

STATE OF WISCONSIN
SUPREME COURT

In the Matter of:

The Petition of Patricia K. Ballman, Thomas J. Basting, Sr., Richard T. Becker, Michelle A. Behnke, Gregory B. Conway, Robert H. Frieber, Janine P. Geske, Franklyn M. Gimbel, E. Michael McCann, Gerald M. O'Brien, Jose A. Olivieri, and G. Lane Ware, for an amendment to Supreme Court Rule 81.02 changing the hourly rate of compensation for court-appointed lawyers to \$80, indexing that rate to the Consumer Price Index, and specifying that the payment of an hourly rate less than the rate set forth in Supreme Court Rule 81.02(1) for legal services rendered pursuant to appointment by the State Public Defender under Wisconsin Statutes section 977.08 is unreasonable.

PETITION FOR SUPREME COURT RULE AMENDMENT

To: The Honorable Justices of the Wisconsin Supreme Court

Patricia K. Ballman, Thomas J. Basting, Sr., Richard T. Becker, Michelle A. Behnke, Gregory B. Conway, Robert H. Frieber, Janine P. Geske, Franklyn M. Gimbel, E. Michael McCann, Gerald M. O'Brien, Jose A. Olivieri, and G. Lane Ware, all members in good standing of the Bar of this Court, individually, by their attorneys, John S. Skilton and Timothy W. Burns of the firm of Perkins Coie LLP, and Dean A. Strang of Hurley, Burish & Stanton, S.C. , petition this Honorable Court to amend Supreme Court Rule 81.02 to change the hourly rate of compensation for court-appointed lawyers to \$80 and to add provisions indexing that rate to the Consumer Price Index and specifying that the payment

of an hourly rate less than the rate set forth in Supreme Court Rule 81.02(1) for legal services rendered pursuant to appointment by the State Public Defender under Wisconsin statutes section 977.08 is unreasonable.

(Proposed) SCR 81.02 Compensation

(1) Except as provided under sub. (1m), attorneys appointed by any court to provide legal services for that court, for judges sued in their official capacity, for indigents and for boards, commissions and committees appointed by the supreme court shall be compensated at the rate of \$80 per hour or a higher rate set by the appointing authority. The minimum rate shall be indexed to the Consumer Price Index (published by the U.S. Bureau of Labor Statistics).

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

(2) The rate specified in sub. (1) applies to services performed after July 1, 2010.

(3) The payment of an hourly rate less than the rate set forth in Supreme Court Rule 81.02(1) for legal services rendered pursuant to appointment by the State Public Defender under Wisconsin Statutes section 977.08 is unreasonable.

The grounds for this petition are as follows:

1. By statute, Wisconsin provides counsel to eligible indigent criminal defendants through the State Public Defender (SPD) or, if the State Public Defender has a conflict of interest or is otherwise unable to represent an eligible indigent defendant, through counsel appointed and paid by the State Public Defender. *See* WIS. STAT. §§ 977.05(4)(i), (j), (jm); 977.05(5)(a); 977.07; 977.08. The legislature requires that the SPD handle 67% of all felony and juvenile indigent representation, and the private bar therefore no more than 33% of indigent clients in those cases. WIS. STAT. § 977.08(5)(c).

2. Now, because of its own budgetary limitations, the State Public Defender appoints counsel in approximately 60,000 cases per year in Wisconsin. The private bar in recent years has been called upon to handle approximately 40-45% of all indigent representations. That increased allocation of cases to the private bar has put a strain on members of the private bar who accept assignment of cases from the State Public Defender.

3. This strain is exacerbated further by the fact that one-half or fewer of the lawyers on the SPD assigned counsel list handle the vast majority of assigned cases. The SPD's assigned counsel list includes approximately 1,000 lawyers. However, according to SPD records, approximately 300-400 of these lawyers accept one case per month or fewer.

4. SCR 81.02 currently sets compensation for court-appointed lawyers at \$70 per hour. Pursuant to Wisconsin Statutes section 977.08, lawyers appointed by the State Public Defender receive \$40 per hour in compensation.

5. Lawyers whom the State Public Defender appoints receive less per hour than the average hourly overhead expense in Wisconsin and court-appointed lawyer's margin after expenses is low. These low hourly rates have caused qualified lawyers to decline appointments and has shifted work from lawyers who, as Wisconsin lawyers traditionally have, perform their work in a professional law office with a secretary and support staff to lawyers whose only office is their home.

6. The present rate of \$40 per hour is inadequate and cannot support adequate representation by criminal indigents.

7. In 1994, the Supreme Court increased the hourly compensation under SCR 81.02 from \$60 to \$70 after hearing argument and evidence that the \$60 rate (a) was significantly lower than the average hourly rate charged by Wisconsin lawyers; (b) was not much higher than the office overhead rate for most lawyers; (c) reduced the number of experience lawyers taking court-appointed cases; and (d) impeded the provision of and reduced the quality of legal services to persons in need of these services.

8. The hourly compensation under SCR 81.02 has remained unchanged since July 1994, despite the requirement under the Rule that the Supreme Court review the compensation every two years.

9. From July 1994 to October 2009, the Consumer Price Index increased by 52%. If the rate set by SCR 81.02 had increased by the same percentage, that rate would now be \$106.

10. The increase in the cost of living is even reflected in the salaries of circuit judges. Those salaries have risen by 49% in the same time frame, from \$86,289 to \$128,600.

11. In 1978, when the legislature established the State Public Defender's role in circuit courts, the hourly rate of compensation for appointed lawyers was \$35 (\$25 for travel time). In 1992, the legislature increased private bar compensation to \$50 for in-court time and \$40 for out-of-court time; travel time remained unchanged at \$25. However, in 1995, the legislature reduced the in-court rate to create a uniform \$40 hourly rate. Again, the \$25 hourly rate for travel remained unchanged. The same compensation structure continues to apply today.

12. Since 1995, the legislature has not responded to requests to increase the compensation of appointed counsel. While the lack of adjustment to the compensation of court appointed counsel has been less than ideal, the lack of adjustment to Public Defender appointed counsel has been shameful. The \$40 hourly rate for criminal defense counsel is just 57% of the \$70 hourly rate that the Wisconsin Supreme Court found reasonable in 1994 for court appointed counsel under SCR 81.02(1).

13. This level of compensation (\$40 per hour) is well below the standards set by the National Legal Aid and Defenders Association (NLADA), which even in the case of contracts for indigent defense calls for a contracting governmental entity to compensate lawyers at "the customary compensation in the community for similar services rendered by privately retained counsel to a paying client . . ." NLADA GUIDELINES FOR NEGOTIATING AND AWARDED GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES, Guideline III-10(b)(1).6. Wisconsin's \$40 hourly rate puts it on par with

the states paying the lowest rates for state-wide appointed defense counsel.

14. The low rate of compensation to the private bar on SPD cases, coupled with the increased share of cases assigned to the private bar, has produced results incompatible both with the reality of justice and the appearance of justice. Wisconsin is meeting neither the promise nor the obligation of *Gideon v. Wainwright*, 372 U.S. 335 (1963) (felony prosecutions); and *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (misdemeanor prosecutions). Although measurements are difficult, petitioners offer some objective indicators:

a. In recent years, a disproportionately high number of all lawyers whom OLR has disciplined publicly were or are on the SPD assigned counsel list.

b. Judges grant motions of indigent clients to dismiss their SPD-appointed private lawyers for cause in about 5% of all cases. But judges grant motions of indigent clients to dismiss an SPD staff lawyer for cause in only about 1% of all cases.

c. On serious felonies and Ch. 980 (sexually violent person civil commitment) trials, for want of willing and qualified local lawyers, the SPD has to appoint lawyers from as far away as Madison and Milwaukee to handle cases in the northeast region of the state (for example, Brown, Door, Kewaunee, Marinette Counties and surrounding areas).

d. The SPD has had to cut off appointments to some assigned counsel because they are above the weighted equivalent of 150 felony cases in a 12 month period. The SPD uses that NLADA standard as a minimal assurance of the effective assistance of counsel that the Sixth Amendment requires.

15. The strain on the private bar, and on the SPD in maintaining a sufficient number of qualified and willing private bar lawyers on its assigned counsel list, also has had a dramatic adverse impact on counties and on property tax payers.

a. When lawyers are unavailable or unwilling to represent indigent clients at the SPD rate of \$40 per hour, or when

clients do not qualify under existing SPD eligibility standards but nonetheless are unable financially to retain counsel, judges face the need to appoint lawyers at county expense. *See State v. Dean*, 163 Wis. 2d 503, 471 N.W.2d 310 (Ct. App. 1991). Counties are required to reimburse appointed counsel at the \$70 per hour rate that SCR 81.02 sets.

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

c. Such appointments represent a shift of a state obligation to counties, with a corresponding unfunded burden imposed on property tax rolls.

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

Dated at Madison, Wisconsin this 5th day of March, 2010.

_____/s/ Dean A. Strang_____
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