



## Legislative Fiscal Bureau

One East Main, Suite 301 • Madison, WI 53703 • (608) 266-3847 • Fax: (608) 267-6873  
Email: [fiscal.bureau@legis.wisconsin.gov](mailto:fiscal.bureau@legis.wisconsin.gov) • Website: <http://legis.wisconsin.gov/lfb>

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2017

Joint Committee on Finance

Paper #486

### Private Bar Costs (Public Defender)

[LFB 2017-19 Budget Summary: Page 340, #3]

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#### CURRENT LAW

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 employs trial and appellate attorneys who represent clients who qualify for SPD representation. Generally, the State Public Defender provides legal representation for indigent persons: (a) facing a possible sentence that includes incarceration; (b) involved in certain proceedings under the Children's and Juvenile Justice Codes (Chapter 48 and 938 of the Wisconsin statutes); (c) subject to petitions for protective placement (Chapter 55 of the Wisconsin statutes); (d) facing involuntary commitment; (e) involved in certain post-conviction or post-judgment appeals; and (f) undergoing proceedings for modification of a bifurcated sentence, if representation has been requested by the indigent person or the case have been referred by a court, and the Public Defender determines that the case should be pursued. Further, unless the individual knowingly and voluntarily waives counsel or appoints his or her own counsel, the SPD must provide counsel to the following individuals without a determination of indigency: (a) those involved in certain proceedings under the Children's and Juvenile Justice Codes; (b) those subject to petitions for protective placement; and (c) those facing involuntary commitment.

While the SPD employs trial and appellate attorneys who represent clients who qualify for SPD representation, staff attorneys do not represent all clients who qualify for SPD representation. Indigent legal defense cases are assigned by the SPD to private bar attorneys due to either an overflow of cases in excess of what can be assigned to available SPD staff attorneys, or for cases in which staff attorneys may have a conflict of interest. Private bar attorneys assigned to SPD cases may be paid in one of two following ways: (a) at a statutorily defined rate of \$40 per hour for time spent in and out of court related to a case, and \$25 per hour for travel related to a case if any portion of the trip is outside the county in which the attorney's principal office is located or if the trip requires travelling a distance of more than 30 miles, one way, from

the attorney's principal location; or (b) a flat, per case contracted fee that may not result in the private attorney receiving more than the attorney would have if the attorney was reimbursed pursuant to the statutory rate.

## **GOVERNOR**

Provide an additional \$3,404,100 GPR annually to pay private bar attorney costs. Base funding for the private bar appropriation is \$21,210,400 GPR.

## **DISCUSSION POINTS**

1. The cost of providing counsel to the indigent in Wisconsin is generally the responsibility of the state through the SPD. The Office is primarily funded through general purpose revenue, which is utilized to support trial and appellate staff attorneys as well as reimbursements to private bar attorneys who are assigned indigent legal defense cases. Under 2015 Act 55, the Office of the State Public Defender was provided with an increase of \$2,304,200 GPR in 2015-16 and \$2,686,000 GPR in 2016-17, and 35.0 positions annually, to its trial representation appropriation. Associated with an increase in SPD staffing, funding for private bar reimbursements was reduced by \$1,677,000 GPR in 2015-16 and \$3,354,000 GPR in 2016-17.

2. In order to provide representation for indigent clients, the SPD has both a trial division and an appellate division. The trial division is comprised of 36 local trial offices located throughout Wisconsin, while the appellate division is comprised of two appellate offices, located in Madison and Milwaukee. Base resources for the SPD's trial division are \$53,657,300 GPR and 542.85 GPR positions, and base resources for the appellate division are \$4,581,700 GPR and 43.35 GPR positions.

3. Wisconsin statute establishes that each trial division assistant state public defender must meet one of the following annual caseload requirements: (a) 184.5 felony cases; (b) 15 first-degree homicides; (c) 15 sexual predator cases; (d) 492 misdemeanor cases; (e) 246 other cases; or (f) some combination of these categories. [Note that "other" cases generally litigated by the SPD include civil commitment proceedings, felony delinquency proceedings, protective placement proceedings under Chapter 55 of the statutes, juvenile cases, felony diversion cases, revocation hearings, termination of parental rights cases, juvenile waiver proceedings, as well as other miscellaneous cases.] Wisconsin statutes allow the SPD, however, to exempt up to 10 full-time supervisory ASPDs from the caseload requirement due to those attorneys' additional responsibilities. The statutorily defined caseload requirement is considered a minimum workload for ASPDs, and does not address workload demands such as administrative tasks, training and continuing education requirements, and other justice system activities such as participating in criminal justice coordinating councils and treatment courts.

4. The SPD employs trial and appellate staff attorneys to represent clients who qualify for SPD representation. However, SPD staff attorneys do not represent all clients who qualify for SPD representation. Due to an overflow of cases in excess of what can be assigned to SPD staff, as well as conflict of interests that may exist between SPD staff and potential clients, the SPD must assign certain cases to private bar attorneys. Private bar attorneys assigned SPD cases do not have to meet

an annual caseload requirement. Base GPR funding for the biennial private bar and investigator reimbursements appropriation is \$21,210,400 GPR annually. In addition to GPR, the SPD utilizes a portion of the program revenue generated from clients who are able to provide modest payments for legal representation to support private bar reimbursements. In 2015-16, the SPD utilized \$977,000 PR from client collections to support private bar reimbursements.

5. Private bar attorneys are compensated pursuant to either: (a) a statutorily defined rate totaling \$40 per hour for time spent related to a case in and out of court, and \$25 per hour for travel of more than 30 miles; or (b) a flat, per case contracted fee that may not result in the attorney receiving more than he or she would under the statutory rate. Except for a number of misdemeanor cases, private bar attorneys are generally compensated pursuant to the statutory rate. Table 1 provides the number of cases assigned to the private bar as well as the average amount that private bar attorneys billed the SPD in 2015-16, by case type.

**TABLE 1**

**Average Amount Billed to the State Public Defender by Case Type, 2015-16**

<u>Case Type</u>	<u>Number of Cases Assigned to Private Bar<sup>1</sup></u>	<u>Average Amount Billed<sup>2</sup></u>
Class ABC Felony (Adult)	1,551	\$1,823
Commitment	3,902	162
Felony Delinquency	1,055	419
Other Life Sentence	26	2,721
Other Felony	17,100	512
Chapter 55 proceeding <sup>3</sup>	851	295
Homicide	39	4,500
Juvenile	3,431	183
Misdemeanor	17,279	242
Post-Dispositional Juvenile Proceeding	1,383	124
Revocation	4,268	287
Special <sup>4</sup>	3,938	169
Termination of Parental Rights	636	956
Juvenile waiver	102	194
Sex predator - original	2	2,789
Sex predator - post commitment	<u>5</u>	798
Total	55,568	

<sup>1</sup>Cases assigned in 2015-16 may not have been billed in 2015-16 due to longevity of a case.

<sup>2</sup>Average amount bill per case type does not include the following: (a) withdrawals; and (b) instances in which the private attorney did not bill the SPD for certain charges filed against the client due to other existing charges for which the private bar attorney was already billing the SPD.

<sup>3</sup>Chapter 55 proceedings are in regards to protective services and placement for persons with mental illnesses, degenerative brain disorders, developmental disorders, or other like incapacities.

<sup>4</sup>Special proceedings may include the following: (a) deferred prosecution agreements; (b) contempt cases; (c) sentencing after revocation; (d) extradition; (e) restitution issues after sentencing; (f) miscellaneous post-conviction proceedings; and (g) competency proceedings.

6. Private bar attorneys compensated at the statutory rate are assigned cases on a rotational basis. Private attorneys who desire indigent legal defense cases must submit their name, legal education, and legal experience that qualifies them to provide representation in the types of cases they have expressed an interest in litigating. For each county, the SPD must annually prepare, certify, and update a list of these private attorneys seeking to litigate indigent legal defense cases.

7. During the 2013-15 biennium, the SPD expended \$54,858,000 on private bar payments (\$52,885,000 GPR and \$1,973,000 PR). Due to the auditing of private bar reimbursements, approximately \$7 million in unpaid private bar bills carried over into the 2015-17 biennium. Based on appropriated GPR amounts and projected client payment receipts, the SPD is estimated to have a total of \$44,664,200 (\$44,097,800 GPR and \$566,400 PR) to pay private bar reimbursements in 2015-17. The SPD anticipates receiving a total of \$53.3 million in private bar bills during 2015-17. [It should be noted that, due to variability in the length of cases as well as the fact that private bar attorneys may bill for an appointment as far back as six fiscal years, bills submitted in this biennium may be from appointments made in previous biennia.]

8. In 2015-16, 138,429 new cases were assigned to SPD staff attorneys and private bar attorneys. Of the newly assigned cases, 79,938 trial and 1,315 appellate (58.7%) cases were assigned to SPD staff, while private attorneys were assigned the remaining 57,176 cases (41.3%). Of the 57,176 cases assigned to private bar attorneys 37,133 were overflow (though over 8,353 cases were instances where a client with a private bar attorney has multiple cases) and 19,124 were conflict of interest cases. [Note that the total number of new cases assigned includes withdrawals, but does not include open cases that were carried over from 2014-15. A withdrawal occurs when a private bar attorney withdraws from a case and the case must be reassigned to a new private bar attorney. Further, it should be noted that the SPD continually updates its records relating to the number of cases opened in recent years, and, as a result, the number of cases opened in 2015-16 is subject to variability.]

9. The workload or number of cases the SPD must assign either to a staff of private bar attorney is dependent on a number of factors, such as the number of people who are statutorily defined as "indigent." In addition, changes in statute regarding the number of misdemeanors and felonies, as well as statutorily changing a misdemeanor to a felony will impact the number of cases going to the SPD. Finally, discretion inherent within the criminal justice system impacts in the number of cases going to the SPD, wherein in one region a case may be handled as an ordinance violation where there is no right to an attorney, in another it may be handled as a misdemeanor, which means that if the defendant is indigent they will be assigned either a staff attorney or a private bar attorney by the state.

10. With some caveats, it is generally less expensive for cases to be assigned to SPD staff attorneys rather than private bar attorneys. Despite the fact that the state supports fringe benefits, supplies and services costs, as well as support staff for assistant state public defenders, potential savings associated with employing additional ASPDs occur because: (a) trial ASPDs must meet an annual caseload requirement established under statute; (b) ASPDs minimum salary is \$33.725 per hour (\$23.673 for salary and \$10.052 for fringe benefits) while private bar attorneys are paid \$40 per hour for time they spend related to a case; and (c) efficiencies may be generated from litigating multiple defense cases at one time. Therefore, costs increase more rapidly when more cases must

be assigned to private bar attorneys. [Information on case assignment efficiency considerations are discussed in a separate paper entitled "Block Grant Appropriation for Program Operations and Position Authority."]

11. The difference in cost between appointing a private bar attorney and a staff attorney is increased the further away a private bar attorney is from the location of the case, since the SPD must pay private attorneys for time spent traveling. The SPD indicates that an extreme example of this is when Madison attorneys need to be appointed to cases in Bayfield or other areas in the northern part of Wisconsin.

12. More cases must be assigned to private bar attorneys when staff attorneys are unavailable or unable to take cases. These situations occur when there are too many cases to be handled by staff as a result of high staff employee turnover or when staff attorneys are on leave (for example military, family and medical leave (FMLA), or terminal sabbatical leave). Over the past biennium, as a result of turnover the SPD has shifted cases to the private bar. The SPD's turnover rate in 2013-14 was 7.38% (shifting the equivalent of 23.7 statutory felony caseloads to the private bar). In 2015-16, the SPD experienced a turnover rate of 12.48% (shifting 41.7 caseloads to the private bar). As a result, the agency's 2017-19 budget request included a request for \$4,935,000 GPR annually for private bar appointments. The SPD has experienced a turnover rate of 9.3% in 2016-17 through nine months (12% on an annualized basis).

13. A high turnover rate increases caseloads in two ways: (a) the cases and other responsibilities of the departing attorney must be reassigned either to other staff attorneys if their caseloads allow it, but cases are more likely to be reassigned to the private bar; and (b) the new attorneys need to maintain the statutory caseload, but takes time for cases to be assigned. In addition, the attorney leaving likely had a caseload above statutory requirements.

14. Due to the need to assign more cases to the private bar and since private bar cases in general are more expensive, the SPD spent more than anticipated on the private bar. Therefore, the SPD will be carrying over some of these costs into the next biennium. However, this amount is difficult to estimate before the end of the biennium, given administrative delay in payments for auditing of bills and the uncertainty regarding the amount of funding available in other appropriations to which allowable expenses may be transferred.

15. The bill assumes the number of cases will remain at 2015-16 levels in the 2017-19 biennium. Within this assumption is the assumption that the no new misdemeanors or felonies are added, and no new misdemeanors will be changed into felonies. It also assumes that the portion of individuals committing crimes qualifying for the services of the SPD will remain the same, that no new rules of eligibility are made, and that no unforeseen economic circumstances make more people eligible for the services of the SPD.

16. 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 15 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 the caseload will be consistent with the last biennium and that estimated by the administration.

17. In addition, the bill assumes that the SPD will have a turnover rate of 7.38% (shifting 23.7 caseloads to the private bar) in each year of the next biennium. Thus, the bill provides \$3,404,100 GPR annually. In light of these assumptions, the Committee may choose to include the Governor's recommendation. [Alternative 1] As a result, the Committee would provide \$3,404,100 GPR annually and the private bar shortfall (the difference over the biennium between the amount provided in the bill and the agency request) would be expected to increase by \$3,061,800 GPR by the end of 2017-19.

18. As indicated by the SPD, there is reason to believe that higher turnover will continue through the next biennium. A recovered job market means that attorneys who would work for the SPD are finding higher paying jobs or jobs with a lower caseload and this economic outlook is expected to continue. Given that conditions affecting SPD turnover are not expected to change in the upcoming biennium, the Committee may wish to fund the private bar appropriation using the most recently experienced turnover rates of 12.48% in 2015-16, and anticipated 12% in 2016-17. [Alternative 2] As a result, the Committee would provide increased funding of \$1,530,900 GPR annually to address private bar appointments.

19. In the 2015-17 biennium, 26 additional ASPDs and supporting staff were provided instead of adding funding to the private bar appropriation. While the SPD was able to hire these 26 positions, a high rate of turnover due to retirement and other job movements required the SPD to continue to assign cases to the private bar. In adding the additional attorney positions the SPD has filled its current office space almost to capacity. Adding a similar number of new ASPDs and support staff would require expanding current leases for more office space.

20. As an alternative to providing more funding for the private bar, however, some additional ASPD positions could be provided to decrease the number of cases going to the private bar. As a result of increased positions, the turnover estimate would be decreased to 10%. As such, the Committee may wish to provide the SPD with the following positions: (a) 8.0 ASPDs (an additional 2% of total ASPDs); (b) 1.6 legal secretaries; (c) 0.8 investigators; and (d) 0.4 client service specialists. [Alternative 3] As a result, the Committee would provide increased funding of \$919,400 GPR in 2017-18 and \$307,800 GPR in 2018-19 to the private bar appropriation and 10.8 GPR positions with funding of \$664,300 GPR in 2017-18 and \$828,300 GPR in 2018-19. This would save approximately \$341,900 GPR over the biennium as compared to Alternative 2.

21. 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 \$6,808,200 GPR over the biennium, under current law it is estimated that this alternative would increase the private bar shortfall by \$9,870,000 GPR by the end of 2017-19. The difference over the biennium between the amount provided and the agency request. [Alternative 4]

## **ALTERNATIVES**

1. Include the Governor's recommendation to provide \$3,404,100 GPR annually to the private bar appropriation.

ALT 1	Change to	
	Base	Bill
GPR	\$6,808,200	\$0

2. Provide increased funding of \$1,530,900 GPR annually to the private bar appropriation under the assumption of a 12% vacancy rate in 2017-19.

ALT 2	Change to	
	Base	Bill
GPR	\$9,870,000	\$3,061,800

3. Provide increased funding \$919,400 GPR in 2017-18 and \$307,800 GPR in 2018-19 to the private bar appropriation and 10.8 GPR positions with funding of \$664,300 GPR in 2017-18 and \$828,300 GPR in 2018-19 under the assumption of a 10% vacancy rate in 2017-19.

ALT 3	Change to Base		Change to Bill	
	Funding	Positions	Funding	Positions
GPR	\$9,528,000	10.80	\$2,719,900	10.80

4. Maintain current funding.

ALT 4	Change to	
	Base	Bill
GPR	\$0	-\$6,808,200

Prepared by: Sarah Wynn