

House Judiciary Committee

February 15, 2021

HB 2363

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

Dear Chairman Patton 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.<sup>1</sup> 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 also incentivize attorneys to take more cases than they should in order to make ends meet. Low hourly rates have also been shown to incentive attorneys to go to trial less often because pleas are paid better for the time spent on them than jury trials are.<sup>2</sup>

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 and more frequently and in much larger numbers than they used to be even just five years ago.<sup>3</sup> The added pressures of more cases going to our assigned

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<sup>1</sup> 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>

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

<sup>3</sup> 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>

counsel, combined with this crushingly low hourly rate, is causing many of our assigned counsel to leave our panels. That 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**

HB 2363 would insert a minor 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 is "no less than" \$80 per hour.<sup>4</sup> 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.

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 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.

### **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 future 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 a 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 potential assigned counsel panel crisis and to make reasonable adjustments to our rate for years to come.

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

Heather Cessna  
Executive Director  
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<sup>4</sup> There are a few specific exceptions to that rate already contained in the statute. This language change would not affect any of those exceptions.

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