EXPERT WITNESSES
IN FLORIDA’S TRIAL COURTS

Recommendations from the
Joint Due Process Workgroup
of the Trial Court Budget Commission and the
Commission on Trial Court Performance and
Accountability

November 2016
DUE PROCESS WORKGROUP MEMBERS

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The Honorable Diana L. Moreland, Circuit Court Judge, Twelfth Judicial Circuit, Chair of the Commission on Trial Court Performance and Accountability and Chair of the Due Process Workgroup

The Honorable John K. Stargel, Circuit Court Judge, Tenth Judicial Circuit, Chair of the Due Process Workgroup

The Honorable Fredrick Lauten, Jr., Chief Judge, Ninth Judicial Circuit

The Honorable Margaret Steinbeck, Circuit Court Judge, Twentieth Judicial Circuit

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EXECUTIVE SUMMARY

Recognizing a trend over the last few years of increasing due process contractual expenditures, with significant increases in court interpreting and expert witness expenditures, Judge Mark Mahon, then-chair of the Trial Court Budget Commission (TCBC), and Judge Diana Moreland, chair of the Commission on Trial Court Performance and Accountability (TCP&A), established the joint Due Process Workgroup (Workgroup) in the summer of 2015. The Workgroup was tasked with identifying factors affecting the cost of providing court reporting, court interpreting, and expert witness services and developing comprehensive fiscal and operational recommendations for the provision of all services.

The Workgroup developed a work plan to examine the delivery of services in relation to the current standards and best practices; review the efficiency and effectiveness of service delivery methods, given current funding levels; develop recommendations for fair allocation of resources and containment of costs; develop recommendations relating to statutory, rule, or other policy changes; and determine an appropriate level of resources.

Due to the significant increase in expenditures from FY 2013-14 to FY 2014-15 (an increase of approximately 16 percent) and concerns regarding changes in practices by other stakeholders, expert witness was determined as the first element to be addressed.

The Workgroup held several meetings, both in-person and telephonically, from November 2015 through November 2016, in a continual effort to collect data, review administrative policies and procedures, and develop operational and statutory solutions. Findings from the Workgroup’s research, analysis of invoices, and survey data are discussed in the following sections of the report.

Based on the thorough review of information related to expert witnesses and many discussions on current practices of appointing and managing expert witness resources, the Workgroup developed recommendations for administrative, fiscal, operational, policy, and statutory solutions in order to improve the processes for appointing experts and containing costs.

Administrative Solutions

The Workgroup recommended three administrative solutions to improve the contracting, payment, and data collection related to expert witnesses. Specifically, the Workgroup recommended:

- Revising the Statewide Uniform Expert Witness Invoice. This recommendation was approved and implemented as a requirement in July 2016.

- Revising the Uniform Data Reporting (UDR) System, including updating the web-based reporting system and instructions, and recommending training and data quality audits on the system. This recommendation was approved and implemented in July 2016.

- Developing a uniform contract for expert witness services. This recommendation was referred to the Office of the State Courts Administrator for implementation. A contract template is under development.
Fiscal Solutions

The Workgroup recommended two fiscal solutions to better identify payment responsibility for expert witness services, improve communication across the state for interested parties, and ensure more consistency in the amount of fees paid by the courts to the expert witnesses. Specifically, the Workgroup recommended:

- Updating the *Payment Responsibility – Expert Witness* matrix. A revised version of the matrix was approved by the TCBC and TCP&A and disseminated to the circuit chief judges in August 2016.

- Developing a statewide rate structure for the payment of certain expert witness fees. The TCBC and TCP&A concurred with the Workgroup’s recommendations for a statewide expert witness rate structure, to establish a range of allowable rates to be used for evaluations and follow-up evaluations by type of evaluation and expert. In addition to the proposed range of rates for evaluations, the rate structure included a maximum allowable flat rate for no show based on 40 percent of the initial evaluation rate and an hourly rate of $150 for in-court testimony (including wait time and a 2-hour cap) for adult competency examinations ordered by the court. This issue is being recommended to the Supreme Court for approval.

Operational and Policy Solutions

The Workgroup recommended five operational and policy solutions to oversee and manage the deployment of resources in the expert witness element and also to contain costs. Specifically, the Workgroup recommended:

- Requiring circuits to select experts from a registry maintained by the circuit.
- Setting a policy which requires the courts to initially appoint one expert for the evaluation in standard adult competency proceeding and standard juvenile competency proceedings.
- Allowing courts to pay above the set rates for extraordinary circumstances.
- Requiring circuits to issue a comprehensive written policy to document rates, policies, and procedures relating to expert witnesses, but to allow circuits to choose the form of the written policy.
- Developing an educational component for circuit court administration staff regarding expert witness policies and practice, and an educational program for judges. This issue was referred to the Office of the State Courts Administrator for further consideration. The Workgroup also created a reference tool – in the form of a decision tree – for judges to use when appointing experts.

The TCBC and TCP&A have concurred with the Workgroup on all proposed operational and policy recommendations. These issues are being recommended to the Supreme Court for approval.
Statutory Solutions

The Workgroup recommended changes to the following seven statutory sections to better clarify ambiguities in the statutes, identify payment responsibilities, and to implement policy recommendations of the Workgroup. The Workgroup also acknowledged there may be corresponding rule changes needed if the statutes are revised. Specifically, the Workgroup recommended revising the following statutes as described in the body of the report:

- Adult Competency (ss. 916.115, 916.12, and 916.17, F.S.)
- Forensic Services for Intellectually Disabled or Autistic Defendants (ss. 916.301-304, F.S.)
- Sentencing Evaluation (ss. 921.09 and 921.12, F.S.)
- Death Penalty – Intellectual Disability (s. 921.137, F.S.)
- Juvenile Competency – Mental Illness and Intellectual Disability or Autism (s. 985.19, F.S.)
- Developmental Disabilities (s. 393.11, F.S.)
- Guardianship Examining Committee (s. 744.331, F.S.)

The TCBC and TCP&A have concurred with the Workgroup on all proposed statutory changes. These issues are being recommended to the Supreme Court for inclusion in the judicial branch legislative agenda.
SECTION ONE: HISTORY AND BACKGROUND

Over the past fiscal years, concerning trends related to the trial courts’ due process (expert witness, court interpreting, and court reporting) contractual budgets have been identified. In particular, although circuit and county due process-related cases have been declining, some circuits have been experiencing increased contractual expenditures with significant increases in court interpreting and expert witness expenditures. In FY 2014-15, multiple circuits with due process deficits sought access to the statewide due process reserve managed by the Trial Court Budget Commission (TCBC) resulting in the depletion of the reserve. The TCBC activated steps to replenish the reserve through a transfer of unobligated funds from the trial courts. Concurrent with the depletion of the due process reserve, at the end of the fiscal year, the judicial branch often reverts due process funds to the state. Appendix A provides a historical overview of the due process reserve and deficits.

In order to better strengthen the reserve and manage end-of-year reversions, the TCBC approved revisions to the funding methodologies used to determine circuit contractual allotments and the manner in which contractual funds are distributed to the circuits. Fiscal Year 2015-16 expenditures were closely monitored throughout the year, as shown in Table 1, to determine if sufficient funds were available to the circuits, or if additional funding would need to be accessed from the due process reserve, or requested as a legislative budget request.

Table 1. Fiscal Year 2015-16 Due Process Contractual Allotments and Estimated Expenditures

<table>
<thead>
<tr>
<th></th>
<th>FY 2015-16 Beginning Allotment</th>
<th>FY 2015-16 Estimated Expenditures</th>
<th>Difference</th>
</tr>
</thead>
<tbody>
<tr>
<td>Expert Witness</td>
<td>$7,713,763</td>
<td>$7,646,742</td>
<td>$67,021</td>
</tr>
<tr>
<td>Court Interpreting</td>
<td>$2,944,507</td>
<td>$3,246,630</td>
<td>($302,123)</td>
</tr>
<tr>
<td>Court Reporting</td>
<td>$7,792,522</td>
<td>$7,688,925</td>
<td>$89,827</td>
</tr>
<tr>
<td>Total</td>
<td>$18,450,792</td>
<td>$18,612,733</td>
<td>($161,941)</td>
</tr>
</tbody>
</table>

1 Beginning allotments as of July 1, 2015. Does not include allotments for Remote Interpreting and OpenCourt. A total of $27,840 (Remote Interpreting) and $175,000 (OpenCourt) were allocated from Due Process funds for FY 2015-16.

2 FY 2015-16 Estimated Expenditures, as of April 2016, were determined based on applying the FY 2015-16 Estimated Percent of Total Expenditures to the FY 2015-16 July - March Expenditures.

In addition to the changes in fiscal policies, the members of the TCBC’s Executive Committee, at their April 12, 2015, meeting, extensively discussed the potential reasons for the increased expenditures and discussed the importance of better managing resources to minimize reversions. Several observations were made including the following:

- Circuits have different models and practices for delivering court reporting services. For example, some rely more heavily on stenography while others prefer digital technology, and some circuits use a staffing model while others prefer a contractual model. In
addition, Supreme Court Administrative Order AOSC10-1 permits circuit variations in the types of proceedings for which stenography or digital court reporting (DCR) is used.

- Some circuits have indicated additional reliance on contractual services to meet court interpreting needs amid difficulties in recruiting and retaining qualified court interpreters resulting in increasing contractual expenditures.

- Some circuits reported they were experiencing a shift in expert witness costs as the Office of the Public Defender will forego confidentiality in favor of having the courts order and pay for the competency evaluations.

- There are instances in which, under the state’s policy of having the Offices of Public Defender and the Offices of State Attorney share costs with the courts, the level of court reporting transcription services provided by the courts to the public defenders and state attorneys does not match the amount of funds transferred to the court system’s budget.

The Executive Committee concluded the provision of due process services merited thorough study in order to better position the TCBC to make decisions on due process legislative budget requests, the allocation of funds among the circuits, and management of the statewide reserve. Recognizing the provision of these services presents both fiscal and policy considerations, the members recommended creating a joint workgroup, with representatives from both the Commission on Trial Court Performance and Accountability (TCP&A) and the TCBC.

In response, the chairs of the TCBC and the TCP&A created the joint Due Process Workgroup (Workgroup) (see Appendices B, C, and D), comprised of four members from the TCBC and four members from the TCP&A. The Workgroup was charged with cataloging due process delivery practices among the circuits; considering the extent to which, absent current statewide standards, due process standards should be employed; identifying drivers affecting expenditures and techniques to manage costs; reviewing circuit practices under the cost-sharing relationship with public defenders and state attorneys; developing ideas for consideration by TCBC’s Funding Methodology Committee on ways to approach allocation of resources; and exploring ways to enhance the estimation of due process funding needs for the courts and its justice system partners to the Legislature. In order to provide specific recommendations, the Workgroup plans to address each element individually. Due to the significant increase in expenditures from FY 2013-14 to FY 2014-15 (an increase of approximately 16 percent) and immediate concerns regarding changes in practices by other stakeholders, expert witness was determined as the first element to be addressed.

The Workgroup held an in-person meeting in Orlando, Florida, on November 5, 2015, to initiate discussion of expenditure trends, budget and operational issues, and to determine the scope of the work. Research into previously documented concerns submitted by various circuits revealed common factors among the circuits as shown below in Table 2.
### Table 2. Expert Witness Concerns by Circuit and Topic

<table>
<thead>
<tr>
<th>Circuit</th>
<th>Increasing Costs/Insufficient Funding</th>
<th>Ambiguity in Statutes/Rules/Ordinances</th>
<th>Payment Responsibility</th>
<th>Reimbursement Practices</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
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<tr>
<td>3</td>
<td>X</td>
<td></td>
<td></td>
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<tr>
<td>5</td>
<td>X</td>
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<td>8</td>
<td>X</td>
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<tr>
<td>9</td>
<td>X</td>
<td>X</td>
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<tr>
<td>10</td>
<td>X</td>
<td></td>
<td></td>
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<tr>
<td>12</td>
<td>X</td>
<td></td>
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<tr>
<td>14</td>
<td>X</td>
<td></td>
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<tr>
<td>16</td>
<td>X</td>
<td></td>
<td></td>
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<tr>
<td>18</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>19</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>20</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Note: Documented concerns were not available for Circuits 4, 6, 7, 11, 13, 15, and 17.

Specific concerns noted by the Workgroup include the following:

**Increasing Costs and Insufficient Funding (Reported by 13 out of 20 Judicial Circuits)**

- Procedural changes for requesting competency evaluations – some defense parties choose not to retain their own experts, foregoing confidentiality of the findings.
- Increases in the number and complexity of competency exams.
- Circuits exceeding budget allotments, with many transferring funds from other elements or turning to the due process reserve.

**Ambiguity in Statutes, Rules and Ordinances (Reported by 3 out of 20 Judicial Circuits)**

- Authority for appointment and payment of expert witnesses when there is no express grant of statutory authority.
- Appointment of expert for determination of need for specialized treatment at sentencing.
- Testimony of competency experts at hearings and trials.

**Payment Responsibility (Reported by 3 out of 20 Judicial Circuits)**

- Court’s responsibility to pay for expert witness services versus the responsibility of other parties.
- Specific case types or types of evaluations that may be the court’s responsibility for payment:
  - County Ordinances
  - Baker and Marchman Act
  - Evaluations of Insanity
Reimbursement Practices (1 Circuit)

- Wide variations in allowable rates and reimbursable activities across circuits.
- Flat fees versus hourly rates.
- Reimbursement of travel, testimony (in-court or in a deposition), waiting to testify, preparation and consultation with attorneys.

One of the prominent areas of concern discussed by the Workgroup was the increasing costs in expert witness expenditures. Contractual expenditures for expert witnesses have steadily increased beginning in FY 2010-11 ($5,755,339) through FY 2014-15 ($7,961,097). This represents an increase of 38.3 percent over 5 fiscal years (see Appendix E). In conjunction with the steady increase in costs, the number of expert witness evaluations, as represented through the OSCA Uniform Data Reporting (UDR) database, have also increased by 21.3 percent over the same timeframe, indicating increased demand for expert witness services provided by the trial courts.

Although the TCBC determines the yearly circuit allotments of contractual funds using standard funding formulas for calculating circuit need, the circuits determine how expert witness services, that are the responsibility of the courts, are obtained and paid. It is the belief of the trial courts that local circuits can best determine the provision of services based on the local environment. As a result, wide variations in allowable rates and reimbursable activities exist across circuits. This variation can be demonstrated in the range of costs-per-event compared across circuits (see Appendix E).

The Workgroup also considered previous work conducted by the TCP&A in evaluating the provision of expert witness services in the trial courts. In June 2014, the TCP&A developed Recommendations for the Provision of Court Appointed Expert Witness Services in Florida’s Trial Courts. The report is currently pending submission to the Supreme Court for approval. Recommendations by the Workgroup are intended to build upon and complement the TCP&A’s report.

The Workgroup held several meetings, both in-person and telephonically, from November 2015 through November 2016 in a continual effort to collect data, review administrative policies and procedures, and develop operational and statutory solutions. Results of the Workgroup’s research, analysis of invoice and survey data, and recommended solutions are discussed further in the following sections. The recommended operational changes and proposed solutions have been approved by both the TCBC and the TCP&A.

SECTION TWO: CHARGE AND GOAL OF THE WORKGROUP

The Due Process Workgroup held their first meeting on November 5, 2015, at which they developed a work plan (see Appendix F). The expert witness element was identified as the priority issue as FY 2014-15 saw a 16 percent increase in expenditures from the previous year, with 13 circuits either transferring funds from other due process elements or turning to the due...
process reserve. Once the expert witness element has been addressed, the Workgroup will focus on the court interpreting and court reporting elements, respectively. Included in the work plan are concerns affecting all due process elements as well as issues specific to the expert witness element.

The general objectives for all due process elements is to identify factors affecting the cost of providing court reporting, court interpreting, and expert witness services and to develop comprehensive fiscal and operational recommendations for the provision of all services. The Workgroup elected to examine the delivery of services in relation to the current standards and best practices; review the efficiency and effectiveness of service delivery methods, given current funding levels; develop recommendations for fair allocation of resources and containment of costs; develop recommendations relating to statutory, rule, or other policy changes; and determine an appropriate level of resources.

The Workgroup identified the most pressing issues affecting expert witness expenses and service delivery, such as:

- Services paid for by the court vary across the state by case type, case phase, type of evaluation, etc.
- Rates paid vary widely for the same services and include flat fees and hourly rates and compensation policies for time spent on testimony, depositions, travel, and preparation.
- Service delivery models vary in the use of contracted workers versus full time equivalent (FTE) positions.
- The number of experts consulted per evaluation and the use of examining committees differ by circuit and individual judge.
- Changes in statutory requirements have affected service delivery and costs to varying degrees.
- Variations exists in actual practices, compared to proposed standards and best practices and there may be a need for standardization and education.
- Changes in practices by stakeholders may have resulted in an increase in requests for court-ordered evaluations.

To address these concerns, the Workgroup identified the following tasks and questions:

- Catalogue due process delivery practices among the circuits to determine the extent to which, where there are not currently statewide due process standards, standards should be considered. Identify drivers affecting expenditures and techniques to optimize services.
- Identify TCBC policies and decisions that affect services and rates.
- Identify the potential impact of the pending TCP&A report, *Recommendations for the Provision of Court Appointed Expert Witness Services in Florida’s Trial Courts*, on services provided and rates used.
- Determine services provided (case type, phase or type of evaluation) and determine what is currently being paid for by the courts.
• Determine rates. Determine what types of evaluations have set rates and if they are hourly or flat rates. Do circuits pay for travel time or per diem, time to testify in court or via telephone? What instrument sets the rates? Are there economies of scale related to urban versus rural areas, circuit size, or regional practices? Are standard, statewide rates a feasible option?

• Determine staffing models. What variations in staffing models exist? Are any changes needed?

• Determine statutory requirements. What recent changes have affected the cost of providing expert witnesses? Are changes needed in statutory language?

• Determine demands of external stakeholders. How have practices of the public defenders and state attorneys affected the courts’ costs in providing expert witnesses? What is the impact of public guardianship offices and use of guardian advocates and guardianship examining committees?

The following deliverables were determined by the Workgroup:

• Determine if sufficient funding of due process elements for the trial courts exists.
• Update existing payment obligation matrix to clearly define responsibility for payment and consider proposing changes to current statutes, rules, or other policies.
• Create an inventory of current service delivery models, resources, policies, and procedures by circuit. Determine the impact of costs of alternative staffing models, if needed.
• Determine costs related to operational and procedural structure. For example, a unit cost analysis has been created.
• Consider new funding formulas or alternative staffing models and determine the equitable distribution of resources through new funding formulas.
• Develop proposed statutory changes.
• Determine cost containment strategies.
• Determine sufficient resources for the trial courts in out years.
• Determine appropriate data measurements and methods of providing data to circuits.
• Prepare usage and expenditure reports for the TCBC, chief judges, and trial court administrators.
• Determine the need for emergency funding for the trial courts in FY 2015-16.
• Recommend issues outside the scope of this workgroup to be referred to other commissions, committees, and workgroups, if needed.
• Prepare status update reports and final report.

In order to implement these fiscal, policy, and operational changes, the Workgroup determined that recommendations for a legislative budget request or any associated statutory changes would be considered for the legislative session of 2017.
SECTION THREE: RESEARCH AND DATA

To accomplish the general objectives, the Workgroup directed staff of the Office of the State Courts Administrator (OSCA) to gather information through a variety of methods.

A. Survey of Court Administration Operations

In February 2016, OSCA staff distributed a 21-question survey to gather information on current policies and practices as they relate to expert witness events. Responses were received from all 20 judicial circuits, which provided insight into rules on appointing experts, establishing pay rates, and overall circuit operations (Appendix G). An analysis of survey responses indicated most circuits have a formal written policy that governs use of expert witnesses in the circuit. In addition, most circuits follow statutes and rules in determining how many experts to appoint, but interpretation of the statutes and rules may be different and may lead to inconsistencies in appointment practices across circuits. Many circuits report having factors unique to their circuit which contribute to increased expert witness expenditures, and several circuits reported changes in the practices of outside entities have affected their expenditures. The survey was a valuable tool for identifying the differences in the trial courts which formed the basis for the solutions recommended by the Workgroup discussed later in this report.

B. Expert Witness Invoice Review Results

The Workgroup also directed staff to review a sample of expert witness invoices to determine what types of services were being performed within the circuits and what rates are paid for those services. Staff reviewed a representative random sample of 625 of the total 17,151 invoices that were paid during FY 2014-15. The 625 invoices were selected using a statistical random sampling technique to ensure that every invoice had an equal chance of being selected. The methodology ensured a representative sample of the total population of invoices was reviewed with a 95 percent confidence level.

The table below provides a summary of the number of invoices reviewed by area of expertise as well as a comparison to corresponding Uniform Data Reporting (UDR) event data.

<table>
<thead>
<tr>
<th>Type of Invoice Reviewed</th>
<th>Number of Invoices</th>
<th>Percent of Total</th>
<th>Number of UDR Events</th>
<th>Percent of Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Adult Competency</td>
<td>340</td>
<td>54.4%</td>
<td>11,564</td>
<td>60.0%</td>
</tr>
<tr>
<td>Guardianship Examining Committee</td>
<td>177</td>
<td>28.3%</td>
<td>4,997</td>
<td>25.9%</td>
</tr>
<tr>
<td>Juvenile Competency</td>
<td>85</td>
<td>13.6%</td>
<td>2,118</td>
<td>11.0%</td>
</tr>
<tr>
<td>Developmental Disabilities</td>
<td>N/A</td>
<td>N/A</td>
<td>116</td>
<td>0.6%</td>
</tr>
<tr>
<td>Developmental Disability Examining Committee</td>
<td>6</td>
<td>1.0%</td>
<td>53</td>
<td>0.3%</td>
</tr>
<tr>
<td>Other Examinations</td>
<td>7</td>
<td>1.1%</td>
<td>423</td>
<td>2.2%</td>
</tr>
<tr>
<td>Unknown</td>
<td>10</td>
<td>1.6%</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>625</strong></td>
<td><strong>100.0%</strong></td>
<td><strong>19,271</strong></td>
<td><strong>100.0%</strong></td>
</tr>
</tbody>
</table>
From the information gathered in the study, staff compiled a summary analysis by type of evaluation as illustrated in the table below. The analysis shows the type of rates paid (flat, hourly, or both) based on either ranges or the specific amount of the payment. The number of invoices are also presented by circuit within rate ranges. Additionally, for informational purposes, circuit-specific summaries have been provided in Appendix H.

Table 4: Statewide Rate Comparison for Adult Competency Evaluations

<table>
<thead>
<tr>
<th>Rate Range</th>
<th>Number of Invoices</th>
</tr>
</thead>
<tbody>
<tr>
<td>Under $300</td>
<td>10</td>
</tr>
<tr>
<td>$300</td>
<td>58</td>
</tr>
<tr>
<td>$301-$399</td>
<td>27</td>
</tr>
<tr>
<td>$400</td>
<td>45</td>
</tr>
<tr>
<td>$401-$499</td>
<td>3</td>
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<td>$500</td>
<td>49</td>
</tr>
<tr>
<td>$501-$600</td>
<td>9</td>
</tr>
<tr>
<td>$601-$700</td>
<td>18</td>
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<tr>
<td>$701-$800</td>
<td>0</td>
</tr>
<tr>
<td>$801-$900</td>
<td>0</td>
</tr>
<tr>
<td>$900-$1,000</td>
<td>1</td>
</tr>
<tr>
<td>$1,001 and over</td>
<td>0</td>
</tr>
</tbody>
</table>

C. Comparison of Policies of Other Florida Government Entities and Other State Courts

Staff of OSCA collected information on the policies and practices of other Florida government entities as well as other state courts. The information collected is summarized below.

*Florida Government Entities*

**Florida Department of Children and Families** – The Department of Children and Families noted they do not pay for adult forensic evaluations but that they contract with Twin Oaks Juvenile Development, Inc. (with offices statewide) to perform some of their juvenile competence examinations at the rate of $450 per evaluation. They also noted there have been times, due to staff shortages, when they have contracted with independent experts to perform competency evaluations for residents of the state hospital at the rate of $150-$200 per hour.

**Florida Public Schools** – School districts employ school psychologists to assist with evaluations for the purpose of developing an appropriate educational plan. The parent or guardian of the student can also submit reports from independent experts they have retained at their own expense.

**Judicial Administrative Commission** – The General Appropriations Act establishes rates for expert witnesses in Jimmy Ryce proceedings at $200 per hour. Other rates for court-appointed counsel and indigent for costs defendants are set by the circuit’s Indigent Services Committee and those rates vary widely, with both hourly and flat rates ranging from $175 to $600 for similar services (Appendix I).
**Social Security Administration** – The Social Security Administration relies on court determinations of competency or capacity and employs evaluators to make decisions on granting and continuing to pay benefits. Their evaluators are employees of the SSA and are not licensed medical professionals.

**Other State Courts**

**Alaska** – Expert witness fees, including travel, expenses, and per diem, shall be paid by the judiciary only for witnesses called or appointed by the court. In all other cases, they shall be paid by the parties. The Rules of Administration also authorize witness fees to be paid for attending court to testify. The standard attendance fee is $12.50 per day, or $25.00 per day if the attendance will exceed three hours.

**Colorado** – Colorado has provisions for payment of hourly rates (shall not exceed $150 per hour) and for maximum payments for sanity and competency evaluations (maximum of $1,500 without testimony; $2,250 with testimony). Payment for preparation time and in-court testimony is authorized at 100 percent of the authorized hourly rate; payment for travel time and/or time spent waiting to testify is authorized at percent of the authorized hourly rate and may not exceed 6 hours. Expenses for food and lodging shall not be compensated or reimbursed. Requests to exceed the hourly rate must come in the form of a motion prior to services being rendered.

**Connecticut** – The court shall determine a reasonable fee to be paid to the practitioner which will then be taxed as costs in lieu of all other witness fees and paid to the practitioner. Experts called to testify in court can be compensated for appearance fees and travel in accordance with state travel and reimbursement rules.

**Michigan** – Expert witness fees, including fees to testify, are determined by the judge assigned to the case. Determinations of criminal responsibility are handled by the state’s Center for Forensic Psychiatry and determinations of competency are handled by the Center for Forensic Psychiatry or other facility certified by the state department of mental health.

**Minnesota** – The State Courts Administrator establishes a maximum allowable rate and then each judicial district establishes a rate within that limit. The rates are $105 per hour in a metro area and $125 per hour in a rural “outstate” area. If the judge determines testimony is necessary, the maximum allowable rate is $195 per hour. The court is permitted to enter into contracts for hourly or flat rates, but they must not exceed the maximum allowable rates.

**New Jersey** – The court does not appoint expert witnesses to perform competency evaluations for criminal proceedings or uncontested guardianship petitions; instead, each party is responsible for retaining their own experts and submitting reports to the court. In contested guardianship actions, the court may appoint an expert whose fees will be charged back to one of the parties in the final judgement. Evaluations for residents of the state forensic hospital are performed by staff psychologists.

**New York** – Expert witness rates are set by the individual court or county of jurisdiction, with a statutory cap of $1,000. The court can award a higher amount in extraordinary circumstances. The state Administrative Office of the Courts issued an administrative order in 1992 setting
hourly rates for court-appointed psychiatrists and other non-lawyer professionals, and those rates are still in effect.

**Texas** – Texas has no set statewide rate for expert witness fees, instead each district sets their own rates and policies. The Texas Indigent Defense Commission’s attorney fee schedule includes information on allowable expert witness fees for each jurisdiction. A small sample includes Dallas County, which allows counsel to be reimbursed for expert witness fees at the expert’s actual hourly rate, not to exceed a maximum of $750, and Travis County (Austin) simply specifies that all reimbursements require prior written authorization.

### D. Development of Solutions

Following adoption of the work plan and development of the research goals on November 5, 2015, the Workgroup met on April 11, 2016, and again on May 4, 2016, to review updated expenditure and event data, discuss specific research performed by OSCA staff on expert witness costs and operations, and determine potential process improvements and cost containment mechanisms. Each issue discussed by the Workgroup was considered for the type of approval that will be required for implementation and the type of recommendation that will be made.

**Type of Approval Required for Implementation**

- Trial Court Budget Commission and Commission on Trial Court Performance and Accountability approval only.
- Supreme Court approval, in addition to above approval.
- Legislative approval, in addition to above approval.
- Referral of issue to another entity.

**Type of Recommendation**

- Standard
- Best Practice

In addition, analysis of the data gathered in the research projects discussed above resulted in the development of recommended solutions the Workgroup classified as either administrative, fiscal, operational, or statutory. The recommendations were approved by the TCP&A and the TCBC at their June 15, 2016, and June 17, 2016, meetings and are discussed in detail in the sections below.

**SECTION FOUR: ADMINISTRATIVE SOLUTIONS**

The administrative solutions discussed below primarily affect circuit court administration and are designed to improve the process of expert witness payment, contracts, and data collection. These solutions required approval by the TCBC and TCP&A and implementation by OSCA and the circuits.
A. Revisions to the Statewide Expert Witness Invoice Template

Requiring the use of the Uniform Invoice for Expert Witness Services

The Office of Finance and Accounting within OSCA maintains a Uniform Invoice for Expert Witness Services and provides it to the circuits for their use in submitting requests for payment. The form is not mandatory, and not all circuits use it; however, during the invoice review exercise, it was noted that information reported on the uniform invoice was more consistent than if the expert used an alternate invoice system. To ensure requests for payment from expert witnesses are submitted with consistent data elements such as the date of service, case number, division of court, defendant’s name, and type of evaluation performed, the Workgroup recommended requiring the use, exclusively, of the Uniform Invoice for Expert Witness Services as a standard.

Updating the Uniform Invoice for Expert Witness Services

The uniform invoice template was revised to include data elements that will more closely align the invoice with the web-based Uniform Data Reporting (UDR) data collection system, which will enhance the quality of information reported and improve consistency in budgeting and payment for expert witness services. Updates to the template include changes designed to assist in better determining the type of evaluation performed, the division of court in which the case is being heard, and the specific activity related to the expert’s evaluation. In addition, the new template provides a way to document payments for both flat and hourly rates and allows vendors to use the same form for work associated with multiple cases by requiring the case number and defendant name for each reported event (see Appendix J).

To gain input from circuit staff, the draft invoice was presented and discussed at the statewide Administrative Services Division Training in April 2016, and a statewide conference call was held in May 2016 to gather additional feedback. The updated template was approved by the TCBC and TCP&A at their meetings on June 17, 2016, and June 15, 2016, respectively. Circuits were instructed to begin using the new invoice on July 1, 2016, to coincide with the start of the new fiscal year.

B. Revisions to the Uniform Data Reporting system

Updating the Uniform Data Reporting (UDR) System and Instructions

The Uniform Data Reporting, or UDR, system allows the court system to count events related to due process services (court reporting, court interpreting, and expert witness) as well as mediation and child support cases. The system consists of an online data input portal as well as instructions for counting each element. Circuit staff submit their monthly data through the portal and the information is collected and compiled for use in to developing legislative budget requests and determination of resource allocations.

The Workgroup determined the data elements collected in the UDR system should be updated to more accurately reflect the types of expert witness events occurring in the trial courts and be more consistent with the updated uniform invoice and that and modifications to the portal should make reporting events easier for circuits and will improve data quality. In addition, each element
reported in the UDR system has associated instructions which were updated to reflect changes to the reporting categories. The TCBC and TCP&A approved the recommended updates to the UDR system reflected in Appendix K and the associated instructions and referred implementation of the changes to the OSCA. The changes were implemented on July 1, 2016, and circuits began reporting data in the new format to coincide with the start of the new fiscal year.

**Training on Uniform Data Reporting**

Results from the circuit survey and discussions with circuit staff revealed a need for training in UDR event counting and reporting to improve data quality. The TCBC and TCP&A approved the Workgroup’s recommendation to develop a UDR training program for circuit staff. In response, OSCA staff developed an electronic training module and disseminated it to circuit staff in October 2016.

**Data Quality**

Another issue recognized by the Workgroup was the lack of a formal process for auditing UDR data. Each circuit reports data to OSCA, and the data is published online, but staff and workload constraints have precluded a formal audit to date. To improve data quality and reliability, the Workgroup recommended implementation of a routine audit process for UDR data. The TCBC and TCP&A approved the recommendation and referred implementation to OSCA and a formal audit process is currently under development.

**C. Contracts**

The General Services unit within OSCA maintains standard contractual agreement forms, available to circuits for use, but does not have a contract form that specifically addresses expert witnesses. Additionally, not all circuits use contracts for expert witness services, and the current state policy requires a contract only when the service provider will be paid over $35,000 per fiscal year. Processes for expert witness payments may be enhanced by developing a uniform contract template to be used statewide. The Workgroup recommended development of a uniform expert witness contract template and noted circuits should consider its use as a best practice. Following approval by the TCBC and TCP&A, implementation of this issue was referred to OSCA and a contract template is currently under development.

**SECTION FIVE: FISCAL SOLUTIONS**

The Workgroup developed fiscal policy solutions designed to assist circuits with identifying the responsible party for payment for different types of evaluations or portions of the same evaluation and to establish reasonable rates of pay based on comparable services throughout the state. These recommended solutions require a combination of approval for adoption and implementation.
A. Payment Responsibility Matrix

In 2005, and again in 2008, the then-chair of the TCBC sent memorandums to the chief judges and trial court administrators advising them on issues related to the payment of expert witness fees, including statutory language changes and a matrix detailing the appropriate budget to be charged for certain case types. Court administration staff have referenced the matrix over the years and have posed questions when they encounter scenarios that are not addressed. In November 2015, the Workgroup directed staff, including OSCA’s Office of the General Counsel, to update the matrix. The revised Payment Responsibility Matrix - Expert Witness (Appendix L) represents current law.

The guiding principle to determine the court’s responsibility to pay is whether the appointment is made pursuant to an express grant of statutory authority. When there is no express grant of statutory authority, the question of payment is determined by whether the expert was appointed to advise the court or whether the expert was retained or requested by a party advocating a particular position. Court expert witnesses are neutral witnesses, and the court pays for their services. A witness produced to prove insanity, as an example, is brought in by a party to advocate that party’s position. Those witnesses are paid by the party even if the judge ultimately makes the appointment.

The updated document reflects current statutory and corresponding rule provisions. However, there are statutory provisions that are ambiguous, need to be corrected due to errors, or may need to be amended to improve the process. As the Workgroup continued to explore process improvements to expert witness services, they developed recommended statutory revisions that, if approved, will necessitate updates to the matrix. Further, this document does not represent the universe of payment responsibilities that exist, and within the identified case types there may be factual, legal, or other unique circumstances that affect the decision on payment responsibility. Thus, the document is designed to be a guide but not necessarily definitive.

The updated matrix was approved by the TCBC and the TCP&A, acknowledging as policy decisions are codified and potential statutory changes made, the document may again need to be updated. The matrix was sent to the chief judges of the circuits with a request they share the document with their judges and staff. Additionally, the Workgroup recommended sharing this document with the Offices of the State Attorney, the Offices of the Public Defender, the Justice Administrative Commission, the Agency for Persons with Disabilities, and the Department of Children and Families, to facilitate common understanding on payment responsibility.

B. Proposed Rate Structure for Expert Witness Services

The Workgroup discussed development of a statewide rate structure for expert witness services as a tool to guide circuits on reasonable fees and to serve as a cost containment mechanism. The Workgroup reviewed the findings of the 2006 and 2007 Florida Due Process Rate studies and researched other government entities’ expert witness policies and fees. They also evaluated information provided in the expert witness invoice review identified several factors that warrant careful consideration in developing a proposed statewide rate structure. Such considerations included the following:

- Establish statewide rates for different types of expert witness examinations?
- Establish a single flat rate, range of rates, or a maximum allowable rate?
- Allow compensation for time spent travelling as part of the recommended rate or require that it be billed separately? If billed separately, should minimum requirements be established in order to receive travel compensation? For example, should compensation be paid when the expert travels outside of the county of residence or over a set number of miles? Note: Vendors may still claim statewide allowable mileage, meal, hotel costs, and per diem costs.
- Establish a “no show/loss of income” rate? Should the expert only be allowed one “no show/loss of income” payment per evaluation?
- Establish a follow-up evaluation rate when the same expert is used for a follow-up evaluation?
- Establish an hourly rate for in-court testimony, ordered by the court? Does the rate include wait time or should a different hourly rate be established?

The Workgroup discussed the following options in developing their rate structure recommendations (for additional detail, see Appendix M):

Option 1 – Funding Cap: Establish a maximum allowable rate for evaluations by type. Does not include a separate rate for travel time as it is included in the rate for evaluations. Various maximum allowable rates are established for follow-up evaluations and a maximum allowable no show/loss of income. Allows for a maximum hourly rate of $150 for in-court testimony (including wait time) for adult competency examinations ordered by the court.

Option 2 – Funding Cap and Travel Time: Establish a maximum allowable rate for evaluations by type. Allows for an additional maximum allowable flat rate for travel time. Various maximum allowable rates are established for follow-up evaluations and no show/loss of income scenarios. Allows for an hourly rate of $150 for in-court testimony (including wait time) for adult competency examinations ordered by the court.

Option 3 – Range of Rates: Establish a range of allowable rates to be used for evaluations and follow-up evaluations by type of evaluation. Establish a maximum allowable flat rates for no show/loss of income and travel time, and an hourly rate of $150 for in-court testimony (including wait time) for adult competency examinations ordered by the court.

Option 4 – Other: Establish a rate structure based on components of the options above or develop other options.

The Workgroup considered these four options for a proposed statewide expert witness rate structure and recommended Option 4 (illustrated in Table 5 below), to establish a range of allowable rates to be used for evaluations and follow-up evaluations by type of evaluation and expert. The rates recommended by the Workgroup reflect the average rates that are currently being paid around the state as determined through the review of invoices discussed previously (see Appendix H). In addition to the proposed range of rates for evaluations, the Workgroup recommended a maximum allowable flat rate for no show based on 40 percent of the initial evaluation rate and an hourly rate of $150 for in-court testimony (including wait time and a 2-hour cap) for adult competency examinations ordered by the court. The TCBC and TCP&A concurred with the Workgroup’s recommendations for approval by the Supreme Court.
Table 5. Due Process Workgroup Recommended Expert Witness Rate Structure

<table>
<thead>
<tr>
<th>Type of Evaluation</th>
<th>Range of Allowable Rates for Evaluation*</th>
<th>Maximum Allowable Travel Rate</th>
<th>Range of Allowable Follow-up Evaluation Rates (With same expert)</th>
<th>Maximum Allowable No Show Rate</th>
<th>Maximum Hourly Testimony Rate, Court Ordered (Including wait time, 2 hour cap)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Adult Competency</td>
<td>$300-$500</td>
<td></td>
<td>$200-$350</td>
<td></td>
<td>$150</td>
</tr>
<tr>
<td>Juvenile Competency</td>
<td>$250-$350</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Guardianship Examining Committee</td>
<td>$250-$350</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ph.D., M.D., or D.O.</td>
<td>$250-$350</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>ARNP, RN, MSW, LPN, LCSW, Lay Person</td>
<td>$75-$250</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Developmental Disability Examining Committee</td>
<td>$250-$350</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ph.D., M.D., or D.O.</td>
<td>$250-$350</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>ARNP, RN, MSW, LPN, LCSW, Lay Person</td>
<td>$75-$250</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

*Note: Maximum Allowable Rate for Evaluation recommendation cannot be exceeded unless extraordinary circumstances exists and are approved according to circuit policy.

**SECTION SIX: OPERATIONAL AND POLICY SOLUTIONS**

The Workgroup identified potential considerations regarding policy and operational changes that emerged from discussions, information gathered from results of a survey to circuits, and additional concerns expressed by circuits. Each issue discussed by the Workgroup was considered for the type of recommendation made: either a proposed standard, which is mandatory, or a proposed best practice, which is a suggested improvement. The TCBC and TCP&A approved the Workgroup’s recommendations for all operational/policy changes discussed below. These recommended solutions require a combination of approval for adoption and implementation.

A. Selection of Experts

Survey responses received from circuits indicated that, when selecting experts for appointment, most circuits consult a registry maintained by their Office of Court Administration. Several circuits use a rotating wheel, selecting the next available expert on the registry; others allow the presiding judge to select any expert from the registry. Of the circuits that use a registry, most have lower average costs-per-event and have stated the registry has been a useful tool in containing costs. Some circuits reported their standard practice is for the judge to select the expert by consulting the attorneys or that selection practices vary by judge or other factors. The table below shows current circuit practices when selecting experts to appoint.
The circuits that do not use a registry of experts and do not follow a standard selection practice have higher average costs-per-event than those that do use a registry. The Workgroup recommended, as a standard, requiring circuits to select experts from a registry maintained by the circuit.

**B. Number of Experts to Appoint**

Many circuits reported relying on statute or rule for determining how many experts to appoint in each case. However, there are different interpretations of how many experts to appoint for initial competency evaluations. For example, statutory language authorizes one expert to be appointed for standard adult competency evaluations in certain circumstances (s. 916.115, F.S.), but several circuits reported having local policies to appoint two experts at the first request for an evaluation. The table below shows the different circuit practices followed when determining how many experts to appoint at the outset.

**Table 7: Determining How Many Experts to Appoint**

<table>
<thead>
<tr>
<th>Guidance Followed When Selecting Experts</th>
<th>Statute/Rule</th>
<th>Judge Decides</th>
<th>Other</th>
<th>Circuits Responding</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number</td>
<td>9</td>
<td>6</td>
<td>5</td>
<td>20</td>
</tr>
<tr>
<td>Percent</td>
<td>45.0%</td>
<td>30.0%</td>
<td>25.0%</td>
<td>100.0%</td>
</tr>
</tbody>
</table>

The Workgroup recommended, as a standard, a policy requiring courts to initially appoint one expert for the evaluation in standard adult competency proceeding and acknowledged that clarification of the statutes may be helpful to distinguish requirements related to commitment from requirements related to non-commitment decisions. The Workgroup further recommended, as a standard, a policy that courts initially appoint one expert for the evaluation in standard juvenile competency proceedings. This would require a change to statute and rule.

**C. Payments in Extraordinary Circumstances**

Most circuits set limits for expert witness payments either through specific language in their administrative order or simply by using flat rates for each evaluation. Some circuits do not have a procedure in place for identifying unusual rates or an approval process for authorizing payment of these rates. Several circuits indicate having a policy that identifies maximum rates and a procedure for authorizing payments in extraordinary circumstances as an effective cost.
containment measure. Some circuits require judicial approval of extraordinary rates in advance of the service being rendered and some require administrative approval. The tables below are excerpts from the circuit survey regarding extraordinary payments.

Table 8: Defining Extraordinary Rates

<table>
<thead>
<tr>
<th>Identifying Extraordinary Rates</th>
<th>Number</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Anything in Excess of Set Rates</td>
<td>10</td>
<td>50.0%</td>
</tr>
<tr>
<td>Determined by Case-Specific Factors</td>
<td>5</td>
<td>25.0%</td>
</tr>
<tr>
<td>Not Defined</td>
<td>5</td>
<td>25.0%</td>
</tr>
<tr>
<td>Circuits Responding</td>
<td>20</td>
<td>100.0%</td>
</tr>
</tbody>
</table>

Table 9: Payment of Extraordinary Rates

<table>
<thead>
<tr>
<th>Extraordinary Rate Payment Procedures</th>
<th>Number</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judicial Approval</td>
<td>10</td>
<td>50.0%</td>
</tr>
<tr>
<td>Administrative Approval/Other</td>
<td>5</td>
<td>25.0%</td>
</tr>
<tr>
<td>No Procedure</td>
<td>5</td>
<td>25.0%</td>
</tr>
<tr>
<td>Circuits Responding</td>
<td>20</td>
<td>100.0%</td>
</tr>
</tbody>
</table>

The Workgroup acknowledged that circumstances will arise that require payments that exceed those prescribed in the recommended rate structure and recommended, as a standard, allowing courts to pay above the set rates for extraordinary circumstances.

D. Circuit Administrative Order

Most circuits already employ some form of written policy that governs expert witness practices. As displayed in the table below, 65 percent of circuits use an administrative order; 25 percent use another format; and 10 percent have no formal written policy. The Workgroup discussed recommending each circuit adopt a comprehensive administrative order that details their policies on use and payment of expert witnesses. The order may include pay rates, policies on loss of income (“no shows”), procedures for addressing extraordinary rates or circumstances, policies on payment for travel and per diem expenses, policies and procedures for submission of invoices, and guidance on the evaluations for which the court is responsible for payment.

Table 10: Written Policies Governing Expert Witnesses

<table>
<thead>
<tr>
<th>Written Policies on Expert Witnesses</th>
<th>Number</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Administrative Order</td>
<td>13</td>
<td>65.0%</td>
</tr>
<tr>
<td>Other Written Policy</td>
<td>5</td>
<td>25.0%</td>
</tr>
<tr>
<td>No Written Policy</td>
<td>2</td>
<td>10.0%</td>
</tr>
<tr>
<td>Circuits Responding</td>
<td>20</td>
<td>100.0%</td>
</tr>
</tbody>
</table>

The Workgroup recommended, as a standard, requiring circuits to issue a comprehensive written policy to document rates, policies, and procedures relating to expert witnesses, but to allow circuits to choose the form of the written policy.
E. Education and Training

The survey responses from circuits and the invoice review exercise highlighted the differences in circuit practices as they relate to appointment of experts, use of administrative orders and contracts, billing and invoicing, and uniform data reporting. The Workgroup determined that developing an educational component for circuit court administration staff regarding expert witness policies and practices would be beneficial. They also discussed developing an educational program for judges and referred the development of an educational component to the Office of the State Courts Administrator for further consideration.

The Workgroup also created a reference tool – in the form of a decision tree – for judges to use when appointing experts. The decision tree illustrated in Table 11 is designed to reflect the key policy recommendations of the Workgroup, most notably the concept of appointing one expert initially for all adult competency evaluations. Further, the decision tree addresses factors that lead to the appointment of more than one expert. The decision tree does not attempt to capture every conceivable variation in how competency issues may be raised or challenged in cases. Rather, it serves as a general reference guide for appointment decisions if the Workgroup’s policy recommendations are adopted.

The Workgroup convened a committee of advisory judges from around the state with experience and expertise in the process of appointing expert witnesses to offer feedback that assisted the Workgroup in finalizing the decision tree and other recommendations for inclusion in this report. Members of the committee included:

- Hon. Denise Ferrero, County Judge, Eighth Judicial Circuit;
- Hon. Olga Levine, County Judge, Seventeenth Judicial Circuit;
- Hon. Robert Luck, Circuit Judge, Eleventh Judicial Circuit;
- Hon. Ashley Moody, Circuit Judge, Thirteenth Judicial Circuit;
- Hon. Nushin Sayfie, Circuit Judge, Eleventh Judicial Circuit;
- Hon. Mark Speiser, Circuit Judge, Seventeenth Judicial Circuit;

The advisory judges met by conference call three times in October. They had discussions about the Workgroup’s recommendations (see summary in Appendix N). One issue identified by the committee related to Rule 3.210, Florida Rules of Criminal Procedure. It specifies what is needed from the defense attorney in order for the court to appoint an expert. It was noted that some judges may not adhere strictly to the requirements specified in Rule 3.210, and the issue should be referred as a judicial education item.

The Workgroup met on November 8, 2016, by conference call, to discuss the summary of comments from the committee of judges, as the Workgroup reviewed and finalized their recommendations and report. Of significance, the Workgroup made revisions to the following decision tree chart, based on the comments of the committee.
Table 11: Decision Tree for Appointing Expert Witnesses for Adult Competency Evaluations Based on Workgroup Recommendations

**SECTION SEVEN: STATUTORY SOLUTIONS**

The Workgroup considered a number of statutory issues related to expert witnesses and recommended the following revisions. Some of the recommended revisions are technical in nature (e.g., correcting apparent errors or clarifying ambiguities in the statutes), while others represent policy decisions. The Workgroup also acknowledged there may be corresponding rule changes needed if the statutes are revised. The TCBC and TCP&A approved the recommended concepts proposed by the Workgroup.

**A. Adult Competency (ss. 916.115, 916.12, and 916.17, F.S.)**

The statutes require the court to appoint no more than three experts to determine the mental condition of a defendant. Further, the statutes specify the court shall pay for any expert that it appoints by court order. If the defendant retains an expert and waives confidentiality of the expert’s report, the court may pay for no more than two additional experts. Distinct from the evaluations, the statutes do not specify who pays costs related to testimony by these experts.
Despite the apparent intent to afford the court discretion to appoint between one and three experts, the statutes specify a defendant must be evaluated by no fewer than two experts before the court can commit the defendant or take other action authorized by chapter 916, F.S., which includes action less than commitment (e.g., community treatment). However, if one expert finds the defendant is incompetent to proceed and the parties stipulate to that finding, the court may commit the defendant or take action less than commitment without further evaluation. Thus, the statutes require evaluation by at least two experts to take action less than commitment when the parties do not stipulate to one expert’s determination of incompetence.

Further, when determining whether a defendant who fails to comply with the conditions of release now meets the criteria for involuntary commitment, the court shall hold a hearing. However, the statutes do not specify who pays for expert evaluations or testimony related to that hearing.

The Workgroup recommended revising the statutes to:

- Specify unless an expert testifies regarding competency pursuant to an order from the court, the court does not pay for the expert to testify in court.
- Clarify the court initially only has to appoint one expert and may refrain from appointing additional experts until the findings of that evaluation are known and the parties decide whether to stipulate to them.
- Authorize the court to take action less than commitment based on the determination by one expert that the defendant is incompetent to proceed – regardless of whether the parties stipulate to that determination.
- Specify the court shall pay for evaluations and testimony related to hearings on whether a defendant who fails to comply with the conditions of release now meets the criteria for involuntary commitment.

B. Forensic Services for Intellectually Disabled or Autistic Defendants (ss. 916.301-304, F.S.)

The statutes require the court to appoint:

- One or two (if a party so requests) experts to evaluate whether the defendant meets the relevant definitions and is incompetent to proceed;
- A psychologist to evaluate whether the defendant meets the relevant definitions and is incompetent to proceed; and
- A social services professional to provide a social and developmental history.

The Workgroup discussed whether appointment of some of these individuals should be discretionary. Further when determining whether a defendant who fails to comply with the conditions of release now meets the criteria for involuntary commitment, the court shall hold a hearing. However, the statutes do not specify who pays for expert evaluations or testimony related to that hearing.

The Workgroup recommended revising the statutes to:
• Make appointment of the psychologist and the social services professional mandatory and appointment of additional experts discretionary, paid for by the party who requests the additional expert.
• Parallel the adult competency statutes to provide for a stipulation process.
• Specify the court shall pay for evaluations and testimony related to hearings on whether a defendant who fails to comply with the conditions of release now meets the criteria for involuntary commitment.

C. Sentencing Evaluation (ss. 921.09 and 921.12, F.S.)

These statutes relate to appointment by the court of a physician to determine the mental condition of a defendant who alleges insanity as a cause for not pronouncing sentence or to examine a defendant for whom pregnancy is alleged as a cause for not pronouncing sentence. Both statutes specify the county shall pay the fees. The Workgroup discussed whether the defendant should be responsible for payment.

The Workgroup recommended revising the statutes to:

• Provide the physician is retained by the defendant (rather than appointed by the court).
• Specify the defendant shall pay the fees.

D. Death Penalty – Intellectual Disability (s. 921.137, F.S.)

This statute requires the court to appoint two experts to determine whether a defendant convicted of a capital felony and facing a sentence of death is intellectually disabled. The statute is silent as to payment responsibility.

The Workgroup recommended revising the statutes to specify the court shall pay for the first two experts, regardless of indigence status.

E. Juvenile Competency – Mental Illness and Intellectual Disability or Autism (s. 985.19, F.S.)

The statute requires determinations of competency to be based on findings by “not less than two nor more than three” experts appointed by the court. In contrast, the adult competency statute authorizes action based on evaluation by one expert when the expert finds the defendant is incompetent and the parties stipulate to that finding.

In cases involving mental illness, the statute requires the Department of Children and Family to provide to the court a list of mental health professionals qualified to perform the evaluations.

In cases involving intellectual disability or autism, the statute requires the court to order the Agency for Persons with Disabilities to examine the child, which may result in confusion on who should pay and is not consistent with the structure of comparable evaluation statutes that provide for the Agency to select the expert.
Additionally, the statute provides fees shall be taxed as costs in the case but does not specify payment responsibility prior to costs being recovered. Lastly, the statute specifies implementation is subject to specific appropriation, which contributes to payment uncertainty between the court and the Agency.

The Workgroup recommended revising the statutes to:

- Parallel the adult competency statutes to provide for a stipulation process as an alternative to “not less than two” experts.
- Mirror the proposed revisions to the adult competency statutes to specify the court may take action less than secure placement based on one expert’s determination that the juvenile is incompetent to proceed – regardless of whether the parties stipulate to that determination.
- Clarify, in cases involving intellectual disability or autism, the Agency shall select the expert to examine the child, rather than examine the child itself.
- Specify the court’s payment responsibility and remove or narrow the existing statutory language making implementation subject to specific appropriation.

F. Developmental Disabilities (s. 393.11, F.S.)

The statute specifies examining committee fees shall be “paid from the general revenue of the county,” which appears to be a lingering reference overlooked during implementation of Revision 7 to Article V of the State Constitution. The Workgroup recommended revising the statutes to match current practice and specify the fees shall be paid by the court.

G. Guardianship Examining Committee (s. 744.331, F.S.)

The statute provides if the ward is indigent, fees for the examining committee will be paid by “the state.” The Workgroup recommended revising the statute to match current practice and specify the fees shall be paid by the court, if the ward is indigent.

SECTION EIGHT: CURRENT STATUS AND NEXT STEPS

As noted previously, the proposed recommendations of the Workgroup require varying levels of approval prior to implementation. Those recommendations that tend to be administrative in nature may be implemented based on the approval of the TCBC and TCP&A, while solutions related to statewide fiscal changes and operational and/or policy changes are being submitted to the Supreme Court for approval. Recommended statutory changes require both Supreme Court and legislative approval. Table 12 provides a summary of the recommendations that have been implemented, those that have been referred to OSCA for development and implementation, and recommendations that are pending final approval from the Supreme Court.
Table 12: Current Status and Next Steps Summary Chart

<table>
<thead>
<tr>
<th>Workgroup Recommendations</th>
<th>Current Status</th>
<th>Next Steps</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Administrative Solutions</strong></td>
<td></td>
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<tr>
<td>- Revisions to the Statewide Expert Witness Invoice Template</td>
<td>• Revises nationwide invoice template have been implemented as a requirement July 2016.</td>
<td></td>
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<tr>
<td>• Requiring the use of the Uniform Invoice for Expert Witness Services</td>
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<tr>
<td>• Updating the Uniform Invoice for Expert Witness Services</td>
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<tr>
<td>- Revisions to the Uniform Data Reporting system</td>
<td>• Revised UDR system have been implemented July 2016.</td>
<td>• Implementation of a routine audit process for UDR data was referred to OSCA. An audit process is currently under development.</td>
</tr>
<tr>
<td>• Updating the Uniform Data Reporting (UDR) System and Instructions</td>
<td>• UDR training module has been developed and distributed to circuit staff October 2016.</td>
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</tr>
<tr>
<td>• Training on Uniform Data Reporting</td>
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<tr>
<td>• Data Quality</td>
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<tr>
<td>- Contracts</td>
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<tr>
<td>• Sample contractual agreement forms for expert witness services</td>
<td></td>
<td>• Recommendation for a uniform contract was referred to OSCA for implementation. A contract template is currently under development.</td>
</tr>
<tr>
<td><strong>Fiscal Solutions</strong></td>
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<tr>
<td>- Update Payment Responsibility – Expert Witness Matrix</td>
<td>• A revised version of the matrix was approved by the TCBC and TCP&amp;A and disseminated to the circuit chief judges in August 2016.</td>
<td></td>
</tr>
<tr>
<td>- Rate Structure Changes</td>
<td>• TCBC and TCP&amp;A concurred with Workgroup’s recommendations for a statewide expert witness rate structure.</td>
<td>• Implementation of a statewide expert witness rate structure is recommended to the Supreme Court.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• If recommendations are approved by the Supreme Court, provide sufficient time for the circuits to implement rate changes.</td>
</tr>
<tr>
<td>Workgroup Recommendations</td>
<td>Current Status</td>
<td>Next Steps</td>
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<tr>
<td>---------------------------</td>
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<tr>
<td><strong>Operational and Policy Solutions</strong></td>
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<td></td>
</tr>
<tr>
<td>● Selection of Experts</td>
<td>● The TCBC and TCP&amp;A have concurred with all proposed operational and policy changes.</td>
<td>● Implementation of operational and policy changes is recommended to the Supreme Court.</td>
</tr>
<tr>
<td>● Number of Experts to Appoint</td>
<td></td>
<td>● Development and implementation of an educational component to be referred to OSCA.</td>
</tr>
<tr>
<td>● Payments in Extraordinary Circumstances</td>
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<td></td>
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<tr>
<td>● Comprehensive Written Policy Governing Expert Witnesses</td>
<td></td>
<td></td>
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<tr>
<td>● Education and Training</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Statutory Solutions</strong></th>
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<tbody>
<tr>
<td>● Adult Competency</td>
<td>● The TCBC and TCP&amp;A have concurred with all proposed statutory changes.</td>
<td>● All proposed statutory changes are recommended to the Supreme Court for inclusion in the judicial branch legislative agenda.</td>
</tr>
<tr>
<td>● Forensic Services for Intellectually Disabled or Autistic Defendants</td>
<td></td>
<td>● If accepted by the Court, proposed statutory language will be developed and submitted for legislative approval.</td>
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<tr>
<td>● Sentencing Evaluation</td>
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<tr>
<td>● Death Penalty – Intellectual Disability</td>
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</tr>
<tr>
<td>● Juvenile Competency – Mental Illness and Intellectual Disability or Autism</td>
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<td></td>
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<tr>
<td>● Developmental Disabilities</td>
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<td></td>
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<tr>
<td>● Guardianship Examining Committee</td>
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</table>
Commission on Trial Court Performance and Accountability (TCP&A) Pending Expert Witness Report

The Workgroup acknowledged similar issues being addressed in the TCP&A’s pending report on expert witnesses. In reconciling the recommendations of the two reports, it was evident that the majority of the issues considered by the two entities are consistent or complementary. However, the recommendations diverge in a few areas. Listed below is a comparison of the notable differences:

<table>
<thead>
<tr>
<th>TCP&amp;A: Recommendations for the Provision of Court Appointed Expert Witness Services in Florida’s Trial Courts</th>
<th>Recommendations from the Joint Due Process Workgroup of the TCBC and TCP&amp;A: Expert Witnesses in Florida’s Trial Courts</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Registry and Selection of Expert Witnesses</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Proposed Standard of Operation</strong> – Circuits shall develop a fair mechanism for the selection of court appointed expert witnesses.</td>
<td><strong>Proposed Standard of Operation</strong> – Require circuits to select experts from a registry maintained by the circuit. The Workgroup did not make recommendations as to how expert witnesses are selected, but rather left the selection to the discretion of the judge.</td>
</tr>
<tr>
<td><strong>Proposed Standard of Operation</strong> – Circuits shall develop an application and vetting process for selection of court appointed expert witnesses.</td>
<td></td>
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<tr>
<td><strong>Proposed Standard of Operation</strong> – The OSCA shall develop and maintain an online registry of expert witnesses, by field of expertise, based on lists submitted by the circuits. The registry should indicate whether each expert is willing to travel to provide services in other circuits.</td>
<td></td>
</tr>
<tr>
<td><strong>Proposed Standard of Operation</strong> – Circuits shall submit their current list of approved experts, their qualifications and approved fees to the OSCA, when requested.</td>
<td></td>
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<tr>
<td><strong>Funding/Payment</strong></td>
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<tr>
<td><strong>Proposed Best Practice</strong> – Circuits should set, by administrative order or standard contract, and standardized rates for expert witness services for each of the most commonly needed expert witness examinations.</td>
<td><strong>Proposed Standard of Operations</strong> – Recommendations for a statewide expert witness rate structure. Circuits shall issue a comprehensive written policy to document rates, policies, and procedures relating to expert witnesses. Circuit may choose the form of the written policy.</td>
</tr>
</tbody>
</table>
APPENDICES

Appendix A – Historical Overview of Due Process Reserve and Deficits

Appendix B – Letter from Judge Mahon to Judge Moreland Initiating the Due Process Workgroup

Appendix C – Letter from Judge Moreland to Judge Mahon Appointing Workgroup Members from the Commission on Trial Court Performance and Accountability

Appendix D – Letter from Judge Mahon to Judge Moreland Appointing Workgroup Members from the Trial Court Budget Commission

Appendix E – Events, Expenditures and Cost per Event Chart

Appendix F – Due Process Workgroup Work Plan

Appendix G – Court Administration Expert Witness Survey Summary of Results

Appendix H – Analysis of Current Expert Witness Rates

Appendix I – Justice Administrative Commission Rates

Appendix J – Updated Uniform Invoice for Expert Witness Services and Associated Instructions

Appendix K – Updated Uniform Data Reporting Web-Based Input Screen

Appendix L – Expert Witness Payment Responsibility Matrix

Appendix M – Statewide Rate Structure Options Considered by the Workgroup

Appendix N – Summary of Expert Witness Committee of Judges Group 1 and II Conference Calls