



## Legislative Fiscal Bureau

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Joint Committee on Finance

Paper #246

### Base Budget Reduction (Public Defender)

[LFB 2001-03 Budget Summary: Page 527, #2]

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#### CURRENT LAW

Under current law, the following Public Defender appropriations are GPR state operations appropriations: (a) program administration; (b) appellate representation; (c) trial representation; (d) private bar and investigator reimbursement; (e) private bar and investigator payments; administration costs; and (f) transcript and record payments. The adjusted base for all Public Defender GPR state operations appropriations is \$64,738,600 GPR annually.

#### GOVERNOR

Reduce the base budgets for state operations for a number of agencies by 5% annually. In total, the proposed reduction generates general fund savings of \$41,355,000 in 2001-02 and \$41,069,900 in 2002-03. Thus, the Governor's budget reduces base level appropriations by \$8.4 million for the biennium. A total of 44 agencies, including the State Public Defender, would be subjected to a reduction.

Reduce the State Public Defender's (SPD's) largest GPR state operations appropriation, trial representation, by \$3,236,900 GPR annually. This amount represents 5% of the agency's total GPR adjusted base for state operations.

#### DISCUSSION POINTS

1. The cost of providing indigent defense is generally borne by the state. The SPD provides legal representation for eligible indigent defendants who are formally accused of crimes or are defendants in certain specified civil matters. The SPD also represents indigent defendants

seeking certain post-conviction relief. 1995 Act 27 (the 1995-97 biennial budget act) eliminated SPD representation of clients in cases where there is no clear constitutional right to representation. Act 27 eliminated SPD representation in cases involving conditions of confinement, early representation, certain sentence modifications and certain appeals. In addition, representation was limited for paternity and nonpayment of child support cases, probation and parole modifications, and revocations. Representation for parents whose children are alleged to be in need of protection or services (CHIPS) was also eliminated, except for parents who are themselves minors.

2. Under current law, when an accused has a constitutional right to counsel and meets the financial eligibility standards of the SPD, the SPD must provide counsel to the accused. The SPD's caseload, therefore, is non-discretionary. The statutory standards to determine indigency were established in 1987 and have not been updated. As a result, a person with an income level below the current federal poverty guidelines may not meet the financial standards for SPD representation, yet cannot afford to hire a private attorney. In such cases, the court may appoint an attorney, at county expense, to assure that the individual's constitutional right to counsel is satisfied.

3. Increasingly, courts are appointing counsel for individuals who do not qualify for SPD representation, yet the court determines the individuals cannot afford counsel. In 1999, 69 counties voluntarily reported court-appointed counsel costs to the Director of State Courts of \$4,078,900 for four types of cases: (a) adult criminal; (b) mental commitment or emergency detention; (c) CHIPS parents; and (d) other (the "other" category is not defined). In 2000, 65 counties reported court-appointed counsel costs of \$4,486,300 for the above four case types.

4. Under the bill, the SPD's largest state operations appropriation, trial representation, is reduced by \$3,236,900 GPR annually. Although the reduction is initially assigned to the trial representation appropriation, the bill does allow the SPD to submit an alternative plan to the Department of Administration (DOA) allocating the required reduction among its sum certain GPR state operations appropriations. The bill does not change current law which requires the SPD to provide counsel to an accused when the accused has a constitutional right to counsel and meets the SPD financial eligibility standards.

5. Under current law, when the SPD determines that an accused has a right to SPD representation, the case is either assigned to an SPD staff attorney or to a private attorney (the private bar). In 1999-00, 58.5% of new cases were assigned to SPD staff and 41.5% of new cases were assigned to the private bar.

6. It is projected that the SPD caseload (the number of cases assigned to SPD staff and the private bar) for the upcoming biennium will remain constant. As a result, it is not anticipated that the SPD will be able to address the recommended reduction through declining caseloads.

7. Given projections that the SPD caseload is not expected to decline, other options to manage base budget reductions could be considered. One option would be to reduce the SPD's nondiscretionary caseload by lowering the financial eligibility standards. However, these financial standards of poverty are tied to 1987 Aid to Families with Dependent Children income guidelines.

As a result, an individual with an income below the current federal poverty guidelines may already not qualify for SPD representation. If the Committee were to lower the SPD financial eligibility standards further, courts would likely increase the number of counsel hired at county expense to meet the state's constitutional obligation to provide counsel to defendants who cannot afford counsel. While the state retains private bar attorneys at the rate of \$40 per hour, counties are required to pay counsel \$70 per hour or more under Supreme Court Rule. Wisconsin units of government as a whole could end up paying more for constitutionally-required indigent defense if the state lowered the SPD financial eligibility standards.

8. As part of standard budget adjustments, the Department of Administration (DOA) requires most state agencies to budget a 3% turnover rate for agency positions in each appropriation with 50 or more employees. In 2000-01, DOA required the SPD and 14 other state agencies to generate a 7% turnover rate for agency positions and lapse the additional revenues to the general fund.

9. In meeting the DOA requirement, SPD indicates that it was able to manage the required GPR lapses in 2000-01 by keeping attorney positions vacant, without increasing private bar costs, through a one-time change in private bar billing policy. In prior fiscal years, the SPD has paid private bar attorneys entering into misdemeanor case contracts at the beginning of the contract before the work was done. In 2000-01, the SPD began paying for the contract work at the end of the contract. This change provided one-time savings that allowed the SPD to manage the 2000-01 required GPR lapses.

10. Approximately 90% of the SPD's budget is for salary, fringe benefit and private bar costs. Certain supplies and services costs, such as rent, remain relatively fixed. As a result, cost saving measures would have to cut salary, fringe benefit or private bar costs. Because such a large portion of the agency's budget is devoted to personnel costs, the SPD argues that the 5% reduction could not be realized.

11. On the other hand, a number of other agencies subject to the 5% reduction also have a significant portion of their budgets devoted to salaries and fringe benefits. The fact that approximately 90% of their budget is devoted to compensation is not unique to the SPD.

12. If it is viewed that the SPD's mission would not permit a reduction of the magnitude of that recommended by the Governor, but that some reduction should be applied, some percentage other than 5% could be adopted. Each 1% of the SPD's base budget equals \$647,400 annually.

13. If the Committee believes that it would be unwise to implement the reduction amount of SB 55, the Committee could consider reducing the SPD's supplies and services budget in all of its appropriations. If reduced by 5% annually, these reductions would generate \$328,900 GPR annually.

14. Another potential approach to managing the recommended reduction is to shift more indigent defense cases to either SPD staff or the private bar, depending on whether SPD staff or the

private bar provides representation more cost effectively. For budgetary purposes, the statutes provide an annual caseload standard for SPD attorneys to meet that has been converted into a weighted point system. Based on an analysis that assigned all SPD costs of providing indigent representation to either SPD staff or the private bar, the estimated cost of the private bar is \$813 per weighted point and the estimated cost of SPD staff is \$779 per weighted point. As a result, it is anticipated that savings could result if indigent defense cases were shifted from the private bar to SPD staff.

15. The Committee could consider providing an additional \$1,690,500 GPR in 2001-02, \$1,982,900 GPR in 2002-03 and 37.5 GPR positions annually (25.0 assistant public defenders, 8.0 legal secretaries, 3.5 investigators and 1.0 client services specialist) to the SPD's trial representation appropriation, and delete \$728,400 GPR in 2001-02 and \$2,913,600 GPR in 2002-03 from the private bar and investigator reimbursement appropriation. For the biennium, this alternative would require an additional \$31,400 GPR, but in 2002-03, would save \$930,700 GPR (annualized cost savings).

16. The Committee could also consider the creation of a conflicts office in the SPD that would handle cases that the trial division could not handle due to a conflict. Under current rules of ethics governing attorneys, public defenders generally may not represent multiple defendants who have conflicting interests. Such conflicts cases, as well as other indigent defense cases if the number of conflicts cases was insufficient, could be assigned to a newly-created conflicts office.

17. The SPD indicates it would place a conflicts office in Milwaukee where there is the largest caseload and where the most conflicts are generated. In an effort to avoid legal problems, the SPD would place the office under its assigned counsel division, as opposed to its trial division, so that the newly-created conflicts office would have the necessary separation from the trial division.

18. Under current Supreme Court Rule 20:1.10, governing the ethical conduct of attorneys, there is ambiguity as to the permissibility of a conflicts office in the SPD and how it would have to be structured so as to avoid problems with this rule. The rule provides that if an attorney in a firm could not represent a client due to a conflict of interest, the entire firm would also be precluded from representing the client due to the attorney's conflict of interest. The comment to the rule provides that, "lawyers employed in the same unit of a legal service organization constitute a firm, but not necessarily those employed in separate units." The question unresolved in Wisconsin courts or by the Wisconsin Supreme Court is what would the SPD have to do to qualify the conflicts office as a "separate unit." In 1990, the Wisconsin State Bar's Standing Committee on Professional Ethics responded to an opinion request by the SPD and advised the SPD to petition the Wisconsin Supreme Court for an amendment to the rule to clarify matters on the permissibility of a conflicts office.

19. The SPD believes, however, that such a conflicts office would be permissible so long as it: (a) had its own separate office; (b) included attorneys, support staff and supervisors who were entirely separate from the trial division; and (c) kept all conflicts files separate from trial

division files, with access limited to conflicts office employees.

20. The Committee could consider providing an additional \$734,400 GPR in 2001-02, \$863,300 GPR in 2002-03 and 16.0 GPR positions annually (10.0 assistant public defenders, 1.0 attorney supervisor, 3.0 legal secretaries, 1.5 investigators and 0.5 client services specialist) to the SPD, and delete \$311,800 GPR in 2001-02 and \$1,247,000 GPR in 2002-03 from the private bar and investigator reimbursement appropriation. For the biennium, this alternative would require an additional \$38,900 GPR, but in 2002-03, would save \$383,700 GPR (annualized cost savings). Costs are higher than private bar savings in the first year because it takes, on average, six months for a case assigned to the private bar to be completed and the resulting bill to be paid. In 2001-02, there would be: (a) a period of overlap when the SPD would be paying both higher private bar costs for cases already assigned to the private bar as well as paying new staff salaries and fringe benefits; and (b) one-time costs associated with the creation of new staff positions.

21. During briefings on the SPD's budget, questions were raised regarding collection efforts that are made by the agency or on the agency's behalf. Under administrative rule, an SPD client may elect to prepay, within 30 days of appointment of counsel by the state public defender, an optional prepayment amount based on the type of case as follows: (a) first-degree intentional homicide, \$500; (b) other class A or B felony, \$100; (c) sexual predator, \$100; (d) other felony, \$50; (e) commitment, \$25; (f) protective placements under Chapter 55, \$50; (g) misdemeanor, \$50; (h) parole/probation revocation, \$50; (i) termination of parental rights, \$50; (j) special proceeding, \$25; (k) paternity, \$50; (l) appellate/plea, \$50; and (m) appellate/trial, \$100. If a client prepays, the client is not liable for any additional payment for public defender legal counsel for that case. Internal SPD collections are largely based on these upfront payments. SPD's collection efforts (largely based on prepayment) have netted the following amounts: (a) \$825,938 in 1997-98; (b) \$851,654 in 1998-99; (c) \$863,665 in 1999-00; and (d) an estimated \$928,100 in 2000-01.

22. If an SPD client does not prepay, the client is liable for a higher amount, which is based on the average cost of the type of case. DOA is responsible for collecting these costs from SPD clients after their cases have been concluded if there has been no payment activity for 120 days. DOA's collection efforts have netted the following amounts: (a) \$31,613 collected in 1997-98 on payment obligations of \$18,041,686; (b) \$38,774 collected in 1998-99 on payment obligations of \$17,558,437; (c) \$83,536 collected in 1999-00 on payment obligations of \$18,168,915; and (d) through mid-April, \$67,882 in 2000-01 on payment obligations of \$13,254,573.

23. DOA bids and awards contracts for collection of state agency accounts under which the collection agencies typically retain a percentage of monies they are able to collect, generally ranging from 13% to 30%.

24. For SPD collection work, DOA contracts with the State Collections Service (SCS). When SCS first began collecting monies owed to the SPD, it retained 17% of what it collected, but this was raised to 60% in 1997, as SCS was losing money processing SPD accounts. In 1998, DOA renegotiated with SCS so that it now retains 50% of the SPD monies it is able to collect. The

problems SCS has experienced in collecting SPD accounts may be due to the fact that an individual may be below the federal poverty guidelines but still not qualify for SPD representation. Also, a portion of the individuals are in jail or prison.

**ALTERNATIVES TO BILL**

1. Approve the Governor’s recommendation to reduce the SPD’s largest GPR state operations appropriation, trial representation, by \$3,236,900 GPR annually.

2. Modify the budget of the SPD by any of the following amounts.

<u>Reduction %</u>	<u>Amount to be Restored to SB 55</u>	
	<u>2001-02</u>	<u>2002-03</u>
No reduction	\$3,236,900	\$3,236,900
1%	2,589,600	2,589,600
2%	1,942,200	1,942,200
3%	1,294,800	1,294,800
4%	647,400	647,400

3. Delete the Governor’s recommendation. In addition, delete \$328,900 GPR annually, which represents a reduction of 5% annually of the SPD’s supplies and services adjusted base.

<u>Alternative 3</u>	<u>GPR</u>
<b>2001-03 FUNDING</b> (Change to Bill)	\$5,816,000

4. Maintain current law.

<u>Alternative 4</u>	<u>GPR</u>
<b>2001-03 FUNDING</b> (Change to Bill)	\$6,473,800

5. In addition to any of the above alternatives, do any of the following:

a. Provide \$1,690,500 GPR in 2001-02, \$1,982,900 GPR in 2002-03 and 37.5 GPR positions annually (25.0 assistant public defenders, 8.0 legal secretaries, 3.5 investigators and 1.0 client services specialist) to allow SPD staff to handle more cases. Delete \$728,400 GPR in 2001-02 and \$2,913,600 GPR in 2002-03 from the private bar and investigator reimbursement appropriation.

<b>Alternative 5A</b>	<b>GPR</b>
<b>2001-03 FUNDING</b> (Change to Bill)	\$31,400
<b>2002-03 POSITIONS</b> (Change to Bill)	37.50

b. Provide \$734,400 GPR in 2001-02, \$863,300 GPR in 2002-03 and 16.0 GPR positions annually (10.0 assistant public defenders, 1.0 attorney supervisor, 3.0 legal secretaries, 1.5 investigators and 0.5 client services specialist) to create a conflicts office in the SPD. Delete \$311,800 GPR in 2001-02 and \$1,247,000 GPR in 2002-03 from the private bar and investigator reimbursement appropriation.

<b>Alternative 5B</b>	<b>GPR</b>
<b>2001-03 FUNDING</b> (Change to Bill)	\$38,900
<b>2002-03 POSITIONS</b> (Change to Bill)	16.00

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