



Legislative Fiscal Bureau

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Joint Committee on Finance

Paper #121

Civil Legal Services for the Indigent (DOA -- Office of Justice Assistance, Corrections and Health and Family Services)

[LFB 2005-07 Budget Summary: Page 44, #2, Page 128, #10, and Page 262, #6]

CURRENT LAW

Both the United States and Wisconsin Supreme Courts have ruled that the indigent are constitutionally entitled to counsel at public expense in criminal proceedings. While subsequent decisions of these courts have held that there is no absolute right to the appointment of counsel in non-criminal cases carrying no threat of loss of physical freedom, both courts have concluded that due process requires an individualized determination of the necessity for the appointment of counsel based on the circumstances of the particular case.

State and County Funding. The cost of providing required criminal counsel to the indigent in Wisconsin is generally the responsibility of the state through the Office of the State Public Defender (SPD). The SPD provides this counsel either through SPD staff attorneys or SPD-appointed private bar attorneys. The agency's total adjusted base funding for all GPR state operations appropriations is \$75,176,300 GPR annually.

Counties are increasingly appointing counsel for individuals involved in the circuit court system. The Director of State Courts conducts an informal annual survey of county clerks of court to report the costs of court-appointed counsel charged to the county for four types of cases: (1) adult criminal; (2) mental commitment or emergency detention; (3) representation of parents whose children are alleged to be in need of protection or services ("CHIPS parents"); and (4) other cases (typically guardianship and family law matters). In calendar year 2003, 70 counties reported incurring \$6,471,600 in costs to provide court-appointed counsel for these types of cases.

Other Funding. The federal government distributes funding nationally for civil legal services through its Legal Services Corporation (LSC). In 2004, Legal Action of Wisconsin Inc.

and Wisconsin Judicare Inc. received \$4,103,900 in federal funding from the LSC for civil legal services.

Funding for civil legal services is also provided pursuant to Wisconsin Supreme Court rule [SCR 13] through the Wisconsin Trust Account Foundation, Inc. (WisTAF). Interest on lawyers' trust accounts provides the primary funding for WisTAF grants for civil legal services. In 2003, WisTAF reported total income of \$1,302,500 and grant awards totaling \$1,146,700. Under the rules of professional conduct governing Wisconsin attorneys, individual attorneys are also directed to provide legal services at no fee or a reduced fee for the indigent.

Further, by order of the Wisconsin Supreme Court, dated March 24, 2005, all active attorneys of the State Bar of Wisconsin will be required to pay an annual assessment of \$50 to support additional civil legal services grants distributed by WisTAF. In its petition to the Supreme Court, WisTAF estimated that this new assessment could generate an additional \$850,000 in annual revenue, beginning on July 1, 2005.

GOVERNOR

Office of Justice Assistance. Provide \$500,000 GPR in 2006-07 under a new GPR annual indigent civil legal services appropriation for the Department of Administration's Office of Justice Assistance (OJA). Beginning in 2006-07, specify that OJA must annually pay the amounts appropriated to WisTAF. Provide that WisTAF would be required to distribute the moneys received as grants to programs that provide civil legal services to indigent persons.

Stipulate that the grants could be used only for the following civil legal services: (1) serving as guardian ad litem for cases with the Bureau of Milwaukee Child Welfare of the Department of Health and Family Services; (2) coordinating insurance benefits for medical assistance recipients; (3) assisting Wisconsin Works participants in applying for supplemental security income program benefits; (4) obtaining and enforcing child support, including legal services related to domestic abuse; (5) developing discharge plans for mentally ill inmates and assisting those inmates in their community integration planning; and (6) providing ancillary services to juvenile offenders.

Department of Health and Family Services. Reduce medical assistance (MA) benefits funding by \$590,000 (-\$250,000 GPR and -\$340,000 FED) in 2006-07 to reflect anticipated savings the administration expects to realize by coordinating insurance benefits for MA recipients served under the indigent civil legal services grant program.

Department of Corrections. Reduce funding for supplies and services from the Department of Corrections' general program operations appropriation (-\$125,000 GPR) and from the community corrections services appropriation (-\$125,000 GPR) in 2006-07.

The Executive Budget Book indicates that these GPR funding reductions provide the initial funding for the OJA civil legal services grants program.

DISCUSSION POINTS

Federal and State Court Initiatives

1. Since the mid-1970s, the federal government has distributed grant funding for civil legal services through its Legal Services Corporation (LSC). Under federal law, individuals are eligible for civil legal assistance with LSC funding if their income is less than 125% of the Federal Poverty Guidelines.

2. As a condition of receiving LSC funding, grant recipients may not utilize any of their funding (including non-LSC funds) for: (a) criminal cases; (b) fee-generating cases that attorneys are willing to accept on a contingency basis; (c) class action lawsuits; (d) challenges to welfare reform; (e) collection of attorneys' fees; (f) rulemaking; (g) lobbying; (h) litigation on behalf of prisoners; (i) representation in drug-related public housing evictions; and (j) representation of certain categories of aliens.

3. In the mid-1980s, the Wisconsin Supreme Court created WisTAF to distribute and oversee grants for civil legal services. These grants are funded primarily by interest earned on lawyers' trust accounts. The following table identifies annual revenues, annual grant allocations, and annual administrative and related expenditures for WisTAF over the last 15 years. During this period, the annual revenues averaged \$1,680,800 and annual grant allocations averaged \$1,568,000.

WisTAF Revenue, Grant Allocations, and Other Expenses

<u>Year</u>	<u>Revenue</u>	<u>Grant Allocations</u>	<u>Other Expenses</u>
1990	\$1,879,600	\$1,398,100	\$110,100
1991	1,840,700	1,532,400	108,900
1992	1,666,800	1,681,500	118,400
1993	1,172,300	1,594,800	115,800
1994	977,800	1,428,500	112,800
1995	867,200	1,232,200	112,800
1996	1,346,400	988,000	119,300
1997	1,686,400	1,012,000	136,700
1998	1,949,700	1,475,000	154,500
1999	2,020,600	1,785,300	179,500
2000	2,425,400	2,313,800	235,200
2001	2,428,100	1,956,600	236,000
2002	2,710,600	2,839,900	290,700
2003	1,302,500	1,146,700	235,500
2004	937,500	1,135,200	238,200

4. On June 2, 2004, WisTAF petitioned the Supreme Court to create a new \$50 assessment on Wisconsin's active attorneys to fund grants for civil legal services. In its petition, WisTAF indicated that it had experienced a drop in interest revenue from lawyer trust accounts as a result of: (a) a 45-year low in interest rates; and (b) a decrease in the use of trust accounts by attorneys. While interest revenue to WisTAF may not return to prior levels, it is anticipated that

WisTAF revenues will rebound during the upcoming biennium as interest rates are anticipated to rise.

5. On March 24, 2005, a majority of the Wisconsin Supreme Court approved the creation of a new annual \$50 assessment on Wisconsin's active attorneys, effective July 1, 2005. If an active Wisconsin attorney refuses to pay this new \$50 assessment, his or her license to practice law will be suspended. It is estimated that this new assessment will generate an additional \$850,000 annually. WisTAF will be responsible for overseeing and distributing these additional monies to grantees for the provision of civil legal services.

6. Wisconsin courts have also undertaken other efforts to make the court system more accessible to citizens of modest means. Circuit courts have established a number of court-based self-help services, with the most developed services located in Dane, Milwaukee, and Waukesha Counties. These services generally utilize volunteer lawyers to assist individuals with family law and small claims forms. The Supreme Court is also developing an online capability to enable individuals to prepare the necessary forms for most initial divorce, custody, or child support filings.

7. The Wisconsin Supreme Court's rules governing the professional conduct of attorneys have been fashioned to permit attorneys to be paid in many instances on a contingent fee basis, other than for family law or criminal proceedings. This practice has permitted individuals of more modest means to afford the legal assistance that might otherwise have been denied to them. These Supreme Court rules also direct attorneys to provide pro bono legal services. This directive may be met by providing legal services at no fee or a reduced fee for the indigent.

The Governor's Civil Legal Services Initiative

8. When the Wisconsin Supreme Court approved the WisTAF petition on March 24, 2005, to create the new \$50 assessment on attorneys to fund grants for civil legal services, the State Bar of Wisconsin was directed by the Supreme Court to "advise this court, in writing, within 60 days of the date of this order if it will undertake to lead a study addressing the civil legal needs of low-income residents of Wisconsin. The State Bar's response should include a tentative timetable for completion of the study. It is the court's view that the study should be conducted with an emphasis upon workable solutions to the existing crisis in legal services funding."

9. However, prior to the Court's actions establishing the new \$50 assessment and encouraging the State Bar study, the Governor had recommended in AB 100 providing \$500,000 GPR, commencing in 2006-07, to be allocated to WisTAF for a variety of civil legal services.

10. On March 29, 2005, in comments to the Committee, the Chief Justice indicated that, "providing legal services to the indigent is not ... solely a lawyers' issue--all the people of Wisconsin have an interest in and responsibility for finding a long-term solution to providing needed civil legal services to the poor." She urged the Committee to approve the recommendation under AB 100.

11. The Committee could view the Governor's recommendation as a reasonable and measured response to concerns that have been raised relating to a growing need for additional

indigent civil legal services. The Supreme Court stated in its order of March 24, 2005, "as the materials and testimony submitted to this court reflect, Wisconsin's poor citizens increasingly lack access to legal representation for fundamental civil legal issues such as custody matters, domestic violence, housing, government benefits, and health care." Materials submitted to the Supreme Court suggested that civil legal services were being provided to approximately 20,000 low-income residents annually, constituting less than 5% of the state's poverty level population.

12. The Supreme Court went on to say that, "the civil legal needs of the poor will not await completion of a comprehensive study. Presently, those needs greatly exceed the services available. We conclude that the result, aside from the human toll, is a profoundly adverse impact on the effective and meaningful administration of justice."

13. Alternatively, it could be argued that until a comprehensive State Bar study is complete, it is premature to develop an additional state program to address civil legal services needs. The following considerations could be advanced in support of this position:

- While there are many indications that a significant problem exists, policy makers currently lack a meaningful understanding of the frequency with which the indigent in Wisconsin today face different types of civil legal problems.

- Without a study, policy makers will not be in a position to assess the degree to which the different types of civil legal problems facing the indigent are going unaddressed or are being addressed through a combination of: (a) civil legal services organizations; (b) other organizations providing assistance to the indigent; (c) pro bono or reduced cost legal services provided by State Bar attorneys; (d) assisted pro se litigation (litigation in which an individual represents himself or herself without the assistance of an attorney); (e) representation by an attorney on a contingent fee basis; and (f) appointment of counsel by a court at county expense.

- Without information on the different types of legal problems faced by the indigent, the frequency with which the indigent face these legal problems, and the extent to which such problems are being addressed under current law, policy makers may not be in a position to meaningfully prioritize the allocation of resources to those areas where there is the greatest need.

- There are civil legal services programs already in place to meet a portion of the need until a study is completed.

14. Further, until the study directed by the Court has been completed, additional concerns may be raised regarding the specific civil legal services program funding initiative in the bill:

- The recommended program does not establish standards for who would qualify for civil legal services on the grounds of indigency. A completed study on the delivery of civil legal services to the indigent in Wisconsin could guide the Committee on where to set the indigency standard in order to target assistance to those most in need.

- The \$500,000 GPR in 2006-07 recommended for the program was not determined

based on an analysis of anticipated caseload. Without a completed study on the delivery of civil legal services to the indigent in Wisconsin, this Committee will not be in a position to estimate caseload for different types of civil legal services and appropriately budget funding to address that need.

- Grant funding under the program could only be used for six types of civil legal services. Without a completed study on the delivery of civil legal services to the indigent in Wisconsin, it would be difficult for the Committee to evaluate the appropriateness of these priorities or to assess the frequency with which the indigent require these services. With additional information, the Committee might choose to address other, currently unspecified, civil legal services needs.

- WisTAF would be required to distribute the amounts received as grants to programs that provide civil legal services to indigent persons. A completed study on the delivery of civil legal services to the indigent in Wisconsin, however, might conclude that scarce resources could be more effectively allocated in other ways, such as expanding the funding available for courthouse self-help resource centers.

- The additional funding for civil legal services grants would be administered by WisTAF, a Wisconsin nonstock, nonprofit corporation. The bill would not require WisTAF to report to OJA as to its administration of these grant funds. Under the bill, OJA would simply serve as the conduit to transfer the grant funding from the state general fund to WisTAF. The Committee might conclude that greater accountability for the use of these funds could be achieved if they were directly administered and distributed by a state agency.

- Questions could also be raised as to whether OJA is the most appropriate agency to administer this state-funded grant program.

15. Based on the foregoing concerns, the Committee could conclude that implementation of the current proposal should be deferred until the results from the State Bar's study on the delivery of civil legal services to the indigent has been completed and funding priorities have been developed consistent with the findings and recommendations of the study. If the Committee shares this conclusion, it could delete the Governor's funding recommendation.

16. Current revenues from interest earned on lawyers' trust accounts, coupled with the new \$50 assessment on attorneys and the Governor's recommended funding would provide additional resources to address some of the civil legal needs of the poor cited in the Supreme Court's order. The Committee could consider approving the Governor's recommendation.

Medical Assistance and Corrections Reductions

17. This recommendation is unlikely to reduce MA benefits costs, as assumed by the administration. Although one of the purposes of the grants would be to enable agencies to "coordinate insurance benefits for MA recipients," it is not known to what extent grant recipients would perform this function, and how many MA recipients would be found to have insurance that would pay for benefits that MA would otherwise pay. Moreover, it is not clear why this effort may

be more effective in identifying alternative payment sources for MA than the methods the Department of Health and Family Services currently uses to identify liable third-party payers. Finally, under another item, the Governor's budget would reduce MA benefits funding by approximately \$3.5 million (all funds) in 2005-06 and \$3.6 million (all funds) in 2006-07 to reflect projected cost savings of contracting with an outside entity to perform additional third-party liability identification and recovery activities.

18. Since the MA program is an entitlement program, reducing funding for MA benefits without the assurance that savings will be realized could potentially create or contribute to a shortfall in the MA program. Based on the funding source the administration has used to support the new program, the Committee may wish to delete the new grant program from the bill and restore base funding to support MA program benefits.

19. Under the bill, Corrections' appropriations are reduced by \$250,000 GPR in 2006-07 as follows: (a) -\$125,000 GPR in supplies and services from the general program operations appropriation; and (b) -\$125,000 GPR in supplies and services from the community corrections services appropriation. While the Executive Budget Book indicates that these funding reductions in Corrections are associated with increased funding in OJA for civil legal services to indigent persons, these adjustments may be viewed as a general funding reduction to the Department since the change is not associated with any workload or caseload reduction. As a result, if the civil legal services provision is removed from the bill, the Committee may still wish to retain the funding reduction in Corrections.

ALTERNATIVES

1. Approve the Governor's recommendation to provide \$500,000 GPR in 2006-07 under a new GPR annual indigent civil legal services appropriation for the Department of Administration's Office of Justice Assistance. Beginning in 2006-07, specify that the Office of Justice Assistance must annually pay the amounts appropriated to the Wisconsin Trust Account Foundation, Inc. Provide that the Foundation would be required to distribute the monies received as grants to programs that provide civil legal services to indigent persons. The Foundation would be limited to providing grants for six types of civil legal services. Reduce medical assistance benefits funding by \$590,000 (-\$250,000 GPR and -\$340,000 FED) in 2006-07, and reduce supplies and services funding for Corrections by \$250,000 GPR in 2006-07.

2. Delete the creation of a civil legal services grant program under the Office of Justice Assistance. Restore medical assistance benefits funding that would have been deleted under the bill to support the new grant program. The reduction to the Department of Corrections would be retained.

<u>Alternative 2</u>	<u>GPR</u>	<u>FED</u>	<u>TOTAL</u>
2005-07 FUNDING (Change to Bill)	- \$250,000	\$340,000	\$90,000

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