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Senate Judiciary

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House Bill 2605 Hearing

Proponent Testimony of
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Kansas State Board of Indigents' Defense Services

Chairwoman Warren, Members of the Committee, and Legislative Staff,

The Board of Indigents' Defense Services is tasked with providing constitutionally effective and 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 required 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. At this point, when BIDS wants to pursue additional funding and pay an assigned counsel rate higher than \$80 per hour, that statutory language prevents BIDS from doing so unless a higher rate is included in a special budget proviso or a specialty contract rate under K.S.A. 22-4507(c)(2).

Since 2021, BIDS has been paying more than \$80 per hour under a series of special budget provisos, first at \$100 dollars per hour and most recently, since FY 2023, at the current \$120 per hour rate.

Why HB 2605 is Necessary

BIDS' current \$80 per hour statutory rate under K.S.A. 22-4507(c) was set eighteen (18) years ago. A recent KBA study from 2017 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 can 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. This is particularly of concern to BIDS right now as we continue to suffer from extreme shortages of qualified criminal defense counsel across the state, particularly in our more rural jurisdictions.

Low hourly rates can also unintentionally incentivize attorneys to take more cases than they should to make ends meet. Low hourly rates can also unintentionally incentivize attorneys to go to trial less often, potentially because pleas are paid better for the comparable 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 shortages and ethical 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. The added pressures of more cases going to our assigned counsel, combined with this crushingly low hourly rate, and our caseload caps based in part upon that rate, has caused many of our assigned counsel to leave our panels in past years. These issues can also deter 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 who are constitutionally owed an attorney provided by the State.

Over the past few years, the legislature has funded and provided authority under special budget provisos so that we can pay above that \$80 per hour statutory rate, first at \$100 per hour in FY 2022 and then at \$120 in FY 2023 and FY 2024 through FY 2025. Those increased temporary rates have provided BIDS the ability to maintain many of our

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).

panel attorneys on our appointed panels. Now, the main reason attorneys tend to leave our appointed panels is due to caseload overload and not due to pay. Furthermore, once their caseloads are more manageable, those attorneys are more likely to return to the appointed panels thanks to these higher temporary rates.

We believe HB 2605 is needed so that BIDS can continue to respond to the pressures of current appointed counsel panel needs and continue proactively addressing the Sixth Amendment assigned panel crisis that we are currently weathering. Amending our statutory rate with HB 2605 would ensure that, with appropriate ongoing funding to support that rate, BIDS may continue to pay out our current temporary assigned counsel rate and maintain as many private attorneys on our appointed panels as possible.

It will also allow us in future years to be able to continue to meet those assigned counsel panel needs if we can obtain the financial support under future budgets, to consider incrementally raising that rate to as high as \$140 per hour in order to bring in new attorneys to our appointment panels.

What HB 2605 Does

As written, HB 2605 would insert a language change into K.S.A. 22-4507(c). This change would amend language indicating that the BIDS-assigned counsel rate is \$80 per hour, to instead indicate that the BIDS-assigned counsel rate may be paid out at a minimum rate of at least \$120 per hour up to as high as \$140 per hour, except for some specific circumstances contained in the subsections of section (c). Essentially, this language clarification would make it clear that BIDS is no longer capped at the hopelessly outdated and unconscionably low \$80 per hour assigned counsel rate.

Currently, BIDS' budget for FY 2024 and FY 2025 contains funding sufficient to continue paying out a rate of \$120 per hour for our assigned counsel panel attorneys.

While BIDS has made a budget request in FY 2025 for funding to support a \$140 per hour rate, that funding has not been supported by the Governor, Senate Ways and Means, or House Appropriations at the time of this testimony. Any efforts to support future increases in the assigned counsel rate above \$120 per hour will require budget requests for supportive funding in future fiscal years.

HB 2605 Solves Our Present-Day Concerns and Allows Time to Plan for the Future

This amendment gives BIDS the authority to continue paying our current assigned counsel rate into the future and the flexibility to address our panel needs in years to come. This amendment to our statutes is vitally important for BIDS to continue to proactively address the ongoing crisis of the shortage of assigned counsel panel attorneys across Kansas.

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

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