



## Legislative Fiscal Bureau

One East Main, Suite 301 • Madison, WI 53703 • (608) 266-3847 • Fax: (608) 267-6873

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Joint Committee on Finance

Paper #720

### Early Representation (Public Defender)

[LFB 2001-03 Budget Summary: Page 528, #4]

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#### CURRENT LAW

The State Public Defender (SPD) may not provide legal services or assign counsel to: (a) adults who are not in custody and have not yet been charged with a crime; and (b) juveniles who are not in custody and not yet subject to a proceeding under the Children's Code (Chapter 48) or the Juvenile Justice Code (Chapter 938) for which counsel is required or for which counsel may be appointed.

#### GOVERNOR

Authorize the SPD to provide (early) representation to: (a) adults who are not in custody and have not yet been charged with a crime; and (b) juveniles who are not in custody and not yet subject to a proceeding under the Children's Code (Chapter 48) or the Juvenile Justice Code (Chapter 938) for which counsel is required or for which counsel may be appointed.

#### DISCUSSION POINTS

1. In 1995 Act 27 (the 1995-97 biennial budget act), a series of statutory modifications were made to the SPD's authority associated with eliminating Public Defender representation in cases where there is no clear constitutional right to representation. This included eliminating the SPD's authority to provide representation to adults who are not in custody and have not been charged with a crime and juveniles who are not in custody and are not yet subject to a proceeding under Chapters 48 and 938 for which counsel is required or may be appointed. 1995 Act 27 reduced the private bar appropriation by \$133,100 GPR in 1995-96 and \$262,500 GPR in 1996-97 to reflect this statutory change.

2. In its budget request, the SPD requested \$141,600 GPR in 2001-02 and \$279,300 GPR in 2002-03 and statutory changes to authorize the SPD to provide early representation. The SPD indicated that the amount requested represented approximately the amount by which the SPD's budget was reduced in 1995 Act 27 when early representation was eliminated. The request further indicated that the costs of early representation "are likely to be offset by corresponding savings. These anticipated savings will result from fewer formal charges being filed, less serious charges being filed as a result of negotiated pre-charging settlements, and less attorney time spent on some cases as a result of earlier client contact." These cost savings were not, however, quantified. The bill provides no funding associated with the early representation provision. DOA indicates that it believes that the potential savings associated with early representation will result in no additional costs to the SPD.

3. Under Supreme Court Rule 20:3.8, a "prosecutor in a criminal case shall not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing." As a part of a broader petition, in January, 2000, the Wisconsin District Attorneys Association (WDAA) petitioned the Supreme Court to eliminate this prohibition. The Supreme Court has not acted on the petition and the rule remains in place and limits the ability of prosecutors to engage in settlement negotiations with unrepresented clients. To the extent the Governor's recommendation was adopted, this could increase the number of uncharged cases where prosecutors might have more freedom to engage in settlement negotiations with represented clients and resolve cases early.

4. The SPD strictly construes the current law prohibition against early representation of adults and juveniles. If an SPD client has been charged with one crime, but there are other potential charges against the SPD's client that have not yet been issued, the SPD will not provide counsel to the client in regards to the crimes that have not been formally charged. If the Governor's recommendation was adopted, the SPD would be able to negotiate on behalf of clients not only in regards to charged crimes, but in regards to uncharged crimes as well. This could improve the system's ability to resolve cases efficiently.

5. Finally, if early representation was allowed, public defenders could be working with prosecutors before individuals were charged, in cases where the prosecutor and the public defender deemed it appropriate, to divert some cases from the formal criminal system and craft alternatives to prosecution. Senate Bill 55 provides that the Secretary of Administration may allocate up to \$2 million in federal Byrne anti-drug enforcement grant and match money for a misdemeanor offender diversion program. Under the bill, SPD, in consultation with the Director of State Courts and the WDAA, would be required to develop alternative charging and sentencing options for misdemeanor crimes to divert offenders from imprisonment, and to submit a proposal to DOA by July 1, 2002. The SPD indicates that without the proposed statutory change allowing early representation, the options available for the SPD in developing this diversion program would be reduced.

6. In January, the executive board of the WDAA met and reviewed the budget requests of the SPD for the upcoming biennium. The WDAA executive board unanimously supported the SPD's request to permit representation of individuals who have been arrested for a crime but who

are not in custody and have not yet been charged.

7. A concern could be raised at expanding the SPD's authority to provide representation at the same time that base budget reductions are recommended. The bill would authorize, but not require, the SPD to provide early representation for adults and juveniles. Some might argue that with a discretionary early representation program, it might prove to be arbitrary in practice as to who receives early representation and who does not. On the other hand, a discretionary early representation program would better enable the SPD to control costs.

8. The SPD has indicated that if this recommendation were adopted, it would undertake a number of steps to control costs. The SPD expects the early representation cases to represent a small part of its caseload. Second, in order to avoid additional costs, early representation cases would be assigned to SPD staff rather than the private bar whenever possible. Third, early representation would not change the budgetary caseload standards for an SPD attorney if the case subsequently went forward, but rather the representation of that client from the pre-charge phase forward would count as one case. Fourth, the SPD would monitor the early representation cases and the costs associated with such representation. The SPD indicated that if early representation resulted in costs that the SPD could not absorb, the SPD would scale back or discontinue early representation.

9. If, however, early representation proved to be cost effective, the SPD would continue early representation. The SPD indicated that while there may be some savings to the SPD from early representation (settling a case early for example), it would expect the savings to be felt system-wide.

## **ALTERNATIVES TO BASE**

1. Approve the Governor's recommendation to authorize the SPD to provide representation to: (a) adults who are not in custody and have not yet been charged with a crime; and (b) juveniles who are not in custody and not yet subject to a proceeding under the Children's Code (Chapter 48) or the Juvenile Justice Code (Chapter 938) for which counsel is required or for which counsel may be appointed.

2. Maintain current law.

Prepared by: Paul Onsager