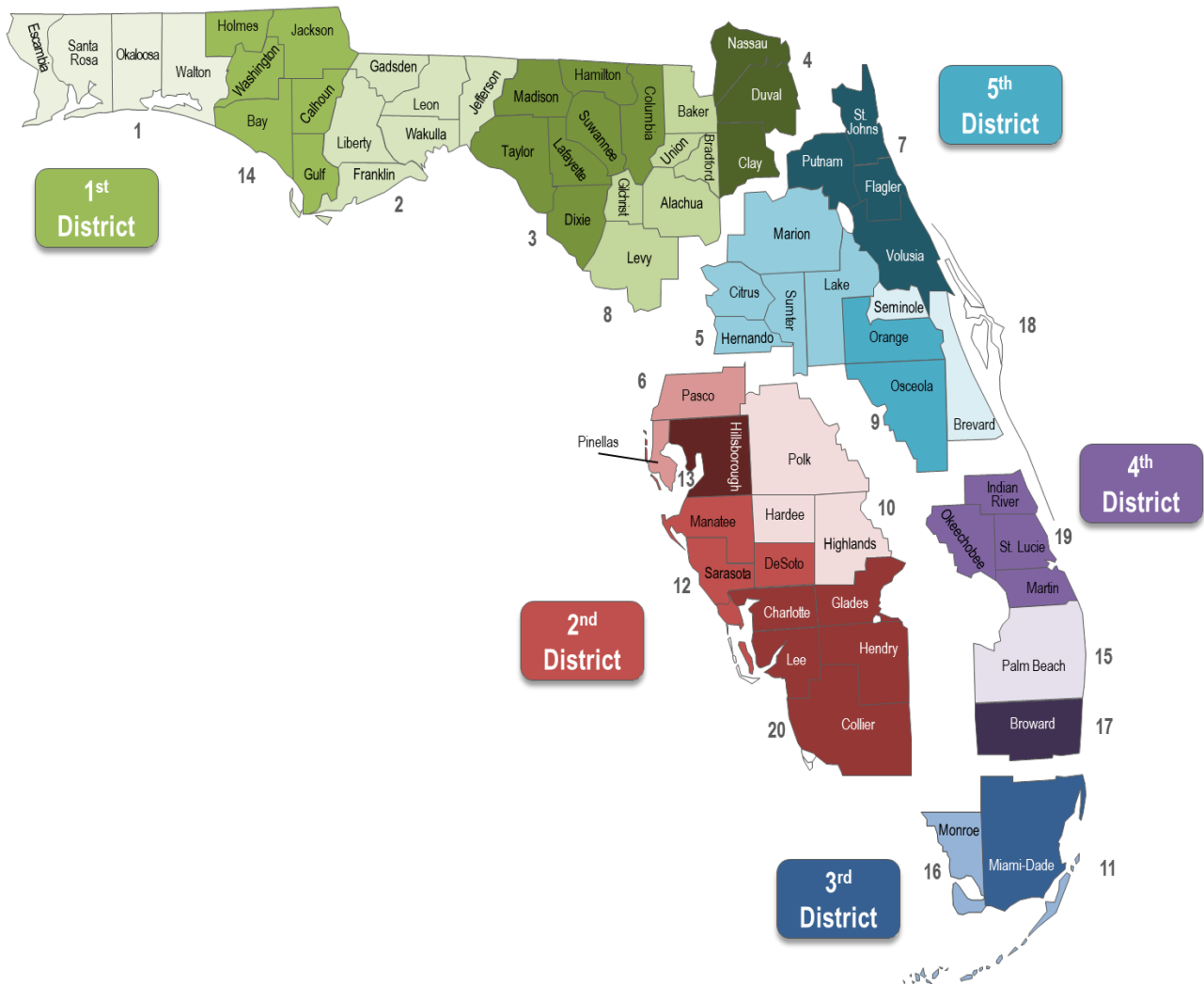
Source: Justice Administrative Commission.

After arrest, indigent defendants are initially represented by public defenders. Florida has 20 judicial circuits, and each circuit has a public defender who is elected to four-year terms and who employs assistant public defenders to represent indigent defendants. Public defenders represent many indigent criminal defendants throughout Florida's criminal justice process. If the public defender is unable to provide representation due to a conflict of interest, the regional conflict counsel is typically appointed. There are five regional conflict counsels whose geographic boundaries conform to those of Florida's five appellate court districts. In addition to criminal cases, regional conflict counsels also provide legal representation to indigent clients in certain civil proceedings as provided by law.⁵ (See Exhibit 2.)

⁵ These include child dependency and termination of parental rights cases, guardianship cases, developmental disability guardianships, involuntary commitments under the Marchman Act for individuals needing substance abuse services, and individuals found to meet criteria under the Sexually Violent Predator Civil Commitment Act.

Exhibit 2

Florida Has Five Offices of Criminal Conflict and Civil Regional Councils



Source: OPPAGA analysis of information from the Justice Administrative Commission.

Conflict of interest is addressed in statute and outlined in further detail in the Uniform Standards for Use in Conflict of Interest Cases for both Florida's public defenders and regional conflict counsel.⁶ While other scenarios for conflict of interest occur, conflict typically occurs during the representation of two or more defendants when the public defender or regional conflict counsel determines that the interests of those accused are so adverse or hostile that they cannot all be represented by the same office. While uniform standards offer a framework for determining conflict of interest, they are not binding, and each potential conflict must be evaluated in the light of the particular facts and circumstances of a given case and individual client. A public defender or regional conflict counsel who believes they have a conflict of interest must file a motion to withdraw and request that the court appoint other counsel. The judge makes a determination, and the court may deny the motion if grounds for withdrawal are insufficient or the asserted conflict is not prejudicial to the indigent client. In cases where both the public defender and regional conflict counsel have conflicts of interest, private

⁶ Section 27.5303, F.S.

counsel may be appointed. In such cases, the court appoints private counsel from the court-appointed attorney registry.

Each judicial circuit is responsible for maintaining a registry of willing attorneys who meet the minimum requirements established by the chief judge, are available to represent indigent defendants, and are willing to enter into a contract for services. While most indigent defendants are provided representation through the three-tier system, a portion of defendants are afforded due process via Florida's indigent for costs statutory provision. In these instances, indigent defendants who are eligible for public defender representation but who are represented by private counsel or are representing themselves may request a determination that they are indigent for costs and thus eligible for provision of state-funded due process services. In these cases, family members sometimes pay the defendant's attorney costs. However, in some cases, defendants represent themselves, or attorneys provide representation pro bono or at no cost to the defendant. As the case is prepared for trial, due process service costs may be incurred by both the defense and the prosecution for expert witness evaluations, transcription of depositions (court reporting), and in some cases, language interpretation for both the defendant and witnesses.

FINDINGS

Due process services are funded through the legislative budget process; the Justice Administrative Commission is responsible for overseeing payment for certain services

The Legislature annually appropriates general revenue funds to each judicial entity that provides due process services. Additionally, it appropriates funding by case type for private court-appointed attorneys and associated due process expenses. These include civil commitment of sexually violent predators, dependent children with special needs, child dependency and civil conflict, post-conviction capital collateral cases, defendants found indigent for costs, and death penalty proceedings as a result of the U.S. Supreme Court decision in *Hurst v. Florida*.⁷ The Legislature also appropriates money to the JAC for a due process contingency fund, which is used when due process funds have been depleted before the end of the fiscal year. Total due process appropriations amounted to \$141.2 million for Fiscal Year 2019-20. (See Exhibit 3.)

⁷ *Hurst v. Florida*, 136 S. Ct. 616 (2016).

Exhibit 3

The Legislature Appropriated Over \$141 Million for Due Process Services and Private Court-Appointed Counsel in Fiscal Year 2019-20

Fiscal Year 2019-20 Appropriation	
Appropriations for Judicial Entities	
Public Defenders	\$17,598,144
State Attorneys	\$9,577,519
Office of Criminal Conflict and Civil Regional Counsel ¹	\$4,485,505
Office of Capital Collateral Regional Counsel	\$1,575,701
State Courts System ¹	\$24,143,991
Appropriations for Special Categories	
Sexual Predator Civil Commitment	\$2,250,000
Legal Representation for Dependent Children With Special Needs	\$2,115,500
Child Dependency and Civil Conflict Cases	\$14,366,133
Post-Conviction Capital Collateral Cases – Court-Appointed Attorneys	\$1,338,310
Court-Appointed Attorney Payments Over Flat Fee	\$10,667,589
Criminal Conflict Case Costs ²	\$34,792,479
Capital Resentencing for <i>Hurst v. State Cases</i>	\$250,000
Justice Administrative Commission Due Process Contingency Fund	\$1,000,000
For Fiscal Year 2018-19 Projected Deficit Related to Conflict Case and Due Process Payments	\$15,600,000
For Fiscal Year 2018-19 Projected Deficit Related to Public Defender Due Process Costs	\$1,450,000
Total	\$141,210,871

¹ Includes \$3,695,347 in funding that is passed through from the public defenders (\$2,764,890), state attorneys (\$713,523), and the special category for criminal conflict and indigent for costs cases (\$216,934) for shared court reporting or interpreter services.

² Includes funding for both private court-appointed counsel for indigent criminal defendants and due process costs for those individuals the court finds indigent for costs.

Source: 2019 General Appropriations Act, Ch. 19-115, *Laws of Florida*.

The Justice Administrative Commission (JAC) is a state entity that provides administrative services to state attorneys, public defenders, regional conflict counsel, the Office of Capital Collateral Regional Counsel (CCRC), and the Statewide Guardian ad Litem Program.⁸ These services include accounting, budgeting, financial, and human resource services.⁹ Although the JAC does not exercise any direction or control over the entities it serves, it is the mechanism by which due process costs are monitored for fiscal compliance and authorized for payment. The Legislature appropriated the JAC \$6.4 million in Fiscal Year 2019-20 to provide these services.

The JAC has statutory responsibilities related to private court-appointed conflict counsel and associated due process vendors. In Fiscal Year 2018-19, the JAC executed over 3,000 contracts with private court-appointed attorneys, indigent for costs attorneys, and due process service providers. Correspondingly, the JAC processed approximately 68,000 bills from these vendors. For these types of expenses, in addition to monitoring and processing payments, the JAC is charged with reviewing bills for completeness and compliance with contractual and statutory requirements. The attorneys

⁸ The CCRC provides representation to defendants under sentence of death who have exhausted their direct appeals and who seek to challenge the sentence on other grounds. Counsel is provided to indigent defendants free of charge, and the law provides for assessment of fees to those who are able to afford some, if not all, of the legal services. Florida law requires three CCRC offices, which are located in the northern, middle, and southern regions of the state. In some cases, the regional counsel may have a conflict of interest, in which case another regional counsel will be designated. If the replacement regional counsel also has a conflict of interest, the court will appoint private counsel.

⁹ Each year, the JAC submits a funding request to the Legislature based on projected costs for the upcoming fiscal year provided by the judicial entities it serves. Once the budget is finalized by the Legislature, the amounts appropriated for each entity are delineated in the General Appropriations Act.

who register with the court as willing to take conflict cases are required by statute to enter into a contract with the JAC and are compensated according to a schedule of flat fees listed annually in the General Appropriations Act. (See Appendix A for a listing of flat fee amounts.) The flat fees are statutorily capped, and any counsel who exceeds those limits must seek the approval of the court to allow for payment of extraordinary costs for cases that have required unusual effort. Bills that conform to the flat fee can be approved for payment by the JAC without a court order.

The JAC is also responsible for reviewing and approving payments for associated due process services for indigent for costs cases, similar to its responsibility for private court-appointed counsel. Persons seeking to be found indigent for costs must go through a formal process that includes filing a written motion with the court, submitting a completed indigent application form, and, in the case of a person represented by counsel, an affidavit attesting to the estimated amount of attorney's fees and the source of payment for those fees. Based upon its review, the court makes a determination, and if the applicant is found indigent for costs, there must be a court order so that due process expenses can be authorized for payment by the JAC. Similar to private court-appointed attorneys, private counsel representing a person declared indigent for costs must have a contract with the JAC, although the state is not paying their attorney costs. Due process cost are reimbursed at set rates, and attorneys and due process providers must follow statutory procedures and requirements regarding billing and compensation. Indigent for costs cases are growing, with 3,874 cases in Fiscal Year 2018-19 with a cost of \$6.4 million. This represents a 36% increase in the annual number of cases since Fiscal Year 2014-15.

Though several mechanisms are in place to oversee due process costs, they can exceed appropriated amounts

Florida has several mechanisms in place to manage due process costs. First, each agency that receives due process funding has established internal accountability mechanisms. Second, the JAC is statutorily authorized to oversee private court-appointed attorney and vendor contracts as well as payments and can challenge funding irregularities when they occur. Third, the judicial branch has created commissions and workgroups to develop policies related to the efficient and effective functioning of Florida's trial courts. Fourth, the Legislature created regional conflict counsels to provide predictability and contain court-appointed counsel costs. Finally, to preempt shortfalls, the Legislature established budget protocols that detail funding contingencies both within an agency's budget categories as well as across agencies. Despite these mechanisms, due process costs can be high and often unpredictable, resulting in funding shortfalls.

Each agency that receives due process funding has established internal accountability mechanisms. Each state attorney, public defender, regional conflict counsel, and the CCRC can set policies within their offices for requesting, reviewing, and approving due process service expenditures. While some variation exists, this process typically involves attorneys or investigators submitting a request and obtaining approval before incurring due process expenses. While some lower cost expenditures (e.g., transcription for a deposition) may be approved at the supervisory level, higher cost expenditures (e.g., retaining an expert witness or ordering a mental health evaluation) often require the prior approval of the state attorney, public defender, or regional conflict counsel or their designee. In some offices, the agency executive approves all due process expenses. In further efforts to contain costs, some entities may negotiate a reduced contractual rate with due process vendors such as mental health experts and court reporting firms. Once a due process expense has been approved, it is sent to the JAC for payment processing.

Along with providing administrative services for state attorneys, public defenders, regional conflict counsel, and the CCRC, the JAC functions as statewide fiscal agent for private court-appointed attorneys and due process vendors. Another mechanism for managing due process costs is the JAC, which provides a state-level entity to contract, review, and authorize payment for expenditures incurred by private court-appointed counsel and due process vendors. This allows the JAC to review the accuracy of invoices and claims and detect fraudulent behavior, such as investigators billing over 24 hours a day. Through its contracts with private court-appointed counsel and due process vendors, the JAC has direct authority to control the billing of due process expenditures. The commission can make appropriate changes to these standard contracts, resulting in potential savings and increased effectiveness. In the last five years, the JAC has approved 16 amendments to its private court-appointed attorney and due process service vendor contracts. For example, in response to private court-appointed attorneys billing for multiple hours of in-court wait time, JAC amended the contract to stipulate that the state will only pay for a half hour of an attorney's in-court wait time.

The JAC also has the authority to challenge any due process cost expenditure that is incorrect and all expenditures that exceed the flat fee rate incurred by private court-appointed counsel; over Fiscal Years 2014-15 through 2018-19, 2.6% of cases exceeded the flat fee rate. If a private court-appointed attorney exceeds the flat fee rate, the attorney must prove to the court by competent and substantial evidence that the case required extraordinary and unusual efforts. Attorneys representing the JAC are required to object to any such billing, which provides a built-in safeguard against inaccurate billing by requiring the requesting attorney to prove that it is an extraordinary case.

Moreover, the JAC has standing to appear before the court to contest any motion to declare a person indigent for costs. In reviewing the motion, the court must consider several factors, including the extent to which the person's income equals or exceeds the income criteria for indigency status, when the applicant retained private counsel, and the amount of any attorney's fees and who is paying them. Based upon its review, the court makes a determination. There must be a court order finding the defendant indigent for costs in order for due process expenses to be authorized for payment by the JAC.

State law includes funding contingencies that detail protocols in the event of a funding shortfall. In the event of a due process services funding deficit, statute provides protocols to address funding for private court-appointed counsel, state attorneys, public defenders, regional conflict counsel, and the state courts. When a shortfall in appropriations occurs for private court-appointed counsel and due process services, the JAC is required to first attempt to identify surplus funds from other contracted due process services appropriation categories within the JAC.¹⁰ If the JAC is unable to identify surplus funds from within the commission, the JAC should then inquire of each of the public defenders and regional conflict counsel as to whether any office has surplus funds in its contracted due process services appropriations categories that can be transferred. Additionally, statute provides for a contingency fund to alleviate deficits in contracted due process services appropriation categories that may occur and lead to unexpected expenditures. If no public defender or regional conflict counsel has surplus funds, the JAC can request to transfer funds from the contingency fund.

If one of the judicial entities has a funding deficit, it is required to first attempt to identify surplus funds from other appropriation categories within its office. In the event that there is no surplus within the office, the office certifies this to the JAC along with an explanation of the circumstances that led to the deficit and any steps the office has taken to alleviate the deficit. It is then up to the JAC to determine if any other state attorney, public defender, or regional conflict counsel has surplus funds in its

¹⁰ Sections 29.015, F.S.

contracted due process appropriation categories that can be transferred to the office experiencing a deficit. If no office indicates that surplus funds are available to alleviate the deficit, the JAC can request to transfer funds from the contingency fund. Similar funding contingency protocols are in place for the state court system. However, judicial circuits are required to certify the deficit to the Office of the State Courts Administrator (OSCA), which determines if surplus funds are available in another circuit. If OSCA determines surplus funds are not available in other circuits, it notifies the Trial Court Budget Commission, which may ask the Chief Justice to request a budget amendment to transfer funds from the due process contingency fund.

The judicial branch has created workgroups to oversee the state trial courts and implement efficient and cost-effective policies. In 2000, the Florida Supreme Court created the Trial Court Budget Commission (TCBC), which consists of 14 trial court judges and 7 trial court administrators who are appointed by the Chief Justice. The TCBC is charged with overseeing the preparation and implementation of the trial court component of the judicial branch budget, which offers an opportunity for trial court judges and administrators to have a voice in the budgeting process and ensures that they have confidence in a process that affects their courts. The TCBC sometimes works in conjunction with the Commission on Trial Court Performance and Accountability (TCP&A), which was established by the Florida Supreme Court in 2002 to propose procedures related to the efficient functioning of trial courts through the development of comprehensive performance measurement, resource management, and accountability programs. The TCP&A is comprised of 12 trial court judges and 4 trial court administrators. Both commissions meet multiple times a year and release reports regarding policies relevant to the efficient operation of the court system.

The Due Process Workgroup was created in 2015 as a joint effort by the TCBC and TCP&A to identify factors affecting the cost of providing expert witness, court interpreting, and court reporting services and to develop recommendations for providing due process services for the state court system. The creation of a workgroup to research and explore cost containment measures for due process costs provides an in-depth look at those expenditures and allows the court system to play a role in improving the cost effectiveness of due process services. One of the workgroup's latest recommendations involved clarifications needed to the Florida Supreme Court Statewide Rate Structure Chart for expert witnesses. This clarification would continue to provide a comprehensive policy that creates uniformity among the circuits, generates cost savings, and improves the delivery of due process services. In May 2018, the TCBC and the TCP&A approved the workgroup's recommendations and recommended approval of the revised rate structure chart. The Florida Supreme Court approved these recommendations in June 2018.

The Legislature has taken other steps to contain due process costs, including creating the regional conflict counsel. In 1998, Florida voters amended Article V of *The Constitution of the State of Florida* to require the state to assume a greater portion of the costs of operating the state's trial courts. This amendment, known as Revision 7, was intended to help ensure equity in court funding across all counties and required the shift of primary funding responsibility for the state courts system from county government to the state by July 1, 2004. Prior to that time, each of Florida's 67 counties provided conflict counsel for those deemed indigent and paid the expense for these attorneys. This resulted in county-by-county funding variations, as some counties could afford to provide better funding for these services. In 2004, the state assumed responsibility for funding private court-appointed attorneys from the registry in criminal conflict and in civil cases for which the state was required by law to provide counsel. From 2004 to 2007, a local registry system for providing legal counsel handled all such cases. The registry attorneys were selected by local indigent services

committees, which also set compensation rates for attorneys and due process providers. However, this system proved to be both expensive and difficult to manage. In the first year of implementation, the new system cost Florida \$48 million, increasing to \$68 million the next year and more than \$94 million the year after. By Fiscal Year 2006-07, the cost had grown to more than \$120 million. Because of the burgeoning cost of indigent legal services and the inability to predict or manage the year-to-year expenses of the registry system, the 2007 Legislature created the five regional conflict counsel offices to handle public defender conflicts and civil appointment and adopted a statewide flat fee compensation system for private court-appointed cases.

Most recently, the Legislature enacted additional legislation aimed at containing due process costs. The 2019 Legislature amended s. 27.40, *Florida Statutes*, to require the courts to presume flat fees are sufficient compensation and that objections made by the JAC are correct. Justification must be made in writing to overrule the JAC objections. According to the JAC, this statute creates a rebuttable presumption of correctness that would affect the course of fee hearings by placing the burden of proof onto the requesting attorney. Private court-appointed attorneys are required to establish that the case involved extraordinary and unusual effort, which provides an extra layer of scrutiny when any attorney seeks compensation in excess of the flat fee. In addition, the 2019 Legislature also required public defenders and regional conflict counsel to certify to the court in writing the reason for a conflict of interest in the case and to submit this information to the JAC quarterly.¹¹ This may help reduce the number of cases in which private attorneys are appointed by decreasing the number of conflict cases referred to regional conflict counsel and then to private court-appointed attorneys.

Despite these mechanisms, due process costs can still be high, especially for death penalty cases.

Due process expenditures can be unpredictable from year to year, as variations in legal practices and certain case types can substantially increase costs. Due to the factors discussed below, the JAC exhausted the Fiscal Year 2018-19 funding appropriated by the Legislature to pay for private court-appointed attorneys and due process expenditures in April 2019, before the end of the state fiscal year in June. As a result, payment of these costs was temporarily delayed. The Legislature approved \$15.6 million in supplemental funding to address this shortfall, and payments resumed in July 2019.

Florida judicial system stakeholders we spoke with agreed that death penalty cases are the most expensive case type. These cases are usually intensive with regard to attorney time, which often leads to extraordinary cost. As shown in Exhibit 4, in Fiscal Year 2018-19, \$7.6 million of extraordinary costs were related to death penalty cases.

¹¹ Section 27.40, *F.S.*

Exhibit 4

Extraordinary Cost Cases by Judicial Circuit by Case Type, Fiscal Year 2018-19¹

Circuit	Capital	Racketeer Influenced and Corrupt Organizations (RICO)	Other ²	Total
First	\$33,226	\$0	\$12,835	\$46,061
Second	\$6,773	\$0	\$9,188	\$15,961
Third	\$0	\$0	\$0	\$0
Fourth	\$561,789	\$26,540	\$266,261	\$854,590
Fifth	\$523,177	\$0	\$198,200	\$721,377
Sixth	\$500,911	\$0	\$83,471	\$584,381
Seventh	\$83,185	\$0	\$90,317	\$173,502
Eighth	\$83,876	\$4,350	\$38,668	\$126,894
Ninth	\$53,764	\$172,495	\$23,135	\$249,394
Tenth	\$499,406	\$2,530	\$86,585	\$588,521
Eleventh	\$2,344,556	\$115,955	\$1,221,710	\$3,682,221
Twelfth	\$193,305	\$0	\$23,028	\$216,332
Thirteenth	\$51,738	\$162,208	\$139,594	\$353,540
Fourteenth	\$0	\$0	\$0	\$0
Fifteenth	\$258,264	\$0	\$121,086	\$379,350
Sixteenth	\$0	\$0	\$0	\$0
Seventeenth	\$1,988,359	\$100,618	\$636,866	\$2,725,843
Eighteenth	\$361,628	\$0	\$37,121	\$398,748
Nineteenth	\$49,270	\$0	\$27,810	\$77,080
Twentieth	\$26,445	\$524,040	\$364,671	\$915,156
Total	\$7,619,671	\$1,108,735	\$3,380,544	\$12,108,950

¹ This table does not include the flat fee portion of the attorneys' fees.

² The other case type category includes all other types of criminal cases, the most expensive of which are first degree and life felonies.

Source: Justice Administrative Commission.

In addition, death penalty cases typically require a multi-person legal team, court reporters, forensic experts, investigators, and mitigation specialists.¹² Also, expert witnesses are often engaged to speak to the defendant's mental health or intellectual abilities. Stakeholders reported that the number of expert witnesses per capital felony cases has increased, and their expertise has become more specialized; both situations lead to higher costs. For example, brain injury science and its effect on offender behavior is being introduced more often. There is a limited number of these experts, and, according to stakeholders, their hourly fees can be \$350 or higher, and may also require additional travel expenses.

In the last four years, the high and unpredictable cost of Florida's capital cases was further exacerbated by *Hurst v. Florida*, a U.S. Supreme Court case that invalidated Florida's death penalty statute. Decided in January 2016, the U.S. Supreme Court held that Florida's capital sentencing scheme, under which an advisory jury made a recommendation to a judge, and the judge made the critical findings needed for a death sentence, violates the Sixth Amendment right to a jury trial. These cases had to wait to be retried until March 2017, when the Florida Legislature amended its capital sentencing law to conform to *Hurst*. In addition, there were death penalty cases that were awaiting trial or sentencing during the

¹² Mitigation specialists examine defendants' family history, medical history, educational and employment background, and any other element of an individual's life that may convince the jury to return a sentence other than death.

fourteen months Florida did not have a valid death penalty statute. Many of these cases are still in the process of resentencing.

A second contributor to increased due process costs in recent years is juvenile resentencing related to the 2010 U.S. Supreme Court case, *Graham v. Florida*, where the court found that the Eighth Amendment prohibits a sentence of life in prison without the possibility of parole for juveniles convicted of non-homicide crimes.¹³ In 2012, *Miller v. Alabama* extended the reasoning of *Graham* and adopted a categorical Eighth Amendment ban on the imposition of a mandatory life sentence without the possibility of parole for juveniles. In 2016, in *Atwell v. State*, the Florida Supreme Court held that the state's parole system, as set forth by statute at the time of Atwell's sentencing, did not provide for individualized consideration of the defendant's juvenile status at the time of their offense, as required by *Miller*.

As shown in Exhibit 5, costs for these cases have steadily increased, along with the number of *Hurst*, *Graham*, and *Miller* case filings, resulting in over \$4 million paid for such cases in the last five years.

Exhibit 5

Increasing Number of *Hurst*, *Graham*, and *Miller* Case Filings Involving Private Court-Appointed Attorneys Have Cost Over \$4 Million in the Last Five Years

Fiscal Year	Number of <i>Graham</i> , <i>Miller</i> , and <i>Hurst</i> Cases	Total Amount Paid
2014-15	6	\$83,045
2015-16	22	\$197,329
2016-17	64	\$607,840
2017-18	111	\$1,390,388
2018-19 ¹	148	\$2,005,349
TOTAL	351	\$4,283,952

¹ Data for Fiscal Year 2018-19 is through August 26, 2019.

Source: Justice Administrative Commission.

Indigent defense and funding takes various forms in other states; certain mechanisms may provide opportunities for due process cost containment in Florida

The 1963 ruling in the U.S. Supreme Court case of *Gideon v. Wainwright* indicates that under the Sixth Amendment of the Constitution, states are required to provide an attorney to those individuals accused of a crime but unable to afford an attorney. However, there have been no guidelines for states to meet this constitutional obligation. Consequently, the manner in which states organize and manage indigent defense and due process rights can vary widely from state to state. To gather information about other states' due process funding, OPPAGA conducted telephone interviews with 12 states, the majority of which have a unified court structure, similar to that of Florida.¹⁴

Other states have various models for the structure and funding of indigent defense. Within the different models for indigent representation among states, a key distinction is whether there is a statewide system in which the entire state follows a similar format or whether local jurisdictions determine how indigent defense is carried out. Similar to Florida, nine of the states interviewed

¹³ *Graham v. Florida*, 560 U.S. 48 (2010).

¹⁴ Alaska, Kentucky, Missouri, New York, North Carolina, North Dakota, Rhode Island, Tennessee, Texas, Virginia, Vermont and Wisconsin.

employ statewide systems.¹⁵ In general, statewide systems fund 100% of indigent defense; this is the case in Florida. However, North Carolina and Tennessee also receive a small portion of funding from wealthier counties. Alternatively, states such as Texas require counties to provide the majority of funding, while the state provides a smaller percentage (14%). In this system, not all counties have access to designated public defender offices.

Four states receive the majority of their due process funding from the state's general revenue fund. Seven other states also have due process payments funneled through an office other than that of the public defender. Of these states, four have payments processed through a central office similar to the JAC in Florida.¹⁶ The three remaining states have payments processed through the courts.¹⁷

Indigency determination can vary by state. For example, Wisconsin's indigency determination guidelines are set in state statute and suggest eligibility up to 115% of the 2011 poverty guidelines as well as an income and assets test that takes into account several factors, such as whether the defendant has equity in a home or owns a vehicle.¹⁸ However, in other states (e.g., Tennessee), defendants simply complete an affidavit and a judge questions the defendant without any formal investigation; this action is completed at arraignment and leads to 80% of defendants being deemed indigent. Overall, the general practice of states is for indigency to be determined at the court level using state standards. In Texas, however, each county sets its own standards for indigency determination.

While Florida's indigent for costs statute provides funding for due process costs for indigent defendants who have paid for private counsel, other states vary in whether they have such laws. Five of the states we spoke with indicated that they do not have such a provision, and the other seven states reported that they have a provision or it is possible for them to provide due process funding for indigent defendants who have private counsel. Alaska has taken the position that a defendant does not qualify for due process funding if their public defender's office is not handling the case. In Florida, stakeholders reported that indigent for costs has become a business model for some private attorneys to have their clients' litigation costs funded by the state. Missouri constrains the cost of litigation expenses via state rule, whereby private attorneys representing indigent defendants must request coverage of reasonable litigation expenses through the Office of State Public Defender.¹⁹ Those expenses will only be covered if they do not exceed what the office would normally pay in a similar case or does not significantly exceed that amount. In Florida, these expenses are approved by a judge prior to submission to JAC for their review and authorization for payment.

Four states we interviewed have a two-tier system and contract out to private attorneys if the public defender's office has a conflict. Only two states (Wisconsin and Vermont) have three-tier conflict schedules similar to Florida. For example, Wisconsin uses staff attorneys if there is a conflict with the public defender's office, and if there is second conflict, they utilize private attorneys. In Vermont's system, if a public defender has a conflict, the state has contract attorneys who are paid a flat rate per year to take a certain percentage of a jurisdiction's cases.²⁰ This is different from Florida's private court-appointed counsels, who are paid per case. If Vermont's contract attorneys have a conflict, the state has ad-hoc private attorneys at the third tier who are paid an hourly rate. Vermont attempts to minimize use of ad-hoc attorneys (since these are some of their highest costs) by increasing the amount of contract

¹⁵ Alaska, Kentucky, Missouri, North Carolina, North Dakota, Rhode Island, Tennessee, Vermont, and Wisconsin.

¹⁶ Alaska, New York, North Carolina, and Tennessee.

¹⁷ Kentucky, Rhode Island, and Virginia.

¹⁸ Section 977.07, *Wisconsin Statutes*.

¹⁹ 18 CSR 10-4.010 Payment of Private Counsel Litigation Costs.

²⁰ Attorneys enter into an annual contract to take on a full-time caseload for \$75,000, paid in monthly increments. The number of cases can expand or contract over the course of the year, but the flat fee typically remains the same.

attorneys they utilize at an annual flat rate and ensuring fewer ad-hoc attorneys are needed; this approach provides greater budget predictability. Vermont staff reported that since increasing the use of annual contract attorneys, they have not exceeded their budgetary allotment for indigent defense.²¹

Other states have implemented due process cost containment mechanisms. States we spoke with reported that generally, costs of due process services are increasing. The consensus among these states is that the highest level of indigent costs on a per case basis comes from capital cases. More specifically, the majority of states with a death penalty (5 out of 6) identified capital cases as having the highest per case costs.²² Among non-death penalty states, two (Wisconsin and Rhode Island) suggested that homicide or murder cases have the highest per case costs. Two states (Tennessee and Wisconsin) specified investigation costs as a driver for increased due process costs. Conversely, Texas suggested that its costs have decreased due to fewer cases being filed. However, the state also noted that in many counties within the state, indigent defense does not meet the constitutional requirements of due process representation.

One trend in state responses to increased due process costs is fee management. Two states (Kentucky and Rhode Island) indicated that ensuring private entities, such as attorneys and investigators, are not overcharging for their services is a cost containment strategy. For example, Rhode Island found that private attorneys were billing far over the allowed amount under its old paper-based system of billing; the state has switched to an electronic system with built in stopgaps to detect any misuse. New York recently created the Office of Indigent Legal Services, which ensures that money is being appropriately spent in accordance with professional standards. The office provides funding to counties via contracts, which are implemented with a budget and work plan and are monitored by the office to ensure the money is spent consistent with contract requirements.

When comparing all 50 states (and the District of Columbia), only Florida and six other states have a flat fee system for private court-appointed counsel.²³ Forty-one states (including Florida) have cap limits, but eight states have not instituted cap limits. There are provisions included for exceeding the set cap limit in Florida statute; 17 other states also have provisions for cases in which the cap limit is exceeded.²⁴ Eleven states (excluding Florida) have fees that are set by their court system. While most states have caps, they vary significantly in the cap amount and whether they stipulate an hourly rate or a flat rate up to the cap (as Florida does). In addition, states vary in the extent to which they disaggregate the cap for different types of crime. For example, some states simply differentiate between misdemeanor and felony cases, while other states break the cases down further. Florida distinguishes its flat fees in the following manner: capital: \$25,000; life felonies: \$9,000; noncapital, nonlife felonies: \$6,000; misdemeanors & juveniles: \$1,000; and appeal: \$9,000. Including Florida, 19 states have additional categories for their caps beyond simply misdemeanor and felony.

Comparing Florida's flat fees or cap amounts to those of other states can prove difficult due to the different manner in which states classify categories for caps. For example, Alaska distinguishes misdemeanor caps based on whether there was a guilty plea, no contest plea, or a dismissal, all of which have a cap of \$400. However, misdemeanors that go to trial have a cap of \$800. As mentioned previously, Florida simply identifies whether the case is a misdemeanor and does not distinguish further.

²¹ Prior to this implementation, Vermont's General Defense Office had exceeded their budget due to ad-hoc attorney costs.

²² Kentucky, Missouri, North Carolina, Tennessee, and Texas.

²³ Louisiana, Missouri, New Mexico, and Oklahoma.

²⁴ Section 27.5304, F.S.

Florida's uniform indigent defense model has advantages compared to other state models, but there are opportunities for improvement. Compared to other states, Florida's system of indigent defense has multiple attributes that contain due process costs while preserving the rights of indigent persons entitled to legal counsel in criminal and civil cases. These attributes include having

- a single fiscal agent with review and challenge authority;
- budget line item allocation of due process services providing funding transparency for agencies that utilize due process services as well as private court-appointed attorneys;
- statutory funding protocols that allow for flexibility within and among agencies to respond to unpredictable due process expenses;
- statutory caps on private court-appointed attorneys and due process service vendor fees; and
- a three-tiered criminal defense model that provides greater predictability in funding conflict cases.

However, mechanisms in other states may provide potential options for Florida to further predict and contain due process costs. Some of these options may require authorization or implementation by the state courts system.

In most cases, flat fees for registry attorneys help contain costs and provide predictability. According to JAC staff, 97% of fees for registry attorneys in criminal conflict cases from Fiscal Years 2014-15 through 2018-19 are billed at the flat fee; only 2.6% were found by the courts to be extraordinary and unusual, requiring payment over the flat fee. However, in Fiscal Year 2018-19, these extraordinary attorneys' fees accounted for \$17 million or 37% of costs in criminal conflict cases. The most costly criminal case type for extraordinary payments are capital cases. Other states have mechanisms in place to mitigate the costs related to these types of cases. Five states (Georgia, Mississippi, Missouri, North Carolina, and Texas) have agencies that are specifically assigned to represent indigent defendants in capital cases. For example, Mississippi's Capital Defense Division was created to relieve the financial burden that death penalty cases pose to local governments. In North Carolina, the Office of the Capital Defender oversees and approves expenses incurred by private counsel representing capital defendants. Texas's Regional Public Defender for Capital Cases was designed to provide small to midsize counties a cost-effective way to obtain qualified counsel. The office is funded by counties that choose to participate; these counties pay annual premiums based on population and average yearly capital case filings as a percentage of all county filings.

To address extraordinary costs associated with private court-appointed attorneys in death penalty cases, the Legislature may wish to establish regional capital counsels. Florida stakeholders reported that death penalty cases are the most expensive, typically requiring multiple experts and being highly intensive with regard to attorney time. According to the JAC, in Fiscal Year 2018-19, 63% of extraordinary cost cases were for court-appointed counsel in death penalty cases. Creating regional counsels would redirect Criminal Conflict and Civil Regionals' capital conflict cases from private court-

OPTIONS FOR LEGISLATIVE CONSIDERATION

- Establish regional conflict counsels specifically for capital cases
- Create reporting requirements to facilitate comparing Florida's indigent defense costs to those of other states
- Modify contractual terms with private court-appointed counsel
- Direct judicial stakeholders to convene a workgroup to develop guidelines that limit the number of expert witnesses by case type
- Require further verification of information contained in applications for indigent status

appointed attorneys, who often exceed the statutory flat fee, to a regional capital counsel office with budgeted staff attorneys, investigators, and mitigation specialists. Establishing regional offices for capital conflict cases, similar to the establishment of regional conflict counsels, could introduce more predictability by reducing the number of extraordinary cases, bringing expert witness expenditures under internal agency review, and ensuring budget accountability mechanisms like the public defenders and regional conflict counsels.²⁵

The Legislature may also wish to consider creating reporting requirements to facilitate comparing Florida's indigent defense costs to those of other states. For example, the Legislature could require a report that provides a state comparison of private court-appointed attorney rates for indigent defense. Virginia's Indigent Defense Commission is charged with providing legal representation for indigent defendants accused of crimes that have the possibility of incarceration or death. As part of its annual report, the commission is statutorily required to provide the State General Assembly data on how Virginia compares to other states for indigent defense costs; data includes a 50-state table of hourly rates, caps, and rate authority for indigent defense costs. The Legislature could require that JAC, in its role as fiscal agent, provide similar data as part of its annual legislative budget request to assist in establishing maximum flat rate fees for private court-appointed counsel for the upcoming fiscal year.

The Legislature could also consider modifying the contractual terms with private court-appointed counsel. Currently in Florida, private court-appointed attorneys are paid a flat fee per case. However, other states and jurisdictions use a variety of contracts to provide indigent defense services; these contract types include fixed-fee and flat-fee for a specific number of cases. For example, Oklahoma and New Mexico generally utilize flat-fee contracts, while Montana's statute simply allows for fixed-fee contracts. Fixed-fee contracts specify the total amount of compensation the attorney will receive for work on all cases assigned during a specified contract period. The number of cases assigned is not capped, and attorneys are expected to accept all (or a specified percentage of) appointments that arise in the jurisdiction, except those in which there is a conflict of interest. Contracts that are flat-fee for a specific number of cases pay the attorney a flat fee for work completed based on the specific number of cases the attorney agrees to accept during the contract period. In jurisdictions using fixed-fee and flat-fee-specific number of cases contracts, the total costs associated with representation is largely known and less susceptible to fluctuations or peculiarities in charging practices, caseloads, or case type during the course of the contract.

To bring expert witness costs associated with indigent for costs counsels into alignment with public defender and regional conflict counsel expenditures, the Legislature may wish to convene a workgroup that includes judges, public defenders, regional counsels, and private court-appointed attorneys to develop guidelines that limit the number of expert witnesses by case type. While the Legislature has established rates for some types of expert witnesses, no such guidelines have been established for the number of experts that can be utilized in indigent for costs cases. As a result, expert witness costs for these cases may exceed what public defender and regional counsels would have approved and utilized for the case. According to the JAC, case law has established that an indigent defendant represented by privately retained counsel remains eligible for the provision of due process costs through the state.

²⁵ In response to the extreme costs of death penalty cases sent to private court-appointed attorneys, the Second District Regional Conflict Counsel has created a proposal for a Cross Jurisdictional Death Penalty Program. The program would allow the Second District Regional Conflict Counsel to take conflict cases in Orlando and Ocala in an attempt to provide death penalty litigation at reduced costs, when compared to private court-appointed counsel, while still ensuring effective representation. The Second District Regional Conflict Counsel is interested in housing the program with community partners, such as state colleges and universities, to further contain costs and provide educational opportunities for students.

Although the state is not obligated to provide a defendant with services that a wealthier defendant might elect to purchase, a defendant represented by privately retained indigent for costs counsel is entitled to the same services that the defendant would receive if represented by the public defender or other court-appointed counsel. However, according to JAC data, private attorneys in the small number of indigent for costs cases disproportionately consume due process funds compared to private court-appointed attorneys. Over the last five years, expenses for the average indigent for costs case has exceeded cost averages for private court-appointed counsel for certain case types, such as criminal traffic, second degree felony, and juvenile delinquency first degree felony. One would expect indigent for costs cases to have lower average expenditures across all case types, as the state is not responsible for funding attorney fees. JAC staff also reported that the agency has no mechanism for denying payment for expert witnesses hired by indigent for costs attorneys because this is the purview of the courts. Although the JAC does review due process vendor billings for compliance with contractual and statutory requirements, the courts ultimately determine the rates allowable by experts. Unlike requests for experts generated by attorneys within the public defender and regional conflict counsel offices, indigent for costs expenditures are approved by court order and are not subject to established internal agency accountability mechanisms.

The Legislature could also consider requiring further verification of the information contained in applications for indigent status. Lack of verification can lead to non-indigent defendants accessing states' indigent defense systems. Other states, such as Tennessee and Rhode Island, indicated that their indigency determination process was similar to or less stringent than Florida's approach, and one of the areas that needed improvement was the verification of information used to determine a person's indigent status. Legal stakeholders in Florida have expressed similar concerns. Although s. 29.016(2), *Florida Statutes*, emphasizes that the determination of indigent status is a ministerial act of the clerk of the court, the statute does allow some investigation of the applicant's reported information. For example, the clerk may review county property records and state motor vehicle title records and use such data when making a determination of indigency; however, this type of review is not statutorily required. The clerk is further authorized to contract with third parties to perform those functions assigned to the clerk for the review of information provided in indigent status applications. The Legislature could consider statutorily requiring the clerks to perform additional investigation to help ensure the state is not paying costs for non-indigent defendants.

AGENCY REVIEW

In accordance with the provisions of s. 11.51(2), *Florida Statutes*, a draft of OPPAGA's report was submitted to the Justice Administrative Commission and to the Office of State Courts Administrator for review.

APPENDIX A

Maximum Flat Fee Rates for Conflict Cases

Exhibit A-1

Maximum Flat Fee Rates for Criminal and Civil Conflict Cases

Criminal Case Type	Maximum Flat Fee Amount
Post-Conviction, Rules 3.850, 3.801, & 3.800 Florida Rules of Criminal Procedure	\$1,250
Capital, First Degree Murder (Lead Counsel)	\$25,000
Capital, First Degree Murder (Co-counsel)	\$25,000
Capital, First Degree Murder (Non-death)	\$15,000
Capital Sexual Battery	\$4,000
Capital Appeals	\$9,000
Contempt Proceedings	\$500
Criminal Traffic	\$500
Extradition	\$625
Felony, Life	\$5,000
Felony, Life (RICO)	\$9,000
Felony, Noncapital Murder	\$15,000
Felony, Punishable by Life	\$2,500
Felony, Punishable by Life (RICO)	\$6,000
Felony, First Degree	\$1,875
Felony, First Degree (RICO)	\$5,000
Felony, Second Degree	\$1,250
Felony, Third Degree	\$935
Felony Or Misdemeanor, No Information Filed	\$500
Felony Appeals	\$1,875
Juvenile Delinquency, First Degree Felony	\$750
Juvenile Delinquency, Second Degree Felony	\$500
Juvenile Delinquency, Third Degree Felony	\$375
Juvenile Delinquency, Felony Life	\$875
Juvenile Delinquency, Misdemeanor	\$375
Juvenile Delinquency, Direct File or No Petition Filed	\$375
Juvenile Delinquency Appeals	\$1,250
Misdemeanor	\$500
Misdemeanor Appeals	\$935
Violation of Probation or Community Control, Felony	\$625
Violation of Probation or Community Control, Misdemeanor	\$375
Violation of Probation or Community Control, Juvenile Delinquency	\$375
Civil Case Type	Maximum Flat Fee Amount
Admission of Inmate to Mental Health Facility	\$300
Adult Protective Services Act, Ch. 415, <i>F.S.</i>	\$500
Baker Act/Mental Health, Ch. 394, <i>F.S.</i>	\$400
Children and Families in Need of Services, Ch. 984, <i>F.S.</i>	\$750
Civil Appeals	\$400
Dependency, Up to One Year	\$800
Dependency, Each Year After First Year	\$200
Dependency, No Petition Filed or Dismissed at Shelter	\$200
Dependency Appeals	\$1,000
Developmentally Disabled Adult, Ch. 393, <i>F.S.</i>	\$400
Emancipation, s. 743.015, <i>F.S.</i>	\$400
Emergency Guardianship, Ch. 744, <i>F.S.</i>	\$400
Guardianship, Ch. 744, <i>F.S.</i>	\$400
Marchman Act/Substance Abuse, Ch. 397, <i>F.S.</i>	\$300
Medical Procedures, s. 394.459(3), <i>F.S.</i>	\$400
Parental Notification of Abortion Act	\$400
Termination of Parental Rights, Up to One Year, Ch. 39, <i>F.S.</i>	\$1,000
Termination of Parental Rights, Each Year After First Year	\$200
Termination of Parental Rights, Up to One Year, Ch.63, <i>F.S.</i>	\$1,000
Termination of Parental Rights, Each Year After First Year	\$200
Termination of Parental Rights Appeals	\$2,000
Tuberculosis, Ch. 392, <i>F.S.</i>	\$300

Source: *Florida Statutes*.

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