# Wisconsin Association of Criminal Defense Lawyers

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March 22, 2018

Julie Anne Rich
Supreme Court Commissioner
Supreme Court of Wisconsin
110 E. Main Street
Suite 440
Madison, Wisconsin 53703

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

Dear Commissioner Rich:

This letter is submitted in reply to your letter of January 19, 2018. The Court submitted fifteen (15) questions. For ease of reference, we have taken the liberty of numbering each one. To the best of our ability we have answered all of them. Also, we expect to submit a comprehensive study/ report next month. It will be a supplement to the 2014 report *Justice Shortchanged: Assigned Counsel Compensation in Wisconsin* and will address many of the same questions.

Our answers are as follows:

**1. What is the status of related pending legislation in Wisconsin?**

The history of legislative attempts to raise the rate under Wis. Stats. § 977.08 (4m) is contained in Exhibits 4 and 5 of Petition 17-06. As a result of the Wisconsin Legislature's failure to act, the Wisconsin Association of Criminal Defense Lawyers (WACDL) commissioned a study to help educate the legislature about the scope of the problem. See, Exhibit 3, *Justice Shortchanged: Assigned Counsel Compensation in Wisconsin.*

Since the release of this study in August, 2014, there have been three legislative attempts to raise the rate statutorily: 1) AB275 was introduced June 29, 2015 and proposed raising the rate to $85/hour; 2) AB37 was introduced in January, 2017 and proposed, as here, raising the rate to $100/hour; 3) AB828 was proposed in January 2018 and proposed a three tiered rate for different types of cases (to be determined by rule) of $55/hour, $60/hour and $70/hour.

AB275 was referred to the Committee on Judiciary on June 29, 2015. An amendment to raise proposed rate to $100/hour was offered on January 19, 2016 and was defeated on April 13, 2016. There was no further action taken. AB37 was referred to the Committee on Judiciary on January 20, 2017 but was never acted on. AB828 was referred to the Committee on Judiciary on January 12, 2018 but was also never acted on.

**2. How often are attorneys appointed and paid at County expense?**

**and**

**3. How much are the Counties paying court appointed lawyers?**

**and**

**5. What is the fiscal impact of the petition, generally and to the counties, specifically?**

$34.2 million more/ year for a total of $57 million/ year for State Public Defender (SPD) private bar appointments (according to the fiscal estimate by the SPD for AB37 discussed above in the answer to question # 1).

The data below answers questions 2, 3 and the remainder of question 5 - to the extent that counties were willing/ able to share their financial data. This data covers 55 of Wisconsin's 72 counties and is drawn from information gathered from the Wisconsin Counties Association as well as Petitioners' own requests to all the counties:

**Bold**: Data from WI Counties Association (2016 fiscal year)

**COUNTY APPOINTMENT/COST INFORMATION**

| County | # of Appts | How Paid/Amount | Annual Budget (Where Available) | Actual Expenditure | Over or Under Budget (Where Known) |
|---|---|---|---|---|---|
| Adams<br>(608) 339-4200 | Not reported | $70/hr | $100,000 | | Under |
| Ashland<br>(715) 682-7016 | Not reported | $60/hr out of court<br>$70/hr in court | $15,000 (GAL)<br>$13,000 (Adversary) | | Over<br>Under |
| Barron<br>(715) 537-6265<br>Sharon.Milllermon@wicourts.gov | 298 | $70/hr<br>$35/hr travel | $76,5000 | | Over |
| Bayfield<br>(715) 373-6108<br>kay.cederberg@wicourts.gov | Not reported | $60/hr out of court<br>$70/hr in court | $15,000 | | Over |
| Brown<br>(920) 448-4155 | **Not reported** | **$70/hr** | | **$180.263** | |
| Buffalo<br>(608) 685-6202 | 37 | $70/hr | $12,000 | | Unknown |
| Burnett<br>(715) 349-2147 | 25 | $80/hr<br>$40/hr travel | $10,000 | | Over |
| Calumet<br>(920) 849-1414 | 44 | $70/hr | $20,000 | | Under |
| Chippewa<br>(715) 726-7758<br>Karen.Hepfler@wicourts.gov | Not reported | | | | |
| Clark<br>(715) 743-5181<br>Heather.Bravener@wicourts.gov | Not reported | | | | |
| Columbia<br>(608) 742-9642<br>Susan.Raimer@wicourts.gov | **6** | **$70/hr** | | **15,330** | |
| Crawford<br>(608) 326-0209<br>donna.steiner@wicourts.gov | **31** | **$70/hr** | | **4,440** | |
| Dane<br>(608) 386-3570<br>carlo.esqueda@wicourts.gov | 1833 | Hourly & flat fee; hourly range is $40-70/hr; flat fee range is $750 to $2500 per case | $930,040 | | Over |
| Dodge | Not reported | | | | |
| Door<br>(920) 746-2205 | **8** | **$70/hr** | | **12,921** | |

| | | | | | |
|---|---|---|---|---|---|
| connie.defere@wicourts.gov | | | | | |
| Douglas<br>(715) 395-1203<br>Michele.wick@wicourts.gov | **Not reported** | **$62.50/hr** | | **176,501** | |
| Dunn<br>(715) 232-2611 | **277** | **$70/hr** | | **13,660** | |
| Florence<br>(715) 528-3205 | 4 | $85/hr | $10,000 | | Under |
| Fond du Lac<br>(920) 929-3040<br>Ramona.Geib@wicourts.gov | 416 | $70/hr | $172,000 | | Over |
| Forest<br>(715) 478-3323 | Not reported | $70/hr | | | |
| Grant<br>(608) 723-2752 | Not reported | $70/hr | $40,000 | | Under |
| Green<br>(608) 328-9420<br>Nicollette.Golubov@wicourts.gov | Not reported | $70/hr | | | |
| Green Lake<br>(920) 294-4145<br>Amy Thoma@wicourts.gov | **46** | **$70/hr** | | **17,965** | |
| Iowa<br>(608) 935-0395<br>Lisa.Leahy@wicourts.gov | **11** | **$70/hr** | | **15,941** | |
| Iron<br>(715) 561-4084<br>Karen.Ransanici@wicourts.gov | Not reported | | | | |
| Jackson<br>(715) 284-0208<br>Jan.Moenning | Not reported | | | | |
| Jefferson<br>(920) 674-7150<br>Carla.Robinson@wicourts.gov | **3** | **$70/hr GAL-contract** | | **100,794** | |
| Juneau<br>(608) 847-9356<br>Patty.Schluter@wicourts.gov | Not reported | | | | |
| Kenosha<br>(262) 653-2664<br>Rebecca.Matoska-Mentink@wicourts.gov<br>(On line submission) | **42** | **$70/hr** | | **38,500** | |
| Kewaunee<br>(920) 388-7144<br>Becky. @wicourts.gov | 20 | $70/hr | $15,000 | | Under |
| LaCrosse<br>(608) 785-9590<br>Pam.Radtke@wicourts.gov | **Not reported** | **CF $600, CT $300, CM & criminal OWI $400** | | **270,744** | |
| Lafayette<br>(608) 776-4832<br>Kitty.Mcgowan@wicourts.gov | Not reported | | | | |
| Langlade<br>(715) 627-6215<br>Marilyn.Baraniak@wicourts.gov | Not reported | | | | |

| | | | | | |
|---|---|---|---|---|---|
| Lincoln<br>(715) 536-0319<br>Marie.Peterson@wicourts.gov | Not reported | | | | |
| Manitowoc<br>(920) 683-4030<br>Lynn.Zigmunt@wicourts.gov<br>(on line submission) | Not reported | $70/hr | $40,000 | | Over |
| Marathon<br>(715) 261-1300<br>clerkofcourts@co.marathon.wi.us | **Not reported** | **$70/hr** | | **200,000** | |
| Marinette<br>(715) 732-7450<br>Sheila.Dudka@wicourts.gov | Not reported | | | | |
| Marquette<br>(608) 297-3005<br>Shari.Rudolph@wicourts.gov | Not reported | | | | |
| Menominee<br>(715) 799-3313<br>Pamela.Frechette@wicourts.gov<br>(on line submission) | 1 | Defendant has to pay appt atty directly @ $40/hr | No budget | | --- |
| Milwaukee<br>(414) 278-5362<br>John.Barrett@wicourts.gov | **Not reported** | **$70/hr** | | | |
| Monroe<br>(608) 269-8745<br>Shirley.Chapiewsky@wicourts.gov | 179 | $70/hr | $137,000 | | Over |
| Oconto<br>(920) 834-6857<br>Michael<br>Hodkiewicz@wicourts.gov<br>(on line submissions) | Not reported | | | | |
| Oneida<br>(715) 369-6120<br>Brenda.Behrle@wicourts.gov | **329** | **$70/hr** | | **25,626** | |
| Outagamie<br>(920) 832-5131<br>Barb.Bocik@wicourts.gov | 225 | $70/hr<br>$313 per case for CM & CT | 73,399 | | |
| Ozaukee<br>(262) 284-8409<br>Mary.Mueller@wicourts.gov | Not reported | | | | |
| Pepin<br>(715) 672-8861<br>Audrey.Lieffring@wicourts.gov | Not reported | | | | |
| Pierce<br>(715) 273-3531<br>Peg.Feuerhelm@wicourts.gov | Not reported | | | | |
| Polk<br>(715) 485-9299<br>Joan.Ritten@wicourts.gov | Not reported | | | | |
| Portage<br>(715) 346-1364<br>Lisa.Roth@wicourts.gov | **374** | **$70/hr** | | **74,865** | |
| Price<br>(715) 339-2353<br>Chris.Cress@wicourts.gov | Not reported | | | | |

| | | | | | |
|---|---|---|---|---|---|
| Racine<br>(262) 636-3333<br>Samuel.Christensen@wicourts.gov | **1396** | **$70/hr** | | | |
| Richland<br>(262) 636-3333<br>Stacy.Kleist@wicourts.gov | 23 | $70/hr | $10,000 | | Over |
| Rock<br>(608) 743-2200<br>Jackie.Gackstatter@wicourts.gov | **546** | **$70/hr<br>GAL-contract** | | **63,922** | |
| Rusk<br>(715) 532-2108<br>Lori.Gorsegner@wicourts.gov | Not reported | | | | |
| St. Croix<br>(715) 386-4630<br>Kristi.Severson@wicourts.gov | 296 | $70/hr felony<br>$50/hr other | $60,000 | | Over |
| Sauk<br>(608) 355-3287<br>Carrie.Wastlick@wicourts.gov | **313** | **$65/hr<br>GAL-contract** | | **71,750** | |
| Sawyer<br>(715) 634-4887<br>Sarah.Jungbluth@wicourts.gov | Not reported | | | | |
| Shawano<br>(715) 526-9347<br>Susan.Krueger@wicourts.gov | Not reported | | | | |
| Sheboygan<br>(920) 459-3068<br>Melody.Lorge@wicourts.gov | Not reported | | | | |
| Taylor<br>(715) 748-1425<br>Rose.Thums@wicourts.gov | **5** | **$70/hr** | | **5,120** | |
| Trempealeau<br>(715) 538-2311<br>Michelle.Weisenberger@wicourts.gov | **37** | **$70/hr<br>$50/travel** | | **25,011** | |
| Vernon<br>(608) 637-5340<br>Sheila.Olson@wicourts.gov | 36 | $70/hr | Unknown | | |
| Vilas<br>(715) 479-3632<br>Beth.Soltow@wicourts.gov | **43** | **$70/hr** | | **13,977** | |
| Walworth<br>(262) 741-7012<br>Kristina.Secord@wicourts.gov | Not reported | | | | |
| Washburn<br>(715) 468-4677<br>Shannon.Anderson@wicourts.gov | 208 | $125/hr | No JA so they use # from the state that would be allocated for a JA | | Over |
| Washington<br>(262) 335-4341<br>Theresa.Russell@wicourts.gov | 59 | $70/hr | $110,000 | | Over |
| Waukesha<br>(262) 896-8525<br>Gina.Colletti@wicourts.gov | Not reported | | | | |

| | | | | | |
|---|---|---|---|---|---|
| Waupaca<br>(715) 258-6460<br>Terrie.Tews-Liebe@wicourts.gov | Not reported | | | | |
| Waushara<br>(920) 787-0441<br>Melissa.Zamzow@wicourts.gov | 125 | $70/hr | | **32,639** | Over |
| Winnebago<br>(920) 236-4848<br>Melissa.Pingel@wicourts.gov | Not reported | | | | |
| Wood<br>(715) 421-8490<br>Cindy.Joosten@wicourts.gov | 589 | $70/hr | $153,500 | | Over |

**4. In many counties the County contracts with attorneys to perform legal services for it at a rate that differs from this petition. Does this practice affect this petition?**

Yes:

a) This petition affects all Court and State Public Defender (SPD) appointments – hourly and under contract – currently paying less than $100/ hr.

b) This petition seeks to ban arbitrary flat rate contracts for legal services based solely on cost.

**6. What is the anticipated fiscal impact of the petition on the Supreme Court, considering that the Office of Lawyer Regulation (OLR) and the Medical Mediation Panels (MMP) currently pay attorneys $70 per hour for their legal services, as prescribed by current rule?**

Keith Sellen, head of the Office of Lawyer Regulation (OLR), reports that for the most recent fiscal-year his office spent approximately $100,000 at $70/hr. Therefore, the proposed Rule would add approximately $43,000/yr. to his budget.

The MMP panels are not court appointments. Under Wis. Stat. § 655.465 (1) the Director of State Courts make the appointments. Panel members are compensated at a rate of $150/day plus actual and necessary expenses per Wis. Stat. § 655.465(5). It is not the petitioner's intent to affect compensation of the MMP panels, nor would the proposed rule change do so.

**7. How are the federal compensation standards for court appointed lawyers set and who sets them?**

Federal compensation standards for court appointed lawyers are set by statute and by Congress. In 1984, 18 U.S. Code § 3006A (d)(1) provided for hourly rates of $60 per hour for in court time, and $40 per hour for out of court time. In 1986 subsection (d)(1) was amended to permit the Judicial Conference to authorize a higher rate, up to $75 per hour for circuits or districts within a circuit. As part of the 1986 revisions, the judicial conference was also authorized (not less than three years after the 1986 revisions) to raise the maximum hourly rates based on the annual ECI (employment cost index).

Congress has not consistently authorized the ECI adjustment for the CJA hourly rates. The FY 2017 actual hourly rate for capital representations is $185, which is the maximum statutory authorized rate. The FY 2017 actual hourly rate for non-capital representations is $132 per hour; the maximum statutory authorized rate for FY 2017, (assuming the ECI rate increase had been granted annually), is $145 per hour.

**8. Could a rule (or statute) addressing compensation be tied to the federal standard?**

Yes. Maryland Administrative Code 14.06.02.06(A) states: "As the annual budget permits, panel attorneys will be compensated at the same hourly rate at which federal panel attorneys are compensated for indigent criminal defense representation, effective July 1, 2007." However, Admin Code § 14.06.02.06 is limited by Admin Code § 14.06.02.12 which says: "Implementation of this chapter is contingent upon availability of funds in accordance with State Finance and Procurement Article, §§7-234 and 7-235, Annotated Code of Maryland."

**9. What have other states have done regarding this issue? Has it been addressed by case law, statute, or court rule?**

To answer this question and, more importantly, to understand why assigned counsel compensation rates have been stagnant in Wisconsin for so long – it is necessary to categorize each state by: a) funding; b) state oversight; and, c) delivery model. An update the Petitioners' study, *Justice Shortchanged: Assigned Counsel Compensation in Wisconsin*, is underway and will be filed with the Court in April, 2018. It will contain a comprehensive overview of this issue. However, to answer the Court's question, at this time, we have drawn from the pending study by comparing actual compensation methods in all 50 states - along with the mechanism(s) for changing those rates.

## I. How Compensation Is Set

Most states have more than one court system in which private attorneys are compensated to represent indigent defendants who face the possibility of incarceration. For example, in many states, counties or cities operate local courts that are outside of the overview of the state courts. This response does not attempt to address how rates of compensation are set in all of the court systems of every state, and instead it addresses only the primary court system in which felonies are prosecuted.

Many states have special provisions governing compensation rates in certain types of cases (such as death penalty or juvenile cases) that differ from the compensation paid to private attorneys more generally. This response does not attempt to address how rates of compensation are set in every type of case in which private attorneys are appointed, and instead it addresses the most broadly used system of compensating private attorneys in Sixth Amendment cases.

With those caveats, following are the mechanisms that set the rates of compensation paid to private attorneys to provide Sixth Amendment representation as of 2018 and any express provisions for reviewing the appropriateness of those rates of compensation (shown in **bold**).

<u>State-Funded, State Administered</u> (21 states): Eighteen states allow the state run agency to set compensation rates on their own (provided they can advocate for such resources in the state budget process):

- Arkansas: Hourly rates by case type, ranging from $50 to $ 100. ARKANSAS PUBLIC DEFENDER COMMISSION, PAYMENT & EXPENSE REIMBURSEMENT GUIDELINES (Aug. 2012).

- Connecticut: Hourly rates by case type, ranging from $50 to $100, and also fixed fees by case type. OFFICE OF DIRECTOR OF ASSIGNED COUNSEL, CONN. DIV'N OF PUB. DEFENDER SERV., GUIDELINES FOR ASSIGNED COUNSEL – CRIMINAL (July 1, 2011).

- Delaware: Hourly rates by case type and geographic location, ranging from $60 to $ 90, with maximum of 125 hours per case, and also fixed fees by case type and geographic location. DELAWARE OFFICE OF CONFLICTS COUNSEL, POLICIES AND PROCEDURES GOVERNING ATTORNEY BILLING AND COMPENSATION (June 27, 2017).

- Kentucky: Fixed fee by case type. Kentucky Department of Public Advocacy.

- Maine: $60 hourly rate, with maximum fee per case based on case type. CODE ME. R. 94-649 ch 301 §§ 2, 4 (2016).

- Maryland: $90 hourly rate, with maximum fee per case based on case type. MD. REGS. CODE § 14.06.02.06 (2017). "**As the annual budget permits, panel attorneys will be compensated at the same hourly rate at which federal panel attorneys are compensated for indigent criminal defense representation, effective July 1, 2007." MD. REGS. CODE § 14.06.02.06.A. (2017)**.

- Minnesota: Varies by judicial district; fixed monthly fee for specified number of cases. Minnesota Board of Public Defense.

- Missouri: Fixed fee by case type, plus fixed daily fee for trial. MISSOURI STATE PUBLIC DEFENDER, MSPD CASE CONTRACTING PANEL ATTORNEY CONTRACT RATES (June 10, 2016).

- Montana: $62.50 hourly rate, with maximum 150 hours billing monthly. Montana State Public Defender (per email); *see also* MONTANA STATE PUBLIC DEFENDER, FEE SCHEDULE (Oct. 3, 2016).

- New Mexico: Two-year contracts let in response to Request for Proposal. NEW MEXICO PUBLIC DEFENDER DEPARTMENT, CONTRACT COUNSEL LEGAL SERVICES, Policy 200-007 (2012).

- North Dakota: $75 hourly rate, with maximum fee per case based on case type; and also fixed fee monthly contracts. NORTH DAKOTA COMMISSION ON LEGAL COUNSEL FOR INDIGENTS, POLICY ON PAYMENT OF EXTRAORDINARY ATTORNEY FEES (undated).

- Oregon: Hourly rates by case type, ranging from $46 to $61. OREGON PUBLIC DEFENSE SERVICES COMMISSION, PUBLIC DEFENSE PAYMENT POLICY AND PROCEDURES (Apr. 1, 2017).

Two of these states set rates by court rule or administrative order:

- Colorado: Hourly rates by case type, ranging from $70 to $ 90, with maximum fee per case based on case type. Chief Justice Directive 04-04 at Att. D(1) (Colo. Nov. 2014).

- Vermont: $50 hourly rate, with maximum fee per case based on case type. Admin. Order 4, § 6 (Vt.)

In three of these states, assigned counsel compensation is set by statute:

- Hawaii: Hourly rates by case type, ranging from $ 60 to $ 90, with maximum fee per case based on case type. HAW. REV. STAT. §§ 571-87(b), (c), 802-5(b) (2017).

- Massachusetts: Hourly rates by case type, ranging from $ 53 to $100, with maximum hours billable yearly. MASS. GEN. LAWS ch. 211D, § 11 (2017).

- West Virginia: $65 hourly rate in court and $ 45 out of court, with maximum fee per case based on case type. W. VA. CODE § 29-21-13a (2017).

Finally, in four states assigned counsel compensation is established under multiple authorities:

- Alaska: $75 hourly rate, with maximum fee of $1,000 per case. ALASKA R. CT. ADMIN. 12(e)(5)(B); hourly rates by experience of attorney, ranging from $ 60 to $85, with maximum fee per case based on case type, and also fixed fees. Office of Public Advocacy.

- Iowa: Hourly rate by case type, ranging from $ 60 to $70, IOWA CODE § 815.7 (2017), with maximum fee per case based on case type and maximum hours billable daily, IOWA ADMIN CODE r. 493-12.5(1),-12.6 (2017). **The State Public Defender is required to review the maximum fee per case limits "at least every three years." IOWA CODE § 13B.4(4)(a) (2017)**.

- New Hampshire: Fixed fee per case "unit. NEW HAMPSHIRE JUDICIAL COUNCIL, CONTRACT ATTORNEY UNIT SCHEDULE (FY 2018); hourly rate by case type, ranging from $60 to $100, with maximum fee per case based on case type. N.H. R. SUP. CT. 47.

- Virginia: Up to $ 90 hourly rate, SUPREME COURT OF VIRGINIA, CHART OF ALLOWANCES (Feb. 1, 2018), with maximum fee per case based on case type, Va. Code Ann. § 19.2-163 (2016).

State-Funded, Mixed Administered (2 states):

One state sets assigned counsel compensation by court rule or administrative order:

- Rhode Island: Hourly rates by case type, ranging from $30 to $100, with maximum fee per case based on case type. Executive Order 2013-07 (R.I. July 15, 2013).

One state sets compensation by statute:

- Florida: Fixed fee by case type, ranging from $375 to $ 25,000. General Appropriations Act, 2017 Fla. Laws. Ch. 2017-70 § 4 Specific Appropriation 782. **Rate of compensation reviewed by legislature as part of the General Appropriations Act.**

State-Funded, Local Administered (3 states):

Two of these states allow the state run agency to set compensation rates on their own (provided they can advocate for such resources in the state budget process):

- Louisiana: Varies by parish/court/judge. Louisiana Public Defender Board.

- North Carolina: Hourly rates by case type, ranging from $55 to $ 90; and also fixed fee by case type in 6-county pilot; and also fixed fee contracts for a minimum to maximum number of cases. NORTH CAROLINA OFFICE OF INDIGENT DEFENSE SERVICES, PRIVATE ASSIGNED COUNSEL RATES (Nov. 1, 2017); NORTH CAROLINA OFFICE OF INDIGENT DEFENSE SERVICES, DISTRICT COURT FEE SCHEDULE (June 1, 2017).

One of these states sets compensation by statute:

- Alabama: $70 hourly rate, with maximum fee per case based on case type. ALA. CODE §§ 15-12-21(d), 15-12-22(c) (2016).

Mixed Funded, State Administered (1 state): The one state in this category sets assigned counsel compensation rates by court rule or administrative order:

- Wyoming: Up to $ 100 hourly rate in court and minimum $35/maximum $60 out of court. WYO. R. CRIM. PROC. 44(e).

Mixed Funded, Mixed Administered (17 states):

Three of these states set policies through the state administered agency:

- Georgia: Varies, but most frequently fixed fee in exchange for specified number of cases plus additional fixed fee for cases that go to trial. Georgia Public Defender Council (per email).

- Michigan: Varies by county; proposed standard sets minimum hourly rate by case type, ranging from $100 to $120. MICHIGAN INDIGENT DEFENSE COMMISSION, MINIMUM STANDARDS FOR INDIGENT CRIMINAL DEFENSE SERVICES, std 8 (Fall 2017) (proposed). **"These rates must be adjusted annually for cost of living increases consistent with economic**

**adjustments made to State of Michigan employees' salaries." MICHIGAN INDIGENT DEFENSE COMMISSION, MINIMUM STANDARDS FOR INDIGENT CRIMINAL DEFENSE SERVICES, std 8 (Fall 2017) (proposed).**

- New Jersey: $60 hourly rate in court and $50 out of court, with maximum 9 hours billing daily and 1,500 hours billing yearly. NEW JERSEY OFFICE OF THE PUBLIC DEFENDER, POOL ATTORNEY GUIDELINES AND APPLICATION PROCESS (2018).

One of these states sets compensation via court rule or administrative order:

- Tennessee: $50 hourly rate in court and $ 40 out of court, with maximum fee per case based on case type. TENN. SUP. CT. R. 13 § 2.

Ten states set compensation through statutes:

- Idaho: Varies by county contract. IDAHO CODE § 19-859 (2017).

- Illinois: Reasonable fee, other than in Cook County; in Cook County, $ 40 hourly rate in court and $ 30 hourly rate out of court, with maximum fee per case based on case type. 725 ILL. REV. STAT. ch. 38, para. 113-3 (2017).

- Indiana: Varies by judge. IND. CODE § 33-40-8-2 (2017).

- Mississippi: Varies by judge, with maximum fee per case based on case type. MISS. CODE ANN. § 99-15-17 (2017).

- Nevada: Hourly rate by case type, ranging from $ 100 to $ 125, with maximum fee per case based on case type. NEV. REV. STAT. § 7.125 (2017).

- New York: Hourly rates by case type, ranging from $ 60 to $ 75, with maximum fee per case based on case type. N.Y. COUNTY LAW § 722-b (2017).

- Oklahoma: Fixed fee "best offer" contract or maximum fee per case based on case type. OKLA. STAT. tit. 22, § 1355.8 (2017).

- South Carolina: $60 hourly rate in court and $ 40 out of court, with maximum fee per case based on case type. S.C. CODE ANN. § 17-3-50 (2017).

- Texas: Reasonable fee varies by county plan that must state fixed rates or minimum and maximum hourly rates. TEX. CRIM. PROC. CODE ANN. § 26.05 (2017).

- Utah: Reasonable compensation varies by county but with maximum fee per case based on case type. UTAH CODE ANN. § 77-32-304.5 (2017).

Finally, three mixed administered, mixed funded states have more than one authority for assigned counsel compensation:

- Kansas: $80 hourly rate except chief judge of each judicial district can lower and State Board of Indigents' Defense Services can lower, KAN. STAT. ANN. § 22-4507(c) (2017), and rate currently lowered by BIDS to $ 70 hourly rate, with maximum fee per case in certain case types, KAN. ADMIN. REGS. 105-5-2, 105-503, 105-5-6, 105-5-7, 105-5-8 (2017).

- Ohio: Varies by county, OHIO REV. CODE ANN. § 120.33(A)(3) (2017), with maximum $ 60 hourly rate in court and $ 50 out of court, and maximum fee per case based on case type, OHIO PUBLIC DEFENDER, STATE MAXIMUM FEE SCHEDULE FOR APPOINTED COUNSEL REIMBURSEMENT (2003).

- Wisconsin: $40 hourly rate. WIS. STAT. § 977.08(4m) (2017); $ 70 hourly or higher. WIS. SUP. CT. R. 81.02.

Local Funded, Local Administration:

One state sets compensation by court rule or administrative order:

- South Dakota – $ 94 hourly rate. Letter from Greg Sattizahn, State Court Administrator, South Dakota Unified Judicial System, to Thomas Barnett, State Bar of South Dakota (Nov. 15, 2017), *pursuant to* South Dakota Unified Judicial System policy on court-appointed attorney fees. "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." *South Dakota Unified Judicial System policy on court-appointed attorney fees.*

One state (Nebraska) gives authority on compensation completely to local governments and four states statutorily set rates requiring only 'reasonable" rates:

- Arizona – reasonable compensation. ARIZ. REV. STAT. § 13-4013(A) (2017).
- California – reasonable sum. CAL. PENAL CODE §§ 987.2(a),(b), 987.3 (2017).
- Pennsylvania – reasonable compensation varies by judge. 16 PA. CONS. STAT. § 9960.7 (2018).
- Washington – reasonable compensation varies by court. WASH. REV. CODE § 36.26.090 (2017).

## II How Compensation Is Changed Without Litigation

Those states with little or no state involvement in right to counsel services have the least protections to ensure that assigned counsel attorneys are paid reasonably, with one notable exception. Perhaps because South Dakota is one of only two states (Pennsylvania is the other) that contribute no funding for indigent defense services with no state oversight, and that relies extensively on private attorneys to provide services, the South Dakota Supreme Court had to step in to ensure a reasonable fee for attorneys (currently $94 per hour and increasing annually in an amount equal to the cost of living increase of state employees).

The states that are in the "middle" (i.e., those states that have mixed funding and mixed oversight to varying degrees), struggle to keep compensation rates reasonable. This is especially true when compensation is set by statute, as is done in Wisconsin, rather than by a state agency through the normal budget process or by Court Rule.

Conversely, those states that fund 100% of indigent defense services and that administer services at the state-level through an independent agency and that

set rates through the normal budget process through that state agency tend (but not always) to have reasonable rates that increase with some regularity over time.

Indeed, even those state funded, state administered services that set rates by statute have struggled at times. We note one such example. In 2004, indigent defendants claimed[1] that the chronic underfunding of the assigned counsel system in Massachusetts — then at rates of $40/hour — resulted in "an insufficient number of attorneys willing to accept assignments."

The Massachusetts Committee for Public Counsel Services (CPCS) is a judicial branch agency overseeing the delivery of indigent defense services in all courts across the state of Massachusetts. CPCS is a board of 15 members, appointed by diverse authorities to ensure that no one branch of government can exert disproportionate influence over the delivery of right to counsel services. [2] Since its founding in 1983, CPCS has traditionally provided the bulk of right to counsel representation through assigned counsel, with public defender offices handling only the most serious cases in the more urban areas of the state.[3] CPCS has an extensive process to qualify for assigned counsel panels and the certification requirements increase with each level of court and case type.[4]

1Lavallee v. Justices in the Hampden Superior Court, No. SJC-09268, 812 N.E.2d 895 (Mass. July 28, 2004)

2Governor (2 appointees); President of the Senate (2); Speaker of the House of Representatives (2); and, the Supreme Court Justices (9 – of whom five must be: one public defender, one private bar advocate, one criminal appellate attorney, one with public administration/finance experience, and one current or former law school dean or faculty member). The board appoints CPCS's chief counsel to run the agency from its central office in Boston.

3The delivery of direct services at the trial level is divided between two divisions, the Public Defender Division and the Private Counsel Division, each with a deputy chief counsel at its head. The deputy chief counsel for the Public Defender Division and the deputy chief counsel for the Private Counsel Division sit as equals on the agency's executive team, and ethical screens maintain confidentiality of direct services between one division and the other and between each division and the central office.

4The minimum standards for certification are promulgated at the state level, and the initial screening of attorney applicants is handled locally. CPCS maintains annual contracts with non-profit bar advocate programs in each county. The composition of the local volunteer boards is determined according to statewide standards promulgated by CPCS. Those bar advocate programs in turn select a volunteer board to review attorney applications using CPCS' minimum statewide qualifications standards.

The county bar programs are also responsible for the actual assignment of cases to individual attorneys. Private attorneys accepting public case assignments agree to abide by CPCS' "Performance Guidelines Governing Representation of Indigents in Criminal Cases," and the direct review of ongoing attorney performance is also handled locally. Each county bar program maintains contracts with private attorneys who handle no cases, instead acting solely as supervisors for the private attorneys who represent clients.

There is no minimum level of experience required for attorneys to handle misdemeanors and concurrent felonies in District Court (the lowest level of qualification). Instead, selection is based on merit and interviews with the local volunteer board. Attorneys selected must then complete a 7-day training program (or apply for a waiver), which involves lectures each day along with small group sessions targeting skills training (client interviews, ethics, direct/cross, immigration consequences, etc.).Attorneys seeking approval for Superior Court work are required to have handled a minimum of six criminal jury trials as lead counsel within the past five years. A state blue ribbon

And, because CPCS has independence from undue political and judicial interference and because CPCS constantly evaluates the assigned counsel system and knew the impact that the low rates were having on attorneys' willingness to take cases, CPCS was the plaintiff in the lawsuit (joined by the American Civil Liberties Union). Although the Court declined to raise compensation rates, it found that defendants were being denied their constitutional right to counsel due to the lack of attorneys willing to serve at the low rates, stating "[w]e need not wait for counsel's presence or the articulation of a specific harm before we may remedy the denial of counsel in the early stages of a case." The Court ordered that pre-trial detainees be released after seven days if no counsel was appointed and that charges be dismissed after 45 days against any defendant who was entitled to counsel and had not received one.

Days after the *Lavallee* ruling, out of fear that potentially violent defendants were to be released on to the streets, the Massachusetts state legislature passed a bill improving compensation for indigent defense attorneys and establishing "a commission to study the provision of counsel to indigent persons who are entitled to the assistance of assigned counsel." This resulted in an increase in assigned counsel compensation rates and the CPCS budget has more than doubled since 2004.

## III Class-Action Litigation as a Mechanism for Change

While change of appointed attorney compensation in criminal cases varies widely across the country, one mechanism of change - where the legislatures or courts have failed to act - has been class-action litigation. Below is a summary of class-action suits that have been brought in Michigan, New York, Texas, California, Pennsylvania and Idaho between 2009 and 2017:

### 1. Duncan v. Michigan[5] (2009)

The national and state American Civil Liberties Union (ACLU), along with two law firms, filed a class action lawsuit in February 2007 on behalf of all current and future indigent defendants charged with felonies in three Michigan counties,

panel of "top notch" attorneys then reviews their applications. Finally, each attorney must complete 8 hours of mandatory CLE, with CPCS pre-approving specific sessions. Certain attorneys may also need additional training, which is determined by the attorneys and the private bar supervisors. Certification to handle murder cases requires a minimum of 10 jury trials, of which five must be felonies carrying a potential of life imprisonment, within the past five years.

5 Duncan v. Michigan, No. 278652 (Mich. Ct. App. June 11, 2009).

suing the counties as well as the State of Michigan.[6] The complaint alleged that the state had done "nothing to ensure that any county has the funding or the policies, programs, guidelines, and other essential resources in place to enable the attorneys it hires to provide constitutionally adequate legal representation."[7] Though the three counties were the focus of the complaint, the ACLU acknowledged that the types of harms suffered by indigent defendants were "by no means limited or unique" to just the three named counties.

The state and counties made a wide variety of claims in a lengthy effort to get the suit dismissed, including lack of standing, governmental immunity, and separation of powers. The trial court denied the state and counties' motion, and the governments appealed. In a detailed 53-page ruling, the Michigan Court of Appeals affirmed the trial court's decision that the case could go forward, stating:

> We cannot accept the proposition that the constitutional rights of our citizens, even those accused of crimes and too poor to afford counsel, are not deserving and worthy of any protection by the judiciary in a situation where the executive and legislative branches fail to comply with constitutional mandates and abdicate their constitutional responsibilities, either intentionally or neglectfully. If not the courts, then whom . . . , concerns about costs and fiscal impact, concerns regarding which governmental entity or entities should bear the costs, and concerns about which governmental body or bodies should operate an indigent defense system cannot be allowed to trump constitutional compliance, despite any visceral reaction to the contrary.[8]

The Michigan Supreme Court affirmed as well.[9] After more than six years of litigation, the Michigan legislature passed comprehensive reform legislation in July 2013, and the ACLU dismissed the lawsuit as moot. The statutory changes created the Michigan Indigent Defense Commission; a state agency with authority to promulgate and enforce right to counsel standards – including compensation standards - across the state.

6 Complaint, Duncan v. Michigan, No. 07-000242-CZ (Mich. Cir. Ct. filed Feb. 22, 2007), *available at* https://www.clearinghouse.net/chDocs/public/PD-MI-0003-0001.pdf.

7 *Id*. at 3.

8 Duncan v. Michigan, No. 278652, at 3 (Mich. Ct. App., June 11, 2009).

9 Duncan v. Michigan, 780 N.W.2d 843 (Mich. 2010), *vacated*, No. 139345-7(108)(109) (July 16, 2010), *and reinstated*, No. 139345-7(113) (Nov. 30, 2010).

### 2. Hurrell-Harring v. New York[10] (2010)

In 2007, the New York Civil Liberties Union Foundation (NYCLU) and a private law firm filed a class action lawsuit on behalf of all indigent criminal defendants in five counties who were being or would be represented by publicly provided attorneys, suing the state and the five counties.[11] The suit argued that public defense counsel did not "have the resources and the tools" necessary to provide the meaningful and effective assistance of counsel required by the constitution, in part because the state had "abdicated it responsibility" and left the counties with the responsibility "to establish, fund and administer their own public defense programs."[12] As a result, according to the lawsuit, many public defense providers failed to:

> [P]rovide representation for indigent defendants at all critical stages of the criminal justice process, especially arraignments where bail determinations are made; meet or consult with clients prior to critical stages in their criminal proceedings; investigate adequately the charges against their clients or obtain investigators who can assist with case preparation and testify at trial; employ and consult with experts when necessary; file necessary pre-trial motions; or provide meaningful representation at trial and at sentencing.[13]

As the complaint explained, "the failings in [the five sued counties] and the types of harms suffered by the named plaintiffs [were] by no means limited or unique" to those counties, but were instead statewide problems.[14] The trial court denied a motion to dismiss the lawsuit, but an intermediate court granted the dismissal.

In 2010, the New York Court of Appeals[15] reinstated the lawsuit.[16] The court found that the complaint alleged claims of both outright denial of the right to counsel and constructive denial of counsel where attorneys were appointed in name only but were unavailable to assist their clients, thus "stat[ing] cognizable

10 Hurrell-Harring v. New York, 930 N.E.2d 217 (N.Y. 2010).

11 Class Action Complaint, Hurrell-Harring v. New York , No. 8866-07 (N.Y. Sup. Ct. Albany Cty., filed Nov. 8, 2007), *available at* https://www.clearinghouse.net/chDocs/public/PD-NY-0002-0001.pdf.

12 *Id*. at 4.

13 *Id*. at 4-5.

14 *Id*. at 5.

15 The Court of Appeals is the highest court in New York.

16 Hurrell-Harring v. New York, 930 N.E.2d 217 (N.Y. 2010).

Sixth Amendment claims."

> These allegations state a claim, not for ineffective assistance under *Strickland*, but for basic denial of the right to counsel under *Gideon*.
>
> Similarly, while variously interpretable, the numerous allegations to the effect that counsel, although appointed, were uncommunicative, made virtually no efforts on their nominal clients' behalf during the very critical period subsequent to arraignment, and, indeed, waived important rights without authorization from their clients, may be reasonably understood to allege non-representation rather than ineffective representation. Actual representation assumes a certain basic representational relationship. . . . It is very basic that "if no actual 'Assistance' for' the accused's 'defence' is provided, then the constitutional guarantee has been violated. . . ."
>
> Collateral preconviction claims seeking prospective relief for absolute, core denials of the right to the assistance of counsel cannot be understood to be incompatible with *Strickland*. These are not the sort of contextually sensitive claims that are typically involved when ineffectiveness is alleged. The basic unadorned question presented by such claims where as here the defendant-claimants are poor, is whether the State has met it obligation to provide counsel, not whether under all the circumstances counsel's performance was inadequate or prejudicial.[17]

Quoting *Strickland*, the court went on to note that "'[i]n certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice.'"[18] The court held that the allegations contained in the class action lawsuit "state claims falling precisely within this described category. . . . Given the simplicity and autonomy of a claim for non-representation, as opposed to one truly involving the adequacy of an attorney's performance, there is no reason . . . why such a claim can not or should not be brought without the context of a completed prosecution."[19] Further, the court observed: "the right that plaintiffs would

17 *Id.* at 224-25.
18 *Id.* at 225.
19 *Id.* at 225-26.

enforce—that of a poor person accused of a crime to have counsel provided for his or her defense—is the very same right that *Gideon* has already commanded the States to honor as a matter of fundamental constitutional necessity. There is no argument that what was justiciable in *Gideon* is now beyond the power of a court to decide."[20]

After seven years of litigation, the lawsuit settled by agreement in October 2014[21] and was approved by the trial court on March 11, 2015. Under the settlement, the state was required to: (1) pay 100% of the cost for indigent representation in the five named counties; (2) ensure that all indigent defendants are represented by counsel at their arraignment; (3) establish and implement caseload standards for all attorneys; and (4) assure the availability of adequate support services and resources. In 2017, the state agreed to extend the settlement to apply to all counties.

### 3. Heckman v. Williamson County, Texas[22] (2012)

Five indigent defendants facing misdemeanor charges in Texas that could lead to up to a year's incarceration brought a civil class action lawsuit in 2006 claiming they had been or would be denied their right to counsel. The complaint alleged that the county failed to "inform accused persons of crime of their right to counsel," provided "inaccurate and misleading information about the right to appointed counsel in order to discourage requests for counsel," encouraged defendants "to waive their right to counsel and speak directly to prosecutors," and threatened defendants who asserted the right to counsel with financial sanctions, while delaying or denying appointment of counsel to individuals who were "eligible for court-appointed counsel under Texas and federal law."[23] The indigent defendants sued the county and several of its judges, seeking injunctive and declaratory relief to stop the violations of their right to counsel and of the rights of all similarly situated indigent misdemeanor defendants. The trial court denied a motion to dismiss the lawsuit, but a court of appeals reversed and granted the dismissal.

On review in 2012, the Texas Supreme Court reinstated the lawsuit.[24] First, the

20 *Id*. at 227.

21 *See* Stipulation and Order of Settlement, Hurrell-Harring v. New York, No. 8866-07 (N.Y. Sup. Ct. Albany Cty., filed Oct. 21, 2014, *available at* https://www.nyclu.org/sites/default/files/releases/10.21.14_hurrellharring_settlement.PDF.

22 No. 10-0671 (Tex. June 8, 2012).

23 Plaintiff's Second Amended Class Action Petition at 2-3, Heckman v. Williamson County, No. 10-0671 (Tex. filed July 21, 2006) (on file with the Sixth Amendment Center).

24 Heckman v. Williamson County, No. 10-0671 (Tex. June 8, 2012).

court held that the indigent defendants had standing to bring their claims in a civil lawsuit because they had pled facts demonstrating that they were being denied their right to counsel, that the denial of their right to counsel was fairly traceable to the county and its judges, and that the requested relief would remedy the denial. By the time the Texas high court considered the case, all of the named individuals had been appointed counsel and all of their criminal cases had ended. The court did not find the case to be moot however, because the denial of the right to counsel was "inherently transitory"—that is, it is of short duration and it was likely that other people would also be denied their right to counsel. Importantly, the court said:

> The U.S. Supreme Court has described the right to counsel as 'indispensable to the fair administration of our adversary system of criminal justice.' In the words of one learned commentator, '[t]here is no more important protection provided by the Constitution to an accused than the right to counsel.' Like all participants in our judicial system, and indeed all members of our society, we take seriously an allegation that any person or entity is systematically depriving others of such a fundamental right.[25]

The Texas Supreme Court remanded the case back to the trial court to determine whether changes in the practices of appointing counsel in Williamson County guaranteed that future indigent misdemeanor defendants would not be deprived of their right to counsel. The lawsuit subsequently settled in 2013 when Williamson County agreed to put in place procedures ensuring defendants will not be encouraged to waive the right to counsel or communicate with prosecutors prior to the court ruling on their requests for appointed counsel.[26] The committing magistrate must report all requests for counsel to the county court of law within twenty-four hours, and provide every defendant with written information on how to contact the indigent defense office to obtain information about their request for counsel. Attorneys representing defendants must now be provided with a defendant's contact information so that the attorney may make every reasonable effort to contact the defendant no later than the end of the first working day after the date the attorney is appointed.

25 *Id.*

26 *See* Joint Motion to Dismiss, Heckman v. Williamson County, No. 06-453-C277 (Tex. 277th J.D.C. filed Jan. 14, 2013), *available at* http://sixthamendment.org/wp-content/uploads/2013/01/Joint-Motion-to-Dismiss-Heckman-et-al-v.-Williamson-County-et-al-.pdf.

### 4. Phillips v. California[27] (2016)

Represented by various branches of the ACLU and a private law firm, in 2015, a Fresno County attorney, a family member of two indigent defendants, and a former indigent defendant filed a class action lawsuit against the state and county seeking to protect the right to counsel of all indigent persons charged with crimes in the county.[28] The complaint alleged that the state is responsible for providing indigent defendants with meaningful and effective assistance of counsel, but that "California has delegated its constitutional duty to run indigent defense systems to individual counties" and does not provide any oversight to ensure those county systems actually provide constitutionally required representation.[29] In particular, because the state requires the counties to bear the cost of providing representation to indigent people and at the same time "places strict limits on the ability of cities and counties to raise revenue, . . . indigent defense services vary widely across the state, and some counties with the highest percentages of indigent defendants–like Fresno County–also have the lowest levels of per capita funding due to an impoverished tax base."[30] The lack of oversight and funding, according to the lawsuit, has resulted in a severe shortage of attorneys and support to provide representation to the poor, meaning that attorneys do not "have adequate time and resources to meet with and counsel their clients, investigate, conduct legal research, file and litigate appropriate motions, and take cases to trial when their clients wish to contest the charges."[31]

In denying a motion to dismiss, the trial court declared that "[t]he State cannot disclaim its constitutional responsibilities merely because it has delegated such responsibilities to its municipalities . . . [n]or can the State evade its constitutional obligation by passing statutes. . . . The State remains responsible, even if it delegated this responsibility to political subdivisions."[32] Then, the court held that "[s]ystemic violations of the right to counsel can be remedied through prospective relief," noting that the lawsuit does not challenge individual convictions, but instead "claim[s] that the State systematically deprives Fresno County indigent defendants of the right to counsel," and that "mere token

27 No. 15-CE-CG-02201 (Cal. Super. Ct. Apr. 13, 2016), *available at* https://www.aclu.org/sites/default/files/field_document/phillipsvcalifrulinginstatemotiondismiss.pdf.

28 Verified Petition, Phillips v. California, No. 15-CE-CG-02201 (Cal. Super. Ct. filed July 14, 2015), *available at* https://www.aclu.org/sites/default/files/field_document/file_stamped_phillips_v_state_of_california_complaint.pdf.

29 *Id*. at 6.

30 *Id*. at 6-7.

31 *Id*. at 10-11.

32 Phillips v. California, No. 15-CE-CG-02201, at 3-4 (Cal. Super. Ct. Apr. 13, 2016), *available at* https://www.aclu.org/sites/default/files/field_document/phillipsvcalifrulinginstatemotiondismiss.pdf.

appointment of counsel does not satisfy the Sixth Amendment."[33] Therefore, "plaintiffs need not plead and prove the elements of ineffective assistance as to specific individuals in order to state a cause of action" for prospective relief.[34]

**5. Kuren v. Luzerne County, Pennsylvania[35] (2016)**

In 2012, the chief public defender for Luzerne County and three indigent defendants facing incarceration in criminal prosecutions but who were denied representation by the public defender office filed a class action lawsuit against the county.[36] The complaint alleged that the county "failed to allocate sufficient resources to provide constitutionally adequate representation for indigent adult criminal defendants. . . resulting in the provision of sub-constitutional representation to many indigent criminal defendants and the complete deprivation of representation to many others."[37] In particular, lack of funding by the county meant there were not enough attorneys to represent everyone who was entitled to public counsel. And for those who did receive an attorney, that attorney did not always have knowledge of the relevant law, was not always provided in a timely fashion and was not always present at all critical stages of a case, was often unable to investigate the facts, frequently failed to consult with clients to ensure the ability to make informed decisions, and was often unable to provide representation with reasonable diligence and promptness. The lawsuit asked the court to compel the county to provide adequate funding. After the trial court dismissed the case and an intermediate court affirmed that dismissal, the case went to the Pennsylvania Supreme Court on appeal.

In 2016, Pennsylvania's high court reversed the dismissal and ruled that indigent defendants have the right to prospectively challenge "systemic violations of the right to counsel due to underfunding, and to seek and obtain an injunction forcing a county to provide adequate funding to a public defender's office,"[38] at the outset of a case before having to suffer from denial of counsel. The court said it was "obvious" that "the mere existence of a public defender's office and the assignment of attorneys by that office" was not sufficient to satisfy the

33 *Id*. at 4-5.

34 *Id*. at 6.

35 146 A.3d 715 (Pa. 2016), *available at* http://www.pacourts.us/assets/opinions/Supreme/out/J-47A-2016mo%20-%2010282709712025453.pdf?cb=1.

36 Class Action Complaint, Flora v. Luzerne County, No 04517 (Pa. Ct. Com. Pl. filed Apr. 10, 2012), *available at* https://www.clearinghouse.net/chDocs/public/PD-PA-0002-0001.pdf, *appealed sub nom*. Kuren v. Luzerne County, 146 A.3d 715 (Pa. 2016).

37 *Id*. at 1-2.

38 Kuren v. Luzerne County, 146 A.3d 715, 178 (Pa. 2016), *available at* http://www.pacourts.us/assets/opinions/Supreme/out/J-47A-2016mo%20-%2010282709712025453.pdf?cb=1.

right to counsel, because "[i]t is the defense itself, not the lawyers as such, that animates *Gideon's* mandate."[39] If the appointed lawyers cannot provide a defense, "the promise of the Sixth Amendment is broken." The court observed that "*Strickland* does not limit claims asserting *Sixth Amendment* violations to the post-conviction context," and it found that the *Strickland* test of ineffective assistance of counsel should be used by courts in evaluating post-conviction claims, but that "[a]pplying the *Strickland* test to the category of claims at bar would be illogical."[40] Prospective relief "is available, because the denial of the right to counsel, whether actual, or as here, constructive, poses a significant, and tangible threat to the fairness of criminal trials, and to the reliability of the entire criminal justice system."[41] The court concluded:

> The right to counsel is the lifeblood of our system of criminal justice, and nothing in our legal tradition or precedents requires a person seeking to vindicate that right to wait until he or she has been convicted and sentenced. To so hold would undermine the essentiality of the right during the pretrial process. It would render irrelevant all deprivations of the right at the earliest stages of a criminal process so long as they do not clearly affect the substantive outcome of a trial. If the right to counsel is to mean what the Supreme Court has consistently said it means, this view cannot prevail. A person has the same right to counsel at a preliminary hearing as he or she does at a sentencing hearing. It would confound logic to hold that the person can only seek redress for the latter stages of the criminal process.[42]

### 6. Tucker v. Idaho[43] (2017)

In 2015, the ACLU of Idaho and a private law firm filed a complaint on behalf of four indigent people who were each assigned a public defender but nonetheless were not receiving actual representation at various critical stages of their cases.[44] The complaint, suing the state and its Public Defense Commission, alleged that Idaho's indigent defense systems lacked structural safeguards to protect the independence of defenders, made widespread use of flat-fee contracts,

39 *Id.* at 735.
40 *Id.* at 746.
41 *Id.* at 744.
42 *Id.* at 747.
43 No. 43922 (Idaho, Apr. 28, 2017), *available at* https://isc.idaho.gov/opinions/43922.pdf.
44 Class Action Complaint, Tucker v. Idaho, No. CV-OC-2015-1024 (Idaho 4th J.D.C. filed June 17, 2015), *available at* https://www.aclu.org/sites/default/files/field_document/acluidahopubdefensecomplaintfilestamp-sm.pdf.

had extraordinarily high attorney caseloads, and lacked standards, training, and supervision, among other things. The complaint stated:

> Despite amendments to Idaho's public-defender statutes that were passed in 2014 through a bill enacted as the "Idaho Public Defense Act," the current, patchwork public-defense arrangement in Idaho remains riddled with constitutional deficiencies and fails, at all stages of the prosecution and adjudication processes, to ensure adequate representation for indigent defendants in both criminal and juvenile proceedings in Idaho.[45]

The class action sought declaratory and injunctive relief on behalf of all indigent persons charged with an offense that carries jail time, and who cannot afford an attorney and the necessary expenses of a defense, to remedy the state's systemic failure to provide effective legal representation. The trial court dismissed the lawsuit and the plaintiffs appealed to the Idaho Supreme Court.

On April 28, 2017, the Idaho Supreme Court reinstated the lawsuit against the state and the PDC and remanded the case back to the trial court.[46] The court found that indigent defendants "suffered ascertainable injuries by being actually and constructively denied counsel at critical stages of the prosecution, which they allege are the result of deficiencies in Idaho's public defense system."[47] The alleged injuries are "fairly traceable" to the state and the public defense commission, since the state "has ultimate responsibility to ensure that the public defense system passes constitutional muster."[48] The court also found that the public defense commission is responsible for, among other things, promulgating rules governing training, caseload, and workload requirements for public defenders that would bind the counties. The courts, according to the opinion, are capable of providing relief to address the injuries alleged in the lawsuit. "[T]he State has the power–and indeed the responsibility–to ensure public defense is constitutionally adequate. . . . Given that the counties have no practical ability to effect statewide change, the State must implement the remedy."[49] And, particularly under the expanded authority and duty given to the public defense commission by 2016 legislation, "the PDC can promulgate rules to ensure public defense is constitutionally adequate and, moreover, can intervene at the county

45 *Id*. at 7-8.
46 Tucker v. Idaho, No. 43922 (Idaho Apr. 28, 2017), *available at* https://isc.idaho.gov/opinions/43922.pdf.
47 *Id*. at 18.
48 *Id*. at 9.
49 *Id*. at 15.

level."[50] Last, the court held that the "requested relief does not implicate the separation of powers doctrine. The right to counsel . . . is not entrusted to a particular branch of government."[51]

Importantly, the court explained that the two-pronged ineffective assistance of counsel test of *Strickland* "is inapplicable when systemic deficiencies in the provision of public defense are at issue. The issues raised in this case do not implicate *Strickland*."[52] Instead, the claims "alleged systemic, statewide deficiencies plaguing Idaho's public defense system. Appellants seek to vindicate their fundamental right to constitutionally adequate public defense at the State's expense," as required by the federal and state constitutions.[53] "They have not asked for any relief in their individual criminal cases. Rather, they seek to effect systemic reform."[54] Therefore, the lower court wrongly applied the *Strickland v. Washington* standard to the lawsuit, because *Strickland* is inapplicable when systemic deficiencies in the provision of public defense are at issue. Instead, the court held the appropriate standard is that of *United States v. Cronic*: "[a] criminal defendant who is entitled to counsel but goes unrepresented at a critical stage of prosecution suffers an actual denial of counsel and is entitled to a presumption of prejudice."[55]

**10. Is it within the court's province to act on this matter?**

Yes. On July 6, 2011, in its ruling on petition 10-03, this Court considered a request for a rule increasing the statutory rates for counsel appointed by the State Public Defender. 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 (July 6, 2011). Further, this Court observed that "[i]f this funding crisis is not addressed, we risk a constitutional crisis that could compromise the integrity of our justice system." *Id.* at 9.

*In the Interest of Jerrell C.J.,* 2005 WI 105, ¶66, 283 Wis. 2d 145, 176, 699 N.W.2d 110, 126 (Abrahamson, C.J., concurring, observed):

50 *Id.* at 16.
51 *Id.* at 21.
52 *Id.* at 7.
53 *Id.*
54 *Id.*
55 *Id.*

> *"It is well-established that the Wisconsin Supreme Court has express, inherent, implied and incidental powers" to manage the sound operation of the judicial system in our tripartite form of government.*
>
> *This court has grouped inherent power with implied and incidental powers and has defined them as those powers that are necessary "to enable the judiciary to accomplish its constitutionally or legislatively mandated functions, "* (citing *State ex rel. Friedrich v. Circuit Court for Dane County, 192 Wis.2d 1, 16, 531 N.W.2d 32 (1995)).*

*Id.* at n.25

Also, in *Jerrell C.J.,* Justice Prosser noted that the Court's inherent power "has long been recognized," and "must necessarily be expansive enough to facilitate the performance of constitutional mandates." 2005 WI 105 at,154 (Prosser, J., concurring in part and dissenting in part.) Justice Prosser cited five decisions from 1874 to 1956 that constitute recognition of the Court's inherent power: *In re Janitor,* 35 Wis 410 (1874); *Stevenson v. Milwaukee County,* 140 Wis.14, 121 N.W. 654 (1909); *State v. Cannon,* 196 Wis. 534, 221 N.W. 603 (1928); *In re Cannon,* 206 Wis. 374, 240 N.W. 441 (1932); and *Integration of the Bar,* 273 Wis. 281, 77 N.W.2d 602 (1956). 2005 WI 105 at 154.

In the first case, *In re Janitor,* the Court restored its appointee, the Janitor of the Supreme Court, to his position after he had been removed by the State Superintendent of Public Property. The Court stated:

> *It is a power inherent in every court of record, and especially courts of last resort, to appoint such assistants; and the court itself is to judge of the necessity. This principle is well settled and familiar, and the power so essential to the expedition and proper conducting of judicial business, that it may be looked upon as very doubtful whether the court can be deprived of it.*

35 Wis. at 419.

Not only did the Court overturn the Superintendent's order to remove its appointed official, it strongly indicated , though it did not command, that

the legislature was to appropriate the funds necessary to compensate him:

> "... *it will devolve upon the next legislature to make the requisite appropriation and likewise to provide against the recurrence of similar contingencies in the future. It is not within the range of presumption, or a supposition to be for a moment indulged, that any legislative body will neglect or refuse to make such appropriation . . .* "

*Id.* at 421.

In *State* v. *Cannon,* 196 Wis. 534,221 N.W. 603 (1928), the Court affirmed its inherent power to disbar a lawyer. In so doing, it explained the basis for inherent power of the courts:

> *In order that any human agency may accomplish its purposes, it is necessary that it possess power. . . . From time immemorial, certain powers have been conceded to courts because they are courts. Such powers have been conceded because without them they could neither maintain their dignity, transact their business, nor accomplish the purposes of their existence. These powers are called inherent powers.*

196 Wis. at 536.

The Court in *State v. Cannon* also recognized the importance of lawyers in doing justice. Attorneys:

> *. . . are responsible in no small degree for the quality of justice administered by the Courts. . .*
> *. It is the function of the bar to render assistance to the Courts in administering exact justice and not to frustrate the courts in the accomplishment of this high purpose.*

*Id.* at 539.

In the "Integration of the Bar" cases, the Court applied its inherent power beyond individual cases involving specific court appointees and attorneys. It applied that power to more general aspects of the justice system, holding that the Court, by reason of its inherent powers, may require the bar to act as a unit to "promote high standards of practice and the economical and speedy enforcement of legal rights." *In re Integration of the Bar,* 273 Wis.

281, 283, 77 N.W.2d 602 (1956). A major part of its rationale in exercising its inherent power in a systemic manner was, once again, the vital role that lawyers play in the "proper and efficient administration of justice":

> *We must reiterate, the primary duty of the courts as the judicial branch of our government is the proper and efficient administration of justice. Members of the legal profession by their admission to the Bar become an important part of that process and this relationship is characterized by the statement that members of the Bar are officers of the court. An independent, active and intelligent Bar is necessary to the efficient administration of justice by the courts. The labor of the courts is lightened, the competency of their personnel and the scholarship of their decisions are increased by the ability and the learning of the Bar. The practice of the law in the broad sense, both in and out of the courts, is such a necessary part of and is so inexorably connected with the exercise of the judicial power that this Court should continue to exercise its supervisory control of the practice of law.*

*In re the Integration of the Bar,* 5 Wis.2d 618,622, 93 N.W.2d 601 (1958).

The authority supporting the exercise of Supreme Court power to resolve systemic justice issues was succinctly summarized by Justice Abrahamson, with a concurrence by Justice Coffey, in *State v. Holmes,* 106 Wis.2d 31, 44,315 N.W.2d 703 (1982):

> *It is well established that this court has express, inherent, implied and incidental judicial power. Judicial power extends beyond the power to adjudicate a particular controversy and encompasses the power to regulate matters related to adjudication. The nature of the constitutional grant of judicial power has been described by this court as follows: "... when the people by means of the constitution established courts, they became endowed with all judicial powers essential to carry out the judicial functions delegated to them. . . . But the Constitution makes no attempt to catalogue the powers granted. . . . These powers are known as incidental, implied or inherent powers, all of which terms are used to*

*describe those powers which must necessarily be used by the various departments of government in order that they may efficiently perform the functions imposed upon them by the people."*

*Thus the 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 courts and the judicial system against any action that would unreasonably curtail the powers or materially impair the efficiency of the courts or judicial system. 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 regulated this 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.*

**11. Does the court have authority to address this Constitutional question administratively?**

Yes, this Court has the authority to address this constitutional question administratively. Concerns over separation of powers do not prevent this Court from increasing assigned counsel rates through judicial rule. 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 Cty.*, 192 Wis. 2d 1, 531 N.W.2d 32 (1995). As described below, although the legislature holds the power to pass budgets, an expenditure policy that inherently diminishes or compromises the constitutional right to counsel cannot be allowed to stand.

The *Friedrich* Court viewed the power to set compensation as a power shared with the legislature and accommodated both the Supreme Court rule and the statute which established compensation rates. It also, however, exercised its power to order Dane County and the Wisconsin DOA to pay those court-appointed guardians *ad litem* and special prosecutors who had been

appointed prior to the date of the *Friedrich* decision at the higher SCR or court-set rate. *Id.* at 41-42. Dane County and the DOA had both refused to pay at these rates, which refusal generated the *Friedrich* litigation. *Id.* at 9-10.

In *Joni B.* v. *State ,* 202 Wis.2d 1,549 N.W.2d 411 (1996), this Court looked to *Holmes* and *Friedrich* for the proper analysis of the separation of powers doctrine in a case in which the legislature had prohibited the Circuit Courts from appointing counsel for parents in certain civil (CHIPS) cases. 202 Wis.2d at 8-9. The *Joni B.* Court stated that "[t]his Court has repeatedly found that the judiciary's power to appoint counsel is inherent," and quoted in support *State ex rel. Fitas v. Milwaukee County,* 65 Wis.2d 130, 134, 221 N.W.2d.

The Wisconsin Constitution grants the "supreme court power to adopt measures necessary for the due administration of justice in the state, including . . . to protect the court and the judicial system against any action that would unreasonably curtail its powers or materially impair its efficacy." *State v. Holmes*, 106 Wis. 2d 31, 44–45, 315 N.W.2d 703, 710 (1982); *see also In re Commitment of Rachel*, No. 00-0467, 2001 WL 1480545, at *3 (Wis. Ct. App. Nov. 21, 2001) ("Whether ch. 980, as amended by 1999 Wis. Act 9, continues to meet the rights of committed persons in Wisconsin requires an important constitutional determination which is most properly within the province of the supreme court."). And there can be no doubt that a wholly inadequate rate for defense counsel creates unconstitutional risks for defendants. *See, e.g.*, *Strickland v. Washington*, 466 U.S. 668, 685–86 (1984):

> The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair. For that reason, the Court has recognized that "the right to counsel is the right to the effective assistance of counsel."

*Id.* (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)).

**12. Has this court previously used a rule amendment to deem some aspect of a statute unreasonable?**

No. However, this Court has used a rule amendment to create and/or amend some aspect of a statute it has determined needs attention. These amendments have related to its "statutory" rules of practice and ethical rules. *See, e.g.*, *In re Supreme Court Rule Chapter 20*, 2014 WI 45, ¶ 1, 848 N.W.2d 283 (amending or creating SCR Chapter 20 and Wis. Stat. Chapter 800, 801,802, and 809).

**13. What showing is needed to establish that there is a Constitutional issue? Does this require fact finding? How would the court, as an appellate court, make the requisite factual determinations?**

Petitioners' view is that the current rate under Wis. Stat. § 977.08(4m) is unconstitutional. However, our petition does not seek such a finding. At this juncture, this court need not conduct a factual inquiry of its own for purposes of a constitutional analysis; that said, our petition supplies the court with ample factual evidence of the unreasonableness of the rate. We intend to supplement that filing in the near future. We are simply asking the court to declare any statutory rate below that set by Rule 81.02 as "unreasonable."

**14. What is the standard needed to establish that the effect of inadequate compensation rates for court appointed lawyers has created a situation that rises to the level of a Constitutional issue? Beyond a reasonable doubt? Something lower?**

As explained in the answer to question # 13, petitioners are not seeking a ruling that Wis. Stat. § 977.08(4m) is unconstitutional.

**15. Has this issue ever been presented as an as-applied challenge? Why not?**

If a statute is unconstitutional as-applied, that means "it operates unconstitutionally on the facts of a particular case or with respect to a particular party." *State v. Herrmann*, 2015 WI App 97, ¶ 6, 366 Wis. 2d 312, 317, 873 N.W.2d 257, 259. Courts, thus, analyze "the merits of the particular case in front of [them], 'not hypothetical facts in other situations.'" *Coyne v. Walker*, 2016 WI 38, ¶ 25, 368 Wis. 2d 444, 466, 879 N.W.2d 520, 531. The analysis for an as-applied challenge, thus, differs from case to case, depending on the constitutional issue. *In re Gwenevere T.*, 2011 WI 30, ¶ 49, 333 Wis. 2d 273, 300, 797 N.W.2d 854, 868.

Given the above overview, the short answer to the Court's question is no. However, the Wisconsin Supreme Court reviewed a similar case in analyzing the constitutionality of the statute providing limited compensation for court-appointed guardians ad litem and court-appointed special prosecutors. *State ex rel. Friedrich v. Circuit Court for Dane Cty.*, 192 Wis. 2d 1, 5312d 32 (1995). However, that case involved a facial challenge on the grounds of separation of powers. *Id.* at 12-13 (deeming the statute facially constitutional).

Yet, there are a handful of out-of-jurisdiction cases involving as-applied challenges. For example, in *In re Morton*, a Virgin Islands district judge reviewed a request for a writ of mandamus arguing that the statutory method for compensating court-appointed attorneys was unconstitutional where its application to a criminal defendant would violate their rights under the Sixth Amendment. *In Re Morton*, No. 2011-0116, 2012 WL 653786, at *1 (V.I. Feb. 27, 2012). Ultimately the court denied the mandamus petition, noting its inability "to locate a single decision in any jurisdiction in which a court has permitted a defendant or an attorney to pursue a pre-conviction Sixth Amendment challenge to a compensation system within the underlying criminal case itself." *Id.* at *4. The court did not reach the merits of this case.

In *People ex rel. Conn v. Randolph*, five members of the Illinois Bar brought a writ of mandamus against the Auditor, Treasurer, Attorney General and Director of Public Safety seeking to compel the respondents to reimburse and compensate the petitioners for their expenses and services in defending indigent prisoners in capital cases. *People ex rel. Conn v. Randolph*, 35 Ill. 2d 24, 25-26, 219 N.E.2d 337, 338 (1966). Here, the Illinois Supreme Court held that while the statute is not facially unconstitutional, it "cannot constitutionally be applied where it appears, as here, that appointed counsel cannot continue to serve because they are suffering an extreme, if not ruinous, loss of practice and income and must expend large out-of- pocket sums in the course of trial." *Id.* at 30 (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)). Petitioners provided evidence to disclosure that they had "incurred financial burdens and hardships far in excess of those normally attendant upon the defense of indigent persons." *Id.* at 28. They also demonstrated petitioners were "compelled to forsake their regular law practice during the trial, thereby eliminating their major source of income. At the same time, they must pay substantial travel and living expenses as well as the day-to-day costs of litigation, such as stenographic expenses and witness fees. *Id.* Notably, the court's holding was limited to "extraordinary circumstances" as presented in this capital case. *Id.* at 29.

There are likely not many as-applied challenges in light of the substantial evidentiary showings required for success, as exemplified above. Below is a list of case law describing other constitutional challenges to similar statutes:

- The Wisconsin Supreme Court once permitted a circuit court to compensate an *attorney* in excess of the rate mandated by

SCR 81.02 where no other attorney would accept an individual's case "to accommodate the constitutional requirement that an indigent defendant be afforded the assistance of counsel in a criminal prosecution." *Cty. of Door v. Hayes-Brook*, 153 Wis. 2d 1, 13, 449 N.W.2d 601, 606 (1990).

- In *Makemson v. Martin Cty.*, the Florida Supreme Court analyzed Florida's law limiting the maximum amount of compensation for representation of an indigent criminal defendant. *Makemson v. Martin Cty*., 491 So. 2d 1109, 1110 (Fla. 1986). The court found "the statute unconstitutional when applied in such a manner as to curtail the court's inherent power to ensure the adequate representation of the criminally accused." *Id.* at 1112. "At that point, the statute loses its usefulness as a guide to trial judges in calculating compensation and becomes an oppressive limitation." *Id.* The court held that "the statute impermissibly encroaches upon a sensitive area of judicial concern, and therefore violates [the Florida state constitution on separation of powers grounds]." *Id.*
- Criminal defendants allege that, with respect to their specific cases, the compensation system caused them to receive ineffective assistance of counsel from their court-appointed attorney in violation of the Sixth Amendment or deprived them of due process under the Fifth Amendment, which justifies reversing their convictions." *In Re Morton*, No. 2011-0116, 2012 WL 653786, at *4 (V.I. Feb. 27, 2012). *State v. Smith*, 681 P.2d 1374, 1381 (Ariz.1984);*Commonwealth v. Williams*, 950 A.2d 294, 313 (Pa.2008); *State v. Young*, 172 P.3d 138, 139 (N.M.2007).
- Attorneys appointed to represent indigent defendants allege that the appointment constituted a taking of property under the Fifth Amendment, and that fee caps and similar limitations resulted in them not receiving just compensation for services performed with respect to that specific appointment. *See, e.g.*, *State ex rel. Dressler v. Circuit Court for Racine Cty., Branch 1*, 163 Wis. 2d 622, 636, 472 N.W.2d 532, 538 (Ct. App. 1991) (rejecting the taking theory in Wisconsin); *DeLisio v. Alaska Superior Ct.*, 740 P.2d 437, 442–43 (Alaska 1987); Arnold v. Kemp, 813 S.W.2d 770, 774–75 (Ark.1991); *State ex rel Stephen v. Smith*, 747 P.2d 816, 842 (Kan.1987); *State v. Lynch*, 796 P.2d 1150, 1158 (Okla.1990).
- Some courts have permitted attorneys or defendants to file civil suits under a theory that the compensation system, although not violating the Sixth Amendment to the extent that any particular defendant should receive a new trial as a

> remedy, possesses such significant structural problems that prospective relief is warranted in order to prevent future harm stemming from conduct that--while likely to constitute harmless error in any particular criminal case--is nevertheless unconstitutional. *See, e.g.*, *Luckey v. Harris*, 860 F.2d 1012, 1016–17 (11th Cir.1988); *Simmons v. State Public Defender*, 791 N.W.2d 69, 70 (Iowa 2010).

In Wisconsin there is potential for prospective, as applied-type relief, under *United States v. Cronic*[56] and *Wahlberg v. Israel.*[57] The pre-conviction side to a post-conviction facial, or as-applied challenge, can be found in these cases. Such cases invite a pretrial, case-by-case, challenge to the right to effective assistance of counsel based on: 1) the state's failure to provide adequate resources to appointed attorneys or, 2) proper oversight of appointed counsel to ensure they actually are able to, and do engage, in the adversarial process.

All states must be able to ensure that each and every indigent defendant gets effective representation by a lawyer the works in a system that meets the parameters established in *United States v. Cronic.*[58] *Cronic* explains that a state must ensure that they provide the early appointment of qualified and trained attorneys with sufficient time and resources to provide effective representation under independent supervision. Over 30 years ago in *Wahlberg v. Israel*,[59] the Seventh Circuit suggested that a pretrial challenge alleging ineffective assistance of counsel is a possibility under *Cronic* "if the state is not a passive spectator of an inept defense, but a cause of the inept defense, the burden of showing prejudice [under *Strickland*] is lifted. It is not right that the state should be able to say, 'sure we impeded your defense – now prove it made a difference.'"[60]

Very truly yours,

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56 466 U.S. 648 (1984).
57 766 F.2d 1071 (7th Cir. 1985).
58 466 U.S. 648 (1984).
59 766 F.2d 1071 (7th Cir. 1985).
60 *Id*. at 1076.