



Legislative Fiscal Bureau

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Joint Committee on Finance

Paper #615

Agency Operational Budget Modifications and Private Bar Funding (SPD)

[LFB 2009-11 Budget Summary: Page 512, #2, Page 513, #3, and Page 513, #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.

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 current 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. If an individual does not meet the statutory 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 2007-08, the SPD received \$1,849,400 PR in payments from its indigent clients, including receipts from court-ordered recoupments.

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. 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 2007-08, 77,602 new cases were assigned to SPD staff attorneys.

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 2007-08, 59,023 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 Wisconsin 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.

GOVERNOR

Private Bar Funding Reduction. Reduce the SPD's GPR-funded private bar and investigator reimbursement biennial appropriation by: (a) \$227,800 GPR annually as part of an across-the-board 1% reduction in most non-federal appropriations; and (b) \$500,000 GPR annually as part of an additional GPR reduction (a 2.2% reduction).

Fifth Week of Vacation as Cash. Provide \$251,300 GPR and \$1,300 PR in 2009-10 and \$262,100 GPR and \$1,700 PR in 2010-11, to fully fund projected agency costs associated with fifth week of vacation as cash payments. Under current law, certain long-term employees may elect to receive a cash payment in lieu of a fifth week of paid vacation.

DISCUSSION POINTS

1. Under 2007 Wisconsin Act 20, the Legislature re-estimated the funding required by the SPD to address its projected caseload for the biennium. Act 20 approved the restoration of supplies and services funding cut under the 2005-07 budget, and approved funding for the costs of fifth week of vacation as cash so as to minimize the need to hold attorney positions vacant and to maximize caseload that could be addressed by SPD staff. Act 20 also provided an additional 12.0

positions to the SPD to further increase caseload that could be addressed by staff (9.0 attorneys and 3.0 legal secretaries).

2. After accounting for caseload assigned to staff, Act 20 re-estimated the caseload that would be assigned to the private bar and its associated cost. Accounting for an estimated \$2,883,300 PR in available client fees during 2007-09 to offset SPD private bar costs, Act 20 re-estimated the remaining private bar funding required under the GPR-funded private bar and investigator reimbursement appropriation. Act 20 provided \$24,425,800 GPR in 2007-08, and \$22,777,900 GPR in 2008-09 to this appropriation.

3. In order to balance the 2007-09 state budget, Act 20 authorized the Secretary of Administration to lapse \$200 million in unencumbered balances from executive branch state agency appropriations over the biennium. In implementing this lapse requirement, the Secretary of DOA subsequently directed the SPD to lapse \$2.3 million GPR annually to the general fund during each year of the biennium. The SPD indicates that \$2,036,100 was lapsed from the GPR-funded private bar appropriation in 2007-08. The Office further indicates that the entire \$2.3 million lapse requirement for 2008-09 was also initially assigned to the GPR-funded private bar appropriation.

4. In its 2009-11 budget request the SPD estimated that, primarily as a result of the Act 20 lapse requirements, the GPR-funded private bar appropriation would end 2008-09 with a deficit of \$4,912,700 GPR. After re-estimating caseload for the 2009-11 biennium and accounting for this deficit, the Office estimated that it would need to supplement adjusted base funding with increased net funding of \$2,983,900 GPR during 2009-11 to fully fund estimated private bar costs (\$3,948,300 GPR in 2009-10, and -\$964,400 GPR in 2010-11).

5. In its January 27, 2009, quarterly report to the Committee, the SPD re-estimated the 2007-09 private bar shortfall at \$5.5 million (an increase of approximately \$600,000 over the September estimate).

6. Under AB 75, as introduced, funding for the GPR-funded private bar appropriation is reduced by \$727,800 GPR annually including: (a) \$227,800 GPR annually as part of an across-the-board 1% reduction in most non-federal appropriations; and (b) \$500,000 GPR annually as part of an additional GPR reduction (a 2.2% reduction). While these reductions reduce available funding to address projected private bar costs, under AB 75 the Office was also provided full funding for agency costs associated with fifth week of vacation as cash. Administration staff indicates that this funding was provided to reduce the need for the SPD to hold attorney positions vacant and to increase the ability of the Office to assign caseload to SPD staff.

7. The SPD subsequently re-estimated the private bar funding required by the Office through 2010-11, based on the provisions of AB 75, as introduced, and based on a re-estimate of caseload. The SPD estimated the 2007-09 deficit at \$5,697,800 GPR and estimated needing \$9,654,600 GPR to fully fund private bar costs through the 2009-11 biennium. (This latter estimate includes funding to eliminate the 2007-09 deficit).

8. In response to the increasing shortfall in private bar funding, the administration now

indicates that it anticipates relieving the SPD of its entire \$2.3 million lapse requirement for 2008-09.

9. It is estimated that \$48,701,200 GPR will be needed to eliminate the 2007-09 private bar deficit and fully fund projected 2009-11 private bar costs (this assumes that the SPD will be relieved of its 2008-09 GPR lapse requirement). As AB 75 provides \$41,361,100 GPR over the biennium for private bar costs, an additional \$7,340,100 GPR over the biennium would be needed to fully fund projected private bar costs (\$5,361,700 GPR in 2009-10, and \$1,978,400 GPR in 2010-11).

10. 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 an additional \$7,340,100 GPR over the biennium to fully fund projected private bar costs. [Alternative 2] Alternatively, the Committee could adopt the provisions of AB 75, as introduced. Under this latter alternative, it would be the responsibility of the administration to identify available GPR expenditure authority over the course of the 2009-11 biennium that could be provided or transferred to the private bar appropriation under either separate legislation or s. 13.10 to address shortfalls in private bar funding. [Alternative 1]

11. The Committee could also consider deleting the provisions under AB 75 which reduce funding to the GPR-funded private bar appropriation and provide funding for fifth week of vacation as cash. Deleting the reductions to the private bar appropriation would restore \$727,800 GPR annually in funding for private bar payments. Deleting fifth week of vacation as cash funding would initially offset some of the costs of restoring funding to the private bar appropriation. If the SPD must hold attorney positions vacant to pay for fifth week of vacation as cash payments, however, some of the initial savings could be lost due to more cases and associated costs shifting to the private bar. [Alternative 3]

ALTERNATIVES

1. Approve the Governor's recommendation to reduce the GPR-funded private bar and investigator reimbursement biennial appropriation by \$727,800 GPR annually including: (a) \$227,800 GPR annually as part of an across-the-board 1% reduction in most non-federal appropriations; and (b) \$500,000 GPR annually as part of an additional GPR reduction. Provide \$251,300 GPR and \$1,300 PR in 2009-10, and \$262,100 GPR and \$1,700 PR in 2010-11, to fully fund projected agency costs associated with fifth week of vacation as cash payments.

2. Provide \$5,361,700 GPR in 2009-10, and \$1,978,400 GPR in 2010-11, to the private bar appropriation as a re-estimate of the funding needed to eliminate the 2007-09 private bar deficit and fully fund 2009-11 private bar costs.

ALT 2	Change to Bill Funding
GPR	\$7,340,100

3. Delete provisions. This alternative would: (a) restore \$727,800 GPR annually in funding reductions to the private bar appropriation; and (b) delete \$251,300 GPR and \$1,300 PR in 2009-10 and \$262,100 GPR and \$1,700 PR in 2010-11 in fifth week of vacation as cash funding.

ALT 3	Change to Bill Funding
GPR	\$942,200
PR	<u>- 3,000</u>
Total	\$939,200

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