

TO: Chief Judges
Trial Court Administrators
Clerks of the Court

CC: Public Defenders
Criminal Conflict and Civil Regional Counsel

FROM: Stephen Presnell, General Counsel
Justice Administrative Commission

DATE: March 25, 2009

RE: Court-Appointed Counsel and IFC Cases

Background

The Justice Administrative Commission (JAC) receives numerous calls from private court-appointed registry counsel (CAC), due process vendors including court reporters (vendors), private attorneys with a client indigent for costs (IFC), and others regarding the court orders and other documentation required for payment purposes. Under section 27.5304, F.S., as part of its review process, JAC must verify compliance with statutory and contractual requirements.

JAC staff has noted several common issues that may delay payment of vendors and attorneys. These issues include:

- 1. No finding in the Order of Appointment regarding whether the Office of Criminal Conflict and Civil Regional Counsel (Regional Counsel) withdrew or had a conflict of interest precluding appointment to the case;**
- 2. Appointment of an attorney who is not included on the circuit registry without any finding or other explanation regarding why a registry attorney was not appointed;**
- 3. Missing IFC documents required under Florida law; and**
- 4. Orders for due process services that lack essential information such as specific services approved, authorized rates for the services, and maximum amounts authorized for each service.**

Confusion regarding these statutory and contractual requirements increases the burden on JAC's limited resources and can result in delay of payments and increased workload on the part of the attorneys, vendors, and the courts.

Florida law requires that the courts must appoint Regional Counsel before considering appointing private counsel. Regional counsel are authorized to accept appointment to the same

types of cases as the public defenders as well as other civil cases such as dependency where an indigent person is entitled to appointed counsel under the federal or state constitutions or as authorized by general law. See §§ 27.40, 27.51, 27.511, 29.006, & 29.007, F.S.

Pursuant to s. 27.40(5), F.S., JAC has approved uniform contracts, forms, and procedures for payment of attorney fees and due process services for CAC, IFC, and pro se defendants. JAC may only pay attorneys and vendors who have executed the appropriate contract and have submitted billings that comply with statutory and contractual requirements and procedures.

Orders of Appointment to Private Court-Appointed Counsel – Registry Attorneys

In order for JAC to pay a private court-appointed attorney, the order of appointment must reflect why Regional Counsel was not appointed to the case. The order should either indicate Regional Counsel was allowed to withdraw or Regional Counsel had a conflict precluding representation. - When the order of appointment lacks such a finding, court-appointed counsel must obtain an amended order addressing this matter before JAC can process his or her billing for payment.

Sections 27.40, 27.51, 27.511, and 27.5303, F.S., address appointment of the PD and Regional Counsel in those cases where provision is made for court-appointed counsel. If the PD withdraws or has a conflict, the court must appoint the Regional Counsel. If the PD is not authorized to provide representation, then Regional Counsel must be appointed (a limited exception is found in s. 27.511(6)(c), F.S., for chapter 744 proceedings).

Sections 27.40 and 27.5303, F.S., outline the mechanism by which a court appoints attorneys in those cases for which a person is entitled to court-appointed counsel. If the Regional Counsel moves to withdraw due to a conflict, the court may appoint private counsel. See § 27.5303(1)(b), F.S. See also § 27.40(2)(a), F.S. The court also has the discretion to appoint private counsel “when the facts developed upon the face of the record and court files in the case disclose a conflict of interest.” § 27.5303(1)(c), F.S.. In such circumstances, the order must specify the basis of the conflict. See id.

If a trial court appoints a private attorney in a case for which Regional Counsel did not withdraw or was otherwise found to have a conflict, then JAC would be unable to pay the attorney for any work completed on the case. JAC has no authority to pay private counsel unless Regional Counsel has withdrawn or was found to have a conflict. Pursuant to JAC’s Agreement for Attorney Services, a court-appointed attorney is responsible for verifying that, as applicable, the Public Defender and Regional Counsel have properly withdrawn from the case.

In order to ensure expeditious payment for private court-appointed counsel, the appointment, withdrawal, and conflict of Regional Counsel should be addressed in the order appointing private counsel. When the order does not contain such findings, the private attorney typically has to obtain an amended order of appointment to address the deficiencies before he or she can be paid.

Orders of Appointment to Private Court-Appointed Counsel – Non-Registry Attorneys

Additionally, there have been instances in which trial courts appointed an attorney not included in the registry for the circuit. In addition to the findings discussed above, the order must also reflect why the court appointed an off-registry attorney. If there are no registry attorneys

available for representation for the case, Florida law authorizes a court to appoint an attorney who is not on the registry. See § 27.40(7)(a), F.S. However, the order of appointment, must address why registry counsel was not appointed. “An attorney appointed by the court who is not on the registry list may be compensated under s. 27.5304, F.S., if the court finds in the order of appointment that there were no registry attorneys available for representation for that case.” Id.

In such circumstances, the attorney will need to enter into a non-standard agreement for a single court appointment with JAC in order to receive compensation for attorney’s fees, costs or related expenses. In particular, JAC cannot pay any due process providers such as court reporters until the attorney executes the contract. If the order of appointment addresses the need to enter into a contract with JAC, then the attorney will be notified of this requirement and can act accordingly.

Indigent for Costs

There are specific statutory requirements for a privately retained attorney to have his or her client declared indigent for costs. See §§ 27.52(5), 57.082, F.S. In particular, section 27.52(5), F.S., provides, when determining whether an individual qualifies as indigent for costs, certain documents must be filed with the court. These include a completed clerk’s application for indigency and an affidavit attesting to the estimated amount of attorney fees and the source of payment for these fees. The court must consider this information in assessing whether a defendant is indigent for costs. Section 27.52(5)(d), F.S., also provides that provision of due process services must be pursuant to court order.

Because JAC is required to verify compliance with statutory requirements, an attorney must provide JAC with copies of any statutorily mandated documents before JAC can process billings for payment. These documents include the motion to declare the defendant indigent for costs, the clerk’s application, the affidavit on attorney’s fees, and the order declaring the defendant indigent for costs. Additionally the charging document must be provided. In many instances, particularly when the IFC motion is made *ore tenus*, JAC has great difficulty obtaining those documents from the attorney. This has resulted in delays in payment for due process providers such as court reporters. In some instances, court reporters have become reluctant to provide services in IFC cases because of delays in payment.

When an attorney intends to seek payment of due process costs through JAC, then JAC is entitled to notice and an opportunity to be heard before a court declares the defendant indigent for costs. A copy of the motion with the attachments should be served on JAC prior to a court considering the motion. When JAC receives such a motion, JAC files an appropriate response addressing the requirements to have a defendant declared indigent for costs. When JAC participates in the process, the documentary requirements are typically satisfied. As a matter of course, JAC staff acts diligently to obtain those documents and, if those documents are not forthcoming, JAC requests to participate in the hearing on the motion.

Another issue that often causes problems is the requirement that a privately retained attorney execute the JAC contract for IFC cases. See §§ 27.52(5)(d), 29.007, F.S. Many attorneys fail to execute this contract. Until the attorney executes this contract, JAC cannot process any billing for payment whether from the attorney or from a due process vendor. If the courts include language in the order finding a defendant indigent for costs regarding the requirement to enter into a contract with JAC, this could be helpful in reducing this problem as well.

Motions and Orders for Services

JAC pays for due process services in private court appointed and IFC cases. As a general rule, motions and court orders are required for due process services unless the circuit allows for some services such as investigative fees to be obtained without the need for prior court approval. Before any due process service is approved in a private court-appointed or IFC case, JAC is entitled to notice and an opportunity to be heard. A copy of the motion should be served on JAC at least 5 days prior to any hearing on the motion. The motion should identify the services requested and the amounts requested for those services.

If a court grants such a motion, the order should specify the services approved, rates authorized for each service, and maximum amount authorized for each service. When the order contains this information, then JAC may administratively pay invoices that comply with the terms of the court's order and statutory and contractual requirements. Otherwise, the attorney will need to obtain supplemental orders before JAC can approve an invoice for payment. By including this information in the initial order authorizing the services, the court would be facilitating prompt payment of due process providers without the need for additional motions and orders.

The maximum rates for services are specified annually in the General Appropriations Act. See § 27.425, F.S. Currently, the rates in effect cannot exceed the rates in effect as of June 30, 2006.

The rates established by law can only be exceeded by order of the court approving a higher rate. The JAC contract, policies, and procedures address this requirement and provide, in order to exceed the authorized rates, counsel must demonstrate in the motion that he or she made a diligent effort to find a vendor at the statutorily authorized rates. Additionally, counsel must make a diligent effort to find local or in-state providers before seeking out-of-state providers. JAC objects to use of out-of-state providers absent a showing that there no competent providers available in Florida. Out-of-state providers typically increase the pressure on state resources due to increased costs for travel expenses and travel time.

Additional Information

Additional information, contracts and other forms are available on the JAC website: www.justiceadmin.org, by selecting the appropriate topic under the sections for Court-Appointed Counsel, or Indigent for Costs. Many of the issues are also addressed in the FAQ's (Frequently Asked Questions) accessible from the homepage.

We hope this is helpful. If you have any questions please do not hesitate to contact me: email – stephenp@jac.state.fl.us, or by phone toll-free – 866-355-7902.

Stephen M. Presnell

General Counsel