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Justice Shortchanged--Assigned Counsel Compensation in Wisconsin

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The Defender Initiative

Robert C. Boruchowitz
Seattle University School of Law

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JUSTICE SHORTCHANGED

ASSIGNED COUNSEL COMPENSATION IN WISCONSIN



MAY 2015



SIXTH
AMENDMENT
CENTER

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 helps 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.

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Sixth Amendment Center
PO Box 15556
Boston, MA 02215

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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

¹ This calculation was determined using the Consumer Price Index published by the U.S. Bureau of Labor Statistics between January 1984 and January 2015 using the inflationdata.com calculator at: http://inflationdata.com/Inflation/Inflation_Calculators/Cumulative_Inflation_Calculator.aspx. (Last visited March 2015.)

² The average national price of gas in 1984 was \$1.16 per gallon. In 2013, it was \$3.53, an increase of 204%. U.S. Department of Energy. See: <http://energy.gov/eere/vehicles/fact-835-august-25-average-historical-annual-gasoline-pump-price-1929-2013> (Last visited March 2015). Rates beyond 2013 not yet posted.

³ Wis. Stat. §977.08 (4m)(c).

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

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:

⁴ *In the matter of the petition to amend Supreme Court Rule 81.02*, July 6, 2011, available at: <https://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=67390>. (Last visited March 2015.)

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>. (Last visited March 2015.)

⁷ National Association of Criminal Defense Lawyers. *Rationing Justice: the Underfunding of Assigned Counsel Systems*. March 2013. Available at: <https://www.nacdl.org/gideonat50/>. (Last visited March 2015.)

⁸ *Ibid*, page 12.

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.

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

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)].

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 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.

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>. (Last visited March 2015.)

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/jsери/blog/gideon-alert-updates-wisconsin-and-pennsylvania>. (Last visited March 2015.) Wis. Stat. § 977.02(3)(c) now sets a presumptive threshold at 115% of the Federal Poverty Guideline.

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.”¹⁷ Former Attorney General Eric Holder stated 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.

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. (Last visited March 2015.)

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>. (Last visited March 2015.)

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>. (Last visited March 2015.)

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.”

A response to our survey:

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.

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 its *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>. (Last visited March 2015.)

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 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). West Virginia has a lower cost 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 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

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/>. (Last visited March 2015.)

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>. (Last visited March 2015.)

“insufficient to cover even normal hourly overhead expenses,” which the Court pegged 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 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 it, 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 South Dakota now stands at \$90 per hour⁴⁵ – more than double the pay for attorneys in Wisconsin.⁴⁶

³⁹ NY CLS Jud § 35.

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

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>. (Last visited March 2015.)

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*, December 16, 2014. See: http://www.ujs.sd.gov/uploads/firstcircuit/Court_Appointed_Attorney_Fee_Memo.pdf. (Last visited April 2015.)

⁴⁶ U.S. Census Bureau, *Statistical Abstract of the United States, 2012* (*supra*, note 6) does not list any South Dakota

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 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

Finding #2: Wisconsin violates the ABA *Ten Principles*' prohibition on contracts let primarily 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" cause 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

municipalities by which to compare with Wisconsin.

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 (Ct. 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>. (Last visited March 2015.)

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%).

⁵² NLADA web page on Flat Fee Contracts, at: http://www.nlada.net/library/article/na_flatfeecontracts. (Last visited

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 These Wisconsin contractual arrangements produce financial incentives to triage work in favor of some defendants, but in detriment of others.

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 mis-

A response to our survey:

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.

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>. (Last visited March 2015.)

Wisconsin Criminal Justice Study Commission expresses concern with low rates of compensation

The State Bar of Wisconsin, Marquette Law School, the University of Wisconsin Law School, and the Wisconsin Attorney General created the Wisconsin Criminal Justice Study Commission (WCJSC)¹ “to identify and help correct problems in the Wisconsin criminal justice system.” WCJSC is comprised of “well-respected criminal justice professionals from every facet of the system, including prosecutors, defense attorneys, judges, police, and victim’s advocates, as well as community leaders from outside the system.”

The WCJSC debated the assigned counsel compensation rates several times at meetings between August 2005 and December 2008.² 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 the 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.³

At the February 22, 2008 meeting, Commission member Jerry Buting noted that the current rate of compensation for assigned counsel led to difficulties in finding attorneys to take assigned cases.⁴ Mr. Buting also pointed out that

half of the attorneys disciplined by the Wisconsin Supreme Court are on the SPD’s private bar list.⁵

Judge Fred Fleishauer reported that, in Portage County, the private bar lawyers doing criminal appointments worked from home with no staff and a lack of resources, which led to those lawyers being unable to investigate their cases, research the law, and file motions.⁶ The judge described the lawyers as “plea negotiators,” rather than proper defenders, due to the low rate of pay and lack of resources.⁷

At the May 29, 2008 meeting, SPD Budget Director Megan Christiansen reported that the SPD contracts with approximately 1,100 attorneys throughout the state for overflow and conflict cases, with 47% of its cases appointed to private attorneys.⁸ These cases account for less than one third of the SPD’s total budget.⁹ She further noted that, of the 205 Wisconsin lawyers disciplined in 2005, 58% were on or had recently been on the SPD’s private bar list.¹⁰

A review of the reports of the Commission’s meetings suggests that there was a consensus among prosecutors, law enforcement, defense attorneys, and judges that there was a crisis in public defense and that the assigned counsel rate should be increased.

¹ See: <http://www.law.wisc.edu/fjr/clinicals/ip/wcjsc/index.html>. (Last visited March 2015.)

² Meeting agendas and summaries are found at: <http://law.wisc.edu/fjr/clinicals/ip/wcjsc/meetings.html>. (Last visited March 2015.)

³ November 27, 2007 summary of Commission meeting at 8.

⁴ February 22, 2008 summary at 1.

⁵ *Ibid.*

⁶ *Ibid.*, at 4.

⁷ *Ibid.*

⁸ May 29, 2008, summary at 1.

⁹ *Ibid.*, at 2.

¹⁰ *Ibid.*, at 1.

demeanor case, the attorney must be able to, among other tasks: meet with and interview 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); 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, as soon as possible; research the law; develop and continually reassess the theory of the case; file and argue pretrial motions; read and respond to the prosecution's motions; negotiate plea options with the prosecution, including sentencing outcomes; all the while preparing for the event that the case may go to trial and possibly sentencing.⁵⁸ Although lawyers in *some* cases may dispose of a misdemeanor 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 (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

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/>. (Last visited March 2015.)

⁵⁹ American Bar Association. *The Missouri Project: A Study of the Missouri Defender System and Attorney Workload Standards*. Prepared by RubinBrown 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/l_sclaid_5c_the_missouri_project_report.authcheckdam.pdf. (Last visited March 2015.)

⁶⁰ *Ibid*, at page 6.

⁶¹ I.C. § 19-859 (codified in 2014).

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*.

A response to our survey:

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.

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 is clear that financial conflicts have 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 the ABA, the House of Delegates adopted a resolution reaffirming the core values 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 for another 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

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>.

⁶⁶ ABA House of Delegates. *Resolution 10-F*. July 2000. Available at: <http://www.americanbar.org/groups/leadership/2000dailyjournal10.html>. (Last visited March 2015.)

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. (Last visited March 2015.)

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.

State Bar of Wisconsin Board of Governors Policy Position (April 2013):

“Private Bar Compensation - The State Bar of Wisconsin supports private practice lawyers’ compensation for assigned counsel appointments at a rate that fairly compensates lawyers for their time, 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 rate of compensation less than that set by the Wisconsin Supreme Court for court appointed attorneys does not safeguard the constitutional rights of individuals accused of

committing a crime. The State can guarantee constitutional safeguards by providing fair and timely reimbursements to private bar attorneys to ensure a more efficient and effective criminal justice system.”¹

¹ See: <http://www.wisbar.org/aboutus/governmentrelations/pages/policy-positions.aspx>. (Last visited March 2015.)

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

⁶⁹ *Ferri v. Ackerman*, 444 U.S. 193 (1979). Available at: http://www.oyez.org/cases/1970-1979/1979/1979_78_5981. (Last visited March 2015.)

⁷⁰ *Polk County v. Dodson*, 454 U.S. 312 (1981). Available at: http://www.oyez.org/cases/1980-1989/1981/1981_80_824. (Last visited March 2015.)

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. (Last visited March 2015.)

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 a 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.

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

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.

⁷⁷ *Powell v. Alabama*, 287 U.S. 45 (1932). Available at: http://www.oyez.org/cases/1901-1939/1932/1932_98. (Last visited March 2015.)

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 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.

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 rates be not less than the Rule 81.02 rates.⁸⁰ Despite the Court’s “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 need 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

⁷⁸ *Supra*, note 65.

⁷⁹ *Supra*, notes 14 and 47.

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).

Examples of disciplinary actions against SPD assigned counsel attorneys

SPD Budget Director Megan Christiansen reported that of the 205 Wisconsin lawyers disciplined in 2005, 58% were on or had recently been on the SPD's private bar list.¹ The pattern seems to be continuing. For example, in 2012 one attorney was reprimanded for not taking action and not communicating with the client in three post-conviction matters appointed 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, 2014.²

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

about a potential civil action against the person he ultimately represented in the criminal matter." The Court found that this "reflects a troubling lack of awareness of or attention 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 retained 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 L.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 criminal convictions for participating in two bar fights. As the Supreme Court described it, "In each instance, [the attorney] punched a bar patron multiple times in the face, causing

¹ Spreadsheet of certified attorneys provided by SPD staff.

² The identity of this lawyer, as with each of the others selected as examples in this section, has been withheld. Transcripts of all disciplinary hearings before the Office of Lawyer Regulation are readily available at: <https://www.wicourts.gov/services/public/lawyerreg/statuspublic.htm>. The authors found all subsequent quotes from disciplinary proceedings therein.

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

In 2012, 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 issuance of a worthless check in an amount less than \$1,000, in violation of Wis. Stat. § 943.23 (1). The Court found that this attorney had violated SCR 20:3.4(c) by failing to honor a lawfully served subpoena commanding his attendance at a hearing alleging his ineffective assistance of counsel and that he had violated SCR 22.03(6) and 20:8.4(h) by a misrepresentation to the Office of Lawyer

Regulation. This 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. (In re Alexandria G.), 2013 WI App 83 (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 2012, 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 \$19,600." He had been publicly reprimanded in

1995 for "failing to provide competent and diligent representation of a client and for failing to communicate with a client in a criminal appeal matter."

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 address 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.

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).



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