



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 #517

Public Defender Indigency Standard (Public Defender)

[LFB 2011-13 Budget Summary: Page 340, #5]

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, 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.

GOVERNOR

Provide \$3,576,000 GPR in 2011-12, and \$3,330,000 GPR in 2012-13, to provide salary and fringe benefits funding (\$2,956,100 annually) and associated supplies and services funding (\$619,900 in 2011-12 and \$373,900 in 2012-13) for 45.4 full-time equivalent (FTE) positions created under 2009 Wisconsin Act 164. Effective with cases opened on June 19, 2011, under Act 164, the SPD indigency standard will generally be modeled after the Wisconsin Works (W-2) eligibility standard.

Funding is intended to provide additional SPD staff to process 75% of the anticipated increased Act 164 workload. The remaining estimated increased workload will be assigned to private bar attorneys.

DISCUSSION POINTS

1. Prior to passage of Act 164 by the Legislature, concerns were raised that the SPD indigency standard precluded the poor from qualifying for legal representation. Under s. 977.07(2) of the statutes (prior to June 19, 2011), 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 (prior to June 19, 2011), "reasonable and necessary living expenses" are linked to monthly payments amounts under a 1987 Aid to Families With Dependent Children cost of living table, adjusted for other specified, emergency, or essential costs.

2. Prior to enactment of Act 164, concerns were also raised regarding the appointment of indigent legal defense counsel by the counties in cases where representation was not provided by the SPD. In calendar year 2003, 60 counties reported incurring \$3.9 million in indigent legal defense costs. In calendar year 2008, the Director of State Courts office modified the report that

counties complete on county-appointed legal counsel costs. As a result, while no longer directly comparable to prior year reports, in calendar year 2009, 71 counties reported incurring \$8.2 million in costs for providing defense counsel. In 2009, the net expenditure by counties for these cases totaled \$4.8 million after subtracting recoupment from clients. The SPD believes that much of this caseload will shift to the state under the revised SPD indigency standard that is modeled after W-2.

3. The attachment to this memorandum identifies expenditures, recoupment and net costs, for counties in 2009 (the last year for which data is available) for court-appointed defense counsel by county. In reviewing the data, the following should be noted: (a) not all counties reported information; (b) the reports are unaudited; and (c) counties may not be consistent in how they reported costs. Further, the amounts identified as recoupment by a county may be from previous calendar years. In some counties during 2009, recoupment of appointed counsel costs exceeded appointed counsel expenses.

4. 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 FTE positions to the SPD, effective June 19, 2011. As a result, the costs of the indigency standard change under Act 164 are not incurred by the state until the 2011-12 state fiscal year.

5. Comparable to estimates provided the Legislature when Act 164 was being debated last session, the Governor recommends providing \$3,576,000 GPR in 2011-12, and \$3,330,000 GPR in 2012-13, in standard budget adjustments to support the 45.4 FTE positions created under Act 164. [Alternative 1] The Committee could consider providing this funding in order to effectuate Act 164. The provisions of the act: (a) revise the SPD indigency standard to be modeled after the W-2 standard; and (b) shift a portion of the criminal defense caseload from the counties to the state.

6. Given that positions were provided under Act 164 to address estimated increased caseload, if the Committee deletes funding for the positions, it may also wish to consider deleting the indigency standard change under Act 164. If the Committee deleted the indigency standard change under Act 164, the Committee could also consider deleting 45.4 FTE provided to the SPD under the act, as these positions would no longer be needed to process the increased workload associated with the indigency change. Under this alternative, the Committee could delete \$3,576,000 GPR in 2011-12, and \$3,330,000 GPR in 2012-13, and 45.4 GPR positions annually. [Alternative 2] Under this alternative, however, 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.

ALTERNATIVES

1. Approve the Governor's recommendation to provide \$3,576,000 in 2011-12, and

\$3,330,000 in 2012-13, to provide salary and fringe benefits funding (\$2,956,100 annually) and associated supplies and services funding (\$619,900 in 2011-12 and \$373,900 in 2012-13) for 45.4 full-time equivalent (FTE) positions created under 2009 Act 164. Effective with cases opened on June 19, 2011, under Act 164, the SPD indigency standard will generally be modeled after the Wisconsin Works (W-2) eligibility standard.

Funding is intended to provide additional SPD staff to process 75% of the anticipated increased Act 164 workload. The remaining estimated increased workload will be assigned to private bar attorneys.

2. Delete provision. In addition, delete the provisions of 2009 Act 164 and return to prior law regarding the SPD indigency standard. Delete 45.4 positions annually that were provided to the SPD under Act 164.

ALT 2	Change to Bill	
	Funding	Positions
GPR	- \$6,906,000	- 45.40

Prepared by: Paul Onsager
Attachment

ATTACHMENT

Court-Appointed Counsel, 2009 Expenditures, Recoupment and Net Expenditures

<u>County</u>	<u>Court-Appointed Counsel Expenditures</u>	<u>% of Total Expenditures</u>	<u>Court-Appointed Counsel Recoupment</u>	<u>% of Total Recoupment</u>	<u>Net Expenditure</u>	<u>% of Total Net Expenditures</u>
Adams	\$46,578	0.6%	\$21,211	0.6%	\$25,367	0.5%
Ashland	31,783	0.4	21,444	0.6	10,339	0.2
Barron	55,188	0.7	21,710	0.6	33,478	0.7
Bayfield	14,677	0.2	7,916	0.2	6,761	0.1
Brown	351,806	4.3	235,605	7.0	116,201	2.4
Buffalo	18,014	0.2	12,167	0.4	5,847	0.1
Burnett	33,231	0.4	24,579	0.7	8,652	0.2
Calumet	40,413	0.5	21,535	0.6	18,878	0.4
Chippewa	53,307	0.6	31,774	0.9	21,533	0.4
Clark	24,816	0.3	14,328	0.4	10,488	0.2
Columbia	115,935	1.4	49,345	1.5	66,590	1.4
Crawford	21,630	0.3	11,760	0.3	9,870	0.2
Dane	363,717	4.4	122,670	3.6	241,047	5.0
Dodge	118,870	1.4	74,931	2.2	43,939	0.9
Door	60,984	0.7	37,295	1.1	23,689	0.5
Douglas	20,476	0.2	19,090	0.6	1,386	0.0
Dunn	16,445	0.2	22,807	0.7	-6,362	-0.1
Eau Claire	172,995	2.1	113,399	3.4	59,596	1.2
Florence	20,077	0.2	4,858	0.1	15,219	0.3
Fond du Lac	221,375	2.7	121,725	3.6	99,650	2.1
Forest	10,011	0.1	1,000	0.0	9,011	0.2
Grant	77,566	0.9	52,471	1.6	25,095	0.5
Green	41,658	0.5	16,333	0.5	25,325	0.5
Green Lake	15,546	0.2	3,400	0.1	12,146	0.3
Iowa	35,966	0.4	29,165	0.9	6,801	0.1
Iron	6,732	0.1	2,981	0.1	3,751	0.1
Jackson	59,799	0.7	39,849	1.2	19,950	0.4
Jefferson	103,246	1.3	75,099	2.2	28,147	0.6
Juneau	62,086	0.8	34,765	1.0	27,321	0.6
Kenosha	179,485	2.2	81,475	2.4	98,010	2.0
Kewaunee	22,102	0.3	10,778	0.3	11,324	0.2
La Crosse	331,130	4.0	157,533	4.7	173,597	3.6
Lafayette	11,748	0.1	5,286	0.2	6,462	0.1
Langlade	16,098	0.2	10,817	0.3	5,281	0.1
Lincoln	68,129	0.8	33,294	1.0	34,835	0.7

<u>County</u>	<u>Court-Appointed Counsel Expenditures</u>	<u>% of Total Expenditures</u>	<u>Court-Appointed Counsel Recoupment</u>	<u>% of Total Recoupment</u>	<u>Net Expenditure</u>	<u>% of Total Net Expenditures</u>
Manitowoc	\$106,097	1.3%	\$32,917	1.0%	\$73,180	1.5%
Marathon	320,255	3.9	112,920	3.4	207,335	4.3
Marinette	75,982	0.9	49,938	1.5	26,044	0.5
Marquette	74,125	0.9	48,664	1.4	25,461	0.5
Menominee	2,254	0.0	0	0.0	2,254	0.0
Milwaukee	2,126,248	25.9	47,955	1.4	2,078,293	42.9
Monroe	111,242	1.4	23,189	0.7	88,053	1.8
Oconto	80,043	1.0	1,592	0.0	78,451	1.6
Oneida	59,093	0.7	28,282	0.8	30,811	0.6
Outagamie	196,164	2.4	110,855	3.3	85,309	1.8
Ozaukee	109,802	1.3	70,547	2.1	39,255	0.8
Pepin	6,728	0.1	14,360	0.4	-7,632	-0.2
Pierce	19,183	0.2	5,930	0.2	13,253	0.3
Polk	29,902	0.4	13,692	0.4	16,210	0.3
Portage	115,320	1.4	53,293	1.6	62,027	1.3
Price	0	0.0	0	0.0	0	0.0
Racine	157,605	1.9	78,536	2.3	79,069	1.6
Richland	7,405	0.1	5,133	0.2	2,272	0.0
Rock	206,758	2.5	82,724	2.5	124,034	2.6
Rusk	11,645	0.1	0	0.0	11,645	0.2
Sauk	174,675	2.1	104,519	3.1	70,156	1.4
Sawyer	23,329	0.3	20,063	0.6	3,266	0.1
Shawano	4,422	0.1	2,188	0.1	2,234	0.0
Sheboygan	188,255	2.3	93,952	2.8	94,303	1.9
St. Croix	91,119	1.1	76,019	2.3	15,100	0.3
Taylor	25,488	0.3	20,385	0.6	5,103	0.1
Trempealeau	41,651	0.5	33,114	1.0	8,537	0.2
Vernon	26,212	0.3	7,369	0.2	18,843	0.4
Vilas	35,927	0.4	10,373	0.3	25,554	0.5
Walworth	100,054	1.2	105,689	3.1	-5,635	-0.1
Washburn	41,746	0.5	20,173	0.6	21,573	0.4
Washington	181,339	2.2	123,662	3.7	57,677	1.2
Waukesha	213,813	2.6	141,276	4.2	72,537	1.5
Waupaca	75,037	0.9	41,605	1.2	33,432	0.7
Waushara	47,354	0.6	48,842	1.5	-1,488	0.0
Winnebago	220,371	2.7	149,268	4.4	71,103	1.5
Wood	<u>62,692</u>	0.8	<u>39,745</u>	1.2	<u>22,947</u>	0.5
Total	\$8,212,954		\$3,363,164		\$4,849,790	