



## Legislative Fiscal Bureau

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Joint Committee on Finance

Paper #617

### State Standard for Indigent Legal Defense Counsel (Public Defender)

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#### 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 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.

#### GOVERNOR

No provision.

#### DISCUSSION POINTS

1. 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.

2. 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.

3. 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.

4. 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.

5. 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.

6. 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."

7. 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.

8. 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.

9. 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.

10. 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 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 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.

11. 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.

12. 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

13. 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.

14. During the Finance Committee's public hearings on AB 75, a number of individuals testified in support of raising the indigency standard utilized to determine whether an individual qualifies for SPD counsel. Specifically, concerns have been raised regarding the utilization of the 1987 Aid to Families with Dependent Children cost of living table as the starting point for calculating the "amount required to provide the necessities of life."

15. 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.

16. Table 2 identifies the number of indigent legal defense cases in which the SPD has appointed counsel over the last 10 years. Given its linkage to the 1987 Aid to Families with Dependent Children cost of living table, one would anticipate a steady decline in the number of applicants qualifying for SPD representation under the current indigency standard. However, the

annual number of cases assigned to the SPD over this period has not only held steady, but generally grown. On January 27, 2009, the SPD indicated to the Joint Committee on Finance that it had appointed counsel in 71,860 cases for the first six months of 2008-09. If this pace continues, the SPD will appoint more than 19,000 more cases in 2008-09 than it did in 1998-99, or a total of 143,720 cases.

**TABLE 2**

**Public Defender Caseload in State Fiscal Years 1998-99 through 2007-08**

<u>Fiscal Year</u>	<u>Cases</u>
1998-99	124,169
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

17. Concerns have also been raised regarding the appointment of indigent legal defense counsel by the counties. 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 by calendar year 2007 (the last year for which data is available) 63 counties reported incurring \$6.3 million in indigent legal defense costs.

18. There are important caveats associated with this court data including: (a) not all counties reported; (b) the reports are unaudited; and (c) counties may have been inconsistent in how they reported costs. Nonetheless, this voluntary court reported data does seem to indicate a substantial growth in the cost of indigent legal defense cases appointed by the courts at county expense.

19. By way of comparison, 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. By calendar year 2006, these costs had increased to \$81,463,900, and for calendar year 2007 the state expended \$81,323,000 to operate the SPD and provide indigent legal defense counsel.

20. Under its 2009-11 agency budget request, the SPD did not propose modifying its current indigency standard. (It should be noted, however, that the SPD supported the passage of 2007 Assembly Bill 576/2007 Senate Bill 321 which would have increased and modeled the SPD indigency standard after Wisconsin Works (W-2).) Likewise, under AB 75 the administration has not proposed modifying the SPD's indigency standard. As the courts and counties of Wisconsin have had a role in providing indigent legal defense counsel since the 1860s, and as the state under the current SPD indigency standard continues to address a substantial majority of the caseload and

associated costs with providing indigent legal defense counsel, the Committee could maintain the current SPD indigency standard. [Alternative 3]

21. Under Wisconsin case law, the trial courts may, in their discretion, invoke their 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. Circuit courts across the state will inevitably disagree on a case-by-case basis as to when this standard is met triggering the constitutional right to representation. As a result, even if a majority of courts agree that the SPD indigency standard generally captures those defendants constitutionally entitled to representation, one could still expect to find circuit courts in individual cases appointing indigent criminal defense counsel at county expense.

22. It could be argued, therefore, that the current indigency standard helps to ensure that the state does not pay for indigent legal defense counsel in cases in which it is not constitutionally required. If the courts were appointing few indigent criminal defense cases at county expense, it could suggest that the indigency standard was high enough that individuals not entitled to constitutional representation were nonetheless receiving legal counsel at government expense.

23. On the other hand, if the Committee were to raise the SPD indigency standard, more indigent legal defense cases would be appointed by the SPD and fewer cases would be provided counsel at county expense.

24. Under this change more cases would be addressed in a uniform manner, that is, more cases would be subject to a single standard for indigency, the SPD indigency standard. Such a change could reduce any inconsistent application of the constitutional standard for representation. As the State Public Defender indicated in his testimony to the Legislature on December 4, 2007, "I would like to point out some problems with the current law. Many individuals who do not qualify for SPD representation are still too poor to afford a lawyer. In these cases, the courts appoint a lawyer at county taxpayer expense. Consequently there is inconsistent application from court to court, and county to county. For example, a person may be provided a county-appointed attorney in one court, yet be denied an appointed attorney under the same circumstances in an adjoining courtroom or in another county."

25. This change could also reduce court resources that are utilized to make independent determinations of whether an individual is constitutionally entitled to representation if they do not qualify for SPD counsel. As the courts are jointly funded by the state and counties, this change could reduce the demands on both state and county resources.

26. In addition, the Public Defender noted, "the reimbursement rate for county-appointed attorneys is, in many cases, almost twice the rate paid by the SPD (\$40/hour) to its appointed private attorneys." [It should be noted, however, that the SPD has raised concerns regarding the current SPD reimbursement rate to private bar attorneys for providing representation to SPD clients. If the SPD reimbursement rate to private bar attorneys is increased, the relative cost savings to having private bar cases appointed by the SPD could disappear.] However, increasing the number of indigent legal defense cases assigned to the SPD would decrease county costs to

provide this counsel.

27. Based on these considerations, the Committee could consider adopting the provisions of 2007 Assembly Bill 576/2007 Senate Bill 321 which would increase and model the SPD indigency standard after Wisconsin Works (W-2), which when measuring gross income is set at 115% of the federal poverty level. Each time federal poverty levels are adjusted, the indigency standard would be adjusted accordingly. It is estimated that this change to the SPD indigency standard would require additional funding of \$2,576,200 GPR in 2009-10, and \$4,398,200 GPR in 2010-11, and 49.3 additional full-time equivalent (FTE) employees (32.3 FTE attorneys, 10.8 FTE legal secretaries, 4.6 FTE investigators, and 1.6 FTE client services specialists). This estimate assumes that: (a) 75% of the caseload would be assigned to SPD staff and the remaining 25% of caseload would be assigned to the private bar; and (b) the change would take effect November 1, 2009, to give the SPD time to plan for and hire the additional staff. [Alternative 1]

28. The Committee could also consider increasing the SPD indigency standard to 100% of the federal poverty level when measuring gross income, but otherwise model the amended indigency standard after W-2 as contemplated under 2007 AB 576 and 2007 SB 321. It is estimated that this change to the SPD indigency standard would require additional funding of \$2,241,700 GPR in 2009-10, and \$3,826,500 GPR in 2010-11, and 42.9 additional FTE employees (28.1 FTE attorneys, 9.4 FTE legal secretaries, 4.0 FTE investigators, and 1.4 FTE client services specialists). [Alternative 2] Costs would not vary substantially under these two alternatives to modify the SPD indigency standard, as an estimated 87% of the increased caseload made eligible by applying the W-2 standard would also be represented if the indigency standard were increased to 100% of the federal poverty level.

29. Finally, considering the status of the state's fiscal condition, the fact that the SPD caseload continues to grow under the current standard, and the relative costs incurred by the state and the counties to provide constitutionally required representation, an argument can be made to maintain the current standard for the 2009-11 biennium. If the SPD believes that the indigency standard should be modified, it could submit a proposal to make changes to the standard in its 2011-13 biennial budget request. [Alternative 3]

## ALTERNATIVES

1. Adopt the provisions of 2007 Assembly Bill 576/2007 Senate Bill 321 which would increase and model the SPD indigency standard after W-2, which when measuring gross income is set at 115% of the federal poverty level. Provide \$2,576,200 GPR in 2009-10, and \$4,398,200 GPR in 2010-11 and 49.3 full-time equivalent positions annually (32.3 attorneys, 10.8 legal secretaries, 4.6 investigators, and 1.6 client services specialists). Provide that the amended indigency standard would apply to determinations of indigency beginning on or after November 1, 2009. Further, provide that the positions would be created effective November 1, 2009.

ALT 1	Change to Bill	
	Funding	Positions
GPR	\$6,974,400	49.30

2. Modify the provisions of 2007 Assembly Bill 576/2007 Senate Bill 321 by increasing and modeling the SPD indigency standard after W-2, but measure gross income at 100% of the federal poverty level, instead of 115% of the poverty level as under W-2. Provide \$2,241,700 GPR in 2009-10, and \$3,826,500 GPR in 2010-11, and 42.9 full-time equivalent positions annually (28.1 attorneys, 9.4 legal secretaries, 4.0 investigators, and 1.4 client services specialists). Provide that the amended indigency standard would apply to determinations of indigency beginning on or after November 1, 2009. Further, provide that the positions would be created effective November 1, 2009.

ALT 2	Change to Bill	
	Funding	Positions
GPR	\$6,068,200	42.90

3. Maintain current law.

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