



Legislative Fiscal Bureau

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January 14, 2010

TO: Members
Joint Committee on Finance

FROM: Bob Lang, Director

SUBJECT: 2009 Senate Bill 263/Assembly Bill 395: State Standard for Indigent Legal Defense Counsel

Senate Bill 263 (SB 263) and Assembly Bill 395 (AB 395) are companion bills that would increase and model the state indigency standard for legal defense representation after Wisconsin Works (W-2), which when measuring qualifying gross income is set at 115% of the federal poverty level.

Senate Bill 263 was introduced on August 11, 2009, and was referred to the Senate Committee on Judiciary, Corrections, Insurance, Campaign Finance Reform, and Housing. On October 29, 2009, the Senate Committee on Judiciary, Corrections, Insurance, Campaign Finance Reform, and Housing adopted Senate Amendment 1 on a vote of 5-0. The Committee then recommended the bill for passage, as amended, on a vote of 4-1. On November 4, 2009, SB 263 was referred to the Joint Committee on Finance.

Assembly Bill 395 was introduced on August 26, 2009, and was referred to the Assembly Committee on Judiciary and Ethics. On October 20, 2009, the Assembly Committee on Judiciary and Ethics adopted Assembly Amendment 1 on a vote of 10-0. The Committee then recommended the bill for passage, as amended, on a vote of 8-2. On November 3, 2009, AB 395 was referred to the Joint Committee on Finance.

BACKGROUND

Both the United States Constitution and the Wisconsin Constitution provide the right to legal counsel for individuals accused of a crime. Both the United States Supreme Court and the Wisconsin Supreme Court have ruled that this right to counsel requires the government to provide counsel to indigent criminal defendants.

The Office of the State Public Defender (SPD) is statutorily required to provide counsel to criminal defendants facing a sentence that includes incarceration, certain children involved in proceedings under the Children's and Juvenile Justice Codes (Chapters 48 and 938), persons facing involuntary civil commitment and protective placement, and certain appellants. These individuals must generally meet the SPD standard for indigency under s. 977.07(2) of the statutes in order to receive representation. If an individual does not meet the SPD indigency standard, but is nonetheless determined by a circuit court to have a constitutional right to counsel, the court will appoint an attorney at county, rather than state, expense.

Chapter 479, Laws of 1965 first created the State Public Defender position under the Wisconsin Supreme Court. The duties of the early SPD were limited to post-conviction appeals for indigent persons. Counties retained the sole responsibility for providing constitutionally required counsel to indigent persons at the trial level. Counties generally met this responsibility through court-appointed private counsel.

Under Chapter 29, Laws of 1977, the SPD was transferred from the judicial branch to the executive branch and became an independent agency under the Public Defender Board. Chapter 29 also provided funding for a phase-in of the state's public defender program at the trial level. The SPD was directed to phase-in its services at the trial level over the biennium to the extent that funding and position authority permitted. The SPD provided representation at the trial level both through the use of staff attorneys as well as through the retention of private counsel.

Chapter 418, Laws of 1977, directed that the state assume responsibility for indigent trial defense in all counties, effective July 1, 1979. Chapter 34, Laws of 1979, subsequently provided funding for the 1979-80 fiscal year to implement the statewide public defender system. However, appropriations for the SPD for the 1980-81 fiscal year were vetoed with the exception of funding for the retention of private counsel. Nonetheless, by the 1979-80 fiscal year, the SPD had established 31 district offices providing indigent trial defense services in all 72 Wisconsin counties.

Chapter 356, Laws of 1979, restored funding for the SPD for program administration and for both trial and appellate representation by SPD staff for the 1980-81 fiscal year. Chapter 356 also mandated that 100% of the indigency cases at the trial level in 25 counties be assigned to private counsel. The remaining 47 counties were assigned to three statutory groups with not less than 15%, 25%, or 50% respectively, of these cases assigned to private counsel, with the remaining balance of cases assigned to SPD staff. Further, Chapter 356 requested the Legislative Council to study the state public defender program and to report its findings and recommendations to the Legislature no later than January 1, 1985. Finally, Chapter 356 sunsetted the SPD on November 15, 1985.

Under 1985 Wisconsin Act 29, all requirements mandating that a certain percentage of cases in each county be assigned to private counsel were repealed, again permitting public defender staff attorneys to represent the indigent in all 72 counties. Act 29 also created annual caseload standards for SPD trial attorneys and repealed the sunset provision for the SPD.

In its 2008 *State v. Kennedy* decision, the Wisconsin Court of Appeals described the current system for providing constitutionally required counsel to the indigent as follows: "There are two avenues by which an indigent criminal defendant will be afforded counsel at no expense. The first is through the legislatively created Office of the State Public Defender. The legislature created WIS. STAT. ch. 977 of the Wisconsin Statutes establishing the Office of the State Public Defender 'to deal with the appointment of counsel for indigent defendants.' The second avenue emerges only after a defendant has been found ineligible by the SPD and rests in the inherent power of the court. If a criminal defendant has been found ineligible by the SPD statutory standards for the appointment of counsel, the trial court may, in its discretion, invoke its inherent authority and appoint counsel at county expense when the 'necessities of the case' and the demands of 'public justice and sound policy' require appointing counsel to protect the defendant's constitutional right to counsel."

In its seminal 1991 *Wisconsin v. Dean* decision, the Court of Appeals stated that: "The legislature cannot limit who is constitutionally entitled to an attorney. The creation of the public defender's office is not the exclusive means for assuring counsel to indigents and did not negate the inherent power of the court to appoint when the public defender declines to act." The Court of Appeals went on to find that Wisconsin courts have been appointing constitutionally required counsel at county expense since the 1860s.

Under s. 977.07(2) of the statutes, an individual will qualify for SPD representation "if the person's assets, less reasonable and necessary living expenses, are not sufficient to cover the anticipated cost of effective representation when the length and complexity of the anticipated proceedings are taken fully into account." Under state statute, "reasonable and necessary living expenses" are linked to monthly payment amounts under a 1987 Aid to Families With Dependent Children cost of living table, adjusted for other specified, emergency, or essential costs.

Under administrative rule, a person's "available assets" must be determined by adding together: (a) the person's liquid assets (including disposable income, cash in hand, stocks and bonds, bank accounts and other property which can be converted to cash within a reasonable period of time and is not needed to hold a job, or to shelter, clothe and care for the person and the person's immediate family); (b) any money belonging to the person and expended to post bond to obtain release regarding the current alleged offense; (c) the amount which could be raised by a loan on the person's non-liquid assets with a value of \$500 or more (assets which cannot be converted to cash within a reasonable period of time, such as a person's home, car, household furnishings, clothing and other property which has been declared exempt from attachment or execution by law, must be calculated to be assets equivalent in dollars to the amount of the loan which could be, in fact, raised by using these assets as collateral); and (d) the amount of income or other money the person anticipates receiving during the pendency of the case, and subtracting from that sum the "amount required to provide the necessities of life" for that person and those dependent on that person, during the pendency of the case.

Under SPD administrative rule, in determining the "amount required to provide the

necessities of life" for an individual and his or her family, the SPD begins its analysis by consulting the 1987 Aid to Families with Dependent Children cost of living table and determining the monthly net income allowance for the individual's family based on this table (for a family of four, either \$599/month or \$617/month, depending on the region of the state). The SPD then adjusts this initial net monthly income allowance based on other specified, emergency, or essential costs, including: (a) rent payment or mortgage payment arrearages; (b) payments for health insurance, medical care, and dental care; (c) work-related child care costs; (d) student loan payments; (e) payments for automobile insurance necessary to maintain employment; (f) court-ordered obligations; (g) utility bill arrearages (not including telephone or cable); (h) arrearages on taxes; (i) social service agency bills; (j) payments by incarcerated persons as a condition of work-release privileges; and (k) amounts paid to a person under a state and federal grant of supplemental security income for the aged, blind, and disabled.

In determining assets available to pay for legal counsel, the SPD must also consider the assets of the applicant's spouse unless the spouse was the victim of a crime allegedly committed by the individual.

In determining whether or not a defendant's available assets exceed the "anticipated cost of retaining counsel," the SPD, by administrative rule, has determined the "anticipated cost of retaining counsel" for its various types of cases as identified in Table 1.

TABLE 1

"Anticipated Cost of Retaining Counsel" Under SPD Administrative Rule

<u>Case Type</u>	<u>Milwaukee County</u>	<u>Other Counties</u>
1st Degree Intentional Homicide	\$7,500	\$7,500
Other Class A & Class B Felony	3,400	2,800
Other Felony	1,900	1,450
Traffic Misdemeanor	400	300
Other Misdemeanor	500	400
Juvenile	500	400
Chapter 51 (Involuntary Commitment)	565	450
Chapter 55 (Protective Placement)	1,900	1,450
Paternity	800	700
Appeals	2,000	1,500
Involuntary Termination of Parental Rights	3,400	2,800

Based on the foregoing indigency determination process, if the SPD determines that an individual does not have sufficient assets to pay the "anticipated cost of retaining counsel," then the individual qualifies for SPD representation. If an individual does not qualify for SPD representation, he or she may still receive counsel at county expense if the court determines that the

"necessities of the case" and the demands of "public justice and sound policy" require appointing counsel to protect the individual's constitutional right to counsel. The remaining individuals not constitutionally entitled to legal representation at state or county expense, must provide for their own legal counsel.

Although the SPD standard for representation utilizes an indigency measure of income that is more than 20 years old, the standard continues to qualify most applicants for SPD representation at state expense. From August 9, 2000, through October 3, 2000, the SPD conducted a study of 14,780 applications for SPD representation. Of the 14,780 applications, 11,084, or 75% of these cases, qualified for SPD representation. From August 1, 2005, through September 10, 2005, the SPD conducted an updated study of 11,506 applications for SPD representation. In 2005, 78.4% of these cases (9,015) qualified for SPD representation. [Applicants generally fall into one of three categories: (a) those entitled to SPD representation; (b) those not entitled to SPD representation, but still constitutionally eligible who receive their legal counsel by court appointment; and (c) those not constitutionally entitled to legal representation.]

Table 2 identifies the number of indigent legal defense cases in which the SPD has appointed counsel over the last 10 years. Over this time period the number of cases assigned to the SPD has increased by approximately 15%.

TABLE 2

Public Defender Caseload in State Fiscal Years 1999-00 through 2008-09

<u>Fiscal Year</u>	<u>Cases</u>
1999-00	124,020
2000-01	123,753
2001-02	132,209
2002-03	138,778
2003-04	144,678
2004-05	143,327
2005-06	145,240
2006-07	142,396
2007-08	136,628
2008-09	142,879

In calendar year 2003, the state expended \$74,880,800 to operate the SPD and provide indigent legal defense counsel at the trial and appellate court levels. In calendar year 2006, these costs had increased to \$81,463,900, in calendar year 2007 the state expended \$81,323,000, and in calendar year 2008 the state expended \$84,049,500 to operate the SPD and provide indigent legal defense counsel. Approximately \$1.8 million annually is collected from SPD clients to offset these costs.

Counties have also continued to play a meaningful role in providing indigent legal defense counsel. In calendar year 2003, 60 counties reported incurring \$3.9 million in indigent legal defense costs. In calendar year 2006, 62 counties reported that these costs had increased to \$5.8 million, and in calendar year 2007, 63 counties reported incurring \$6.3 million in indigent legal defense costs.

In calendar year 2008, the Director of State Courts office modified the report that counties complete on county-appointed legal counsel costs. As a result, the calendar year 2008 data is not directly comparable to prior year reports. In 2008, 69 counties reported incurring \$6.1 million in costs for *Dean* case appointments. Expenditures by counties for *Dean* cases represents cases in which circuit court judges concluded that a defendant was constitutionally entitled to representation but did not qualify to be represented by the SPD.

The attachment to this memorandum identifies expenditures, recoupment and net costs, for counties in 2008 (the last year for which data is available) for court-appointed defense counsel by county. While 69 counties reported \$6.1 million in costs for *Dean* cases in 2008, the net expenditure by these counties for these cases in 2008 totaled \$3.0 million. In reviewing the data, the following should be noted: (a) not all counties reported information; (b) the reports are unaudited; and (c) counties may not be consistent in how they reported costs. Further, the amounts identified as recoupment by a county may be from previous calendar years. In some counties during 2008, recoupment of appointed counsel costs exceeded appointed counsel expenses. Of the cases represented in the attachment, by county, it is unclear how many of these cases would be assigned to the SPD under a revised indigency standard of SB 263 and AB 395, and how many would remain county appointments. [However, when the SPD completed its 2005 study, it found that if the SPD indigency standard had modeled W-2, approximately 94% of all individuals in the study would have qualified for SPD representation.]

Under 2009 Assembly Bill 75 (the 2009-11 biennial budget bill), the Legislature adopted the provisions that are in the bills currently before the Committee, and provided for a delayed effective date of June 30, 2011. As a result of the delayed effective date, no additional costs associated with the change would have been incurred in this biennium. In order to permit 75% of the estimated additional caseload to be assigned to SPD staff, the 2009-11 biennial budget bill would have provided an additional 49.3 GPR-funded positions to the Office, again effective June 30, 2011.

In signing the 2009-11 biennial budget bill into law as 2009 Wisconsin Act 28, the Governor vetoed this provision. The Governor indicated that, "I am vetoing these provisions because of the additional cost and positions associated with implementing the higher standard. This veto returns the indigency standard to current law and deletes the positions associated with the increase. I remain committed to ensuring adequate representation of individuals with limited income. I will continue to review this policy issue in future budgets."

In his quarterly report to the Joint Committee on Finance dated September 3, 2009, the State Public Defender indicated that, "2009 Wisconsin Act 28 did not include the cost-to-continue

funding requested by the Public Defender Board. Instead, the private bar appropriation was reduced by nearly \$1.5 million over the biennium. The 2007-2009 shortfall in this appropriation required that \$5.2 million of invoices received during the last quarter of that biennium be held until July and paid with 2009-2011 funds. It is too early in the biennium to project the amount of the 2009-2011 private bar deficit with confidence. Unless there are changes in charging policies, continued decriminalization of minor non-violent offenses, and full implementation of changes in sentencing options included in the Department of Corrections' budget, the private bar deficit is likely to range from \$11 to \$13 million. If so, this biennial appropriation would be depleted half way through Fiscal Year 2011." [Based on preliminary SPD projections as of January, 2010, the Office would now estimate the cumulative 2009-11 private bar deficit between \$9 million and \$10 million dollars.]

SUMMARY OF BILLS

The bills would delete the current law SPD standard for determining whether an individual is indigent and entitled to SPD representation. As a result, an individual would no longer qualify for SPD representation, "if the person's assets, less reasonable and necessary living expenses, are not sufficient to cover the anticipated cost of effective representation when the length and complexity of the anticipated proceedings are taken fully into account." In addition, "reasonable and necessary living expenses" would no longer be linked to monthly payment amounts under a 1987 Aid to Families With Dependent Children cost of living table, adjusted for other specified, emergency, or essential costs.

Instead, the bills provide that the SPD indigency standard would generally be modeled after the W-2 eligibility standard. In determining assets available to pay for representation, the W-2 asset standard for available assets would generally be utilized, except that the SPD could only exclude the first \$30,000 of the equity value of a home that served as the individual's homestead. (Under W-2, an individual may not have assets exceeding \$2,500 in combined equity value. However, in determining the combined equity value of assets under W-2, up to \$10,000 in the equity value of vehicles is excluded, as well as the complete equity value of one home that serves as the individual's homestead.)

In determining income available to pay the costs of legal representation, the income limitation of W-2 would be utilized. In order to be eligible under W-2, an individual's gross income must generally be at or below 115% of the federal poverty level. Under the new SPD indigency standard, only income in excess of 115% of the federal poverty level would be considered available to pay the costs of legal representation. [For 2009, the last year for which federal poverty standards have been issued, the monthly income for a family of four at 115% of the federal poverty level would be \$2,113.13.]

As under current law, under the bills' revised indigency standard the SPD would be required to: (a) consider the anticipated costs of effective representation for the type of case in which the person seeks representation; and (b) treat assets or income of the person's spouse as available

income or assets to pay for legal counsel unless the spouse was the victim of a crime the person allegedly committed.

The bills' provisions would generally take effect June 19, 2011, except that the new indigency standard would take effect on the day after publication of the bill as an act to permit the SPD time to develop and promulgate rules to effectuate the new standard. The bills specifically provide, however, that the new standard would not apply to new cases opened by the SPD until June 19, 2011.

In addition, effective June 19, 2011, the bills would authorize the SPD 49.25 additional GPR positions to the Board's Trial Division to provide legal representation to the indigent.

SENATE AMENDMENT 1 TO SB 263 AND ASSEMBLY AMENDMENT 1 TO AB 395

Senate Amendment 1 to SB 263 and Assembly Amendment 1 to AB 395 are identical amendments that would make technical language corrections to the new indigency standard under the bills summarized above.

FISCAL EFFECT

The SPD has estimated that due to the delayed effective date of June 19, 2011, enactment of SB 263 or AB 395 would not have a fiscal effect in 2009-11, but would require additional funding of \$7.9 million during the next biennium (\$3.8 million in 2011-12, and \$4.1 million in 2012-13). In addition, based on assumptions that 75% of the increased caseload would be assigned to staff, the SPD has identified an increased need for staff of 45.40 GPR positions. (These estimates include the effect of the decriminalization of certain operating after revocation violations under 2009 Act 28.) As the bills would provide the SPD 49.25 additional GPR positions annually (based on an analysis that assumed that the Act 28 provisions would not be adopted), a technical amendment could be considered to reduce the provided positions to 45.40 FTE. It is estimated that these positions would require funding of \$3.4 million in 2011-12, and \$3.2 million in 2012-13. The remaining funding would be associated with increased private bar costs of \$0.4 million in 2011-12, and \$0.9 million in 2012-13.

Based on preliminary SPD projections as of January, 2010, the 2009-11 private bar shortfall may range from \$9 million to \$10 million. In addition, based on these estimates, if it is assumed that caseload levels in 2011-13, will remain at 2010-11 levels, the private bar appropriation would have an additional 2011-13 structural deficit of approximately \$5.5 million. The bills do not provide funding to address the 2009-11 private bar shortfall. Enactment of either SB 263 or AB 395 would further increase the private bar funding shortfall, as well as the broader funding shortfall for the agency.

Prepared by: Paul Onsager
Attachment

ATTACHMENT

Court-Appointed Counsel, 2008 Expenditures, Recoupment and Net Expenditures

<u>County</u>	<u>Court-Appointed Counsel Expenditures</u>	<u>Percent of Total Cost</u>	<u>Court-Appointed Counsel Recoupment</u>	<u>Percent of Total Recoupment</u>	<u>Net Expenditure</u>	<u>Percent of Net Expenditures</u>
Adams	\$25,476	0.4%	\$8,627	0.3%	\$16,849	0.6%
Ashland	31,995	0.5	26,255	0.9	5,740	0.2
Barron	32,133	0.5	26,041	0.8	6,092	0.2
Bayfield	15,682	0.3	8,121	0.3	7,560	0.3
Brown	268,023	4.4	204,510	6.6	63,513	2.1
Buffalo	10,017	0.2	8,313	0.3	1,703	0.1
Burnett	18,888	0.3	11,447	0.4	7,441	0.2
Calumet	44,904	0.7	13,226	0.4	31,678	1.1
Chippewa	29,458	0.5	30,522	1.0	-1,064	0.0
Clark	23,939	0.4	15,501	0.5	8,438	0.3
Columbia	77,426	1.3	42,032	1.4	35,394	1.2
Crawford	16,785	0.3	12,588	0.4	4,197	0.1
Dane	372,083	6.1	121,867	4.0	250,216	8.4
Dodge	93,670	1.5	63,346	2.1	30,324	1.0
Door	62,248	1.0	37,795	1.2	24,453	0.8
Douglas	39,688	0.7	15,903	0.5	23,785	0.8
Dunn	34,145	0.6	11,877	0.4	22,268	0.7
Eau Claire	166,948	2.8	115,928	3.8	51,020	1.7
Florence	812	0.0	0	0.0	812	0.0
Fond du Lac	234,207	3.9	119,211	3.9	114,997	3.9
Forest	8,114	0.1	0	0.0	8,114	0.3
Grant	51,796	0.9	41,427	1.3	10,369	0.3
Green	55,133	0.9	18,571	0.6	36,562	1.2
Green Lake	12,325	0.2	5,859	0.2	6,466	0.2
Iowa	20,417	0.3	44,934	1.5	-24,517	-0.8
Iron	19,711	0.3	6,235	0.2	13,477	0.5
Jackson	52,154	0.9	29,289	1.0	22,865	0.8
Jefferson	78,982	1.3	92,877	3.0	-13,894	-0.5
Juneau	75,760	1.2	28,291	0.9	47,469	1.6
Kenosha	183,987	3.0	65,202	2.1	118,785	4.0
Kewaunee	39,362	0.6	21,223	0.7	18,139	0.6
La Crosse	391,174	6.4	135,588	4.4	255,586	8.6
Lafayette	0	0.0	0	0.0	0	0.0
Langlade	28,453	0.5	13,671	0.4	14,782	0.5
Lincoln	70,351	1.2	28,909	0.9	41,442	1.4

<u>County</u>	<u>Court-Appointed Counsel Expenditures</u>	<u>Percent of Total Cost</u>	<u>Court-Appointed Counsel Recoupment</u>	<u>Percent of Total Recoupment</u>	<u>Net Expenditure</u>	<u>Percent of Net Expenditures</u>
Manitowoc	\$5,495	0.1%	\$1,205	0.0%	\$4,290	0.1%
Marathon	273,071	4.5	108,624	3.5	164,447	5.5
Marinette	49,713	0.8	37,512	1.2	12,201	0.4
Marquette	64,783	1.1	38,963	1.3	25,820	0.9
Menominee	84	0.0	84	0.0	0	0.0
Milwaukee	360,434	5.9	38,979	1.3	321,455	10.8
Monroe	91,630	1.5	27,804	0.9	63,826	2.1
Oconto	69,195	1.1	68,113	2.2	1,082	0.0
Oneida	58,626	1.0	16,287	0.5	42,339	1.4
Outagamie	181,490	3.0	115,109	3.7	66,381	2.2
Ozaukee	65,305	1.1	47,471	1.5	17,834	0.6
Pepin	5,106	0.1	9,485	0.3	-4,379	-0.1
Pierce	8,297	0.1	9,573	0.3	-1,276	0.0
Polk	21,357	0.4	9,117	0.3	12,239	0.4
Portage	108,582	1.8	49,146	1.6	59,436	2.0
Price	0	0.0	0	0.0	0	0.0
Racine	166,625	2.7	126,506	4.1	40,119	1.3
Richland	7,313	0.1	2,840	0.1	4,473	0.1
Rock	196,795	3.2	88,794	2.9	108,001	3.6
Rusk	4,648	0.1	0	0.0	4,648	0.2
Sauk	209,426	3.5	4,615	0.1	204,811	6.9
Sawyer	22,928	0.4	17,038	0.6	5,891	0.2
Shawano	3,175	0.1	0	0.0	3,175	0.1
Sheboygan	141,497	2.3	78,720	2.6	62,777	2.1
St. Croix	95,253	1.6	0	0.0	95,253	3.2
Taylor	33,705	0.6	24,104	0.8	9,601	0.3
Trempealeau	64,987	1.1	23,829	0.8	41,158	1.4
Vernon	20,444	0.3	13,017	0.4	7,427	0.2
Vilas	20,196	0.3	3,571	0.1	16,625	0.6
Walworth	100,744	1.7	117,543	3.8	-16,799	-0.6
Washburn	42,539	0.7	18,840	0.6	23,699	0.8
Washington	183,938	3.0	143,219	4.6	40,719	1.4
Waukesha	224,515	3.7	136,533	4.4	87,982	2.9
Waupaca	76,522	1.3	37,346	1.2	39,176	1.3
Waushara	50,518	0.8	46,977	1.5	3,542	0.1
Winnebago	313,558	5.2	160,655	5.2	152,903	5.1
Wood	<u>40,130</u>	0.7	<u>35,381</u>	1.1	<u>4,749</u>	0.2
Total	\$6,068,873		\$3,082,185		\$2,986,689	