

THE WISCONSIN STATE PUBLIC DEFENDER ORGANIZATION

The United States Constitution and the Wisconsin Constitution guarantee the right to be represented by counsel when an individual is accused of a crime. This right is a cornerstone of the adversarial system of justice used in the United States. The United States Supreme Court and the Wisconsin Supreme Court applied that right to individuals who cannot afford to hire an attorney by requiring that the government provide counsel to represent that individual.

Federal (National) Level

When an individual is accused of a federal crime (meaning a statute enacted by the United States Congress), the federal defender system appoints counsel. The Federal Public Defender system follows one of two models.

The first model, the Federal Public Defender, is a federal agency established in 1964 by Congress. This model operates under the Judicial Branch of the federal government, specifically administered by the Administrative Office of the United States Courts. Federal Defenders are appointed to a 4-year term by the Court of Appeals of the circuit in which the office is located. The Congress placed this appointment authority in the Court of Appeals rather than the District Court in order to insulate, as best as possible, the Federal Public Defender from the involvement of the court before which the Defender principally practices. The Federal Defender in turn hires lawyers and support staff and manages the office for each individual judicial district in their circuit. The Federal Defender may appoint cases to staff or panel attorneys. Panel attorneys are private attorneys who agree to take appointments and be paid by the government. These panel attorneys are not government employees.

The second model is that of the community defender office. The community defender offices are federally funded non-profit corporations that receive federal grant money to staff the offices. This model may also appoint cases to staff or panel attorneys.

Although both types of defender offices are supported by public funding, they do not take direction from the government as to the operation of the offices. They hire full-time staff lawyers who represent indigent clients charged with crimes against the United States Government (the United States Criminal Code). The United States Attorneys General are the prosecutors of these alleged crimes.

State Level: In General

When an individual is accused of a state crime (i.e. a statute enacted by a state legislature), different jurisdictions use different models to provide public defender counsel. One model is a state-wide public defender office, in which the office is an agency of state government and the employees are state employees. Another model is a county public defender office, in which the office is an agency of county government (a

subunit of state government) and the employees are county employees. A third model is a not-for-profit agency, often referred to as Defender Service, Defender Office or a Legal Aid Society, that is paid to provide legal services. Another model is to use a panel of private attorneys who are compensated for their appointed work on an hourly basis or by the case.

In Wisconsin, the delivery system is the Wisconsin State Public Defender's Office (SPD), a state-wide public defender office.

State Level: Wisconsin

History:

The SPD is a law office created by the Wisconsin Legislature to provide legal services in Trial (original jurisdiction) and Appellate Courts to individuals charged with state crimes. The SPD also provides legal services to juveniles charged with delinquent acts and individuals in certain civil cases. The SPD is a state agency: it receives its funding from the state legislature and is subject to various state laws, rules, procedures and regulations regarding personnel, contracting, and other administrative functions. The SPD is an Executive Branch, independent agency because an oversight board comprising nine non-partisan members hires the agency head. This Board provides independence from the political appointment process and direct appointment by the Governor used in most other executive branch agencies.

The SPD is considered a "mixed model" delivery service because some cases are appointed to staff attorneys who are employees of the SPD law office and some cases are appointed to private attorneys who are not employees of the SPD.

Until 1977, Wisconsin used a different model. Between 1965 and 1977, Wisconsin divided the Trial Court and Appellate Court appointment responsibilities between the Wisconsin Supreme Court for appellate cases, and individual County Court systems for trial or original court jurisdiction cases. Wisconsin comprises 72 counties. A county is a local unit of government in which the citizens of each county elect a district attorney as the chief law enforcement officer. This county district attorney enforces the criminal laws enacted by the Wisconsin State Legislature. Under the county-based appointment system, the judge or his/her designee handled the administrative aspects of appointment of counsel: determination of financial need, approval of investigative and expert services needed to defend the case; oversight and review of the attorney's bill and payment of that bill. In 1977, the Wisconsin Legislature transferred the appellate case appointment and oversight responsibilities from the Judicial Branch to the Executive Branch by creating the SPD and expanding those responsibilities to include trial cases.

Organizational Structure of the SPD:

To carry out these new and expanded responsibilities, the Wisconsin Legislature established the Public Defender Board. This Board comprises nine non-partisan members who are selected by the Governor and confirmed by the State Senate to

staggered three-year terms. This Board hires the State Public Defender. In turn, the State Public Defender supervises the operation, activities, policies and procedures of the SPD.

The SPD comprises four divisions: Trial, Assigned Counsel, Appellate, and Administrative. In addition, the SPD maintains an Office of Legal Counsel, an Office of Training and Development and a Chief Information Officer. The agency's budget is just over 78 million dollars a year and is budgeted for two years at a time. The SPD has approximately 550 employees deployed in 38 field offices and provides defense services in every Wisconsin county.

The Trial Division has 36 local offices that provide legal services in the 72 counties of Wisconsin. The Division provides legal representation at the trial level to indigent persons in adult criminal, civil commitment (including sexually violent persons' commitment), probation or parole revocation, contempt of court and termination of parental rights cases. In addition, our trial offices also represent juveniles who are subject to delinquency, commitment, paternity, children in need of protection and termination of parental rights proceedings.

The Assigned Counsel Division (ACD), located in the central administration office in Madison, provides support services to certified private attorneys appointed to SPD cases. The ACD certifies private attorneys for trial level representation, provides trainings for private attorneys, processes investigator and expert requests for private bar attorneys in SPD cases and administers all SPD private bar attorney payments. The ACD shares responsibility with the Trial and Appellate Divisions for monitoring private attorney performance. Currently, approximately 1200 private bar attorneys affiliate with the SPD to provide defense services in conflict and surplus cases.

The Appellate Division has two offices that provide post-conviction or post-judgment legal representation to indigent persons at the trial and appellate levels for all Wisconsin counties. This Division certifies private bar attorneys for eligibility to receive appellate level SPD appointments, assigns the conflict or surplus cases to those attorneys, monitors performance and provides litigation assistance in private bar Supreme Court cases. The Division also reviews requests for counsel outside the direct appeal process and acts upon complaints about attorneys from clients or the courts.

The Administrative Division is responsible for providing staff support services in areas such as budget preparation, fiscal analysis, purchasing, payroll and personnel.

Specifics of the SPD:

The SPD provided legal services to approximately 142,900 indigent clients in the fiscal year that ended June 30, 2009. SPD staff attorneys represent approximately 58 percent of those clients. Approximately 38 percent are assigned to certified private bar attorneys on a rotational basis at an hourly rate of pay, and 5 percent (misdemeanors only) are assigned to certified private bar attorneys via fixed fee contracts (the percentages do not total 100 percent due to rounding).

In most circumstances, individuals are provided representation when they are charged with a crime. In some circumstances, especially in more serious cases, such as a homicide or sexual assault, an individual will be provided counsel prior to formal charging.

The Wisconsin Public Defender's Office is also available by pager (or phone) outside of normal business hours. The availability of attorneys outside of normal business hours is intended for situations when an individual who is the suspect in a crime or actually charged with a crime is in need of assistance. Such situations could be for requests for counsel, interrogations or line-ups. Our goal is to promote access to counsel whenever possible. Results in a study showed that 23 percent of the early representation cases avoided felony charges, 20 percent avoided misdemeanor charges, 10 percent resulted in less serious charges and 12 percent resulted in no charges filed.

Representation of Juveniles

In Wisconsin, all juveniles are considered eligible for public defender representation. If the parents are found to not be indigent, then the court can require recoupment from the parents. In Wisconsin Statutes Sec. 938.23(6), counsel is defined as "an attorney acting as an adversary counsel who shall advance and protect the legal rights of the party (in these cases, the juvenile) represented and who may not act as guardian ad litem for any party in the same proceeding". An attorney cannot advance arguments or positions contrary to their client's wishes. This is true even if the attorney feels the juvenile's best interests are not furthered by the juvenile's position.

Counsel for the juvenile must observe the ethical requirements of the Professional Responsibility Code, which includes:

- As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.
- As negotiator, a lawyer seeks a result advantageous to the client but consistent with the requirements of honest dealings with others.
- As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications.

Representation in Mental Commitments

In Wisconsin, the appointment of adversary counsel is required for all persons subject to civil commitment petitions and all are considered eligible for public defender representation. However, the State Public Defender does not provide representation in proceedings to have a person declared incompetent, unless the guardianship proceeding is coupled with a petition for protective placement or protective services.

In Wisconsin Statutes, "mental illness" for purposes of involuntary commitment, means a substantial disorder of thought, mood, perception, orientation, or memory which grossly impairs judgment, behavior, capacity to recognize reality, or ability to meet the ordinary demands of life, but does not include alcoholism.

Commitment cases include cases in which a petition has been filed against an adult under the Mental Health Act. Reexamination hearings (including hearings to modify or cancel a commitment order), recommitments and changes in placement brought after the original case is closed, are counted as separate commitment cases. Cases involving children as subjects of commitment proceedings are classified as “other juvenile cases”.

Use of Legal Professionals: Client Service Specialists

The Office of the State Public Defender currently has authorized 12.75 full-time equivalent Client Services Specialist (CSS) positions. A CSS is a professional who has a social work background with specialized knowledge and skill in assisting SPD clients. The major responsibilities of a CSS are gathering pertinent information about individual clients; investigating placement, treatment, and educational opportunities and preparing a written recommendation for use at sentencing or revocation hearings. SPD attorneys rely heavily upon CSS staff to prepare coherent sentencing plans that offer reasonable alternatives to long prison sentences.

At a sentencing hearing, both the prosecutor and defense attorney typically present sentencing recommendations. The prosecutor’s office assists the victim, if he or she wishes to participate, in having a voice at the sentencing hearing. A report by a CSS is usually the most effective tool available to defense counsel to balance the factual assertions and recommendations made by the state.

Often a CSS is requested to assist in these cases to investigate and develop an alternative to incarceration, which can both promote the successful reintegration of the client into the community and save considerable costs for imprisonment that would otherwise be ordered. The daily cost to incarcerate an individual in a state institution is \$81.22 (\$29,647 per year). Significant cost savings can be achieved by developing and implementing appropriate alternatives to incarceration.

The SPD Appellate Division also relies extensively on sentencing specialists in direct appeal cases in which the trial attorney inadequately developed or presented recommendations for sentencing to the trial court, or presented inaccurate information at sentencing. In these cases, the CSS reviews the court transcript, analyzes the sentencing recommendations and develops more appropriate sentencing alternatives for consideration by the Circuit Court and the Court of Appeals.

In many cases, particularly non-violent, first offense felony cases, the attorney will advocate for probation instead of a prison sentence. Because the client has more at stake and because the court has more sentencing alternatives, there is a greater need for CSS assistance in truth-in-sentencing cases in which the client’s exposure to incarceration and extended supervision are typically greater than they would otherwise have been.

The sentencing proceeding is now the client’s primary opportunity to present mitigating factors and dispositional alternatives to the sentencing authority (there is a newly created and limited right for inmates to seek a judicial sentence modification, but only after

serving a minimum of 75% of the original term of imprisonment). The assistance of a CSS presents pertinent information to the court.

Advantages of the Wisconsin SPD Model

There are many advantages to the Wisconsin SPD model, a state-wide, Executive Branch, public defender agency.

A state-wide public defender model ensures consistency and uniformity in applying the financial qualification to individuals charged, regardless of the county in which they are charged. In Wisconsin, criminal statutes are enacted at the state legislative level and apply to acts within Wisconsin. However, state crimes are prosecuted at the county level by locally-elected district attorneys. Without a state-wide financial eligibility application, two persons with similar financial circumstances who allegedly commit similar crimes in two different counties could have different financial eligibility standards applied, potentially resulting in appointment in one case and no appointment in another.

Also, a state-wide public defender model permits the agency to employ a rigorous selection process for our staff hiring. That plus annual performance review and day-to-day supervision give us the consistent high quality service from staff. Managers and leaders of the agency have direct, supervisory control over staff. This monitoring includes reviewing and evaluating the quality of legal representation provided by an attorney and other professionals and establishing and enforcing performance measures. The management of the SPD has the ability to intercede in an individual case if a staff attorney is not providing competent representation.

Additionally, a state-wide, Executive Branch model prevents judicial control or interference in legal representation because the requests for funding (for expert witnesses, for example) are directed to the SPD division heads for approval, not to the judge who presides over the case. Also, the rotational system of appointment of private attorneys used by the SPD quells any perception that judges appoint attorneys who the judges like, regardless of qualification. The appointed attorneys are shielded from worries about angering the judge who appoints them to cases. The appointed attorneys are free to pursue zealous and uncompromised representation of their clients.

Also, a state-wide, Executive Branch, public defender model permits the agency to provide information on criminal justice issues to legislators, the governor's office, the courts, the media, the public and other interested parties.

AWARDS:

Mastery Level of the Wisconsin Forward Award: The Wisconsin State Public Defender's Office received the Mastery Level of the Wisconsin Forward Award (WFA). WFA is an organizational performance assessment and improvement program that collaborates with Wisconsin organizations including state agencies, to solve the issues of competitive performance, operational excellence and sustainability, leading to improved

economic performance, creating jobs and improving the quality of life in Wisconsin. It applies the national [Baldrige Criteria for Performance Excellence](#) to the leadership and operations of an organization to assess that organization's structure and foundation. The Criteria for Performance Excellence provides organizations with an integrated, results-oriented framework for implementing and assessing processes for managing all operations.

American Bar Association Dorsey Award: The American Bar Association's Government and Public Sector Lawyers Division honored State Public Defender Nicholas L. Chiarkas with the 2009 Dorsey Award. The Dorsey Award, a prestigious national honor that recognizes an outstanding public defender or legal aid lawyer, was presented to SPD Chiarkas for his 21 years of dedication to providing an effective indigent defense system in Wisconsin.

ONGOING INITIATIVES and ISSUES AT THE SPD

The State Public Defender's mission to promote justice throughout Wisconsin by providing high-quality and compassionate legal services, protecting individual rights, and advocating as a criminal justice partner for effective defender services and a fair and rational criminal justice system. In order to achieve this mission, the agency collaborates as a team to focus on the individual cases and clients. Teams include the attorney as well as the support staff, investigators, client service specialists and other staff personnel. All members are considered important to reach the best outcome for a client. As an independent state agency, the SPD has the delicate balance of maintaining itself as a law firm as well a branch of state government. The SPD is funded from the revenue generated by taxes and because of a fluctuating economy and differing priorities, the agency must work tirelessly to provide high quality services at an efficient cost. Leadership of the agency continuously re-examines the strategies to fulfill the mission to respond and adapt to changes in the political and economic environment.

Continued Advocacy against the Death Penalty

Under current law, no state crime in Wisconsin is punishable by death. Wisconsin is one of fifteen states that do not impose the death penalty. Wisconsin abolished the death penalty in 1853; however, almost every legislative session contains renewed proposals to re-enact the death penalty. The SPD vigilantly and consistently advocates against reinstating the death penalty. The Public Defender Board unanimously passed a resolution opposing any reinstatement of the death penalty in Wisconsin. Accordingly, the Wisconsin State Public Defender's Office continues to oppose the death penalty.

Continued Advocacy for Raising the Eligibility Standards for SPD Legal Services

The financial eligibility standards to qualify for appointment of counsel are linked to the now-obsolete federal standards. These eligibility standards have remained stagnant since 1987. Consequently, many individuals who are indigent do not financially qualify for SPD appointment of counsel. In the 2009-2011 State Budget Bill, the Wisconsin Legislature voted to increase the eligibility standards to 115 percent of the Federal Poverty Guidelines (FPG). The Governor vetoed this provision. Currently, 47 legislators are co-sponsoring legislation to increase these standards to 115% of the FPG. The Governor's Racial Disparity Oversight Commission unanimously passed a resolution on August 19, 2009 in support of this legislation. The SPD has worked with various legislators during at least the last four legislative sessions to increase the eligibility standards.

Continued Advocacy for Raising the Private Bar Compensation Rate

The Wisconsin Legislature created the SPD in 1977 and set reimbursement rate at \$45/hour for in-court work, \$35/hour for out-of-court work and \$25/hour for travel time. *Current* levels are \$40/hour for in-court and out-of-court work and \$25/hour for travel time. However, this SPD rate does not cover the typical attorney's office overhead; the national law office hourly overhead rate was reported to be \$64/hour. The low rate makes it difficult to find lawyers to take SPD appointments. The SPD's 2009-2011 budget request included a proposal to restructure the private bar, thereby addressing both cost and quality issues. This item was not included in the Governor's 2009-2011 budget proposal. Each SPD budget request for the last decade has included a request to address the private bar reimbursement rate.

Continued Advocacy for Eradicating Racial Disparity in the Criminal Justice System

Wisconsin leads the nation in disproportionate minority contact by law enforcement personnel. The relative ratio of African-American to Caucasian for new prison sentences is 444:22. In Wisconsin's prisons, nearly half of inmates are African-American, yet African-Americans represent just 6 percent of Wisconsin's population.

The SPD Board adopted a resolution in 2008 to direct the SPD's efforts to eradicate racial disparity and address the concern within the criminal justice system. In response, the SPD created a Racial Disparity Team in 2008 and identified the following five areas to focus our efforts to end racial disparity: litigation strategies, data-gathering, self-evaluation, talking points and partnerships. The 2009 SPD Annual Conference will focus on racial disparity, bringing in speakers both state and nationwide to share and discuss ways in which we, as individual advocates and as criminal justice system partners, can help end racial disparity.

Innovative Approaches to Addressing Veterans' Legal Issues:

Recognizing that veterans face a number of issues including and exacerbated by post-traumatic stress and alcohol and other drug use problems, the SPD developed the Wisconsin Veterans Intervention Program. The Wisconsin Veterans Intervention Program (WI-VIP) is a justice system-oriented, multi-faceted approach comprising veterans' Treatment Courts;

veterans' civil legal clinic; institutional treatment programming and justice system training. A key characteristic of veterans' Treatment Courts are the mentors that would work with the client-veteran both in and outside of court. The first veterans' Treatment Court is scheduled to start on September 17, 2009. In the Fall 2009, a holistic civil legal clinic designed to assist veterans is scheduled to open at the Frank J. Remington Center at the University of Wisconsin Law School. This clinic would address a range of civil-related issues such as loss of job and family matters, and will utilize the talents of law school students. The institutional treatment programming component of WI-VIP is focused on veterans who have been through the criminal justice system and find themselves confined in a correctional institution or on probation/parole. On June 29-30, 2009, the SPD and approximately 160 criminal justice system stakeholders including judges, prosecutors, defense attorneys, DOC staff and law enforcement officers participated in a training focused on best practices in addressing and treating veterans with post-traumatic stress disorder, substance abuse problems, reckless behaviors, and traumatic brain injuries.

**Holistic, Client-Centered Representation:
Treatment Oriented Courts:**

Treatment Courts reduce substance abuse, crime and recidivism and improve the efficiency of justice systems by providing community corrections alternatives to defendants. The types of Treatment Courts operating in Wisconsin are mental-health, drug, intoxicated driving, teen and veterans' courts. SPD staff serve on state and national associations of Treatment-Court professionals. Currently, the SPD is involved in the oversight committees for the various Treatment Courts operating in more than 20 Wisconsin counties.

Drug Treatment Courts

Treatment Courts typically conduct frequent review hearings to oversee treatment for drug abuse, alcohol abuse, or mental disorders. Treatment Courts may also focus on specific groups (such as veterans or children) that may have needs substantially different from those of other groups. The courts offer participants the opportunity to obtain a lesser sentence or dismissal of charges upon successful completion of the treatment program. The Treatment-Court model "calls for collaboration among various components of the criminal justice and substance abuse treatment systems to combine the coercive power of the court with effective and scientifically based treatment practices".

Generally, these courts are operated by a team comprising representatives of several agencies. For example, a Treatment Court team often includes a judge, prosecutor, probation agent, social worker, public defender, and law enforcement officer.

Quality Performance Measures:

In order to provide the highest quality representation for SPD clients, the office created a quality indicators work group, which worked to identify barriers to high quality attorney-client communication and ways to reduce barriers. The Wisconsin SPD defines high quality attorney-client communication as client-centered, timely, effective, confidential, honest and ongoing. High quality attorney-client communication meets the needs of both

counsel and client, creates a positive attorney-client relationship and maximizes the opportunity to achieve a positive outcome in the resolution of the case. A client-centered approach to attorney-client communication includes the following:

- Identifying problems from a client's perspective;
- Actively involving the client in the process of exploring potential solutions;
- Encouraging the client to make those decisions which are likely to have a substantial legal or non-legal impact;
- Providing advice that addresses the client's goals and objectives;
- Acknowledging the client's feelings, listening to the client's concerns and recognizing the importance of both; and
- Conveying a desire to help.

Effective communication clearly and accurately furnishes all relevant information to the listener, who in turn understands the information being communicated.

Investment in the Future of the Agency through Leadership Training

Since 2000, the SPD has offered a year-long Leadership Development Program designed to involve staff and managers in agency-wide issues. The program uses classroom presentations, mentors and a participant-developed project to introduce the intersection of law-office and state-agency management concepts and provide opportunities for real-life application of these concepts. In 2009, the SPD developed the Leadership Academy, a two-day intensive program designed for new managers and staff interested in management and leadership. The program focuses on the personal and professional development of leadership skills, including collaborative approaches to issue-identification and creative solutions. The program uses case studies and small group exercises to apply ideas.