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FISCAL IMPACT REPORT

ORIGINAL DATE 02/18/09

SPONSOR Kintigh LAST UPDATED _____ HB 797

SHORT TITLE Ineffective Lawyer Penalties SB _____

ANALYST Wilson

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY09	FY10	FY11	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total		\$0.1 Indeterminate See Below	\$0.1 Indeterminate See Below		Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)

Attorney General's Office (AGO)

General Services Department (GSD)

Public Defender Department (PDD)

SUMMARY

Synopsis of Bill

House Bill 797 adds a new section to Chapter 36, "Attorneys," that significantly increases the penalties for attorneys who are found to have rendered ineffective assistance:

- Automatic disbarment for five years
- Liability for the costs of a new trial
- Re-admission to the bar is subject to:
 - 1) Payment of costs of retrial;
 - 2) 24 credit hours of legal education;
 - 3) Retaking, and passing, the New Mexico bar examination

FISCAL IMPLICATIONS

If this bill becomes law, additional hearings are likely and have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase. There will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judiciary will be proportional to the enforcement of this law and commenced prosecutions.

PDD states that in order to field lawyers who will be willing to work so that no possible allegations of ineffective assistance of counsel brought against them, the PDD will require an expansive increase in financial resources for experts and additional attorneys to handle its case loads. Further, the PDD will be liable under the bill for the costs of re-trials following any infrequent actual findings of ineffective assistance of counsel.

SIGNIFICANT ISSUES

The AOC provided the following:

Discipline of attorneys has traditionally fallen within the purview of the New Mexico Supreme Court. The authority of the Supreme Court under powers of superintending control encompasses the power and responsibility to determine the grounds for the discipline of lawyers. The authority also extends to determining the appropriate discipline for any New Mexico attorney. Any legislative attempt to limit what conduct the Supreme Court may consider as grounds for imposing attorney discipline will be an unconstitutional infringement of the Supreme Court's authority to regulate the practice of law.

A recent case also illustrates difficulties with the absolute penalties in this bill. In *State v. Schoonmaker*, defense counsel advised the court that defendant could not pay for any experts, and that defense counsel will be rendering ineffective assistance if he went to trial without the assistance of such experts or the ability to interview the State's experts. The court refused to allow counsel to withdraw, and the Supreme Court ultimately found that ineffective assistance was rendered in this case. Because there is no provision for a case-by-case analysis of circumstances attendant to the finding of ineffective assistance, the attorney in *Schoonmaker* will incur the penalties of HB 797.

HB 797 also directs the bill for the costs of retrial to be sent to the offending attorney and the attorney's law firm of record. In many, if not most, cases, the "offending attorney" will be a public defender and the public defender's office will absorb the costs of a new trial.

The AGO provided the following:

HB 797 attempts to compensate for the costs associated when counsel is found ineffective. HB 797 does not make any distinction between civil and criminal proceedings. Many times, any claim of ineffective assistance of counsel is a matter for legal malpractice insurance. In criminal cases, a claim of ineffective assistance of counsel is subject to lengthy litigation both on direct appeal, in state habeas corpus actions, and in federal habeas corpus proceedings.

HB 797 may be construed as an intrusion on the ability of the judiciary to control the practice of law including membership in the bar and disbarment. The collection of monies may be problematic including how the value of a trial and related costs are assessed and collected.

Finally HB 797 does not provide for any due process protections for the removal of the right to practice law. HB 797 appears to impose a strict liability: Once a ruling of ineffective assistance of counsel is made, an automatic disbarment is set for a period of five years. The right to practice law and disbarment will be subject to due process protections under the New Mexico and United States Constitutions.

The PDD provided the following:

While the problem of ineffective lawyers is sometimes a vexing one that is handily addressed already by the Disciplinary Board of the New Mexico Supreme Court, it is a minor one and this bill is not an effective means of addressing it. Most significantly and bluntly, this bill proposes a statutory scheme that will be held unconstitutional as violating separation of powers with the Legislature overstepping its bounds in attempting to control the function of the Judiciary. Research shows no jurisdiction in the country where a similar scheme has been constitutionally implemented.

There are many further concerns about how passage of this bill will affect the judicial system. As a framework for this analysis, it should be noted that the procedure for demonstration of a claim of ineffective assistance of counsel is well established and quite difficult to achieve: following a 1984 federal case, the New Mexico Supreme Court requires a defendant to show, first, that his counsel's performance was deficient and, second, that this deficiency prejudiced his defense. To be ineffective, a lawyer's performance must be so unprofessional that no reasonable attorney will so behave, and must not be in pursuit of a trial tactic or strategy. The prejudice prong of this test requires that a new trial will only be ordered where the result will have been different but for counsel's errors.

As a review of case law will show, while allegations of ineffective assistance of counsel are frequent on appeal and in habeas corpus suits, actual holdings of ineffective assistance of counsel are extremely rare and are not a major cause of those retrials that are ordered. Allegations of ineffective assistance of counsel are often the result of factors outside the lawyer's control – for instance, the lawyer is forced by a judge to try a case too soon after another major trial, or the lawyer is unable to find an available expert to testify in support of a defense theory.

Further, as the system presently stands, lawyers generally fall on their swords and make plain the evidence that supports a finding that they were ineffective. This leads to an accurate finding by the reviewing court about whether there was a miscarriage of justice. Under the proposed scheme, an ineffective lawyer will have self-interest in hiding any miscarriage of justice. Given the way that the system actually works, this is likely to lead to even more severe miscarriages of justice as individuals refuse to cooperate or intentionally obfuscate in an attempt to shield themselves from liability.

ADMINISTRATIVE IMPLICATIONS

The PDD claims that the implementation of this unconstitutional scheme will have profound performance implications on PDD lawyers. In an already overstressed and over busy system in which lawyers are already under-resourced, what lawyer will feel safe proceeding to trial in any case where he or she might be disbarred and lose if some later tribunal might find the she or he was not able to render effective assistance of counsel in one of the hundreds of cases handled annually?

TECHNICAL ISSUES

The AOC states that this bill should clarify whether the penalties for ineffective assistance of counsel apply only to criminal cases, as suggested by subsection B, or both civil and criminal cases, as suggested by subsection A.

DW/svb