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Joint Committee on Finance

Paper #500

Increased Staffing for the State Public Defender (Public Defender)

[LFB 2015-17 Budget Summary: Page 334, #4]

CURRENT LAW

Both the United State Constitution and the Wisconsin Constitution provide the right to counsel for individuals accused of a crime. The Sixth Amendment to the United States Constitution provides, in part, that, "In all criminal prosecution, the accused shall enjoy the right...to have the Assistance of Counsel for his defense." Article I, Section 7 of the Wisconsin Constitution provides that, "In all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel..." In *Gideon v. Wainright* (1963), the United State Supreme Court held that the constitutional right to counsel guaranteed by the United States Sixth Amendment requires the government to provide counsel to indigent criminal defendants. However, under subsequent United States and Wisconsin Supreme Court decisions, there is no absolute right to the appointment of counsel in non-criminal cases carrying no threat of loss of physical freedom.

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 \$2,304,200 GPR in 2015-16 and \$2,686,000 GPR in 2016-17, and 35.0 GPR positions annually, in order for SPD staff to increase its workload capacity. Funding is comprised of: (a) \$1,196,200 in 2015-16 and \$1,594,900 in 2016-17 for permanent position salaries; (b) \$507,900 in 2015-16 and \$677,200 in 2016-17 for fringe benefits; (c) \$413,900 annually for supplies and services; and (d) \$186,200 in 2015-16 for one-time financing. The 35.0 positions are comprised of: (a) 26.0 assistant state public defenders; (b) 5.2 legal secretaries; (c) 2.5 investigators; and (d) 1.3 client service specialists. All of the proposed positions would be utilized for trial representation, as opposed to appellate representation.

Associated with the increase in SPD staff, reduce funding for private bar and investigator reimbursements by \$1,677,000 GPR in 2015-16 and \$3,354,000 GPR in 2016-17.

The net effect for the biennium would be -\$40,800 GPR and the creation of 35.0 positions.

DISCUSSION POINTS

Background

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. Base resources for the SPD are \$82,894,300 GPR and \$1,306,200 PR, as well as 574.85 GPR positions and 5.0 PR positions. Of the 575.85 positions employed by the SPD, 348.2 positions are assistant state public defenders (ASPDs).

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 \$48,534,900 GPR and 507.85 GPR positions, and base resources for the appellate division are \$4,498,600 GPR and 43.35 GPR positions.

3. While the SPD employs trial and appellate staff attorneys to represent clients who qualify for SPD representation, 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. Base GPR funding for the biennial private bar and investigator reimbursements appropriation is \$23,155,400 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 2013-14, the SPD utilized \$1,128,100 PR from client collections to support private bar reimbursements.

4. 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; 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 2013-14, by case type.

TABLE 1**Average Amount Billed to the State Public Defender by Case Type, 2013-14**

<u>Case Type</u>	<u>Number of Cases Assigned to Private Bar</u> ¹	<u>Average Amount Billed</u> ²
Homicide	30	\$7,766
Other life sentence	16	1,710
Class ABC felony (adult)	1,257	1,660
Termination of parental rights	492	1,505
Other felony	14,813	779
Sex predator - post commitment	65	667
Felony delinquency	936	536
Juvenile waiver	94	491
Revocation	4,016	448
Sex predator - original	3	388
Misdemeanor	18,135	386
Chapter 55 proceeding ³	697	326
Juvenile	4,740	300
Special ⁴	3,828	227
Commitment	<u>3,445</u>	164
Total	52,567	

¹ Cases assigned in 2013-14 may not have been billed in 2013-14 due to the length of certain cases.

² Average amount billed 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.

³ 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.

⁴ 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.

5. Private bar attorneys compensated pursuant to 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.

6. During the 2011-13 biennium, the SPD expended \$46,667,700 on private bar payments (\$44,350,100 GPR and \$2,317,600 PR). Due to funding levels for private bar reimbursements, approximately \$6.8 million in unpaid private bar bills carried over into the 2013-15 biennium. Based on appropriated GPR amounts and projected client payment receipts, the SPD is estimated to have a total of \$54,654,000 (\$52,510,800 GPR and \$2,143,200 PR) to pay private bar reimbursements in 2013-15. The SPD anticipates receiving a total of \$56,301,900 in private bar bills during 2013-15. As a result, it is anticipated that the SPD will carry over \$1,647,900 in unpaid private bar bills into the 2015-17 biennium. [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.]

7. In 2013-14, 133,140 new cases were assigned to SPD staff attorneys and private bar attorneys. Of the 133,140 newly assigned cases, 80,573 (60.5%) cases were assigned to SPD staff, while private attorneys were assigned the remaining 52,567 cases (39.5%). [Note that the total number of new cases that were assigned includes withdrawals, but does not include open cases that were carried over from 2012-13. 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 2013-14 is subject to variability.]

Costs and Potential Savings Associated with the Governor's Recommendation

8. Under the bill, the Governor proposes providing the State Public Defender with \$2,304,200 GPR in 2015-16 and \$2,686,000 GPR in 2016-17 to support 35.0 new GPR positions. The 35.0 new positions would be comprised of 26.0 assistant state public defenders (ASPDs) and commensurate support staff totaling 5.2 legal secretaries, 2.5 investigators, and 1.3 client service specialists. The additional funding and position authority would be for trial representation, as opposed to appellate representation. The 35.0 GPR positions are intended to be budgeted at the current minimum salary levels under the state employee compensation plan.

9. The SPD anticipates it would allocate the 26.0 ASPDs to trial offices in the areas that have a lack of available private bar attorneys, including: (a) Spooner; (b) Superior; (c) La Crosse; (d) Barron; (e) Lancaster; (f) Merrill; (g) Rhinelander; (h) Peshtigo; (i) Shawano; (j) Appleton; (k) Green Bay; and (l) Eau Claire. Further, 2.0 ASPDs would be allocated to the trial office in Milwaukee that handles juvenile offenses. The support staff positions would be primarily utilized to increase part-time positions to full-time.

10. In order to ensure that SPD offices are adequately staffed with support personnel, the SPD tries to maintain the following ratios between support personnel and staff attorneys: (a) one legal secretary for every five ASPDs; (b) one investigator for every 10 ASPDs; and (c) one client service specialist for every 20 ASPDs. To this end, associated with providing the SPD an additional 26.0 ASPDs, the bill provides the SPD with 5.2 legal secretary positions, 2.5 investigator positions, and 1.3 client service specialist positions. To assist SPD attorneys, public defender investigators interview witnesses, visit crime scenes to gather evidence, prepare diagrams, take photographs, and obtain other information to identify defense issues. Client service specialists provide support to SPD attorneys and SPD clients by: (a) gathering pertinent information regarding an individual client's problems and needs; (b) investigating placement, treatment, and educational programs that could assist the client; and (c) preparing written recommendations to be considered at sentencing and revocation hearings.

11. Assuming that the SPD would open a similar number of cases during 2015-17 as it did during 2013-14, the administration estimates that the additional 26.0 ASPDs would allow SPD staff to litigate an additional 5% of the total number of cases opened at trial level. This would, in turn, reduce the number of cases that would have to be assigned to private bar attorneys due to an overflow of cases. In 2013-14, 58.3% of the cases referred to the private bar were referred due to

overflow. The administration did not provide specific rationale as to why additional positions were provided to litigate an additional 5% of cases opened at trial level, as opposed to any other percentage level. The SPD indicates, however, that while current available office space will be able to accommodate the 35.0 positions provided under the bill, office space may not be able to accommodate additional positions beyond those provided in the bill.

12. Due to the reduction in the number of cases that would need to be assigned to the private bar, the administration anticipates an associated reduction in private bar costs. As such, the bill reduces funding for private bar and investigator reimbursements by \$1,677,000 GPR in 2015-16 and \$3,354,000 in 2016-17. The administration estimated these reductions by utilizing the average amount the private bar billed the SPD, by case type, in 2013-14. Reductions are less in 2015-16 because due to the fact that it would take the SPD a few months to hire 26.0 new ASPDs and private bar attorneys generally bill the SPD six months after being assigned a case.

13. As a result of both the additional resources to the SPD and the reductions for private bar reimbursement, the net fiscal effect of the provision, as estimated by the administration, is \$627,200 in 2015-16 and -\$668,000 GPR in 2016-17, or -\$40,800 GPR over the 2015-17 biennium. The administration anticipates that the savings estimated in 2016-17 would continue for future fiscal years.

14. 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.

15. 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.] 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. Private bar attorneys assigned SPD cases do not have to meet an annual caseload requirement.

16. It could be argued that ASPDs are able to litigate indigent legal defense cases more efficiently than private bar attorneys due to the fact that ASPDs handle multiple cases simultaneously. Private bar attorneys are typically assigned one indigent legal defense case at a time due to the fact that private attorneys are generally assigned cases on a rotational basis. The SPD has indicated that certain tasks, such as discussing cases with the district attorney, can be performed

more efficiently when an attorney litigates multiple cases at a time.

17. In light of the overall savings that the administration estimates would be generated, the Committee could approve the Governor's recommendation [Alternative 1]. As a result of this alternative, the Committee would provide the SPD with \$2,304,200 GPR in 2015-16 and \$2,686,000 GPR in 2016-17 to support 35.0 new positions, and reduce funding for private bar reimbursements by \$1,677,000 GPR in 2015-16 and \$3,354,000 in 2016-17.

18. With regards to the cost of supporting ASPDs, the state provides funding for the attorney's salary, fringe benefits, and necessary supplies and services. The state also funds support staff necessary to assist SPD attorney provide indigent legal defense. Under the state employee compensation plan, the minimum hourly salary for an ASPD is currently \$23.673 per hour (\$49,420 annually), while the maximum hourly salary is \$57.218 per hour (\$119,472 annually). It could be expected that the 26.0 ASPDs' salary will increase over time and therefore savings associated with this provision would diminish.

19. Under 2013 Act 20, ASPDs may receive hourly salary adjustments on an annual basis pursuant to a merit-based pay progression plan. The ASPD pay progression plan, mirrored after the plan for assistant and deputy district attorneys, consists of 17 hourly salary steps, with each step equal to one seventeenth of the difference between the lowest possible annual salary (\$49,430) and the highest possible annual salary (\$119,472). Notwithstanding the creation of a 17 hourly salary step pay progression plan, the State Public Defender may: (a) increase the salary of individual ASPDs by up to 10%; and (b) deny annual salary increases to individual ASPDs. During the 2013-15 biennium, \$2,975,600 GPR (\$997,000 in 2013-14 and \$1,978,600 in 2014-15) is appropriated to the SPD to provide salary adjustments to 348.2 ASPDs under the pay progression plan (an average of \$2,900 per ASPD in 2015-16 and \$5,700 per ASPD in 2016-17). During 2014-15, the average salary adjustment provided to ASPDs was a salary increase of approximately 4.4%.

20. Based on similar calculations performed by the administration, any potential savings associated with the reduction in private bar costs would be eliminated were the average hourly salary of the proposed 26.0 ASPDs raised to \$32.37 per hour (\$67,600 annually). Table 2 identifies the hourly salary of an ASPD after eight pay progression salary adjustments, based on: (a) 10% salary increases (the maximum adjustment under the pay progression plan); and (b) 4.4% salary increases (the average adjustment awarded to ASPDs during the 2013-15 biennium). As Table 2 indicates, an ASPD receiving 10% salary adjustments under the pay progression plan would earn more than \$32.37 per hour after four adjustments. An ASPD receiving 4.4% salary adjustments under the pay progression plan would earn more than \$32.37 per hour after eight salary adjustments.

TABLE 2

**Hourly salary of an Assistant State Public Defender
with Pay Progression Salary Adjustments**

<u>Salary Adjustment</u>	<u>Wage (10% increase)</u>	<u>Wage (4.4% increase)</u>
Initial Salary	\$23.67	\$23.67
Adjustment 1	\$26.04	\$24.71
Adjustment 2	28.64	25.80
Adjustment 3	31.51	26.94
Adjustment 4	34.66	28.12
Adjustment 5	38.13	29.36
Adjustment 6	41.94	30.65
Adjustment 7	46.13	32.00
Adjustment 8	50.75	33.41

21. Current law does not obligate the state to continue to consistently provide funding for pay progression. To this end, the bill eliminates base funding for pay progression for assistant state public defenders during the 2015-17 biennium, but retains the pay progression plan under statute. As a result, any funding for pay progression salary adjustments during the 2015-17 biennium would need to be supported from within the agency's budget or from compensation reserves, or both, at the discretion of the agency. [A separate paper, #261, under "District Attorneys" addresses pay progression for District Attorneys and the Public Defender.]

22. In contrast to the compensation rate provided to ASPDs, private bar compensation for litigating indigent legal defense cases is set under statute, and would only be increased by an act of law. As previously indicated, private bar attorneys are generally compensated at a rate of \$40 per hour for time spent related to a case, and \$25 per hour for travel.

23. Given that compensation provided to assistant state public defenders may be increased in future years and reduce overall future savings, the Committee could deny the Governor's recommendation [Alternative 3]. Under this alternative, increased funding and position authority for the SPD totaling \$2,304,200 GPR in 2015-16 and \$2,686,000 GPR in 2016-17, and 35.0 GPR positions, would be eliminated as would reductions for private bar reimbursements totaling \$1,677,000 GPR in 2015-16 and \$3,354,000 in 2016-17.

24. Alternatively, the Committee could decide that while savings may be generated from employing additional ASPDs, the SPD should not be granted 35.0 new positions at this time. To this end, the Committee could decide to provide a lesser number of the positions recommended under the bill. If, for example, 17.5 new positions were provided, the Committee could provide \$1,151,400 GPR in 2015-16 and \$1,342,100 GPR in 2016-17, and the following positions: (a) 13.0 ASPDs; (b) 2.6 legal secretaries; (c) 1.25 investigators; and (d) 0.65 client service specialists. Associated with the increase in funding and position authority for SPD staff trial representation, the

Committee could reduce funding for private bar reimbursements by \$838,500 GPR in 2015-16 and \$1,677,000 GPR in 2016-17. The net fiscal effect of this alternative would be \$312,900 GPR in 2015-16 and -\$334,900 GPR in 2016-17 (-\$22,000 GPR over the 2015-17 biennium) [Alternative 2].

ALTERNATIVES

1. Approve the Governor's recommendation to provide the Office of the State Public Defender with \$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 the increase in SPD staffing, reduce funding for private bar reimbursements by \$1,677,000 GPR in 2015-16 and \$3,354,000 GPR in 2016-17.

2. Reduce the number of positions provided under the bill by half. As a result, provide \$1,151,400 GPR in 2015-16 and \$1,342,100 GPR in 2016-17, and 17.5 positions annually (13.0 ASPDs, 2.6 legal secretaries, 1.25 investigators, and 0.65 client service specialists). Associated with the increase in SPD staffing, reduce funding for private bar reimbursements by \$838,500 GPR in 2015-16 and \$1,677,000 GPR in 2016-17. The net fiscal effect would be \$312,900 GPR in 2015-16 and -\$334,900 GPR in 2016-17 (-\$22,000 GPR over the 2015-17 biennium).

ALT 2	Change to Bill	
	Funding	Positions
GPR	\$18,800	- 17.50

3. Deny the Governor's recommendation and eliminate \$2,304,200 GPR in 2015-16 and \$2,686,000 GPR in 2016-17, and 35.0 GPR positions, for SPD trial representation. In addition, eliminate reductions for private bar reimbursements totaling \$1,677,000 GPR in 2015-16 and \$3,354,000 in 2016-17.

ALT 3	Change to Bill	
	Funding	Positions
GPR	\$40,800	- 35.00

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