



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 #620

Agency Operational Budget Modifications and Private Bar Funding (SPD)

Bill Agency

[LFB 2007-09 Budget Summary: Page 455, #2]

CURRENT LAW

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 cost of providing required counsel to the indigent in Wisconsin is generally the responsibility of the state through the Office of the State Public Defender (SPD).

The SPD is constitutionally and statutorily required to provide representation to indigent 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), indigent persons facing involuntary civil commitment and protective placement, and certain appellants.

The SPD determines indigency based on an analysis of the applicant's income, assets, family size, and essential expenses. If a person's assets, less "reasonable and necessary living expenses" (both factors as determined by Wisconsin statutes and administrative rules), are not sufficient to cover the anticipated cost of effective representation when the likely length and complexity of the proceedings are taken into account, the person is determined to be indigent. "Reasonable and necessary living expenses" under the current SPD financial eligibility standard are linked to a 1987 Aid to Families with Dependent Children cost of living table, plus other specified, emergency or essential costs. If an individual does not meet the statutory indigency standard, but is nonetheless determined by a circuit court to have a constitutional right to counsel, the court may appoint an attorney at county, rather than state, expense.

The SPD is required to determine whether a person has some ability to pay the costs of representation. The Public Defender Board is required to establish, by rule, fixed payments for the cost of SPD representation in various types of cases. Known as the prepayment option, an indigent defendant may elect to prepay the amount if a determination has been made that the person has some ability to pay for his or her representation. If an indigent person elects to pay this fixed amount, the individual cannot be held liable for any additional payment for counsel. For the 2005-07 biennium, the SPD increased these prepayment amounts for SPD clients by 20%. Persons determined to be indigent who receive SPD representation and do not exercise the prepayment option are required to pay for the cost of SPD representation, subject to their ability to pay.

The SPD utilizes client fees to offset the cost of providing private bar counsel to the indigent. In 2005-06, the SPD utilized \$1,404,100 PR in client fees to offset the costs of private bar counsel. It is estimated that there will be \$1,563,800 PR in client fees in 2006-07 that will be available to offset the costs of private bar counsel.

The SPD has trial (280.0 full-time equivalent (FTE) positions) and appellate (27.5 FTE positions) staff attorneys who provide representation to indigent defendants. Each trial division attorney (and generally each attorney supervisor) must meet one of the following annual statutory caseload requirements: (a) 184.5 felony cases; (b) 15.0 homicide or sexual predator cases; (c) 492.0 misdemeanor cases; (d) 246.0 other cases; or (e) some combination of these categories. The SPD sets the caseload standard for each appellate attorney between 54 and 60 cases per year, depending on the complexity of the attorney's case mix and the attorney's level of experience. In 2005-06, 74,131 new cases were assigned to SPD staff attorneys.

Private bar attorneys are assigned: (a) overflow cases; and (b) cases where a staff attorney has a conflict of interest that precludes the attorney from providing representation. In 2005-06, 70,729 new cases were accepted by private bar attorneys. Private bar attorneys are paid in two ways: (a) an hourly rate of \$40 for in-court and out-of-court time; and (b) for some misdemeanor cases, a flat, per case contracted amount. Prior to 1995 Wisconsin Act 27, private bar attorneys were paid \$50 per hour for in-court time and \$40 per hour for out-of-court time. Under Act 27, the in-court rate was reduced to \$40 per hour.

GOVERNOR

Provide -\$1,046,100 GPR and \$800 PR in 2007-08, and -\$1,027,400 GPR and \$800 PR in 2008-09, to permit the SPD to minimize staff attorney vacancies and reduce the number of cases assigned to private bar attorneys. Funding would be allocated as follows:

Fifth Week of Vacation as Cash. Provide \$255,800 GPR and \$800 PR in 2007-08, and \$274,500 GPR and \$800 PR in 2008-09, to fully fund SPD "fifth week of vacation as cash" obligations. Under current law, certain long-term employees (generally, those with 20 to 25 or more years of service) may elect to receive a cash payment in lieu of a fifth week of paid

vacation. Under state statute and collective bargaining provisions, these payments must be made to eligible SPD employees who request them.

Restoration of 2005-07 Base Budget Reduction. Restore \$201,400 GPR annually in supplies and services funding that was deleted as a base budget reduction under 2005 Wisconsin Act 25.

Turnover Reduction. Exempt the SPD from the standard budget adjustment requirement that any appropriation funding more than 50.0 full-time equivalent (FTE) positions is reduced by three percent annually to reflect anticipated vacancies due to staff turnover. Exempting the Office from this requirement would permit the SPD to retain \$849,100 GPR annually in base budget expenditure authority under its GPR annual trial representation appropriation.

Private Bar Funding Reduction. Reduce the SPD's GPR-funded private bar and investigator reimbursement biennial appropriation by \$1,503,300 GPR annually to reflect reduced assignment of SPD cases to the private bar.

The intent of providing increased funding for the various operating budget items identified above is to mitigate the need for the SPD to maintain position vacancies in order to remain within its operational budget. As a result, private bar costs are estimated to decline under the bill.

DISCUSSION POINTS

1. As a standard budget adjustment, state agencies are generally required to take a 3% reduction in base year permanent position salary funding for agency appropriations that fund more than 50 full-time permanent positions. This reduction is taken to reflect the fact that agencies will likely have vacancies during the biennium, and while permanent positions are vacant, no funding will be required. As a result, under the 2005-07 biennial budget, the SPD was required to reduce funding to its GPR-annual trial representation appropriation by \$839,400 GPR annually to reflect this adjustment.

2. Under 2005 Wisconsin Act 25, the SPD trial representation appropriation was also required to reduce its base supplies and services funding by \$201,400 GPR annually to implement the partially vetoed across-the-board budget reduction originally equal to approximately 2.3% of the agency's total GPR state operations appropriations.

3. In addition, under current law, certain long-term employees (generally those with 25 or more years of service) may elect to receive a cash payment in lieu of a fifth week of vacation. Under state statute and collective bargaining provisions, these payments must be made to eligible SPD employees who request them. Under Act 25, the SPD, as with most state agencies, was expected to fund these expenses from base resources.

4. SPD staff indicates that in order to meet these budgetary obligations, the agency held

attorney positions vacant in order to reduce expenditures. As a result, additional caseload was required to be assigned to private bar attorneys.

5. In order to reduce both the number of cases assigned to the private bar and the number of staff attorney vacancies, the provisions of the bill: (a) provide \$255,800 GPR and \$800 PR in 2007-08, and \$274,500 GPR and \$800 PR in 2008-09, to fully fund the SPD "fifth week of vacation as cash" obligations; (b) restore \$201,400 GPR annually in supplies and services funding that was deleted as a base budget reduction under 2005 Wisconsin Act 25; and (c) exempt the SPD from the standard budget adjustment turnover reduction requirement, permitting the SPD to retain \$849,100 GPR annually in base budget expenditure authority under its GPR annual trial representation appropriation.

6. The biennial funding requirements for the SPD's private bar appropriation are estimated by: (a) projecting the SPD biennial caseload; (b) identifying the number of SPD trial staff attorneys available to handle budgetary caseloads; (c) estimating the number of cases appellate staff attorneys will handle; (d) identifying the remaining caseload to be assigned to the private bar; and (e) estimating the private bar cost to complete this caseload, based on average cost data collected by the SPD.

7. Under SB 40, as introduced, expenditure authority for private bar reimbursements would be reduced by \$1,503,300 GPR annually to reflect anticipated reductions in assignment of SPD cases to the private bar. Table 1 reflects the recommended GPR funding for private bar costs under SB 40, as introduced. [Table 1 does not include \$320,500 GPR in 2008-09, that would be provided under SB 40 to expand SPD representation to include all adults subject to Chapter 51 (mental health act) and Chapter 55 (protective service system) proceedings, regardless of indigency. This funding is addressed under a separate budget paper.]

TABLE 1

Private Bar GPR Funding Under SB 40, as Introduced

<u>Private Bar GPR Funding</u>	<u>2007-08</u>	<u>2008-09</u>	<u>Total</u>
Adjusted Base Funding	\$24,092,400	\$24,092,400	\$48,184,800
SB 40	<u>-1,503,300</u>	<u>-1,503,300</u>	<u>-3,006,600</u>
Funding under SB 40	\$22,589,100	\$22,589,100	\$45,178,200

8. By letter to the Co-Chairs of the Joint Committee on Finance dated March 19, 2007, the Secretary of the Department of Administration requested an additional \$1.2 million GPR annually in funding to the SPD private bar appropriation to reflect estimates of funding need developed after the introduction of SB 40. Table 2 reflects the recommended GPR funding for private bar costs under the revised recommendations.

TABLE 2

Private Bar GPR Funding Under March 19, 2007 Request

<u>Private Bar GPR Funding</u>	<u>2007-08</u>	<u>2008-09</u>	<u>Total</u>
Funding under SB 40	\$22,589,100	\$22,589,100	\$45,178,200
March 19, 2007, Request	<u>1,200,000</u>	<u>1,200,000</u>	<u>2,400,000</u>
Governor's Recommendation	\$23,789,100	\$23,789,100	\$47,578,200

9. Utilizing an analysis of caseload, state unemployment and state workforce data, SPD caseload was projected for the upcoming 2007-09 biennium. Based on eight and a half years of data, it has been determined that more than 94% of the change in the SPD's caseload can be statistically explained by changes in the state unemployment rate and changes in the state workforce.

10. In projecting the number of cases that can be assigned to SPD attorneys, it has generally been assumed that the SPD would experience a 3% position vacancy rate over the course of the biennium. However, given the recommendations included under SB 40 to permit the SPD to minimize attorney vacancies, the caseload projection for this analysis assumes that the SPD attorney vacancy rate will be reduced to 1.5% during the 2007-09 biennium.

Based on updated projections of caseload during 2007-09, and increasing the number of cases assigned to SPD staff to reflect a 1.5% vacancy rate, it is estimated that, under the bill, \$47,654,200 GPR would be needed to fund estimated private bar payments during the 2007-09 biennium (\$76,000 more than the Administration's March 19 request).

11. The Committee could consider modifying the Governor's recommendations by utilizing the \$849,100 GPR annually that would normally have been deleted from the trial representation appropriation to reflect an anticipated 3% turnover rate, to fund an additional 9.0 full-time equivalent (FTE) trial attorneys and 3.0 FTE legal secretaries.

12. It is estimated that providing these 12.0 FTE would require funding totaling \$615,700 GPR in 2007-08, and \$826,500 GPR in 2008-09. Given the \$849,100 GPR annually in available turnover funding, this would leave \$256,000 GPR in turnover funding under the trial representation appropriation.

13. After factoring in the increased caseload that could be assigned to 9.0 additional trial attorneys, reducing caseload to SPD staff to reflect a 3% vacancy rate over the biennium, and transferring \$256,000 GPR from the trial representation appropriation to the private bar appropriation, it is estimated that \$46,837,400 would be required for 2007-09 to fund private bar payments. This is \$1,659,200 above the SB 40 amount, but \$740,800 less than the Administration's revised request. Table 3 identifies the GPR-funding need for private bar costs under the staffing alternative.

TABLE 3

**Additional GPR Funding Required to Fully Fund Private Bar Costs
Under Staffing Alternative**

<u>Private Bar GPR Funding</u>	<u>2007-08</u>	<u>2008-09</u>	<u>Total</u>
Funding Under SB 40, as Introduced	\$22,589,100	\$22,589,100	\$45,178,200
SB 40 Re-estimate (Increased Staffing)	<u>1,675,100</u>	<u>-15,900</u>	<u>1,659,200</u>
Private Bar Funding Need if SPD Staff Provided	\$24,264,200	\$22,573,200	\$46,837,400

14. The Committee could also consider deleting the Governor's recommendations entirely. Under this alternative, the Committee would: (a) delete \$255,800 GPR and \$800 PR in 2007-08, and \$274,500 GPR and \$800 PR in 2008-09 in fifth week of vacation as cash funding; (b) delete \$201,400 GPR annually in supplies and services funding from the trial representation appropriation; (c) delete \$849,100 GPR annually in base salary funding from the GPR annual trial representation appropriation to reflect anticipated savings associated with staff turnover; and (d) restore \$1,503,300 GPR annually to the private bar appropriation. Deleting the Governor's recommendations would require the Committee to restore \$375,300 GPR in funding to the SPD.

15. If the Committee deleted the Governor's recommendations, the SPD would have to hold attorney positions vacant to generate required turnover savings, and to fund fifth week of vacation as cash payments and supplies and services costs. Under this alternative, it is estimated that the SPD would have to maintain a 6% attorney vacancy rate over the biennium. As a result, more cases would be transferred to the private bar. After re-estimating the increased cost, it is projected that deleting the Governor's recommendations would also require the Committee to provide an additional \$1,916,500 GPR over the biennium to fully fund private bar costs. Table 4 identifies the projected GPR funding need for private bar costs during 2007-09 under the alternative deleting the Governor's recommendations.

TABLE 4

**GPR Funding Required to Fully Fund Private Bar Costs Under
Alternative Deleting the Governor's Recommendations**

<u>Private Bar GPR Funding</u>	<u>2007-08</u>	<u>2008-09</u>	<u>Total</u>
Funding Under SB 40, as Introduced	\$22,589,100	\$22,589,100	\$45,178,200
Restored Base Funding	\$1,503,300	\$1,503,300	\$3,006,600
SB 40 Re-estimate	<u>1,765,000</u>	<u>151,500</u>	<u>1,916,500</u>
Private Bar Funding Need if Governor's Recommendation is Deleted	\$25,857,400	\$24,243,900	\$50,101,300

Nature of Private Bar Appropriation

16. Under current law, the Legislature has limited the cases in which the SPD can provide representation by: (a) establishing a statutory indigency standard linked to a 1987 Aid to Families with Dependent Children cost of living table, plus other specified, emergency or essential costs; and (b) apart from a negligible paternity caseload, only funding SPD representation of the indigent in categories of cases where representation is constitutionally required.

17. Despite these restrictions, the SPD has experienced a significant growth in caseload in recent years. However, based on Department of Revenue (DOR) projections as to the state's unemployment and workforce levels during the next two years, it is currently estimated that the SPD caseload will decline by 2.6% during 2007-09.

18. If state unemployment rates and workforce participation vary from DOR projections, however, the SPD caseload could grow more or less than projected during the course of the upcoming biennium. If state unemployment rates would run higher, and the state workforce would grow slower or shrink from what is currently projected, the SPD caseload would be expected to grow beyond what has been projected in this paper. This would likely require the SPD to seek a supplement for private bar expenses from the Legislature during the course of the 2007-09 biennium. It may be worth noting that the Legislature has always provided such supplemental funding when required by the SPD.

19. As the SPD has a largely mandatory caseload under both the United States and Wisconsin Constitutions and under state statute, it could be argued that the Legislature would be required to provide any private bar supplement required by the SPD, if, in fact, a supplement is required during 2007-09. Given the mandatory nature of the SPD caseload, it could be argued that the private bar GPR appropriation could be converted from a biennial appropriation to a sum sufficient appropriation. Converting the appropriation to a sum sufficient appropriation would reflect the fact that the SPD's private bar funding need is caseload driven, would reflect the mandatory nature of this caseload, and would eliminate the need for separate legislation (or s. 13.10 action) to address the funding need if caseloads during 2007-09 do not decrease as currently projected.

20. It may be worth noting that apart from the issue of rising caseloads, current law does limit the state's exposure to pay private bar costs. First, state statute restricts the hourly reimbursement that the SPD may pay private bar attorneys. When the Legislature created the SPD in 1978, the hourly rate paid to private bar attorneys who accepted appointment of Public Defender cases was \$35 per hour (excluding travel time, which was and continues to be reimbursed at the rate of \$25 per hour). In 1992, the Legislature increased the hourly rate paid to private bar attorneys to \$50 per hour for in-court work, and \$40 per hour for out-of-court work. Under 1995 Wisconsin Act 27 (the 1995-97 biennial budget act), the in-court rate was reduced to \$40 per hour.

21. Second, state statutes specify annual caseload standards that SPD trial attorneys are required to meet. As a result, SPD trial attorneys cannot reduce their caseloads and shift cases to the private bar. It could be argued that these statutory provisions would help ensure that a private bar

sum sufficient appropriation would be appropriately utilized.

22. On the other hand, the Legislature has always provided supplemental private bar funding when it has been required to address larger SPD caseloads. In addition, maintaining the GPR-funded private bar appropriation as a biennial appropriation would permit the Legislature to retain a more active role in setting and providing oversight of the SPD's budget for private bar representation. It may also be worth noting that the biennial nature of the appropriation provides the SPD flexibility to shift funding between fiscal years in a biennium to address unanticipated increases in private bar costs in one year of the biennium. Consequently, the Committee could maintain the GPR private bar appropriation as a biennial appropriation.

ALTERNATIVES TO BILL

1. Approve the Governor's recommendation to provide -\$1,046,100 GPR and \$800 PR in 2007-08, and -\$1,027,400 GPR and \$800 PR in 2008-09, to permit the Office of the State Public Defender (SPD) to minimize staff attorney vacancies and reduce the number of cases assigned to private bar attorneys by: (a) funding fifth week of vacation as cash obligations; (b) restoring prior base budget reductions; (c) exempting the SPD from the turnover reduction; and (d) reducing private bar funding.

ALT 1	Change to Bill Funding	Change to Base Funding
GPR	\$0	-\$2,073,500
PR	<u>0</u>	<u>1,600</u>
Total	\$0	-\$2,071,900

2. In addition to Alternative 1, provide \$2,055,200 GPR in 2007-08, and \$420,800 GPR in 2008-09, to the private bar appropriation as a re-estimate of the funding needed to fully fund private bar costs during 2007-09 under the Governor's recommendations.

ALT 2	Change to Bill Funding	Change to Base Funding
GPR	\$2,476,000	\$402,500
PR	<u>0</u>	<u>1,600</u>
Total	\$2,476,000	\$404,100

3. In addition to Alternative 1, modify the Governor's recommendations by: (a) creating 9.0 full-time equivalent (FTE) attorneys positions and 3.0 FTE legal secretary positions under the trial representation appropriation; (b) transferring \$161,600 GPR in 2007-08, and \$22,600 GPR in 2008-09, from the trial representation appropriation to the private bar appropriation; and (c) providing an additional \$1,675,100 GPR in 2007-08, and -\$15,900 GPR in 2008-09, to the private bar appropriation to fully fund private bar costs during the biennium.

ALT 3	Change to Bill		Change to Base	
	Funding	Positions	Funding	Positions
GPR	\$1,659,200	12.00	-\$414,300	12.00
PR	<u>0</u>	<u>0.00</u>	<u>1,600</u>	<u>0.00</u>
Total	\$1,659,200	12.00	-\$412,700	12.00

4. Delete provision.

ALT 4	Change to Bill	Change to Base
	Funding	Funding
GPR	\$375,300	-\$1,698,200
PR	<u>- 1,600</u>	<u>0</u>
Total	\$373,700	-\$1,698,200

5. In addition to Alternative 4, provide \$1,765,000 GPR in 2007-08, and \$151,500 GPR in 2008-09, as a re-estimate of the funding needed to fully fund private bar costs during 2007-09 if the Governor's recommendations are deleted.

ALT 5	Change to Bill	Change to Base
	Funding	Funding
GPR	\$2,291,800	\$218,300
PR	<u>- 1,600</u>	<u>0</u>
Total	\$2,290,200	\$218,300

6. Convert the private bar biennial GPR appropriation into a GPR sum sufficient appropriation. *[This alternative may be selected in addition to any of the above alternatives.]*

Prepared by: Paul Onsager