



# Wisconsin State Public Defender

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Tuesday, May 1, 2018

Ms. Sheila Reiff  
Clerk of the Supreme Court  
P.O. Box 1688  
Madison, WI 53701

**RECEIVED**

**MAY 01 2018**

**CLERK OF SUPREME COURT  
OF WISCONSIN**

Dear Ms. Reiff,

The Office of the State Public Defender (SPD) submits these written comments regarding Supreme Court Petition 17-06, a petition to amend Supreme Court Rule 81.02 on the compensation for court appointed attorneys.

The SPD provides representation for financially eligible individuals charged with a criminal or civil offense that affects their liberty interests. Representation is provided through a combination of staff attorneys and certified counsel assigned by the SPD. Assigned counsel attorneys are compensated at the rate of \$40 per hour, which is the nation's lowest rate of hourly compensation. That the rate must be increased is a critical issue, and the SPD is supportive of efforts to increase that rate.

The private bar attorneys who accept appointments are an integral part of Wisconsin's indigent defense system. These private attorneys have a substantial impact on the delivery of justice and the SPD is a full supporter of its private bar partners.

The petition before this Court specifies three requests at pages 1-2: (1) Amend SCR 81.02 to raise the court appointment rate to \$100 per hour; (2) Index future compensation rates to annual cost of living increases; and (3) Specify that any SPD payment under Wis. Stat. §977.08 that is less than the SCR 81.02 rate is "unreasonable." In its March 22, 2018 submission to this Court, the petitioner explained that by seeking a finding that any rate less than the 81.02 rate is "unreasonable," it is not seeking a finding that the current § 977.08(4m) rate (\$40 per hour) is unconstitutional. (3/22/18 at 34). The text of the petition requests that the Court "direct the State Public Defender to pay assigned counsel an hourly rate not less than \$100 per hour, ... ban flat fee contracting, and, ... require annual increases to the rate consistent with the consumer price index." (Petition at 3). The petition's conclusion, in addition to its proposed SCR 81.02 amendments, repeats its request that the Court direct the SPD to pay assigned counsel \$100 per hour and ban SPD contracting. (Petition at 18).

The SPD seeks to provide information to assist this Court as it decides the above-requests, by providing context regarding the impact of the current \$40 per hour rate and the SPD's ongoing efforts to raise that rate. This response will also discuss the flat fee contracting that the petition seeks to ban.

**The SPD's Private Bar Partners are Essential to Providing Indigent Defense in Wisconsin.** Almost 40 percent of all cases for which a person is eligible for public defender representation are appointed to the private bar. Those appointments are primarily for reasons of conflict and overflow. For example, in Fiscal Year 2017, out of 137,734 total SPD case appointments, a private bar attorney was appointed 55,111 times.

Private bar fixed-fee contracting, which the petition seeks to ban, accounts for a small fraction of the total appointments to the private bar.

Per Wis. Stat. § 977.08(3)(f) and (fg), the SPD is required to enter into fixed fee contracts for provision of legal representation. Generally, this type of contracting creates the possibility that the primary concern will be pecuniary compensation over quality representation. The statute allows for the SPD to "...make additional payments for a case or to reassign a case if the circumstances surrounding the case justify the additional payment or reassignment." The SPD follows the intent of the statute by offering to private attorneys a certain number of contracts for which private bar attorneys are free to accept or decline.

Over the last four full fiscal years, SPD has seen a significant decrease in the number of contract cases accepted by attorneys and the number of cases ultimately appointed through the contract system. Between fiscal years 2014 and 2017, there was a 36% decrease in the number of contract appointments authorized and a 33% decrease in the number of cases actually appointed under established contracts. In Fiscal Year 2017, only about 71% of the total number of authorized contract cases were ultimately appointed.

**The \$40 per Hour Rate is Inadequate and Should Be Increased.** According to the State Bar of Wisconsin's study, 2017 Economics of Law Practice in Wisconsin, by all measures the current SPD rate is far below industry standards. The report showed the following:

- The median gross annual salary for an attorney in private practice is \$101,500.
- The median hourly billing rate for a criminal law private practitioner is \$183.
- The mean hourly billing rate for a legal associate with no experience is \$175, and for a paralegal or legal secretary is \$100.
- For paid summer law clerks, the average salary was \$26.90 per hour. This represents a reduction of approximately 35% from the private bar rate of reimbursement.

Another key finding of the State Bar's Economics of Law Practice in Wisconsin is that the median overhead rate to operate a law practice is 35% of gross income. Given the median income for attorneys, the SPD payment rate is inadequate to meet overhead requirements, and is a disincentive for many attorneys to accept SPD appointments.

Wage inflation rates compiled by the Social Security Administration indicate that a \$40 per hour wage set in 1995 would equate to \$78.75 per hour in 2016. Over the same period, the buying power of the dollar has decreased to \$0.64 in 2016. For perspective, the buying power of \$40 in 1995 is the equivalent of \$25.20 in 2016. The cumulative effect of even modest annual

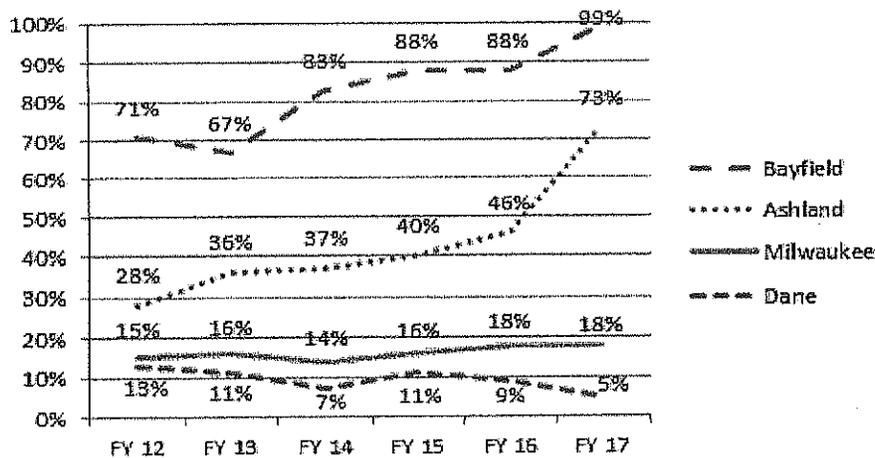
inflation rates shows that in terms of wages and buying power, private attorneys have had their reimbursement rate substantially reduced over time.

Considering the \$40 rate and the cost of operating a law practice, it is unsurprising that there are fewer attorneys willing to accept SPD appointments. Coupled with difficulties in recruiting and retaining attorneys from all areas of practice to locate in more rural parts of Wisconsin, there are negative effects on the rights of defendants, victims, the efficiency of the court system, and the budgets of both county and state-based criminal justice system partners.

While the number of appointments has remained relatively steady, the number of attorneys who have actively taken public defender appointments has declined steadily, from 1099 attorneys in 2012 to only 921 attorneys in 2017.

This decrease is most apparent in the northern part of the state where the SPD has seen a steady increase in the number of SPD appointments going to out-of-county private attorneys (attorneys who live outside the county where the case originated from). For example, in FY 2012, Ashland County appointed only 28% of cases to out-of-county private attorneys, whereas in FY 2017, that number had risen to 73%. Bayfield County cases are now being assigned to out-of-county private attorneys 99% of the time.

**Chart One:  
Number of Appts. to Out-of-County  
Private Attorneys**



As a result of the shortage of private bar attorneys willing to accept appointments at the \$40 per hour rate, the justice system is put on temporary hold (affecting defendants as they wait in custody or with bail restrictions, prosecutors with open cases, victims waiting for resolution, and court calendars at standstills).

Recently, the SPD examined trends related to the appointment of private attorneys across the state. In Marathon County, it takes an average of 80 contacts and 17 days to appoint a case to a private attorney. In Price County, it takes (on average) 33 days to appoint a private attorney to

a case. In Appleton, it takes an average of 17 contacts per case to find an assigned counsel attorney. In three difficult cases, it took 302, 261, and 260 contacts to find an attorney. The Ashland office (which covers Ashland, Bayfield, and Iron counties) needs nearly 39 contacts per case and an average of 24 days to find an attorney. By contrast, the Milwaukee Juvenile/Mental Health office needs fewer than 2 contacts per appointment. However, the lack of availability in rural areas is beginning to have an indirect effect in Milwaukee as more and more attorneys from urban areas are appointed to cases in rural counties.

The SPD has tried alternative methods to lessen the effects on defendants and the court system. Staff attorneys and support staff resources from offices in other parts of the state have been redeployed to regions where the need is most acute. Two attorneys have been designated as "roving" attorneys who accept cases in areas of particular need. In addition, non-financial incentives are being offered such as no-cost training to private attorneys who agree to accept a certain number of appointments. But staff attorneys cannot represent co-defendants from the same case; caseloads are high and workloads even higher; and while some of these measures have helped, they do not solve the need to appropriately compensate private bar attorneys.

**Increasing the Hourly Rate Paid to Our Private Bar Partners Has Long Been a Priority of the SPD.** In total, 18 separate formal efforts have been attempted since the 1999 budget. SPD budget requests have not been included in the budget introduced by the Governor, and none of the stand-alone legislation has received a public hearing or vote by the Legislature or its standing committees.

Since the rate was decreased (to the present \$40 per hour) in the 1995 state budget, the SPD requested an increase in each biennial budget request. These requests have varied in terms of the requested increase to the rate, delayed effective dates to reduce the initial fiscal impact, and other compensation ideas such as additional payments to cover overhead expenses (which cannot presently be billed for by the private bar). In addition to the SPD budget requests, there have been several legislative proposals offered to increase the rate of reimbursement.

The petition requests that the Court direct the SPD to pay assigned counsel an hourly rate not less than \$100 per hour. To provide fiscal information on the impact of an increase to \$100 an hour on actual expenditures, during the 2015-2017 biennium, SPD made payments totaling \$41,752,323.64 based on a reimbursement rate of \$40 an hour. At \$100 per hour, the actual expenditures would have totalled \$104,380,809, an increase of \$62,628,485. Please note that these figures only account for actual expenditures for attorney time both in and out of court. They do not include other authorized expenditures such as travel, experts, and investigators which are billed at rates other than \$40 per hour.

By way of comparison, during the 2017 legislative session, the 2017 SPD budget request was structured to create a tiered-rate system in which the hourly rate increased with the difficulty of the case type. The request included a delayed effective date of July 1, 2018 to reduce the immediate fiscal impact, with an initial fiscal impact of \$7.5 million. Over a biennium, the total increased appropriation for this proposal would be \$20.2 million.

May 1, 2018

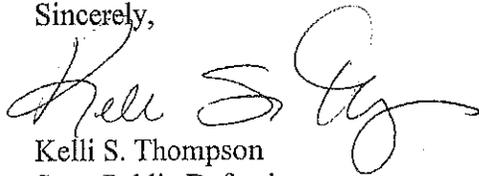
One piece of legislation introduced this session was 2017 Assembly Bill (AB) 828. AB 828 was modeled on the SPD budget request in creating a tiered-rate system but proposed a higher increase. This bill too contained a delayed effective date of January 1, 2019. AB 828 was estimated to require an additional biennial appropriation of \$38.8 million. Also, 2017 AB 37 proposed a straightforward increase to \$100 per hour. AB 37 was estimated to require an additional biennial appropriation of \$68.4 million. These estimates were based on an increase to the appropriation specifically enumerated in statute. Actual expenditures are higher than the appropriated amount and are funded within the SPD budget by, for example, fees collected from clients.

On April 6, 2018, the State Public Defender Board unanimously approved this statement expressing the Board's will to the Supreme Court:

The Public Defender Board strongly supports an increase to the rate of compensation for private bar attorneys. Wisconsin's indigent defense system, a model national program, excels because it is coordinated at the state level and has a hybrid system of representation. Utilizing both staff attorneys and certified private attorneys, it allows for the most effective use of taxpayers resources and provides the best opportunity to fulfill the 6th Amendment guarantee of the right to the effective assistance of counsel. The system, however, relies on proper resources and adequate funding. The current reimbursement rate severely disrupts both the quantity and quality of representation. As the reimbursement rate has become more disparate from the market rate of compensation, there has been a significant impact on defendants, victims, and all sectors of the criminal justice system at both the state and county level. Having attempted multiple legislative solutions to this problem, the Public Defender Board supports and encourages the Supreme Court to use its superintending authority regarding the effective administration of justice by supporting efforts to raise the private bar rate.

The SPD hopes that the above-information assists this Court as it decides the multiple requests contained in Petition 17-06. I will be available at the May 16th hearing to answer any questions the Court may have.

Sincerely,



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State Public Defender

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