

RECEIVED

APR 27 2018

CLERK OF SUPREME COURT
OF WISCONSIN

Date: April 27, 2018

To: Clerk of Supreme Court,
Attention: Deputy Clerk-Rules
P.O. Box 1688
Madison, WI 53701-1688

CC: Carrie.Janto@wicourts.gov
Attorney John Birdsall
Attorney Henry Schultz

Re: Rule Petition 17-06, in re petition to amend SCR 81.02

Deputy Clerk,

Thank you for the April 17, 2018 order (listed on your website as April 17, 2017^[1]) extending time to comment on this proposed rule change. Please amend these comments to my prior ones filed March 30, 2018.

I have taken the time to review many if not all of the comments filed and would like to incorporate this supplementary commentary based on others input.

This is still not a legal matter; therefore, it is not the courts place to implement policy to fix it. The court's past unjustified meddling by establishing the imprudent policy of \$70 per hour didn't fix the problem in 1993. As such why should anyone think that increasing this to \$100 per hour will fix this in 2018? You haven't been able to move the needle on the legislative side of the aisle since going rogue with this injudicious practice, as the legislature is clearly considering the impact of the laws that allow these fees to be collected from the litigant, and therefore believe the balancing act is most appropriately at \$40. From an analytical standpoint, if you were to multiply the reported spend by each county by 0.57 (difference between \$40 & \$70) how many of these counties would still be over budget?^[2] If counties are still budgeting based on legislative statute (which they should) the only reason for being *so far* over budget is the court does not follow the law. Nobody should need to point out the irony of that fact.

When you actually read SCR 81, it states that the last time it was revised was June 21, 1993, yet 81.02(1) also states

The supreme court shall review the specified rate of compensation every two years.

How is it that if the Supreme Court has been diligently reviewing this compensation "every two years" for the past 25 years, they have never of their own initiative adjusted this? Could it be because they know they are in the wrong in deviating from the legislative amount set at \$40? Or is it just tacit admission that the judiciary has no authority in this matter?

[1] <https://www.wicourts.gov/scrules/1706.htm> Court order and communications section, 4th comment up from bottom as viewed today.

[2] Nowhere is hard evidence presented *by the petitioner* that a budget issue exists. The petitioners' supplemental response filed April 19, 2018 Table 1 only indicates either budget OR expenditure, such that over/under cannot be surmised from this data. As indicated in the Appendix, the data presented in this report is immaterial given the effort to collect it was "fruitless".

In the statement provided by the Wisconsin Association of Criminal Defense Lawyers, it is claimed that Dane County is over budget. Note that Waukesha and Milwaukee did not provide a response to the request and no Dane County fiscal information is in the petitioners' analysis. Still, this and the graphic of Gretchen Schuldt show that there is a demand for court appointed attorneys in the other counties. Now consider the State Bar of Wisconsin (comments of Paul Swanson, President) that indicates that 64% of attorneys have their offices in these 3 aforementioned counties. So, clearly there is an ample supply. A lack of response might infer that Milwaukee and Waukesha counties are under budget. If it is not as simple as the supply vs. demand debate that you whitewash this with, it renders this a statewide commerce problem. And **issues of commerce are for the legislature to fix.**

Wisconsin Clerks of Circuit court ask a very direct question in their April 2nd response that nobody identifying as a member of the state bar appears willing to address. "How do we, at the county level, pay for this?" We all know that the State budget is not an infinite well to draw upon. Nobody has identified programs that could be eliminated to defer funds to this pursuit. All I hear are a bunch of people drunk on self-anointed power guiltlessly saying "dilly dilly" or sounding like Patrick Ewing's infamous quote from the 1998 NBA strike: "We make a lot of money, but we also spend a lot of money". The lawyers, your peers, who don't participate by accepting cases at the current rates are essentially "on strike" and offering more money doesn't guarantee their engagement. To think otherwise is naïve. A significant part of the problem is that you need to get all the law firms and attorneys in this state to engage in solving this problem and not just the struggling ones. I ask Attorney Wickman, "If the average monthly expense is \$8,500 per attorney as the petitioners report indicates (page 18), is your business spending \$34,000 per month on overhead?"^[3] and "As a small business owner, do you think that is a wise business decision?" Some of these struggling attorneys might be the best attorneys in the room, but nowhere is that a measure that they are *also* effective small business owners.

Here is a very simple starting point that addresses multiple facets of this problem. Work with the legislature to establish that all law offices obtain a "legal advice license" managed by each of the counties. This *commerce* fee (think of it as a wheel tax for law firms) established on a per-county basis would be used to augment county budget shortfalls for court appointed attorneys. It can be paid for in either cash or barter, say either \$350 per attorney annually (~ 2 hours billable time as per State Bar economics, less than 1 years state bar dues^[4]) or accept ONE court appointed case for every THREE attorneys that practice law in an office. For example, a law firm like Attorney Wickman's (1 attorney + 1 partner + 2 associate attorneys = 4) between the 4 of them they would need to take 1 court appointment per year *or* pay \$1400. If he were to add 2 more attorneys, the cumulative 6 attorneys would then need to take 2 court appointments per year or pay \$2100 annual licensing fee. Offices of only one or two attorneys would still need a county license but have a \$0 fee until they pass the 3-lawyer threshold. Public defenders and DA offices are exempt (unlike WisBar dues for every lawyer). The bus tours described in Paul Swanson's response have been a waste of WisBar funds to compel people to practice law where everyone identifies there is a critical geographic need not being met. People compelled to be their own boss can easily establish their business in counties with a dearth, not just where they

[3] Business costs are typically divided into direct materials, direct labor, and overhead, where service industries (Like legal) typically have minimal direct materials and costs are split between the other 2 categories. Lawyer salaries would list under "direct labor".

[4] <https://wislawjournal.com/2017/02/10/bar-dues-increase-could-be-in-offing/>

want to in Dane, Milwaukee, and Waukesha counties where there is already a surplus. If they *want* to work in those counties swimming in attorneys, they simply need to work for a practice that has an existing "legal advice license" if none are available from the county. Counties control the finite number of licenses. Lower the rate per attorney by 10% per additional judicial district (see petition 18-01) occupied (2-year minimum) to distribute attorneys across geography. Law firms can open offices or acquire existing practices in multiple districts to facilitate franchising or establish cooperatives to reduce overhead and share overhead expenses. Counties can continue to negotiate their own contracted rates, as well as how many law firms they are willing to let reside locally, no different than gas stations, restaurants, casinos, or liquor retailers are moderated. It's as easy as adding a Chapter 5 to the Wisconsin Administrative code, Department of Revenue section; or use the Public Defenders office to manage this under PD 1.03-1.08 Administrative code; or add "Lawyer" to the Department of Safety and Professional Services (DSPS.wi.gov) professions list. Or simply add 1 field to each record in WisBar's database for associated practice license #. It doesn't require an entirely new infrastructure to establish this simple task. Not only does this proposal address some of the funding gap and impoverished resource pool issues, it also remediates some of the geographical disparities such that the limited funds can be spent on services instead of travel to address the repeated theme that local resources are not available outside of Dane, Waukesha, and Milwaukee Counties. I'm confident there is ample revenues earned annually in the Wisconsin Legal industry to absorb these costs. It doesn't require the onerous creation & overhead of a CPCS (petitioners response page 10) for the initial rollout. This would be far less expensive than repealing the legal tax exemptions^[5] which 2016 fiscal effect was listed at \$118,400,000 which would cover all county expenses^[6] for this insatiable demand of yours. Do you want this \$100 minimum wage bad enough to give up the legal services tax exemption to fund it? Nobody else's statement provides any suggestion on how to pay for this. My alternate proposal would cost all of you less than that repeal.

As for arguments about the attorneys needing some oversight or peer review (petitioners response pages 12 & 24, footnote #21), that is accomplished by larger firms franchising offices in other districts within the state, thereby insuring a distributed, empowered, and supervised resource pool is available for the courts to draw upon. Foley & Lardner or Quarles & Brady could add an office of one lawyer in La Crosse and have 20% off their annual fee (Districts 1 & 5 + 7) instead of just 10% (existing Districts 1 & 5 presence). Compel these largest firms to invest within the state in addition to or instead of subsidizing offices nationwide.

Just because you might be a good lawyer, doesn't guarantee that you are also a qualified small business proprietor. Not every cooking student is qualified to run a restaurant, neither is every farmhand qualified to run an entire farming operation, nor excellent mechanic qualified to run his own repair shop. How many pet grooming, electricians, plumbers, bicycle repair, cleaning services or other skilled labor businesses close in 3 years because they were not profitable? If we issue state licenses to a business to dispense liquor or serve food, we can also issue licenses to dispense legal advice at the county level and use the proceeds collected within the community to help fund any "court appointed attorney" compensation gap. It's not

[5] <https://www.revenue.wi.gov/DORReports/17sumrpt.pdf> page 2 & table 3. Hawaii, New Mexico, and South Dakota all tax gross receipts on legal services. https://www.americanbar.org/advocacy/governmental_legislative_work/resources/state_legislative_clearinghouse/tax_on_professional_services.html

[6] \$118.4M / 72 counties is \$1.64M per county.

mandatory pro-bono work, as they would still be getting paid at the \$40 rate which according to the petitioners' report covers exaggerated overhead costs. (petitioners response page 18)

And please stop comparing yourselves to other states. Yes, there are differences, but in all other 49 states everyone has to pass a state bar exam to practice law. Until you eliminate the injudicious diploma privilege, the bottom of the list is where you should stay. You incompetently compare yourselves to the "expert medical witnesses" in Hon. John Anderson's response, yet *they* have to pass a national board exam^[7] to practice medicine and become subject matter experts. He didn't. The fact he would make such an uneducated claim shows both diploma privilege and the Wisconsin State bar exam that he took in 1989 (William Mitchell College of Law graduate '89) is as claimed in my original response, profoundly ineffective at insuring qualified, competent people as attorneys and judges. To substantiate any similar claim, the state should adopt the UBE as have 29 other states, if you want to make a rational, educated comparison to people in the medical profession or judicial practices beyond state borders.

In 2013, Fred Lautz was quoted as saying "The days are gone when law firms could just raise their rates to cover expenses and increase their income"^[8]. Five years later, here we are having this conversation showing how reluctant the Wisconsin legal industry is to accept that fact. It's interesting how nobody mentions the 2017 WISBAR survey report^[9] in this conversation. At some point, the people in this room have to acknowledge that the economic realities that are hitting every other profession (agricultural, educational, auto repair, etc.) are also impacting the legal industry. If you want to survive these industry wide tunings, then it is in your own best interest and the interest of all litigants to comprehend the commerce of law^[10], and not just the practice of law, and if the commerce of law is beyond your limited means, work for an entity that is capable. Capitalism will work the rest out without having to establish the unjustified minimum wage of \$100 per hour or create further rules that have zero possibility of being realistically financed by others when there is ample revenue in the legal industry^[5] to help fund this. It's the same choice everyone else has to successfully make in their working careers if they want to profit. Once legislature sees that all of you across the legal marketplace have some incurred risk and widespread involvement, they might be more motivated to come to the table to discuss the current \$40 rate, which is still borne on the backs of the represented litigants as indicated in my first paragraph who can't afford your expenses in the first place. Until then, your black flu^[11] walkout and exclamations of "dilly dilly" will continue to fall on deaf ears.

Thank you for your consideration of the additional points raised in this commentary.



Martin Hying
9300 Luane Dr.
Mount Pleasant, WI 53406

[7] <http://www.usmle.org>

[8] <https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=86&Issue=9&ArticleID=11150>

[9] Economics of Law practice in Wisconsin 2017 Survey Report <https://marketplace.wisbar.org/Pages/Product.aspx?cat=WISBAR&pid=JCPDF0007E17>

[10] Profit Patterns: Maximizing Opportunities in Your Practice <https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=86&Issue=9&ArticleID=11152>

[11] a judicial equivalent of a "blue flu" walkout by law enforcement officers