

Proposed

Board of Indigents' Defense Services

Notice of Public Hearing on Proposed Administrative Regulations

A public hearing will be conducted on Friday, March 1, 2019, at 9 a.m. in the meeting room of BIDS, Suite 500, 700 Jackson, Topeka, Kansas. The hearing is scheduled to last for 30 minutes. The hearing is to consider the adoption of proposed regulations by the Board of Indigents' Defense Service on a permanent basis.

This 60-day notice of the public hearing shall constitute a public comment period for the proposed regulations noted below. All interested parties may submit written comments prior to the hearing to BIDS, Suite 500, 700 SW Jackson, Topeka, KS 66603 or by email to Pscalia@sbids.org. All interested parties will be given a reasonable opportunity to present their views orally regarding the adoption of the proposed regulations during the public hearing. In order to provide all parties an opportunity to present their views, it may be necessary to request that each participant limit any oral presentation to an appropriate timeframe.

Any individual with a disability may request an accommodation in order to participate in the public hearing and may request the proposed regulations and economic impact statement in an accessible format. Requests for accommodation to participate in the hearing should be made *at least one week* in advance of the hearing by contacting Beth Child at 785-296-8416. The Jayhawk Hotel building is accessible for disabled persons and accessible parking is located in front of the building. A summary of the proposed regulations and their Economic Impact follow.

Copies of the **full** proposed regulations and the Economic Impact Statement for the proposed regulations can be obtained at BIDS, Suite 500, 700 SW Jackson, Topeka, KS 66603

K.A.R. 105-5-2, K.A.R.105-5-3, K.A.R. 105-5-6, K.A.R. 105-5-7, K.A.R. 105-5-8 establish the hourly rate to be paid to the private attorneys who accept court appointments to defend indigent persons in the absence of a public defender. The rate to be paid to assigned counsel is increased from \$70 per hour to \$75 per hour and each of the "caps" for the severity level of the charge is similarly increased from the "cap" at \$70 per hour to the "cap" at \$75 per hour. These amendments reflect action taken by the Board under its statutory authority to adjust the rate of compensation to more closely approach the rate set by statute of \$80 per hour.

K.A.R. 105-11-1, incorporates by reference the "Attorney Cost Reimbursement Tables: Assigned Counsel and Public Defender". This table lists the average actual cost to the agency for attorney costs on each level of felony.

Economic Impact.

The Board anticipates that the continued proration of the assigned counsel hourly rate down from \$80/hour to \$75/hour will save \$680,000 to the state general fund.



105-5-2. Rates of compensation. (a) Each assigned counsel shall be compensated at the rate of \$76 ~~\$75~~ per hour.

(b) Contract counsel shall be compensated at the rate or rates specified in the contract between the board and the assigned counsel. (Authorized by and implementing K.S.A. 22-4507 and 22-4522; effective May 1, 1984; amended May 1, 1988; amended, T-105-6-13-88, July 1, 1988; amended Oct. 31, 1988; amended July 1, 1993; amended, T-105-6-15-93, July 1, 1993; amended Aug. 16, 1993; amended March 28, 1994; amended Aug. 20, 1999; amended, T-105-7-5-06, July 5, 2006; amended Nov. 13, 2006; amended, T-105-8-16-10, Aug. 16, 2010; amended Nov. 5, 2010; amended Dec. 11, 2015; amended Nov. 14, 2016; amended P-_____)

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105-5-3. Appellate courts; compensation. (a) For authorized services performed in appealing a case to the comt of appeals or the Kansas supreme comt, compensation shall be paid at the rate prescribed in K.A.R. 105-5-2. as recommended by the court.

(b) Compensation for attorneys' services in cases appealed to the Kansas supreme comi or the court of appeals shall not exceed \$1;400 \$1,800. However, additional compensation may be approved by the board. as recommended by the court. (Authorized by and implementing K.S.A. 22-4507 and 22-4522; effective May 1, 1984; amended May 1, 1985; amended Aug. 20, 2010; amended, T-105-7-5-06, July 5, 2006; amended Nov. 13, 2006; amended, T-105-8-6-10, Aug. 16, 2010; amended Nov. 5, 2010; amended Dec. 11, 2015; amended Nov. 14, 2016; amended P- _____ .)

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105-5-6. Reasonable compensation; non-tried cases. (a) Each appointed and assigned attorney shall be compensated for time expended in representing indigent defendants and other indigent persons at the hourly rate prescribed in K.A.R. 105-5-2. Except as provided in K.A.R. 105-5-8, reasonable compensation shall not exceed \$1,400 \$1,500 in the following cases:

(1) Those felony cases in the trial court that are classified as non-drug offenses of severity levels 1 through 5 that are not submitted to a judge or jury, including services at a preliminary hearing and sentencing, if applicable; and

(2) those felony cases in the trial court that are classified as drug offenses, that have not been submitted to a judge or jury, and in which there have been six hours or more spent in court in defense of the indigent defendant, including services at a preliminary hearing and sentencing, if applicable.

(b) Except as provided in K.A.R. 105-5-8 and K.A.R. 105-5-6(a), reasonable compensation shall not exceed \$1,500 in the following cases:

(1) Those felony cases in the trial court that are not submitted to a judge or jury, including services at a preliminary hearing and sentencing, if applicable, and are classified as severity levels 6 through 10 non-drug offenses; and

(2) those felony cases in the trial court that are not submitted to a judge or jury, that are classified as drug offenses, and in which there have been fewer than six hours spent in court in defense of the indigent defendant, including services at a preliminary hearing and sentencing, if applicable.

(c) Except as provided in K.A.R. 105-5-8, K.A.R. 105-5-6(a), and K.A.R. 105-5-6(b), reasonable compensation shall not exceed \$750 in the following types of cases:

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- (1) Habeas corpus cases as authorized by K.S.A. 22-4503 and K.S.A. 22-4506 and amendments thereto;
 - (2) cases filed pursuant to K.S.A. 60-1507 and K.S.A. 22-4506 and amendments thereto;
 - (3) habeas corpus cases as authorized by K.S.A. 22-2710 and amendments thereto;
 - (4) habeas corpus cases as authorized by K.S.A. 22-3428 and K.S.A. 22-3428a and amendments thereto; and
 - (5) habeas corpus cases as authorized by K.S.A. 59-2965 and amendment amendments thereto.
- (d) Except as provided in K.A.R. 105-5-8, reasonable compensation shall not exceed \$400 in the following types of cases:
- (1) Representation of grand jury witnesses determined to be indigent and called to testify pursuant to K.S.A. 22-3009 and amendments thereto:
 - (2) representation of indigent persons committed to custody as material witnesses pursuant to K.S.A. 22-2805 and amendments thereto;
 - (3) probation revocation hearings; and
 - (4) motions to modify sentence pursuant to K.S.A. 2018 Supp. 21-6702 and amendments thereto. (Authorized by and implementing K.S.A. 22-4507 and 22-4522; effective May 1, 1984; amended May 1, 1985; amended May 1, 1986; amended May 1, 1988; amended, T-105-6-13-88, July 1, 1988; amended Nov. 1, 1988; amended Oct. 30, 1989; amended July 1, 1993; amended, T-105-6-15-93, July 1, 1993; amended, Aug. 16, 1993; amended Aug. 20, 1999; amended, T-105-7-5-06; amended July 5, 2006; amended Nov. 13, 2006; amended, T-105-8-16-10, Aug. 16, 2010; amended Nov. 5, 2010; amended Dec. 11, 2015; amended Nov. 14, 2016;

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105-5-7. Reasonable compensation; tried cases. Each appointed and assigned attorney shall be compensated for time expended in representing indigent defendants at the hourly rate prescribed in K.A.R. 105-5-2. Except as provided in K.A.R. 105-5-8, reasonable compensation for felony cases tried on pleas of not guilty and submitted to a judge or jury for adjudication, including compensation for services at the preliminary hearing, sentencing, and motions to modify the sentence, shall not exceed the following:

(a) ~~0000~~ \$2,400 for felonies classified as non-drug offenses of severity levels 5 through 10;

(b) ~~0000~~ \$3,000 for felonies classified as non-drug offenses of severity level 4 and felonies classified as drug offenses of severity levels 2 through 5; and

(c) ~~0000~~ \$7,500 for felonies classified as non-drug offenses of severity levels 1 through 3, off-grid felonies, and felonies classified as drug offenses of severity level 1. (Authorized by and implementing K.S.A. 22-4507 and 22-4522; effective May 1, 1984; amended, T-105-6-13-88, July 1, 1988; amended Nov. 1, 1988; amended Oct. 30, 1989; amended July 1, 1993; amended, T-105-6-15-93, July 1, 1993; amended Aug. 16, 1993; amended Aug. 20, 1999; amended, T-105-7-5-06, July 5, 2006; amended Nov. 13, 2006; amended, T-105-8-16-10, Aug. 16, 2010; amended Nov. 5, 2010; amended Dec. 11, 2015; amended Nov. 14, 2016; amended P-

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105-5-8. Compensation; exceptional cases. (a) Any compensation for attorneys' services in excess of the amounts specified in K.A.R. 105-5-6 and K.A.R. 105-5-7 may be approved only in exceptional cases. A finding by the court that a case is exceptional shall be subject to final approval by the board. An exceptional case shall mean any of the following:

(1) Any case involving a felony charge in the trial court that does not appeal on the sentencing-range grid is off-grid;

(2) any felony case tried on a not guilty plea in which there have been 25 or more hours spent in court in defense of the indigent defendant;

(3) any felony case not submitted to a judge or jury in which there have been 10 hours or more of in-court time spent in defense of the indigent defendant; or

(4) any case that has been declared an exceptional case by the court due to its complexity or other significant characteristics.

(b) Each claim for compensation in an exceptional case shall be accompanied by a specific finding in a court order specifying the basis for the declaration that the case is exceptional.

(c) Reasonable compensation for attorneys' services in exceptional cases shall not exceed \$7,500 per case. However, additional compensation may be approved by the board if warranted by the extreme complexity of the case. (Authorized by and implementing K.S.A. 22-4507 and 22-4522; effective May 1, 1984; amended, T-105-6-13-88, July 1, 1988; amended Nov. 1, 1988; amended Oct. 30, 1989; amended July 1, 1993; amended, T-105-6-15-93, July 1, 1993; amended Aug. 16, 1993; amended Aug. 20, 1999; amended, T-105-7-5-06, July 5, 2006; amended Nov. 13, 2006; amended, T-105-8-16-10, Aug. 16, 2010; amended Nov. 5, 2010; amended Dec. 11, 2015; amended Nov. 14, 2016; amended P-----)

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105-11-1. (Authorized by K.S.A. 22-4504; implementing K.S.A. 22-4522; effective, T-105-10-3-05, Oct. 3, 2005; effective Feb. 17, 2006; amended, T-105-7-5-06, July 5, 2006; amended Nov. 13, 2006; amended, T-105-7-26-07, July 26, 2007; amended Nov. 26, 2007; amended, T-105-8-12-08, Aug. 12, 2008; amended Dec. 29, 2008; amended, T-105-6-26-09, June 26, 2009; amended Oct. 16, 2009; amended, T-105-8-16-10, Aug. 16, 2010; amended Nov. 5, 2010; amended, T-105-7-22-11, July 22, 2011; amended Nov. 14, 2011; amended Dec. 14, 2012; amended Dec. 29, 2014; amended Dec. 11, 2015; amended Nov. 14, 2016; revoked P-_____.)

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**Kansas Administrative Regulations
Economic Impact Statement
For the Kansas Division of the Budget**

Board of Indigents' Defense Services
Agency

Pat Scalia
Agency Contact

785-368-6295
Contact Phone Number

105-5-2, 105-5-3, 105-5-6, 105-5-7, and 105-5-8
K.A.R. Number(s)

Submit a hard copy of the proposed rule(s) and regulation(s) and any external documents that the proposed rule(s) and regulation(s) would adopt, along with the following to: Division of the Budget
900 SW Jackson, Room 504-N
Topeka, KS 66612

I. Brief description of the proposed rule(s) and regulation(s).

These regulations state the hourly compensation rate for assigned counsel and the reasonable compensation amount based on the severity level of the felony and whether it was a trial or a plea. The court may allow a higher amount for cases found to be exceptional.

II. Statement by the agency if the rule(s) and regulation(s) is mandated by the federal government and a statement if approach chosen to address the policy issue is different from that utilized by agencies of contiguous states or the federal government. (If the approach is different, then include a statement of why the Kansas rule and regulation proposed is different)

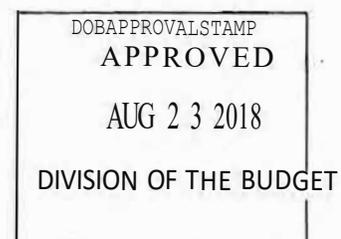
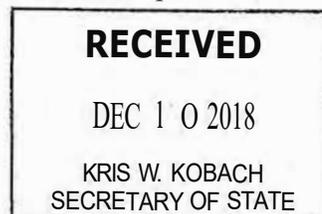
The approach chosen to address indigents' defense policy issues is different in each of the contiguous states. Nebraska provides for indigents' defense through the county rather than a state system.

Like Kansas, Oklahoma provides for indigent defense through public defenders, contract attorney's and volunteer appointed counsel. However, the executive director of Oklahoma indigents' defense has the statutory authority to establish the reasonable hourly rates of compensation for appointed attorneys, subject to approval by the board. Additionally, attorney compensation for work that was not performed under contract cannot exceed \$3,500 unless the executive director determines that the case is exceptional due to the length of time that was required to complete the case.

Colorado provides for indigents defense through public defenders and alternate defense counsel. The alternate defense counsel compensation rate is set by Chief Justice Directive and relates to the severity level of the charges. The defense of a homicide or rape is paid \$85 per hour. All other felonies are paid \$80 per hour.

Missouri provides for indigents' defense through statewide public defenders, who defend about 90% of the cases and through contract counsel who provide for the defense of about 10% of the cases on a flat fee per case depending on the severity level of the case and depending on whether the case is completed by trial or by plea.

The federal government provides a system for the provision of indigent defense through public defenders and through the appointment of private attorneys who are compensated at the rate of \$140 per hour currently



with an annual increase to match the salary increase provided to public defenders that year. This is established by federal regulation.

These Kansas regulations are not mandated by the federal government.

III. Agency analysis specifically addressing following:

A. The extent to which the rule(s) and regulation(s) will enhance or restrict business activities and growth;

These regulations will enhance the economic growth of over four hundred assigned counsel law firms. These regulations will allow for local attorneys to accept assigned cases thus ensuring the provision of the right to counsel through local attorneys rather than attorneys from other judicial districts.

B. The economic effect, including a detailed quantification of implementation and compliance costs, on the specific businesses, sectors, public utility ratepayers, individuals, and local governments that would be affected by the proposed rule and regulation and on the state economy as a whole;

These regulations will effect an increase in the hourly rate set by the Board for assigned counsel fees from \$70 per hour to \$75 per hour but maintain a decrease from the statutory rate of \$80 per hour. There will be an added cost of \$850,000 to the state but effects the same amount of reduction from the payment of the statutory rate. These regulations also increase the amount of repayment that the court can require a defendant to repay the state general fund - currently 1.4 M

C. Businesses that would be directly affected by the proposed rule and regulation;

Law firms that accept court appointment to felony cases.

D. Benefits of the proposed rule(s) and regulation(s) compared to the costs;

The regulations will increase the number of attorneys accepting appointed cases and will enhance the quality of the defense provided as required by the Sixth Amendment

E. Measures taken by the agency to minimize the cost and impact of the proposed rule(s) and regulation(s) on business and economic development within the State of Kansas, local government, and individuals;

On January 18, 2010, the Board responded to mid-fiscal year budget reductions by reducing the hourly rate paid to assigned counsel from \$80 per hour as set by statute to \$62 per hour as the lowest possible hourly rate without effecting a taking of property without due process of law. At that time, the Board assured assigned counsel that it would restore the statutory rate of \$80 per hour when the state finances were in better circumstances.

On July 1, 2015, the Board increased the hourly rate to \$65 per hour and on July 1, 2016, the Board increased the hourly rate to \$70 per hour. The increase on July 1, 2018 to \$75 per hour is still \$5 per hour below the statutory rate which was established by the legislature twelve years ago in 2006.

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F. An estimate, expressed as a total dollar figure, of the total annual implementation and compliance costs that are reasonably expected to be incurred by or passed along to business, local governments, or members of the public.

\$0

An estimate, expressed as a total dollar figure, of the total implementation and compliance costs that are reasonably expected to be incurred by or passed along to business, local governments, or members of the public.

\$0

Do the above total implementation and compliance costs exceed \$3.0 million over any two-year period?

YES 0 NO

Give a detailed statement of the data and methodology used in estimating the above cost estimate.

In determining that there is no cost for the annual implementation of these regulations and no cost for compliance with these regulations, the State Board of Indigents' Defense Services acknowledges that the assigned counsel law firms, as local businesses, will not be required to file additional motions with the court to determine that the facts of a case or the work required on a case is not "exceptional" and does not require additional court review.

A public hearing was scheduled on June 15, 2018, however there were no attendees.

Prior to the submission or resubmission of the proposed rule(s) and regulation(s), did the agency hold a public hearing if the total implementation and compliance costs exceed \$3.0 million over any two-year period to find that the estimated costs have been accurately determined and are necessary for achieving legislative intent? If applicable, document when the public hearing was held, those in attendance, and any pertinent information from the hearing.

YES D NO

G. If the proposed rule(s) and regulation(s) increases or decreases revenues of cities, counties or school districts, or imposes functions or responsibilities on cities, counties or school districts that will increase expenditures or fiscal liability, describe how the state agency consulted with the League of Kansas Municipalities, Kansas Association of Counties, and/or the Kansas Association of School Boards.

Not applicable to these regulations.

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H. Describe how the agency consulted and solicited information from businesses, associations, local governments, state agencies, or institutions and members of the public that may be affected by the proposed rule(s) and regulation(s).

The Board conducted a public hearing on June 15, 2018, to receive comments from the public regarding the effect that continued proration of the statutory rate paid to assigned counsel would have on the quality of representation and on the numbers of assigned counsel willing to accept appointed cases. (K.S.A. 22-4507)

I. For environmental rule(s) and regulation(s) describe the costs that would likely accrue if the proposed rule(s) and regulation(s) are not adopted, as well as the persons would bear the costs and would be affected by the failure to adopt the rule(s) and regulation(s).

Not applicable to these regulations.

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**Kansas Administrative Regulations
Economic Impact Statement
For the Kansas Division of the Budget**

Board of indigents' Defense Services
Agency

Pat Scalia
Agency Contact

785-368-6295
Contact Phone Number

105-11-1
K.A.R. Number(s)

Submit a hard copy of the proposed rule(s) and regulation(s) and any external documents that the proposed rule(s) and regulation(s) would adopt, along with the following to: Division of the Budget
900 SW Jackson, Room 504-N
Topeka, KS 66612

I. Brief description of the proposed rule(s) and regulation(s).

Revocation of current regulation in response to a decision by the Kansas Court of Appeals which applies the limitations set in other regulations rather than the table that was incorporated by reference in this regulation. (State v. Joiner No. 117,042)

II. Statement by the agency if the rule(s) and regulation(s) is mandated by the federal government and a statement if approach chosen to address the policy issue is different from that utilized by agencies of contiguous states or the federal government. (If the approach is different, then include a statement of why the Kansas rule and regulation proposed is different)

This regulations are not mandated by the federal government.

III. Agency analysis specifically addressing following:

A. The extent to which the rule(s) and regulation(s) will enhance or restrict business activities and growth;

Revocation of this regulation will have no effect on business.

B. The economic effect, including a detailed quantification of implementation and compliance costs, on the specific businesses, sectors, public utility ratepayers, individuals, and local governments that would be affected by the proposed rule and regulation and on the state economy as a whole;

Revocation of this regulation will have no economic effect.

C. Businesses that would be directly affected by the proposed rule and regulation;

None

D. Benefits of the proposed rule(s) and regulation(s) compared to the costs;

Revocation will eliminate the possible application of the table incorporated by reference which would cause a reversal on appeal and need for a resentencing.

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- E. **Measures taken by the agency to minimize the cost and impact of the proposed rule(s) and regulation(s) on business and economic development within the State of Kansas, local government, and individuals;**

Revocation will allow for the application of the decision of the Kansas Court of Appeals.

- F. **An estimate, expressed as a total dollar figure, of the total annual implementation and compliance costs that are reasonably expected to be incurred by or passed along to business, local governments, or members of the public.**

\$0

An estimate, expressed as a total dollar figure, of the total implementation and compliance costs that are reasonably expected to be incurred by or passed along to business, local governments, or members of the public.

\$0

Do the above total implementation and compliance costs exceed \$3.0 million over any two-year period?

YES NO

Give a detailed statement of the data and methodology used in estimating the above cost estimate.

Not applicable

Prior to the submission or resubmission of the proposed rule(s) and regulation(s), did the agency hold a public hearing if the total implementation and compliance costs exceed \$3.0 million over any two-year period to find that the estimated costs have been accurately determined and are necessary for achieving legislative intent? If applicable, document when the public hearing was held, those in attendance, and any pertinent information from the hearing.

YES NO

- G. **If the proposed rule(s) and regulation(s) increases or decreases revenues of cities, counties or school districts, or imposes functions or responsibilities on cities, counties or school districts that will increase expenditures or fiscal liability, describe how the state agency consulted with the League of Kansas Municipalities, Kansas Association of Counties, and/or the Kansas Association of School Boards.**

Not applicable

- H. **Describe how the agency consulted and solicited information from businesses, associations, local governments, state agencies, or institutions and members of the public that may be affected by the proposed rule(s) and regulation(s).**

Not applicable

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I. For environmental rule(s) and regulation(s) describe the costs that would likely accrue if the proposed rule(s) and regulation(s) are not adopted, as well as the persons who would bear the costs and would be affected by the failure to adopt the rule(s) and regulation(s).

Not applicable

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