
STATE OF WISCONSIN
SUPREME COURT

FILED
MAY 25 2017
CLERK OF SUPREME COURT
OF WISCONSIN
17-06

In the Matter of:

The Petition of the Wisconsin Association of Criminal Defense Lawyers, the Wisconsin Association of Justice, Francis W. Deisinger, Paul G. Swanson, Christopher E. Rogers, Dean A. Strang, Jerome F. Buting, Louis B. Butler, Janine P. Geske, John A. Birdsall, Henry R. Schultz, Keith A. Findley, Franklyn M. Gimbel, Walter F. Kelly, Peggy A. Lautenschlager, John T. Chisholm, Kelly J. McKnight, E. Michael McCann, Daniel D. Blinka, James M. Brennan, Ben K. Kempinen, John S. Skilton, James C. Boll, Ralph M. Cagle, Robert R. Gagan, Diane S. Diel, Thomas S. Sleik, Gerald W. Mowris, Gerald M. O'Brien, Jon P. Axelrod, Michael J. Steinle, Howard A. Pollack, Thomas R. Streifender, Joseph E. Tierney, Christy A. Brooks, for an amendment to Supreme Court Rule 81.02 changing the hourly rate of compensation for court-appointed lawyers to \$100/hour, indexing that rate to annual cost of living increases, and specifying that the payment of an hourly rate less than the rate set forth in Supreme Court Rule 81.02 for legal services rendered pursuant to appointment by the State Public Defender under Wisconsin Statutes section 977.08 is unreasonable.

PETITION TO AMEND SUPREME COURT RULE 81.02

To: The Honorable Justices of the Wisconsin Supreme Court

The Wisconsin Association of Criminal Defense Lawyers, the Wisconsin Association of Justice, Francis W. Deisinger, Paul G. Swanson, Christopher E. Rogers, Dean A. Strang, Jerome F. Buting, Louis B. Butler, Janine P. Geske, John A. Birdsall, Henry R. Schultz, Keith A. Findley, Franklyn M. Gimbel, Walter F. Kelly, Peggy A. Lautenschlager, John T. Chisholm, Kelly J. McKnight, E. Michael McCann, Daniel D. Blinka, James M. Brennan, Ben K. Kempinen, John S. Skilton, James C. Boll, Ralph M. Cagle, Robert R. Gagan, Diane S. Diel, Thomas S. Sleik, Gerald W. Mowris, Gerald M. O'Brien, Jon P. Axelrod, Michael J. Steinle, Howard A. Pollack, Thomas R. Streifender, Joseph E. Tierney, and Christy A. Brooks petition this Honorable Court to amend Supreme Court Rule 81.02 accordingly:

1. Change the hourly rate of compensation for court-appointed lawyers to \$100/hour;

2. Include a provision indexing future compensation rates to annual cost of living increases; and,
3. Include a provision specifying that any payment for legal services rendered pursuant to appointment by the State Public Defender under Wisconsin statutes section 977.08 of an hourly rate less than the rate set forth in Supreme Court Rule 81.02 is unreasonable.

SCR 81.02 COMPENSATION (PROPOSED)

- (1) ~~Except as provided under sub. (1m), a~~[A]ttorneys appointed by any court to provide legal services for that court, for judges sued in their official capacity, for indigents and for boards, commissions and committees appointed by the supreme court shall be compensated at a rate of ~~\$70 per hour or a higher rate set by the appointing authority. The supreme court shall review the specified rate of compensation every two years~~ \$100/ hour or a higher rate set by the appointing authority. The minimum hourly rate shall be indexed and raised annually consistent with cost of living increases.
- ~~(1m Any provider of legal services may contract for the provision of legal services at less than the rate of compensation under sub. (1).~~
- (2) The rate specified in sub. (1) applies to services performed after ~~July 1, 1994~~ January 1, 2018.
- (3) The payment of an hourly rate less than the rate set forth in Supreme Court Rule 81.02(1) for legal services rendered pursuant to appointment by the State Public Defender under Wisconsin Statutes section 977.08 is unreasonable.

I. INTRODUCTION

The Sixth and Fourteenth Amendments to the U.S. Constitution obligate states to provide effective representation to the indigent accused at all critical stages of criminal or delinquency cases that carry loss of liberty as a potential punishment. However, unreasonably low attorney compensation rates interfere with a lawyers' ethical and constitutional obligations to give

undivided loyalty to each and every defendant. Unreasonable compensation with no allowances for an attorney's overhead expenses, and flat fee contractual arrangements to represent the poor in criminal and delinquency courts, are constitutionally deficient because of financial conflicts of interests that pit an attorney's financial interests against the client's right to effective representation.

Wisconsin has the lowest assigned counsel compensation rates in the country due to decades of neglect by the legislature. The court should amend Supreme Court Rule 81.02 and direct the State Public Defender to pay assigned counsel an hourly rate not less than \$100/hour, to ban flat fee contracting, and, to require annual increases to the rate consistent with the consumer price index.

II. RIGHT TO COUNSEL APPOINTMENT PROCESS

By statute, Wisconsin provides counsel in the first instance to eligible indigent criminal defendants through the State Public Defender ("SPD"). When the SPD has a conflict of interest, or is otherwise unable to represent an eligible indigent defendant, representation is provided through counsel appointment and paid by the SPD. *See Wis. Stats. §§ 977.05(4)(i), (j), (jm); 977.05(5)(a); 977.07; 977.08.* Nearly forty percent of all SPD cases are appointed to the private bar based on conflicts that preclude SPD staff representation. State Bar of Wisconsin Bi-Weekly Newsletter, *Inside Track*, v.7 n.6 (2015).

As discussed below, the quality of representation depends on the experience of the appointed attorney, the financial incentives in the compensation scheme and the case resources available to the attorney. Currently, the statutory compensation of \$40/hour and flat rate contracting attracts mainly inexperienced attorneys who are incentivized to provide minimal representation to their financially poor clients in some counties.

Anecdotal examples of inadequate representation abound across the state – in both urban and rural areas - and are daily witnessed by judges and district attorneys who work in the criminal justice system. Raising the rate - and prohibiting flat rate contracting - will drastically improve the quality of attorneys willing to accept SPD appointments and prevent the reality of ineffective assistance of counsel that is occurring daily in the criminal courts of this state.

III. 2010 PETITION TO AMEND SCR 81.02

This court has been asked to address this issue before. On July 6, 2011, in its ruling on petition 10-03, this Court considered and rejected a request for a rule increasing the statutory rates for counsel appointed by the SPD. But in the course of ruling, this Court made several important holdings that make granting the request now, six years later, appropriate and necessary. First, this Court held that the question of the statutory appointed counsel rate is “an area of shared authority for the court and the legislature.” *In the matter of the petition to amend Supreme Court Rule 81.02*, at 8 (App. 1.) Second, this Court found that there was “extensive anecdotal evidence that supports [the petitioners’] assertion that funding shortfalls may compromise the right to effective assistance of counsel.” (App. 9.) Finally, this Court observed that “our criminal justice system is reaching a breaking point” with regard to defense funding:

“The resources available for the defense of poor people accused of crime has fallen alarmingly, potentially compromising our constitutional responsibility to ensure that every defendant stands equal before the law and is afforded the right to a fair trial guaranteed by our constitution. **If this funding crisis is not addressed, we risk a constitutional crisis that could compromise the integrity of our justice system.**” (*Id.*) (emphasis added).

Unfortunately, that funding crisis has not been addressed. Rather, rates for assigned counsel have remained stagnant, and hence have become even less adequate than they were when the Court declared that we were at risk of a “constitutional crisis.” (*Id.*) And the result has been cases with wholly inadequate assigned counsel representing citizens facing even the most serious charges. The Court’s concern that this looming constitutional crisis would “compromise the integrity of our justice system” has become a reality. (*Id.*)

IV. EMPIRICAL STUDIES REGARDING RATE INSUFFICIENCY

The instant petitioners seek this Court’s intervention because the funding crisis has *not* been addressed since petition 10-03 in 2011, and we have reached a constitutional crisis wherein the Sixth Amendment is continuously jeopardized. Petitioners offer concrete, empirical evidence—not just anecdotes—of this crisis in the form of two studies released since 2011 that bring clarity to the “constitutional crisis”: a) *Rationing Justice: The Underfunding of Assigned Counsel Systems*, National Association of Criminal Defense Lawyers (NACDL) (2013) (App. 11); and, b) *Justice Shortchanged: Assigned Counsel Compensation in Wisconsin*, Sixth Amendment Center (6AC) (2014) (App. 47).

The NACDL study confirms that Wisconsin’s assigned counsel rate is the lowest in the nation. (App. 11.) The 6AC study demonstrates that Wisconsin’s \$40/hour compensation rate fails to even cover attorney overhead—causing attorneys to essentially work for free. (App. 50.) This makes it nearly impossible to attract even average quality lawyers to perform this critical, constitutionally mandated, function. Courts across the country have repeatedly acted to increase appointed counsel rates when they fail to account for overhead or are confiscatory, as in Wisconsin. The 6AC study details—through a meticulous review of other states and a survey of Wisconsin appointed counsel—what this court previously heard only in anecdotal terms:

1. Wisconsin violates the ABA *Ten Principles*' demand that appointed counsel be paid both a "reasonable fee" and "actual overhead expenses." (App. 54.)
 - a. In 2002, the American Bar Association (ABA) promulgated *Ten Principles of a Public Defense Delivery System*—a set of ten standards that, in the words of the ABA, "constitute the fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney." (App. 52-53.)
 - b. In 2002, the American Bar Association (ABA) promulgated *Ten Principles of a Public Defense Delivery System*—a set of ten standards that, in the words of the ABA, "constitute the fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney." (*Id.*)
 - c. SPD's assigned counsel division pays attorneys in one of two ways: (1) the \$40 hourly rate with no allotment for overhead; or, (2) a flat, per-case contracted amount. Both methods fail the *Ten Principles* as detailed below. (*Id.*)
 - d. Wisconsin
 - i. According to a 2013 State Bar of Wisconsin analysis, the average overhead for a Wisconsin lawyer is \$102,050. (App. 54.) As shown below, even if such a lawyer is able to bill 2000 hours per year he or she would still fall over \$20,000/yr. short of meeting that overhead. (*Id.*)
 - ii. In 1978, when the legislature established the State Public Defender's role in the circuit courts, the hourly rate of compensation for appointed lawyers was \$35 (\$25 for travel time). In 1992, the legislature increased private bar compensation to \$50 for in-court time and \$40 for out-of-court time; travel time remained unchanged at \$25. However, in 1995, the legislature *reduced* the in-court rate to create a uniform \$40 hourly rate. Again, the \$25 hourly

rate for travel remained unchanged. The 1995 structure continues to apply today. (*Id.*¹)

- e. Accordingly, several state courts have demanded a reasonable fee in addition to overhead expenses, as detailed below.
 - i. Kansas: In 1987, the Kansas Supreme Court ordered that the state has an "obligation to pay appointed counsel such sums as will fairly compensate the attorney, not at the top rate an attorney might charge, but at a rate which is not confiscatory, considering overhead and expenses." The court established, *in 1987*, that overhead was \$30.00/hour and ordered the rate to be established at \$80.00/hour. (*Id.*)
 - ii. Alaska: "We thus conclude that requiring an attorney to represent an indigent criminal defendant for only nominal compensation unfairly burdens the attorney by disproportionately placing the cost of a program intended to benefit the public upon the attorney rather than upon the citizenry as a whole." *DeLisio v. Alaska Superior Court*, 740 P.2d 437 (1987). So stated the Alaska Supreme Court in 1987 because doing so would be taking "private property for a public purpose without just compensation." (App. 55.)
 - iii. West Virginia: The West Virginia Supreme Court determined in 1989 that court appointed attorneys in that state were forced to "involuntarily subsidize the State with out-of-pocket cash" because the then-current rates did not cover attorney overhead. *Jewell v. Maynard*, 383 S.E.2d 536 (W. Va. 1989). "Perhaps the most serious defect of the present system," the West Virginia Court determined, "is that the low hourly fee may prompt an appointed lawyer to advise a client to plead guilty, although the same lawyer would advise a paying client in a similar case to demand a jury trial." In 1989, the court set the rate at \$45.00/hour out of court and \$65.00/hour in court. (App. 55.)
 - iv. Mississippi: In 1990, the Mississippi Supreme Court determined that indigent defense attorneys are entitled to "reimbursement of actual expenses" in addition to a reasonable sum, and defined "actual expenses" to include "all actual costs to the lawyer for the purpose of keeping his or her

¹ See Exhibit 3 (a summary of legislative attempts to increase the rate since 1995) and Exhibit 4 (a summary of SPD budget proposals to increase the rate every biennium since 1995).

door open to handle this case.” *Wilson v. State*, 574 So.2d 1338 (Miss. 1990). The court set the rate for overhead at \$25.00/hour. (App. 55.) The Mississippi overhead rate has been subsequently increased to \$32.50 per hour.

- v. Oklahoma: In the same year as the Mississippi decision, the Oklahoma Supreme Court echoed the 1987 Kansas decision in finding that state government “has an obligation to pay appointed lawyers sums which will fairly compensate the lawyer, not at the top rate which a lawyer might charge, but at a rate which is not confiscatory, after considering overhead and expenses.” *State v. Lynch*, 796 P.2d 1150 (Okla. 1990). The court held that “[a]s a matter of course, when the district attorneys’ . . . salaries are raised by the Legislature so, too, would the hourly rate of compensation for defense counsel.” The Oklahoma Court also determined that a “provision must be made for compensation of defense counsel’s reasonable overhead and out of pocket expenses.” The overhead costs for the Oklahoma attorneys in 1989 were between \$50.88 per hour and \$48.00 per hour. This is in addition to the reasonable fee, making the total compensation rate between \$62.63 and \$80.14—in 1989. (App. 56)

- vi. New York: Landmark litigation in New York City in 2003 announced that “[e]qual access to justice should not be a ceremonial platitude, but a perpetual pledge vigilantly guarded.” *N.Y. County Lawyer’s Ass’n v. State*, 192 Misc. 2d 424, 425 (N.Y. Sup. Ct. 2002). Deriding the “pusillanimous posturing and procrastination of the executive and legislative branches” for failing to raise the rate for more than 17 years, the court determined that the other two branches of government created an assigned counsel “crisis” that impairs the “judiciary’s ability to function.” The low compensation was found to result “in denial of counsel, delay in the appointment of counsel, and less than meaningful and effective legal representation.” The following year the rate was statutorily raised to \$75.00/hour. (App. 56-57.)

- vii Alabama: In 1993, the Alabama Court of Criminal Appeals determined in *May v. State* that indigent defense attorneys were entitled to overhead expenses of \$30 per hour in addition to a reasonable fee. *May v. State*, 672 So. 2d 1307, 1308 (Ala. Crim. App. 1993). In *Wright v Childree*, the Alabama Supreme Court determined that assigned counsel are entitled

to a reasonable fee in addition to overhead expenses. *Wright v. Childree*, 972 So. 2d 771 (Ala. 2006). After this litigation, the Alabama Legislature increased the hourly rate to \$70 per hour. (App. 57-58.)

vii South Dakota: in 2000, the South Dakota Supreme Court set public counsel compensation hourly rates at \$67 per hour. To ensure that attorneys were perpetually paid both a reasonable fee and overhead, the Court also mandated that “court-appointed attorney fees will increase annually in an amount equal to the cost of living increase that state employees receive each year from the legislature.” Assigned counsel compensation in the farmlands of South Dakota now stands at \$84 per hour—more than double the pay for attorneys in Wisconsin. (App. 58.) As of December 2016, the South Dakota assigned counsel compensation rate is \$94/hour. (See: <http://uj.s.sd.gov/uploads/docs/2017CourtAppointedAttorneyFees.pdf>)

2. Wisconsin violates the ABA *Ten Principles*’ prohibition on contracts let solely on cost (App. 61.)
 - a. Fixed fee contracts that require lawyers to be paid “the same amount, no matter how much or little he works on each case,” causes conflicts because it is in the lawyer’s “personal interest to devote as little time as possible to each appointed case, leaving more time for the lawyer to do other more lucrative work.” (*Id.*)
 - b. “As of February 2014, SPD employed 58 fixed-fee contracts compensating attorneys at a rate between \$248 and \$362 per case (depending on the county). Do these Wisconsin contractual arrangements produce financial incentives to triage work in favor of some defendants, but in detriment of others? The answer is ‘yes.’” (*Id.*)
 - c. “Even in the average misdemeanor case, the attorney must be able to, among other tasks: meet with and interview with the client; attempt to secure pretrial release if the client remains in state custody (but, before doing so, learn from the client what conditions of release are most favorable to the client); keep the client informed throughout the duration of proceedings; prepare for and appear at the arraignment, wherein he must preserve his client’s rights; request and review formal and informal discovery; launch an investigation, scouring all sources of potential investigative

information in the process, and as soon as possible; research the law; develop and continually reassess the theory of the case; file and argue on behalf of pretrial motions; read and respond to the prosecution's motions; negotiate plea options with the prosecution, including sentencing outcomes; and all the while preparing for the event that the case may be going to trial and possibly sentencing." (App. 61-62.²) Fixed fee contracting makes it financially impractical and infeasible for lawyers to provide these essential services to their clients.

- d. Accordingly, several states have barred fixed fee contracting, as detailed below.
 - i. Idaho: Idaho requires that representation shall be provided through a public defender office or by contracting with a private defense attorney "provided that the terms of the contract shall not include any pricing structure that charges or pays a single fixed fee for the services and expenses of the attorney." I.C. § 19-859 (codified in 2014). (App. 62.)
 - ii. Michigan: In establishing minimum standards, rules, and procedures, the Michigan Indigent Defense Commission is statutorily barred from approving indigent defense plans that provide "economic disincentives," and the statute further states that "incentives that impair defense counsel's ability to provide effective representation shall be avoided." Mich. Stat. Ann. § 780.991(2)(b). (App. 62-63.)
 - iii. South Dakota: The South Dakota Unified Judicial System Policy 1-PJ-10, issued by the state supreme court, not only set a reasonable hourly rate that "will increase annually in an amount equal to the cost of living increase that state employees receive each year from the legislature," but also banned flat fee contracting. The policy requires that "[a]ll lawyers . . . be paid for all legal services on an hourly basis." (App. 63.)
 - iv. Washington: A federal court in 2013 called the use of very low rate flat fee contracts in two cities in Washington State prior to a supreme court ban an "intentional choice" that

² See also National Association of Criminal Defense Lawyers, *Minor Crimes, Massive Waste: The Terrible Toll on America's Broken Misdemeanor Courts* 22 (2009), available at <https://www.nacdl.org/reports/misdemeanor/>; Wisconsin State Public Defender, *Minimum Attorney Performance Standards*, http://wispsd.org/images/ACD_Forms/Minimum_Atorney_Performance_Standards_Private_Bar.pdf.

purposefully “left the defenders compensated at such a paltry level that even a brief meeting [with clients] at the outset of the representation would likely make the venture unprofitable.” *Wilbur v. Mount Vernon*, No. C11-1100RSL, at *15 (W.D. Wash. Dec. 2013), available at <http://sixthamendment.org/wpcontent/uploads/2013/12/Wilbur-Decision.pdf>. (App. 63.)

v. Nevada: Since the publication of the 6AC report, the Nevada Supreme Court also banned flat fee contracting: <http://sixthamendment.org/nevada-supreme-court-bans-flat-fee-contracting/>.

3. Unreasonably low attorney compensation rates interfere with a lawyers’ ethical obligation to give undivided loyalty to each and every defendant (App. 64.)
 - a. At its July 2000 meeting, the ABA House of Delegates adopted a resolution reaffirming the core value of the legal profession. The resolution calls on lawyers to maintain “undivided loyalty” to the client and to “avoid conflicts of interest” with the client. (*Id.*)
 - b. A lawyer shall not permit a person that pays the lawyer to render legal services to “regulate the lawyer’s professional judgment in rendering such legal services.” (*Id.*) The *Model Rules* have since been adopted by the state bar associations in 49 of 50 states, plus the District of Columbia (including Wisconsin). (*Id.*)
 - c. In a 1979 case, *Ferri v. Ackerman*, the United States Supreme Court determined that “independence” of appointed counsel to act as an adversary is an “indispensable element” of “effective representation.” *Ferri v. Ackerman*, 444 U.S. 193 (1979), available at http://www.oyez.org/cases/1970-1979/1979/1979_78_5981.
 - d. Two years later, the Court determined in *Polk County v. Dodson* that states have a “constitutional obligation to respect the professional independence of the public defenders whom it engages.” *Polk County v. Dodson*, 454 U.S. 312 (1981), available at http://www.oyez.org/cases/1980-1989/1981/1981_80_824. Observing that “a defense lawyer best serves the public not by acting on the State’s behalf or in concert with it, but rather by advancing the undivided interests of the client.” *Id.*

- e. This principle is confirmed in *Strickland v. Washington*. In that case, the Court states that “independence of counsel” is “constitutionally protected,” and that “[g]overnment violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense.” *Strickland v. Washington*, 466 U.S. 688 (1984), available at http://www.oyez.org/cases/1980-1989/1983/1983_82_1554.
 - f. Both unreasonable compensation with no allowances for overhead expenses and flat fee contractual arrangements to represent the poor in criminal courts are constitutional violations precisely because each pits the attorney’s financial well-being against the client’s right to conflict-free representation. A lawyer can be pushed into thinking about how to make the representation profitable in addition to, and potentially in opposition to, the interests of the client. (App. 65.)
4. Concerns over separation of powers do not prevent the Wisconsin Supreme Court from increasing assigned counsel rates through judicial rule. (App. 68.)
- a. Despite the Court’s “sincere concern” and recognition of the “extensive anecdotal evidence” that “shortfalls may compromise the right to effective assistance of counsel” in Wisconsin, this Court in 2011 denied petition 10-03, in part because of “a particularly challenging budgetary environment” for the legislature at that time. *In the matter of the petition to amend Supreme Court Rule 81.02*, at 9. However, the legislature’s failure to act to increase the assigned counsel rate for more than twenty years spans periods of budgetary surplus as well as the more challenging environment the court took note of in 2010, when the state was still recovering from the last recession. In times of surplus, as well as the last six years, the legislature instead returned money to the taxpayers through various means rather than adequately fund the ACD caseload. Tax reductions are certainly a laudable goal, but not at the expense of the state’s constitutional obligations under *Gideon v. Wainwright*, 372 U.S. 335 (1963).
 - b. There is no separation of powers concern here. This court recognized that it has “shared authority” in this area with the legislature. (App. 8.) And this Court has inherent power to ensure the effective administration of justice in the State of Wisconsin. *See, e.g., State ex rel. Friedrich v. Circuit Court for Dane County*,

192 Wis. 2d 1, 531 N.W.2d 32 (1995). The Wisconsin constitution grants the

...supreme court power to adopt measures necessary for the due administration of justice in the state, including assuring litigants a fair trial, and to protect the court and the judicial system against any action that would unreasonably curtail its powers or materially impair its efficacy. Such power, properly used, is essential to the maintenance of a strong and independent judiciary, a necessary component of our system of government. In the past, in the exercise of its judicial power this court has regulate the court's budget, court administration, the bar, and practice and procedure, has appointed counsel at public expense, has created a judicial code of ethics and has disciplined judges.

State v. Holmes, 106 Wis. 2d 31, 44-45, 315 N.E.2d 703, 710 (1982). Forty years of active indifference by the executive and legislative branches has materially impaired the administration of justice in this state.

- c. The Court should not fear that adopting a court rule increasing pay will necessarily result in forcing the legislature to expend more money. The Wisconsin legislature can, for instance, find other ways to offset the increased costs required to fulfill the constitutional command of access to competent, conflict-free counsel. The legislature could, for example, offset the expenses by increasing reliance on diversion that could move juvenile and adult defendants out of the formal criminal justice system and provide help with potential drug or other dependencies. Similarly, lawmakers can change low-level, non-serious crimes to "citations"—in which the offender is given a ticket to pay a fine rather than being threatened with jail time thus triggering the constitutional right to counsel. (App. 69.)
- d. But if the failure to pay a reasonable rate creates financial conflicts of interests that result in lawyers triaging the Sixth Amendment duty they owe to some clients in favor of others, then Wisconsin is in violation of the U.S. Constitution—a situation the policymakers may want to redress to avoid costly systemic litigation.

V. FEDERAL GOVERNMENT

The United States Department of Justice has determined that Courts may act preemptively to prevent constructive denial of counsel rather than waiting to resolve issues retrospectively through *Strickland*.

1. On September 25, 2014, the DOJ filed a Statement of Interest³ in a class action lawsuit, *Hurrell-Harring v. New York*, brought by the New York Civil Liberties Union (NYCLU) alleging a systemic denial of counsel in five upstate New York counties.⁴ The Statement of Interest provides DOJ's expertise to the court on what constitutes a "constructive" denial of counsel under the Sixth Amendment. In short, the DOJ statement establishes that a court does not have to wait for a case to be disposed of and then try to unravel retrospectively whether a specific defendant's representation met the aims of *Gideon* and its progeny. If state or local governments create structural impediments that make the appointment of counsel "superficial" to the point of "non-representation," a court can step in and presume prospectively that the representation is ineffective. The types of government interference enunciated in the DOJ Statement of Interest include (but most assuredly are not limited to): "a severe lack of resources," "unreasonably high caseloads," "critical understaffing of public defender offices," and/or anything else making the "traditional markers of representation" go unmet (i.e., "timely and confidential consultation with clients," "appropriate investigations," and adversarial representation, among others).
2. In another Statement of Interest⁵ filed August 14, 2013, in *Wilbur v. City of Mount Vernon*, the DOJ comments specifically on the issue of public defense attorneys having sufficient time to provide adequate representation. At the heart of the *Wilbur* case was the issue of how excessive caseloads of public defense attorneys resulted in deficient

³ Statement of Interest of the United States, *Hurrell-Harring v. New York* (N.Y. Sup. Ct. Oct. 21, 2014) (No. 8866-07), available at http://www.justice.gov/sites/default/files/press-releases/attachments/2014/09/25/statement_of_interest.pdf.

⁴ In March 2015, the case settled on the eve of trial with the State of New York agreeing to pay 100% of all indigent defense costs in the counties that were named defendants. Stipulation and Order of Settlement, *Hurrell-Harring v. New York*, No. 8866-07 (N.Y. Sup. Ct. filed Oct. 21, 2014). The state agreed to pay \$5.5 million in attorneys' fees and costs to the NYCLU and the law firm representing the plaintiffs. The lawsuit settlement has sparked greater advocacy for the state to pick up 100% of all indigent defense costs in the remaining upstate counties.

⁵ Statement of Interest of the United States, *Wilbur v. City of Mount Vernon*, (W.D. Wash. Dec. 4, 2013) (No. C11-1100RSL), ECF No. 322, available at <http://www.justice.gov/crt/about/spl/documents/wilbursoi8-14-13.pdf>.

representation under the Sixth Amendment to the U.S. Constitution. At the time the original complaint was filed in 2011, the cities of Mt. Vernon and Burlington, Washington, jointly contracted with two private attorneys to represent indigent defendants in their municipal courts, as they had done “for nearly a decade.” Under the contract, the two attorneys served together as “the public defender” and were paid a flat annual fee out of which they had to provide all “investigative, paralegal, and clerical services” without any additional compensation. In other words, the more work and non-attorney support they dedicated to their clients’ cases, the less each attorney’s take-home pay. And each contracting attorney handled between 950 and 1,150 appointed cases each year, in addition to maintaining a healthy private practice on the side. With such heavy caseloads, the contract defenders were alleged to “regularly fail to return calls” or “meet with” or “interview” their clients, and “rarely, if ever, investigate the charges made against” their clients. And the cities’ failure to adequately “monitor and oversee” the system they operated by way of the contract amounted to a “construct[ive] denial of the right to counsel” as guaranteed under *Gideon*. The judge in the federal lawsuit challenging the constitutionality of the indigent defense services in two Washington cities, noted that “no hard and fast number of pretrial motions or trials is expected,” but when hardly any motions are ever filed and the number of trials is “incredibly small” it is a “sign of a deeper systemic problem.” *Wilbur v. Mount Vernon*, No. C11-1100RSL (W.D. Wash. Dec. 2013), available at <http://sixthamendment.org/wp-content/uploads/2013/12/Wilbur-Decision.pdf>.

3. The DOJ has twice filed amicus briefs furthering their position on constructive denial of counsel. Most recently, on May 12, 2016, DOJ filed an amicus brief⁶ in the Supreme Court of Idaho in *Tucker v. Idaho*, in which the ACLU of Idaho alleges systemic denial of counsel for the indigent accused. As in *Hurrell-Harring*, the DOJ states in *Tucker* that a “constructive denial of counsel violating *Gideon* occurs where the traditional markers of representation are frequently absent or significantly compromised as a result of systemic, structural limitations.” (*Id.*)

On September 11, 2015, the DOJ filed an amicus brief⁷ in *Kuren v. Luzerne County* at the Pennsylvania Supreme Court. The *Kuren* class

⁶ Brief for the United States as Amicus Curiae Supporting Plaintiffs-Appellants, *Tucker v. Idaho*, No. 43922-2016 (Idaho filed May 11, 2016).

⁷ Brief for the United States as Amicus Curiae in Support of Appellants, *Kuren v. Luzerne County*, Nos. 57 MAP 2015, 58 MAP 2015 (Pa. Sept. 10, 2015), available at <http://www.justice.gov/opa/pr/departments-justice-files-amicus-brief-pennsylvania-right-counsel-case>.

action lawsuit alleged that the county so poorly funded right to counsel services as to constructively deny counsel to the indigent accused. The DOJ amicus brief makes clear that a civil constructive denial of counsel claim is an “effective way for litigants to seek to effectuate the promise of *Gideon*,” and “[p]ost-conviction claims cannot provide systemic structural relief that will help fix the problem of under-funded and under-resourced public defenders.”

4. The DOJ has also made clear that its *Cronic* analysis applies equally to juvenile delinquency proceedings, through its Statement of Interest⁸ in *N.P. v. Georgia*, filed March 13, 2015. The Southern Center for Human Rights (“SCHR”) filed the class action lawsuit alleging that children were regularly denied their right to counsel and instead treated to “assembly-line justice” in the Cordele Judicial Circuit. According to SCHR, kids regularly appeared in court without lawyers, and those who did receive representation were assigned lawyers who did not have time to talk with them before court. The suit claimed that the Cordele Circuit Public Defender Office was structurally unable to provide meaningful representation due to chronic underfunding and understaffing. The DOJ Statement provides the trial court with a *Cronic* framework to evaluate the claims.⁹
5. The Federal Government pays assigned counsel attorneys an hourly rate of \$132/hour in non-capital cases and \$185/hour for capital cases. The rates include both a reasonable fee and overhead. See: <http://www.uscourts.gov/services-forms/defender-services>.

⁸ Statement of Interest of the United States, *N.P. v. Georgia* (Ga. Super. Ct. filed Mar. 13, 2015) (No. 2014-CV-241025), available at http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/13/np_v_state_of_georgia_usa_statement_of_interest.pdf.

⁹ A month after the DOJ filed its statement of interest, on April 20, 2015 the defendants in the class action lawsuit – the Georgia Public Defender Standards Council, the Cordele Circuit Public Defender, and the four counties in the circuit – agreed to settle the matter with SCHR. Consent Decree, *N.P. v. Georgia*, No. 2014-CV-241025 (Ga. Super. Ct. filed Apr. 20, 2015). The approved consent decree seeks to address several structural flaws. Specifically, it will: increase the size of the public defender’s office staff; require public defenders to meet with clients (a) within three days of their detainment to determine indigency, and (b) within three days of assignment to their case; and require defenders to receive training, including specific training for juvenile defenders. The consent decree requires public defenders to advise juvenile defendants seeking to waive their right to counsel what a lawyer could do for them, and also requires the public defender office to comply with the terms of the Georgia Indigent Defense Act of 2003 including by creating a specialized juvenile division.

VI. ATTORNEY SURVEY

To discover whether such negative impacts exist in Wisconsin in relation to the low attorney compensation rate, the authors of the 6AC report conducted a survey of Wisconsin lawyers, including attorneys who currently take cases and those who no longer take cases for any reason. 378 lawyers filled out the survey.

1. Nearly one half of respondents (49.4%) stated that they represent fewer public defender appointed clients than in the past. Another 6.8% of respondents stated that they no longer take SPD appointed cases at all. (App. 65.)
2. There are two distinct classes of appointed attorneys: (a) those attorneys who take occasional cases (perhaps out of some perceived duty to the Court or SPD); and (b) those lawyers who represent a significant number of SPD defendants. (*Id.*) it may not even be that the attorneys are trying to make the work "more profitable" by triaging cases; the attorneys could simply be trying to make them not a loss.
3. However, surveyed attorneys reported that they spend 37% less time, on average, meeting with their appointed clients than they do with their retained clients. (App. 68.) The Wisconsin survey revealed that attorneys who have a higher number of public defender cases tend not to file motions in their cases, and they are more likely to resolve cases by their public defender clients pleading to the offense charged. This suggests that attorneys with many SPD cases are prioritizing speed in order to make representation more profitable. (*Id.*)

VII. LEGISLATIVE HISTORY

As detailed above and in Exhibits 4, (app. 71), and 5, (app. 72), the history of attempts to raise the private bar rate is one of failure. This includes extensive attempts at individual bills in the legislature and SPD budget requests every biennium since 1995.

The requested amounts have varied but the failing result is the same whether there's a Republican or Democratic governor and/or whether one party controls either or both house of the legislature, and in strong economic

times or challenging budgetary environments. Shamefully, Wisconsin has allowed itself to sink to the very bottom of the fifty states in hourly compensation for appointed counsel in indigent criminal cases.

VIII. MILWAUKEE JOURNAL-SENTINEL INVESTIGATION

On April 21, 2017, the *Milwaukee Journal Sentinel* published¹⁰ the results of an investigative report by Jacob Carpenter revealing:

1. Between 2010 and 2016, the “data shows about 100 lawyers accepted at least 50 felony case appointments without using a private investigator over that time. Several lawyers were assigned more than 200 felony appointments without billing for an investigator. One lawyer topped 300 cases.”
2. “In addition, a few dozen lawyers took 50-plus felony appointments and almost never billed for investigators. One lawyer, for example, accepted about 300 felony cases and billed for seven hours of investigator work.”
3. “Lawyers also have spurned investigators on the most serious types of cases, the analysis shows. The Journal Sentinel found at least 15 homicide cases, dozens of armed robbery cases and nearly 200 sexual assault cases in which indigent defendants were represented by lawyers who rarely or never billed for investigators.”

IX. CONCLUSION

Poor people accused of crimes in Wisconsin have a constitutional right to effective assistance of counsel who is not conflicted by competing economic interests. This court should, following decades of neglect by the legislature, exercise its shared authority to direct that the SPD pay assigned counsel an hourly rate of \$100/hour - commensurate with national averages - ban SPD contracting and set automatic annual increases equal to the consumer price index and adopt the proposed SCR 81.02 amendments.

¹⁰ (See: <http://www.jsonline.com/story/news/investigations/2017/04/21/investigator-couldve-kept-him-out-prison-thousands-similar-clients-arent-getting-one/100500922/>)

WHEREFORE, the petitioners request the Court to adopt the proposed amendment to SCR 81.02 and to grant such other relief as the Court may deem necessary.

Dated at Milwaukee, Wisconsin this 25th day of May 2017.

/s/ John A. Birdsall
John A. Birdsall
Wisconsin Bar No. 1017786
Birdsall Law Offices, S.C.
Riverfront Plaza
1110 N. Old World Third St.
Suite 218
Milwaukee, WI 53203
(414)-831-5465

/s/ Henry R. Schultz
Henry R. Schultz
Wisconsin Bar No. 1003451
Schultz Law Office
300 E Pioneer St
PO Box 42
Crandon WI 54520-0042
(715) 804-4559

FILED
MAY 25 2017
CLERK OF SUPREME COURT
OF WISCONSIN

(17-06)

STATE OF WISCONSIN
SUPREME COURT

In the Matter of:

The Petition of the Wisconsin Association of Criminal Defense Lawyers, the Wisconsin Association of Justice, Francis W. Deisinger, Paul G. Swanson, Christopher E. Rogers, Dean A. Strang, Jerome F. Buting, Louis B. Butler, Janine P. Geske, John A. Birdsall, Henry R. Schultz, Keith A. Findley, Franklyn M. Gimbel, Walter F. Kelly, Peggy A. Lautenschlager, John T. Chisholm, Kelly J. McKnight, E. Michael McCann, Daniel D. Blinka, James M. Brennan, Ben K. Kempinen, John S. Skilton, James C. Boll, Ralph M. Cagle, Robert R. Gagan, Diane S. Diel, Thomas S. Sleik, Gerald W. Mowris, Gerald M. O'Brien, Jon P. Axelrod, Michael J. Steinle, Howard A. Pollack, Thomas R. Streifender, Joseph E. Tierney, Christy A. Brooks, for an amendment to Supreme Court Rule 81.02 changing the hourly rate of compensation for court-appointed lawyers to \$100/hour, indexing that rate to annual cost of living increases, and specifying that the payment of an hourly rate less than the rate set forth in Supreme Court Rule 81.02 for legal services rendered pursuant to appointment by the State Public Defender under Wisconsin Statutes section 977.08 is unreasonable.

APPENDIX - PETITION TO AMEND SUPREME COURT RULE 81.02

<u>Item / Title</u>	<u>Page No.</u>
Exhibit 1 / Supreme Court Decision on 2011 Petition to Amend.....	1
Exhibit 2 / Rationing Justice: The Underfunding of Assigned Counsel Systems.....	11
Exhibit 3 / Justice Shortchanged: Assigned Counsel Compensation in Wisconsin...47	
Exhibit 4 / Wisconsin State Public Defender Proposed Budgets.....	71
Exhibit 5 / State Public Defender Petition Legislative History.....	72

SUPREME COURT OF WISCONSIN

No. 10-03

In the matter of the petition to amend Supreme
Court Rule 81.02.

FILED

JUL 6, 2011

A. John Wecker
Attorney General
Supreme Court
Madison, WI

This petition asks the court to amend Supreme Court Rule (SCR) 81.02 by increasing the hourly rate of compensation for court-appointed lawyers from \$70 to \$80, indexing that rate to the Consumer Price Index, and specifying that the payment of an hourly rate less than the rate set forth in SCR 81.02(1) for legal services rendered pursuant to appointment by the State Public Defender under Wis. Stat. § 977.08 is unreasonable. The petitioners provided the court with documentation in support of the petition, including: ABA, Sideck's Broken Promise: America's Continuing Quest for Equal Justice, (December 2004); ABA, Findings Concerning Contracting for the Delivery of Indigent Defense Services, (July 1995); and The Spangenberg Group, Rates of Compensation Paid to Court-Appointed Counsel in Non-Capital Felony Cases at Trial: A State-By-State

This rule petition was filed on March 5, 2010, by Attorneys Dean A. Strang, John S. Skilton, and Timothy W. Burns on behalf of Patricia K. Ballman, Thomas J. Basting, Sr., Richard T. Becker, Michelle A. Behnke, Gregory B. Conway, Robert H. Friebeert, Janine P. Geske, Franklin K. Gimbel, Ralph Johnson, E. Michael McCann, Gerald R. O'Brien, Jose A. Olivieri, and G. Lane Ware, all members in good standing of the State Bar of Wisconsin.

EXHIBIT 1

Overview, (June 2007).² The petitioners submitted a supplemental filing on September 29, 2010, responding to certain written questions from the court. Written comments from interested parties were also received.

On November 9, 2010, the court conducted a public hearing on this petition.³ Attorney John Skilton presented the petition and a number of individuals spoke regarding the petition.⁴ The testimony presented to the court was often eloquent and very informative. At the ensuing open administration conference the court discussed the matter at length.

This petition requires an understanding of the sometimes complicated interplay of statutes and rules that govern which defendants are sufficiently indigent to qualify for representation,

² All of these documents are available on the court's Web site at: www.wicourts.gov/scrules.

³ Initially, this matter was scheduled for public hearing on October 19, 2010. Immediately prior to the start of the public hearing on October 19, 2010, the State Capitol building was evacuated by Capitol Police for a period of several hours. As a result the administrative conference was cancelled. The matter was rescheduled and conducted on November 9, 2010.

⁴ Attorneys Dean Strang, Robert Friebert, Dave Jones, Ray Dall'Ostro, John Ebbott, Brian Gleason, John Birdsall, and Hank Schultz spoke in support of the petition. Carlo Esqueda, Dane County Clerk of Circuit Court, expressed concern about the proposed use of the Consumer Price Index as a basis for future rate increases. Sara Diedrick of the Wisconsin Counties Association, Mark Wadium, a lobbyist for Outagamie County, and John Barrett, Milwaukee County Clerk of Circuit Court, all spoke in opposition to the petition. Attorney Deb Smith advised the court that the Office of the State Public Defender took no formal position on the petition.

who represents these indigent criminal defendants, how these lawyers are compensated for their services, and who pays the bills.

It is a fundamental cornerstone of our justice system that indigent criminal defendants are constitutionally entitled to effective assistance of counsel. Gideon v. Wainwright, 372 U.S. 335 (1963); In re Gault, 387 U.S. 1 (1967); Argersinger v. Hamlin, 407 U.S. 25 (1972). In Gideon, the United States Supreme Court said:

That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

372 U.S. at 349. Consistent with this constitutional mandate, Wisconsin law requires the appointment of counsel for all eligible indigent criminal defendants.

The Wisconsin State Public Defender's Office (SPD) provides legal representation to qualified defendants in cases specified by state law.⁴ Applicants for public defender representation are required by state law to meet strict financial guidelines to qualify for appointment of an attorney by the SPD.

⁴ These cases include criminal, civil commitment, protective placement (personal guardianship), revocation of conditional liberty (probation, parole, or extended supervision), termination of parental rights, and juvenile delinquency proceedings and certain other juvenile court matters.

However, SPD staff attorneys cannot represent all the people who are entitled to representation. The law provides that if the SPD has a conflict of interest or is otherwise unable to represent an eligible indigent defendant, the SPD will appoint and pay for a private attorney to provide representation. See Wis. Stat. §§ 977.05(4)(i), (j), (jm); 977.05(5)(a); 977.07; 977.08.⁶ Because of the budget constraints imposed on the SPD, private attorneys currently handle approximately 40%-45% of all indigent representations.

These appointed lawyers are paid \$40 per hour.⁷ See Wis. Stat. § 977.08. This is the same rate Wisconsin paid private attorneys for these services 15 years ago and only \$5 more per hour than the original rate established in 1978, over thirty years ago. We are advised that this is the lowest such hourly rate in the nation.

By comparison, during the same time span the rate of compensation for attorneys serving in the federal system has doubled from \$65 (1995) to \$125 (2010).⁸

⁶ The legislature requires that the SPD handle 67% of all felony and juvenile indigent representation, and the private bar therefore no more than 33% of indigent clients in those cases. Wis. Stat. § 977.08(5)(c).

⁷ In 1978, when the legislature established the SPD's role in circuit courts, the hourly rate of compensation for appointed lawyers was \$35 (\$25 for travel time). In 1992 the legislature increased private bar compensation to \$50 for in-court time and \$40 for out-of-court time; travel time remained unchanged at \$25. However, in 1995, the legislature reduced the in-court rate to create a uniform \$40 hourly rate. The \$25 hourly rate for travel remained unchanged. The rate has not changed since 1995.

⁸ See <http://www.ca7.uscourts.gov/cja/cjarates.htm>.

The petitioners assert that the low hourly rates have increasingly caused qualified and/or experienced lawyers to decline SPD appointments. For many lawyers, their basic office overhead costs (such as malpractice insurance, rent, staffing costs, work-related travel, law school loan payments) exceed the compensation rate that is paid by the SPD. In short, they lose money if they agree to represent these criminal defendants. SPD appointed lawyers may feel pressure to receive cases early with a plea because they cannot afford the time to prepare for a trial even if their client wants one. SPD attorneys are managing increasingly heavy caseloads which affects the amount of time they can spend on each case.

If lawyers are unavailable or unwilling to represent indigent clients at the SPD rate of \$40 per hour, or when clients do not qualify under existing SPD eligibility standards but nonetheless are unable financially to retain counsel, judges then must appoint lawyers at county expense. See *State v. Dean*, 163 Wis. 2d 502, 471 N.W.2d 326 (Ct. App. 1991).

These court-appointed lawyers are compensated at a rate that is established by the supreme court in SCR 31.02. Since 1994 SCR 31.02 has set compensation for court-appointed lawyers at \$70 per hour.⁹

⁹ In 1994 the supreme court increased the hourly compensation under SCR 31.02 from \$60 to \$70 after hearing argument and evidence that the \$60 rate (a) was significantly lower than the average hourly rate charged by Wisconsin lawyers; (b) was not much higher than the office overhead rate for most lawyers; (c) reduced the number of experience lawyers taking court-appointed cases; and (d) impeded the provision of and reduced the quality of legal services to persons in need of these services.

Counties are thus required to reimburse court-appointed counsel at the \$70 per hour rate.¹⁶

This admittedly simplified background brings us to the petition pending before this court. The petition asks the court to raise the rate for court-appointed attorneys from \$70 per hour to \$80 per hour, adopt a provision tying the compensation rate to the Consumer Price Index, and, perhaps most significantly, adopt a newly created SCR 81.02(3), which would state the "payment of an hourly rate less than the rate set forth in Supreme Court Rule 81.02(1) for legal services rendered pursuant to appointment by the State Public Defender under Wisconsin Statutes section 977.08 is unreasonable."

Adopting proposed 81.02(3) would constitute a challenge to the compensation rate set by the legislature in Wis. Stat. § 977.08. The petitioners have repeatedly tried to persuade the legislature to address the issue of compensation rates for SPD appointed attorneys. Although the legislature recently acted to expand eligibility for SPD representation and has approved additional staff positions to cover

¹⁶ The petition states that in calendar year 2008 alone, "Wisconsin's counties expended at least \$5,965,186 on court-appointed counsel for indigent defendants, according to figures that the SPD maintains. Especially in less populous counties, that expense can be significant."

the anticipated increase in cases.¹ The last action taken by the legislature on compensation rates was in 1995 and was to reduce the rate to \$49 per hour in court or out of court and \$25 per hour travel time. Then State Public Defender Rich Chiarkas stated in a written submission to this court:

Each biennium since 1990, the Wisconsin State Public Defender Board has requested a private bar rate increase. We have made every argument for the rate increase that our collective intelligence and experience could generate. The agency's budget request has never been included in the Governor's budget bill.

¹ In 2010 the Legislature enacted 2009 Wisconsin Act 164, which expanded financial eligibility for public defender representation from the previous level set in 1987 (based on Aid to Families with Dependent Children (AFDC) to current W-2 limits. It authorized 45 new SPD staff positions to handle the anticipated increased caseload that will result from the expanded eligibility guidelines. In April 2011 the Joint Finance Committee (JFC) voted to approve funding for 45 new SPD positions to handle the workload generated by expanded eligibility standards for criminal defendants that will take effect June 19, 2011.

The JFC also approved Governor Walker's budget proposal to increase funding to help fill the hole in the perennially under-funded SPD private bar appropriation, which has repeatedly run out of money during the second year of the biennium. The SPD budget as approved by JFC increases the private bar appropriation by \$3.6 million. This will not cover the entire shortfall in the next biennium because it will not address a projected shortfall of \$3.5 million for the current 2009-11 biennium, which ends June 30, 2011. The remaining shortfall this year will be carried forward into the next biennium and added to the projected shortfall in fiscal year 2013.

A threshold question for this court is whether this court has the authority to effectively declare a legislative mandate "unreasonable." The petitioners urge that we do. The petitioners state:

This Court has inherent power to ensure the effective administration of justice in the State of Wisconsin, which necessarily includes the power to set reasonable attorneys' fees and, conversely, to declare inadequate fees "unreasonable." See, e.g., State ex rel. Friedrich v. Circuit Court for Dane Cnty, 192 Wis. 2d 1, 531 N.W.2d 32 (1995) (discussed in answer to the second question below). This is particularly true in instances involving the appointment of defense counsel for indigents charged with crimes where the right to the effective assistance of counsel is constitutionally guaranteed. See Gideon v. Wainwright, 372 U.S. 335 (1963). Assuming that the legislature has the power to set rates, even if that power is a shared one, and it fails to set a "reasonable" rate, this Court may, indeed it must, act. Here, a rate which is essentially confiscatory, was set more than 15 years ago, and has not been changed despite, for example, the Consumer Price Index having risen by 52%, is prima facie "unreasonable" and because of legislative inaction, this Court has the duty to step in and make the necessary adjustments. Indeed, § 751.12(2), Stats., expressly authorizes the Supreme Court to modify or suspend "statutes relating to pleading, practice and procedure." For a rate as to which "reasonableness" is time-dependent, determination, periodic adjustment is inherently necessary as this Court itself recognizes in existing SCR 81.02(1).

We agree that this is an area of shared authority for the court and the legislature, but we decline at this time to use our administrative regulatory process to effectively circumvent a legislative enactment.

However, we express sincere concern because we recognize that indigent criminal defense programs in Wisconsin are inadequately funded. While it can be difficult to demonstrate a clear correlation

between inadequate funding and legal representation that falls below constitutional requirements the petitioners have provided extensive anecdotal evidence that supports their assertion that funding shortfalls may compromise the right to effective assistance of counsel.

This funding crisis is not unique to Wisconsin. Across the nation, there are reports of systemic issues where inadequate funding has compromised the ability of the adversary system to function properly, including disturbing reports of innocent people incarcerated because of ineffective legal representation. Several states have faced court challenges related to inadequate funding for criminal representation.

Yet we also recognize and acknowledge that this is a particularly challenging budgetary environment. Legislators are required to make difficult funding decisions with inadequate resources while striving to support many worthy programs. Several counties have advised us that they oppose this petition because they simply cannot afford it.

However, our criminal justice system is reaching a breaking point. The resources available for the defense of poor people accused of crime has fallen alarmingly, potentially compromising our constitutional responsibility to ensure that every defendant stands equal before the law and is afforded the right to a fair trial guaranteed by our constitution. If this funding crisis is not addressed we risk a constitutional crisis that could compromise the integrity of our justice system.

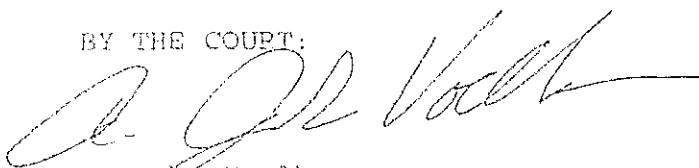
EXHIBIT 1

IT IS ORDERED that the petition is denied.

Justice David T. Prosser concurs in the result.

Dated at Madison, Wisconsin, this 6th day of July, 2011.

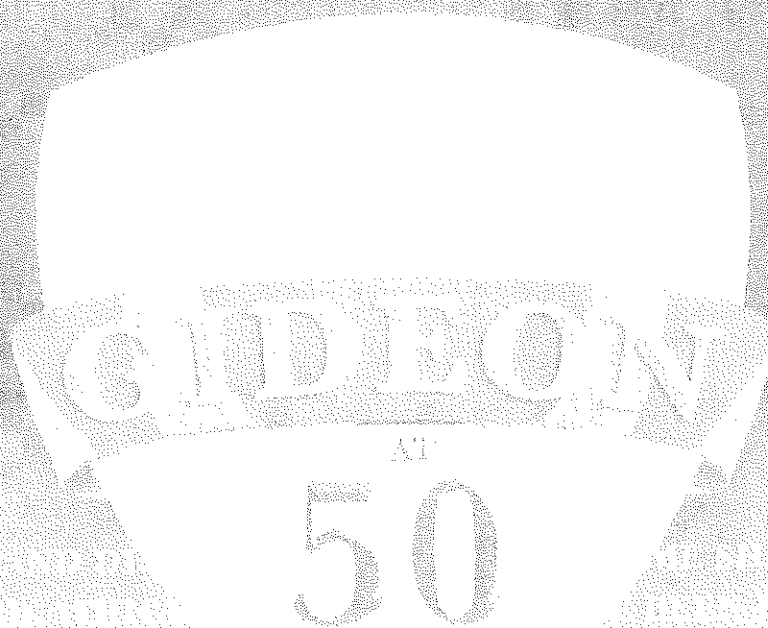
BY THE COURT:

A handwritten signature in black ink, appearing to read "A. John Voelker". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

A. John Voelker
Acting Clerk of Supreme Court

Sideon at 50: A Three-Part Examination of Indigent Defense in America

Part I – Rationing Justice: The Underfunding of Assigned Counsel Systems



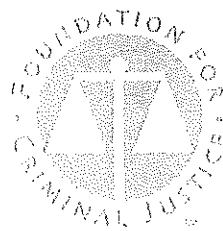
SIXTH AMENDMENT
RIGHT TO FAIR TRIAL

AT

ACCUSED SHALL
IMPARTIAL JURY

50

THE STATE HAVE BEEN



NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

March 2013

EXHIBIT 2

Appendix - 11

Supported by a grant from the Foundation for Criminal Justice.

COPYRIGHT © 2013 NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

This report is subject to a Creative Commons Attribution-Noncommercial-Nonderivative Work license (see www.creativecommons.org). It may be reproduced, provided that no charge is imposed, and the National Association of Criminal Defense Lawyers is acknowledged as the original publisher and the copyright holder. For any other form of reproduction, please contact NACDL for permission.

NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
1660 L Street NW, 12th Floor
Washington, DC 20036
Phone: 202-872-8600
www.nacdl.org



EXHIBIT 2

Rationing Justice: The Underfunding of Assigned Counsel Systems

A 50-State Survey of Trial Court Assigned Counsel Rates

BY

JOHN P. GROSS

Indigent Defense Counsel
National Association of
Criminal Defense Lawyers

STEVEN D. BENJAMIN
President, NACDL
Richmond, VA

GERALD B. LESCOURT
President, ICI
New York, NY

MORMAN L. REIMER
Executive Director, NACDL
Washington, DC

KYLE O'DOWD
Associate Executive Director
for Policy, NACDL
Washington, DC

EXHIBIT 2

Appendix - 13

THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS 3

STATE'S OBLIGATION FOR CRIMINAL JUSTICE 4

APP. A: OVERVIEW 5

THE WORLD 6

RACE, GUILT & JUSTICE: THE UNDERSTANDING OF
ASSIGNED COUNSEL SYSTEMS 7

 Introduction 7

HOW STATES SET THE RATE OF COMPENSATION
AND COMET-APPOINTED COUNSEL 9

 Uniform Rates Set by Statute, Regulation or Rule 9

 Maximum Fees 9

 Rates Determined by the Trial Court 9

 Rates Determined by Contract 9

 Map of Assigned Counsel Compensation in the 50 States 10-11

 Problematic Aspects of Current Appointed
 Counsel Compensation Systems 12

 Unreasonably Low Hourly Rates 12

 Unreasonably Low Maximum Fees 13

 Flat Fees & Flat Fee Contracts 14

 Judicial Control 15

IDENTIFYING NEGATIVE IMPACT ON THE
INDIGENT DEFENSE DELIVERY SYSTEM 13

CONCLUSIONS 18

APPENDICES 19

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
NATIONAL SURVEY OF TRIAL COURT ASSIGNED
COUNSEL RATES BY STATE 20

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

The National Association of Criminal Defense Lawyers (NACDL) is the preeminent organization in the United States advancing the goal of the criminal defense bar to ensure justice and due process for persons charged with a crime or wrongdoing. NACDL's core mission is to: *Ensure justice and due process for persons accused of crime ... Foster the integrity, independence and expertise of the criminal defense profession ... Promote the proper and fair administration of criminal justice.*

Founded in 1958, NACDL has a rich history of promoting education and reform through steadfast support of America's criminal defense bar, *amicus curiae* advocacy, and myriad projects designed to safeguard due process rights and promote a rational and humane criminal justice system. NACDL's approximately 9,500 direct members — and more than 90 state, local and international affiliates with an additional 40,000 members — include private criminal defense lawyers, public defenders, active U.S. military defense counsel, and law professors committed to preserving fairness in America's criminal justice system. Representing thousands of criminal defense attorneys who know firsthand the inadequacies of the current system, NACDL is recognized domestically and internationally for its expertise on criminal justice policies and best practices.

The research and publication of this report was made possible through the support of the Foundation for Criminal Justice and its contributors, including individuals, the Open Society Foundation and the Ford Foundation.

For more information contact:

NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
1660 L Street NW, 12th Floor
Washington, DC 20036
202-872-8600
www.nacdl.org

This publication is available online at

<http://www.nacdl.org/gideonat50/>



The Foundation for Criminal Justice (FCJ) is organized to preserve and promote the core values of America's criminal justice system guaranteed by the Constitution — among them due process, freedom from unreasonable search and seizure, fair sentencing, and access to effective counsel. The FCJ pursues this goal by seeking grants and supporting programs to educate the public and the legal profession on the role of these rights and values in a free society and assist in their preservation throughout the United States and abroad.

The Foundation is incorporated in the District of Columbia as a non-profit, 501(c)(3) corporation. All contributions to the Foundation are tax-deductible. The affairs of the Foundation are managed by a Board of Trustees that possesses and exercises all powers granted to the Foundation under the DC Non-Profit Foundation Act, the Foundation's own Articles of Incorporation and its Bylaws.

For more information contact:

FOUNDATION FOR CRIMINAL JUSTICE
1660 L Street NW, 12th Floor
Washington, DC 20036
202-872-8600
www.nacdl.org/foundation



EXHIBIT 2

This report was prepared by John P. Gross, Indigent Defense Counsel for the National Association of Criminal Defense Lawyers.

The author would like to thank the following NACDL staff for their careful editing and helpful suggestions: Norman Reimer, Executive Director; Kyle O'Dowd, Associate Executive Director for Policy; and Quintin Chatman, Editor of *The Champion* magazine. The author would also like to thank NACDL law clerk Melissa Baldwin for her legal research on assigned counsel compensation rates. The author wishes to acknowledge Cathy Zlomek, NACDL Art Director, for the design of the report.

The author also wishes to thank the members of NACDL's Indigent Defense Committee for their support of this project.

The lack of adequate compensation for assigned counsel is a serious threat to our criminal justice system. Our adversarial system cannot function properly when defense attorneys are impeded from providing adequate representation. Low hourly wages combined with caps on fees undermine the right to counsel guaranteed by the Sixth Amendment.

Low hourly wages for assigned counsel in criminal cases reinforce the idea that we have two criminal justice systems, one for the wealthy and one for the poor. This disparity violates the principle that everyone in this country stands equal before the law. Statutory caps on the already low court-appointed fees are an additional impediment to the representation of the indigent accused. These caps result in attorneys earning less per hour the more they work on a client's case. This type of financial disincentive creates a conflict of interest for defense attorneys and undermines the confidence of the accused and the public in our criminal justice system. While the vast majority of assigned counsel zealously represents their clients, inadequate compensation substantially reduces the number of attorneys willing to represent indigent defendants and diminishes the overall quality of representation.

The provision of counsel at state expense is a necessary predicate to a lawful prosecution of an accused who cannot afford his own attorney. The attorneys who represent the indigent in our nation's criminal courts perform an invaluable service without which, the criminal justice system would collapse. Yet in many instances, states pay hourly wages that do not even cover the costs incurred by the attorneys during the course of representation. When states refuse to adequately compensate assigned counsel, they fail to discharge their constitutional obligation to the accused.

The right to counsel is a fundamental American right. When states fail to adequately compensate assigned counsel, they discourage the active participation of the private bar in indigent defense, which causes excessive caseloads for public defender organizations. NACDL's 50-State Survey of Assigned Counsel Rates documents the current funding levels for assigned counsel across the nation. It is a guide for the defense bar, assigned counsel plan administrators and government officials in all three branches who must determine compensation rates for assigned counsel. As we celebrate the 50th anniversary of the Supreme Court's decision in *Gideon v. Wainwright*, the information contained in the survey should provide the impetus for the reform of our nation's assigned counsel systems so that every defendant stands equal before the law irrespective of financial status.

Steven D. Benjamin
President, NACDL

EXHIBIT 2

RATIONING JUSTICE: THE UNDERFUNDING OF ASSIGNED COUNSEL SYSTEMS

Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the wide-spread belief that lawyers in criminal courts are necessities, not luxuries.

Gideon v. Wainwright, 372 U.S. 335, 344 (1963)

Introduction

This 50-state survey of assigned counsel rates identifies the current hourly rates paid to private attorneys who represent the indigent in criminal cases as well as the maximum fee that can be earned by those attorneys.¹ The last comprehensive survey of assigned counsel rates was undertaken by the Spangenberg Group a decade ago and was limited to the rates of compensation paid in non-capital felony cases.² This survey includes data on assigned counsel rates for both misdemeanor and non-capital felony cases. While some jurisdictions rely primarily on public defender organizations to provide representation to the indigent, private assigned counsel plays a significant and critical role in the proper functioning of a public defense delivery system. The *ABA Ten Principles of a Public Delivery System* calls for the active participation of the private bar, even in areas where the

caseload is sufficiently high to warrant the establishment of a public defender's office. Private attorneys must be available to handle cases where the public defender's office has a conflict and to handle cases when public defender caseloads become excessive.³

Inadequate compensation for assigned counsel discourages the participation of the private bar and ultimately reduces the effectiveness of a public defense delivery system.

A public defense delivery system can take a number of forms: a full-time public defender's office, an assigned counsel plan, or contracts with individual attorneys. Whatever form it takes, a key component to the success of that system is adequate compensation for the attorneys who represent the indigent. While public defenders are typically full-time salaried employees, assigned counsel programs use private attorneys who represent indigent defendants but also maintain a private practice. Inadequate compensation for assigned counsel discourages the participation of the private bar and ultimately reduces the effectiveness of a public defense delivery system. In some cases, inadequate compensation may induce attorneys to accept more clients than they can effectively represent in order to maintain their practices.

States employ several different methods to compensate assigned counsel: hourly rates that can vary depending on the seriousness of the charge or whether the work is performed in or out of court; flat fees that vary based on the seriousness of the case; fees for specific events that take place such as a guilty plea, a hearing or a trial; or flat fee contracts that require the attorney to represent an entire class of defendants.

This survey reveals the staggeringly low rates of compensation for assigned counsel across the nation. A combination of low hourly wages combined with limits on the amount of compensation make it difficult, if not impossible, for members of the private bar to actively participate in assigned counsel systems. The average rate of compensation for felony cases in the 30 states that have established a statewide compensation rate is less than \$65 an hour, with some states paying as little as \$40 an hour. That rate of compensation does not take into account the various overhead costs associated with the practice of law, which include the costs of reference materials, office equipment, rent, travel, malpractice insurance and, for most young attorneys, student loans. The *2012 Survey of Law Firm Economics* by ALM Legal Intelligence estimates that over 50 percent of revenue generated by attorneys goes to pay overhead expenses.

The average rate of compensation for felony cases in the 30 states that have established a statewide compensation rate is less than \$65 an hour with some states paying as little as \$40 an hour.

EXHIBIT 2

Assigned Counsel Rates Determined by the Trial Court or by Contract

Compensation rates for assigned counsel are set in one of three ways: (1) uniform rates set by statute, regulation or rule, (2) rates set at the discretion of the presiding judge on a case-by-case basis, or (3) through a contract between the state or a state agency and a private attorney. Determining the hourly rate of compensation becomes difficult when the discretion to award compensation rests in the hands of the trial judge. It is also difficult to determine an hourly rate of compensation when attorneys enter into flat fee contracts, since the number of cases handled during the length of that contract may vary considerably. Another obstacle to collecting accurate data on assigned counsel rates is that many states do not employ statewide indigent defense delivery systems but instead delegate the responsibility to individual counties. In these cases, assigned counsel rates may vary widely within a state. Despite these obstacles, a review of the existing statewide hourly rates as well as the limitations imposed on the amount of compensation reveals indigent defense delivery systems that fail to adequately compensate assigned counsel.

Uniform Rates Set by Statute, Regulation or Rule

Uniform hourly rates have been established in 30 states: Alabama, Alaska, Arkansas, Colorado, Connecticut, Delaware, Hawaii, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Montana, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, West Virginia, Wisconsin and Wyoming.

Maximum Fees

Maximum fees or caps have been established in 26 states: Alabama, Alaska, Colorado, Connecticut, Delaware, Florida, Hawaii, Iowa, Kansas, Maine, Maryland, Mississippi, Nevada, New Hampshire, New Mexico, New York, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Virginia and West Virginia.

Rates Determined by the Trial Court

In 9 states the trial court has discretion to award counsel reasonable fees: Arizona, California, Idaho, Michigan, Mississippi, Pennsylvania, Texas, Utah and Washington.

Rates Determined by Contract

At least 20 states permit individual counties to enter into flat fee contracts with private attorneys: Arizona, California, Connecticut, Florida, Georgia, Illinois, Iowa, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Mexico, Oklahoma, Pennsylvania, Texas, Utah and Washington.

A combination of low hourly rates, fee limitations and the use of flat fees discourages attorneys from providing zealous representation and can give rise to serious conflicts of interest.

= States WITH established uniform hourly rates

= States WITHOUT established uniform hourly rates

= States where rates are determined by the TRIAL COURT

= States with established MAXIMUM FEES or CAPS

= States where rates are determined by CONTRACT

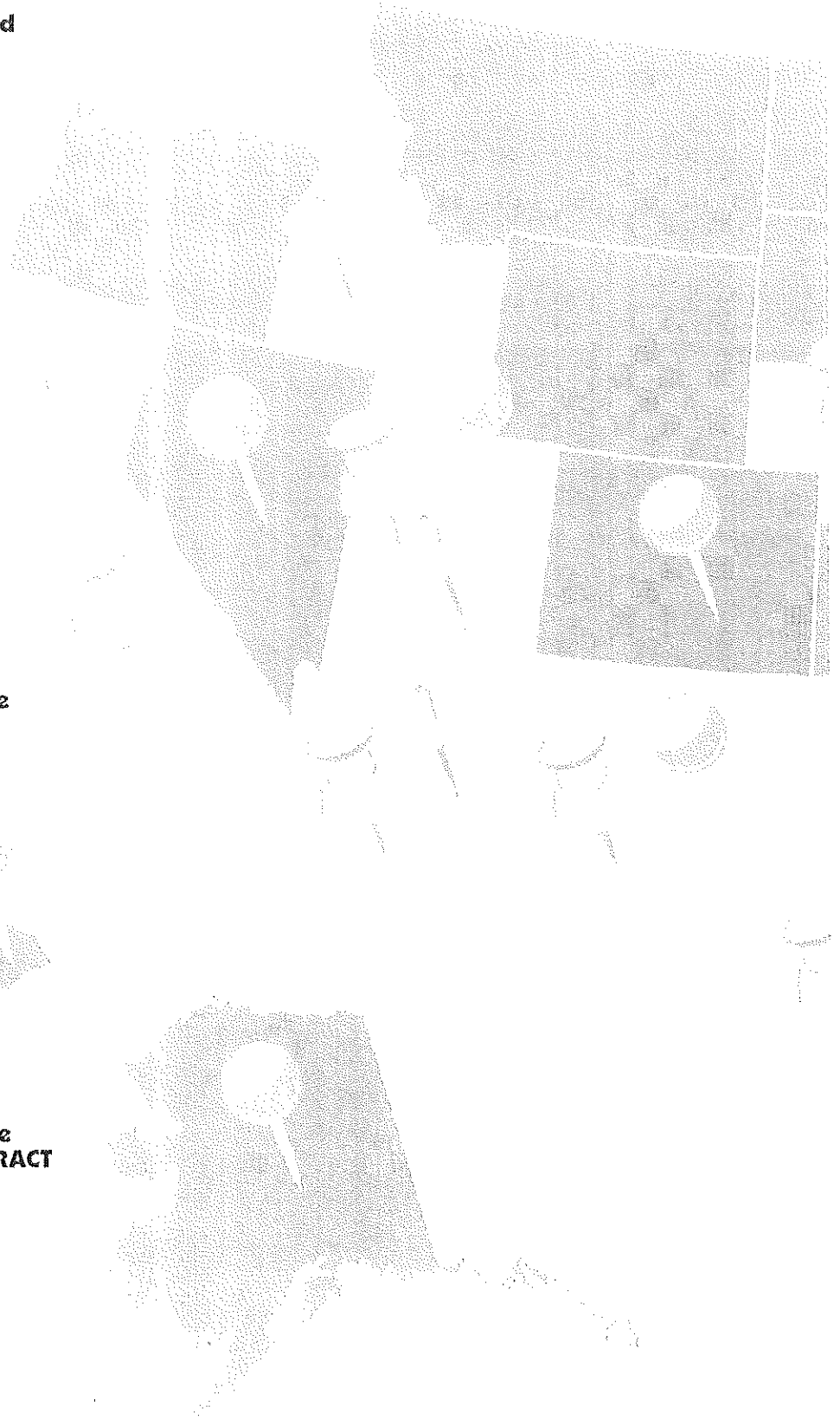


EXHIBIT 2



MAP OF ASSIGNING COUNSEL
COMPENSATION IN THE 50 STATES

Wisconsin has the lowest
hourly rate in the
nation at \$40 an hour.

Problematic Aspects of Current Appointed Counsel Compensation Systems

There are a number of problems with the current systems used by states to compensate assigned counsel. These problems hinder or disincentivize appointed counsel from providing effective representation. A combination of low hourly rates, fee limitations and the use of flat fees discourages attorneys from providing zealous representation and can give rise to serious conflicts of interest.

Unreasonably Low Hourly Rates

The ABA Standards for Providing Defense Services call for "compensation at a reasonable hourly rate" as well as reimbursement for "reasonable out-of-pocket expenses."⁴ The Federal Criminal Justice Act currently compensates attorneys representing indigent defendants in federal court at a rate of \$125 an hour and limits attorney compensation to \$9,700 in the case of non-capital felonies and \$2,800 in the case of misdemeanors.⁵ No state comes close to matching the Federal CJA compensation rate. The average hourly rate of compensation among the 30 states that have an established

statewide rate of compensation is below \$65 an hour. Wisconsin has the lowest rate in the nation at \$40 an hour. Oregon pays attorneys \$45 an hour for all non-capital cases, including cases where juveniles are charged with aggravated murder. Alaska, Connecticut, Maine, Maryland, Massachusetts, New Jersey, Ohio, Rhode Island, Tennessee and Vermont compensate assigned counsel at a rate of \$50 an hour for misdemeanor cases where a defendant is typically facing up to a year in jail if convicted.

A number of states — Alaska, New Jersey, Ohio, South Carolina, Tennessee and Virginia — pay a lower hourly rate for work done out of court. Over 80 years ago, the Supreme Court recognized that a defendant in a criminal case "requires the guiding hand of counsel at every step in the proceedings against him" and not merely at trial.⁶ Despite that fact, states continue to undervalue what are essential components of an adequate defense such as client and witness interviewing, legal research and the filing of discovery requests and motions. In Tennessee, attorneys are paid \$40 for work done outside of court, while court-appointed investigators are compensated at the higher rate of \$50 an hour.

In Tennessee, attorneys are paid
\$40 for work done outside of court,
while court-appointed investigators
are compensated at the
higher rate of \$50 an hour.

EXHIBIT 2

A decade ago, when declaring New York's statutory scheme for compensating counsel to be unconstitutional, one court found that the unreasonably low rate paid to counsel, \$40 an hour for in-court work and \$25 an hour for out-of-court work, "resulted in less than meaningful and effective" representation.⁷ This was caused by the fact that attorneys did not "conduct a prompt and thorough interview of the defendant; consult with the defendant on a regular basis; examine the legal sufficiency of the complaint or indictment; seek the defendant's prompt pre-trial release; retain investigators, social workers or other experts where appropriate; file pre-trial motions where appropriate; fully advise the defendant regarding any plea and only after conducting an investigation of the law and facts; prepare for trial and court appearances; and engage in appropriate presentencing advocacy, including seeking to obtain the defendant's entry into any appropriate diversionary programs."⁸

States continue to use hourly rates that have remained stagnant for years. Alaska has had the same rate since 1986, West Virginia since 1990, South Carolina since 1993 and Vermont since 1994. In Wisconsin, the hourly rate for assigned counsel has only increased by \$5 in the last 35 years. The hourly compensation rates for assigned counsel have remained the same over the last decade in 13 states: Alaska, Maine, Maryland, Massachusetts, Nevada, New Hampshire, New Jersey, New York, Ohio, South Carolina, Tennessee, Vermont and Wisconsin. To put that level of rate stagnation into perspective, the Bureau of Labor Statistics Consumer Price Index Calculator estimates that \$1.00 in 2003 has the same purchasing power as \$1.25 in 2013. Over the last decade, states would have needed to raise assigned counsel rates by 25 percent just to have kept pace with the increased costs of living.

Hourly rates for court-appointed counsel that have remained stagnant for a decade or longer simply fail to reflect current economic conditions. South Dakota provides an example of fees keeping pace with the changing economy: beginning in the year 2000, flat fees were abolished and an hourly rate of \$67 was established along with an order that each year the fees would increase in an amount equal to the cost of living increase that state employees received that year. Since the initial rate of \$67 an hour, the compensation rate has increased to \$84 an hour in 2013.

Over the last decade states would have needed to raise assigned counsel rates by 25 percent just to have kept pace with the increased costs of living.

Unreasonably Low Maximum Fees

At least 26 states impose some cap or maximum fee on appointed counsel compensation even though the ABA Standards for Providing Defense Services recommend that assigned counsel "be compensated for all hours necessary to provide quality legal representation."⁹ Fee caps have been the subject of litigation in many states over the years and have been invalidated on a number of grounds. Courts in Florida, Michigan, New Hampshire and Oklahoma have invalidated fee caps on the ground that they unduly invade the power of the courts to regulate the practice of law

and judicial proceedings.¹⁰ Courts in West Virginia¹¹ and Iowa¹² have pointed to the perverse economic incentives introduced into the criminal justice system by fee caps when declaring them invalid. At other times, courts have interpreted statutory limitations on fees as unenforceable, since strict adherence to them would not permit the effective assistance of counsel.¹³

States continue to limit the amount of compensation that may be earned by assigned counsel, effectively rationing justice.

Despite these cases, the majority of states continue to limit the amount of compensation that may be earned by assigned counsel, effectively rationing justice.¹⁴ The combination of hourly rates with fee limitations creates a finite amount of compensable time a lawyer can devote to a case. Any hours worked that are beyond the cap effectively reduce the hourly rate of compensation. It is important to recognize the relationship that exists between hourly rates and fee limitations: by dividing the hourly rate by the maximum fee we arrive at the maximum number of compensated hours available for assigned counsel.

New York has an hourly rate of compensation for misdemeanors of \$60 and a fee limitation of \$2,400, which means there are 40 compensated hours available for assigned counsel.¹⁶ Alabama has an hourly rate of compensation for misdemeanors of \$70 but a fee limitation of \$1,500,

which means there are approximately 21.43 compensated hours available for assigned counsel. Colorado has an hourly rate of compensation for misdemeanors of \$65 and a fee limitation of \$1,000, which means there are 15.38 compensated hours available for assigned counsel. Nevada has an hourly rate of compensation for misdemeanors of \$100, the highest of all 50 states, but a fee limitation of \$750, which means there are only 7.5 compensated hours available for assigned counsel. What becomes clear is that relatively high hourly rates are no guarantee of effective representation if there are also unreasonably low fee limitations.

It should be noted that of the 26 states that impose a cap or maximum fee on assigned counsel compensation, 20 of them permit that maximum to be waived under special circumstances.¹⁶ However, even in those states where there is a "soft cap" on the level of attorney compensation, these fee limitations undoubtedly have an impact on the willingness of judges and assigned counsel program administrators to award additional compensation.

Flat Fees and Flat Fee Contracts

At least 20 states utilize flat fee contracts to provide indigent defense services or pay a flat rate to assigned counsel based on the seriousness of the charge. As previously noted, the use of flat fee contracts makes it difficult to determine the rate of assigned counsel compensation. These types of contracts typically do not include case-load limitations, which calls into question whether defense counsel's workload can be controlled in order to ensure quality representation as required by the ABA *Ten Principles of a Public Delivery System*.

Judicial Control

The first of the ABA's *Ten Principles of a Public Defense Delivery System* is that the selection and funding of assigned counsel be done independently from the judiciary. Despite that fact, at least 9 states rely primarily on the trial court judge to determine a reasonable amount of compensation for assigned counsel.

Inadequate compensation restricts the pool of attorneys willing to represent indigent defendants and threatens the quality of indigent defense because of the perverse economic incentives.

Resulting Negative Impact on the Indigent Defense Delivery System

The issues identified above have troubling implications for a public defense delivery system's ability to provide adequate representation. Inadequate compensation restricts the pool of attorneys willing to represent indigent defendants and threatens the quality of indigent defense because of perverse economic incentives.¹⁷ It creates conflicts of interest for attorneys by encouraging them to limit the amount of work they perform on a case for an indigent client. A stagnant hourly rate leads to a decrease in the overall number of attorneys willing to accept court appointments. More experienced attorneys refuse to participate in assigned counsel systems that pay hourly rates far below the market rate. Younger attorneys, who are often burdened by

They also create perverse economic incentives since attorneys will be compensated the same amount regardless of how much, or how little, work they perform. Despite this fact, states have increasingly relied on flat fee contracts or compensation schedules in order to control indigent defense costs. Some examples of current flat rates for misdemeanor representation: Florida \$400, Connecticut \$350, North Dakota \$300, New Mexico \$180 and Virginia \$158. The current compensation system for Wayne County, Michigan (Detroit), actually pays attorneys based on specific events that take place in court with attorneys being compensated \$200 more for a guilty plea than for a dismissal. In Florida, appointed counsel is paid a flat fee of \$2,500 when defending someone who could go to prison for life.

Current flat rates for misdemeanor representation:

Florida \$400, Connecticut \$350, North Dakota \$300, New Mexico \$180 and Virginia \$158.

...the quality of his or her representation cannot be ignored.

student loans, never even consider joining the defense bar.¹⁸ Even more troubling is the possibility that low hourly rates will encourage some attorneys to accept more clients than they can effectively represent in order to make ends meet. The result is an inadequate, inexperienced, overworked and inherently conflicted pool of attorneys accepting court appointments in our criminal courts.

The National Legal Aid & Defender Association's *Standards for the Administration of Assigned Counsel Fees* makes it clear that there needs to be a reasonable rate of compensation in order to ensure the quality of an assigned counsel system. The American Bar Association's *Ten Principles of a Public Defense Delivery System* stresses the need for assigned counsel compensation to be "a reasonable fee in addition to actual overhead and expenses." Designation of an hourly rate, without consideration of overhead expenses, is a haphazard and flawed method of compensation. For example, in 1996 court-appointed counsel in Iowa were paid an hourly rate of \$45, but the mean overhead expenses for court-appointed counsel was \$36.75 an hour, resulting in an hourly rate of

\$8.75.¹⁹ In 2003, it was estimated that an attorney working in New York City had hourly overhead costs of \$42.88, but the rate for appointed counsel was only \$40 for in-court work and \$25 for out-of-court work. Attorneys actually lost money when handling assigned cases.²⁰ Altman Weil's 2008 *Survey of Law Firm Economics* reported that the annual overhead costs for small law firms, defined as those with 2 to 8 lawyers, were \$160,000 per lawyer. Assuming an attorney was able to bill for 2,000 hours of work in a year, that would result in an overhead rate of approximately \$80 an hour. Another survey by Altman Weil reported that law firm overhead has risen twice as fast as the consumer price index since 1985.²¹

Hourly rates combined with a maximum fee cap lead to perverse incentives and conflicts of interest. The consequence of setting a maximum fee is that it unintentionally establishes the number of hours a lawyer "should" work on the case. This creates a conflict of interest for lawyers once they have worked the maximum number of hours available for compensation. Several courts when adjudicating challenges to the adequacy of compensation for appointed counsel have recognized this conflict of interest. The Florida Supreme Court stated the attorney's right to fair compensation and the defendant's rights are "inextricably linked"²² and "[t]he relationship between an attorney's compensation and the quality of his or her representation cannot be ignored. It may be difficult for an attorney to disregard that he or she may not be reasonably compensated for the legal services provided due to the statutory fee limit."²³ The Supreme Court of Iowa stated that "low compensation pits a lawyer's economic interest... against the interest of the client in effective representation."²⁴

EXHIBIT 2

A study done on Virginia's indigent defense system concluded that unreasonably low statutory fee caps encourages assigned counsel to put in as little effort as possible on individual cases and the low rate of compensation discourages many qualified, competent criminal defense lawyers from handling court-appointed cases.²⁵ A similar study of the indigent defense system in Pennsylvania concluded that flat fees paid to appointed counsel could be a disincentive to effective preparation and advocacy and that low compensation rates create little incentive to develop expertise in criminal defense.²⁶ A study which compared the effectiveness of defense counsel in Philadelphia concluded that low pay reduces the pool of attorneys willing to take appointments, makes doing preparation uneconomical and the use of a flat fee structure creates no marginal incentives to prepare for trial.²⁷

Even in the states where the maximum fee can be exceeded in special circumstances, the designation of a maximum fee still has an impact on the level of compensation. While the maximum fee may not be an accurate estimate of the amount of work required to provide adequate representation, it still represents the perceived maximum amount of compensation that can be earned. Attorneys wishing to be awarded additional compensation need to demonstrate that the specific facts and circumstances of their case justify additional compensation. In addition, there are transactional costs associated with seeking additional compensation. The time and effort needed to file a motion seeking additional compensation discourage attorneys from seeking additional compensation.

Providing indigent defense services through a system of flat fee contracts gives rise to the same concerns, but also creates the possibility of unreasonably high caseloads. There is often a lack of transparency with regard to the terms and conditions of the contract as well. Awarding a contract to provide indigent defense services to the lowest bidder led at least one court to conclude that the continued use of a flat fee contract to provide indigent defense services gives rise to the presumption of ineffective assistance of counsel.²⁸ Contracting terms and processes are often hidden and unavailable to the public. As a result, there is no way to exercise oversight and regulation of the indigent defense system to ensure that defendants are receiving effective representation.

Flat fee contracts are undoubtedly attractive to legislatures as a way to contain costs. However, a report by the Department of Justice found that "good contract systems cost more per case than do public defender or assigned counsel programs."²⁹ While very few empirical studies have examined indigent defense contracting systems, the few available show troubling consequences for the quality of representation. One study in Clark County, Washington, found the contracting system decreased the quality of representation, the number of cases taken to jury trials, increased guilty pleas at first appearances, caused a decline

"Low compensation pits a lawyer's economic interest...against the interest of the client in effective representation."

in motions to suppress and requests for expert assistance, and an increase in complaints from defendants.³⁰ Another study found similar deficiencies in representation provided under a contracting system and concluded that, over the long term, contracting would cost the state more than an appointed counsel system.³¹

If a jurisdiction chooses to utilize a contracting system, several guiding criteria should be followed to ensure effective representation. The National Legal Aid & Defender Association's *Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services* recommends the following contractual elements: specifications for minimum professional qualifications; provisions for support staff, forensic experts, and investigators; compensation commensurate with experience; an allowable caseload; ability to decline cases without penalty when the maximum caseload is reached; funds and staff to permit systematic and comprehensive training; a filing retention and management system; and others.³² A Department of Justice report affirmed the importance of many of these features.³³

It is also important to recognize that the Bureau of Justice Statistics estimates that over 80 percent of felony defendants have publically assigned counsel.³⁴ When we take into consideration that the vast

The Bureau of Justice Statistics estimates that over 80 percent of felony defendants have publically assigned counsel.

majority of criminal defendants are classified as indigent, it becomes clear that the rates paid to assigned counsel have a tremendous impact on the cost of legal services. Since lawyers tend to specialize, and since the field of criminal defense has become increasingly complex, it is safe to assume that the attorneys who participate in assigned counsel programs devote a significant portion, if not all of their practice, to criminal defense. If these attorneys are paid an unreasonable low hourly rate for their work as assigned counsel, the inescapable conclusion is that they will need to charge private clients significantly more. An unforeseen consequence of under-resourcing assigned counsel may be an increase in the cost of legal services for those defendants who are not classified as indigent.

Conclusion

The following table details the state of appointed counsel compensation in all 50 states. It is undeniable that the rate of compensation is directly linked to the quantity of attorneys willing to accept court appointments and the quality of their representation. While some states have made improvements throughout the years, too many states have neglected this essential element of their public defense delivery system. As a result, the current hourly rates and maximum fee caps do not reflect the reality of the legal marketplace. Without immediate reform, the supply of qualified attorneys willing to take appointments will dwindle and those attorneys who continue to accept appointments will find it almost impossible to provide effective representation.

The real issue is not that lawyers are not getting paid what they are worth. Rather, the issue is that they are being paid so little that they are no longer able to participate in our indigent defense systems. A dwindling supply of attorneys willing to partic-

ipate in assigned counsel programs exposes public defender organizations to ever-increasing case-loads. Only a reasonable rate of compensation can create an elastic supply of qualified private attorneys willing to be active members of the defense bar. Without their participation, our nation's indigent defense systems cannot guarantee that all defendants will receive equal justice under the law.

Footnotes

1. While some states permit fees in excess of statutory maximums under special circumstances, this report focuses on the maximum fee that can be earned under normal circumstances.
2. The Spangenberg Group, *RATES OF COMPENSATION PAID TO COURT-APPOINTED COUNSEL IN NON-CAPITAL FELONY CASES AT TRIAL: A STATE-BY-STATE OVERVIEW* (2003).
3. Norman Lefstein, *Securing Reasonable Caseloads: Ethics and Law in Public Defense* (2011).
4. See ABA STANDARDS FOR CRIMINAL JUSTICE PROVIDING DEFENSE SERVICES, STANDARD 5-2.4: COMPENSATION AND EXPENSES (1992).
5. The District of Columbia compensates assigned counsel at a rate of \$90 an hour and limits attorney compensation to \$7,000 for felonies and \$2,000 for misdemeanors.
6. *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932).
7. *New York County Lawyers' Association v. State*, 196 Misc2d. 761, 763 N.Y.S.2d 397, 407 (2003).
8. *Id.* at 407.
9. See ABA STANDARDS FOR CRIMINAL JUSTICE PROVIDING DEFENSE SERVICES, STANDARD 5-2.4: COMPENSATION AND EXPENSES (1992).
10. See *White v. Board of County Commissioners*, 537 So.2d 1376, 1380 (Fla. 1989); *Makemson v. Martin County*, 491 So.2d 1109 (Fla. 1986); *In re Recorder's Court Bar Association*, 443 Mich. 110, 503 N.W.2d 885 (1993); *Smith v. State*, 118 N.H. 764, 394 A.2d 834 (1978); *State v. Lynch*, 796 P.2d 1150 (Okla. 1990).
11. *Jewell v. Maynard*, 181 W.Va. 571, 383 S.E.2d 536 (1989).
12. *Simmons v. State Defender*, 791 N.W.2d 69 (Iowa 2010).
13. *Bailey v. State*, 309 S.C. 455, 424 S.E.2d 503 (1992); *May v. State*, 672 So.2d 1307 (Ala. Crim. App. 1993).
14. "If we are to keep our democracy, there must be one commandment: Thou shalt not ration justice." Judge Learned Hand, Remarks to the New York Legal Aid Society (16 February 1951).
15. *But see* New York County Law § 722-bf(3) which permits compensation in excess of fee limitations in extraordinary circumstances.
16. Those states are: Alaska, Colorado, Delaware, Florida, Hawaii, Kansas, Maine, Nevada, New Hampshire, New York, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Virginia and West Virginia.
17. See *Lavallee v. Hampden Superior Court*, 442 Mass. 228, 812 N.E.2d 895 (2004) (attributing a shortage of criminal defense attorneys to represent indigent defendants to the low rate of attorney compensation); see also Gershowitz, *Raise the Roof: A Default Rule for Indigent Defense*, 40 Conn. L. Rev. 85, 96 (2007) ("Because funding for indigent defense is so low, competent lawyers usually refuse to take appointed cases.").
18. See Final Report of the ABA Commission on Loan Repayment and Forgiveness, *LIFTING THE BURDEN: LAW SCHOOL DEBT AS A BARRIER TO PUBLIC SERVICE* (2003).
19. Robert R. Rigg, *The Constitution, Compensation, and Competence: A Case Study*, 27 Am. J. Crim. L. 1, 25-26 (1999) (citing Iowa State Bar Association Indigent Defense Survey).
20. *New York County Lawyers' Association v. State*, 196 Misc2d. 761, 763 N.Y.S.2d 397, 407 (2003).
21. See Altman Weil, *SURVEY OF LAW FIRM ECONOMICS: TREND COMPARISON OF OVERHEAD EXPENSES* (2003).
22. *Makemson v. Martin County*, 491 So.2d 1109, 1112 (1986).
23. *White v. Bd. of County Com'rs of Pinellas County*, 537 So.2d 1376, 1380 (1989).
24. *Simmons v. State Public Defender*, 791 N.W.2d 69, 88 (2010).
25. The Spangenberg Group, *A COMPREHENSIVE REVIEW OF INDIGENT DEFENSE IN VIRGINIA* 86 (2004).
26. Pennsylvania Supreme Court, *FINAL REPORT OF THE PENNSYLVANIA SUPREME COURT COMMITTEE ON RACIAL AND GENDER BIAS IN THE JUDICIAL SYSTEM* 168 (2003).
27. James M. Anderson, Paul Heaton, *MEASURING THE EFFECT OF DEFENSE COUNSEL ON HOMICIDE CASE OUTCOMES* (2013) available at: <https://www.ncjrs.gov/pdffiles1/nij/grants/241158.pdf>
28. *State v. Smith*, 140 Ariz. 355, 681 P.2d 1374 (1984).
29. Bureau of Justice Assistance, Dep't of Justice, *CONTRACTING FOR INDIGENT DEFENSE SERVICES* 17 (April 2000) (noting several additional characteristics shared by effective contract systems, including independent oversight and monitoring, limitations on the practice of law outside the contract, guidelines on client contact and notification of appointment, and a mechanism for oversight and evaluation).
30. *Id.* at 10. (citing Lefstein, Norman, *CRIMINAL DEFENSE SERVICES FOR THE POOR: METHODS AND PROGRAMS FOR PROVIDING LEGAL REPRESENTATION AND THE NEED FOR ADEQUATE FINANCING* (1982)).
31. *Id.* (citing Houlden, Pauline, and Steven Balkin, *QUALITY AND COST COMPARISONS OF PRIVATE BAR INDIGENT DEFENSE SYSTEMS: CONTRACT VS. ORDERED ASSIGNED COUNSEL*, *Journal of Criminal Law and Criminology* 76:176 (1985)).
32. See NLADA, *GUIDELINES FOR NEGOTIATING AND AWARDED GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES* (1984).
33. Bureau of Justice Assistance, Dep't of Justice, *CONTRACTING FOR INDIGENT DEFENSE SERVICES* 16 (April 2000).
34. United States Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *DEFENSE COUNSEL IN CRIMINAL CASES* (2000).

50-State Survey of Trial Court Assigned Counsel Rates for 2013

STATE	HOURLY RATE	MAXIMUM FEE*	YEAR ENACTED
Alabama	\$70	Class A Felony: \$4,000 Class B Felony: \$3,000 Class C Felony: \$2,000 Misdemeanors: \$1,500	2011
<i>Authority:</i> Code of Alabama 1975 § 15-12-21			
Alaska	\$60 in court \$50 out of court	<i>Felony Trial: \$4,000</i> <i>Felony disposition without trial: \$2,000</i> <i>Misdemeanor trial: \$800</i> <i>Misdemeanor Disposition without trial: \$400</i>	1986
<i>Authority:</i> Alaska Administrative Code Title 2 § 60.010			
Arizona	Varies by county Maricopa County (Phoenix) \$70 for major felonies (such as murder or manslaughter) Uses a flat fee for other charges Class 1,2,3 Felony: \$1,250 Class 4,5,6 Felony: \$900 Misdemeanor: \$400	None	2005
<i>Authority:</i> Arizona Revised Statute § 13-4013(A): Compensation for services rendered to the defendant shall be in an amount that the court in its discretion deems reasonable, considering the services performed.			
Arkansas	Class A or Y Felony: \$70 - \$90 Other felony: \$60 - \$80 Misdemeanor: \$50 - \$80 Travel hours paid at ½ hourly rate	None	2012
<i>Authority:</i> Arkansas Code Annotated § 16-87-211(b)(2)2001 Directs the Arkansas Public Defender Commission to establish rates Payment & Expense Reimbursement Guidelines2012			

*Maximum fees listed in italics are subject to waiver under special circumstances.

50-State Survey of Trial Court Assigned Counsel Rates for 2013

STATE	HOURLY RATE	MAXIMUM FEE*	YEAR ENACTED
California	Varies by county	None	1951
	<p>San Francisco Superior Court Indigent Defense Administration: Serious felonies: \$106 Felonies: \$89 Misdemeanors: \$66</p> <p>Authority: California Penal Code § 987.2: Assigned counsel shall receive a reasonable sum for compensation and for necessary expenses, the amount of which shall be determined by the court</p>		
Colorado	Type A Felony: \$68	<i>Class 1 Felonies with trial / without trial: \$24,000 / \$12,000</i>	2008
	Type B Felony: \$65	<i>Class 2 Felonies with trial / without trial: \$10,000 / \$5,000</i>	
	Misdemeanors: \$65	<i>Class 3 - 6 Felonies with trial / without trial: \$6,000 / \$3,000 Misdemeanors with trial / without trial: \$2,000 / \$1,000</i>	
	Authority: Chief Justice Directive 04-04		
Connecticut	Felony: \$75	Most cases are handled through flat rate contracts:	2013
	Misdemeanor: \$50	Class A and B Felonies: \$1,000 per case Class C Felony and Misdemeanor: \$350 per case	
	Authority: Connecticut Public Defender Services Commission		
Delaware	\$60 maximum	<i>Felonies: \$2,000 Misdemeanors: \$1,000</i>	2012
	Authority: Rules of Criminal Procedure for the Superior Court of the State of Delaware Rule 44(c)(1)		

*Maximum fees listed in italics are subject to waiver under special circumstances.

50-State Survey of Trial Court Assigned Counsel Rates for 2013

STATE	HOURLY RATE	MAXIMUM FEE*	YEAR ENACTED
Florida	Flat rate which varies depending on the offense charged	<i>Statutory Maximums</i> <i>Life felony: \$3,000</i> <i>Felony: \$2,500</i> <i>Misdemeanor: \$1,000</i> <i>Flat Rates</i> <i>Life felony: \$2,500</i> <i>Felony: \$750 to \$1,500</i> <i>Misdemeanor: \$400</i>	2003
<p>Authority: Florida Statute Annotated § 27.5304 (sets maximum compensation) & Annual General Appropriations Act (sets flat rate)</p>			
Georgia	Georgia Public Defender Standards Council contracts with individual attorneys	Flat fee structure authorized by statute	2011
<p>Authority: Code of Georgia Annotated § 17-12-22</p>			
Hawaii	\$90	<i>Felony: \$6,000</i> <i>Misdemeanor jury trial: \$3,000</i> <i>Misdemeanor: \$1,500</i> <i>Petty Misdemeanor: \$900</i>	2005
<p>Authority: Hawaii Revised Statute § 802-5</p>			
Idaho	The court shall prescribe a reasonable rate of compensation	None	1998
<p>Authority: Idaho Official Code § 19-860(b)</p>			
Illinois	For Cook County \$40 in court \$30 out of court All other counties establish rates independently	<i>For Cook County</i> <i>Felony: \$1,250</i> <i>Misdemeanor: \$150</i>	2000
<p>Authority: 725 Illinois Compiled Statutes § 5/113-3</p>			

*Maximum fees listed in italics are subject to waiver under special circumstances.

50-State Survey of Trial Court Assigned Counsel Rates for 2013

STATE	HOURLY RATE	MAXIMUM FEE*	YEAR ENACTED
Indiana	Determined by court	None	2012
	Indiana Public Defender Commission Standards: Not less than \$70		
	Authority: Indiana Code 33-40-8-2 & 2004 Indiana Public Defender Commission Standards for Indigent Defense Services in Non-Capital Cases 2012		
Iowa	State Public Defender authorized to use flat fee contracts	State Public Defender has established fee limitations Class A Felony: \$18,000 Class B Felony: \$3,600	2007
	If not under contract then Class A Felony: \$70 Class B Felony: \$65 All other charges: \$60	Class C & D Felonies and Aggravated Misdemeanors: \$1,200 Serious Misdemeanors: \$600 Simple Misdemeanors: \$300	
	Authority: Iowa Code Annotated § 13B.4 (flat fee contracts) & Iowa Code Annotated § 815.7 (hourly rates)		
Kansas	\$80 an hour but can be lowered by the Chief Judge of any Judicial District or the Kansas Board of Indigent Defense Services	<i>Kansas Board of Indigent Defense Services sets maximum fees for some felonies: Varies from \$930 to \$1,240</i>	2007
	Rate set by Board: \$62		
	Authority: Kansas Statutes Annotated § 22-4507 & Kansas Administrative Regulations 105-5-2, 105-5-6		
Kentucky	Department of Public Advocacy uses mostly flat fee contracts but has proposed hourly rates of \$100 for felonies and \$75 for misdemeanors	Department of Public Advocacy uses mostly flat fee contracts but has proposed caps ranging from \$2,500 for class A felonies to \$375 for misdemeanors in non-trial cases	2002
	Authority: Kentucky Revised Statutes Annotated § 31.235		

*Maximum fees listed in italics are subject to waiver under special circumstances.

**NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
50-State Survey of Trial Court Assigned Counsel Rates for 2013**

STATE	HOURLY RATE	MAXIMUM FEE*	YEAR ENACTED
Louisiana	Uses flat fee Contracts	None	2007
Authority: Louisiana Revised Statutes Annotated § 15:147			
Maine	\$50	<i>Class A Crime (max. sentence of 30 years): \$2,500</i> <i>Class B & C Crimes against a person (max. sentence of 10 & 5 years respectively): \$1,875</i> <i>Class B & C Crimes against property (max. sentence of 10 & 5 years respectively): \$1,250</i> <i>Class D & E Crimes against a person (max. sentence of 1 year & 6 months respectively): \$625 in Superior Court or \$450 in District Court</i>	2012
Authority: Code of Maine Rules § 94-649, Chapter 301			
Maryland	Maryland Administrative Code calls for the same hourly rate as federal panel attorneys "as the annual budget permits" Current rate: \$50	Felonies: \$3,000 Misdemeanors: \$750	2008
Authority: Maryland Code of Criminal Procedure § 16-207 Maryland Administrative Code 14.06.02.06			
Massachusetts	\$60 in Superior Court \$50 in District Court	None+	2011
Authority: Massachusetts General Laws Annotated § 211D § 11			

+There is no per case maximum but there is an annual cap on billable hours of 1,650.

*Maximum fees listed in italics are subject to waiver under special circumstances.

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
50-State Survey of Trial Court Assigned Counsel Rates for 2013

STATE	HOURLY RATE	MAXIMUM FEE*	YEAR ENACTED
Michigan	Varies by County: Reasonable compensation as determined by the chief judge In Wayne County (Detroit) attorneys are initially paid a flat fee based on the possible sentence and are then paid by the "event." Initial flat fee for case with potential sentence of 5 years: \$250 5 - 10 years: \$300 10 - 20 years: \$350 For a "Disposition Conference" that results in: a dismissal \$130 a guilty plea \$350 Sentencing: \$60 Evidentiary Hearing: \$80 Jury Trial ½ day: \$90	Counties often use flat fee contracts	1981
Authority: Michigan Compiled Law Annotated 775.16 § 11			
Minnesota	State Board of Public Defense determines compensation rates but relies on flat fee contracts	Relies on flat fee contracts	1991
Authority: Minnesota Statutes Annotated § 611.215			
Mississippi	Judge approves amount of compensation	\$1,000 in Circuit Court \$200 if the case does not originate in a court of record	1971
Authority: Mississippi Code Annotated § 99-15-17			

*Maximum fees listed in italics are subject to waiver under special circumstances.

**NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
50-State Survey of Trial Court Assigned Counsel Rates for 2013**

STATE	HOURLY RATE	MAXIMUM FEE*	YEAR ENACTED	
Missouri	Public Defender	Additional compensation is provided if the case goes to trial	1982	
	Commission uses flat fee contracts with individual attorneys			
	Class A or B Felony \$750 to \$2,000			
	Class C or D Felony \$750 to \$1,500			
	Misdemeanor \$375			
Authority: Missouri Revised Statutes § 600.042				
Montana	\$60	None	2012	
	Plus an additional office stipend of \$25 per month			
	Authority: Montana Code Annotated § 47-1-216			2005
	The Montana Public Defender Commission has the authority to set rates of compensation Office of State Public Defender Administrative Policy 130: Fee Schedule 2012			2012
Nebraska	Varies by county	None	1995	
	Lancaster County (Lincoln): \$75 District Court \$50 County Court			
	Authority: Revised Statutes of Nebraska § 29-3927			
	Empowers the Commission on Public Advocacy to set rates			
Nevada	\$100	<i>Felony or Gross Misdemeanor: \$2,500</i>	2003	
		<i>Misdemeanor: \$750</i>		
Authority: Nevada Revised Statutes Annotated § 7.125				

*Maximum fees listed in italics are subject to waiver under special circumstances.

50-State Survey of Trial Court Assigned Counsel Rates for 2013

STATE	HOURLY RATE	MAXIMUM FEE*	YEAR ENACTED
New Hampshire	\$60	<i>Felonies: \$4,100</i> <i>Misdemeanors: \$1,400</i>	2008
Authority: Superior Court Rules, Rule 47			
New Jersey	\$60 in court \$50 out of court	None [‡]	2012
Authority: New Jersey Statutes Annotated § 2A:158A-71967 Empowers the Public Defender to establish rates Office of the Public Defender Pool Attorney Application Process.....2012			
New Mexico	New Mexico Public Defender Department uses flat fee contracts	Flat fee based on seriousness of the offense Felonies 1st Degree: \$700 2nd Degree: \$650 3rd Degree: \$595 4th Degree: \$540 Misdemeanor: \$180	2012
Authority: New Mexico Statutes Annotated § 31-15-7(11)1978 Empowers the New Mexico Public Defender Department to establish rates Contract Counsel Legal Services Requests for Proposals.....2012			
New York	Felony: \$75 Misdemeanor: \$60	<i>Felony: \$4,400</i> <i>Misdemeanor: \$2,400</i>	2003
Authority: New York County Law § 722-b			

[‡]Attorneys may only bill up to 9 hours on any given day.

*Maximum fees listed in italics are subject to waiver under special circumstances.

50-State Survey of Trial Court Assigned Counsel Rates for 2013

STATE	HOURLY RATE	MAXIMUM FEE*	YEAR ENACTED
North Carolina	Class A – D	None	2012
	Felonies: \$70		
	All other cases in District Court: \$55		
	Authority: General Statutes of North Carolina § 7A-498.5		2001
	Office of Indigent Defense Services sets rates		
	Private Assigned Counsel Rates		2012
North Dakota	\$75	<i>Presumed rates</i>	2012
		<i>Felony: \$525 (7 hours worked)</i>	
		<i>Misdemeanor: \$300 (4 hours worked)</i>	
	Authority: North Dakota Century Code § 29-07-0.1.1		2005
	The Commission on Legal Counsel for Indigents sets rates		
	Presumed Rate for Attorney Fee Reimbursement		2012
Ohio	\$60 in court	<i>Felonies</i>	2003
	\$50 out of court	<i>1st to 3rd Degree: \$3,000</i>	
		<i>4th and 5th Degree: \$2,500</i>	
		<i>Misdemeanors: \$1,000</i>	
Authority: Ohio Revised Code § 120.041975		1975	
	Ohio Public Defender sets assigned counsel rates and maximum levels of compensation		
	Standards & Guidelines for Appointed Counsel Reimbursement	2000	
	State Maximum Fee Schedule	2003	
Oklahoma	Oklahoma Indigent Defense System uses flat fee contracts	<i>Felony: \$3,500</i> <i>Misdemeanor: \$800</i>	1993
	Authority: Oklahoma Statutes Title 22 § 1355.8		

*Maximum fees listed in italics are subject to waiver under special circumstances.

50-State Survey of Trial Court Assigned Counsel Rates for 2013

STATE	HOURLY RATE	MAXIMUM FEE*	YEAR ENACTED
Oregon	\$45	None	2013
<p>Authority: Oregon Revised Statutes § 151.216.....2001 Oregon Public Defense Services Commission sets rates Public Defense Payment Policies and Procedures.....2013</p>			
Pennsylvania	Varies by county Judge determines reasonable compensation	Some counties use flat fee schedules Alleghany County (Pittsburgh) Preparation for Serious felonies (rape, robbery, child abuse): \$1,500 All other cases: \$500 Preliminary hearings: \$250 Trial ½ day: \$250 Trial full day: \$500	1969
<p>Authority: 16 Pennsylvania Consolidated Statutes § 9960.7</p>			
Rhode Island	Class 1 Felony: \$90 Class 2 Felony: \$60 Misdemeanor: \$50	<i>Class 1 Felony: \$10,00</i> <i>Class 2 Felony: \$5,000</i> <i>Misdemeanor: \$1,500</i>	2012
<p>Authority: General Laws of Rhode Island § 8-15-2.....1956 Chief Justice of the Supreme Court has authority to set rates Supreme Court Executive Order No. 2016-06.....2012</p>			
South Carolina	\$60 in court \$40 out of court	<i>Felony: \$3,500</i> <i>Misdemeanor: \$1,000</i>	1993
<p>Authority: Code of Laws of South Carolina § 17-3-50</p>			

*Maximum fees listed in italics are subject to waiver under special circumstances.

50-State Survey of Trial Court Assigned Counsel Rates for 2013

STATE	HOURLY RATE	MAXIMUM FEE*	YEAR ENACTED
South Dakota	\$84	None	2013
	Authority: South Dakota Codified Laws § 23A-40-81983 Judge has authority to set rates Unified Judicial System Policy regarding court appointed attorney fees2013		
Tennessee	\$50 in court \$40 out of court	<i>Felony: \$1,500</i> <i>Misdemeanor: \$1,000</i>	2005
	Authority: Tennessee Supreme Court Rule 13		
Texas	Varies by county Average payment to defense counsel in the five largest counties (Harris, Dallas, Tarrant, Bexar & Travis) Felony: \$653 Misdemeanor: \$120**	Varies by county	2011
	Authority: Texas Code of Criminal Procedure Article 26.05 County judges authorized to set rates		
Utah	Counties often use flat fee contracts	<i>Felony: \$3,500</i> <i>Misdemeanor: \$1,000</i> Average attorney compensation for felony cases: \$400++	1997
	Authority: Utah Code Annotated § 77-32-304.5 Trial judge sets rates, subject to statutory maximums		

§ State of South Dakota Unified Judicial System policy is to increase court appointed attorney fees in an amount equal to any cost of living increase for state employees approved by the legislature.

**"Harris County Public Defender Preliminary Report on Operations and Outcomes" prepared by the Council of State Governments Justice Center (2012)

++"Failing Gideon: Utah's Flawed County by County Public Defender System" American Civil Liberty Union of Utah (2011)

*Maximum fees listed in italics are subject to waiver under special circumstances.

50-State Survey of Trial Court Assigned Counsel Rates for 2013

STATE	HOURLY RATE	MAXIMUM FEE*	YEAR ENACTED
Vermont	\$50	<i>Major Felony: \$5,000</i> <i>Minor Felony: \$2,000</i> <i>Misdemeanor: \$1,000</i>	1994
	Authority: 13 Vermont Statutes Annotated Title 13 § 52051981 Courts set rates		
	Supreme Court Administrative Order No. 4.....1994		
Virginia	Attorneys are paid a statutory fee based on the charge	<i>District Court \$240</i> <i>Circuit Court Felony punishable by more than 20 years: \$2,085</i> <i>All other felonies: \$600</i> <i>Misdemeanors punishable by jail: \$158</i>	2013
	District Court \$120		
	Circuit Court Felony punishable by more than 20 years: \$1,235		
	All other felonies: \$445		
	Misdemeanors punishable by jail: \$158		
	Authority: Code of Virginia Annotated § 19.2-1632007 Court sets rates, subject to statutory limits		
	Supreme Court of Virginia Chart of Allowances 2013.....2013		
Washington	Varies by county	Varies by county	1984
	King County (Seattle) Class A Felony: \$70 Class B/C Felony: \$55 Misdemeanor: \$50	Many counties use flat fee contracts	
	Authority: Revised Code of Washington Annotated § 36.26.090 Court awards reasonable compensation		

*Maximum fees listed in italics are subject to waiver under special circumstances.

50-State Survey of Trial Court Assigned Counsel Rates for 2013

STATE	HOURLY RATE	MAXIMUM FEE*	YEAR ENACTED
West Virginia	\$65 in court \$45 out of court	<i>\$3,000</i>	1990
Authority: West Virginia Code § 29-21-13(a)			
Wisconsin	\$40	None	1995
Authority: Wisconsin Statutes § 977.08			
Wyoming	\$100 in court Maximum Minimum \$30 and Maximum \$60 for out of court	None	2007
Authority: Wyoming Rules of Criminal Procedure Rule 44(e)			

*Maximum fees listed in italics are subject to waiver under special circumstances.

This publication is available online at www.nacdl.org/gideonat50/

EXHIBIT 2



NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS

1660 L Street NW, 12th Floor

Washington, DC 20036

Phone: 202-872-8600

www.nacdl.org

JUSTICE SHORTCHANGED

ASSIGNED COUNSEL COMPENSATION IN WISCONSIN



AUGUST 2014



SIXTH
AMENDMENT
CENTER

EXHIBIT 3

ABOUT THE SIXTH AMENDMENT CENTER

The Sixth Amendment Center seeks to ensure that no person faces potential time in jail or prison without first having the aid of a lawyer with the time, ability and resources to present an effective defense, as required under the United States Constitution. The 6AC does so by measuring public defense systems against established standards of justice. When shortcomings are identified, 6AC help states and counties make their courts fair again in ways that promote public safety and fiscal responsibility.

The 6AC contracted with the Defender Initiative of the Fred T. Korematsu Center for Law and Equality at Seattle University School of Law (SUSL Defender Initiative) to help with the research on this project. The SUSL Defender Initiative is a law school-based project aimed at providing better representation for people accused of crimes through a unified vision that combines research, advocacy, and education.

Copyright © 2014 by the Sixth Amendment Center. All rights reserved.

Sixth Amendment Center
PO Box 15556
Boston, MA 02115

Publication Number: 2014.005

Cover image adapted from "Found Money" by Sharon Drummond (c) 2011, creative commons.

INTRODUCTION

Imagine holding the same job over the past thirty years without ever once receiving a raise. What if that job required you to pay for many of the associated costs of doing business, like buying your own computer and carrying professional insurance? The cumulative rate of inflation has increased by 130% since 1984,¹ meaning that your business expenses have increased substantially – steadily decreasing your take home pay since you first started working. The cost alone to fill your car with gas would have more than tripled over that time period.²

Now imagine that twenty years ago you were forced to take a 20% pay cut with no further increases.

Regardless of the profession, the quality of the work being performed under such a financial arrangement will always be questioned. Wherever and whenever the level of compensation creates a financial conflict between a worker's take home pay and the resources needed to do the job right a number of potential impacts may result. Good workers will leave to take on more profitable endeavors. Those that remain will often do everything in their power to increase their take home pay by cutting costs of doing business wherever they can. Inexperienced people may also jump at the chance to get on-the-job training, as a trade-off for the inadequate income provided, raising doubts that the job being done is up to minimally effective standards.

The example above is not a hypothetical. It describes the financial conflicts imposed on Wisconsin lawyers representing poor people charged with crime and, in turn, the significant flaws in how the state of Wisconsin attempts to uphold its obligations under the Sixth Amendment to the United States Constitution. Attorneys defending the indigent accused are paid \$40 per hour, a rate that has not changed since 1995 when the Wisconsin legislature *reduced* the rate from \$50 per hour.³ The current \$40-per-hour rate, as noted by the Wisconsin Supreme Court in 2011, is “only \$5 more per hour than the original rate established in 1978.”⁴

¹ This calculation was determined using the Consumer Price Index published by the U.S. Bureau of Labor Statistics between January 1984 and January 2014 using the inflationdata.com calculator at: http://inflationdata.com/Inflation/Inflation_Calculators/Cumulative_Inflation_Calculator.aspx. (Last visited July 2014.)

² The average national price of gas in 1984 was \$1.25 per gallon. In 2012 it was \$3.96 – an increase of 217%. See: <http://inflationdata.com/articles/2013/04/22/gas-inflation-doug-s-says-im-full-of-it/>. (Last visited July 2014.)

³ Wis. Stat. §977.08 (4m)(c).

⁴ *In the matter of the petition to amend Supreme Court Rule 81.02*, July 6, 2011, available at: <https://www.wicourts.gov>.

Although \$40 per hour may sound like a lot of money to the average person trying to make ends meet in tough economic times, it is not given the requirements of representing accused persons. The up-front costs required to maintain and operate a law practice in Wisconsin – commonly referred to as “overhead expenses” – are many, including, but not limited to office rent, telecommunications, utilities, support staff, accounting, bar dues, legal research services, business travel, and professional liability insurance.

As a means of comparison, the Mississippi Supreme Court determined, in a case challenging the state’s assigned counsel compensation rate, that private attorneys representing indigent criminal defendants are entitled to a reasonable hourly fee *in addition to overhead expenses*.⁵ During hearings on the matter, the Mississippi Court took testimony from the Mississippi State Bar Association that set the average overhead rate at \$34.86 per hour (or 87% of the *total* hourly rate paid in Wisconsin). Consider the cost of living difference between, for example, Madison and the Mississippi Delta,⁶ and then consider that the Mississippi case challenging public defense compensation is now nearly 25 years old. In other words, the assigned counsel rate today for Wisconsin lawyers today barely covers the basic costs of keeping a law practice open in Mississippi in 1990.

Imagine if it was your son or daughter facing potential incarceration and his or her freedom depended on an attorney toiling under such financial restraints.

That Wisconsin’s compensation rate for Sixth Amendment lawyers is the lowest in any state in the country is undisputed. In 2013, the National Association of Criminal Defense Lawyers (NACDL) published a comprehensive study entitled, *Rationing Justice: the Underfunding of Assigned Counsel Systems*, that details the hourly rates of compensation for appointed counsel in all fifty states.⁷ Generally calling the low compensation rates afforded to lawyers across America a “serious threat to our criminal justice system,” NACDL pegs Wisconsin as the state offering the “lowest rate in the nation.”⁸

This report takes the NACDL conclusion as its starting point and does not try to reduplicate their efforts to prove the already-proven – that Wisconsin pays Sixth Amendment attorneys the lowest hourly rate in the country. Instead, this report seeks to achieve two aims:

1. To explain whether the manner in which Sixth Amendment lawyers are paid in Wisconsin is in violation of recognized national standards of justice; and,
2. To explain the impact the low compensation rate is having on the constitutional right to counsel in Wisconsin.

gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=67390.

⁵ *Wilson v. State*, 574 So.2d 1338 (Miss. S.Ct., 1990).

⁶ *The U.S. Census Bureau, Statistical Abstract of the United States, 2012*, reports that the cost of living in Madison, Wisconsin was 9.8% above the national average in 2010, while Tupelo, Mississippi was 11.6% below the same national composite index for the same year. See: <https://www.census.gov/compendia/statab/2012/tables/12s0728.pdf>.

⁷ National Association of Criminal Defense Lawyers. *Rationing Justice: the Underfunding of Assigned Counsel Systems*. March 2013. Available at: <https://www.nacdl.org/gideonat50/>.

⁸ *Ibid*, page 12.

The Wisconsin Association of Criminal Defense Lawyers (WACDL)⁹ commissioned the Sixth Amendment Center (6AC), in cooperation with the Defender Initiative at Seattle University School of Law (SUSL), to conduct the report.¹⁰

As part of this study, the authors of this report conducted a statewide survey of criminal defense lawyers. To emphasize research findings, survey responses are highlighted throughout the report.

THE STRUCTURE OF INDIGENT DEFENSE IN WISCONSIN

The fear of government unduly taking a person's liberty led the United States Supreme Court in 1963 to unanimously declare it to be an "obvious truth"¹¹ that the indigent accused cannot receive a fair trial against the "machinery"¹² of law enforcement unless a lawyer is provided to him at no cost. "The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries," the Court announced in *Gideon v. Wainwright*, "but it is in ours."¹³ Accordingly, *Gideon* made it incumbent upon states through the Fourteenth Amendment to provide Sixth Amendment right to counsel services to any person of limited means facing a possible loss of liberty at the hands of the criminal justice system.¹⁴

In the immediate wake of the *Gideon* decision, the Wisconsin legislature created the Wisconsin State Public Defender (SPD) in 1965. Created first as a system to provide counsel in post-conviction appeals, the legislature transformed the SPD in 1979 into an independent state agency to provide direct trial-level right to counsel services in all counties. Today, primary indigent defense services are provided by government staff attorneys working in 35 local public defender offices to handle trial-level services, plus another two offices for appellate work, all overseen by the system's

⁹ The Wisconsin Association of Criminal Defense Lawyers (WACDL) is a membership organization of more than 400 private attorneys and public defenders practicing criminal law across the state. WACDL provides support and training to criminal defense attorneys statewide and promotes the proper administration of criminal justice.

¹⁰ The 6AC is a Massachusetts-based non-profit organization that measures right to counsel services against established standards of justice. When shortcomings are identified, the 6AC provides technical assistance to state and county policymakers to make their courts systems fairer for accused indigents in ways that promote public safety and fiscal responsibility. In 2013, the 6AC formed a partnership with the Defender Initiative of the Fred T. Korematsu Center for Law and Equality at Seattle University School of Law (SUSL Defender Initiative). The SUSL Defender Initiative is a law school-based project aimed at providing better representation for people accused of crimes through a unified vision that combines research, advocacy, and education.

¹¹ *Gideon v. Wainwright*, 372 U.S. 355 (1963).

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Gideon* established the right to counsel in felony proceedings. In the intervening 50+ years, the Supreme Court has extended the promise of *Gideon* to any case in which a defendant may potentially lose their liberty. The *Gideon* mandate now extends to: direct appeals [*Douglas v. California*, 372 U.S. 353 (1963)]; juvenile delinquency proceedings [*In re Gault*, 387 U.S. 1 (1967)]; misdemeanors [*Argersinger v. Hamlin*, 407 U.S. 25 (1972)]; misdemeanors with suspended sentences [*Shelton v. Alabama*, 505 U.S. 654 (2002)]; and appeals challenging a sentence as a result of a guilty plea [*Halbert v. Michigan*, 545 U.S. 605 (2005)].

central administration in Madison. The state public defender serves as the system's chief attorney, appointed by a nine-person commission, and responsible for carrying out the commission's policies and directives.

But of course not all people who stand accused before Wisconsin's courts receive the benefit of the primary public defender system. For example, a public defender office generally cannot ethically represent people charged as co-defendants in the same crime because the interests of one of the accused could directly conflict with the interests of the other. Just think of one co-defendant pointing a finger at the other as being more culpable of the crime they are both accused of having committed. The Sixth Amendment right to counsel is an individual right. The state of Wisconsin owes the same level of minimally effective representation to each and every defendant regardless if an individual is deemed co-defendant #1 or #2.

So the SPD is also responsible for overseeing the representation of conflict defendants, through a separate division set apart from the primary system through ethical screens (i.e., substantive information about conflict cases is kept apart between the primary staff public defenders and the conflict private attorneys). Despite being the secondary system of representation, conflict appointed counsel represent a significant number of the indigent accused. There are approximately 60,000 appointed cases per year,¹⁵ a number that is expected to grow in coming years because of fairly recent changes to the criteria by which a defendant is deemed indigent.¹⁶ It is this conflict assigned counsel system that is the focus of the current report.

NATIONAL ASSIGNED COUNSEL COMPENSATION STANDARDS

The use of standards in criminal justice is not a new concept for government officials. After all, for many decades policymakers have ordered minimum safety standards in all proposals to build a brand new courthouse, a new state highway overpass, or even to redo the electrical wiring in one's home. Our Constitution demands that the taking of an individual's liberty be given the same level of concern and care.

In 2002, the American Bar Association (ABA) promulgated *Ten Principles of a Public Defense Delivery System* – a set of ten standards that, in the words of the ABA, “constitute the fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, con-

¹⁵ Dean Strang and John Skilton. *Petition for Supreme Court Rule Amendment 81.02*. March 2010. Page 3. Available at: <https://www.wicourts.gov/supreme/docs/1003petition.pdf>.

¹⁶ Prior to March 2012, Wisconsin had the lowest indigency standard in the country. As noted by the National Legal Aid & Defender Association, “The financial eligibility threshold had been set so far below the Federal Poverty Guidelines that even a person who was poor enough to qualify for Medicaid coverage or Food Stamps was considered by Wisconsin to be able to afford their own defense. In fact, a person who earned more than \$3,250 per year was not eligible for a court appointed attorney.” NLADA. *Gideon Alert*, March 16, 2010 at <http://www.nlada.net/jscri/blog/gideon-alert-updates-wisconsin-and-pennsylvania>. Wis. Stat. § 977.02(3)(c) now sets a presumptive threshold at 115% of the Federal Poverty Guideline.

flict-free legal representation for criminal defendants who are unable to afford an attorney.”¹⁷ Our nation’s top law enforcement officer, Attorney General Eric Holder, states that the ABA “quite literally set the standard”¹⁸ for indigent defense systems with the *Ten Principles*, calling them the “basic building blocks of a well-functioning public defense system.”¹⁹

The *Ten Principles* requires two things of the indigent defense system when it comes to assigned counsel compensation. *Principle 8* states that “[a]ssigned counsel should be paid a reasonable fee in addition to actual overhead expenses,”²⁰ while also specifically banning contract systems that are let “primarily on the basis of costs” without regard for “performance requirements,” “anticipated workloads,” and additional expenses²¹ – referred to nationally as “flat fee” contracting.

SPD’s assigned counsel division pays attorneys in one of two ways: (1) the \$40 hourly rate with no allotment for overhead; or, (2) a flat, per-case contracted amount. Both methods fail the *Ten Principles* as detailed below.

10/20/12 10:30 AM
10/20/12

The danger is that because of the low rate it also encourages people who are just doing it for the money and have little supervision to take cases...and in the process of learning, they leave a wake of casualties behind them. I think the \$40 an hour rate for people who are purportedly protecting people’s liberty interest is really astoundingly cynical.

¹⁷ American Bar Association. *Ten Principles of a Public Defense Delivery System*. February 2002. Available at: http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_ten_principlesbooklet.authcheckdam.pdf.

¹⁸ United States Attorney General Eric Holder. *Attorney General Eric Holder Speaks at the American Bar Association’s National Summit on Indigent Defense*. New Orleans ~ Saturday, February 4, 2012. Available at: <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-120204.html>.

¹⁹ United States Attorney General Eric Holder. *Address to the Department of Justice’s National Symposium on Indigent Defense: Looking Back, Looking Forward, 2000-2010*. Washington, D.C., February 18, 2010. Available at: <http://www.justice.gov/ag/speeches/2010/ag-speech-100218.html>.

²⁰ *Supra* note 17, Commentary to *Principle 8* at page 3.

²¹ *Ibid.* “Contracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should specify performance requirements and the anticipated workload, provide an overflow or funding mechanism for excess, unusual, or complex cases, and separately fund expert, investigative, and other litigation support services.”

FINDINGS

Finding #1: Wisconsin violates the ABA *Ten Principles*' demand that appointed counsel be paid both a "reasonable fee" and "actual overhead expenses"

In November of 2013, the Wisconsin State Bar Association published the results of their 2013 *Economics of Practice Survey*.²² For 2012, Wisconsin private practitioners had median total annual overhead expenses of \$102,050. To calculate an average overhead rate, the annual median expenses must be divided by twelve months and then divided again by the number of hours the average attorney works in a month. Based on the WSBA survey, the average practitioner spends approximately \$8,500.00 on overhead expenses per month.²³ The WSBA survey reports that Wisconsin attorneys work, on average, 47 hours per week.²⁴ Assuming the average month consists of 4.33 weeks,²⁵ Wisconsin attorneys work about 204 hours per month.²⁶ This means that the average overhead rate in Wisconsin is \$41.79,²⁷ or slightly *more* than the total \$40 per hour compensation offered by the state.

Because the Wisconsin assigned counsel hourly compensation is not sufficient to cover overhead expenses, it is easy to conclude that attorneys are not paid a "reasonable fee" above and beyond that.

To underscore just how a \$40 per hour rate does not begin to afford both a reasonable fee *and* coverage of actual overhead expenses, one need only to look at other states that have had their assigned counsel compensation rates challenged in court (most of which have significantly lower costs-of-living in comparison to Wisconsin):

- **Kansas:** In 1987, the Kansas Supreme Court determined that the State has an "obligation to pay appointed counsel such sums as will fairly compensate the attorney, not at the top rate an attorney might charge, but at a rate which is not confiscatory, considering overhead and expenses."²⁸ Testimony was taken in the case that the average overhead rate of attorneys in Kansas in 1987 was \$30 per hour. Kansas now compensates public defense attorneys at \$80 per hour, or double the rate paid in Wisconsin.²⁹

²² Wisconsin State Bar Association. *2013 Economics of Practice Survey*. Results published in Wisconsin Lawyer, November 2013, Volume 86, Number 9. Available at: <http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?Volume=86&Issue=9&ArticleID=11150>.

²³ \$102,050 divided by 12 equals \$8,504.17.

²⁴ *Supra* note 22.

²⁵ Dividing 52 weeks per year by twelve months equals 4.33 weeks per month.

²⁶ Multiplying 47 hours per week by 4.33 weeks per month equals 203.51 hours per month.

²⁷ This figure is calculated by dividing the monthly overhead expenses (\$8,504.17) by the average number of hours worked per month (203.51 hours).

²⁸ *State Ex Rel Stephen v. Smith*, 747 P.2d 816 (Kansas S.Ct., 1987).

²⁹ U.S. Census Bureau, *Statistical Abstract of the United States, 2012* (*supra*, note 6) lists four Kansas cities in its statistical abstract. All four have a cost of living index below the national average: Dodge City (-10.7% below national average); Garden City (-10.3%); Hays (-10.6%); and, Salina (-13.1%).

- **Alaska:** “We thus conclude that requiring an attorney to represent an indigent criminal defendant for only nominal compensation unfairly burdens the attorney by disproportionately placing the cost of a program intended to benefit the public upon the attorney rather than upon the citizenry as a whole.”³⁰ So stated the Alaska Supreme Court in 1987 in determining that Alaska’s constitution “does not permit the state to deny reasonable compensation to an attorney who is appointed to assist the state in discharging its constitutional burden,” because doing so would be taking “private property for a public purpose without just compensation.” Importantly – and unlike the Kansas Court before them – the Alaska Court determined that appointed cases did not simply merit a reasonable fee and overhead, but rather the fair market rate of an average private case. The assigned counsel compensation rate was subsequently set at \$60 per hour.
- **West Virginia:** The West Virginia Supreme Court determined in 1989 that court appointed attorneys in that state were forced to “involuntarily subsidize the State with out-of-pocket cash,”³¹ because the then-current rates did not cover attorney overhead. A now 25-year-old survey of more than 250 West Virginia lawyers who were taking appointed cases (i.e., not a survey of all private attorneys, but of only those accepting public cases) determined that in 1989 the average hourly overhead was \$35 per hour (or, 87.5% of Wisconsin’s 2014 payment rate). “Perhaps the most serious defect of the present system,” the West Virginia Court determined, “is that the low hourly fee may prompt an appointed lawyer to advise a client to plead guilty, although the same lawyer would advise a paying client in a similar case to demand a jury trial.” The Court subsequently raised the hourly rate to cover both a reasonable fee and overhead, setting the rate above the current Wisconsin rate at \$45 per hour (for out of court work) and \$65 per hour (for in court representation). The same rate applies today despite West Virginia having a lower cost of living than Wisconsin.³²
- **Mississippi:** In 1990, the Mississippi Supreme Court determined that indigent defense attorneys are entitled to “reimbursement of actual expenses” in addition to a reasonable sum, and defined “actual expenses” to include “all actual costs to the lawyer for the purpose of keeping his or her door open to handle this case.”³³ This allows defense attorneys in Mississippi to receive a “pro rata share of actual overhead.” As mentioned in the introduction to this report, the Mississippi State Bar determined that overhead costs nearly 25 years ago in that state were \$34.86 (or 87% of the total hourly rate that Wisconsin defense attorneys make in 2014), although the court eventually settled on an overhead rate of \$25 per hour.³⁴

³⁰ *DeLisio v. Alaska Superior Court*, 740 P.2d 437 (1987).
³¹ *Jewell v. Maynard*, 383 S.E.2d 536 (W. Va. 1989).
³² U.S. Census Bureau, *Statistical Abstract of the United States, 2012* (*supra*, note 6) lists two West Virginia municipalities in its statistical abstract. Both have a cost of living index at or below the national average: Martinsburg-Berkeley County (-10.4% below national average); Morgantown (0.06 above the national average).
³³ *Wilson v. State*, 574 So.2d 1338 (Miss. S.Ct., 1990).
³⁴ The Court upheld a statute that limited attorney fees and wrote:

Following our rule of statutory construction, we are able to save this statute from unconstitutionality by interpreting this language to include reimbursement for all actual costs to the lawyer for the purpose of keeping his or her door open to handle this case, i.e., the lawyer will receive a pro rata share of actual overhead. The appellant urges us to

- Oklahoma:** In the same year as the Mississippi decision, the Oklahoma Supreme Court echoed the 1987 Kansas decision in finding that state government “has an obligation to pay appointed lawyers sums which will fairly compensate the lawyer, not at the top rate which a lawyer might charge, but at a rate which is not confiscatory, after considering overhead and expenses.”³⁵ Based on the existing salary structure for Oklahoma district attorneys, the Court determined a reasonable appointed counsel fee to be between \$14.63 and \$29.26 (based on experience) and “[a]s a matter of course, when the district attorneys’ ... salaries are raised by the Legislature so, too, would the hourly rate of compensation for defense counsel.” In addition to this reasonable fee, and in order “to place the counsel for the defense on an equal footing with counsel for the prosecution,” the Oklahoma Court also determined that a “provision must be made for compensation of defense counsel’s reasonable overhead and out of pocket expenses.” The Court found that the two lawyers involved in the case at dispute should be paid their actual overhead costs. The overhead costs for the Oklahoma attorneys in 1989 were respectively \$50.88 per hour and \$48.00 per hour. This is in addition to the reasonable fee, making the total compensation rate between \$62.63 and \$80.14.³⁶ And Oklahoma has a significantly lower cost of living than Wisconsin.³⁷
- New York:** Announcing in 2003 that “[e]qual access to justice should not be a ceremonial platitude, but a perpetual pledge vigilantly guarded,”³⁸ the Supreme Court for the County of New York ordered the City and State to compensate assigned counsel attorneys at \$90 per hour – an increase from the \$40-per-hour rate they were being paid. The Court determined that the \$40-per-hour rate paid to panel attorneys was “insufficient to cover even normal hourly overhead expenses,” which the Court pegged

adopt a figure of \$34.86 per hour for overhead. This figure is derived from a survey conducted by the Mississippi State Bar in 1988. See, 35 *Mississippi Lawyer*, No. 5, at 45 (March-April 1989). However, we choose rather to adopt a \$25.00 per hour figure, which is also based on the survey. For ease of administration and to avoid a lot of satellite litigation, we create a rebuttable presumption that a court appointed attorney’s actual overhead within the statute is \$25.00 per hour. However, the trial court is bound by this only in the absence of actual proof to the contrary -- proof offered by the lawyer that it is more or by the State that it is less. (Emphasis added.)

It is important to note that Mississippi sets a statutory cap on the total payments possible to appointed attorneys, for example, \$1000 for a felony case, plus “actual expenses.” MS Code § 99-15-17 (2013). The Legislature has directed the State Office of the Public Defender to “coordinate the collection and dissemination of statistical data and make such reports as are required of the divisions, develop plans and proposals for further development of a statewide public defender system in coordination with the Mississippi Public Defenders Task Force.” (Miss. Code Ann. § 99-18-1.)

³⁵ *State v. Lynch*, 796 P.2d 1150 (Oklahoma S.Ct., 1990). Available at: <https://www.courtlistener.com/okla/7tsU/state-v-lynch/>.

³⁶ In 1991, the high attorney compensation rate hastened the creation of the Oklahoma Indigent Defense System – a state-funded agency in the executive branch that provides trial-level, appellate and post-conviction criminal defense representation to the indigent accused in 75 of the state’s 77 counties. Both Tulsa County (Tulsa) and Oklahoma County (Oklahoma City) established public defender offices prior to statewide reform and were allowed to continue to provide services outside of the OIDS system.

³⁷ U.S. Census Bureau, *Statistical Abstract of the United States, 2012* (*supra*, note 6) lists six Oklahoma cities in its statistical abstract. All six have a cost of living index below the national average: Ardmore (-12.7% below the national average); Muskogee (-14%); Ponca City (-10%); Pryor Creek (-15.5%); Stillwater (-9.9%); and, Tulsa (-11.6%).

³⁸ *N.Y. County Lawyer’s Ass’n v. State*, 192 Misc. 2d 424, 425 (N.Y. Sup. Ct. 2002). The trial court (cited here) handed down its judgment in February 2003, available here: <http://www.sado.org/fees/newyorkfeecase.pdf>.

16. "Various studies for a number of years have consistently shown that 41.0% of employees of large companies (SPD) were surveyed describe their company as an excellent benefit package including such benefits and fringe benefits as: (1) a fully paid vacation, (2) deferred compensation plans, and (3) an employee contribution to a company 401(k). These fringe benefits are calculated at 41.0% annually. They mean that an attorney earning an entry-level salary has a total compensation package of approximately \$70,140 per year. Using a 2,000 hour work year, a starting attorney's hourly compensation rate is \$33.27.

Of course an SPD staff attorney can take paid vacations, holidays, and sick leave, while appointed counsel cannot bill for vacations, holidays, or sick leave. Deducting four weeks of vacation (160 hours), 17 sick days (68 hours), 9 court holidays (72

³⁷ Data provided to report authors by SPD staff.

³⁸ SPD employees do not have paid sick leave or other paid time off opportunities.

hours) are not billable. The total billable hours for an entry-level attorney are 760 hours per year. Dividing the entry-level compensation plus benefits of \$70,140 by 760 billable hours results in a billable hourly rate of \$92.29. Dividing the entry-level compensation plus benefits of \$70,140 by 2,000 hours results in a billable hourly rate of \$35.07. SPD staff attorneys are compensated at a rate of \$33.27 per billable hour.

SPD staff attorneys are 200 attorneys (more than a third of its total staff) who earn more than \$30,000 per year. With 41.0% benefits, an \$30,000 salary produces a total compensation package of more than \$42,000 per year, or a billable hourly rate of a 1,650 billable hours. SPD attorneys of course do not have to pay for the overhead of their offices but SPD appointed attorneys do.

³⁹ The amount of vacation and sick days per year and holiday time provided by the state. See Benefits of State Employees, <http://www.psc.state.nj.us/employees/benefits.html>.

at approximately \$35 per hour. Deriding the "pusillanimous posturing and procrastination of the executive and legislative branches" for failing to raise the rate for more than 17 years, the Court determined that the other two branches of government created an assigned counsel "crisis" that impairs the "judiciary's ability to function." The low compensation was found to result "in denial of counsel, delay in the appointment of counsel, and less than meaningful and effective legal representation." The following year, the rate was statutorily amended to \$75 per hour.³⁹

- **Alabama:** In 1993, the Alabama Court of Criminal Appeals determined in *May v. State*⁴⁰ that indigent defense attorneys were entitled to overhead expenses (set at \$30 per

³⁹ NY CLS Jud § 35.

⁴⁰ *May v. State*, 672 So. 2d 1307, 1308 (Ala. Crim. App. 1993).

hour) in addition to a reasonable fee.⁴¹ When the Attorney General in that state issued an opinion against paying the overhead rate and the state comptroller subsequently stopped paying, the issue was litigated all the way to the Alabama Supreme Court (2006). In *Wright v Childree*,⁴² the Alabama Supreme Court determined that assigned counsel are entitled to a reasonable fee in addition to overhead expenses.⁴³ After this litigation, the Alabama Legislature increased the hourly rate to \$70 per hour.⁴⁴

Although it is not the result of litigation, it should also be mentioned that in 2000, the South Dakota Supreme Court set public counsel compensation hourly rates at \$67 per hour. To ensure that attorneys were perpetually paid both a reasonable fee and overhead, the Court also mandated that "court-appointed attorney fees will increase annually in an amount equal to the cost of living increase that state employees receive each year from the legislature." Assigned counsel compensation in the farmlands of South Dakota now stands at \$84 per hour⁴⁵ – more than double the pay for attorneys in Wisconsin.⁴⁶

Indeed, even in Wisconsin, the state supreme court has authorized payment of \$70 per hour for attorneys appointed directly by lower courts in those instances where the SPD has a conflict in which neither the primary public defender system nor the assigned counsel system can ethically represent a client (e.g., multiple defendant cases where not enough assigned counsel attorneys are

⁴¹ U.S. Census Bureau, *Statistical Abstract of the United States, 2012* (*supra*, note 6) lists four Alabama municipalities in its statistical abstract: Decatur-Hartselle has a cost of living that is -10.8% below national average; Dothan (-10.2%); Florence (-9.8%); and, Montgomery (-0.8%).

⁴² *Wright v. Childree*, 972 So. 2d 771 (Ala. 2006). This was a statutory analysis of a statute that provided: "Counsel shall also be entitled to be reimbursed for any expenses reasonably incurred in the defense of his or her client, to be approved in advance by the trial court." Ala. Code 1975 § 15-12-21.

⁴³ See: *Attorney's Fee Declaration for cases after June 14, 2014*, at: <http://oids.alabama.gov/Forms/AFD-2%20Adult%20After%206142011%20Rev1.pdf>.

⁴⁴ Code of Ala. § 15-12-21 provides:

Counsel shall also be entitled to be reimbursed for any nonoverhead expenses reasonably incurred in the representation of his or her client, with any expense in excess of three hundred dollars (\$300) subject to advance approval by the trial court as necessary for the indigent defense services and as a reasonable cost or expense. Reimbursable expenses shall not include overhead expenses. Fees and expenses of all experts, investigators, and others rendering indigent defense services to be used by counsel for an indigent defendant shall be approved in advance by the trial court as necessary for the indigent defense services and as a reasonable cost or expense. Retrials of any case shall be considered a new case for billing purposes. Upon review, the director may authorize interim payment of the attorney fees or expenses, or both.

⁴⁵ *Memorandum to 1st Circuit Attorneys and County Commissioners*, 12/1/12, at: http://ujs.sd.gov/media/firstcircuit/court_appointed_attorney_fees.pdf.

⁴⁶ U.S. Census Bureau, *Statistical Abstract of the United States, 2012* (*supra*, note 6) does not list any South Dakota municipalities by which to compare with Wisconsin.

The committee also heard from members of the low-income legal services community who began to work with the Wisconsin Legal Services Corporation in the Wisconsin Judicial Financial Incentive Program ("WIFIP") to identify and to help correct problems in the Wisconsin criminal justice system, which is up of "well-respected criminal justice professionals from every part of the system, including prosecutors, defense attorneys, judges, police, and victim's advocates, as well as community leaders from outside the system."

The WCJC debated the assigned counsel compensation rates several times at its meetings between August 2005 and December 2008.¹ State Public Defender Kelli Thompson identified a "crisis" in Wisconsin indigent defense due to the low rate of compensation for private attorneys accepting assigned cases, noting that in smaller counties, there were often no attorneys who would take the cases and that in the larger counties, the attorneys that took assigned cases were young and inexperienced.

At the January 22, 2008 meeting, County Attorneys from throughout the state testified that the low rate of compensation for assigned counsel led to difficulties in finding attorneys to accept assigned cases. Mr. Rothert also noted that the vast majority of the attorneys

that were taking assigned cases were young and inexperienced attorneys.

Another witness, an experienced attorney from one of the largest counties, but lawyers' demand on an appointment, worked from home with no staff and a lack of resources, which led to some lawyers being unable to law clerk, do their own research in the law, and file motions. The judge described the lawyers as "too cheap labor" rather than "proper defendants" due to the low rate of pay and lack of resources.²

At the May 19, 2008 meeting, SPC Budget Director Whipple's testimony reported that the SPC now works with approximately 1,000 attorneys throughout the state for overflow and conflict cases, with 47% of those attorneys appearing as private attorneys,³ 20% as court-appointed attorneys, and one-third of the 20% as judicial job. The further testimony at the 2008 Wisconsin lawyers discipline hearing, 49% were on or had previously been on the list of "private bar list."

A review of the report of the Commissioner of Public Safety, Law and Justice Commission, dated 2008, also was a comprehensive report on the law enforcement, judicial, and justice system, which noted that there were "significant problems" and "many areas appear to need further attention."

¹ www.wisconsinjudicial.org/recordings.html
<http://www.wisconsinjudicial.org/recordings.html>

² <http://www.wisconsinjudicial.org/recordings.html>
<http://www.wisconsinjudicial.org/recordings.html>

³ <http://www.wisconsinjudicial.org/recordings.html>
<http://www.wisconsinjudicial.org/recordings.html>

⁴ <http://www.wisconsinjudicial.org/recordings.html>
<http://www.wisconsinjudicial.org/recordings.html>

⁵ <http://www.wisconsinjudicial.org/recordings.html>
<http://www.wisconsinjudicial.org/recordings.html>

available).⁴⁷ This rate has been in place for approximately 20 years.⁴⁸

And, it is not solely state courts that have taken on this issue. A number of state legislatures have also dealt with the issue. Recognizing that the NACDL report has firmly established Wisconsin to have the lowest compensation rates in the nation, we note that other more rural states have invested the authority to set attorney compensation rates in an independent statewide commission (akin to the SPD in Wisconsin). For example, the statewide commissions in both Arkansas (\$60-\$80)⁴⁹ and North Dakota (\$75)⁵⁰ have established assigned counsel rates that far exceed Wisconsin's and encompass both a reasonable fee and overhead expenses. Both states have a cost of living below that of Wisconsin.⁵¹

Because of the low hourly rate, I take almost no SPD cases anymore. Maybe one per year, and only those which require my "niche" experience, like homicides, DNA or other scientific cases. The hourly rate is so pitiful I view them as largely pro bono and don't even bother to bill all my time, as it's not worth the (unbillable) time effort to do so.

⁴⁷ The rule reads:

SCR 81.02 Compensation.

(1) Except as provided under sub. (1m), attorneys appointed by any court to provide legal services for that court, for judges sued in their official capacity, for indigents and for boards, commissions and committees appointed by the supreme court shall be compensated at the rate of \$70 per hour or a higher rate set by the appointing authority. The Supreme Court shall review the specified rate of compensation every two years.

(1m) Any provider of legal services may contract for the provision of legal services at less than the rate of compensation under sub. (1).

(2) The rate specified in sub. (1) applies only to services performed after July 1, 1994.

⁴⁸ "If lawyers are unavailable or unwilling to represent indigent clients at the SPD rate of \$40 per hour, or when clients do not qualify under existing SPD eligibility standards but nonetheless are unable financially to retain counsel, judges then must appoint lawyers at county expense." See *State v. Dean*, 163 Wis. 2d 503, 471 N.W.2d 310 (Cl. App. 1991). Also see: *In the matter of the petition to amend Supreme Court Rule 81.02* (June 2011), at: <https://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=67390>.

⁴⁹ Arkansas Code Ann. §16-87-211.

⁵⁰ N. Dak. Cent. Code §54-61-02(a)(1).

⁵¹ U.S. Census Bureau, *Statistical Abstract of the United States, 2012* (*supra*, note 6) lists three Arkansas municipalities in its statistical abstract: Conway has a cost of living that is -13.4% below national average; Fort Smith (-13.9%); and Jonesboro (-11.1%). Only one North Dakota city is listed in the same document. Minot, North Dakota is marginally below the national cost of living average: (-0.01%).

Finding #2: Wisconsin violates the ABA *Ten Principles*' prohibition on contracts let solely on cost

ABA *Principle 8* does not support flat fee contracts because they are rife with conflicts of interest between lawyer and defendant. As noted in standards promulgated by the National Legal Aid & Defender Association, fixed fee contracts that require lawyers to be paid "the same amount, no matter how much or little he works on each case" causes similar conflicts because it is in the lawyer's "personal interest to devote as little time as possible to each appointed case, leaving more time for the lawyer to do other more lucrative work."⁵²

As of February 2014, SPD employed 58 fixed-fee contracts compensating attorneys at a rate between \$248 and \$362 per case (depending on the county).⁵³ Do these Wisconsin contractual arrangements produce financial incentives to triage work in favor of some defendants, but in detriment of others? The answer is "yes."

Using the \$41.75 per hour overhead rate calculated above, an attorney paid \$248 per misdemeanor case will begin to lose money within the first six hours worth of work performed on the case (and would not have any net income from the fee).⁵⁴ So, what if the attorney wants to earn some money and, on average, disposes of the cases within five hours time? Under that scenario, the attorneys' overhead costs would be \$208.75.⁵⁵ This leaves a "reasonable" fee of just \$39.25.⁵⁶ Spread over the five hours worth of work, the attorney is working at a rate of \$7.85 (or slightly more than minimum wage).⁵⁷ Working to complete the average job in three hours means that an attorney expends \$125.25 in overhead costs, netting \$122.75 for him or herself. This equates to working at a rate of approximately \$41 per hour – approaching a reasonable "reasonable fee" based on the rates of other states. There is a clear financial incentive to the attorney to limit what is done on a case in order to make it profitable, all to the detriment of the defendant.

But, can an attorney ethically dispose of the average misdemeanor case in just three hours? No matter how complex or basic a case may seem at the outset, there are certain fundamental tasks each attorney must be able to do for each and every client in advance of the plea. Even in the average misdemeanor case, the attorney must be able to, among other tasks: meet with and interview with the client; attempt to secure pretrial release if the client remains in state custody (but, before doing so, learn from the client what conditions of release are most favorable to the client);

⁵² NLADA web page on Flat Fee Contracts, at: http://www.nlada.net/library/article/na_flatfeecontracts. (Last visited July 2014). In the *Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services*, written by NLADA and adopted by the ABA in 1985, Guideline III-13 similarly prohibits contracts under which payment of expenses for necessary services such as investigations, expert witnesses, and transcripts would "decrease the Contractor's income or compensation to attorneys or other personnel," because this situation creates a conflict of interest between attorney and client.

⁵³ Covering approximately 10,000 cases.

⁵⁴ If the \$248 flat misdemeanor case rate is divided by the average hourly overhead rate of \$41.75, the result is that an attorney begins losing money after 5.94 hours put into a case.

⁵⁵ Calculated by multiplying the hourly overhead rate of \$41.75 by five hours ($\$41.75 \times 5 \text{ hours} = \208.75).

⁵⁶ Calculated by subtracting \$208.75 from the \$248 flat per case rate.

⁵⁷ Calculated by dividing \$39.25 by five hours. The minimum wage in Wisconsin stands at \$7.25. See U.S. Department of Labor, at: <http://www.dol.gov/whd/minwage/america.htm#content>.

With the way funding works, there is so much that has to be preapproved . . . that becomes a timing issue. If I have to get permission to order transcript or something not provided in discovery, timing wise that adds up and I end up spending more time on administrative, unbillable work and it is a huge hassle. I think that is what adds to perception (even among public defenders) that PD cases are not worthwhile because you are not paid well enough. If you have 2 files on your desk, one pays \$40 and the private pays \$250/300 an hour, which one are you going to pick up first and put more effort into? The answer is obvious.

keep the client informed throughout the duration of proceedings; prepare for and appear at the arraignment, wherein he must preserve his client's rights; request and review formal and informal discovery; launch an investigation, scouring all sources of potential investigative information in the process, and as soon as possible; research the law; develop and continually reassess the theory of the case; file and argue on behalf of pretrial motions; read and respond to the prosecution's motions; negotiate plea options with the prosecution, including sentencing outcomes; and all the while preparing for the event that the case may be going to trial and possibly sentencing.⁵⁸ Although lawyers in *some* cases may dispose of a misdemeanor or ethically in under three hours, the majority of cases should take longer.

For example, in January 2014, the ABA published its most recent report on public defense workload.⁵⁹ The report determined that "to provide reasonable effective assistance of counsel,"⁶⁰ the average Missouri lawyer needs to spend 11.7 hours to dispose of the average misdemeanor case through a plea deal. Applying this analysis to Wisconsin, the state of Wisconsin would have to pay attorneys nearly \$490 per misdemeanor case *just to cover overhead*.

Several states have recently prohibited fixed fee contracting altogether because of the financial conflicts of interest they generate. For example, Idaho requires that representation shall be provided through a public defender office or by contracting with a private defense attorney "provided that the terms of the contract shall not include any pricing structure that charges or pays a single fixed fee for the services and expenses of the attorney."⁶¹ Similarly, the Michigan Legislature created a statewide public defender commission in the 2013 legislative session, called the Michigan Indigent Defense Commission

⁵⁸ National Association of Criminal Defense Lawyers. *Minor Crimes, Massive Waste: The Terrible Toll on America's Broken Misdemeanor Courts*. April 2009. See page 22. Available at: <https://www.nacdl.org/reports/misdemeanor/>.

⁵⁹ American Bar Association. *The Missouri Project: A Study of the Missouri Defender System and Attorney Workload Standards*. Prepared by Rubin-Brown LLP on behalf of the ABA, Standing Committee on Legal Aid and Indigent Defendants. Available at: http://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2014/ls_sclaid_5c_the_missouri_project_report.authcheckdam.pdf.

⁶⁰ *Ibid*, at page 6.

⁶¹ I.C. § 19-859 (codified in 2014).

Michigan Stat. Ann. § 780.991 (2)(b).
State of Wis., Indigent Defense Policy 1-PJ-10, available at <http://www.wisconsin.gov/courts/courtsystem/indigent-defense-policy> (last visited 12/12/13).
Indigent defense counsel appointment fees are not that fairly compensated lawyer fee. These times, travel and any other costs associated with providing quality representation to their clients. Rates of compensation should be at least as much as those set by the Wisconsin Supreme Court for court-appointed attorneys. A ratio of compensation less than that set by the Wisconsin Supreme

Court for court-appointed lawyers is a policy of equalization on individual rights of individual accused. It would be a crime. The state can guarantee constitutional safeguard by providing indigent defense reimbursement to provide best services to ensure a more efficient and effective criminal justice system."

Michigan Stat. Ann. § 780.991 (2)(b).
http://www.wisconsin.gov/courts/courtsystem/indigent-defense-policy

(MIDC). In establishing minimum standards, rules, and procedures, the MIDC is statutorily barred from approving indigent defense plans that provide "economic disincentives" and statute further states that "incentives that impair defense counsel's ability to provide effective representation shall be avoided."⁶²

Other states have barred flat fee contracting through judicial rules. For example, the South Dakota Unified Judicial System Policy 1-PJ-10, issued by the state supreme court, not only set a reasonable hourly rate that "will increase annually in an amount equal to the cost of living increase that state employees receive each year from the legislature,"⁶³ but also bans flat fee contracting.⁶⁴

Finally, a Federal Court in 2013 called the use of very low rate flat fee contracts in two cities in Washington State prior to the Supreme Court ban an "intentional choice" that purposefully "left the defenders compensated at such a paltry level that even a brief meeting [with clients] at the outset of the representation would likely make the venture unprofitable."⁶⁵ Whether or not Wisconsin's policymakers similarly made an "intentional choice" to create financial conflicts of interest in the delivery of constitutional right to counsel services cannot be decided here. However, it

⁶² Mich. Stat. Ann. § 780.991 (2)(b).

⁶³ *Supra*, note 45.

⁶⁴ UJS Policy 1-PJ-10 requires that "[a]ll lawyers . . . be paid for all legal services on an hourly basis" thereby banning the use of flat fee contracting for public counsel services. *Ibid*.

⁶⁵ United States District Court, Western District of Washington at Seattle. *Memorandum of Decision in Wilbur v. Mount Vernon*, No. C11-1100RSL, at 15, December 2013. Judge Robert Lasnik. Available at: <http://sixthamendment.org/wp-content/uploads/2013/12/Wilbur-Decision.pdf>.

is clear that financial conflicts are having a number of impacts on the delivery of right to counsel services, as detailed in Finding #3 below.

Finding #3: Unreasonably low attorney compensation rates interfere with a lawyers' ethical obligation to give undivided loyalty to each and every defendant

At the July 2000 meeting of ABA, the House of Delegates adopted a resolution reaffirming the core value of the legal profession.⁶⁶ The resolution calls on lawyers to maintain "undivided loyalty" to the client and to "avoid conflicts of interest" with the client. The ABA resolution expands upon the core values first established in 1983 in its *Model Rules of Professional Conduct*. Rule 5.4(c) states that a lawyer shall not permit a person that pays the lawyer to render legal services to "regulate the lawyer's professional judgment in rendering such legal services."⁶⁷ The *Model Rules* have since been adopted by the state bar associations in 49 of 50 states, plus the District of Columbia (including Wisconsin).⁶⁸

Moreover, there is a constitutional imperative for defender representation to be independent and free from undue interference on a lawyer's professional judgment. In the 1979 case, *Ferri v. Ackerman*, the United States Supreme Court determined that "independence" of appointed counsel to act as an adversary is an "indispensable element" of "effective representation."⁶⁹ Two years later, the Court determined in *Polk County v. Dodson* that states have a "constitutional obligation to respect the professional independence of the public defenders whom it engages."⁷⁰ Observing that "a defense lawyer best serves the public not by acting on the State's behalf or in concert with it, but rather by advancing the undivided interests of the client,"⁷¹ the Court concluded in *Polk County* that a "public defender is not amenable to administrative direction in the same sense as other state employees."⁷²

This is confirmed in *Strickland v. Washington*.⁷³ In that case, the Court states that "independence of counsel" is "constitutionally protected," and that "[g]overnment violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense."⁷⁴

⁶⁶ ABA House of Delegates. *Resolution 10-F*. July 2000. Available at: <http://www.americanbar.org/groups/leadership/2000dailyjournal10.html>

⁶⁷ American Bar Association. *Model Rules of Professional Conduct*. 2013. Available at: http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html.

⁶⁸ Failure to adhere to the bar rules of each state may result in disciplinary action against the attorney – even loss of license to practice law.

⁶⁹ *Ferri v. Ackerman*, 444 U.S. 193 (1979). Available at: http://www.oyez.org/cases/1970-1979/1979/1979_78_5981.

⁷⁰ *Polk County v. Dodson*, 454 U.S. 312 (1981). Available at: http://www.oyez.org/cases/1980-1989/1981/1981_80_824.

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ *Strickland v. Washington*, 466 U.S. 688 (1984). Available at: http://www.oyez.org/cases/1980-1989/1983/1983_82_1554.

⁷⁴ *Ibid.*

Both unreasonable compensation with no allowances for overhead expenses and flat fee contractual arrangements to represent the poor in criminal courts are constitutional violations precisely because each pits the attorney's financial well-being against the client's right to conflict-free representation. A lawyer can be pushed into thinking about how to make the representation profitable in addition to, and potentially in opposition to, the stated interest of the client.

To discover whether such negative impacts exist in Wisconsin in relation to the low attorney compensation rate, the authors of this report conducted a survey of Wisconsin lawyers. The survey was sent electronically to 1,277 criminal defense attorneys, using lists provided by WACDL and the SPD. These lists include attorneys currently taking cases and those that no longer take cases for whatever reason. E-mail analytics show that 166 bounced back as having wrong email addresses. This means that 1,111 surveys were sent with 378 people filling out the survey (a 34% response rate).

Nearly one half of respondents (49.4%) stated that they represent fewer public defender appointed clients than in the past. This is in addition to the 6.8% of respondents stating that they no longer take SPD appointed cases at all.⁷⁵ These results confirm what SPD reported its *2013-2015 Biennial Budget Issue Paper*: "Although there are currently about 1,100 lawyers on the appointment lists, about 25% of them take less than five cases per year and more than 10% take one or less cases per year."⁷⁶

This is important because there appear to be two distinct classes of appointed attorneys: (a) those attorneys that take occasional cases (perhaps out of some self-perceived duty to the Court or SPD); and (b) those lawyers that represent a significant number of SPD defendants. But, before delving deeper into that divide it is important to note that regardless of how many SPD cases an attorney takes on annually, the survey showed that Wisconsin attorneys spend, on average, about 13% less time working on their appointed cases than on similar retained cases.

⁷⁵ A quarter of the attorneys state that the number has remained the same. 18.5% say that they've increased the number of appointed cases they have accepted.

⁷⁶ SPD, *2013-2015 Biennial Budget Issue Paper*, provided to authors by SPD staff.

I only take SPD appointed cases when I do not have enough other work to keep busy full time. This is because SPD management, more concerned with maintaining the status quo of its operations than seeing clients get high quality representation, punishes attorneys who do a thorough job by arbitrarily "cutting time" from hourly bills.

SPD Director Doree Forney and Kathleen Seaman approved that of the 1,074 Wisconsin lawyers disciplined in 2009, 42% (450) had previously been on the SPD private bar list. The pattern seems to be continuing, for example, in 2012 one attorney was reprimanded for not taking action and then communicating with the client in three post-conviction matters adjudicated by SPD in 2007 and 2008. This attorney was on the SPD certified bar list in 2012 and in 2013 until he was suspended from the list in March of that year. A new lawyer regulation case against him was filed on January 2, 2014.

In 2010, the Wisconsin Supreme Court reprimanded a different attorney for "representing an individual on criminal charges in which he had previously consulted with the victim in the criminal case." ¹⁴

¹⁴ A rehash of reprimanded attorneys provided by SPD staff.

¹⁵ Of course, in the lawyer discipline field, there are many examples of attorneys who would have transcripts of all disciplinary hearings before the Office of Lawyer Regulation. However, the records of the discipline process are not public and the records of all disciplinary hearings are not publicly accessible.

potential civil claim analysis. The court to be ultimately represented in the criminal matter. The Court found that this "reflects a troubling lack of awareness of a lawyer's duty to the rights of his clients or his responsibility as a lawyer to guard sensitive information with which he had been entrusted." This was the attorney's third reprimand. His first reprimand was because he was convicted for failure to file a tax return. In 2012, his license was suspended for 60 days because he failed to keep a related client "reasonably informed about the status of her case and failed to promptly respond to her request for information about fees." He also acknowledges that he failed to timely take steps to withdraw from representation after J.P. left numerous messages saying she wanted to discharge him. This thrice-reprimanded lawyer was on the SPD certified private bar list as of November 13, 2013.

In 2011, yet another attorney was reprimanded as the result of judicial allegations for participating in two bar fights. As the Supreme Court noted, the attorney "intentionally and repeatedly violated the rules of professional conduct in the course of his

injuries. [The attorney] fled the scene after each incident. The lawyer was on the SPD appointment list in 2012 but not in 2013.

In 2013, another lawyer was reprimanded because of his misconduct in a juvenile case appointed to him by SPD. This attorney also had a prior conviction, having pled guilty to a class A misdemeanor involving the possession of a worthless check in an amount less than \$1,000, in violation of Wis. Stat. § 943.21(1). The Court found that this attorney had violated SCR 203.463 by failing to honor a lawfully served subpoena commanding his attendance at a hearing, despite his self-proclaimed status as a lawyer of competent standing. He had violated SCR 203.463 and SCR 203.464 by a misrepresentation to the Office of Lawyer

Control. The attorney was on the SPD-certified private bar list as of November 13, 2013.

Case law indicates that there is reason for concern about the effectiveness of SPD-appointed counsel.

In Amy W. v. David G. Uhere, Alexandra G.J. 2013 WL App 43 (Wis. Ct. App. 2013), the court granted a habeas corpus petition and allowed an extended time to file an appeal because the appointed appellate counsel's performance was both deficient and prejudicial. After an initial consultation, counsel failed to consult with her client about the appeal or to file an appeal before the deadline for filing had passed.

In 2017, the Wisconsin Supreme Court revoked the license of a different lawyer, in part because he had been convicted of felony theft for billing the Wisconsin State Public Defender's Office for 691 hours of work that he never performed, consisting of 628 fraudulent billing entries in more than 40 client matters over a nearly four-year period, and for which he received more than \$19,000. He had been publicly reprimanded by

the Court for "failing to provide competent and diligent representation of a client and willfully communicating with a client in a prohibited appellate context."

EXHIBIT 3

A lawyer must be appointed early to represent the accused so that she can work with the client to develop the level of trust that is essential to her ability to be effective – what the Supreme Court has described as “those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional.”⁷⁷ However, surveyed attorneys reported that they spend 37% less time, on average, meeting with their appointed clients than they do with their retained clients.

Motions are a vitally important component of an attorney’s litigation strategy. Where the government’s evidence was acquired through an unlawful search, as one example, a defense lawyer’s motion can suppress such evidence, thereby increasing the chances of a better plea offer from the prosecution or maybe even obtaining a dismissal of the charges entirely. As the judge in the Federal lawsuit challenging the constitutionality of the indigent defense services in two Washington cities noted, “no hard and fast number of pretrial motions or trials is expected,” but when hardly any motions are ever filed and the number of trials is “incredibly small” it is a “sign of a deeper systemic problem.”⁷⁸ The Wisconsin survey revealed that attorneys who have a higher number of public defender cases tend not to file motions in their cases, and they are more likely to resolve cases by their public defender clients pleading to the offense charged. This suggests that attorneys with many SPD cases are prioritizing speed in order to make representation more profitable. Even if that is not the conscious intent, the pressure of having to make a living and potentially of devoting time to higher-paying retained cases can have that effect.

Conversely, the data suggest that those attorneys who take on fewer public defender cases in favor of private clients file more motions for both their private clients and public defender clients. These attorneys tend to spend more time working on their public defender cases, meet with them more often, see their cases more often result in acquittal, and are less likely to resolve cases with guilty pleas as charged compared with attorneys who take on more public defender clients and who file fewer motions.

Finding #4: Separation of powers concerns do not prevent the Wisconsin Supreme Court from increasing assigned counsel rates through judicial rule

The Sixth Amendment to the U.S. Constitution was created to prevent the tyrannical impulses of big government from taking away an individual’s liberty without the process being fair. It does not solely apply in good economic times.

Despite this, there is some evidence that financial considerations may have trumped the constitutional imperative for independent, conflict-free representation in Wisconsin. In 2011, the Wisconsin Court expressed concern about the adequacy of assigned counsel fees in the context of a petition to amend Supreme Court Rule 81.02.⁷⁹ The Petition asked the Court to increase the court-appointed rate to \$80, tie it to the Consumer Price Index, and provide that SPD-appointed

⁷⁷ *Powell v. Alabama*, 287 U.S. 45 (1932). Available at: http://www.oyez.org/cases/1901-1939/1932/1932_98.

⁷⁸ *Supra*, note 65.

⁷⁹ *Supra*, notes 14 and 47.

rates be not less than the Rule 81.02 rates.⁸⁰ Despite the Courts' "sincere concern" and recognition of the "extensive anecdotal evidence" that "shortfalls may compromise the right to effective assistance of counsel"⁸¹ in Wisconsin, the Court denied the petition, in part, because of "a particularly challenging budgetary environment" for the legislature.

If the Court is worried about separation of powers concerns, it should not be. The Court has inherent power to ensure the effective administration of justice in the State of Wisconsin.⁸² Although the legislature holds the power to pass budgets, an expenditure policy that creates a financial conflict of interest in which the constitutional right to counsel is compromised cannot be allowed to stand. The Court should not fear that passing a court rule increasing pay will necessarily result in forcing the legislature to expend more money. The Wisconsin legislature can, for instance, work together to increase the reliance on diversion that could move juvenile and adult defendants out of the formal criminal justice system and provide help with potential drug or other dependencies. Similarly, lawmakers can change low-level, non-serious crimes to "citations" - in which the offender is given a ticket to pay a fine rather than being threatened with jail time thus triggering the constitutional right to counsel.⁸³ By shrinking the size of the criminal justice system, Wisconsin's funding requirements under the right to counsel could be mitigated, even with increased rates of pay for attorneys.

It is easy for policymakers, especially in hard economic times, to say that they do not want to give more taxpayer resources to lawyers. But if the failure to pay a reasonable rate creates financial conflicts of interests that result in lawyers triaging the Sixth Amendment duty they owe to some clients in favor of others, then Wisconsin is in violation of the U.S. Constitution - a situation the policymakers may want to redress to avoid costly systemic litigation.

RECOMMENDATION

The Wisconsin Supreme Court should amend Rule 81.02 to increase the court-appointed rate to \$85. This includes an overhead rate of \$41.79, plus a reasonable fee of \$43.21. The Court should require that the rate be increased in conjunction with either (a) the cost of living increases given for state government workers, or (b) the annual increase in the Consumer Price Index. The Court should require that SPD-appointed counsel rates be not less than the Rule 81.02 rates. Finally, the Court should ban all indigent defense contracts that interfere with a lawyer's professional independent judgment through economic incentives or disincentives.

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² See, e.g., *State ex rel. Friedrich v. Circuit Court for Dane County*, 192 Wis. 2d 1, 531 N.W.2d 32 (1995).

⁸³ For example, jurisdictions in Washington State have developed diversion programs for suspended driver license cases, resulting in reducing caseloads by one-third. See, Robert C. Boruchowitz, *Fifty Years After Gideon: It is Long Past Time to Provide Lawyers for Misdemeanor Defendants Who Cannot Afford to Hire Their Own*, 11 *Seattle Journal for Social Justice* 891, 922(2013).



www.sixamendments.org

EXHIBIT 3

Appendix - 70

WISCONSIN STATE PUBLIC DEFENDER PROPOSED BUDGETS

YEAR	PROPOSED PRIVATE BAR RATES
1995-97	Request for a budget increase of 89,800 to change the rate of compensation provided to private attorneys appointed by the public defender to a flat rate of \$45 per hour.
1997-99	Request for a budget increase of \$147,800 to increase reimbursement to private attorneys from \$40 to \$45 per hour
1991-2001	Request to increase the reimbursement rates paid to private attorneys from \$40 to \$45 per hour. Mentioned: results of a 1997 survey conducted by the State Public Defender's appellate division suggest that a decline in the number of attorneys willing to accept State Public Defender appointments can be explained by a low hourly wage rate.
2001-03	Request \$3,042,500 to increase the in-court and out-of-court hourly compensation paid to private bar attorneys accepting appointment to represent indigent SPD clients from \$40 per hour to the compensation rate paid to attorneys appointed under Supreme Court Rule 81.02(1). (\$70 per hour)
2003-05	Request to increase the current SPD private bar reimbursement rate of \$40 to \$70 per hour; the amount currently authorized under SCR 81.02(1)
2005-07	Request statutory language increasing the in-court and out-of-court hourly compensation rate paid to private bar attorneys accepting appointment to represent indigent SPD clients to \$70 per hour
2007-09	Request statutory language increasing the in-court and out-of-court hourly compensation rate paid to private bar attorneys accepting appointment to represent indigent SPD clients to \$70 per hour
2009-11	Request statutory language increasing the in-court and out-of-court hourly compensation rate paid to private bar attorneys accepting appointment to represent indigent SPD clients to \$70 per hour SPD current travel time compensation rate would remain at \$25 per hour and would not be changed under this requested modification
2011-13	Request statutory language increasing the in-court and out-of-court hourly compensation rate paid to private bar attorneys accepting appointment to represent indigent SPD clients to \$70 per hour Amend current law to eliminate reimbursement for time spent traveling if any portion of the trip is outside the county in which the attorney's principal office is located.
2013-15	Request \$3,506,000 to increase the hourly compensation paid to private bar attorneys representing SPD clients from \$40 per hour for in-court and out-of-court work to \$50 per hour
2015-17	Request \$930,000 in 2015-16 and \$7,627,900 in 2016-17 to increase the rate at which private bar attorneys are compensated from \$40 per hour to \$45-\$60 depending on the case type.

SPD Petition Legislative History

LEGISLATIVE SESSION	BILL	ACT	CHANGE	HISTORY IN LEGISLATURE
1981/1982	Assembly Bill 66	Chapter 20 (Section 1835-6)	<u>Created 977.08(4m): Private local attorneys shall be paid \$35 dollars per hour for time spent in court and \$25 dollars for other time spent related to a case</u>	PASSED AND IMPLEMENTED
1983/1984				
1985/1986	Assembly Bill 85	Act 29 (Section 2474a), Act 20	<u>Amended 977.08(4m): For cases assigned prior to December 1st 1987, private local attorneys shall be paid \$40 dollars per hour for time spent in court, \$30 dollars for time spent out of court, excluding travel, and \$25 per hour for travel if outside the county in which the attorneys office is located. For cases assigned after December 1st 1987 the rates shall be \$45, \$35, and \$25 (respectively)</u>	PASSED AND IMPLEMENTED
1987/1988				
1989/1990				
1991/1992	Assembly Bill 91	Act 39 (Section 3655)	<u>Amended 977.08(4m): Changed before/after date to 1992. For cases assigned after December 1st 1992, the rates shall be \$50, \$40 and \$25 (respectively)</u>	PASSED AND IMPLEMENTED
1993/1994				
1995/1996	Assembly Bill 150	Act 27 (Section 7285g & 7285m)	<u>Amended 977.08(4m): Split up dates and renumbered as (a) and (b). Created 977.08(c): \$40 dollars per hour related to case and \$25 dollars per hour for travel</u>	<u>02/16/1995: Introduced by Joint Committee on Finance by request of Governor Tommy G. Thompson. Read for the first time</u> <u>06/15/1995: Amendment proposed by joint committee on finance</u>

EXHIBIT 5

SPD Petition Legislative History

				<p>06/19/1995: Read a second time</p> <p>06/22/1995: Multiple Amendments proposed, adopted and sent to Senate</p> <p>06/23/1995: Received at Senate and read a first time, Referred to Committee for Senate Organization</p> <p>06/27/1995: Read a second time, multiple amendments proposed and adopted</p> <p>06/28/1995: Read a third time, concurred in as amended</p> <p>06/29/1995: Assembly receives, does not concur on 2 of the 3 amendments. Senate rescinds position on the 2 positions</p> <p>07/26/1995: Approved by governor with partial veto</p> <p>PASSED AND IMPLEMENTED</p>
1997/1998	Assembly Bill 768		<p>Private Bar Costs Budget:</p> <p>The budget was proposed to increase by \$816,900 for fiscal year 1997-98 and the dollar amount was to be increased by \$987,600 for fiscal year 1998-1999 to increase funding for the purposes for which the appropriation is made</p>	<p>1998: Sent to the Committee on Finance</p> <p>Vetoed</p>
1999/2000				
2001/2002				
2003/2004				

SPD Petition Legislative History

2005/2006	Assembly Bill 1062		Proposed Creation of 977.08(4m)(d): \$70 dollars related to a case, \$25 dollars related to travel	2/27/2006: Referred to the Committee on Judiciary 2/27/2006: Bill introduced and read for the first time 3/8/2006: Fiscal estimate received 5/11/2006: Failed to pass pursuant to Joint Senate Resolution 1
2007/2008	Assembly Bill 434		Proposed Creation of 977.08(4m)(d): \$70 dollars related to a case, \$25 dollars for travel	7/3/2007: Referred to Committee on Corrections and Court 7/3/2007: Read for the first time 7/18/2007: Fiscal Estimate received 3/21/2008: Failed to pass pursuant to Senate Joint Resolution 1
2009/2010	Assembly Bill 224		Proposed Creation of 977.08(4m)(d): \$70 Dollars related to a case, \$25 dollars for travel	04/23/2009: Bill was introduced 04/23/2009: Read an referred to committee on Judiciary and Ethics 06/02/2009: public hearing held 03/11/2010: Bill referred to the committee on finance 04/28/2010: failed to pass pursuant to Senate Joint Resolution
2011/2012				
2013/2014	Assembly Bill 243		Proposed Creation of 977.08(4m)(d): \$75 dollars per hour related to a case, \$25 dollars per hour for travel	6/11/2013: Referred to the Committee on Judiciary 6/13/2013: Bill was introduced 7/3/2013: Fiscal Estimate received

EXHIBIT 5

SPD Petition Legislative History

2015/2016	Assembly Bill 275		Proposed Creation of 977.08(4m)(d): \$85 dollars related to a case, \$25 for travel	4/8/2014: Failed to Pass pursuant to Joint Resolution 1
				06/29/2015: Bill was introduced 06/29/2015: read and referred to the committee on judiciary 04/13/2016: Failed to pass pursuant to Senate Joint Resolution