



## Legislative Fiscal Bureau

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February 27, 2002

Joint Committee on Finance

Paper #1215

### Private Bar Shortfall (Public Defender)

[LFB Summary of the Governor's Budget Reform Bill: Page 70, #2]

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#### CURRENT LAW

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), those indigent persons facing involuntary commitment and certain appellants are constitutionally entitled to legal representation. When the State Public Defender (SPD) determines that an accused has a right to SPD representation, the case is either assigned to an SPD staff attorney or to a private attorney (the private bar). In 2000-01, 59% of new cases were assigned to SPD staff and 41% of new cases were assigned to the private bar. Private bar costs are primarily paid through the private bar and investigator reimbursement appropriation (private bar appropriation). This biennial appropriation is currently appropriated \$16,725,700 GPR in 2001-02 and \$16,557,800 GPR in 2002-03. Private bar costs are also partially covered through a PR appropriation supported by fees collected from SPD clients. This continuing appropriation is appropriated \$1,024,700 PR annually.

In 2001 Act 16, the biennial budget act, the felony thresholds for the following crimes were raised from \$1,000 to \$2,500: (a) criminal damage to property; (b) graffiti; (c) theft; (d) fraud on hotel or restaurant keeper or taxicab operator; (e) receiving stolen property; (f) fraudulent insurance and employee benefit claims; (g) financial transaction card crimes; (h) retail theft; (i) theft of library materials; and (j) issuing a worthless check. Act 16 also raised the felony threshold for unlawful receipt of loan payments from \$500 to \$2,500. Act 16 raised the Class E felony range for property damage to a vending machine from \$500 to \$1,000, to \$500 to \$2,500. Finally, Act 16 reduced the SPD's private bar and investigator reimbursement appropriation by \$40,600 GPR in 2001-02, and \$357,500 GPR in 2002-03, to reflect estimated lower costs to the SPD to defend these cases as misdemeanors.

## GOVERNOR

As part of the truth-in-sentencing provisions, lower the felony thresholds for the following crimes from \$2,500 to \$1,000: (a) criminal damage to property; (b) graffiti; (c) theft; (d) fraud on hotel or restaurant keeper or taxicab operator; (e) receiving stolen property; (f) fraudulent insurance and employee benefit claims; (g) financial transaction card crimes; (h) retail theft; (i) theft of library materials; and (j) issuing a worthless check. Lower the felony threshold for unlawful receipt of loan payments from \$2,500 to \$500. Lower the Class E felony range for property damage to a vending machine from \$500 to \$2,500, to \$500 to \$1,000. (These felony thresholds and range were increased in Act 16 by the same amounts by which they would be decreased under the Governor's recommendation.) Provide that these changes would first apply to offenses committed on the first day of the seventh month after enactment of the bill.

## DISCUSSION POINTS

### State Public Defender's 2001-03 Budget

1. Senate Bill 55, as introduced by the Governor, would have reduced the SPD's largest GPR state operations appropriation, trial representation, by \$3,236,900 annually. This represents 5% of the agency's total GPR adjusted base for state operations.

2. The Legislature deleted the Governor's recommendation. Instead, Enrolled SB 55 included the following changes to SPD appropriations:

Appropriation	Source	Enrolled SB 55			
		Funding		Positions	
		2001-02	2002-03	2001-02	2002-03
(1)(a) Program Administration	GPR	-\$116,700	-\$116,700	0.00	0.00
(1)(b) Appellate Representation	GPR	-21,500	-21,500	0.00	0.00
(1)(c) Trial Representation	GPR	2,546,000	3,024,900	59.30	59.30
(1)(d) Private Bar and Investigator Reimbursement	GPR	-2,101,000	-5,101,600	0.00	0.00
(1)(e) Private Bar -- Administration Costs	GPR	-28,400	-28,400	0.00	0.00
(1)(f) Transcripts, Discovery and Interpreters	GPR	-70,500	-70,500	0.00	0.00
Required GPR Lapse	GPR	<u>-550,000</u>	<u>-550,000</u>	<u>0.00</u>	<u>0.00</u>
GPR Total		-\$342,100	-\$2,863,800	59.30	59.30

3. The reductions to the private bar and investigator reimbursement appropriation were based on an analysis that concluded that it is more expensive for the private bar to handle a case than it is for SPD staff. As a result of this analysis, in conjunction with the private bar reduction, the Legislature added 59.3 SPD staff positions at a cost of \$2,546,000 GPR in 2001-02, and \$3,024,900 GPR in 2002-03, to the trial representation appropriation.

4. In addition to the above provisions, Enrolled SB 55 also included two provisions requiring lapses from unspecified GPR state operations appropriations tied to: (a) vacant positions; and (b) membership dues payments in national and state organizations.

5. In Act 16, the Governor deleted \$2,894,800 GPR in 2001-02 and \$373,100 GPR in 2002-03 and 59.3 GPR positions annually from the trial representation appropriation. In addition, as implemented by the DOA Secretary, the dues and vacancy lapse provisions require the SPD to lapse an additional \$998,200 GPR annually. As a result of all these actions, the SPD, prior to the current bill, has an annual reduction in this biennium of \$4,235,100 GPR, or 6.5% of its GPR adjusted base for state operations.

6. Act 16 reduced the private bar appropriation by \$2.1 million in 2001-02 and \$5.1 million GPR in 2002-03, to reflect the private bar savings anticipated from creating the additional SPD staff positions and assigning more cases to staff. The Governor's partial vetoes under Act 16 left the trial representation appropriation with no new staff positions and an increase over adjusted base of \$2,651,800 GPR in 2002-03, \$2,434,400 of which was for salary and fringe benefits funding for the deleted positions that generally could not be utilized by the SPD without further legislative action. The Governor could not restore funding to the private bar appropriation in the veto process as a Supreme Court decision on vetoes allows the Governor, through veto, to reduce, but not increase, an appropriation. At the Finance Committee's November 5, 2001, s. 13.10 meeting, the Committee approved an SPD request to transfer \$2,832,700 GPR in 2002-03 from the trial representation appropriation to the private bar appropriation.

7. Based on analysis that has concluded that assigning cases to staff is more cost effective than assigning cases to the private bar, the SPD has requested that the dues and vacancy lapses be assigned to the private bar appropriation, which DOA has approved for 2001-02. Assuming DOA approves the assignment of the 2002-03 lapses to this appropriation as well, the private bar appropriation will have \$30,187,100 GPR available for expenditure in 2001-03.

### **SPD Caseload**

8. Funding needed for the private bar appropriation can be projected based on total caseload estimates, estimates of the portion of the caseload assigned to private bar attorneys and the estimated costs of a private bar case. The caseload assigned to private bar attorneys could potentially be reduced if SPD staff attorneys handle more cases. The annual number of cases budgeted for an SPD trial attorney is set by statute. In 2000-01, the SPD trial division was responsible for 247.4 budgetary caseloads, and SPD trial division attorneys were assigned 249 caseloads of work.

9. While SPD trial division attorneys appear to be meeting their annual statutory budgetary caseload requirements, the statutes do not preclude them from exceeding these annual caseload requirements. It should, however, be noted that the current budgetary standards for felony and misdemeanor caseloads, first established in 1985 Act 29, represent 123% of the recommended felony and misdemeanor caseload standards developed by the National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts in 1973. Further, according to the State Public Defender, SPD attorneys are ethically precluded from undertaking a significantly higher caseload under the Supreme Court rules of professional conduct for attorneys. The SPD has, however, asked its staff attorneys and supervisors to voluntarily handle additional cases to the extent

that they can ethically and competently do so.

10. Through January, 2002, SPD trial division attorneys and supervisors have, in total, assumed a caseload 4.4% higher than the budget caseload. If trial and appellate SPD attorneys and supervisors maintain these higher caseloads through the remainder of the biennium, it is estimated that \$1,676,000 GPR in savings would be generated over the biennium. It should be noted, however, that the SPD trial division feels that it may be difficult to maintain this workload over the biennium.

11. The number of persons qualifying for SPD representation in 2001-02, however, through January 2002, is 7.7% higher than projections made in Act 16. Assuming these higher caseload trends continue through 2001-02, it is projected that even with the increased caseloads assumed by SPD staff, more cases will be assigned to the private bar in 2001-02, than were assigned in 2000-01.

### **Projected Private Bar Shortfall**

12. By letter of January 31, 2002, the State Public Defender notified the Co-Chairs of the Joint Committee on Finance that the SPD was projecting a private bar shortfall of \$10.8 million for 2002-03. The State Public Defender advised the Co-chairs that the SPD would be seeking supplemental funding under s. 13.10 of the statutes at the earliest opportunity. By letter of February 15, 2002, the State Public Defender notified the Co-chairs and Secretary of Administration that the SPD was now projecting a private bar shortfall of \$11.5 million for 2002-03.

13. Given the budget reductions and lapse requirements in Act 16, as well as a projected increase in caseload being assigned to the private bar in 2001-02, it is currently estimated that the shortfall for the private bar appropriation in 2002-03 will be \$10,721,200, based on actual 2001-02, private bar reimbursements through January 2002, and the following assumptions: (a) that the SPD caseload rate for the remainder of 2001-02 will mirror the caseload rate through January, 2002 and the caseload for 2002-03 will mirror the 1999-00 caseload; (b) that SPD trial and appellate staff attorneys will continue to assume new cases at the same rate as they have through January 2002; (c) that payments on assigned private bar cases will come due, on average, six months after they are assigned; (d) that the cost of private bar cases in 2001-03 will mirror the cost of private bar cases in 2000-01; (e) that there will be a 1% growth in collections from SPD clients over 1999-01 collections; and (f) that the required lapses will be made from the private bar appropriation.

14. Because the private bar appropriation is projected to be out of funds by September, 2002, and cases are assigned to private bar attorneys, on average, six months before payments are to be made, the SPD considered asking private bar attorneys to take cases and wait a year or more, until 2003-04, to receive payment. The State Public Defender requested a legal opinion from the Department of Justice as to the legal permissibility of this approach, in light of s. 20.903 of the statutes, which precludes state agencies from contracting or creating any debt or liability against the state in excess of an appropriation of money by the state to pay such debt or liability. This statutory section also provides that any arrangement made by a state agency with a vendor or contractor to

deliver merchandise or provide services and inordinately delay the billing for such merchandise or services for the purpose of circumventing budgetary intent is a violation of the statutes. An Assistant Attorney General concluded that, "asking private attorneys to provide services during this biennium and to delay billing a year or more, until the beginning of the next biennium, would be an arrangement to inordinately delay the billing for the purpose of circumventing budgetary intent," and would, therefore, violate s. 20.903.

15. Under current law, if the SPD determines that an individual meets the state indigency standard, the individual's case must be referred to, or within the SPD for assignment of, counsel. If the statutory framework governing the SPD is not changed and the private bar appropriation is not supplemented, the SPD could potentially be forced to either: (a) continue to assign private bar cases in this biennium after the private bar appropriation is depleted, which appears contrary to s. 20.903; or (b) turning away individuals who meet the state indigency standard for SPD representation.

### **State Hiring Freeze**

16. On November 1, 2001, state agency heads were notified of a state hiring freeze. Under hiring freeze guidelines, vacant positions funded by GPR, or SEG funding in the Department of Transportation and the Department of Natural Resources, were to be frozen effective November 12, 2001, subject to a DOA exemption process. The University of Wisconsin and positions directly protecting public health and safety (including prosecutor positions in district attorney offices) and positions providing direct care were exempt from the hiring freeze.

17. By letter of November 7, 2001, the SPD requested that it be exempted from the hiring freeze as: (a) the SPD has no control over the number of cases for which it will be required to provide representation; (b) provision of that representation is less expensive if done by staff attorneys as opposed to the private bar; and (c) the SPD fits the exemption criteria for directly protecting public health and safety or providing direct care. Through February 19, 2002, DOA has not granted the SPD an exemption from the hiring freeze.

18. Some would argue that allowing additional exceptions to the hiring freeze will undermine the freeze and reduce the associated general fund savings. On the other hand, prior analysis has shown that SPD staff complete cases more cost effectively than the private bar. Imposing the hiring freeze on the SPD could hamper SPD efforts to have staff assume more cases and exacerbate the deficit in the private bar appropriation as more cases would have to be assigned to the private bar. One alternative the Committee could consider would be to maintain the hiring freeze for the SPD's administration division, but lift the freeze on the trial and appellate divisions that employ SPD attorneys and their staff.

### **Lowering Felony Thresholds**

19. In Act 16, the 2001-03 biennial budget act, the felony thresholds for the following crimes were raised from \$1,000 to \$2,500: (a) criminal damage to property; (b) graffiti; (c) theft; (d)

fraud on hotel or restaurant keeper or taxicab operator; (e) receiving stolen property; (f) fraudulent insurance and employee benefit claims; (g) financial transaction card crimes; (h) retail theft; (i) theft of library materials; and (j) issuing a worthless check. Act 16 also raised the felony threshold for unlawful receipt of loan payments from \$500 to \$2,500. Act 16 raised the Class E felony range for property damage to a vending machine from \$500 to \$1,000, to \$500 to \$2,500. Finally, Act 16 reduced the SPD's private bar appropriation by \$40,600 GPR in 2001-02, and \$357,500 GPR in 2002-03, to reflect estimated lower costs to the SPD to defend these cases as misdemeanors.

20. Under the bill, the Governor would undo the Act 16 changes to these felony thresholds and range and lower these felony thresholds and range to their pre-Act 16 levels. The bill provides no additional funding to the SPD for the higher cost of defending these cases as felonies. It is estimated that these felony threshold and range decreases would increase SPD costs by \$89,400 GPR in 2002-03, with an annual cost increase of \$357,500 GPR.

21. DOA indicates that these changes were included so as to incorporate the truth-in-sentencing provisions of Engrossed 2001 Assembly Bill 3 into the budget reform bill. It should be noted, however, that in drafting the truth-in-sentencing provisions for the budget reform bill, other provisions of Engrossed 2001 Assembly Bill 3 were modified to incorporate Act 16 changes.

**ALTERNATIVES TO BILL**

**A. Lowering Felony Thresholds**

1. Approve the Governor's recommendation to lower the felony thresholds for the following crimes from \$2,500 to \$1,000: (a) criminal damage to property; (b) graffiti; (c) theft; (d) fraud on hotel or restaurant keeper or taxicab operator; (e) receiving stolen property; (f) fraudulent insurance and employee benefit claims; (g) financial transaction card crimes; (h) retail theft; (i) theft of library materials; and (j) issuing a worthless check. Lower the felony threshold for unlawful receipt of loan payments from \$2,500 to \$500. Finally, lower the Class E felony range for property damage to a vending machine from \$500 to \$2,500, to \$500 to \$1,000. Provide that these changes first apply to offenses committed on the first day of the seventh month after enactment of the bill.

2. Approve alternative 1. In addition, provide \$89,400 GPR in 2002-03, to the private bar and investigator reimbursement appropriation, to cover the increased cost of defending these cases as felonies.

<u>Alternative A2</u>	<u>GPR</u>
2001-03 FUNDING	\$89,400

3. Maintain current law.

**B. Private Bar Shortfall**

1. Provide \$10,721,200 GPR to the private bar and investigator reimbursement appropriation in 2002-03, in order to address the projected private bar shortfall.

<b>Alternative B1</b>	<b>GPR</b>
2001-03 FUNDING	\$10,721,200

2. In addition to alternative B1, authorize the SPD trial and appellate divisions to hire additional staff when vacancies occur.

3. Maintain current law.

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