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Details: Emergency Rule extension requests by Office of the State Public Defender.

(FORM UPDATED: 08/11/2010)

WISCONSIN STATE LEGISLATURE ... PUBLIC HEARING - COMMITTEE RECORDS

2009-10

(session year)

Joint

(Assembly, Senate or Joint)

Committee for Review of Administrative Rules ...

COMMITTEE NOTICES ...

- Committee Reports ... **CR**
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INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

- Appointments ... **Appt** (w/Record of Comm. Proceedings)
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- Hearing Records ... bills and resolutions (w/Record of Comm. Proceedings)
 - (**ab** = Assembly Bill) (**ar** = Assembly Resolution) (**ajr** = Assembly Joint Resolution)
 - (**sb** = Senate Bill) (**sr** = Senate Resolution) (**sjr** = Senate Joint Resolution)
- Miscellaneous ... **Misc**

* Contents organized for archiving by: Stefanie Rose (LRB) (June 2012)



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ER: 09-26

January 27, 2010

STATE OF WISCONSIN PUBLIC DEFENDER BOARD REQUEST FOR EXTENSION OF EMERGENCY RULE

The State Public Defender Board requests a 60 day extension of Emergency Rule 09-26, published in the Wisconsin State Journal on October 3, 2009. In accordance with Wis. Stat. Sec. 227.24(2)(am) this Petition is made at least 30 days prior to expiration of the emergency rule, and seeks to keep the emergency rule in effect until the permanent rule is promulgated.

It is essential to SPD operations that the Emergency Rule remains in effect while the process for promulgating a permanent rule takes place. Emergency Rule 09-26 was enacted in response to legislative directive, Wis. Stats. Sec. 977.02(9). The vast shortfall in the state public defender's appropriation for transcripts, discovery, and interpreters in both years of the current biennium constitutes an emergency requiring implementation of the emergency rule while the process for implementing a permanent rule takes its course.

The Chapter 227 process for enactment of permanent rule will not be satisfied before expiration of Emergency Rule 09-26. It is unknown whether a second extension will be necessary. Simultaneous to the emergency rule process the State Public Defender Agency has initiated steps for promulgation of permanent rule. The scope of statement for the permanent rule, Chapter PD 8, was published in the Administrative Register Mid-October 2009. A public hearing was held on the Emergency Rule on November 16, 2009. According to State Public Defender Board by-laws, the final draft of the proposed permanent rule must be unanimously approved by the State Public Defender Board which is scheduled to take up the matter at the March 26, 2010 board meeting.

Dated: January _____, 2009

*March 29, 2010
to the PD Board.
Then to legislature.*

WISCONSIN STATE PUBLIC DEFENDER BOARD

DANIEL M. BERKOS, Chair





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State Public Defender

March 1, 2010

✓ Senator Jim Holperin, Co-Chair

Joint Committee for the Review of Administrative Rules
State Capitol, Room 409 South
Madison, Wisconsin 53707-7882

Representative Josh Zepnick, Co-Chair
Joint Committee for the Review of Administrative Rules
State Capitol, Room 219 North
Madison, Wisconsin 53708

INTER-D

Re: SPD Discovery Costs and Payment Information

Dear Senator Holperin and Representative Zepnick:

On February 24, 2010 at the hearing on the SPD petition to extend Emergency Rule PD8 you requested information on the following issues:

1. If the SPD is appropriated \$142,000 for discovery, transcripts, and interpreters, yet discovery bills alone are in excess of \$700,000, how does the SPD cover the difference?

Answer: Attached is an excerpt from the SPD Biennial Budget Request for 2009-2011. That excerpt, Decision Item Request #5003, describes the annual discovery shortfall and methods by which the SPD has covered the shortfall. Generally, the Agency has delayed payment until the next fiscal year, or, asked the Department of Administration to approve transfers of funds from the salary, fringe benefit and LTE lines.

2. How did the SPD determine the amounts it will pay, such as \$.20 per page, for discovery?

Answer: Attached is an excerpt from the SPD Biennial Budget Request for 2009-2011. That excerpt, Decision Item Request #5010, discusses the history of funding based on \$.20 per page, as established in the 1999-2001 biennial budget act.

Also attached is an excerpt from the filed Analysis to ER PD8, "Summary of Factual Data and Analytical Methodologies" which itemizes retail costs of items such as DVDs and photographs.

Thank you for your attention to this matter, and please contact me if you would like additional information.

Kathy Pakes
Legal Counsel
Office of the State Public Defender



PUBLIC DEFENDER BOARD

STATE OF WISCONSIN

BIENNIAL BUDGET REQUEST

For

2009-2011

DANIEL M. BERKOS, Chair
Public Defender Board

NICHOLAS L. CHIARKAS
State Public Defender

**Office of the State Public Defender
2009-2011 Biennial Budget Request
Decision Item Request #5003**

Appn. Nos. 106

Title of Request: Transcript, Discovery, Interpreter Appropriation Cost to Continue

- I. **Request/Objective:** The Public Defender Board proposes increasing the funding level for the appropriation under §20.550(1)(f) for payments for transcripts, discovery, and interpreters, to reflect current needs.

- II. **Background and Analysis:** The SPD is responsible for the cost of transcripts of court proceedings that SPD staff and private bar attorneys request from the courts, for copying costs incurred by counties and other parties to provide SPD attorneys with discovery materials, and for the cost of court interpreters. These costs are funded by a single appropriation under §20.550(1)(f). Total funding and expenditure/commitment levels each year since fiscal year 2001-2002 are:

	<u>Appropriated</u>	<u>Needed</u>	<u>Shortfall</u>
FY02	\$1,339,100	\$1,365,781	\$ 26,681
FY03	\$1,339,100	\$1,449,304	\$110,204
FY04	\$1,339,100	\$1,595,480	\$256,380
FY05	\$1,339,100	\$1,966,968	\$627,868
FY06	\$1,339,100	\$1,761,832	\$422,732
FY07	\$1,339,100	\$1,644,047	\$304,947
FY08	\$1,339,100	\$1,775,960	\$436,860

The amounts appropriated were sufficient through fiscal year 2000-2001. Then, this appropriation was subjected to a five percent across the board "efficiency reduction" in 2001 Wisconsin Act 16, the 2001-2003 biennial budget act. However, as discussed below, these expenses are largely driven by the volume of SPD appointments, which at the same time have increased, peaking at 17.4% above the FY01 level in FY06, and currently (FY08) at 10.4% above FY01.

Beginning in FY02, the SPD has ended each fiscal year with a growing amount of bills for payments relating to that fiscal year which, until FY05, were instead paid in the following fiscal year due to a funding shortfall. In FY 2003-04, this appropriation was depleted by the end of May, 2004. This resulted in delayed payments to numerous court reporters, interpreters, and counties. It also resulted in the SPD incurring interest costs of \$453.87 on payments made after thirty days.

At the end of the FY05, FY06 and FY07 fiscal years, significant delays in payments to court reporters, interpreters and counties were avoided only by transferring available expenditure authority from the salary, fringe benefit and LTE lines.

The SPD's request for a base funding increase in 2007-09 to address this shortfall was not included in the Governor's biennial budget proposal, nor was it considered during the legislative phase of the budget process. Thus, the deficit continued into the 2007-09 biennium.

A total of \$436,860 was again transferred from the salary, fringe benefit and LTE lines in FY08, but could not be executed until pay plan supplement needs were determined in the 13th month. So, even though the SPD was able to begin FY09 without a backlog of bills to pay from the prior year, the appropriation for transcripts, discovery and interpreters was depleted by the end of April 2008, and additional payments could not be made until July 2008. Interest of \$2,083.19 was incurred on those late payments.

Although these transfers prevented funding deficits and payment backlogs being compounded each year, they did not increase the base level of funding going forward, and we cannot count on such balances being available in the future.

These shortfalls, summarized in the right-hand column in the table on the previous page, are broken down as follows between the three types of expenditures. Note that the SPD's internal allocation of this appropriation between the three expenditure types is based on the appropriation levels for the three numeric appropriations (transcripts - 106, discovery - 108, and interpreters - 109) when those appropriations were consolidated in the 1999-2001 biennial budget bill. The SPD allocated the five percent efficiency reduction required in 2001-2003 proportionately.

Appropriation 106 Funding Shortfalls -

	<u>Transcripts</u>	<u>Discovery</u>	<u>Interpreters</u>	<u>Total Shortfall</u>
FY02	\$ 19,231	\$ 5,541	\$ 809	\$ 26,681
FY03	\$101,721	\$ 7,457	\$ 1,026	\$110,204
FY04	\$169,261	\$ 81,606	\$ 5,513	\$256,380
FY05	\$228,553	\$384,530	\$14,785	\$627,868
FY06	-\$ 21,320	\$424,614	\$19,438	\$422,732
FY07	\$ 59,189	\$216,776	\$28,982	\$304,947
FY08	\$112,733	\$288,604	\$35,523	\$436,860

Transcript Payments – The FY01 base budget for transcripts of \$1,249,600 was subject to the five percent efficiency reduction of \$62,500, leaving a new budget level of \$1,187,100 beginning in FY02. The need for transcripts is a function of how many cases are appointed, their complexity, and the number

and duration of court appearances and trials. The SPD has attempted to ameliorate the effect of the increased expenditures for transcripts by urging staff attorneys to carefully determine when transcripts are needed and when they are not. Transcript expenditures are reviewed regionally on a monthly basis, and higher than average expenditure levels are further reviewed to determine which individual attorneys are incurring high transcript costs and why. We currently project an annual shortfall of \$110,000 for transcript payments.

Discovery Payments – Defendants have a constitutional right to “discovery”; that is, to receive copies of the prosecutor’s evidence. Since FY94, the SPD has been responsible for reimbursing counties for copying costs associated with providing discovery materials to SPD attorneys. At first, many counties (including some of the larger ones) did not submit bills for discovery; however, as county budgets became tighter in recent years, they began doing so. Now, all counties bill the SPD for discovery, although not always on a regular basis. For instance, outstanding bills from Dane County are estimated to be as much as \$20,000.

The SPD was initially provided \$60,000 in the 1995 Budget Adjustment Bill for discovery payments. The appropriation was increased to \$150,000 in the 1999-2001 biennial budget, but was then reduced to \$142,500 by the across the board five percent reduction in the 2001-2003 biennial budget act. That spending level was soon exceeded as additional counties began billing the State for discovery.

Discovery payments from this appropriation are driven by the number of cases appointed. Appointments were 10.4% higher than they were prior to the five percent budget cut.

A portion of the rising discovery costs is attributable to 2005 Wisconsin Act 60, which was enacted at the end of December of 2005. Act 60 “codifies the *Jerrell* recording requirement”, as described in the analysis of the bill by the Legislative Reference Bureau. It “requires that law enforcement agencies make an audio or (audio/visual) recording of a custodial interrogation of a juvenile who is suspected of committing a crime if the interrogation is conducted at a place of detention. (It) also requires law enforcement agencies to make a recording, if feasible, of a custodial interrogation of a juvenile suspected of committing a crime if the interrogation is conducted at a place other than a place of detention” with some exceptions.

Further 2005 Wis Act 60 provides that custodial interrogations of adult felony defendants should be recorded and admitted into evidence at trial, and that, barring good cause not to do so, the judge may instruct the jury that they may consider the absence of a recording when weighing the evidence. Video recordings are subject to discovery. The SPD experienced a three-fold increase in payments for video recordings since FY05 (from \$12,184 in FY05 to \$36,182 in FY08).

Based on these factors, a base increase of \$300,000 (for a total base funding level of \$442,500) is requested for discovery.

Interpreter Payments – Even before the SPD's \$10,000 budget for court interpreter payments was permanently reduced by the five percent across the board "efficiency reduction" in 2001, the funding was insufficient to meet the growing need for interpreters. And the number of defendants who are not able to communicate effectively with their attorney without such assistance continues to grow.

The SPD is not the only participant in the criminal justice system to see an increase in interpreter costs. The 2007-09 biennial budget act provided a base funding increase to then Circuit Courts of \$298,000 per year to increase state reimbursement to counties for interpreter services.

Like discovery payments, interpreter payments from this appropriation are driven by the number of cases appointed to staff, rather than to private bar attorneys, as the latter are reimbursed for discovery costs from the private bar appropriation under § 20.550(1)(d). As noted above, staff attorney appointments have increased 6.7% since FY 2001, and are expected to be higher yet in FY 2009 and in the upcoming biennium.

A base increase of \$30,500 (to a total base funding level of \$40,000) is requested for payment to interpreters.

Summary - The Public Defender Board requests that additional funding be provided for transcript, discovery and interpreter payments as follows:

Annual funding needed for transcript payments	\$1,297,100
Annual funding needed for discovery payments	\$ 442,500
Annual funding needed for interpreter payments	<u>\$ 40,000</u>
Total Projected Annual Need in 07-09	\$1,779,600
Appn. 106 Adjusted 2007 Base Funding	<u>\$1,339,100</u>
Annual increase needed	\$ 440,500

Additionally, the board requests one time funding of \$455,500 in FY 2010 for the projected shortfall that is projected to be carried over from the current fiscal year (FY 2009).

IV. Alternative:

1. Retaining the current level of funding is not an acceptable alternative, as it will result in continuing year-end shortfalls in the appropriation for transcripts, discovery and interpreter payments; payment delays, and interest costs incurred.

V. **Statutory Language:** None.

VI. **Fiscal Summary:**

	<u>2005-2006</u>	<u>2006-2007</u>
Base funding increase	\$ 440,500	\$ 440,500
One-time funds	\$ 440,500	
Total	\$ 881,000	\$ 440,500

**Office of the State Public Defender
2009-2011 Biennial Budget Request
Decision Item Request #5010**

Appn. Nos. 106

Title of Request: Discovery Per-Page Rate

- I. **Request/Objective:** The Public Defender Board requests funding to increase the rate per page paid for discovery under §20.550(1)(f), currently \$0.20 per page, to \$0.25 per page, and rulemaking authority to establish maximum rates that the SPD will pay for discovery in any format.

- II. **Background and Analysis:** Defendants have a constitutional right to "discovery"; that is, to receive copies of the prosecutor's evidence. Since FY94, the SPD has been responsible for reimbursing counties for copying costs associated with providing discovery materials to SPD attorneys.

The SPD was initially provided \$60,000 in the 1995 budget adjustment act for discovery payments. The appropriation was increased to \$150,000 in the 1999-2001 biennial budget act, based on a rate of \$0.20 per page. However that spending level was soon exceeded as additional counties began billing the State for discovery. All counties now do so. This appropriation, which provides funding for transcripts and interpreters, in addition to discovery payments, was subjected to a five percent across the board "efficiency reduction" in 2001 Wisconsin Act 16, leaving a budget for discovery payments of \$142,500 since FY02. As explained in the accompanying cost to continue decision item (#5003) for transcript, discovery and interpreter payments, all three subcategories of payments from this appropriation are under-funded, thus funding could not be internally reallocated in lieu of this decision item.

Pursuant to § 971.23(10), discovery fees charged to the SPD "may not exceed the actual, necessary and direct cost of providing the copies." The SPD has assumed that bills for discovery at \$0.20 or less meet those criteria. Currently, just two (smaller) counties request less than \$0.20 per page. Nonetheless, over the past several years, a growing number of counties have been requesting reimbursement at \$0.25 per page. Thus far, the SPD has refused to pay the higher rate, citing our not being budgeted to pay at the higher rate.

At least one District Attorney has responded by refusing (or threatening to refuse?) to provide copies of discovery to SPD attorneys until the rate is raised to \$0.25; instead, the attorneys must (would have to?) visit the DA's office to view the materials, which is not efficient use of an attorney's time.

reimbursement at \$0.25 per page. Thus far, the SPD has refused to pay the higher rate, citing our not being budgeted to pay at the higher rate.

Disputes over how to calculate the "actual, necessary and direct cost" of photocopying may lead to litigation between counties and the SPD, either in the context of individual SPD cases or in a civil suit for copying costs. At least one District Attorney has threatened to stop providing copies of certain discovery materials to SPD attorneys on October 1, 2008, unless the rate is raised to \$0.25; instead, the attorneys would have to visit the DA's office to view the materials, which is not efficient use of an attorney's time.

In FY08, the SPD paid out \$276,074 for paper copies of discovery, to which this request applies. The balance of the \$431,103 spent on discovery that year was payments for CDs, DVDs, and other media not subject to a "per page" rate. An increase of \$0.05 per page would increase payments by \$69,000 annually.

The SPD also requests rulemaking authority to establish maximum rates that the SPD will pay for discovery in any format. Although there is no statutory definition of "the actual, necessary and direct cost of providing the copies," the SPD's analysis of statutes and case law lead us to conclude that time spent by a prosecutor or other staff person to review discovery requests, or to retrieve or copy the materials is not a direct cost, and is therefore not reimbursable. Nonetheless, some counties have included these costs in their attempts to justify a higher – in some cases much higher – rate per page. This dispute could be clarified by Administrative Rule.

Also, bills for discovery provided in electronic formats (e-mails, CDs, DVDs, etc.) vary greatly between various prosecutors, sheriffs and police departments. For example, bills for a single CD range from \$3 to \$35. We propose developing and codifying maximum rates for these formats, as well, in order to establish fair rates and to control costs.

IV. Alternative:

If additional funding is not provided, the SPD will continue paying for discovery at the rate of \$.20 per page, which could result in additional prosecutors refusing to provide copies of discovery materials for SPD attorneys, instead requiring the attorneys to visit the prosecutor's office to view the materials. This alternative is likely to cause the SPD to expend resources to litigate the cost issues and/or to reimburse private attorneys for additional time necessary to obtain and review discovery materials.

V. **Statutory Language:** Modify § 977.02 to add: Promulgate rules to establish maximum payments for copies, in any format, of materials associated with the representation of cases appointed by the state public defender pursuant to § 977.08.

VI. **Fiscal Summary:**

	<u>2009-2010</u>	<u>2010-2011</u>
Total	\$69,000	\$ 69,000

budget act reduced this appropriation by 1%, leaving a base budget of \$141,100, and directed the board to promulgate rules to address the funding shortfall.

Summary of, and Comparison with, Existing or Proposed Federal Regulations

There are no existing or proposed federal regulations that address the activities of the proposed rules.

Comparisons with Rules in Adjacent States

In general, most states require prosecutors to provide copies of all discovery materials under mandatory discovery laws.

Minnesota and Iowa have implemented statewide public defender programs, but only Minnesota has a statute relating to public defenders and discovery costs. Specifically, Minnesota statutes section 611.271 (2008) states that when discovery materials are requested by a public defender, no fee can be charged for police reports, photographs, copies of existing grand jury transcripts, audiotapes, videotapes, copies of existing transcripts of audiotapes or videotapes, and, in child protection cases, reports prepared by local welfare agencies. Iowa public defenders, on the other hand, are charged for most discovery materials obtained from the prosecutor. The cost of discovery varies depending on the county prosecutor.

In Michigan and Illinois, the individual counties themselves establish public defender programs. In Michigan counties, the public defenders do not typically pay for any discovery costs. When they do have to pay, the public defenders only pay for the cost of copies and not the cost of labor. In the Illinois counties surveyed, when the public defenders receive discovery from the prosecutor, they do not pay any fees.

Summary of Factual Data and Analytical Methodologies

Pursuant to s. 977.02 (9), Stats., the public defender board "shall consider information regarding the actual, necessary, and direct cost of producing copies of materials that are subject to discovery" when establishing the maximum fees that the public defender may pay for them.

A significant portion of the direct cost of any copy is the media (e.g., the paper or the blank disc) on which it is provided.

In its biennial budget request for FY 2009-2011, the public defender board requested funding to increase the rate to be paid for paper discovery materials from \$0.20 to \$0.25 per page. This request was neither included in the Governor's budget, nor added to the budget bill by the legislature. The state public defender board interprets the omission of the requested funding as tacit agreement that \$0.20 per page meets or exceeds the "actual, necessary and direct cost" criteria for paper copies of discovery materials. Compare FedEx/Kinko's current retail price of \$0.08 each for up to 100 letter- or legal-size copies, and \$0.07 each for 101 to 1,000 copies. The Department of Justice charges \$0.15 per page for paper copies furnished in response to a public records request under ch. 19, Stats. Under the proposed rule, the state public defender would continue to pay up to \$0.20 per page.

The charges submitted for discovery materials provided in electronic formats vary greatly among the state's prosecutors and law enforcement agencies. For example, bills for a single compact disc (CD) range from \$3 to \$35. The retail cost of blank CDs and digital

videodiscs (DVDs) is currently less than \$0.80 each. Large suppliers such as Corporate Express offer discounts to governmental units, bringing the unit cost down to less than \$0.40 each. The Department of Justice charges \$1.00 per disc for copies furnished in response to a public records request under ch. 19, Stats. Under the proposed rule, the state public defender would pay up to \$5.00 per disc.

The charges submitted for copies of photographs range from \$1.50 to \$25.00 for digital prints, from \$1.00 to \$2.00 for black and white photos, and from \$0.35 to \$2.00 for color photos. The retail cost of photograph reproductions depends upon their size. Walgreen's, a national retailer, charges \$0.19 each for less than 100 4x6 prints, \$0.15 each for 100 or more 4x6 prints, \$1.59 each for 5x7 prints and \$2.99 each for 8x10 prints. The Camera Company in Madison charges \$0.43 each for photos up to 4x6. Under the proposed rule, the state public defender would pay up to \$0.50 each for copies of photos that are 5x7 and smaller, and \$1.00 each for copies of larger photos.

The charges submitted for copies of audio and video tapes also vary greatly. Bills for a single video tape range from \$5.00 to \$46.00, and for a single audio tape from \$1.00 to \$25.00. If purchased from a state contract office supply vendor, blank audio cassette tapes range in price from \$0.42 to \$1.07 each and blank VHS video tape prices range from \$1.22 to \$3.00 each. If purchased from a retailer (Best Buy), a four-pack of audio cassette tapes costs \$5.99 (\$1.50 each), and a four-pack of VHS video tapes costs \$10.99 (\$2.75 each). Under the proposed rule, the state public defender would pay up to \$5.00 per tape.

Analysis and Supporting Documents Used to Determine Effect on Small Business or in Preparation of Economic Impact Report

The impact on counties and municipalities that provide copies of discovery materials is unknown.

Effect on Small Business

Small businesses are not affected by the rule.

Agency Contact Person

Questions regarding these rules may be directed to Marla Stephens at 608-516-1232, stephensm@opd.wi.gov or 315 N. Henry Street, 2nd Floor, Madison, WI 53703.

Place to Submit Comments

Comments may be submitted to Marla Stephens at stephensm@opd.wi.gov or 315 N. Henry Street, 2nd Floor, Madison, WI 53703.

SECTION 1. Chapter PD 8 is created to read:

CHAPTER PD 8 DISCOVERY PAYMENTS

PD 8.01 Scope of chapter on discovery payments. (1) In this chapter, "discovery materials" means the materials and information that a district attorney or other prosecuting attorney is required to disclose by ss. 971.23 and 980.036, Stats., or by the constitution and laws of this state or the United States.