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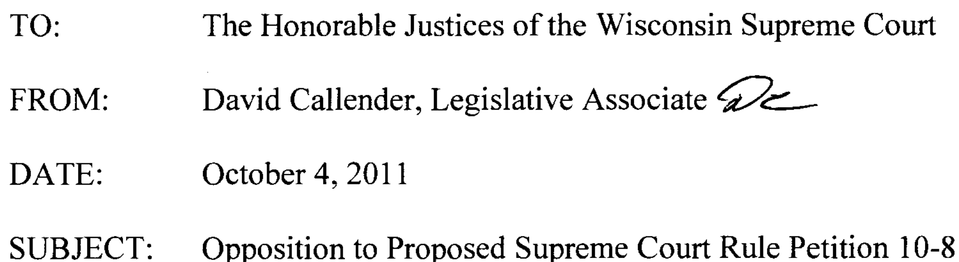
MEMORANDUM



TO: The Honorable Justices of the Wisconsin Supreme Court

FROM: David Callender, Legislative Associate

DATE: October 4, 2011

SUBJECT: Opposition to Proposed Supreme Court Rule Petition 10-8

The Wisconsin Counties Association opposes Supreme Court Rule Petition 10-8 as a costly and significant new unfunded mandate on county government. It should be noted, however, that WCA takes no position on the underlying issue of whether expanding an indigent's right to counsel in certain civil proceedings would best serve the justice system.

The costs to county government if this rule is enacted are unknown and potentially limitless. As the petitioners acknowledge, "it is impossible to calculate an accurate cost of appointed civil counsel, and ... difficult to estimate an approximate cost." This is due in part to the breadth of the proposed rule, which would ensure that indigent persons have legal counsel, at county expense, where "the interests at stake are significant," as the petitioners put it.

The proposed rule states that the court **shall** provide counsel at public expense if needed "to protect the litigant's right to basic human needs, including sustenance, shelter, clothing, heat, medical care, safety, and child custody and placement." Because the rule refers only to the stakes involved in the case, but not the type of litigation, the potential types of litigation for which counsel may be appointed ranges from evictions to child custody and family court to small claims cases. The rule provides no limits to the types of cases for which counsel may be provided, nor does it provide the court with any guidance as to what constitutes "protecting" these rights, or even what constitutes "basic human needs."

Equally ambiguous is the rule's language that the court "consider the personal characteristics of the litigant, such as age, mental capacity, education, and knowledge of the law and legal proceedings, and complexity of the case" in determining whether a litigant needs appointed counsel. Providing the court with this level of discretion makes

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it extremely difficult to predict under what circumstances counsel will be appointed and in what types of cases. This, in turn, complicates any attempt by counties to try to budget for the costs of these court-ordered services and could cause huge variations in the actual costs from year to year.

The only limit the rule places on the appointment of counsel in this wide swath of civil litigation is in the form of the proposed income eligibility guidelines. Thus, while there is income limits for who may receive appointed counsel, there are no similar limits in determining a litigant's need for legal counsel. This places what is potentially a huge new financial burden on counties that are already struggling to pay the costs of current court-ordered services.

The petitioners suggest $56 million is a reasonable annual estimated cost for providing counsel to indigent persons. If this figure is accurate, it is significant. To place it in context, it is approximately two-thirds of what the state spends annually on the Office of State Public Defender. Yet the Office of State Public Defender has traditionally been underfunded, even though the courts have long established a constitutional right to counsel in criminal trials. The petitioners seek to establish a service that would cost at least as much as what the state is already spending to help guarantee a constitutionally recognized right.

Despite the existence of the Office of Public Defender, counties still must pay to provide counsel to indigent persons in criminal cases. Like the proposed rule's income eligibility standards for civil litigants, there already exist income eligibility standards for public defender representation. These indigency standards for criminal defense have not kept pace with inflation. In fact, prior to 2009 Act 164, the income eligibility standards for public defenders did not change for more than 20 years. This meant that many indigent persons who failed to qualify for public defenders still ended up with court-appointed (and county-funded) legal counsel, which created a significant burden for counties.

Although the Legislature has raised the indigency standards for public defender representation, the Legislature this year opted to freeze those standards at their 2011 levels. This means that once again, the gap between indigent criminal defendants eligible who qualify for public defenders and those who must instead rely on court-appointed (and county-funded) counsel will continue to grow. If the Court adopts the proposed rule, counties may again find themselves in the position of having to provide legal counsel for indigent persons who fall outside the state eligibility standards but who nevertheless are ordered by the court to receive legal counsel.

The petitioners propose that the cost of counsel for indigent persons in civil cases could initially be borne by counties who would then seek reimbursement from the state. This is

perhaps the most troublesome aspect of the proposal. First, because the standards are being adopted by Supreme Court rule rather than by statute, there is no obligation on the part of the Legislature to provide any funding for these services. Funding will require an affirmative act on the part of the Legislature, which has already been reluctant to fully fund the Supreme Court's budget request in recent years. Absent any such appropriation from the Legislature, if the court orders the appointment of counsel, then counties must pay. This would appear to reverse the Supreme Court's efforts to work with counties to seek state funding for existing court-ordered services and would, in fact, impose a new burden upon counties.

The petitioners propose that state funding could come from the Court Services Surcharge or the state's General Fund. Both of these funding sources are already severely strained and are unlikely to produce the new revenue the petitioners envision.

The Court Services Surcharge was created in 1993 with the intention to partially offset the cost of county court operations. In 2009-10, the surcharge raised a total of $52.3 million statewide, which is less than the projected cost of the proposed expansion of court-ordered legal services to civil litigants alone. Of the $52.3 million raised by the surcharge last year, $18.5 million was allocated to counties through the Circuit Court Support Payment program, where it funds court operations costs. The remainder of the surcharge revenue goes to the state's General Fund, where it is distributed among all state programs, including circuit courts. If CSS funds are to be redirected from the General Fund, as the petitioners appear to propose, then the funds should go to their original purpose of funding existing court operations. As for the notion of seeking additional funding from the state's General Fund, WCA believes that the Legislature should fully fund existing court costs before considering any new programs. As it is, the Legislature reduced funding for both the Supreme Court and circuit courts by 10 percent in the current biennium, as well as state aids to counties for a number of court-ordered and state-mandated programs. The counties themselves have limited revenue options and are now operating under the most restrictive levy limits yet enacted. In such a budgetary environment, enacting any new mandate -- regardless of its merits -- will result in reductions in other essential programs.

Finally, there is the process of enacting this proposed rule. This court, as well as the U.S. Supreme Court and other federal courts, have consistently declined to recognize that litigants in civil cases have a constitutional right to counsel. In fact, the courts have stated repeatedly that the right to counsel guaranteed by the federal and state constitutions applies only to circumstances where an individual's liberty is in jeopardy, namely in criminal cases and certain involuntary commitments.

In recent years, the Wisconsin Supreme Court has steadfastly refused to usurp the Legislature's role as the policy-making branch of state government by declining to recognize that civil litigants are entitled to counsel at public expense. The Court should continue its position that questions surrounding the scope of a litigant's right to counsel, and how such counsel would be funded, are best left to the Legislature.

Establishing a new right to counsel by way of Supreme Court rule places the Court into what has traditionally been a legislative prerogative. Whatever the Court's intention may be to provide funding for this service, the actual decision to allocate funds will remain with the Legislature. Absent any action by the Legislature, the burden of funding this service will fall entirely on Wisconsin's counties.

It is on this basis, therefore, that WCA respectfully requests the Supreme Court to deny this petition and to leave with the Legislature any decision to further extend the appointment of counsel to indigent persons in civil litigation.

Thank you for considering our comments. If you have any questions, please feel free to contact me.