

Senate Ways and Means Committee

April 7, 2021

HB 2363

Testimony of
Heather Cessna, Executive Director
Kansas State Board of Indigents' Defense Services
Proponent

Dear Chairman Billinger and Members of the Committee,

The Board of Indigents' Defense Services is tasked with providing constitutionally effective and fiscally efficient legal representation to all indigent persons in Kansas accused of state felony crimes. As such, maintaining robust assigned counsel panels with experienced attorneys serving our indigent clients is essential to our state mandate to appropriately administer these services to the people of Kansas.

Since 2006, K.S.A. 22-4507(c) has set the assigned counsel rate BIDS pays its appointed, private counsel at \$80 per hour, except under very limited circumstances. However, at this point, if BIDS wanted to pursue additional funding and pay an assigned counsel rate higher than \$80 per hour, that statutory language would potentially prevent BIDS from doing so.

Why HB 2363 is Necessary

BIDS' current \$80 per hour statutory rate under K.S.A. 22-4507(c) was set fifteen (15) years ago. A recent KBA study determined that the average hourly market rate in Kansas for legal services is around \$225 per hour.¹ This means that at \$80 per hour, BIDS' assigned counsel rate is roughly 64% below the going market value of private legal services in Kansas.

Low hourly rates for assigned counsel deter counsel from joining or staying on our assigned counsel panels because they are not paid sufficiently for the time they are ethically required to spend on their cases. Low hourly rates can also unintentionally incentivize attorneys to take more cases than they should in order to make ends meet. Low hourly rates can also unintentionally incentive attorneys to go to trial less often, potentially because pleas are paid better for the time spent on them than jury trials.²

Because our public defender offices have had to refuse new cases more and more often due to staffing and caseload concerns, those refused public defender cases have to go somewhere. They end up being distributed to our assigned counsel more frequently and in much larger numbers than they used to be even just five years ago.³ The added pressures of more cases going to our assigned counsel, combined

¹ A Flash Report on the 2017 Economics of Law Practice Survey in Kansas, By Kansas Bar Association, September 2017, pg. 7.

<https://cdn.ymaws.com/www.ksbar.org/resource/collection/D6AEF056-5088-4555-B207-2685976B9173/2017EconomicSurvey.pdf>

² Agan et al., Is Your Lawyer a Lemon? Incentives and Selection in the Public Provision of Criminal Defense, Review of Economics and Statistics (2019).

³ See BIDS Report on the Status of Public Defense in Kansas, September 2020, pgs 15-26 for greater detailed explanation of the relationship between caseloads and staffing in our public defender offices and increasing assigned counsel caseloads.

<http://www.sbids.org/forms/Report%209-30-2020.pdf>

with this crushingly low hourly rate, and our caseload caps based in part upon that rate, is causing many of our assigned counsel to leave our panels. These issues are also deterring other attorneys from joining those assigned counsel panels. This is impacting our district courts' ability to retain qualified assigned counsel on their lists for all of our impoverished clients that need an attorney.

We believe HB 2363 is needed so that BIDS has the flexibility to respond to those pressures and hopefully head off a looming Sixth Amendment assigned panel crisis. Amending HB 2363 would ensure that, with appropriate funding, BIDS may periodically increase that assigned counsel rate to respond to these pressures and alleviate this looming panel crisis.

What HB 2363 Does

As originally written, HB 2363 inserted a minor language change into K.S.A. 22-450 (c). This change would have amended language indicating that the BIDS assigned counsel rate is \$80 per hour, to instead indicate that the BIDS assigned counsel rate is "no less than" \$80 per hour.⁴ Essentially, this language clarification would make it clear that BIDS is not capped at the hopelessly outdated and unconscionably low \$80 per hour assigned counsel rate.⁵

During hearings in the House Transportation and Public Safety Budget Subcommittee, the committee amended the proposed language of HB 2363 to indicate instead that the rate of attorney compensation will not exceed \$100 per hour through June 30, 2023, and at a rate not to exceed \$120 per hour on and after July 1, 2023, with some limited exceptions. While the Board would prefer not to have a cap on our rate that would require frequent statutory amendments every time the Board finds the need to raise our assigned counsel rate, these amendments as proposed by the House allow us in the short term to accomplish the same goal as the original language—to allow the Board to proactively address our problem of low compensation for our assigned counsel in the immediate future—while providing the legislature some reassurance with an upper limit on that range. These amendments passed the House by a vote of 116 to 8.

This change would not, in and of itself, actually increase the Board's assigned counsel rate. Rather, once this statutory change is made, the BIDS Board would have the authority to vote to increase the rate and the legislature would have to allocate the appropriate funding to support that increase. Additionally, the corresponding changes to the BIDS reasonable rates of compensation in K.A.R. 105-5-6 and 105-5-7 based on that new rate would have to go through the normal administrative regulation amendment process.

If the committee is interested in amendments to the amended language in the bill, we are certainly open to a discussion about potential changes to the proposed language.

⁴ There are a few specific exceptions to that rate already contained in the statute. This language change would not affect any of those exceptions.

⁵ Attached at the end of this testimony is some additional information regarding the assigned counsel rates of pay in other states for comparison.

HB 2363 Solves Our Present-Day Concerns and Allows Time to Plan for the Future

This amendment gives BIDS the long needed authority to make some immediate adjustments to our assigned counsel rate to address the ongoing needs of our Board and the needs of our assigned counsel panels.

While the actual rate itself will still be subject to Board approval and legislative funding allocations, the statutory language will no longer act as an immediate road block to keeping our assigned counsel adequately compensated for their work and our assigned counsel panels filled with experienced, quality counsel. We believe this is a necessary change to allow BIDS the ability to proactively address a potential assigned counsel panel crisis and to make reasonable adjustments to our rate for the next few years.

BIDS does currently have a pending budget request aimed at funding an increase to the assigned counsel rate, if these statutory amendments can be made. That request is an enhancement for our FY 2022 budget of around \$3.5 million dollars to raise the rate from \$80 to \$100 per hour. I've attached at the end of this testimony a breakdown of what a prorated increase from \$80 to \$100 might look like for your information.

I'm always happy to provide any other information that the committee may find helpful. Thank you for your consideration.

Heather Cessna
Executive Director
Kansas State Board of Indigents' Defense Services
hcessna@sbids.org
785-296-6631

Cost Breakdown of Prorated Increase to Assigned Counsel Rate

For FY 2022, BIDS has requested a budget enhancement to increase our assigned counsel hourly rate from \$80 to \$100 an hour.

For these cost estimates, we have assumed the estimated number of assigned counsel hours per year (in a non-COVID affected year) would be around 178,458 hours. This was our original assigned counsel hours projections for FY 2021 based on our FY 2019, pre-COVID assigned counsel hour data. As a result of ongoing case delays related to COVID-19, our actual assigned counsel case hours may be less than what was originally projected.

The cost breakdown, for this requested \$20 raise to the hourly rate is as follows:

Proposed Increase to BIDS Assigned Counsel Statutory Rate

Hourly Rate	% Below Average Private Counsel Rate**	Increase Over Current Rate per Hour	Additional Budget Cost of Rate increase	Total Anticipated Assigned Counsel Rate Costs
\$80*	-64%			\$17,335,676
\$85	-62%	+\$5	\$892,290	\$18,227,966
\$90	-60%	+\$10	\$1,784,580	\$ 19,120,256
\$95	-58%	+\$15	\$2,676,870	\$ 20,012,546
\$100	-56%	+\$20	\$3,569,160	\$20,904,836

*Current FY 2020 rate based on K.S.A. 22-4507(c)

**Based on a 2017 KBA, the average private counsel rate in Kansas was \$225 per hour.

Comparing Kansas' \$80 per Hour Rate

There appear to be at least 12 states that pay their non-capital assigned counsel cases more than Kansas' \$80 per hour rate. Those states include:

Arkansas (\$90),

Colorado (\$85),

Hawaii (\$90),

Indiana (\$90),

Massachusetts (\$100),

Nevada (\$100),

New Hampshire (\$100),

New Mexico (\$85),

Rhode Island (\$100),

South Dakota (\$97),

Virginia (\$90),

Wyoming (\$100).

There may be more than that, but there were a number of states where detailed information was not immediately available.⁶

⁶ VA Indigents Defense Commission 2020 Annual Report, Appendix B: State Comparisons Chart: http://www.vadefenders.org/wp-content/uploads/2020/10/FY-2020_VIDC-Annual-Report.pdf

Surrounding States Assigned Counsel Rate Comparison Chart

State	Statutory Hourly Rate	Caps	Authority
Kansas	\$80 per hour	<p>NonTried Off Grid: \$1700 SL 1-5: \$1600 SL6-10: 1200 Drug with 6+ hrs of court: \$1600 Drug with less than 6 hrs of court: \$1200</p> <p>Tried Off Grid: \$8,000 SL 1-3, DSL 1: \$8,000 SL 4, DSL 2-4: \$3200 SL 5-10, DSL5 \$2560</p> <p>*In KS, caps can be exceeded with judge approved exceptional order, see KAR 105-5-8.</p>	KAR 105-5-3, 105-5-6, 105-5-7.
Colorado	\$95 Capital Cases \$85 Type A Felony \$80 Type B Felony	<p>Class 1 Felony & unclassified felonies where max penalty is death, life, or 51+ years: \$30,000 (with trial), \$15,000 (without trial)</p> <p>Class 2 Felony, DF1: \$13,000 (with trial), \$6,500 (without trial)</p>	C.R.S. 21-2-101 (2007), C.R.S. 21-2-103 (2018), Chief Justice Directive 04-04 (Amended July 2018).

		Class 3-6 Felonies, DF 2-4: \$8,000 (with trial), \$4,000 (without trial)	
Missouri	Flat Fee Contracts July Trial- \$1,500 for 1 st day, \$750 for each additional day Bench Trial \$750/day, prorated	1 st D Murder: \$10,000 Other homicide: \$6,000 Felony Class A/B- Drugs: \$750 Felony Class A/B- Other: \$1,500 Felony Class A/B – Sex: \$2,000 Felony Class C/D/E—Drugs: \$750 Felony Class C/D/E/-Other: \$750 Felony Class C/D/E- Sex: \$1,500	Sec 600.042 R.S. Mo (2019); Sec. 600.021 R.S. Mo (1986).
Nebraska	Set by Court or Public Defender Commission	N/A	R.R.S. Neb Sec 29- 3927 (2014); R.R.S. Neb Sec 29- 3905 (1990)
Oklahoma	Flat Fee Contracts	Felony: \$3,400	22 Okl.St. Sex 1355.8 (2001) includes provisions for exceeding caps.