



Legislative Fiscal Bureau

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December 14, 2010

TO: Members
Joint Committee on Finance

FROM: Bob Lang, Director

SUBJECT: Public Defender: Section 13.10 Request for Additional Funding for Private Bar Reimbursement -- Agenda Item IX

REQUEST

The Office of the State Public Defender (SPD) is requesting that the Joint Committee on Finance act under its authority under s. 13.101 of the statutes to provide \$9,500,000 GPR in one-time funding to the SPD's biennial private bar and investigator reimbursement appropriation. The purpose would be to address a shortfall in funding for private bar reimbursements.

BACKGROUND

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 SPD.

The SPD is constitutionally and statutorily required to provide 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 (Chapters 48 and 938); (c) subject to petitions for protective placement (Chapter 55); (d) facing involuntary commitment; and (e) involved in certain post-conviction or post-judgment appeals. 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 currently utilized 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 may appoint an attorney at county, rather than state, expense. While the Legislature modified the SPD indigency standard under 2009 Wisconsin Act 164 to model it after the Wisconsin Works (W-2) eligibility standard, this revised standard first applies to case appointments on or after June 19, 2011.

The SPD is required to determine whether a person has some ability to pay the costs of representation. The Public Defender Board is required to establish, by rule, fixed payments for the cost of SPD representation in various types of cases. Known as the prepayment option, an indigent client may elect to prepay the amount if a determination has been made that the person has some ability to pay for his or her representation. If an indigent client 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 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 generally 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 2009-10, 77,130 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 providing representation. In 2009-10, 53,579 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 and commitment cases, a flat, per case contracted amount. The SPD utilizes client fees to offset the cost of providing private bar counsel to the indigent. In 2009-10, the SPD utilized \$988,300 PR in client fees to partially offset the costs of private bar counsel. It is estimated that there will be \$2,011,700 PR in client fees in 2010-11 that will be available to offset the costs of private bar counsel.

ANALYSIS

The biennial funding requirements for the SPD's private bar appropriation are estimated by: (a) projecting the SPD biennial caseload; (b) identifying the number of SPD trial staff attorneys available to handle caseloads; (c) estimating the number of cases appellate staff attorneys will handle; (d) identifying the remaining caseload to be assigned to the private bar; and (e) estimating the private bar costs to complete this caseload, based on average cost data collected by the SPD.

During 2009-11 biennial budget deliberations, it was estimated that the SPD would require

additional funding of \$7,340,100 GPR over the biennium (above what was recommended under 2009 Assembly Bill 75, as introduced) to address the 2007-09 private bar funding shortfall and to fully fund estimated caseload for the 2009-11 biennium. In approving the SPD budget for the 2009-11 biennium, the Legislature adopted the private bar funding provisions under the budget bill (AB 75), as introduced. As a result, no additional funding was provided. The SPD concluded the 2007-09 biennium with a private bar funding shortfall of \$5,233,900.

Under the s. 13.10 request before the Committee, the SPD is requesting \$9.5 million GPR in 2010-11 in one-time funding to eliminate its cumulative private bar funding shortfall. The SPD indicates that without a supplement it will exhaust funding to pay private bar costs in February, 2011. Subsequent to the submission of its s. 13.10 request, however, the SPD developed a revised estimate of its cumulative private bar funding shortfall, incorporating actual expenditures through November, 2010. The SPD now estimates that this shortfall totals \$8.9 million.

In regards to this shortfall estimate, it should be noted that under SPD policy attorneys must submit final bills within 60 days of the conclusion of the case. The SPD is required to pay interest on uncontested bills paid more than 120 days after their submission. If an attorney fails to submit a bill within six months of the conclusion of the case, however, the SPD is released from the obligation to promptly pay the bill and to pay interest on a bill paid more than 120 days after submission. The revised SPD estimate for \$8.9 million GPR does not include an additional \$910,000 in bills that were received more than six months after the conclusion of the case. While the SPD is released from the obligation to promptly pay these bills, these bills remain a legal obligation of the SPD that must ultimately be paid. In order to provide funding to satisfy all projected cumulative private bar obligations, \$9,810,000 GPR in 2010-11 in one-time funding would be needed.

In reviewing the request, the Committee could consider the ability of the SPD during 2007-09, and again in 2009-10, to utilize unexpended salary and fringe benefits funding from its trial and appellate appropriations to pay some private bar obligations. Savings from position turnover and position vacancies permitted this expenditure authority to be redirected to private bar costs. During the 2007-09 biennium, the Office was able to utilize \$2,168,200 GPR in unutilized salary and fringe benefits funding to pay private bar bills. Again in 2009-10, the Office was able to utilize \$882,100 GPR in unutilized salary and fringe benefits funding to pay private bar bills. While more definitive information on unutilized salary and fringe benefits funding will not be available until the end of the 2010-11 state fiscal year, the Committee could consider reducing any provided one-time private bar funding to the SPD by \$882,100 GPR, based on the Office's experience in 2009-10. Under this alternative either: (a) the private bar shortfall estimate that includes bills that are more than six months old could be reduced to \$8.9 million GPR; or (b) the revised SPD estimate of \$8,900,000 GPR could be reduced to \$8,017,900 GPR.

Another alternative would be to provide some funding now and then address the remainder of the amount needed at a subsequent s. 13.10 meeting, in separate legislation, or as a part of any budget adjustment bill that might be necessary over the course of the next few months. Approximately \$1.8 million per month would be necessary to meet private bar obligations beginning in February, 2011. Thus, funding of \$3.6 million would cover obligations through

March; \$5.4 million would meet obligations through April; and \$7.2 million would cover obligations through May.

In its request, the SPD did not identify available funds to address the projected shortfall. While, according to the November 19, 2010, report from DOA, there is an available gross balance of \$10.1 million in the general fund at the end of the 2010-11 state fiscal year, the Committee does not have the authority under s. 13.10 to transfer unappropriated monies.

The question before the Committee becomes the availability of appropriated funds for transfer to the SPD. To the extent that appropriated monies are not available for transfer to fully fund the private bar shortfall, the Committee might still identify partial funding sources. Partial funding would allow the SPD to delay the point at which private bar payments would cease in 2010-11.

Depending upon the level of funding the Committee decides to provide, it may be possible to fund all, or a portion of, the SPD request from amounts currently in the Joint Finance Committee's supplemental appropriation. Currently, \$9,194,500 GPR remains in the Committee's GPR supplemental appropriation to provide emergency supplementation under s. 13.10. Of this amount, \$8,897,500 GPR is reserved by prior legislative action, as follows: (a) \$4,590,400 GPR to address possible increased costs associated with operating while intoxicated (OWI) law changes under 2009 Wisconsin Act 100; (b) \$2,313,400 GPR for pupil assessments to contract for and administer the Wisconsin knowledge and concepts examinations in grades three, four, eight, and 10, including a newly developed standardized alternate assessment for students with severe disabilities, which is required under the federal No Child Left Behind law (under a separate s. 13.10 request currently before the Committee the Department of Public Instruction is seeking the release of this funding); (c) \$1,000,000 GPR to the Department of Children and Families for an automated attendance tracking system (under a separate s. 13.10 request currently before the Committee the Department of Children and Families is seeking the release of this funding); (d) \$543,700 GPR for database upgrades to the Department of Corrections' sex offender registry to comply with the federal Sex Offender Registration Notification Act; and (e) \$450,000 GPR to support the Wisconsin Quality Home Care Authority (WQHCA) in the event that the Department of Health Services determines that the program may not be partially supported with federal medical assistance administrative funding. In addition, \$297,000 GPR in unreserved balances remains in the Committee's appropriation.

Those amounts are shown below:

Reserved Amounts	
OWI Law Changes	\$4,590,400
DPI -- Pupil Assessments	2,313,400
DCF -- Automated Attendance Tracking	1,000,000
DOC -- Sex Offender Registry	543,700
DHS -- Quality Home Care Authority	<u>450,000</u>
Subtotal	\$8,897,500
Unreserved Amount	<u>297,000</u>
TOTAL	\$9,194,500

OWI Law Changes. On March 16, 2010, the Committee released \$4,209,600 for implementation of the OWI legislation. There are no pending, nor known planned requests for the remaining \$4,590,400. Thus, this amount could be transferred to the SPD.

DPI -- Pupil Assessments. As indicated in the s. 13.10 paper on this item, DPI has available federal funds for the testing program that could be used instead of the \$2.3 million GPR in the Committee's appropriation.

DCF -- Automated Attendance Tracking. Similar to the DPI request, the Department has available federal funding that could be used instead of the \$1.0 million GPR in the Committee's appropriation.

DOC -- Sex Offender Registry. In order to access this \$543,700 GPR, legislation must be enacted. Thus, at this time, the funding would be available for the SPD's shortfall.

DHS -- Quality Home Care Authority. The Department of Health Services has indicated that the \$450,000 in the Committee's appropriation is not needed by the Department.

Unreserved Amount. The \$297,000 GPR remains for use to fund the SPD or other supplements that might come before the Committee prior to the end of the fiscal biennium.

Finally, as noted previously, the SPD has a constitutional and statutory obligation to provide counsel to the indigent. Under s. 20.903 of the statutes, an agency cannot commit funds before they are appropriated. The Office has raised concerns that it could risk violating this statutory section if it continued appointing cases to private bar attorneys without a reasonable expectation that funds will be available to pay the bills at the time they are submitted.

ALTERNATIVES

A. Supplemental Expenditure Authority

1. Provide \$9,500,000 GPR in one-time funding to the Office of the State Public

Defender's (SPD) biennial private bar and investigator reimbursement appropriation [s. 20.550(1)(d)] in 2010-11, to address a shortfall in funding for private bar reimbursements.

2. Provide \$8,900,000 GPR in one-time funding to the SPD biennial private bar and investigator reimbursement appropriation [s. 20.550(1)(d)] in 2010-11, based on a revised SPD estimate, to address a shortfall in funding for private bar reimbursements.

3. Provide \$9,810,000 GPR in one-time funding to the SPD biennial private bar and investigator reimbursement appropriation [s. 20.550(1)(d)] in 2010-11, to address a shortfall in funding for private bar reimbursements. This alternative would provide an additional \$910,000 GPR in funding to pay private bar bills that were received more than six months after the conclusion of the case.

4. Provide \$8,017,900 GPR to the SPD biennial private bar and investigator reimbursement appropriation [s. 20.550(1)(d)] in 2010-11, to address a shortfall in funding for private bar reimbursements. This alternative would reduce the SPD estimate by \$882,100 GPR to reflect unutilized salary and fringe benefits funding that was utilized to pay some private bar obligations in 2009-10.

5. Provide funding to the private bar appropriation [s. 20.550(1)(d)] in 2011 sufficient to meet obligations thru:

a. March:	\$3.6 million
b. April:	5.4 million
c. May:	7.2 million

B. Source of Appropriated Funding

1. Transfer available balances in the Joint Committee on Finance GPR supplemental appropriation in 2010-11, to the SPD biennial private bar and investigator reimbursement appropriation. Available reserved balances for this purpose will be determined by the Committee, including actions taken by the Committee under s. 13.10 requests currently before the Committee from the Departments of Public Instruction and Children and Families.

a. OWI Law Changes	\$4,590,400
b. Pupil Assessments	2,313,400
c. Automated Attendance Tracking	1,000,000
d. Sex Offender registry	543,700
e. Quality Home Care Authority	450,000
f. Unreserved Amount	297,000

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