

Wisconsin Counties Association

MEMORANDUM

TO: Honorable Members of the Joint Committee on Finance

FROM: Sarah Diedrick-Kasdorf, Legislative Associate *SDK*

DATE: November 28, 2001

SUBJECT: Support for Legislation Restoring Funding to the State Public Defender's Office

The Wisconsin Counties Association (WCA) has been closely following the debate regarding the appropriate level of funding for the State Public Defender's Office. The Wisconsin Counties Association has had discussions with both the Governor's office and the State Public Defender's office on this important issue. The actual fiscal impact that the Governor's veto will have on county government at this time is, in our opinion, indeterminable. However, we do believe that the Governor's veto will have a significant impact on county budgets.

Two pieces of legislation have been introduced to restore the funding cuts to the State Public Defender's office as a result of Governor McCallum's veto. One of these bills, Assembly Bill 536, was referred directly to the Joint Committee on Finance. WCA strongly urges you to schedule Assembly Bill 536 for action as soon as possible.

If the legislature does not take action soon to restore funding to the SPD's office, the consequences could be very costly to county government. While WCA understands the tight fiscal condition that the state is currently experiencing, the impact of a weakening economy takes its toll at the local level as well. Although Assembly Bill 536 has a \$3.2 million fiscal note attached to it, the fiscal impact to county government will far exceed \$3 million if Assembly Bill 536/Senate Bill 278 is not acted upon.

If the state takes action, the \$3.2 million is funded out of state general purpose revenue. If the state fails to act, several times that amount in property tax revenue will be needed to fund the projected shortfall in the state public defender's budget. State and county taxpayers are one in the same. WCA respectfully requests that positive action be taken on Assembly Bill 536 to ensure that we ask no more of our citizens than what is needed to support indigent defense services in Wisconsin.

Thank you in advance for addressing this very important issue.

cc: Wisconsin State Legislature

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STATE PUBLIC DEFENDER FUNDING – 2001-2003 SUMMARY

1. Changes to the SPD's budget passed by the Legislature would have saved \$3,207,800 during the 2001-2003 biennium. Recognizing that representation by SPD staff is more cost effective than appointing cases to private bar attorneys, it included provisions to open a pilot "conflicts office" and to add staff to SPD local offices. Doing so provided the opportunity to reduce funding for the SPD's private bar appropriation enough to more than offset the staff cost.
2. The Governor vetoed the additional staff, yet did not restore the private bar funds needed to pay the cases that will need to be appointed out, thus creating a deficit in the agency's budget. The cumulative effect was a base cut of 8.07%, beginning in 2002-2003.
3. On November 5th, the Joint Committee on Finance (JCF) approved the SPD's request to transfer \$2.8 million in FY03 from the Trial Division appropriation to the Private Bar appropriation. This action made available the funds that had been appropriated for the vetoed staff, which would otherwise have lapsed.
4. Since the budget was signed, DOA allocated additional budget reductions to the SPD's salary line in the Trial Division:
 - ◆ \$949,800 each year relating to the budget provision to eliminate positions vacant more than nine months. The SPD had eight positions vacant more than nine months, whereas the cut equals the salary and fringe benefits for eighteen staff attorneys. Ironically, appointing those eighteen caseloads to private bar attorneys would cost more than \$2.1 million.
 - ◆ \$48,400 each year relating to the budget provision to reduce expenditures for Dues and Memberships by 20%. This cut equals 1400% of the SPD's \$3,441 expenditures for Dues and Memberships in FY2001.
 - ◆ \$2,189,900, representing a 3.5% lapse in FY02.
5. The SPD's 2001-2003 budget shortfall has increased to \$10,957,600. *Note this does not assume a 3.5% lapse will be ordered in FY03 as well. That, or any other future lapse requirements would increase the SPD deficit.* If DOA approves the agency's request to reallocate these additional cuts to the private bar appropriation, the cumulative effect will be a 9.92% reduction in FY02, or 10,957,600. If the reallocation is not approved, the effective reduction would increase to nearly \$17 million – including the cost to send additional cases to the private bar if the cuts must be applied to staff salaries.
6. These deficit calculations are based on actual case openings in FY01 and the first quarter of FY02. Actual case openings during the first five months of FY02 have been eight to ten percent above last year. If this trend continues, the deficit would be much greater.

7. The projected deficit also does not include the costs of any additional cases that will be opened by the 14.75 additional prosecutor positions approved by the Joint Committee on Finance on November 5th.
8. In early October, AB 536 and SB 278 were introduced with broad bipartisan support, and referred to committees. These bills were crafted with the intent of restoring the budget provisions as passed by the Legislature. Neither bill addresses the above-mentioned additional cuts imposed by DOA.
9. However, of greater concern is that savings projected from the initial legislative provisions, to add staff to local offices and open a conflicts office, were predicated on the new staff being hired October 1, 2001. The sooner the new staff were assigned cases that would otherwise be appointed out, the sooner they would reduce SPD expenditures.

[Note that:

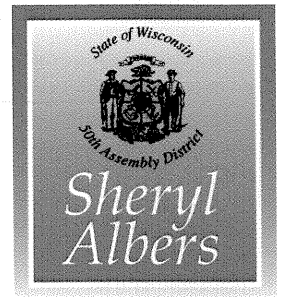
- a) a new attorney is budgeted to have a full caseload beginning with the second month of employment;*
- b) the effect on private bar payments is not felt for approximately five more months, when bills for the cases that would have been assigned to private attorneys are completed, billed and paid; and*
- c) the private bar appropriation has historically been budgeted each biennium to pay bills received by the end of March of the second year.]*

Thus, as the hire date for staff is pushed back, the potential savings in 2001-2003 erode.

10. Based on the above, if staff are added on the following dates, these are the projections to fully fund the SPD in 2001-2003, including lapses per Act 16 as allocated by DOA and the transfer of \$2.8 million to the private bar line. The following chart illustrates what is needed to restore the budget provisions as passed by the Legislature. Had the Joint Finance Committee version of the budget been enacted, the SPD's 2001-2003 shortfall would have been the biennial lapse of \$1.1 million and the additional DOA-mandated lapses.

<u>If Hired:</u>	<u>Funds provided in AB536/SB278</u>	<u>Additional funds needed</u>	<u>Total funds needed</u>
04/01/02	\$3,267,900	\$ 9,593,000	\$12,860,900
07/01/02	\$3,267,900	\$10,357,300	\$13,625,200

11. Our projections indicate that we have already passed the point in time where the most cost-effective solution in 2001-2003 would be to add staff. However, adding staff now is still the best option in the long run, yielding net savings of \$1.5 million per year, beginning in FY04.



Testimony of Attorney Scott Harold Southworth
Office of State Representative Sheryl K. Albers

2001 Senate Bill 278 – Office of the State Public Defender

Senate Committee on Judiciary, Consumer Affairs, and Campaign Finance Reform
December 18, 2001

Thank you, Mr. Chairman, for allowing me to testify today on behalf of Representative Albers.

Much has been made of the budget cuts to the Office of the State Public Defender (OPD) over the past few months. In order to address the crisis now faced by this state agency and the bipartisan legislation introduced by Senator Moore and Representative Albers, it is important to understand the history and background of the issue.

Public representation of the poor is not a legislative decision; rather, our United States Constitution demands that the government provide an attorney to those deemed indigent. This is not new law – the United States Supreme Court established this constitutional standard in 1963 with its *Douglas v. California* decision (372 U.S. 353).

State can choose how to implement the *Douglas* decision. In Wisconsin – a model for public representation systems around the world, indigent individuals get representation in one of three ways: State-employed public defenders, private bar attorneys contracted with the Office of the Public Defender at \$40 per hour, or private bar attorneys contracted with a county at the \$70 rate established by the Wisconsin Supreme Court (or higher, if the county so chooses).

Along those lines, there are two standards for representing the indigent-accused: The SPD standards, created by the Legislature; and the standards set forth by federal and state case law, notably *State v. Dean*, a 1991 Wisconsin Court of Appeals decision.

The Legislative standards for obtaining a public defender do not necessarily meet constitutional standards, however. In *State v. Dean*, for example, the Wisconsin Court of Appeals stated the following:

The trial court cannot restrict itself to the criteria mandated by the legislature
The court should consider all relevant evidence presented by the defendant that is material to the defendant's present ability to retain counsel. The trial court must also disregard the public defender's established cost of retained counsel and consider the fees charged by local private counsel in similar cases. The review at

this stage will ultimately involve examining on a case-by-case basis, factors and circumstances that the legislature is ill-equipped to consider.

In March of this year the District Court of Appeals in Wisconsin reaffirmed this principle in *State v. Nieves-Gonzalez*, noting the following:

If a criminal defendant does not meet the public defender criteria, the trial court must nevertheless determine whether the defendant is indigent, and if he or she is, the trial court should appoint counsel from the private bar.

In the original budget proposal introduced by Governor McCallum, agencies took an “across the board” 5% cut. However, the cuts actually treated various agencies very differently, since it only applied to GPR expenditures, rather than all expenditures. Because the SPD budget, unlike many other agency budgets, is made up of nearly all GPR, it faced a cut of nearly 5% of its total budget. This compares to a less than .25% cut for DOA, DOC and the UW System.

During budget deliberations, Senator Moore and Representative Albers worked closely together to establish a bipartisan package for the Office of the State Public Defender to avoid such a drastic cut to the agency. The motion – adopted unanimously by the Joint Committee on Finance and approved by both houses of the legislature, added funding for staff, mandated cost savings, raised felony thresholds to more rational amounts to avoid excess representation for felony cases, created a conflicts office to defer fewer clients to the private bar, and even required the SPD to file reports to the JCF quarterly in order to monitor the SPD’s progress. The net fiscal impact of the budget action included 59.3 FTE GPR positions and \$3,267,900 in additional GPR spending above Governor McCallum’s original budget allocations. Under the plan, the SPD would still have absorbed a total budget reduction of nearly 2.5% – one of the highest overall budget cuts of any agency in Wisconsin. To his credit, State Public Defender Nicholas Chiarkas, accepted this cut and vowed to implement it to the best of his ability.

Unfortunately, Governor McCallum vetoed the measure, again cutting the agency’s budget. However, the vetoes actually left the SPD in a worse situation than if the legislature had simply approved of the Governor’s request. This occurred because the Legislature increased the Trial Representation appropriation (the appropriation that pays for state-employed public defenders) as part of the bipartisan plan to accommodate the increase in full-time staff. At the same time, the plan reduced the Private Bar appropriation (which pays private bar attorneys at the \$40 / hour rate) by \$7.2 million in anticipation of the savings that would occur by hiring those new state attorneys and changing some of the felony thresholds. When the Governor vetoed dollars out of the SPD budget, he did so out of the Trial Representation appropriation only, leaving the cuts to the Private Bar appropriation intact.

After the vetoes, the overall cut to the SPD stood at over 8% -- not 5% -- beginning in FY02-03, with an overall base cut of \$5,227,300 instead of the \$3,236,900 the governor cut in his original budget.

Since the SPD can no longer realize the cost savings we expected due to the veto, and the statutory caseloads for SPD attorneys are already 23% higher than national standards, it must continue to utilize private bar contracts. Of course, since the legislature cut that appropriation in anticipation of the cost savings, the SPD will need to advise private bar attorneys being asked to

take cases beginning on or about July 1, 2002 – only one-year into the budget – that they cannot be paid for their work until July of 2003. Since the SPD reports that it currently experiences difficulty finding private bar attorneys now to take cases at the statutory \$40/hour rate, the prospect of a 12-month payment delay will likely result in very few private bar attorneys willing to take SPD appointments after June, 2002. If that occurs, county judges will need to appoint attorneys to handle cases.

If judges appoint private bar attorneys at the Supreme Court rate of \$70 an hour, it could cost counties as much as \$28,586,600 for FY02-03, based on current county caseloads. Of course, caseloads could also increase, creating an even bigger problem. As examples of how the legislature can now address this problem, consider the following:

PD (GPR) – staff attorneys =	\$ 3,267,900 (SB 278 / AB 536)
PD (GPR) – staff attorneys =	\$12,860,900 (SB 278 amended to take into account new budget info.)
PD (GPR) – restore current operations to status quo for this biennium	\$10,957,600 (sub. amendment to SB 278)
Counties – private bar contracts @ \$70 / hour =	to \$28,586,600 (no legislation; county expense)

Other alternatives that Representative Albers is willing to consider include lowering the \$70/hour rate now established by the Supreme Court, and/or adding some limited staff into the SPD while also adding additional money into the private bar appropriation.

As a legislature, we could eliminate all public defenders – nothing in the U.S. Constitution requires us to maintain any system where employees of the state represent the poor. However, if a state agency did not exist, local judges would have to appoint a county-funded attorney for every indigent individual who the state is constitutionally required to represent. In essence, it would be a direct – and costly – increase in property taxes.

As we debate the full-funding of the Office of the Public Defender, Representative Albers encourages all of her colleagues to keep in mind that it isn't a question of *if* public representation is funded, it's a question of *who pays, and how much*. If our budget decisions require the elimination of some public defenders in the state, we'll spend more GPR dollars to fund state contracts. If we cannot find enough attorneys to take state contracts, then local judges will appoint attorneys at market rates – at property taxpayer expense.

Thank you for allowing me to testify today. I would be happy to answer any questions.



**STATE BAR
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MEMORANDUM

To: State Senate Judiciary Committee
From: State Bar of Wisconsin
Date: December 18, 2001
Re: SB278—State Public Defender Funding

The State Bar of Wisconsin strongly supports SB278, which would provide adequate funding for the State Public Defender system.

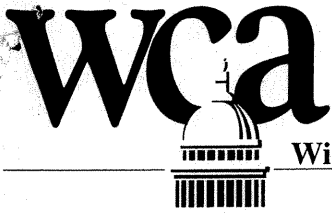
In the State Budget, the Joint Committee on Finance voted 16-0 to reduce the proposed 5% cut to the State Public Defender's Budget to 2.5% and to allow the SPD budget to request more funding later in the year if it cannot absorb all of the cuts. It also created 43 new positions within the Public Defenders Office.

Unfortunately, the Governor vetoed these provisions. The State Bar appears today to encourage the Committee to adopt SB278 and restore the funding approved unanimously by the Joint Committee on Finance. The SPD is essential to the functioning of our criminal justice system. There are four very good reasons to allow these provisions to become law:

1. Providing the Right to Counsel is guaranteed by the 6th Amendment and *Gideon v. Wainwright*. All citizens deserve access to justice regardless of their income.
2. The result of the cut may be a reduction in the Private Bar Rate to \$30, eliminating 50 attorney positions from the PD office, delaying Private Bar payments for up to a year, or a combination of the three. Any of these options would diminish access to the justice system for the indigent.
3. Not funding the SPD will simply result in more appointments at the county level, at property tax payers' expense.
4. The Joint Finance Committee adopted the current funding and staffing levels unanimously with overwhelming bipartisan support.

Further, the Bar has grave concerns about the possibility of additional cuts that may come to pass in any budget adjustment bill. Passage of this bill may be moot if the agency has to endure another cut.





MEMORANDUM

TO: Honorable Members of the Senate Committee on Judiciary, Consumer Affairs and Campaign Finance Reform

FROM: Sarah Diedrick-Kasdorf, Legislative Associate *SDK*

DATE: December 18, 2001

SUBJECT: Support for Senate Bill 278

The Wisconsin Counties Association (WCA) supports Senate Bill 278, which increases the public defender board appropriation for trial representation by \$2,894,800 GPR in FY 2001-02 and \$373,100 GPR in FY 2002-03 for the purpose of funding 43.3 trial representation positions and 16 conflicts office positions. The bill also requires the public defender board to submit quarterly reports on budget savings to JCF, and to seek additional funding from JCF if the appropriations for the public defender board are not sufficient.

As many of you already know, counties are in the unfortunate position of being caught in the middle of the debate between the Governor's office and the State Public Defender's office on the issue of indigent defense funding. The Wisconsin Counties Association has done its best at trying to get to the bottom of this issue so we can best explain to our members the impact the Governor's vetoes, as well as the additional 3.5% cut, will have on county budgets.

Some individuals have had difficulty understanding why this issue is of such importance to county government. It took a four page memo to our membership (see attached) just to outline the issue and present the different points of view. Rather than explaining now how we got to where we are today, I will focus on the effect inaction by the full Legislature and Governor will have on counties.

As explained to Association staff many times by our members, this is what occurs at courthouses statewide in the most simplified terms: A defendant is before the judge awaiting the appointment of counsel. The judge assigns an SPD to the case. The SPD tells the judge that his/her caseload already exceeds national caseload standards and is unable to provide proper representation. The judge agrees and seeks a private bar attorney to take the case. Numerous private bar attorneys refuse to take the case because the \$40 per hour rate is insufficient to cover their costs. Having no other alternatives available, the judge appoints a private bar attorney to the case at a rate of \$70 per hour or

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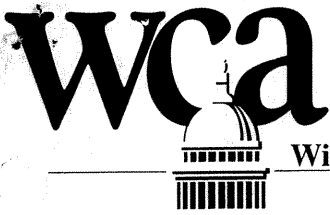
higher and orders the county to pay all defense costs. The county has no choice but to pay the bill.

Many counties are already frustrated with the indigent defense system in the state of Wisconsin. Counties are required to pay for defense services for individuals who are truly indigent, but fail to qualify for SPD services due to inadequate standards. That is a debate we hope the Legislature takes up another day. Unfortunately, we are here today to request that funding be restored to the State Public Defender's office to allow continued service by the SPD's office (either staff attorneys or private bar) for those who qualify under the current indigency guidelines. The office of the State Public Defender was created to remove the financial burden of indigent defense services from the counties, as well as ensure adequate defense services through the utilization of staff specializing in criminal defense services. The Governor's veto, along with the additional 3.5% cut, shifts the fiscal burden back to county government.

If the Legislature does not take action soon to restore funding to the SPD's office, the consequences could be very costly to county government. While WCA understands the tight fiscal condition that the state is currently experiencing, the impact of a weakening economy takes its toll at the local level as well. Although Senate Bill 278 has a \$3.2 million fiscal note attached to it, the fiscal impact to county government will far exceed \$3 million if Senate Bill 278 is not acted upon.

If the state takes action, the \$3.2 million is funded out of state general purpose revenue. If the state fails to act, several times that amount in property tax revenue will be needed to fund the projected shortfall in the state public defender's budget. State and county taxpayers are one in the same. WCA respectfully requests that positive action be taken on Senate Bill 278 to ensure that we ask no more of our citizens than what is needed to support indigent defense services in Wisconsin.

Thank you for considering our comments.



Wisconsin Counties Association

MEMORANDUM

TO: County Board Chairs, Executives and Administrators

FROM: Sarah Diedrick-Kasdorf, Legislative Associate *SK*

DATE: October 24, 2001

SUBJECT: Issues Surrounding Funding of the State Public Defender's Office

Over the past several months, there have been recurring discussions regarding the amount of funding available to the State Public Defender's office for the provision of indigent defense services as well as the impact on county budgets if the SPD office does not receive "sufficient" funding. Front-page headlines indicate that counties will be handed a \$33 million bill associated with indigent defense. The Wisconsin Counties Association has been approached on this issue by not only the State Public Defender's office, but by the Administration (Governor's office and Department of Administration) as well. Over the past several weeks, we have attempted to obtain a clear-cut answer as to what happens when the SPD budget is insufficient. However, each entity we talked to has a different spin on the issue. This memo will attempt to explain the recent history on this issue, the arguments presented by the SPD and the Administration on this issue regarding impact on counties, as well as legislation introduced to provide the SPD with additional funds. Finally, this memo will look at potential remedies available to county government to avoid paying defense costs for individuals who qualify for SPD services.

Before discussing the current issue, it is important to understand the population of defendants we are talking about. As many counties are painfully aware, state statutes/court decisions require counties to pay for the defense of individuals who are deemed to be indigent by the court yet do not meet state public defender indigency criteria. Due to the fact that the current indigency criteria is outdated, each year counties are paying for defense services for a greater number of individuals. WCA has, and continues to ask, that the criteria be updated annually so all indigent individuals qualify for SPD services. However, the defense services referred to in this memo are for individuals who qualify for SPD services, yet the SPD argues they cannot provide services due to a lack of resources.

Recent History

In February of 2001, Governor Scott McCallum introduced his 2001-03 biennial budget. Included in the Governor's budget bill was a 5% cut in each state agency's appropriation

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(with certain exceptions). The state public defender's office was asked to accept the full 5% cut of GPR expenditures. The state public defender argued vigorously against this cut as the SPD budget is 98% GPR, 90% of which pays private bar attorneys, staff salaries and fringe benefits for direct client services intended to supplant county costs when the agency was created. In addition, the state public defender argued that poor people charged with crimes or facing deprivation of liberty have a right to appointed counsel under the state and federal constitutions. However, the SPD has no control over the number of cases for which representation must be provided so private attorneys must be appointed in cases that cannot be handled by staff. The public defender also argued that the \$3.2 million cut proposed by the Governor would result in the elimination of 50.2 staff attorneys. If the cases handled by the 50 attorneys were shifted to the private bar, the SPD indicated that it would cost the state \$5.9 million.

The SPD also indicated that if the cut were to occur, they would have two options available to them: (1) lower the rate paid to private attorneys (currently \$40 per hour) or (2) delay payments to attorneys for 13 months. Many private attorneys indicated that if the cut were to be implemented, they would refuse to take SPD appointments as the \$40 per hour rate was insufficient and they could not wait 13 months for payment. Absent private attorneys accepting these SPD cases, judges could appoint counsel at county expense, at a rate of \$70 per hour or higher. The Wisconsin Counties Association supported the arguments of the SPD at that time and requested that the Joint Committee on Finance restore the 5% cut to the SPD budget. The Joint Finance Committee also agreed with the arguments of the SPD and restored the 5% cut. The Joint Finance Committee also made additional changes to the budget of the SPD.

No other legislative action occurred with the public defender's budget during the remainder of budget deliberations. On August 30, 2001, Governor McCallum issued his budget vetoes. Included in his vetoes was a \$3.2 million cut to the SPD budget to restore the 5% cut originally proposed by the Governor.

When the JCF restored the SPD budget, it increased the trial representation appropriation (the appropriation that pays for state-employed public defenders) as part of their plan to accommodate the increase in full-time staff. At the same time, the JCF reduced the private bar appropriation (which pays private bar attorneys \$40/hour) by \$7.2 million in anticipation of the savings that would occur by hiring these new state attorneys and changing some of the new felony thresholds. When the Governor vetoed dollars out of the SPD budget, he did so out of the Trial Representation appropriation only. Due to the increased dollars already in that appropriation, the SPD likely will not need to lay off staff.

As it stands now, the overall cut to the SPD budget is 8.07% beginning in SFY 02-03 since the Governor vetoed money out of the trial representation appropriation but did not take

into account that the private bar appropriation had already been reduced by the Legislature by \$5.1 million in FY 02-03 to account for the anticipated cost savings with the new staff attorneys and the felony threshold changes. Therefore, an overall base cut of \$5.2 million exists for FY 02-03, instead of the \$3.2 million the governor cut in his original budget.

Arguments Presented by the SPD and Administration on this Issue

It is now being argued by members of the Legislature and the SPD that since the SPD can no longer realize the anticipated cost savings due to the veto, and the statutory caseloads for SPD attorneys are already 23% higher than national standards, the SPD must continue to use private bar contracts. However, since the legislature cut that appropriation in anticipation of the cost savings (from SPD attorneys handling cases), the SPD indicates that it will need to advise private bar attorneys being asked to take cases beginning on or about July 1, 2002, that they cannot be paid for their work until July of 2003. The SPD reports that it currently experiences difficulty finding private bar attorneys now to take cases at the statutory \$40 per hour rate. The prospect of a 12-month payment delay will likely result in very few private bar attorneys willing to take SPD appointments after June, 2002. If that occurs, the SPD argues that judges will appoint attorneys at county expense. If judges appoint private bar attorneys at the Supreme Court rate of \$70 per hour, according to the SPD, it could cost counties as much as \$33.2 million in FY 02-03 based on current county caseloads.

The Governor's office and the Department of Administration, on the other hand, argue that if an individual qualifies for SPD services, the SPD must pay for the service. A legal opinion from the Governor's office is forthcoming. The Department of Administration, in the interim, cited the following statutes in defense of their position:

977.05(4)(g) In accordance with the standards under pars. (h) and (j), accept referrals from judges, courts or appropriate state agencies for the determination of indigency of persons who claim or appear to be indigent. If a referral is accepted and if the person is determined to be indigent in full or in part, the state public defender shall appoint counsel in accordance with contracts and policies of the board, and inform the referring judge, court or agency of the name and address of the specific attorney who has been assigned to the case.

977.07(1)(d) If the representative of the state public defender or the county designee determines that a person is indigent or if no determination of indigency is required as provided in par. (a), the case shall be referred to or within the office of the state public defender for assignment of counsel under s. 977.08.

Legislation to Restore Funding to the State Public Defender's Office

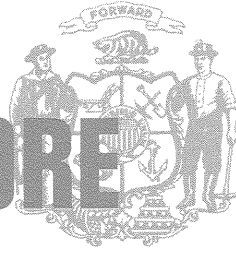
Following the Governor's veto, there was much discussion regarding a potential veto override. It does not appear, however, that a veto override vote will be considered on this issue in either house of the Legislature. Instead, legislation was introduced to restore the \$3.2 million cut to the SPD budget. Assembly Bill 536, sponsored by Representative Sheryl Albers, has 52 Assembly sponsors and 21 Senate sponsors. Senate Bill 278, sponsored by Senator Gwendolynne Moore, has 21 Senate sponsors and 54 Assembly sponsors. Each piece of legislation has enough support to obtain passage and be sent to the Governor's desk. Based on conversation to date, it appears that the Governor may veto this legislation. WCA has indicated to the Governor's office that we will be supporting this legislation.

Potential Remedies Available to Counties to Avoid Paying Defense Costs for Individuals Who Qualify for SPD Services

Regardless of the status of the legislation, the issue of who is responsible for paying for defense services for individuals who qualify for SPD services when the SPD budget is exhausted remains. WCA is examining several options at this time. These options include pursuing legislation clarifying that if an individual qualifies for SPD services, the SPD/state is responsible for funding defense services. Additionally, the potential for court action exists as well. A county could utilize the same argument as the SPD and tell a judge the county budget for indigent defense services has been exhausted and thus, the county will not pay for indigent defense services for anyone who meets SPD qualifications. Obviously, there are legal and political ramifications associated with these options.

WCA will continue to support AB 536/SB 278 as they move through the legislative process as well as continue to explore potential solutions to ensure counties are not placed in such a position in the future. If you have any comments or questions regarding this memo, please do not hesitate to contact the WCA office.

State Senator GWENDOLYNNE MOORE



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Member: Joint Finance Committee

Board Member: Wisconsin Housing and Economic Development Authority

Senator Gwendolynne S. Moore's Testimony on SB 278 Committee on Judiciary, Consumer Affairs, and Campaign Finance Reform Tuesday, December 18, 2001 Room 201 SE, 11:00 a.m.

As the author of Senate Bill 278, I would like to thank Chairman George and the members of the Committee for holding today's public hearing. Unfortunately, due to a concurrent meeting of the Joint Committee on Finance that was scheduled last month, I am unable to testify on behalf of SB 278 in person. I respectfully submit this written testimony instead.

Senate Bill 278 and its Assembly companion bill, AB 536, introduced by Representative Sheryl Albers, will do the following:

- Increase the public defender board appropriation for trial representation by \$2,894,800 GPR in 2001-2002 and \$373,100 in 2002-2003 for the purposes of funding 43.4 trial representation positions and 16.0 conflicts office positions.
- Require the public defender board to submit quarterly reports on budget savings to the Joint Finance Committee; and
- Require the public defender board to seek additional funding from the Joint Finance Committee if their appropriations are not sufficient.

As you know, this legislation was introduced after the Governor slashed funding, positions, and a conflicts office from the budget of the State Public Defender (SPD). This veto unraveled the bipartisan package that received UNANIMOUS support by the Joint Committee on Finance and was endorsed as part of enrolled Senate Bill 55 adopted by the full Legislature in July 2001. The Legislature's provisions would have ensured that the state adhered to its constitutional responsibility to provide indigent defense at the lowest cost to state taxpayers. **These changes would have saved \$3,207,800 during the 2001-2003 biennium.** In addition, public defenders, district attorneys, judges, police officers, private attorneys, government officials, religious representatives, community advocates, editorial boards and individual citizens statewide shared their support for full funding of the SPD.

SPD attorneys provide quality, cost-effective representation to indigent defendants. Currently, when public defenders reach their statutory caseload limits, the SPD must find private bar attorneys who will take additional cases at a state reimbursement rate of \$40 per hour. Oftentimes, it is difficult for the SPD to find private bar attorneys to take these cases, since a private attorney's overhead costs usually run about \$60 per hour. If the SPD is unable to find a private attorney to take a case in a timely fashion, judges often

have no choice but to appoint counsel at the county's expense at a rate of at least \$70 per hour. The Joint Finance Committee shifted funds from the SPD's private bar appropriation (used to pay private attorneys) to fund the 59.3 new positions and a Conflicts Office, therefore allowing the SPD to handle more cases in-house, at a cost savings to the state.

However, the Governor cut all new positions, cut funding from the public defender's trial representation appropriation which pays public defender salaries and benefits, but left the cut to the private bar appropriation in tact. As a result, the SPD is unable to handle additional cases in house and no cost savings are realized. On November 5, 2001, the Joint Committee on Finance approved the SPD's request to transfer funds associated with vetoed positions to the agency's private bar appropriation. **Even so, the SPD and the Legislative Fiscal Bureau (LFB) project a shortfall in the private bar appropriation of \$8.8 million. This biennial appropriation will be depleted as early as November 2002.** Further, the Governor's partial vetoes established a structural deficit in the private bar appropriation that will have to be addressed in subsequent biennia.

The projected \$8.8 million deficit is based on 2000-2001 caseload averages. However, both the LFB and the SPD indicate that the number of cases referred to the SPD has risen above last year's levels during the past quarter. **The SPD has reported a 10% increase in caseload openings during the first five months of FY 2001-2002.** The projected deficit also does not include the costs of any additional cases that will be opened by the 14.75 additional prosecutor positions approved by the Joint Committee on Finance on November 5, 2001. Increased SPD caseloads will further strain the under-funded private bar appropriation and serve to increase the deficit.

The decimation of the SPD budget has not ended with the Governor's vetoes, however. Since the budget was signed, the Department of Administration has allocated the following additional budget reductions to the SPD's salary line in the Trial Division, resulting in a 2001-2003 budget shortfall of \$10,957,600:

- ◆ \$949,800 each year relating to the budget provision to eliminate positions vacant more than nine months. The SPD had eight positions vacant more than nine months, whereas the cut equals the salary and fringe benefits for eighteen staff attorneys. Ironically, appointing those eighteen caseloads to private bar attorneys would cost more than \$2.1 million.
- ◆ \$48,400 each year relating to the budget provision to reduce expenditures for Dues and Memberships by 20%. This cut equals 1400% of the SPD's \$3,441 expenditures for Dues and Memberships in FY2001.
- ◆ \$2,189,900, representing a 3.5% lapse in FY02.

If nothing is done to rectify the damage of the cuts to the SPD, the constitutional mandate to fund indigent defense will fall on county taxpayers. When faced with the possibility that no public defender or private bar attorney is available, judges may have no choice

but to appoint counsel at a rate of \$70 per hour or more – at county expense. Statewide, the SPD estimated that cost to county taxpayers could be as much as \$33.3 million before the additional cuts to the SPD were made.

Indigent defense is not something the state funds only when it chooses -- it is a mandate of the US and Wisconsin Constitutions. If no legislative action is taken on SB 278 or its companion bill, AB 536, we will soon be forced to find the scarce dollars to fill the budget deficit created by these series of short-sighted cuts. This biennium's deficit will continue to exist in subsequent biennia. SB 278 provides a fiscally responsible, cost-effective, long-term solution to this funding dilemma.

However, enrolled Senate Bill 55, from which SB 278 is based, assumed that 40 new staff attorneys would have been hired by October 1, 2001, and handling cases by November 1, 2001. As a result of the Governor's partial vetoes, the additional cuts to the SPD budget, and slow legislative action on the bill, **the 2001-2003 savings associated with hiring additional SPD staff is eroding each day that passage is delayed.**

Once again, I would like to thank the Committee for recognizing the importance of this legislation and holding today's public hearing.



**STATE BAR
of WISCONSIN®**

5302 Eastpark Blvd.
P.O. Box 7158
Madison, WI 53707-7158

MEMORANDUM

To: State Senate Judiciary Committee
From: State Bar of Wisconsin
Date: December 18, 2001
Re: SB278—State Public Defender Funding

The State Bar of Wisconsin strongly supports SB278, which would provide adequate funding for the State Public Defender system.

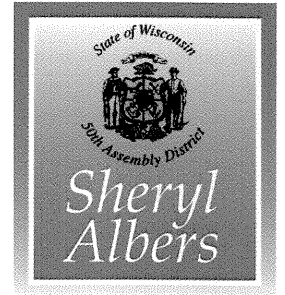
In the State Budget, the Joint Committee on Finance voted 16-0 to reduce the proposed 5% cut to the State Public Defender's Budget to 2.5% and to allow the SPD budget to request more funding later in the year if it cannot absorb all of the cuts. It also created 43 new positions within the Public Defenders Office.

Unfortunately, the Governor vetoed these provisions. The State Bar appears today to encourage the Committee to adopt SB278 and restore the funding approved unanimously by the Joint Committee on Finance. The SPD is essential to the functioning of our criminal justice system. There are four very good reasons to allow these provisions to become law:

1. Providing the Right to Counsel is guaranteed by the 6th Amendment and *Gideon v. Wainwright*. All citizens deserve access to justice regardless of their income.
2. The result of the cut may be a reduction in the Private Bar Rate to \$30, eliminating 50 attorney positions from the PD office, delaying Private Bar payments for up to a year, or a combination of the three. Any of these options would diminish access to the justice system for the indigent.
3. Not funding the SPD will simply result in more appointments at the county level, at property tax payers' expense.
4. The Joint Finance Committee adopted the current funding and staffing levels unanimously with overwhelming bipartisan support.

Further, the Bar has grave concerns about the possibility of additional cuts that may come to pass in any budget adjustment bill. Passage of this bill may be moot if the agency has to endure another cut.





Testimony of Attorney Scott Harold Southworth
Office of State Representative Sheryl K. Albers

2001 Senate Bill 278 – Office of the State Public Defender

Senate Committee on Judiciary, Consumer Affairs, and Campaign Finance Reform
December 18, 2001

Thank you, Mr. Chairman, for allowing me to testify today on behalf of Representative Albers.

Much has been made of the budget cuts to the Office of the State Public Defender (OPD) over the past few months. In order to address the crisis now faced by this state agency and the bipartisan legislation introduced by Senator Moore and Representative Albers, it is important to understand the history and background of the issue.

Public representation of the poor is not a legislative decision; rather, our United States Constitution demands that the government provide an attorney to those deemed indigent. This is not new law – the United States Supreme Court established this constitutional standard in 1963 with its *Douglas v. California* decision (372 U.S. 353).

State can choose how to implement the *Douglas* decision. In Wisconsin – a model for public representation systems around the world, indigent individuals get representation in one of three ways: State-employed public defenders, private bar attorneys contracted with the Office of the Public Defender at \$40 per hour, or private bar attorneys contracted with a county at the \$70 rate established by the Wisconsin Supreme Court (or higher, if the county so chooses).

Along those lines, there are two standards for representing the indigent-accused: The SPD standards, created by the Legislature; and the standards set forth by federal and state case law, notably *State v. Dean*, a 1991 Wisconsin Court of Appeals decision.

The Legislative standards for obtaining a public defender do not necessarily meet constitutional standards, however. In *State v. Dean*, for example, the Wisconsin Court of Appeals stated the following:

The trial court cannot restrict itself to the criteria mandated by the legislature
The court should consider all relevant evidence presented by the defendant that is material to the defendant's present ability to retain counsel. The trial court must also disregard the public defender's established cost of retained counsel and consider the fees charged by local private counsel in similar cases. The review at

this stage will ultimately involve examining on a case-by-case basis, factors and circumstances that the legislature is ill-equipped to consider.

In March of this year the District Court of Appeals in Wisconsin reaffirmed this principle in *State v. Nieves-Gonzalez*, noting the following:

If a criminal defendant does not meet the public defender criteria, the trial court must nevertheless determine whether the defendant is indigent, and if he or she is, the trial court should appoint counsel from the private bar.

In the original budget proposal introduced by Governor McCallum, agencies took an “across the board” 5% cut. However, the cuts actually treated various agencies very differently, since it only applied to GPR expenditures, rather than all expenditures. Because the SPD budget, unlike many other agency budgets, is made up of nearly all GPR, it faced a cut of nearly 5% of its total budget. This compares to a less than .25% cut for DOA, DOC and the UW System.

During budget deliberations, Senator Moore and Representative Albers worked closely together to establish a bipartisan package for the Office of the State Public Defender to avoid such a drastic cut to the agency. The motion – adopted unanimously by the Joint Committee on Finance and approved by both houses of the legislature, added funding for staff, mandated cost savings, raised felony thresholds to more rational amounts to avoid excess representation for felony cases, created a conflicts office to defer fewer clients to the private bar, and even required the SPD to file reports to the JCF quarterly in order to monitor the SPD’s progress. The net fiscal impact of the budget action included 59.3 FTE GPR positions and \$3,267,900 in additional GPR spending above Governor McCallum’s original budget allocations. Under the plan, the SPD would still have absorbed a total budget reduction of nearly 2.5% – one of the highest overall budget cuts of any agency in Wisconsin. To his credit, State Public Defender Nicholas Chiarkas, accepted this cut and vowed to implement it to the best of his ability.

Unfortunately, Governor McCallum vetoed the measure, again cutting the agency’s budget. However, the vetoes actually left the SPD in a worse situation than if the legislature had simply approved of the Governor’s request. This occurred because the Legislature increased the Trial Representation appropriation (the appropriation that pays for state-employed public defenders) as part of the bipartisan plan to accommodate the increase in full-time staff. At the same time, the plan reduced the Private Bar appropriation (which pays private bar attorneys at the \$40 / hour rate) by \$7.2 million in anticipation of the savings that would occur by hiring those new state attorneys and changing some of the felony thresholds. When the Governor vetoed dollars out of the SPD budget, he did so out of the Trial Representation appropriation only, leaving the cuts to the Private Bar appropriation intact.

After the vetoes, the overall cut to the SPD stood at over 8% -- not 5% -- beginning in FY02-03, with an overall base cut of \$5,227,300 instead of the \$3,236,900 the governor cut in his original budget.

Since the SPD can no longer realize the cost savings we expected due to the veto, and the statutory caseloads for SPD attorneys are already 23% higher than national standards, it must continue to utilize private bar contracts. Of course, since the legislature cut that appropriation in anticipation of the cost savings, the SPD will need to advise private bar attorneys being asked to

take cases beginning on or about July 1, 2002 – only one-year into the budget – that they cannot be paid for their work until July of 2003. Since the SPD reports that it currently experiences difficulty finding private bar attorneys now to take cases at the statutory \$40/hour rate, the prospect of a 12-month payment delay will likely result in very few private bar attorneys willing to take SPD appointments after June, 2002. If that occurs, county judges will need to appoint attorneys to handle cases.

If judges appoint private bar attorneys at the Supreme Court rate of \$70 an hour, it could cost counties as much as \$28,586,600 for FY02-03, based on current county caseloads. Of course, caseloads could also increase, creating an even bigger problem. As examples of how the legislature can now address this problem, consider the following:

PD (GPR) – staff attorneys =	\$ 3,267,900 (SB 278 / AB 536)
PD (GPR) – staff attorneys =	\$12,860,900 (SB 278 amended to take into account new budget info.)
PD (GPR) – restore current operations to status quo for this biennium	\$10,957,600 (sub. amendment to SB 278)
Counties – private bar contracts @ \$70 / hour =	to \$28,586,600 (no legislation; county expense)

Other alternatives that Representative Albers is willing to consider include lowering the \$70/hour rate now established by the Supreme Court, and/or adding some limited staff into the SPD while also adding additional money into the private bar appropriation.

As a legislature, we could eliminate all public defenders – nothing in the U.S. Constitution requires us to maintain any system where employees of the state represent the poor. However, if a state agency did not exist, local judges would have to appoint a county-funded attorney for every indigent individual who the state is constitutionally required to represent. In essence, it would be a direct – and costly – increase in property taxes.

As we debate the full-funding of the Office of the Public Defender, Representative Albers encourages all of her colleagues to keep in mind that it isn't a question of *if* public representation is funded, it's a question of *who pays, and how much*. If our budget decisions require the elimination of some public defenders in the state, we'll spend more GPR dollars to fund state contracts. If we cannot find enough attorneys to take state contracts, then local judges will appoint attorneys at market rates – at property taxpayer expense.

Thank you for allowing me to testify today. I would be happy to answer any questions.



INTERGOVERNMENTAL RELATIONS

Office of the County Executive

TO: State Senator Gary George &
Members of the Senate Judiciary, Consumer Affairs, and Campaign
Finance Reform Committee

FROM: Roy de la Rosa, Director, Milwaukee County Intergovernmental Relations

DATE: December 18, 2001

SUBJECT: SB 278 – State Public Defender Appropriations

Milwaukee County supports the passage of Senate Bill 278, which would provide additional resources to the Office of the State Public Defender to help fulfill their statutory duty to provide legal representation to indigent persons.

The Office of the State Public Defender is an important participant in the efficient operation of the Milwaukee County criminal justice system. A reduction in the number of public defenders, or private bar appointments, could negatively impact court operations through trial delays as well as possible increased costs for County-funded legal fees to cover the cost of legal representation for those indigent defendants.

Milwaukee County is already mandated to pay hundreds of thousands of dollars in legal fees in cases where the defendant does not qualify for public defender representation, but is still deemed indigent by the judge. It is our understanding that if the funding level for the Office of the State Public Defender is not significantly improved, Milwaukee County may be mandated to spend *millions* of dollars for indigent legal fees. Milwaukee County taxpayers already provide almost \$30 million to offset the cost of the State Court System, a figure that has increased disproportionately to the amount provided by the State in recent years.

Given the significant caseload in Milwaukee County that involves indigent defendants, legal representation impediments will adversely impact jail populations and the efficiency of other publicly funded court personnel including judges, prosecutors, law enforcement and court support staff. In summary, our criminal justice system needs all court participants, including the public defender, to be effectively staffed so that cases may be adjudicated fairly and expeditiously.

We respectfully request your support of Senate Bill 278 and urge the committee to hold an executive session on this piece of legislation in the near future.

Rossmiller, Dan

From: Bill Cooley [zendisciple@hotmail.com]
Sent: Wednesday, December 19, 2001 4:58 PM
To: GGeorge220@aol.com
Subject: Fwd: FW: SB 278

>From: "Cooley, William"
>To: Zendisciple@hotmail.com
>Subject: FW: SB 278
>Date: Wed, 19 Dec 2001 16:48:00 -0600
>
>

>-----Original Message-----

>From: Larry Balistreri [mailto:larrybal@wi.rr.com]
>Sent: Tuesday, December 18, 2001 5:27 PM
>To: Sen.George@legis.state.wi.us
>Cc: Sen.Moore@legis.state.wi.us; gingerk@mail.opd.state.wi.us
>Subject: SB 278
>
>

>Let the record show that I support SB 278
>

>Lawrence Balistreri
>2204 W. Club View Drive
>Glendale, WI 53209

Join the world's largest e-mail service with MSN Hotmail. [Click Here](#)

Rossmiller, Dan

From: Rossmiller, Dan
Sent: Wednesday, December 26, 2001 11:15 AM
To: 'larrybal@wi.rr.com'
Subject: RE: Support for SB 278

Dear Mr. Balistreri:

On behalf of Senator George, I would like to thank you for taking time to e-mail our office regarding your support for Senate Bill 278, relating to fudnign for the State Public Defender's office. We have noted your support and will share your correspondence with the other members of the Senate Committee on Judiciary, Consumer Affairs and Campaign Finance Reform.

Sincerely,

Dan Rossmiller

Chief of Staff

Office of Senator Gary R. George

608-266-2500

877-474-2000 (toll free)



COUNTY OF KENOSHA

Clerk of Circuit Court

GAIL GENTZ

912 56th Street

Room 204

Kenosha, WI 53140-3747

Phone 262 653-2664

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gail.gentz@kenosha.courts.state.wi.us

December 17, 2001

Senator Gary George
Chairman Judiciary, Consumer Affairs
and Campaign Finance

I understand there is a hearing on two bills scheduled in front of your committee on Tuesday, December 18, 2001. SJR-16 is the Clerks of Circuit Court four year term bill and SB-278 relating to positions for the office of state public defender. I am unable to attend this hearing. I would like to register in support of both bills.

Thank you for any consideration that you can give to support these bills and move them out of committee to the Senate floor.

Sincerely,

Gail Gentz
Clerk of Circuit Court