

STATE OF KANSAS

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JOINT CORRECTIONS &  
JUVENILE JUSTICE OVERSIGHT

HOUSE OF REPRESENTATIVES

**Testimony Regarding HB 2419**  
January 18, 2012

Chairman Colloton and members of the House Corrections and Juvenile Justice Committee, thank you for the opportunity to appear before you today and provide testify in **support of HB 2419**.

**HB 2419** was one of the bills introduced by the Legislative Post Audit Committee to address a problem regarding who receives attorney services paid for by taxpayers.

During the 2011 Session I received a call from the Montgomery County Attorney about a concern he had regarding taxpayer funding of legal counsel for indigent defendants. He stated that he was of the opinion that we (taxpayers) were providing attorneys for individuals that could and should pay their own attorney fees. He cited examples of defendants whom, during the course of their trial or pre-trial discovery process, it was discovered had sufficient, and sometimes more than sufficient, incomes and/or assets to provide for their own legal defense. He further stated he believed it was not just a Montgomery County problem, but that he had had conversations with other attorneys in Kansas who indicated they too had seen cases where the defendant should be paying for their attorney rather than the State.

Initially I was convinced that the Board of Indigent Defense Services (BIDS) was not properly doing their job. I was wrong. There is a problem, but it does not lie with the BIDS

I requested our Post Auditors develop a scope statement to present to the Legislative Post Audit Committee to see if I could get an audit approved; which would hopefully show if there was indeed a problem. Once the scope statement was written, I then made my case to the Legislative Post Audit Committee for approval of the audit and was able to obtain bipartisan support for approval of an audit.

When the audit, "*Reviewing Payments Made for Indigent Defense Services*" was presented to the Post Audit Committee last July, it revealed there is a problem.

Attached to my testimony is the "*Highlights*" of the Audit Report. As you can see, there are several issues that need or needed to be addressed. The Highlighted Report says, "*In 13 of 104 cases we reviewed, the defendant did not appear to be indigent.*" I might point out 13 of 104 is twelve and a half percent (12.5%). On page eight of the full report it says, "*Overall, we identified 13 defendants who didn't appear to be indigent. In most cases, this determination was easy to make. For example, in four cases the defendants' total income was more than \$55,000 for the years in which they were found indigent. This included one defendant who earned more than \$90,000.*" Those figures do not indicate indigence to me.

House Corrections and Juvenile Justice  
Committee  
2012 Session  
Date 1-18-12

The BIDS provides defense services for nearly 25,000 cases per year, and has an annual budget of over \$20 million. If the 104 cases our Post Auditors reviewed are an indication, and I believe they are, than we (taxpayers) are paying for legal representation for some 2,000-3,000 cases per year that don't meet the qualifications.

Although there is much more contained in the Post Audit Report that I believe the Legislature needs to address, and I would encourage you to read the report, they are not at issue in **HB 2419**.

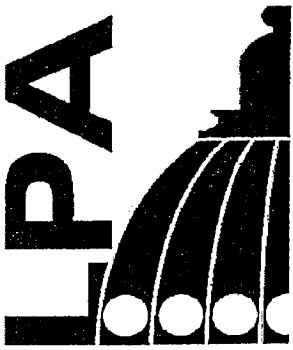
**HB 2419** (and **HB 2413**, which you will hear later) is designed to protect taxpayer money and make certain that every attempt is made so the State is only providing attorneys for those who cannot afford to pay for their own defense.

There are only two word changes in statute in **HB 2419**. However, I might suggest that on line 17 of page 1 the "may", might ought to be changed to "shall".

I am of the opinion that the courts have not done all they should to obtain the necessary documentation from defendants regarding their eligibility for taxpayer provided legal defense prior to ordering the BIDS to provide such a service. Passage of **HB 2419** would assist them with their decision regarding indigence of those charged with a crime.

I ask you to recommend **HB 2419** favorably for passage.

Thank you for your time and I will be happy to answer questions at the appropriate time.



# Legislative Post Audit Performance Audit Report Highlights

Highlights

## Board of Indigents' Defense Services: A K-GOAL Audit Reviewing Payments Made for Indigents' Defense Services

### Report Highlights

#### Audit Concern

Recently legislators have expressed several concerns regarding services provided in district courts and possible misuse of resources.

In particular, concerns were expressed about the sufficiency of the Board's financial affidavit, appointed counsel not providing full information to the court, and the recoupment process in general.

#### Other Relevant Facts for Question 1

Created in 1982, the Board of Indigents Defense Services provides indigent felony defense services as required by the United States Constitution.

District court judges, not the Board, decide whether a defendant will receive court-appointed representation.

The application and approval process is as follows:

- > The defendant completes a financial affidavit form (designed by the Board) to show he or she has limited financial resources. The form asks questions about issues such as employment, bank accounts, and dependents.
- > The judge reviews the financial affidavit and decides whether to appoint counsel for the defendant.

**AUDIT QUESTION 1:** Have the Board of Indigents' Defense Services and the courts taken appropriate actions to ensure that services are provided to indigent persons only?

#### AUDIT ANSWERS and KEY FINDINGS:

Kansas' system for providing legal services to indigent persons is generally sufficient, but it has a few problems.

- The Board's financial affidavit doesn't fully comply with the Board's Regulations. It is missing three of seven required items and also asks for information about vehicles, which judges aren't supposed to consider.
- Judges may make decisions about appointing legal representation based on incomplete and unverified information.
  - > For 31 of 71 cases we reviewed, the financial affidavit was missing or incomplete. *44%*
  - > The information provided by defendants on the financial affidavit is rarely verified. Court officials told us they don't have the time or staff to verify that information.
- In 13 of 104 cases we reviewed, the defendant did not appear to be indigent. We used State income tax returns, payroll information from the Department of Labor, and benefits eligibility information from SRS and KHPA—information that is not normally available to district court judges—to make this assessment. *12.5%*
- Judges have significant discretion in deciding whether to appoint legal counsel, and differ as to which information they rely on to make this determination. Some consider income and employment status more relevant, while others consider assets and the cost of an attorney.

We also identified several other issues regarding district courts' use of the financial affidavit.

- Many of the financial affidavits contained the defendant's social security number. Because the affidavit is a public document, this creates a risk of identity theft.
- Most of the completed financial affidavits were submitted on outdated forms.
- At least one court uses its own different financial affidavit form, which has not been approved by the Board.

**AUDIT QUESTION 2:** Do the Board of Indigents' Defense Services and the courts have adequate procedures in place to ensure effective recoupment of fees and costs from indigent defendants?

**AUDIT ANSWERS and KEY FINDINGS:**

The Board spends far more to provide legal representation than it receives back from indigent defendants. In recent years, the Board has spent about \$20 million to provide defense services. In contrast, district courts collected less than \$2 million in fiscal year 2010 from convicted defendants to repay the cost of their legal representation.

- Kansas law limits a district court's ability to recoup the cost of legal representation. Defendants who are found not guilty or have their cases dismissed do not have to repay their legal fees. *what if defendant was paying does court refund?*
- Further, judges can reduce or completely waive the repayment of legal representation. In about one-third of the cases we reviewed, the judge waived the cost of legal representation.
- The courts have not always collected the full amount owed by defendants. In the cases we reviewed, district courts collected only about one-fourth of the amount assessed by judges. Several factors make it difficult to collect legal fees from defendants:
  - Legal fees are the last item defendants have to repay (after court costs and restitution).
  - The Board isn't likely to be repaid until the end of the defendant's sentence or later.
  - Convicted felons may not have the resources to repay legal fees.
  - Defendants can petition the court to waive repayment.

We also noted that some district courts' practices for approving payments to private attorneys may violate State law. In two of the seven judicial districts we reviewed, attorneys did not submit their payment voucher at the time of sentencing, as required by law.

**WE RECOMMENDED**

- The Board address issues pertaining to the design and use of its financial affidavit and modifying its administrative regulations.
- The Kansas Supreme Court require districts courts to use the most updated version of the financial affidavit form issued or approved by the Board, and to ensure that claims submitted by private attorneys for reimbursement are submitted in accordance with the law, or propose amendments to the law.

**Agency Response:** In general, the Board and the Office of Judicial Administration agreed with the report's findings and recommendations.

**HOW DO I GET AN AUDIT APPROVED?**

By law, individual legislators, legislative committees, or the Governor may request an audit, but any audit work conducted by the Division must be approved by the Legislative Post Audit Committee, a 10-member committee that oversees the Division's work. Any legislator who would like to request an audit should contact the Division directly at (785) 296-3792.

**Other Relevant Facts for Question 2**

The Board provides legal representation through a system of public defenders and private attorneys. Public defenders are State employees while the Board enters into contractual agreements with private attorneys for their services.

Kansas law allows judges to order the defendant to repay the State for the cost of the legal representation if the defendant is convicted and found to be financially able to pay that amount.

The courts are responsible for collecting costs assessed by the judge.

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