



Legislative Fiscal Bureau

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Joint Committee on Finance

Paper #501

Conflicts Office Creation (Public Defender)

[LFB 2015-17 Budget Summary: Page 335, #5]

CURRENT LAW

The Office of the State Public Defender (SPD) employs trial and appellate attorneys who represent clients who qualify for SPD representation. Staff attorneys, however, do not represent all clients who qualify for SPD representation. Indigent legal defense cases are assigned by the SPD to private bar attorneys due to either: (a) an overflow of cases in excess of what can be assigned to available SPD staff attorneys; and (b) a potential conflict of interest that may exist for SPD staff attorneys.

Private bar attorneys assigned to SPD cases may be paid in one of the following ways: (a) at a statutorily defined rate of \$40 per hour for time spent in and out of court related to a case, and \$25 per hour for travel related to a case if any portion of the trip is outside the county in which the attorney's principal office is located or if the trip requires traveling a distance of more than 30 miles, one way, from the attorney's principal location; or (b) a flat, per case contracted fee that may not result in the private attorney receiving more than the attorney would have if the attorney was reimbursed pursuant to the statutory rate. Private bar reimbursements are supported by a biennial GPR appropriation. Base funding for the appropriation is \$23,155,400 annually.

GOVERNOR

Provide \$709,600 GPR in 2015-16 and \$830,900 GPR in 2016-17, and 10.75 GPR positions annually, and direct the SPD to establish and administer a conflicts office in Milwaukee County as part of a two-year pilot program, beginning on the effective date of the bill. Under the bill, the conflicts office would represent clients in Milwaukee County, Waukesha County, and Racine County whose case creates a conflict of interest with SPD staff attorneys.

Associated with the creation of the conflicts office, reduce funding for private bar and investigator reimbursements by \$560,800 GPR in 2015-16 and \$1,121,700 GPR in 2016-17.

DISCUSSION POINTS

Background

1. The cost of providing required counsel to the indigent in Wisconsin is generally the responsibility of the state through the Office of the State Public Defender. Generally, the SPD provides legal representation to indigent persons: (a) facing a possible sentence that includes incarceration; (b) involved in certain proceedings under the Children's and Juvenile Justice Codes (Chapter 48 and 938 of the Wisconsin statutes); (c) subject to petitions for protective placement (Chapter 55 of the Wisconsin statutes); (d) facing involuntary commitment; (e) involved in certain post-conviction or post-judgment appeals; and (f) undergoing proceedings for modification of a bifurcated sentence, if representation has been requested by the indigent person or the case has been referred by a court, and the Public Defender determines that the case should be pursued. Further, unless the individual knowingly and voluntarily waives counsel or appoints his or her own counsel, the SPD must represent the following individuals without a determination of indigency: (a) those involved in certain proceedings under the Children's and Juvenile Justice Codes; (b) those subject to petitions for protective placement; and (c) those facing involuntary commitment.

2. In order to provide representation to individuals who qualify for SPD representation, the SPD employs attorneys who litigate cases at the trial and appellate level. The SPD operates 36 trial representation offices throughout the state and two appellate representation offices. Of the 36 trial representation offices, one trial office is located in each Milwaukee, Racine, and Waukesha Counties. Collectively, these three trial office handle approximately 21% of the SPD's total caseload, through either assigning the cases to SPD staff attorneys or private bar attorneys.

3. Private bar attorneys assigned SPD cases are compensated pursuant to either: (a) a statutorily defined rate totaling \$40 per hour for time spent related to a case in and out of court, and \$25 per hour for travel; or (b) a flat, per case contracted fee that may not result in the attorney receiving more than he or she would under the statutory rate. Except for a number of misdemeanor cases, private bar attorneys are generally compensated pursuant to the statutory rate. Base funding for private bar reimbursements total \$23,155,400 GPR annually.

4. In 2013-14, 133,140 new cases were assigned to SPD staff attorneys and private bar attorneys. Of the 133,140 newly assigned cases, 80,573 (60.5%) cases were assigned to SPD staff, while private attorneys were assigned the remaining 52,567 cases (39.5%). [Note that the total number of new cases that were assigned includes withdrawals, but does not include open cases that were carried over from 2012-13. A withdrawal occurs when a private bar attorney withdraws from a case and the case must be reassigned to a new private bar attorney. Further, it should be noted that the SPD continually updates its records relating to the number of cases opened in recent years, and, as a result, the number of cases opened in 2013-14 is subject to variability.]

5. The SPD assigns cases to private bar attorneys due to either: (a) an overflow of cases

in excess of what can be litigated by available SPD staff; or (b) a conflict of interest that may exist with SPD staff. In total, approximately 41% of the cases assigned to the private bar in 2013-14 were assigned due to a conflict of interest.

6. Under the rules of professional conduct for attorneys established by the Wisconsin Supreme Court (SCR 20), a lawyer may not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (a) the representation of one client will be directly adverse to another client; or (b) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person, or by a personal interest of the lawyer. Further, the rules generally prohibit a lawyer in a firm from knowingly representing a client if any one of the firm's lawyers would have a conflict of interest.

7. The rules of attorney conduct do, however, provide an exception for public employees. Under the rules, the conflicts of a lawyer currently serving as an officer or employee of the government are not imputed to the other lawyers in the agency. The rule further states that where such a lawyer has a conflict that would lead to imputation in a nongovernment setting, the lawyer must be "timely screened" from any participation in the case. The rules define the term "screened" as denoting the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under the law.

8. During deliberations of 2001-03 budget bill the Joint Committee on Finance proposed providing the SPD \$734,400 GPR in 2001-02, \$863,300 GPR in 2002-03, and 16.0 GPR positions annually to create of a conflicts office. Under the proposal, a portion of the cases with which SPD staff has a conflict of interest would have been assigned to the conflicts office rather than private bar attorneys. The proposal was vetoed by the Governor, along with other provisions relating to the SPD, in order to reduce expenditures during the 2001-03 biennium.

Governor's Recommendation

9. The bill provides the SPD with \$709,600 GPR in 2015-16, \$830,900 GPR in 2016-17, and 10.75 GPR positions, and includes non-statutory language directing the SPD to establish and administer a conflicts office in Milwaukee County as part of a two-year pilot program, beginning on the effective date of the bill. Under the bill, the conflicts office would represent clients in Milwaukee County, Waukesha County, and Racine County whose case represents a potential conflict of interest for SPD staff. The 10.75 positions provided under the bill include: (a) 6.0 assistant state public defenders (ASPDs); (b) 1.0 assistant state public defender supervisor; (c) 2.0 legal secretaries; (d) 1.0 investigator; and (e) 0.75 client service specialist.

10. While the bill establishes the conflicts office as a two-year pilot program, the positions provided under the bill are permanent positions. In addition, funding provided in 2016-17 would be included in the SPD 2017-19 base budget. The administration indicates that, "The pilot project will be evaluated at the end of the two-year period. At that time, the project could be renewed, expanded, or eliminated."

11. The bill does not provide the SPD guidance in how it should establish and administer the conflicts office. The SPD has, however, indicated the following with regards to how the office would be established: (a) the office would be operated in an office space in Milwaukee County that is physically separate from other SPD offices in the area; (b) the conflicts office would not send client case information to any other SPD office in the trial division; (c) the supervisor of the conflicts office would report directly to the State Public Defender; and (d) the conflicts office would predominately handle felony cases other than cases involving homicide, juvenile felony cases, sexual predator cases, and other cases involving a possible life sentence in prison. The ASPDs in the conflicts office would generally not handle homicides, juvenile felonies, sexual predator cases, and other cases involving a possible life sentence because it is anticipated that there would be enough "other felony" cases referred to the office to fill a full caseload for the attorneys in the conflicts office. However, staff attorneys in the conflicts office would litigate other case types if there were an insufficient number of other felony conflict of interest cases.

12. According to the SPD, in 2013-14, the trial offices in Milwaukee, Racine, and Waukesha Counties assigned 1,213 felony cases to the private bar due to a conflict of interest. Table 1 identifies that average private bar cost per case for these conflict of interest cases. The administration indicates that the conflicts office would primarily litigate felony cases since the private bar typically bills the SPD a higher cost for felony cases, as these cases are generally more complex and require more time.

TABLE 1

Private Bar Expenses For Felony Conflict of Interest Cases in Milwaukee, Racine, and Waukesha Counties

<u>Case Type</u>	<u>Number of Cases</u>	<u>Average Private Bar Cost per Case*</u>
Class A, B, or C Felony**	215	\$1,660
Other Felony**	<u>998</u>	779
Total	1,213	

*Average amount billed per case type does not include the following: (a) withdrawals; and (b) instances in which the private attorney did not bill the SPD for certain charges filed against the client due to other existing charges for which the private bar attorney was already billing the SPD.

**Felony cases identified as a part of Table 1 do not include cases involving homicide, juvenile felonies, sexual predator cases, and other cases involving a possible life sentence in prison.

13. Wisconsin statute establishes that each trial division assistant state public defender must meet one of the following annual caseload requirements: (a) 184.5 felony cases; (b) 15 first-degree homicides; (c) 15 sexual predator cases; (d) 492 misdemeanor cases; (e) 246 other cases; or (f) some combination of these categories. [Note that "other" cases generally litigated by the SPD include civil commitment proceedings, felony delinquency proceedings, protective placement

proceedings under Chapter 55 of the statutes, juvenile cases, felony diversion cases, revocation hearings, termination of parental rights cases, juvenile waiver proceedings, as well as other miscellaneous cases.] Wisconsin statute does allow the SPD, however, to exempt up to 10 full-time supervisory ASPDs from the caseload requirement due to those attorneys' additional responsibilities.

14. Due to the statutorily established caseload requirement for ASPDs, it is anticipated that the 6.0 ASPDs and 1.0 supervisory ASPD provided under the bill would litigate approximately 1,199 felony conflict of interest cases annually. [Note that while the 6.0 ASPDs would litigate a full caseload, the 1.0 supervisory ASPD would litigate a half caseload due to the attorney's supervisory responsibilities.] Accordingly, it would be expected that the number of cases assigned to the private bar would be reduced by a similar amount.

15. Based on the anticipated reduction in the number of cases assigned to the private bar as well as the average amount per case the private bar bills the SPD for felony case types, the bill reduces funding for private bar reimbursements by \$560,800 GPR in 2015-16 and \$1,121,700 GPR in 2016-17. Reductions are less in 2015-16 due to the fact that it would take the SPD a few months to hire the new ASPDs and private bar attorneys generally bill the SPD six months after being assigned a case. As a result, the net funding provided under the bill related to the creation of the conflicts office is \$148,800 GPR in 2015-16 and -\$290,800 GPR in 2016-17, or -\$142,000 GPR over the 2015-17 biennium. The administration anticipates that savings seen 2016-17 would continue for future fiscal years.

16. Despite the fact that the state supports fringe benefits, supplies and services costs, and support staff for ASPDs, potential savings associated with employing additional ASPDs could occur because: (a) ASPDs must meet an annual caseload requirement; and (b) an ASPD's minimum salary and fringe benefits is \$33.725 (\$23.673 for salary and \$10.052 for fringe benefits) per hour while private bar attorneys are paid \$40 per hour for time spent related to a case.

17. As indicated above, current law establishes a number of cases that each trial division ASPD must litigate on an annual basis. The caseload requirement is considered a minimum workload for ASPDs and does not address workload demands such as administrative tasks, training and continuing education requirements, and other justice system activities such as participating in criminal justice coordinating councils and treatment courts. Private bar attorneys assigned SPD cases do not have to meet an annual caseload requirement.

18. Further, it could be argued that ASPDs are able to litigate indigent legal defense cases more efficiently than private bar attorneys due to the fact that ASPDs handle multiple cases simultaneously. Private bar attorneys are typically assigned one indigent legal defense case at a time as private attorneys are generally assigned cases on a rotational basis. The SPD has indicated that certain tasks, such as discussing cases with the district attorney, can be performed more efficiently when an attorney litigates multiple cases at a time.

19. The Supreme Court rules establishing the professional conduct for attorneys prohibit a lawyer in a firm from knowingly representing a client if any one of the firm's lawyers would have a conflict of interest. The rules do, however, provide an exception for government agencies, under

which an attorney employed by a government agency may litigate a case that would pose as a conflict of interest for another attorney in agency, if the attorney with the conflict of interest is timely screened from the case.

20. According to Legislative Council staff, "it would be possible for the SPD to run its own conflict office to represent clients in conflict-of-interest cases...The central factor is that, under SCR 20:1.1[0], which applies to lawyers who are public employees, a conflict-of-interest of one lawyer will not automatically be imputed to other lawyers in the same government agency, but when a lawyer has a conflict arise that would otherwise be imputed to his or her colleagues, the lawyer must be timely screened from participation in the conflicting manner." The Legislative Council staff goes on to state:

"...The rules do not specifically state what it means to be 'timely screened' from participation in a colleague's matter. However, one can imagine the types of procedures that would be involved in setting up the screening procedures: (1) maintaining separate office space; (2) keeping separate filing systems; (3) establishing appropriate procedures relating to how updates are reported to supervisors; and (4) establishing appropriate procedures to avoid inadvertent disclosure of 'screened' information through casual contact among SPD employees. Other steps may also be required. The budget bill language does not provide details, so it will be up to SPD to determine which procedures to apply under the pilot project."

21. Legal counsel for the SPD indicate that the agency could establish a conflicts office in compliance with the requirements of the rules of attorney professional conduct because:

"An SPD conflicts office would be physically separate from any other SPD office, and client records of the conflicts office would not be accessible to lawyers and other staff who do not work in the conflicts office. Similarly, staff in the conflicts office would not have access to client records from the other SPD regions. Importantly, staff in the conflicts office would not share office space or access to records with staff of the Milwaukee Trial, Waukesha, and Racine offices (the offices that would be representing clients whose interest would often be in conflict with those of the clients represented by the conflicts office)."

22. In light of the overall savings that the administration estimates would be generated and that the Legislative Council staff and SPD legal counsel indicate that the conflicts office could be established in compliance with the Supreme Court rules of attorney professional conduct, the Committee could approve the Governor's recommendation [Alternative 1]. Under the alternative, the Committee would provide the SPD \$709,600 GPR in 2015-16, \$830,900 GPR in 2016-17, and 10.75 positions annually, in order to establish and administer a conflicts office in Milwaukee County as part of a two-year pilot program. In addition, the Committee would reduce funding for private bar reimbursements by \$560,800 GPR in 2015-16 and \$1,121,700 GPR in 2016-17.

23. As indicated above, while the bill establishes the conflicts office as part of a two-year pilot program, funding and position authority under the bill is provided on a permanent basis. Given that the conflicts office is intended as a pilot program, it could be argued that the SPD should report on the operations of the office in order to provide insight as to whether the conflicts office should be continued, expanded, or eliminated during the 2017-19 biennium.

24. Currently, the SPD is statutorily required to submit a quarterly report to the Committee

containing information on SPD staff and private bar caseloads and expenditures. In order to provide insight into the operations of the conflicts office, the Committee could require that language be added to the bill to require the SPD to provide the following information when it submits its quarterly report to the Committee: (a) a description of the operations of the conflicts office, which includes an explanation as to how the SPD ensures that the conflicts office remains in compliance with the rules of professional conduct for attorneys; (b) the number of cases, by case type, referred to the conflicts office; (c) the number of cases, by case type, referred to the private bar due to a conflict of interest with SPD staff attorneys in the trial offices in Milwaukee County, Racine County, and Waukesha County; and (d) the amount expended on private bar reimbursements as a result of conflict of interest cases assigned to the private bar from the trial offices in Milwaukee County, Racine County, and Waukesha County [Alternative 2].

25. In support of the creation of the conflicts office, the administration indicates that the conflicts office would ultimately generate efficiencies and savings as a result of a reduction in private bar costs (-\$142,000 GPR over the 2015-17 biennium, and -\$290,800 GPR in future fiscal years). It could be argued, however, that the estimated savings associated with the creation of the conflicts office may diminish over time. Under the state employee compensation plan, the minimum hourly salary for an ASPD is currently \$23.673 per hour (\$49,420 annually), while the maximum hourly salary is \$57.218 per hour (\$119,472 annually). The bill provides funding to support 6.0 ASPDs at the minimum salary level and 1.0 ASPD supervisor at a rate of \$35.00 per hour. It could be expected, however, that the salary of the 6.0 ASPDs and 1.0 ASPD supervisor would increase over time.

26. Under 2013 Act 20, ASPDs may receive hourly salary adjustments on an annual basis pursuant to a merit-based pay progression plan. The ASPD pay progression plan, mirrored after the plan for assistant and deputy district attorneys, consists of 17 hourly salary steps, with each step equal to one seventeenth of the difference between the lowest possible annual salary (\$49,430) and the highest possible annual salary (\$119,472). Notwithstanding the creation of a 17 hourly salary step pay progression plan, the State Public Defender may: (a) increase the salary of individual ASPDs by up to 10%; and (b) deny annual salary increases to individual ASPDs. During the 2013-15 biennium, \$2,975,600 GPR (\$997,000 in 2013-14 and 1,978,600 in 2014-15) is appropriated to the SPD to provide salary adjustments to 348.2 ASPDs under the pay progression plan. During 2014-15, ASPDs received an average salary increase of approximately 4.4%.

27. Based on similar calculations performed by the administration, the potential savings associated with the reduction in private bar costs would be eliminated if the average hourly salary of the proposed 6.0 ASPDs was increased to \$37 per hour, and the hourly salary of the 1.0 ASPD supervisor was increased to \$54 per hour. Table 2 identifies the potential hourly salary of the 6.0 ASPDs and 1.0 ASPD supervisor after 11 pay progression salary adjustments, based on: (a) 10% salary increases (the maximum adjustment under the pay progression plan); and (b) 4.4% salary increases (the average adjustment awarded to ASPDs in 2013-14). As Table 2 indicates, the 6.0 ASPDs and 1.0 ASPD supervisor would earn over \$37 per hour and \$54 per hour, respectively, after five salary adjustments based on a 10% annual wage increase. Further, the 6.0 ASPDs and 1.0 ASPD supervisor would earn over \$37 per hour and \$54 per hour, respectively, after 11 salary adjustments based on a 4.4% annual wage increase.

TABLE 2

**Hourly Salary of the 6.0 Assistant State Public Defender and
1.0 ASPD Supervisor with Pay Progression Salary Adjustments**

<u>Salary Adjustment</u>	<u>Wage Increase (10%)</u>	<u>Wage Increase (4.4%)</u>
6.0 ASPDs		
Initial Salary	\$23.673	\$23.673
Adjustment 1	26.040	24.715
Adjustment 2	28.644	25.802
Adjustment 3	31.509	26.937
Adjustment 4	34.660	28.123
Adjustment 5	38.126	29.360
Adjustment 6	41.938	30.652
Adjustment 7	46.132	32.001
Adjustment 8	50.745	33.409
Adjustment 9	55.820	34.878
Adjustment 10	57.218*	36.413
Adjustment 11		38.015
1.0 ASPD Supervisor		
Initial Salary	\$35.000	\$35.000
Adjustment 1	38.500	36.540
Adjustment 2	42.350	38.148
Adjustment 3	46.585	39.826
Adjustment 4	51.244	41.579
Adjustment 5	56.368	43.408
Adjustment 6	59.618**	45.318
Adjustment 7		47.312
Adjustment 8		49.394
Adjustment 9		51.567
Adjustment 10		53.836
Adjustment 11		56.205

*The current maximum salary for an ASPD is \$57.218 per hour.

**Currently, ASPD regional supervisors may obtain a \$2.40 per hour add-on due to their supervisory responsibilities. As such, the maximum salary for a regional ASPD supervisor is \$59.618 per hour.

28. Current law does not, however, obligate the state to continue to consistently provide funding for pay progression. To this end, the bill eliminates base funding for pay progression for assistant state public defenders during the 2015-17 biennium, but retains the pay progression plan under statute. [A separate paper, Paper #261, has been prepared on this issue.]

29. In contrast to the compensation provided to ASPDs, private bar compensation for litigating indigent legal defense cases is set under statute, and would only be increased by an act of law. As previously indicated, private bar attorneys are generally compensated at a rate of \$40 per hour for time spent related to a case, and \$25 per hour for travel.

30. Given that compensation provided to assistant state public defenders may be increased in future years and reduce overall future savings, the Committee could deny the Governor's recommendation [Alternative 3]. Under this alternative, the SPD would not be directed to create a conflicts office. Further, funding and position authority totaling \$709,600 GPR in 2015-16, \$830,900 GPR in 2016-17, and 10.75 positions annually, would be eliminated. Associated reductions for private bar reimbursements totaling \$560,800 GPR in 2015-16 and \$1,121,700 GPR in 2016-17 would also be deleted.

ALTERNATIVES

1. Approve the Governor's recommendation and provide the Office of the State Public Defender \$709,600 GPR in 2015-16, \$830,900 GPR in 2016-17, and 10.75 GPR positions annually, and direct the SPD to establish and administer a conflicts office in Milwaukee County. In addition, reduce expenditure authority for private bar reimbursements by \$560,800 GPR in 2015-16 and \$1,121,700 GPR in 2016-17.

2. Approve the Governor's recommendation and, in addition, create language in the bill that would require the SPD to include the following information in its quarterly report to the Committee: (a) a description of the operations of the conflicts office, which includes an explanation as to how the SPD ensures that the conflicts office remains in compliance with the Supreme Court rules of professional conduct for attorneys; (b) the number of cases, by case type, referred to the conflicts office; (c) the number of cases, by case type, referred to the private bar due to a conflict of interest with SPD staff attorneys in the trial offices in Milwaukee County, Racine County, and Waukesha County; and (d) the amount expended on private bar reimbursements as a result of conflict of interest cases assigned to the private bar from the trial offices in Milwaukee County, Racine County, and Waukesha County.

3. Delete provision.

ALT 3	Change to Bill	
	Funding	Positions
GPR	\$142,000	- 10.75

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