



Legislative Fiscal Bureau

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

April 26, 2011

Joint Committee on Finance

Paper #516

Private Bar Funding Shortfall and Agency Budget Reductions (Public Defender)

[LFB 2011-13 Budget Summary: Page 339, #3, and Page 340, #6]

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 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.

Prior to June 19, 2011, 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 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.

Effective June 19, 2011, under 2009 Act 164, the SPD indigency standard is generally modeled after the Wisconsin Works (W-2) eligibility standard. In determining assets available to pay for representation, the W-2 asset standard for available assets will generally be utilized, except that the SPD may only exclude the first \$30,000 of the equity value of a home that serves

as the individual's homestead. (Under W-2, an individual may not have assets exceeding \$2,500 in combined equity value. However, in determining the combined equity value of assets under W-2, up to \$10,000 in the equity value of vehicles is excluded, as well as the complete equity value of one home that serves as the individual's homestead.)

In determining income available to pay the costs of legal representation, the income limitation of W-2 will be utilized. In order to be eligible under W-2, an individual's gross income must generally be at or below 115% of the federal poverty level. Under the new SPD indigency standard, only income in excess of 115% of the federal poverty level will be considered available to pay the costs of legal representation. [For 2011, the annual income for a family of four at 115% of the federal poverty level is \$25,702.50.]

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.

The Public Defender Board is required to establish, by rule, fixed payments for the cost of SPD representation in various types of cases. If an indigent person elects to pay this fixed amount, the individual cannot be held liable for any additional payment for counsel. 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 2009-10, the SPD received \$1,600,000 PR in payments from its indigent clients, including receipts from court-ordered recoupments.

Remaining funding for private bar costs is provided from the GPR biennial private bar appropriation. Base funding in this appropriation is \$20,368,900 GPR annually.

GOVERNOR

Provide \$825,800 GPR in 2011-12, and \$2,786,500 GPR in 2012-13, to the private bar appropriation to address a projected shortfall in funding for private bar attorneys during the 2011-13 biennium. [The funding does not address a remaining projected shortfall of \$3.5 million for the 2009-11 biennium.]

Reduce funding by \$505,200 GPR and \$107,900 PR annually associated with a 10% reduction to supplies and services and other non-personnel costs. [These reductions include a reduction of \$101,500 PR annually from the PR continuing private bar reimbursement appropriation.]

DISCUSSION POINTS

1. The SPD has trial (289.0 full-time equivalent (FTE) positions) and appellate (27.5 FTE positions) staff attorneys who provide representation to indigent defendants. Effective June 19,

2011, the SPD is authorized an additional 29.7 FTE staff attorneys in the trial division to process increased caseload associated with Act 164. 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 2009-10, 77,130 new cases were assigned to SPD staff attorneys.

2. 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 2009-10, 53,579 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 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.

3. During 2009-11 biennial budget deliberations, it was estimated that the SPD would require additional funding of \$7,340,100 GPR over the biennium (above what was recommended under 2009 Assembly Bill 75, as introduced) to address the 2007-09 private bar funding shortfall and to fully fund estimated caseload for the 2009-11 biennium. In approving the SPD budget for the 2009-11 biennium, the Legislature adopted the private bar funding provisions under the budget bill (AB 75), as introduced. As a result, no additional funding was provided. The SPD concluded the 2007-09 biennium with a private bar funding shortfall of \$5,233,900.

4. On September 15, 2010, the SPD submitted its 2011-13 agency budget request to the Governor and the Legislature. In its request, it re-estimated its need for GPR funding to address private bar costs. The SPD estimated needing \$10,006,700 GPR in 2011-12 (including an estimated 2009-11 private bar shortfall of \$9,180,900 if the shortfall was not addressed during the remainder of the 2010-11 state fiscal year), and \$2,786,500 GPR in 2012-13.

5. On December 14, 2010, the Joint Committee on Finance acted on a request of the SPD, under s. 13.10 of the statutes, to provide one-time funding to address the 2009-11 shortfall in private bar funding. Based on expenditures through November, 2010, the SPD re-estimated the shortfall at \$8.9 million. On December 14, 2010, the Joint Committee on Finance provided \$5,400,000 GPR to the SPD to partially address the private bar funding shortfall. Subsequent to Committee action, the cumulative 2009-11 private bar shortfall was reduced to \$3.5 million.

6. On March 1, 2011, the Governor's 2011-13 biennial budget bill was introduced. The Governor recommended approving the SPD's re-estimate of need for private bar funding of \$825,800 GPR in 2011-12 (net of the estimate of the private bar shortfall for 2009-11), and \$2,786,500 GPR in 2012-13. Neither the budget adjustment bill nor the 2011-13 biennial budget bill address the remaining \$3.5 million private bar shortfall for 2009-11. The bill provides total GPR funding of \$21,194,700 GPR in 2011-12, and \$23,155,400 GPR in 2012-13, to fund private bar costs during the upcoming biennium. [Alternative 1]

7. Utilizing an analysis of unemployment, workforce participation, state population, statewide salaries and wages, and the number of authorized prosecutor positions, this office has projected the SPD caseload for the upcoming biennium. Based on 12 years of data, it has been determined that more than 90% of the change in the SPD's caseload can be statistically explained by changes in these factors. It is estimated that an additional \$5,720,300 GPR will be needed in 2011-12 (including the \$3.5 million shortfall carried over from the 2009-11 biennium), and that \$98,300 GPR will be needed in 2012-13, to fully fund private bar costs during 2011-13 (\$5,818,600 GPR cumulatively over the biennium). [Alternative 2]

8. Under the bill, \$101,500 PR annually is reduced from the PR continuing private bar reimbursement appropriation as part of an across-the-board 10% reduction in most non-federal appropriations to supplies and services and other non-personnel costs. [Alternative 1] Administration staff has expressed its intent to lapse \$101,500 PR annually in associated collections from clients to the general fund as a part of a series of lapse provisions to balance the general fund. But for these lapse provisions, the required GPR funding would be \$101,500 less in each year of the upcoming biennium.

9. Under Act 164, the SPD indigency standard is generally modeled after the Wisconsin Works (W-2) eligibility standard, effective with case appointments on or after June 19, 2011. It is estimated that this indigency standard change will increase the SPD workload by an additional 12,800 cases annually. Based on assumptions that 75% of this workload will be assigned to SPD staff, Act 164 provided an additional 45.4 positions to the SPD, effective June 19, 2011.

10. It is estimated that the Act 164 caseload will increase private bar costs in the upcoming biennium by \$499,200 in 2011-12, and by \$998,300 in 2012-13. However, it is also estimated that collections from clients will increase by \$150,000 PR annually in the upcoming biennium due to the increased number of persons receiving representation through the SPD. As a result, the cost to fully fund the private bar could be reduced by \$349,200 GPR in 2011-12, and by \$848,300 GPR in 2012-13, if the Legislature deleted the provisions of Act 164 and returned to prior law regarding the SPD indigency standard. Under this alternative, the Committee could provide an additional \$5,371,100 GPR in 2011-12 (including the \$3.5 million shortfall carried over from the 2009-11 biennium), and delete \$750,000 GPR in 2012-13, to fully fund private bar costs during 2011-13 (\$4,621,100 GPR cumulatively over the biennium). [Alternative 3] However, under this alternative the SPD indigency standard would remain linked to a 1987 Aid to Families with Dependent Children cost of living table. In addition, counties would not receive the anticipated financial relief from having more indigent defense cases shifted to the state.

11. Finally, the Committee could consider deleting the additional funding provided in the bill for private bar costs. While this alternative would reduce budgeted expenditure authority for private bar costs by \$3,612,300 GPR over the biennium, under current law it is estimated that this alternative would increase the private bar shortfall to \$9,430,900 GPR by the end of 2011-13. [Alternative 4]

12. In addition, it may be worth noting that the bill reduces funding by \$505,200 GPR annually to various SPD appropriations associated with a 10% reduction to supplies and other non-personnel costs. [Alternative 1] The SPD has expressed the concern that it may only be able to

manage these reductions by holding positions vacant and transferring caseload to the private bar. To the extent that the SPD undertakes this step to manage these reductions, any private bar shortfall not addressed now may grow over the course of the upcoming biennium.

13. As the SPD has a largely mandatory caseload under both the United States and Wisconsin Constitutions and under state statute, the Committee could consider providing additional resources over the biennium to fund private bar costs. Alternatively, the Committee could elect to not provide full funding for anticipated private bar costs during 2011-13. However, if caseloads materialize as currently projected, then the SPD may need supplemental funding during the biennium to pay private bar costs.

ALTERNATIVES

1. Approve the Governor's recommendation to provide \$825,800 GPR in 2011-12, and \$2,786,500 GPR in 2012-13, to the private bar appropriation to address a projected shortfall in funding for private bar attorneys during the 2011-13 biennium.

Reduce funding by \$505,200 GPR and \$107,900 PR annually associated with a 10% reduction to supplies and services and other non-personnel costs. [These reductions include a reduction of \$101,500 PR annually from the PR continuing private bar reimbursement appropriation.]

2. Provide \$5,720,300 GPR in 2011-12, and \$98,300 GPR in 2012-13, to the private bar appropriation as a re-estimate of the funding needed to eliminate the 2009-11 private bar deficit and fully fund 2011-13 private bar costs.

| ALT 2 | Change to Bill Funding |
|--------------|-----------------------------------|
| GPR | \$5,818,600 |

3. Provide \$5,371,100 GPR in 2011-12, and delete \$750,000 GPR in 2012-13, to the private bar appropriation as a re-estimate of the funding needed to eliminate the 2009-11 private bar deficit and fully fund 2011-13 private bar costs. [This alternative would not provide funding for private bar costs in 2011-13, associated with the implementation of the revised SPD indigency standard under Act 164.]

| ALT 3 | Change to Bill Funding |
|--------------|-----------------------------------|
| GPR | \$4,621,100 |

4. Delete amounts provided under the bill as a re-estimate of funding needed to fully fund private bar costs during 2011-13. This alternative would reduce funding by \$825,800 GPR in 2011-12, and by \$2,786,500 GPR in 2012-13, to the private bar appropriation.

| | |
|--------------|-----------------------------------|
| ALT 4 | Change to Bill Funding |
| GPR | - \$3,612,300 |

Prepared by: Paul Onsager