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Bill to increase SPD private bar rate dies as Legislature adjourns for the year

ADAM KORBITZ

May 12, 2010 – When the Legislature adjourned its regular session in April 2010, it also left unfinished a bill that would have significantly increased the hourly rate for private bar State Public Defender appointments from \$40 to \$70.

The State Bar of Wisconsin has **long supported** legislation to increase the rate, such as **Assembly Bill 224**, which was introduced in April 2009 by Representative **Frederick Kessler**.

On March 9, 2010, the Assembly's Committee on Judiciary and Ethics tied 4-4 on whether to recommend the bill to the full Assembly. Four Democrats voted for the bill, while all four Republicans on the committee voted against it. Despite the tie vote, the committee's chair, Representative **Gary Hebl**, reported the bill out of committee.

Because the legislation included the allocation of state funds, legislative leaders referred it to the Joint Finance Committee, which would have had to approve the bill before it could have been scheduled for a full vote of the state Assembly. The bill died without further action in Joint Finance. Similar legislation was not introduced in the state Senate.

Bill languished in committee for most of session

At a well-attended **public hearing** on June 2, 2009, then-President Diane Diel **testified** in support of AB 224 on behalf of the State Bar.

"Attorneys who accept public defender appointments play a fundamental role in maintaining one of our most important institutions – an honest, fair and effective criminal justice system. Wisconsin's long-outdated hourly rates for private practice attorneys who take public defender cases makes it difficult for attorneys to accept State Public Defender (SPD) appointments and run a successful small business, resulting in delays and postponements of cases," Diel told legislators at last year's public hearing on AB 224.

After that public hearing, State Bar lobbying staff delivered to committee members the names of more than 130 private bar attorneys who support the legislation but could not attend the hearing, as well as more than **30 letters** favoring the bill from State Bar members.

In July 2008, Diel **wrote** to Gov. Doyle, urging him to take steps to improve compensation for defense attorneys who take SPD private bar cases in order to boost retention of experienced lawyers on the private bar list. She **renewed** that call in October 2008 and again **last year**.

On May 5, 2010, State Bar President-elect Jim Boll, who will begin his term as President in July 2010, **reiterated** the need for action at his swearing-in ceremony. Boll pledged to work with the **Wisconsin Association of Criminal Defense Lawyers** and others to raise the rate to a level that fairly compensates participating attorneys and is sufficient to attract qualified lawyers to accept public defender appointments.

The State Bar's Board of Governors has a public policy position in favor of raising the private bar rate, which states that the State Bar "supports private practice lawyers' compensation for public defender appointments at a rate that fairly compensates lawyers for their time. Rates of compensation should be equal to those set by the Wisconsin Supreme Court for court-appointed attorneys."

The State Bar's Government Relations team has established a separate **web page** dedicated to the SPD private bar issue.

During the 2006-2007 fiscal year, the Office of the State Public Defender appointed over 142,000 cases to attorneys in Wisconsin and nearly half of those cases were assigned to private practice lawyers. The hourly rate they receive has not been increased since 1992, and in fact was cut to its current level in 1995.

While AB 224 languished in the Legislature, however, legislators passed and Gov. Jim Doyle **signed** into law

legislation expanding financial eligibility for the appointment of a public defender.

Gov. Doyle signed 2009 Wisconsin [Act 164](#) into law on March 15, 2010. The bill expands state financial eligibility for public defender representation from the antiquated 1987 AFDC limits to current W-2 limits, which generally are 115 percent of the federal poverty level.

Beginning in June 2011, the bill authorizes hiring 32 new SPD staff attorneys and 17 support positions to accommodate the anticipated increase in the State Public Defender's caseload at an estimated cost of approximately \$4.6 million annually.

State Bar of Wisconsin supported the eligibility legislation.

Private bar appropriation expected to run out of money at least five months early

In a related development, State Public Defender Nicholas Chiarkas announced recently that the SPD's private bar appropriation will run out of money sometime in February 2011, at least five months prior to the end of the 2010-11 fiscal year.

In a letter to the Joint Committee on Finance, Chiarkas estimated the biennial shortfall to be between \$9.5 million and \$10 million.

Chiarkas told a local news service his agency is "cautiously hopeful" the Department of Administration and the Legislature will provide the funds necessary to pay private bar lawyers.

Chiarkas also said the projected deficit continues a long history of legislative under-funding of the biennial private bar appropriation, resulting in deficits during the second year of the biennium, which ends on June 30, 2011.

When the Legislature passed the current state budget in 2009, it did not include the SPD's request to fully fund the private bar appropriation and actually reduced the appropriation by \$1.5 million, according to Chiarkas.

Petition filed to increase Supreme Court rate for court-appointed attorneys

While AB 224 has died in the Legislature, several Wisconsin attorneys have [filed](#) a petition with the Supreme Court to increase the rate for court-appointed attorneys to \$80 per hour.

The group filing the petition includes eight past presidents of the State Bar of Wisconsin.

If approved by the court, the [petition](#) would increase the Supreme Court rate under [SCR 81.02](#) to \$80 per hour and index the rate to the consumer price index. The current Supreme Court rate for court-appointed attorneys such as GALs is set by rule at \$70 per hour. However, this rate does not apply to the SPD private bar appointments, which are set by statute at \$40 per hour.

While the petition would not directly set SPD private bar rates, it would provide that payment of an hourly rate less than the rate set forth in SCR 81.02(1) for legal services rendered pursuant to appointment by the SPD under Wis. Stat. section [977.08](#) is unreasonable.

On May 4, 2010, the State Bar's Board of Governors [voted](#) to support the petition.

The attorneys who filed the petition March 5 also filed a supporting [memorandum](#), which notes that the current rate of compensation in federal court for appointed counsel in criminal cases is \$125 an hour. The memorandum also states that the proposed amendment would permit lawyers representing indigent criminal defendants and the defendants themselves to assert that a rate of compensation less than \$80 per hour is unreasonable, by Supreme Court Rule.

The memorandum further states that, although the proposed rule effectively would double the rate of hourly compensation for counsel representing indigent criminal defendants, the fiscal impact of the proposed change is unclear and would require study. According to the memorandum, "Variables include the legislature's response; the possibility that it would be cost-effective to increase the number of staff attorneys employed by the State Public Defender to reduce the number of cases appointed to private counsel; and the possibility that expense of indigent defense would shift from the counties entirely back to the state if the legislature responds appropriately, or would not."

The Supreme Court is not expected to hold a hearing on the petition before its next term, which begins in September 2010.

Continue to monitor WisBar.org and visit the State Bar's [Government Relations page](#) for updated information on these issues.

By [Adam Korbitz](#), Government Relations Coordinator, State Bar of Wisconsin

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