

JUSTICE SHORTCHANGED PART II

ASSIGNED COUNSEL COMPENSATION IN WISCONSIN



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SIXTH
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CENTER

ABOUT THE SIXTH AMENDMENT CENTER

The Sixth Amendment Center seeks to ensure that no person faces potential time in jail or prison without first having the aid of a lawyer with the time, ability and resources to present an effective defense, as required under the United States Constitution. The 6AC does so by measuring public defense systems against established standards of justice. When shortcomings are identified, 6AC helps states and counties make their courts fair again in ways that promote public safety and fiscal responsibility.

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INTRODUCTION

Private lawyers appointed to represent the indigent accused have significant financial conflicts imposed upon them by the State of Wisconsin. Evidence suggests financial considerations have undermined the constitutional imperative for independent, conflict-free, and effective public defense services. As a result, Wisconsin's ability to provide constitutional right to counsel services is undermined.

These are the core findings of the May 2015 report *Justice Shortchanged: Assigned Counsel Compensation in Wisconsin*. The study, commissioned by the Wisconsin Association of Criminal Defense Lawyers (WACDL) and conducted by the Sixth Amendment Center (6AC), in cooperation with the Defender Initiative at Seattle University School of Law (SUSL), sought to achieve two broad aims¹:

- To explain whether the manner in which Sixth Amendment lawyers are paid in Wisconsin is in violation of recognized national standards of justice; and,
- To explain the impact the low compensation rate is having on the constitutional right to counsel in Wisconsin.

Indeed, that Wisconsin's compensation rate for Sixth Amendment lawyers is the lowest in any state in the country is undisputed. Attorneys defending the indigent accused are paid \$40 per hour, a rate that has not changed in 20 years — since 1995 when the Wisconsin legislature *reduced* the rate from \$50 per hour. Although \$40 per hour may sound like a decent wage to

¹ The Sixth Amendment Center seeks to ensure that no person faces potential time in jail or prison without first having the aid of a lawyer with the time, ability and resources to present an effective defense, as required under the United States Constitution. The 6AC does so by measuring public defense systems against established standards of justice. When shortcomings are identified, 6AC helps states and counties make their courts fair again in ways that promote public safety and fiscal responsibility.

The 6AC contracted with the Defender Initiative of the Fred T. Korematsu Center for Law and Equality at Seattle University School of Law (SUSL Defender Initiative) to help with the research on this project. The SUSL Defender Initiative is a law school-based project aimed at providing better representation for people accused of crimes through a unified vision that combines research, advocacy, and education.

some, *Justice Shortchanged* demonstrates that for the average lawyer \$40 per hour is not enough even to pay for basic overhead expenses like office rent and utilities. This leaves the appointed lawyer without a reasonable fee on which to live.

Worse, Wis. Stats § 977.08(3) requires the state to enter into annual contracts with private attorneys set at a fixed rate that is *less* than would be received under the appointed system described above. As Justice Shortchanged made clear, such flat fee contracts invariably produce financial incentives for appointed lawyers to triage work in favor of some defendants, to the detriment of others.

Justice Shortchanged demonstrates that unreasonable compensation rates and flat fee contractual arrangements to represent the poor in criminal courts are constitutional violations because each pits the attorney's financial well-being against the client's right to conflict-free representation. The financial conflicts involved can and do interfere with a lawyers' ethical obligation to give undivided loyalty to each and every defendant.

On May 25, 2017, a coalition of attorneys appeared in the Assembly Parlor of the State Capitol to announce the filing of a petition in the Supreme Court of Wisconsin seeking to end financial conflicts of interests in the appointment of private lawyers to represent poor people charged with crimes in the state. The coalition includes two former Supreme Court of Wisconsin justices, the entire leadership of the State Bar of Wisconsin, noted law professors, and numerous high-profile leaders of the legal community from all ends of the political spectrum whose joint interest is to urge the Supreme Court to take action where the legislative branch has failed to do so for nearly 40 years. Specifically, the coalition asked the court to raise the appointed counsel hourly compensation rate (from \$40 per hour to \$100 per hour) and ban the practice of capping compensation regardless of the time needed to provide effective representation.

On June 21, 2017, the Supreme Court of Wisconsin discussed the petition at an open rules conference and voted to proceed with a public hearing, set for May 16, 2018. In preparation for the hearing, the Supreme Court of Wisconsin sent the petitioners a letter dated January 19, 2018 setting out written answers to a series of questions, including a request for information on how other states assigned counsel compensation rates change over time.

This update to *Justice Shortchanged* by the Sixth Amendment Center (6AC) seeks not only to provide that information, but to also analyze why Wisconsin's rates have been stagnant for so long. To do so first requires an explanation of the various ways states seek to implement the constitutional right to counsel.

INDIGENT DEFENSE SERVICES IN THE 50 STATES

Although the provision of Sixth Amendment indigent defense services is a state obligation through the Fourteenth Amendment,² defining how states choose to deal with that constitutional requirement varies widely. Some states pass on the entirety of its right to counsel duty to local

² *Gideon v. Wainwright*, 372 U.S. 335, 343-45 (1963).

governments, while other states delegate no responsibility at all. A significant number of other states try to strike a balance between sharing a portion of the financial burden of providing a lawyer to the indigent accused with its cities and counties. However, there is wide variation in what “shared responsibility” means. Some of these states contribute the vast majority of funding while others contribute only a minimal amount.

To be clear, it is not believed to be unconstitutional for a state to delegate some or all of its constitutional responsibilities to its counties and cities, but in doing so the state must guarantee that local governments are not only capable of providing adequate representation, but that they are in fact doing so.³ This can only be accomplished if there is some state agency charged with the oversight and evaluation of defender services. Some states have permanent statewide indigent defense commissions or boards that either oversee all indigent defense services (both primary and conflict) or are authorized to set and enforce standards — including compensation standards — on localized right to counsel services. Other states have similar commissions or boards but limit their oversight capabilities to only certain types of cases or certain regions of the state. And, in those states that do have commissions or boards, some states insulate these bodies from undue political and judicial interference in accordance with national standards, and some do not.

The variations amongst how states deal with the Sixth Amendment does not stop at funding and oversight. The number of structural approaches to providing lawyers to the poor is great. City, county or state governments may employ public attorneys on either a full-time or part-time basis⁴ or pay for private lawyers to provide representation. Private lawyers may be under contract to take an unlimited number of cases for a flat fee, or be paid a single rate per case, or be paid hourly (with compensation capped at a set level, or not). And, the authority to set the hourly rates, compensation caps and contracted amounts can occur within any of the three-branches of government and at any local, county or states-level.

Moreover, a state may have a sound assigned counsel compensation standard but seldom rely on such services (e.g., only in the most serious cases). A state may have government-employed lawyers for the majority of case classification of cases but use private lawyers for only select types of cases. other types (e.g., direct appeals), or they may give a first co-defendant a government-employed lawyer but assign the second co-defendant a private lawyer. A state may

³ Cf. *Robertson v. Jackson*, 972 F.2d 529, 533 (4th Cir. 1992) (although administration of a food stamp program was turned over to local authorities, “ultimate responsibility” . . . remains at the state level.”); *Claremont School Dist. v. Governor*, 794 A.2d 744 (N.H. 2002) (“While the State may delegate [to local school districts] its duty to provide a constitutionally adequate education, the State may not abdicate its duty in the process.”); *Osmunson v. State*, 17 P.3d 236, 241 (Idaho 2000) (where a duty has been delegated to a local agency, the state maintains “ultimate responsibility” and must step in if the local agency cannot provide the necessary services); Letter and white paper from American Civil Liberties Union Foundation et al to the Nevada Supreme Court, regarding *Obligation of States in Providing Constitutionally-Mandated Right to Counsel Services* (Sept. 2, 2008) (“While a state may delegate obligations imposed by the constitution, ‘it must do so in a manner that does not abdicate the constitutional duty it owes to the people.’”) *available at* http://www.nlada.net/sites/default/files/nv_delegationwhitepaper09022008.pdf.

⁴ On top of this, two states (Florida and Tennessee) give the electorate the right to vote into office a full-time chief public defender on either a circuit or district basis. Another state (Nebraska) requires counties of a certain population threshold to elect defenders while allowing all other counties the option of electing chief defenders. California authorizes a single county (San Francisco County) to elect its chief public defender.

develop and fund a sophisticated delivery system for the representation of people charged with felony offenses, and then leave the total responsibility for misdemeanor representation to local government — however the cities or counties choose to provide those services.

A state may require local government to design and pay for a local delivery system but then have a state-run organization reimburse the cities and counties a percentage of those costs. Not only do the percentage of reimbursement vary in each of these states, but reimbursement plans may be based on meeting state-imposed standards (or not), be based on a percentage of criminal cases arising in a local jurisdiction (or not), or simply be based on geographical considerations (or not). And, some of these states require all counties to participate in the reimbursement plan, while others allow local governments to either opt-into, or to opt-out of, the state plan.

Therefore, to answer the question it is first necessary to establish the classification of states that are comparable to Wisconsin in terms of: a) funding; b) state oversight; and, c) delivery models.

CATEGORIZING WISCONSIN

The Wisconsin State Public Defenders (SPD) is an executive branch agency providing right to counsel services throughout the state. The Governor, with advice and consent of the Senate, appoints nine people to the Public Defender Board that oversees the SPD. The board appoints the chief public defender of the SPD, who is responsible for carrying out the board's policies and directives.

Primary right to counsel services throughout Wisconsin are provided by attorneys who are employees of the Wisconsin State Public Defender (SPD). SPD has 35 local public defender offices to handle trial level services. For conflict cases, SPD has an Assigned Counsel Division set apart from the primary system through ethical screens that oversees private attorneys who are appointed on a case-by-case basis. As noted above, private attorneys are paid in one of two ways by the state: either an hourly rate; or (in misdemeanor cases only) a flat, per case contracted amount.

National advocates (including the author of this report) have been misclassifying Wisconsin for years as a 100% state-funded, 100% state-oversight system with uniform oversight of primary public defender services and conflict assigned counsel services.

Indigent defense services in Wisconsin are not 100% state-funded

Although the vast majority of indigent defense representation is funded by the state, there is one notable exception. “If 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 then must appoint lawyers at

county expense.”⁵ SCR 81.02 authorizes counties to pay \$70 per hour⁶ (as opposed to the state rate of \$40/hour) for attorneys appointed in these instances.

County funding of the states’ constitutional obligations in this regard is not insignificant. Although the absence of reliable data will be a common theme throughout this updated report, the Sixth Amendment Center reviewed limited data collected by the Wisconsin Association of Counties.

Although Wisconsin has 72 counties, data was collected from only 36 of those counties (exactly 50% of counties). The population of those 36 counties is 2,229,038 (or, 39% of the state’s population of 5,726,986). The 36 counties exclude the states three most populated counties (Dane, Milwaukee and Waukesha).

The 6AC only reviewed actual expenditure information in 20 of the 36 counties. Therefore, in 16 counties our review consisted of projections based on their budgeted amount only.

Table 1. Indigent defense spending by county (excluding Dane, Milwaukee, and Waukesha counties)

County	Pop.	Rate	Budget	Expenditure	Hrs. (Budget)	Hrs. (Expend.)
Adams	20,875	\$70.00	\$100,000		1,428.57	
Ashland	16,157	\$70.00	\$28,000		400.00	
Barron	45,870	\$70.00	\$765,000		10,928.57	
Bayfield	15,014	\$70.00	\$15,000		214.29	
Brown	248,007	\$70.00		\$180,263		2,575.19
Buffalo	13,587	\$70.00	\$12,000		171.43	
Burnett	15,457	\$80.00	\$10,000		125.00	
Calumet	48,971	\$70.00	\$20,000		285.71	
Columbia	56,833	\$70.00		\$15,330		219.00
Crawford	16,644	\$70.00		\$4,440		63.43
Door	27,785	\$70.00		\$12,921		184.59
Douglas	44,159	\$62.50		\$176,501		2,824.02
Dunn	43,857	\$70.00		\$13,660		195.14
Florence	4,423	\$85.00	\$10,000		117.65	
Fond du Lac	101,633	\$70.00	\$172,000		2,457.14	

⁵ See *State v. Dean*, 163 Wis. 2d 503, 471 N.W.2d 310 (Ct. App. 1991). Also see In the matter of the petition to amend Supreme Court Rule 81.02 (June 2011), at <https://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=67390> (last visited March 2015).

⁶ The rule reads: “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 \$70 per hour or a higher rate set by the appointing authority. The Supreme Court shall review the specified rate of compensation every two years. . . . (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 only to services performed after July 1, 1994.”

County	Pop.	Rate	Budget	Expenditure	Hrs. (Budget)	Hrs. (Expend.)
Grant	51,208	\$70.00	\$40,000		571.43	
Green Lake	19,051	\$70.00		\$17,965		256.64
Iowa	23,687	\$70.00		\$15,941		227.73
Jefferson	83,686	\$70.00		\$100,794		1,439.91
Kenosha	166,426	\$70.00		\$38,500		550.00
Kewaunee	20,574	\$70.00	\$15,000		214.29	
Manitowoc	81,442	\$70.00	\$40,000		571.43	
Marathon	134,063	\$70.00		\$200,000		2,857.14
Monroe	44,673	\$70.00	\$137,000		1,957.14	
Oneida	35,998	\$70.00		\$25,626		366.09
Outagamie	176,695	\$70.00	\$73,399		1,048.56	
Portage	70,019	\$70.00		\$74,865		1,069.50
Richland	18,021	\$70.00	\$10,000		142.86	
Rock	160,331	\$70.00		\$63,922		913.17
Sauk	61,976	\$65.00		\$71,750		1,103.85
St. Croix	84,345	\$70.00	\$60,000		857.14	
Taylor	20,689	\$70.00		\$5,120		73.14
Trempealeau	28,816	\$70.00		\$25,011		357.30
Vilas	21,430	\$70.00		\$13,977		199.67
Washington	131,887	\$70.00	\$110,000		1,571.43	
Wood	74,749	\$70.00	\$153,500		2,192.86	
TOTAL	2,229,038		\$ 1,770,899	\$1,056,586	25,255.49	15,475.51

It is estimated that \$2,827,485 is dedicated to county-paid defender services in these 36 counties.⁷ Dividing either the total expenditure or the total budgeted amount for a county by its prevailing hourly rate, the 6AC determined that approximately 40,731 hours of attorney time was dedicated to county-funded cases (15,475 based on expenditure; 25,255 based on projected budgets).⁸ If the per capita spending of these 36 counties was applied to the total state population, Wisconsin counties may be spending more than \$7 million dollars per year on these cases.⁹

⁷ \$1,056,586 based on actual expenditures (20 counties) and \$1,770,899 on budgeted amounts (16 counties).

⁸ Although the majority of counties pay a rate of \$70 per hour, the rate is by no means universal. Some counties pay a different amount by case-type; some counties pay a different rate in-court or out-of-court; and, some counties have a different rate for travel time. To try to help the court project the impact of an increased rate on counties, we have used the felony in-court rate to account for the variances.

If all of those hours were paid at a rate of \$100/hour, the cost to those 36 counties would be \$4,073,100 (40,731 hours x \$100/hour). This is an increase of \$1,245,614 over current expenditure/budget (\$2,827,485), or an increase of 44%. If that increase was pro-rated by county population, it would be an increase of \$0.56 per capita (\$1,245,614/total population of 2,229,038 in the 36 counties). And, if that per capita increase was applied to the total state population, the cost of increasing the hourly rate to \$100/hour could be \$3,200,312 to the counties (\$0.56 X total state population of 5,726,986).

⁹ \$2,827,485 / 2,229,038 (population of 36 counties) X 5,726,986 (population of state) = \$7,264,554.04.

Again, the provision of Sixth Amendment right to effective assistance of counsel is an obligation of the states under the due process clause of the Fourteenth Amendment. Because the “responsibility to provide defense services rests with the state,” national standards unequivocally declare “there should be state funding and a statewide structure responsible for ensuring uniform quality statewide.”¹⁰

State funding is called for by national standards in part because the local jurisdictions most in need of indigent defense services are often the ones least able to afford them. In many instances, the circumstances that limit a county’s revenue — such as low property values, high unemployment, high poverty rates, limited household incomes, and limited educational attainment — are correlated with high crime rates. In high poverty areas, more people accused of crime are indigent and entitled to public defense services. Further, these counties typically spend more on social services such as unemployment compensation or housing assistance, leaving less money available for protecting people’s rights under the Sixth Amendment.

Wisconsin is the only state in the country with a state-funded, state-administered public defense system that makes its counties pay a higher rate for attorneys whenever the state cannot get a lawyer to take a case.

Wisconsin does not have 100% state oversight nor uniform oversight of primary and conflict services

Although the U.S. Supreme Court has never directly considered whether it is unconstitutional for a state to delegate its 14th Amendment constitutional responsibility to its counties, if a state chooses to place any part of its responsibility on its local governments then the state must guarantee that the local governments are not only capable of providing adequate representation but that they are in fact doing so.¹¹ To accomplish this, there needs to be a state-entity that has the authority to promulgate and enforce uniform standards regardless of whether said services are funded by the state or local government.

Yet, an indigent defendant who is facing the possibility of incarceration in Wisconsin will be represented by one of three types of attorneys performing under very different levels of supervision and compensation: (1) an assistant state public defender who is employed by the State Public Defender (SPD) and who is compensated at an annual salary with all of their overhead provided and who receives in-house supervision;¹² or (2) a private attorney who is paid a *maximum* of \$40 per hour and who must provide all of their own overhead and has only limited supervision;¹³ or (3) a private attorney appointed by a judge who is paid \$70 per hour by the county and who must provide all of their own overhead and has no independent supervision at all.¹⁴

¹⁰ TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM § 2 cmt. (AM. BAR ASS’N 2002).

¹¹ *Supra*, note 3.

¹² WIS. STAT. § 977.08(5).

¹³ WIS. STAT. § 977.08(4m)(c) (2016).

¹⁴ WIS. S. CT. R. 81.02. *See also* Friedrich v. Dane County Circuit Ct., 531 N.W.2d 32 (Wis. 1995).

Perhaps to understand Wisconsin's lack of appropriate state oversight, it is necessary to compare Wisconsin to another state. The Massachusetts Committee for Public Counsel Services (CPCS) is a 100% state funded 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.¹⁵ 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.¹⁶ CPCS has an extensive process to qualify for assigned counsel panels and the certification requirements increase with each level of court and case type.¹⁷

Although the Wisconsin SPD has attorney qualification standards too, that is where the similarities end. CPCS has an extensive system of supervision for the private bar attorneys. 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. More importantly, 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.

And, because CPCS constantly evaluates the assigned counsel system and tracks an extensive amount of data, CPCS knew in 2004 when Massachusetts' own low rates (then at rates of \$40/hour) were negatively impacting their attorneys' willingness to take cases. Armed with data,

¹⁵ Governor (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.

¹⁶ The 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.

¹⁷ 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 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.

CPCS was the plaintiff in the lawsuit¹⁸ (joined by the American Civil Liberties Union). Although the Massachusetts 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 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.

Wisconsin’s oversight of indigent defense services contrast markedly with Massachusetts. First, the SPD does not have diverse appointing authorities for its Board membership. When a single branch of government appoints all members that branch exerts undue interference whether or not it is consciously done. That is, it is our national experience, that when a chief public defender is appointed by a board that was appointed by a single branch of government, that chief defender often does what is in the interests of that branch of government rather than what is necessary to ensure constitutionally-effective representation. To be clear, the Sixth Amendment Center has not formally study SPD and cannot say to what extent our national perspective applies here, but we do note that it is more than possible that the judiciary and legislative branches have not acted to raise the assigned counsel compensation rates because they do not have co-responsibility for the indigent defense system. At the very least, it is difficult to see SPD taking the same litigation approach to low assigned counsel compensation rates that Massachusetts did.

Furthermore, it appears as though the assigned counsel system is not a co-equal part of the SPD. That is, the antagonism between the SPD and the private bar is greater than the 6AC has witnessed in many states. The SPD does not employ contracted supervisors for the private attorneys and appears to take a ‘hands off’ approach once a case is assigned to a private attorney. Worse, the state of Wisconsin has no idea of how many indigent defendants are represented by county-funded attorneys nor the amount of money spent to secure representation because no one is charged with tracking this data.

Without even knowing which defendants are being defended by which attorneys, the state is unable to even begin to ensure that each and every defendant receives effective representation.

¹⁸ Lavalley v. Justices in the Hampden Superior Court, No. SJC-09268, 812 N.E.2d 895 (Mass. July 28, 2004).

Indeed, the lack of uniform state oversight presents equal protection concerns. Each and every defendant has a constitutional right to effective representation that is free from conflicts of interest.¹⁹ As the U.S. Supreme Court stated in *Glasser v. United States*, “assistance of counsel” guaranteed by the Sixth Amendment contemplates that such assistance be untrammelled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests.”²⁰ Importantly, an indigent defendant with whom a public defense attorney has a conflict (including the 2nd and 3rd and 4th etc. codefendant in a single case) has exactly the same Sixth Amendment right to counsel as does the defendant who has no conflict. Yet, similarly situated indigent defendants who are represented by attorneys providing representation under such dramatically different financial incentives and receiving significantly differing levels of supervision cannot be receiving equal protection of the law when defendant #1 has a supervised salaried defender where overhead is covered, defendant #2 is paid \$40/hour with no overhead and limited supervision, and defendant#3 is paid \$70/hour with no state oversight at all.²¹

ASSESSING SYSTEMIC EFFECTIVENESS

The lack of state oversight is not by itself outcome-determinative. That is, the absence of institutionalized statewide oversight does not mean that all right to counsel provided by private attorneys are constitutionally inadequate. But it does mean that the state has no idea whether its Fourteenth Amendment obligation to provide competent Sixth Amendment services is being fulfilled.

Two principal U.S. Supreme Court cases, decided on the same day, together describe the tests used to determine the constitutional effectiveness of right to counsel services. *United States v. Cronin*²² and *Strickland v. Washington*.²³ *Strickland* is used after a criminal case is final to determine retrospectively whether the lawyer provided effective assistance of counsel; it sets out a two-pronged test of whether the appointed lawyer’s actions were unreasonable and prejudiced the outcome of the case. *Cronin* explains that, if certain systemic factors are present — or necessary factors are absent — at the outset of a case, then a court should presume that ineffective assistance of counsel will occur.

¹⁹ See, e.g., *Wood v. Georgia*, 450 U.S. 261, 271 (1981) (“Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest.”); *Cuyler v. Sullivan*, 446 US 335, 346 (1980) (“Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial.”); *Glasser v. United States*, 315 U.S. 60, 70 (1942).

²⁰ *Glasser v. United States*, 315 U.S. 60, 70 (1942).

²¹ The Wisconsin legislature was clearly aware that all indigent defendants are entitled to equal protection under the law, because it requires the public defender board to: “Promulgate rules establishing procedures to assure that representation of indigent clients by the private bar at the initial stages of cases assigned under this chapter is at the same level as the representation provided by the state public defender. Promulgate rules to accommodate the handling of certain potential conflict of interest cases by the office of the state public defender. The rules shall not provide for the automatic referral of all potential conflict of interest cases to private counsel.” WIS. STAT. § 977.02(5), (6) (2016).

²² 466 U.S. 648 (1984).

²³ 466 U.S. 668 (1984).

Hallmarks of a structurally sound indigent defense system under *Cronic* include the early appointment of qualified and trained attorneys with sufficient time and resources to provide effective representation under independent supervision. The absence of any of these factors can show that a system is presumptively providing ineffective assistance of counsel. It is these *Cronic* parameters that the State of Wisconsin must assure are being met systemically.

Presence of counsel at critical stages

The first factor that triggers a presumption of ineffectiveness is the absence of counsel for the accused at the “critical stages” of a case. Arraignments,²⁴ plea negotiations,²⁵ and sentencing hearings,²⁶ for example, are all critical stages of a case. If counsel is not present at every one of these critical stages, an actual denial of counsel occurs.

A data review suggests that in lieu of paying the \$70 hourly rate for representation, counties are allowing indigent defendants to enter into plea agreements pro se. The 6AC and Court Data Technologies analyzed the rate of pro se representation as recorded in court data. The problem appears to be particularly acute regarding misdemeanor representation where attorneys may not be inclined to travel for a case that will not last long and/or where a defendant may take, for example, a plea deal for time serve pre-trial to be able to get out of jail.

The table next page looks at pro se rates in the more populated counties. Less populated counties were eliminated because of the small sample size. For example, although it is quite alarming that nearly half (48.44%) of misdemeanor defendants in Florence County were recorded as unrepresented in 2016, it is based on only 44 such cases.

The pro se rates in the urban centers of Milwaukee and Dane Counties are about what one would expect to find nationally (10% or less). Although not uniformly the case, it is concerning that counties further from the Milwaukee-Madison corridor have higher rates of pro se defendants and that the rate is increasing.

²⁴ *Hamilton v. Alabama*, 368 U.S. 52, 53-55 (1961).

²⁵ *Lafler v. Cooper*, 132 S. Ct. 1376, 1386 (2012); *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010); *McMann v. Richardson*, 397 U.S. 759, 771, 771 n.14 (1970).

²⁶ *Lafler*, 132 S. Ct. at 1386; *Wiggins v. Smith*, 539 U.S. 510, 538 (2003); *Glover v. United States*, 531 U.S. 198, 203-04 (2001); *Mempa v. Rhay*, 389 U.S. 128, 134, 137 (1967).

Table 2. Misdemeanor defendants appearing pro se in Wisconsin's more populous counties

County	2014		2015		2016		2014	2015	2016
	rep	pro-se	rep	pro-se	rep	pro-se	% pro se	% pro se	% pro se
Brown	1600	180	1659	200	1515	99	10.11%	10.76%	6.13%
Milwaukee	4519	413	3933	243	3256	217	8.37%	5.82%	6.25%
Rock	1203	119	1268	130	1106	117	9.00%	9.30%	9.57%
Dane	2371	295	2303	265	1849	209	11.07%	10.32%	10.16%
Waukesha	2015	269	2093	277	1783	212	11.78%	11.69%	10.63%
Kenosha	1638	182	1395	155	1328	160	10.00%	10.00%	10.75%
Outagamie	1149	199	1138	147	1038	127	14.76%	11.44%	10.90%
Ozaukee	696	136	836	145	775	129	16.35%	14.78%	14.27%
Racine	2383	359	2385	424	2037	432	13.09%	15.09%	17.50%
Sheboygan	870	198	852	227	705	165	18.54%	21.04%	18.97%
Wood	668	183	668	170	670	182	21.50%	20.29%	21.36%
Fond du Lac	822	229	831	184	745	203	21.79%	18.13%	21.41%
La Crosse	1253	317	1310	305	1202	328	20.19%	18.89%	21.44%
Eau Claire	1094	356	1145	387	1065	317	24.55%	25.26%	22.94%
Marathon	1687	638	1725	621	1634	622	27.44%	26.47%	27.57%
Winnebago	1273	460	1276	546	1209	535	26.54%	29.97%	30.68%
Washington	932	388	920	375	803	372	29.39%	28.96%	31.66%

Unfortunately, it is not possible to say with certainty that the above data is not the result of clerical error because, again, *no one is charged with monitoring and reporting on pro se defendants in Wisconsin*. And, counties are not required to report to SPD or any other central body on the number and costs associated with these appointments.

By not having adequate oversight of the county-paid representation and not requiring uniform data reporting, the state is not meeting its Fourteenth Amendment obligations. Petitioners cannot get the needed data to prove the increasing rate of pro se misdemeanor defendants because the information simply is not available.

Attorney qualifications, training, and resources

Next, the U.S. Supreme Court explains in *Cronic* that there are systemic deficiencies that make any lawyer — even the best attorney — perform in a non-adversarial way. As opposed to the “actual” denial of counsel of *Cronic*’s first prong, the Court calls this a “constructive” denial of counsel.²⁷ The overarching principle in *Cronic* is that the process must be a “fair fight.” *Cronic* notes that the “fair fight” standard does not necessitate one-for-one parity between the

²⁷ *Strickland*, 466 U.S. at 683 (“The Court has considered Sixth Amendment claims based on actual or constructive denial of the assistance of counsel altogether, as well as claims based on state interference with the ability of counsel to render effective assistance to the accused.” (citing *Cronic*, 466 U.S. 648)).

prosecution and the defense. Rather, the adversarial process requires states to ensure that both functions have the resources they need at a level their respective roles demand. As the U.S. Supreme Court notes: “While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators.”²⁸

Cronic’s necessity of a fair fight requires the defense function to put the prosecution’s case to the “crucible of meaningful adversarial testing.”²⁹ If a defense attorney is either incapable of challenging the state’s case or barred from doing so because of a structural impediment, a constructive denial of counsel occurs.

In *Cronic*, the Court points to the deficient representation received by the defendants known as the “Scottsboro Boys” and detailed in the U.S. Supreme Court case of *Powell v. Alabama*³⁰ as demonstrative of constructive denial of counsel. The trial judge overseeing the Scottsboro Boys’ case appointed a real estate lawyer from Chattanooga, who was not licensed in Alabama and was admittedly unfamiliar with the state’s rules of criminal procedure.³¹ The *Powell* Court concluded that defendants require the “guiding hand”³² of counsel — i.e., attorneys must be qualified and trained to help the defendants advocate for their stated interests.

Justice Shortchanged notes that a survey of Wisconsin criminal defense attorneys was conducted to discover what impacts exist in Wisconsin in relation to the low attorney compensation rate.³³ Nearly one half of respondents (49.4%) stated that they represent fewer public defender appointed clients than in the past. This is in addition to the 6.8% of respondents stating that they no longer take SPD appointed cases at all.³⁴ These results confirm what SPD reported its

²⁸ *Cronic*, 466 U.S. at 657 (citing *United States ex rel. Williams v. Twomey*, 510 F.2d 634, 640 (7th Cir. 1975)).

²⁹ *Id.* at 656-57 (“The right to the effective assistance of counsel is thus the right of the accused to require the prosecution’s case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted – even if defense counsel may have made demonstrable errors – the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.”).

³⁰ In 1931, nine young black men stood accused in Alabama of the capital crime of rape. Their trial made national headlines, and quickly they became known as the “Scottsboro Boys.”

³¹ A retired local attorney who had not practiced in years was also appointed to assist in the representation of all nine co-defendants.

³² *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932) (“The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.”).

³³ The survey was sent electronically to 1,277 criminal defense attorneys, using lists provided by WACDL and the SPD. These lists include attorneys currently taking cases and those that no longer take cases for whatever reason. E-mail analytics show that 166 bounced back as having wrong email addresses. This means that 1,111 surveys were sent with 378 people filling out the survey (a 34% response rate).

³⁴ A quarter of the attorneys state that the number has remained the same. 18.5% say that they’ve increased the

2013-2015 Biennial Budget Issue Paper: “Although there are currently about 1,100 lawyers on the appointment lists, about 25% of them take less than five cases per year and more than 10% take one or less cases per year.”³⁵

This is important because there appear to be two distinct classes of appointed attorneys: (a) those attorneys that take occasional cases (perhaps out of a self-perceived duty to the Court or SPD); and (b) those lawyers that represent a significant number of SPD defendants. But, before delving deeper into that divide it is important to note that regardless of how many SPD cases an attorney takes on annually, the survey showed that Wisconsin attorneys spend, on average, about 13% less time working on their appointed cases than on similar retained cases.

Sufficient time

Having been assigned unqualified counsel, the Scottsboro Boys’ trials proceeded immediately that same day.³⁶ *Powell* notes that the lack of “sufficient time” to consult with counsel and to prepare an adequate defense was one of the primary reasons for finding that the Scottsboro Boys were constructively denied counsel, commenting that impeding counsel’s time “is not to proceed promptly in the calm spirit of regulated justice, but to go forward with the haste of the mob.”³⁷ Insufficient time is, therefore, a marker of constructive denial of counsel, and the inadequate time may itself be caused by any number of things, including but not limited to excessive workload or contractual arrangements that produce negative fiscal incentives to lawyers to dispose of cases quickly.

A lawyer must be appointed early to represent the accused so that she can work with the client to develop the level of trust that is essential to her ability to be effective – what the Supreme Court has described as “those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional.”³⁸ However, the work of the 6AC shows that surveyed attorneys reported that they spend 37% less time, on average, meeting with their appointed clients than they do with their retained clients.

Motions are a vitally important component of an attorney’s litigation strategy. Where the government’s evidence was acquired through an unlawful search, as one example, a defense lawyer’s motion can suppress such evidence, thereby increasing the chances of a better plea offer from the prosecution or maybe even obtaining a dismissal of the charges entirely. As the judge in the Federal lawsuit challenging the constitutionality of the indigent defense services in two Washington cities noted, “no hard and fast number of pretrial motions or trials is expected,” but when hardly any motions are ever filed, and the number of trials is “incredibly small” it is a “sign of a deeper systemic problem.”³⁹

number of appointed cases they have accepted.

³⁵ SPD, *2013-2015 Biennial Budget Issue Paper*, provided to authors by SPD staff.

³⁶ Over the course of the next three days, four separate all-white juries, trying the defendants in groups of two or three at a time, found all nine of the Scottsboro Boys guilty, and all but one was sentenced to death. The youngest – only 13 years old – was instead sentenced to life in prison.

³⁷ *Powell*, 287 U.S. at 56-59.

³⁸ *Id.*

³⁹ *Wilbur v. City of Mount Vernon*, No. C11-1100-RSL, 989 F. Supp.2d 1122 (W.D. Wash. Dec. 4, 2013).

The Wisconsin survey revealed that attorneys who have a higher number of public defender cases tend not to file motions in their cases, and they are more likely to resolve cases by their public defender clients pleading to the offense charged. This suggests that attorneys with many SPD cases are prioritizing speed in order to make representation more profitable. Even if that is not the conscious intent, the pressure of having to make a living can have that effect.

Independence of the defense function

Perhaps the most noted critique of the Scottsboro Boys' defense was that it lacked independence from governmental interference. As noted in *Strickland*, "independence of counsel" is "constitutionally protected," and "[g]overnment violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense."⁴⁰ In specific relation to judicial interference, the *Powell* Court stated:

[H]ow can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it that, in the proceedings before the court, the accused shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional.⁴¹

While *Cronic* and *Powell* focus on independence of counsel from judicial interference, other U.S. Supreme Court decisions extend the independence standard to political interference as well. In the 1979 case, *Ferri v. Ackerman*,⁴² the United States Supreme Court stated that "independence" of appointed counsel to act as an adversary is an "indispensable element" of "effective representation." Two years later, the Court observed in *Polk County v. Dodson*⁴³ that states have a "constitutional obligation to respect the professional independence of the public defenders whom it engages." Commenting that "a defense lawyer best serves the public not by acting on the State's behalf or in concert with it, but rather by advancing the undivided interests of the client," the Court notes in *Polk County* that a "public defender is not amenable to administrative direction in the same sense as other state employees."⁴⁴ The *Cronic* Court clearly advises that governmental interference that infringes on a lawyer's independence to act in the stated interests of defendants or places the lawyer in a conflict of interest causes a constructive denial of counsel.

Wisconsin interferes with the defense by imposing financial conflicts of interests on the attorneys. As reported in *Justice Shortchanged*, in November of 2013, the Wisconsin State Bar Association published the results of its *2013 Economics of Practice Survey*.⁴⁵ For 2012, Wisconsin

⁴⁰ *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

⁴¹ *Powell*, 287 U.S. at 61.

⁴² 444 U.S. 193, 204 (1979).

⁴³ 454 U.S. 312, 321-22 (1981).

⁴⁴ *Id.*

⁴⁵ Wisconsin State Bar Association. *2013 Economics of Practice Survey: Results* published in Wisconsin Lawyer, November 2013, Volume 86, Number 9, available at: <http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?Volume=86&Issue=9&ArticleID=11150> (last visited March 2015).

private practitioners had median total annual overhead expenses of \$102,050. To calculate an average overhead rate, the annual median expenses must be divided by twelve months and then divided again by the number of hours the average attorney works in a month. Based on the WSBA survey, the average practitioner spends approximately \$8,500.00 on overhead expenses per month.⁴⁶ The WSBA survey reports that Wisconsin attorneys work, on average, 47 hours per week.⁴⁷ Assuming the average month consists of 4.33 weeks,⁴⁸ Wisconsin attorneys work about 204 hours per month.⁴⁹ This means that the average overhead rate in Wisconsin is \$41.79,⁵⁰ or slightly *more* than the total \$40 per hour compensation offered by the state. Because the Wisconsin assigned counsel hourly compensation is not sufficient to cover overhead expenses, it is easy to conclude that attorneys are not paid a “reasonable fee” above and beyond that.

IMPLICATIONS OF A CRONIC ANALYSIS IN WISCONSIN

Between 2009 and 2017, courts in six states have allowed civil class action lawsuits to go forward, where the plaintiffs allege that indigent criminal defendants are being systemically denied their right to counsel based on the *Cronic* criteria explained above. In each of these cases, the courts have concluded that indigent defendants do not have to wait until their individual criminal cases are concluded and then prove that they received ineffective assistance of counsel. Instead, the courts have held that indigent defendants may seek to vindicate their right to counsel before it is denied to them in the first place.⁵¹

Again, the *Cronic* Court explains that, when actual denial of counsel occurs or when a lawyer provides representation within an indigent defense system that constructively denies the right to counsel, the representation is presumptively ineffective. The government bears the burden of overcoming that presumption. The government may argue that the defense lawyer in a specific case will not be ineffective despite the structural impediments in the system, but it is the government’s burden to prove this.

But, as the Seventh Circuit Court of Appeals noted over 30 years ago in *Wahlberg v. Israel*,⁵² “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.’”⁵³

⁴⁶ \$102,050 divided by 12 equals \$8,504.17.

⁴⁷ *Supra* note 22.

⁴⁸ Dividing 52 weeks per year by twelve months equals 4.33 weeks per month.

⁴⁹ Multiplying 47 hours per week by 4.33 weeks per month equals 203.51 hours per month.

⁵⁰ This figure is calculated by dividing the monthly overhead expenses (\$8,504.17) by the average number of hours worked per month (203.51 hours).

⁵¹ *Duncan v. Michigan*, No. 278652 (Mich. Ct. App. June 11, 2009); *Hurrell-Harring v. New York*, 930 N.E.2d 217 (N.Y. 2010); *Heckman v. Williamson County, Texas*, No. 10-0671 (Tex. June 8, 2012); *Phillips v. California*, No. 15-CE-CG-02201 (Cal. Super. Ct. Apr. 13, 2016); *Kuren v. Luzerne County*, 146 A.3d 715, 178 (Pa. 2016); *Tucker v. Idaho*, No. 43922 (Idaho Apr. 28, 2017).

⁵² 766 F.2d 1071 (7th Cir. 1985).

⁵³ *Id.* at 1076.

This is precisely the situation in Wisconsin. Because the state itself fails to keep reliable data to allow petitioners or others to conclusively show that the low compensation rates is negatively impacting the quality of representation, it is not right for the court or others to conclude therefore that no problem exists.

The Appendix is a timeline of attempts by petitioners to collect data. Additionally, the Sixth Amendment Center attempted to survey Circuit Court Judges to see whether the low assigned counsel compensation rates were having a negative impact on the quality of representation. Although some judges were forthcoming in their criticism of the low rates, none authorized us to use their comments publicly for fear of political backlash.⁵⁴

PUTTING WISCONSIN IN CONTEXT OF ALL OF THE 50 STATES

Now that Wisconsin is properly categorized it is necessary to categorize all states by funding, state oversight, and delivery systems before discussing how the other states change their assigned counsel compensation rates.

Funding

There are three broad classifications for how states fund the right to counsel:

- *State-funded services*: This classification is defined as those states that relieve its local government of all responsibility for funding right to counsel services even if alternative revenue sources (e.g., court fines and/or fees) are used in addition to state general fund appropriations. Also included are those states that allow, but do not require, local governments to augment state indigent funding if they so choose.

⁵⁴ The 6AC reached out to 38 Circuit Judges (38) in the following thirteen counties: Bayfield, Brown, Columbia, Green, La Crosse, Manitowac, Marathon, Rusk, Sawyer, Shawano, Washington, Waushara, and Wood. The response rate was poor (only five judges responded). Most indicated that the assigned counsel compensation rates were negatively impacting practices.

The most vocal of respondents stated that the inability of SPD to properly serve his county means that he has to rely on assigned counsel to a greater extent than others. He said there are some attorneys willing to take cases at the \$40/hour rate but that he was not impressed with their quality. He has started to get SPD on the record regarding their efforts to find attorneys. He recently asked in a case how many calls the SPD placed to lawyers and they said at least 45.

He finds himself in a bad position because he considers it to be un-American to hold people in jail without attorneys. At the same time, he does not want to release someone on to the streets if the person poses a serious threat to public safety. He therefore spends a “significant” amount of time assigning lawyers under the \$70 rate. He says he has a list of local attorneys that he knows simply “waits it out” by refusing the \$40/hr rate knowing that the judge will eventually call them to work at the \$70/hr rate.

We talked at length about why he thought other judges have been reluctant to talk to me. He said that it is all politics. No one wants to be the person out in front of this issue. He said, “I too don’t want to be the face of this issue.”

One other judge said that she is seriously considering conscripting the local bar to provide services pro bono.

- *Mixed state and local-funded services:* This classification includes all states that require local governments to share the funding costs of providing the right to counsel. This category includes states that provide almost all right to counsel funding as well as those where cities and counties shoulder the majority of funding. The thing that distinguishes the states in this category that provide less than half of all indigent defense funding from those in category C (below) is that the state governments in this classification spend a significant sum of money on trial-level services in a significant number of regions in the state.
- *Minimal or no state-funded services:* The states in this classification obligate their local governments to bear the vast majority of costs for indigent defense services while the state contributes minimal to no state funding. This includes those states that pay for all, or a portion of, indigent appellate services but leave all funding responsibilities for indigent trial-level services to its local governments.

Table 3. Right to counsel funding by state

Category	State				
A. State Funded 26 States (52%)	Alabama	Florida	Maryland	New Mexico	Virginia
	Alaska	Hawaii	Massachusetts	North Carolina	West Virginia
	Arkansas	Iowa	Minnesota	North Dakota	
	Colorado	Kentucky	Missouri	Rhode Island	
	Connecticut	Louisiana	Montana	Oregon	
	Delaware	Maine	New Hampshire	Vermont	
B. Mixed Funding 12 States (24%)	Georgia	New Jersey	Oklahoma	Texas	
	Indiana	New York	South Carolina	Wisconsin	
	Kansas	Ohio	Tennessee	Wyoming	
C. Minimal State Funds 12 States (24%)	Arizona	Illinois	Nebraska	Utah	
	California	Michigan	Pennsylvania	Washington	
	Idaho	Mississippi	South Dakota		

Twenty-six states (52%) relieve all local government of the financial burden to fund the right to counsel. Twenty-one states in this classification provide right to counsel funding through a state general fund appropriation.⁵⁵ Three of these states (Arkansas, Kentucky and Virginia) allow local

⁵⁵ Even this statement is not entirely accurate. Fourteen states have other (minimal) funding sources: 1) Arkansas: The Arkansas Public Defender Commission is state-funded except “[t]he cost of facilities, equipment, supplies, and other office expenses” and “additional personnel” beyond public defenders, secretaries, and support staff, which costs are borne by the counties. See ARK. CODE ANN. § 16-87-302; 2) Florida: Funding for all public defenders’ offices “shall be provided from state revenues appropriated by general law” and counties are not required to provide any funding other than for the local facilities, utilities, and communications services. FLA. CONST. art. V, § 14; 3) Kentucky: The funding for the Department of Public Advocacy (DPA) comes predominantly from the state general funds, but also from three special funds: court-ordered partial fees paid by clients who are financially able to pay toward the cost of their representation, KY. REV. STAT. ANN. §31.211 (West 2010); DUI services fees assessed on every person convicted of a DUI, KY. REV. STAT. ANN. §189A.050 (West 2010); and court costs of which DPA receives 3.5% capped at a maximum of \$1.75 million, KY. REV. STAT. ANN. §43.320(2)(f) (West 2010); 4) Massachusetts: The Committee for Public Counsel Services funding is a general appropriation, although a portion of the appropriation comes from fees assessed on indigent clients to defray the cost of public representation. MASS. GEN. LAWS ANN. ch. 211D § 2A (West 2010); 5) Minnesota: A general fund appropriation is augmented through a non-reverting special revenue fund that comes from fees assessed on indigent clients to defray the cost of public representation, MINN. STAT. ANN. § 611.20 (West 2012); 6) Missouri: Funding for all public defense services is provided through a general appropriation, except that cities and counties provide office space and utilities. MO. REV. STAT. § 600.040 (2015). There is also a “Legal Defense and Defender Fund” that holds receipts from fees assessed on indigent clients to defray the cost of public representation, which are used for designated defense-related expenses. MO. REV. STAT. § 600.090, .093 (2015); 7) Montana: Funding is predominantly through a general appropriation, but the state also has a special revenue fund that holds a public defender account that receives various assessments, MONT. CODE ANN. § 47-1-110 (2015); 8) New Mexico: Funding is through a general fund appropriation, N.M. STAT. ANN. § 31-15-5 (West 2010), plus a small Public Defender Automation Fund, N.M. STAT. ANN. § 31-15-5.1 (West 2010), that receives application fees collected from those seeking to have a public defender appointed, N.M. STAT. ANN. § 31-15-12.C. (West 2010); 9) North Carolina: Funding is through three line items in the general appropriation budget: the Indigent Defense Service fund; the Public Defender Service fund; and the Indigent Persons’ Attorney Fee Fund. Every person applying for counsel in trial-level criminal cases is also assessed a mandatory \$60 fee, of which \$55 is remitted to the state Indigent Persons’ Attorney Fee Fund. N.C. GEN. STAT. §§ 7A-455.1. Convicted clients who are capable of paying for some portion of their representation can be assessed a fee, which is collected by the local court and deposited to the state treasury. N.C. GEN. STAT. §§ 7A-455. A small amount of funds is collected by the county or municipal court as a facility fee, imposed as a cost assessed against criminal defendants, and the collected funds remain in the coffers of the locality to defray facility costs. N.C. GEN. STAT. §§ 7A-304(a)(2); 10) North Dakota: Funding is primarily through a general fund appropriation, though there is also a small special fund that receives money from court administration fees and indigent defense application fees; 11) Oregon: The state provides all funding, and 98% of that is through a general fund appropriation, while the remaining 2% is through the Public Defense Services Account, which is continuously appropriated to the Commission, OR. REV. STAT. ANN. § 151.225 (West 2013). The Public Defense Services Account receives: reimbursements from public defense services clients who are financially able to pay a portion of the cost of their representation, OR. REV. STAT. ANN. §§ 135.050(8), 151.487, 151.505, 419A.211, 419B.198, 419C.203, 419C.535 (West 2013); 12) Rhode Island: Funding is predominantly through a general appropriation, R.I. GEN. LAWS § 12-15-7 (2010), although the Office of the Public Defender is authorized to accept grants and funds from other than the state, which are deposited into a restricted receipt account for the use of the public defense system, R.I. GEN. LAWS § 12-15-5 (2010); 13) Vermont: The largest portion of the funding is through a general fund appropriation. Additionally, there is a Public Defender Special Fund that receives money from: indigent clients who are financially able are required to reimburse the state for their representation, VT. STAT. ANN. tit. 13 § 5238 (2015); and, a surcharge assessed against every person convicted of operating a vehicle under the influence of alcohol, VT. STAT. ANN. tit. 23 § 1210(j) (2015); 14) Virginia: Funding is provided by almost entirely from a general fund appropriation. Counties and cities may, but are not required to, supplement the compensation of the public defender attorneys. VA. CODE ANN. § 19.2-163.01:1 (2010). Convicted clients are assessed the cost of their representation as a cost of prosecution and collections go to the Commonwealth.

governments to augment state funding with local funding if they so choose.⁵⁶ Two other states use alternative revenue streams as their primary funding method (Alabama⁵⁷ and Louisiana⁵⁸), but do not require local governments to fund services.

Twelve states (24%) require shared funding for the right to counsel indigent defense services between state and local governments. Wisconsin is the only state that requires counties to fund indigent defense services when the state system has a conflict or is unable to secure private attorneys to take cases. Two states (Oklahoma and Tennessee) provide almost all funds for indigent defense representation, but each state has counties that fall outside of full state funding.⁵⁹

VA. CODE ANN. §§ 19.2-163, -163.4:1 (2010).

⁵⁶ In Kentucky, Jefferson County (Louisville) augments state funding of the right to counsel. Arkansas counties and municipalities both may augment state funding although only the city of Little Rock has chosen to do so. No Virginia counties contribute to indigent defense funding though they are statutorily allowed to augment state funds.

⁵⁷ Alabama assesses a filing fee in civil court matters that is collected in a central fund dedicated to indigent defense services ALA CODE § 12-19-251 establishes the “Fair Trial Tax Fund” (“Fund”). ALA CODE § 12-19-72 requires circuit and district courts to assess, collect and remit civil filing fees to the Fund in the following manner: a) For cases filed on the small claims docket of the district court in which the matter in controversy, exclusive of interest, costs, and attorney fees, totals one thousand five hundred dollars (\$1,500) or less, seventeen dollars (\$17) to the Fair Trial Tax Fund; b) For cases on the small claims docket of the district court in which the matter in controversy, exclusive of interest, costs, and attorney fees, exceeds one thousand five hundred dollars (\$1,500), twenty-one dollars (\$21) to the Fair Trial Tax Fund; and, c) For cases filed in circuit court, twenty-five dollars (\$25) to the Fair Trial Tax Fund. By statute, if the amount in the fund is insufficient to cover the annual costs of indigent defense representation, the difference must be covered by the state General Fund. ALA CODE § 12-19-252.

⁵⁸ The majority of funding for trial-level indigent defense services in Louisiana comes from non-governmental generated revenue in the form of court fines and fees. Each judicial district has a Judicial District Indigent Defender Fund that receives money collected by the courts within that jurisdiction from a \$45 fee assessed on convictions for all offenses other than parking violations and on bond forfeitures. La. Rev. Stat. Ann. §§ 15:168 (2015). Clients seeking appointed counsel are also assessed a nonrefundable \$40 application fee that deposits to the local Judicial District Indigent Defender Fund. La. Rev. Stat. Ann. §§ 15:175.A.(1)(f)-(h) (2015). Clients who are financially able may also be ordered to make reimbursement for their representation, and payments are deposited to the local Judicial District Indigent Defender Fund. La. Rev. Stat. Ann. §§ 15:176(2015). The funds deposited to the Judicial District Indigent Defender Fund are non-reverting and remain permanently within the judicial district where they are collected. La. Rev. Stat. Ann. §§ 15:168 (2015).

The single greatest revenue generator for indigent defense is a special court cost (currently \$45) assessed against every criminal defendant convicted after trial, pleads guilty or no contest, or who forfeits his or her bond for violation of a state statute or a local ordinance other than a parking ticket. The result is that the most significant funding for trial-level defense services in Louisiana comes from fees assessed on traffic tickets. There is no correlation between what can be collected through traffic tickets and the resources needed to provide effective representation. Reliance on fee-generated funding of public defense places law enforcement officers in the unenviable position of dramatically decreasing indigent defense revenue when they uphold public safety concerns. For example, a Louisiana Sheriff may determine it is in the community’s best interest to focus his own limited resources on the prevention of a particular type of crime (e.g., the spread of opioids or methamphetamines). Objectively, that decision to shift police personnel from traffic enforcement to drug prevention may be the exact best thing for public safety. At the very least, it is a public policy that local voters in Louisiana can either support or reject when re-electing a Sheriff in a future election. However, the rededication of police resources in such a hypothetical would result in a decrease in public defense revenue while contemporaneously causing an increase in the need for public defense attorneys to represent those accused of drug crimes. Putting law enforcement in this position simply makes no sense.

⁵⁹ Oklahoma County (Oklahoma City) and Tulsa County (Tulsa) fund their own indigent defense services. Services in the rest of Oklahoma are state-funded. Public defender offices in Davidson County (Nashville) and Shelby County (Memphis) receive some state funding but each county must contribute significant local funding as well. All other indigent defense representation in Tennessee is state-funded.

As the result of a class action settlement, another state (New York) provides all funding for trial-level services in five counties.⁶⁰ Two states (South Carolina and Wyoming) have state-administered indigent defense services but ask all of their counties to fund a portion of the cost.⁶¹ Two states (Kansas and New Jersey) split the cost of representation by case-type.⁶² In four states (Georgia, Indiana, Ohio, and Texas), counties are required to fund trial-level services, but the state then provides some amount of funding to reimburse some portion of the counties' costs.⁶³

⁶⁰ In October 2014, the State of New York settled a class action lawsuit, *Hurrell-Harring v. New York*, that alleged defendants were being deprived of their right to counsel in five upstate counties. As part of that settlement, the state is required to fund and administer defender services in those five counties. The state of New York also currently provides some limited resources to improve defender services in other counties through a centralized grant-making office.

In June 2016, the New York General Assembly and Senate both unanimously passed a bill to have the state of New York state reimburse its counties and New York City for all expenses for the right to counsel phased in over seven years: 25% in 2017; 35% in 2018; 45% in 2019; 55% in 2020; 65% in 2021; 75% in 2022; and full reimbursement as of April 1, 2023 and every year after. If signed by the Governor, New York will be reclassified as “state-funded” if and when that statutory promise is fulfilled.

⁶¹ The South Carolina Commission on Indigent Defense is a statewide, state-funded organization charged with overseeing the state’s delivery of indigent defense services. The commission hires and pays the salary of chief public defenders in the 16 state court circuits. However, although the circuit defenders are state employees, the assistant public defenders are employees of one of the counties within their circuits.

The Wyoming Office of the Public Defender (OPD) directs the delivery of all right to counsel services across the state. However, counties are statutorily required to reimburse the state 15% of costs based upon an equitable formula that takes into account such factors as population, property valuation, and level of serious crime. Thus, all indigent defense budget decisions occur at the state level.

⁶² Kansas pays for all appellate and felony representation while its counties pay for misdemeanor and juvenile delinquency representation. New Jersey funds appellate, felony and delinquency representation while municipalities fund misdemeanor representation.

⁶³ The Georgia Public Defender Standards Council (GPDSC) does not directly provide services to clients but rather it provides support of various types and serves as the fiscal officer for circuit public defender offices, GA. CODE ANN. § 17-12-6 (2015). Under certain circumstances, single county judicial circuits can elect to “opt-out” of the circuit public defender system and instead use an alternative delivery system if: (1) the existing system had a full-time director and staff and had been operational for at least two years on July 1, 2003; (2) GPDSC determined the system meets or exceeds standards; (3) the county submitted a resolution to the GPDSC by September 30, 2004 requesting to opt out; and (4) the county fully funds the system, though the Council will still provide some funds to that county. GA. CODE ANN. § 17-12-36 (2015).

Indiana reimburses those counties that opt to meet state-standards up to 45% of the cost of providing indigent defense representation in non-capital trial services (excluding misdemeanors) and 50% for capital trial services. However, thirty-seven of Indiana’s 92 counties do not choose to participate in the state’s non-capital case reimbursement program as of the end of 2015. And, while any county with an indigent death penalty case can apply for reimbursement of 50% of their defense expenses, only 43 counties have ever done so.

The Ohio State Public Defender (OSPD) provides direct representation in only non-death adult appeals and post-conviction cases. Trial-level services are the responsibility of the state’s 88 counties, though a county may opt to contract with the OSPD to provide these services (only 10 counties have done so). OSPD also reimburses counties up to 50% of the costs of providing trial-level representation.

The Texas Indigent Defense Commission (TIDC) disseminates state funding to counties to offset the cost of meeting TIDC standards. Additionally, TIDC has increasingly provided state funding for regional (multi-county) delivery systems for certain case-types. For example, the Lubbock Regional Capital Defender Office represents clients in death penalty cases in 94 counties scattered across the state. TIDC funds a regional defender office to handle adult felony and misdemeanor cases in Bee County, Live Oak County and McMullen County, while juvenile delinquency and mental health matters are still funded locally.

In twelve states (24%) there is negligible to no funding of trial-level services by the state, leaving local government to bear the vast majority of costs for indigent defense services. Three states (Idaho, Michigan and Utah) recently enacted statutes that when fully implemented will provide significant state money to local jurisdictions to meet state-imposed standards. Each of these three states will be re-classified as “mixed state and local-funded” states whenever implementation occurs.

Two states (Illinois and Mississippi) provide minimal funding for a minimal portion of trial-level indigent defense services while providing state-funded appellate services.⁶⁴ One state (Nevada) provides representation in counties that opt-into a state-run public defender office, though counties must still pay a significant portion of the cost of that program (80%).⁶⁵ Another state (Nebraska) has a limited state-funded office that provides direct representation in some capital trials, appeals, some serious non-capital felonies involving drugs and violent crime, and otherwise serves as a resource and training center for the county-based systems. Three other states (Arizona, California and Washington) provide no state funding of trial-level services but provide state funding for some other services.⁶⁶ Two states (Pennsylvania and South Dakota) provide no funding of any indigent defense representation.

State oversight

There are also three broad classifications for how states oversee right to counsel services:

- *Statewide commission*: States in this classification have one or more commissions or boards that oversee all indigent defense services for all case-types for all regions of the state.
- *Limited commission*: States in this classification have commissions or boards. However, those commissions either: a) oversee some, but not all, case-types; or, b) oversee some, but not all, regions of the state.
- *No state commission*: The states in this classification have no commissions overseeing any portion of indigent defense services.

⁶⁴ 55 ILCS 5/3-4004.2 requires Illinois counties with populations above 35,000 must maintain a county public defender office; 42 of the state’s 102 counties meet this threshold. The remaining 60 select whatever method they so choose. In counties maintaining public defender offices (whether compelled or by choice) the state covers 66.6% of the cost of the chief defender’s salary (55 ILCS 5/3-4007I).

The Mississippi Office of the State Public Defender (OSPD) houses an Office of Capital Defense Counsel that handles some trial-level capital representation.

⁶⁵ Currently only White Pine county and the independent city of Carson City participate.

⁶⁶ Arizona pays “a portion of the fees incurred” by a county when appointed counsel is designated to present a capital defendant in state post-conviction relief. California funds the representation of individuals in direct appeals and post-conviction proceedings, in both capital and non-capital cases. The state funded Office of Public Defense in Washington contracts with private counsel to provide direct representation in direct appeals and civil commitment cases, as well as dependency and termination of parental rights in a limited number of counties.

Table 4. Right to counsel oversight by state

Category	State				
A. Statewide Commission 20 States (40%)	Independent Commissions			Non-Independent	
	Connecticut	Massachusetts	New Mexico	Arkansas	Oregon
	Kentucky	Michigan	North Dakota	Colorado	West Virginia
	Louisiana	Minnesota	Utah	Hawaii	
	Maine	Montana	Virginia	Missouri	
	Maryland	N. Hampshire			
B. Limited Commission 15 States (30%)	Independent Commissions			Non-Independent	
	Idaho	Nevada	S. Carolina	Georgia	Oklahoma
	Indiana	North Carolina	Tennessee	Illinois	Wisconsin
	Nebraska	Ohio	Texas	Kansas	
	New York				
C. No Commission 15 States (30%)	Alabama	Delaware	Mississippi	Rhode Island	Washington
	Alaska	Florida	New Jersey	South Dakota	Wyoming
	Arizona	Iowa	Pennsylvania	Vermont	
	California				

Many states have created commissions and boards with the authority to promulgate and enforce standards.⁶⁷ However, not all commissions are created the same and not all offer the same amount of systemic protections to the indigent accused. For example, national standards⁶⁸ call

⁶⁷ For example, in 2014, a law was enacted banning the use of flat fee contracts in Idaho and creating the Idaho State Public Defense Commission (ISPDC). ISPDC is authorized to promulgate standards relate to attorney performance, attorney workload, and, attorney supervision, among others. All counties must comply with standards, without regard to whether they apply to the ISPDC for state financial assistance. The hammer to compel compliance with standards is significant. If the ISPDC determines that a county “willfully and materially” fails to comply with ISPDC standards, and if the ISPDC and county are unable to resolve the issue through mediation, the ISPDC is authorized to step in and remedy the specific deficiencies, including taking over all services, and charge the county for the cost. And, if the cost is not paid within 60 days, “the state treasurer shall immediately intercept any payments from sales tax moneys that would be distributed to the county,” and the intercepted funds will go to reimburse the commission. As stated in HB 504, the “foregoing intercept and transfer provisions shall operate by force of law.”

⁶⁸ The first of the American Bar Association *Ten Principles of a Public Defense Delivery System* explicitly requires that the “public defense function, including the selection, funding, and payment of defense counsel, is independent.” In the commentary to this standard, the ABA notes that the public defense function “should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel” noting specifically that “[r]emoving oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense.” The ABA *Principles* cite to the National Study Commission on Defense Services’ (NSC) *Guidelines for Legal Defense Systems in the United States* (1976). The *Guidelines* were created in consultation with the United States Department of Justice (DOJ) under a DOJ Law Enforcement Assistance Administration (LEAA) grant. NSC *Guideline 2.10* (The Defender Commission) states in part: “A special Defender Commission should be established for every defender system, whether public or private. The Commission should consist of from nine to thirteen members, depending upon the size of the community, the number of identifiable factions or components of the client population, and judgments as to which non-client groups should be represented. Commission members should be selected under the following criteria: The primary consideration in establishing the composition of the Commission should be ensuring the independence of the Defender Director. (a) The members of the Commission should represent a diversity of factions in order to ensure insulation from partisan politics. (b) No single branch of government should have a majority of votes on the Commission.”

for indigent defense commission members to be appointed from diverse authorities, such that no one branch of government can exert more control over the system than any other branch. Some commissions are more independent than others. There is a direct correlation between the extent to which states authorize commissions to hold state or local services accountable to state promulgated standards, and the quality of services rendered.

Twenty states (40%) vest the oversight of all indigent defense services with one or more statewide commission or board, though the composition and authority of those commissions vary greatly. Statewide commissions in fourteen of these states meet the national standard for independence while commissions in six states⁶⁹ do not.

Fifteen states (30%) have commissions with limited authority, although the degree of those limitations can vary widely.⁷⁰ Limited commissions in ten states meet the national standard for independence while limited authority commissions in five states⁷¹ do not.

Fifteen states (32%) have no state commission overseeing indigent defense representation.

Delivery of trial-level services

The “delivery of trial-level services” differs from “funding” in that the delivery model classifications are concerned with how services are organized and regardless of whether state or local government pays for those services. For example, a state may pay all costs of representing the indigent accused but leave local governments or local courts responsible for the manner in which those services are delivered (public or private attorneys) and/or operated (i.e., on a court-by-court basis or on a multi-county, regional basis). Conversely, a state may require local governments to help pay for Sixth Amendment services but gives the choice of delivery system and the responsibility for daily management of trial-level services entirely with the state.

There are three broad classifications for how states administer right to counsel trial-level services:

- *State-run services*: This classification is defined as those states that relieve its local government and courts of all responsibility for administering trial-level right to counsel services.

⁶⁹ In four of the states the governor makes all appointments (Arkansas, Hawaii, Missouri, and, West Virginia) In two states (Colorado and Oregon) the judicial branch makes all of the appointments.

⁷⁰ One state (North Carolina), for example, has very broad authority to set and enforce standards, but other state and local entities may infringe on that power. The North Carolina commission has apparent broad authority to oversee both primary and conflict services. Despite this the authority to change local delivery service models statutorily requires a legislative act after input from local actors (county bar associations, judiciary, etc.). Additionally, the presiding judge of the Superior Court in the North Carolina district has the authority to hire the local chief public defender. Seven states have commissions that oversee only a part of services statewide. These may be commissions that oversee representation in some counties or regions or commissions that oversee a certain case-type (e.g., direct appeals). The seven states are: Idaho (trial-level only); Illinois (appellate only); Kansas (felony and appellate only); Nebraska (capital trials/appeals and limited non-capital felonies); Nevada (rural counties only); Oklahoma (rural counties only); and Tennessee (capital post-conviction only). Six states (Georgia, Indiana, New York, Ohio, South Carolina, and Texas) have commissions that offer state support to county-based systems.

⁷¹ The governor appoints all commission members in four states (Georgia, Kansas, Oklahoma, and Wisconsin). The judiciary appoints the members of Illinois’ limited authority commission.

- *Mixed state and local-run services:* This classification includes all states that require the shared administration of indigent defense services with state and local governments. This includes states with a state-run agency for certain case-types (felony), but where local government administers other case types (misdemeanor). Also included in this classification are those states where a state-run agency administers indigent defense services in certain regions of the state, but where local governments administer defender services in all other regions.
- *Minimal or no state-run services:* The states in this classification obligate their local governments to administer the vast majority of indigent defense services. This includes those states that may administer all, or a portion of, indigent appellate services but leave all administration of indigent defense trial-level services to its local governments.

Table 5. Delivery of trial-level services by state

Category	State				
A. State-run services 23 States (46%)	Alaska	Hawaii	Massachusetts	New Mexico	Virginia
	Arkansas	Iowa	Minnesota	North Dakota	West Virginia
	Colorado	Kentucky	Missouri	Oregon	Wyoming
	Connecticut	Maine	Montana	Rhode Island	
	Delaware	Maryland	New Hampshire	Vermont	
B. Mixed-run services 8 States (16%)	Florida	New Jersey	New York	Ohio	
	Kansas	Nevada	Oklahoma	Wisconsin	
C. Local-run services 19 States (38%)	Alabama	Idaho	Michigan	Pennsylvania	Texas
	Arizona	Illinois	Mississippi	South Carolina	Utah
	California	Indiana	Nebraska	South Dakota	Washington
	Georgia	Louisiana	North Carolina	Tennessee	

Whether indigent defense trial-level services are organized at the state or local-level, or a combination of both, has less of an impact on the quality of services as either state-funding or state oversight of services.

Twenty-three states (46%) administer all trial-level indigent defense services at the state-level. Twenty states⁷² vest a single public defense agency with the administration of all indigent defense services (both primary and conflict) for all case-types.⁷³ Two states (Alaska and Colorado) have two separate state public defense agencies, one for primary services and one for conflict services. One state (Rhode Island) has a state-administered public defender office for primary services. Conflict representation is provided by a panel of private attorneys, paid hourly on a per-case basis, and administered by the Rhode Island Supreme Court.

⁷² Arkansas, Connecticut, Delaware, Hawaii, Iowa, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, New Hampshire, New Mexico, North Dakota, Oregon, Vermont, Virginia, West Virginia, and Wyoming.

⁷³ All case-types include: appellate, felony, misdemeanor, juvenile delinquency and, if applicable, state civil right to counsel cases (e.g., termination of parental rights, children in need of services, etc.).

Eight states (16%) have mixed state and local-run indigent defense services. Wisconsin would be classified as state-run services but for the representation provided by counties when the state-system has a conflict and cannot secure a private attorney to take the case. Two states (Kansas and New Jersey) split the administration of trial-level services representation by case-type.⁷⁴ Four states (Nevada, New York, Oklahoma and Ohio) administer trial-level representation for a portion of their counties.⁷⁵

One state (Florida) elects chief public defenders on a circuit basis that have sole authority for the operations of primary right to counsel services in each circuit and is therefore considered to have local-administration. Florida's conflict trial-level representation is shared between the state and the local courts. Five state-run regional conflict defender offices covering each of the state's five appellate jurisdictions provide representation when a circuit public defender has a conflict. Tertiary representation is provided by private attorneys paid on an hourly basis or under contract to the local judiciary.

Nineteen states (38%) administer trial-level indigent defense at the local level. Thirteen states require local government to administer all services.⁷⁶

COMPARING HOW ASSIGNED COUNSEL COMPENSATION IS RAISED IN ALL 50 STATES

Taking into account indigent defense service funding, administration, and state oversight, there are 27 possible permutations that states can use to implement their Sixth and Fourteenth Amendment obligations.⁷⁷ If states were spread out evenly over these classifications it would

⁷⁴ Kansas administers all appellate and trial-level felony representation while its counties administer all misdemeanor and juvenile delinquency representation. New Jersey manages all appellate, felony and delinquency representation while municipalities operate misdemeanor trial-level representation.

⁷⁵ Nevada administers public defender services in those counties that opts-into the state systems and agrees to share the costs. New York administers services in five counties. Oklahoma provides services for all rural counties outside of Oklahoma City and Tulsa. Ohio provides services to those counties opting to have services administered by the state.

⁷⁶ Arizona, California, Idaho, Illinois, Indiana, Michigan, Mississippi, Nebraska, Pennsylvania, South Dakota, Texas, Utah, and Washington.

⁷⁷ State-funded, state administered services under a commission; 2) State-funded, state administered services under a limited commission; 3) State-funded, state administered services under no commission; 4) State-funded, mixed administered services under a commission; 5) State-funded, mixed administered services under a limited commission; 6) State-funded, mixed administered services under no commission; 7) State-funded, local administered services under a commission; 8) State-funded, local administered services under a limited commission; 9) State-funded, local administered services under no commission; 10) Mixed-funded, state administered services under a commission; 11) Mixed-funded, state administered services under a limited commission; 12) Mixed-funded, state administered services under no commission; 13) Mixed-funded, mixed administered services under a commission; 14) Mixed-funded, mixed administered services under a limited commission; 15) Mixed-funded, mixed administered services under no commission; 16) Mixed-funded, local administered services under a commission; 17) Mixed-funded, local administered services under a limited commission; 18) Mixed-funded, local administered services under no commission; 19) Local-funded, state administered services under a commission;

make comparisons virtually meaningless. However, states fall into six broad categories:

Table 6. Comparison of states by oversight, funding, and administration

Category	State					
A. State Funded, State Administered 21 States (42%)	Independent Commissions			Non-Independent		No Comm'n
	Connecticut	Mass.	New Mexico	Arkansas	Oregon	Alaska
	Kentucky	Minnesota	North Dakota	Colorado	W. Virginia	Delaware
	Maine	Montana	Virginia	Hawaii		Iowa
	Maryland	New Hamp.		Missouri		Vermont
B. State Funded, Mixed Administered 2 States (4%)	Statewide Commission			Limited Commission		No Comm'n
						Florida Rhode Island
C. State Funded, Local Administered 3 States (6%)	Statewide Commission			Limited Commission		No Comm'n
	Louisiana			N. Carolina		Alabama
D. Mixed Funded, State Administered 1 State (2%)	Statewide Commission			Limited Commission		No Comm'n
					Wyoming	
E. Mixed Funded, Mixed Administered 17 States (34%)	Statewide Commission			Limited Commission		No Comm'n
	Michigan	Nevada	Utah	Georgia	Oklahoma	Mississippi
				Idaho	Ohio	New Jersey
				Illinois	S. Carolina	
				Indiana	Tennessee	
				Kansas	Texas	
				New York	Wisconsin	
F. Local Funded, Local Administered 6 States (12%)	Statewide Commission			Limited Commission		No Comm'n
				Nebraska		Arizona
						California
						Penn.
						S. Dakota
						Washington

Now that comparison state categories are established, the question becomes how best to compare assigned counsel compensation. Again, further explanation is needed.

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

20) Local-funded, state administered services under a limited commission; 21) Local-funded, state administered services under no commission; 22) Local-funded, mixed administered services under a commission; 23) Local-funded, mixed administered services under a limited commission; 24) Local-funded, mixed administered services under no commission; 25) Local-funded, local administered services under a commission; 26) Local-funded, local administered services under a limited commission; and, 27) Local-funded, local administered services under no commission.

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.

It appears that all states have some sort of default fallback provision that allows a judge, in the interests and necessity of justice, to directly appoint a private attorney and pay that attorney something reasonable. This memo does not attempt to identify the authority upon which judges are allowed to do that in every state.

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.

State-Funded, State Administered (21 states)

Eighteen states allow the state run public defense 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 (per TC).
- 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 (per TC).
- 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 (per TC).
- 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 (per TC).
- 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, standard 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, standard 8 (Fall 2017) (proposed).
- New Jersey – \$60 hourly rate in court and \$50 out of court, with maximum 9 hours billing daily and 1500 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, paid by counties when state cannot get attorneys at the \$40/hour rate. 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).

ANALYSIS OF HOW STATES CHANGE COMPENSATION RATES

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.

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 with little or no state involvement in right to counsel services have the least protections to ensure that assigned counsel attorneys are paid a reasonable rate.

There is one notable exception to all of this: South Dakota. All right to counsel services in South Dakota are provided by the counties and cities. The State of South Dakota has no involvement in the oversight of indigent defense services and very limited involvement in the funding of the right to counsel. The vast majority of South Dakota’s counties rely on private attorneys for indigent defense services, with only three counties electing the public defender model [in Lawrence County (Spearfish), Minnehaha County (Sioux Falls), and Pennington County (Rapid City)]. 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 has stepped 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).

Moreover, the South Dakota Court has interpreted the all this to ban the practice of flat fee contracting. This makes at least four states that have banned the type of contracts that cause conflicts of interest between the indigent defense attorney’s financial self-interest and the legal interests of the indigent defendant, including:

- *Idaho*. County commissioners may provide representation by contracting with a defense attorney “provided that the terms of the contract shall not include any pricing structure that charges or pays a single fixed fee for the services and expenses of the attorney.”⁷⁸
- *Michigan*. The Michigan Indigent Defense Commission is statutorily barred from approving local indigent defense plans that provide “[e]conomic disincentives or incentives that impair defense counsel’s ability to provide effective representation.”⁷⁹
- *Washington*. The Washington *Rules of Professional Conduct* decree that “A lawyer shall not: (1) make or participate in making an agreement with a governmental entity for the delivery of indigent defense services if the terms of the agreement obligate the contracting lawyer or law firm: (i) to bear the cost of providing conflict counsel; or (ii) to bear the cost of providing investigation or expert services, unless a fair and reasonable amount for such costs is specifically designated in the agreement in a manner that does not adversely affect the income or compensation allocated to the lawyer, law firm, or law firm personnel.”⁸⁰
- *Nevada*. Announcing that the “competent representation of indigents is vital to our system of justice,” the Nevada Supreme Court banned the use of flat fee contracts that fail to provide for the costs of investigation and expert witnesses and required that contracts must allow for extra fees in extraordinary cases.⁸¹

CONCLUSION

The Sixth Amendment to the U.S. Constitution was created to prevent the tyrannical impulses of big government from taking away an individual’s liberty without the process being fair. It does not solely apply in good economic times.

Despite this, there is some evidence that financial considerations may have trumped the constitutional imperative for independent, conflict-free representation in Wisconsin. In 2011, the Wisconsin Court expressed concern about the adequacy of assigned counsel fees in the context of a petition to amend Supreme Court Rule 81.02. The Petition asked the Court to increase the court-appointed rate to \$80, tie it to the Consumer Price Index, and provide that SPD-appointed rates be not less than the Rule 81.02 rates.⁸² Despite the Court’s “sincere concern” and

⁷⁸ IDAHO CODE § 19-859 (2015).

⁷⁹ MICH. COMP. LAWS § 780-991(2)(b) (2016).

⁸⁰ Washington R.P.C. 1.8(m)(1) (as amended through Sept. 2015).

⁸¹ Order, *In re Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases*, ADKT No. 411 (Nev. filed July 23, 2015).

⁸² *Id.*

recognition of the “extensive anecdotal evidence” that “shortfalls may compromise the right to effective assistance of counsel”⁸³ in Wisconsin, the Court denied the petition, in part, because of “a particularly challenging budgetary environment” for the legislature.

If the Court is worried about separation of powers concerns, it need not be. The Court has inherent power to ensure the effective administration of justice in the State of Wisconsin.⁸⁴ Although the legislature holds the power to pass budgets, an expenditure policy that creates a financial conflict of interest in which the constitutional right to counsel is compromised cannot be allowed to stand. The Court should not fear that passing a court rule increasing pay will necessarily result in forcing the legislature to expend more money. The Wisconsin legislature can, for instance, work together to increase the reliance on diversion that could move juvenile and adult defendants out of the formal criminal justice system and provide help with potential drug or other dependencies. Similarly, lawmakers can change low-level, non-serious crimes to “citations” — in which the offender is given a ticket to pay a fine rather than being threatened with jail time thus triggering the constitutional right to counsel.⁸⁵ By shrinking the size of the criminal justice system, Wisconsin’s funding requirements under the right to counsel could be mitigated, even with increased rates of pay for attorneys.

It is easy for policymakers, especially in hard economic times, to say that they do not want to give more taxpayer resources to lawyers. But if the failure to pay a reasonable rate creates financial conflicts of interests that result in lawyers triaging the Sixth Amendment duty they owe to some clients in favor of others, then Wisconsin is in violation of the U.S. Constitution — a situation the policymakers may want to address to avoid costly systemic litigation.

⁸³ *Id.*

⁸⁴ See, e.g., *State ex rel. Friedrich v. Circuit Court for Dane County*, 192 Wis. 2d 1, 531 N.W.2d 32 (1995).

⁸⁵ For example, jurisdictions in Washington State have developed diversion programs for suspended driver license cases, resulting in reducing caseloads by one-third. See, Robert C. Boruchowitz, *Fifty Years After Gideon: It is Long Past Time to Provide Lawyers for Misdemeanor Defendants Who Cannot Afford to Hire Their Own*, 11 SEATTLE JOURNAL FOR SOCIAL JUSTICE 891, 922 (2013).

APPENDIX

ATTEMPTED DATA COLLECTION

Throughout the process of researching and drafting the original Justice Shortchanged report, the Wisconsin Association of Criminal Defense Lawyers (WACDL) attempted to secure data for review by the Sixth Amendment Center (6AC). Those efforts eventually proved fruitless because of a perceived lack of cooperation by the State Public Defender (SPD). Below is a timeline of the data collection efforts based on a review of email communications:

- In 2014, WACDL worked with Court Data Technologies (CDT) to determine what data was publicly-available. WACDL Board wants to compare five categories of attorneys across four types of cases:
 - o The attorney categories are: (1) SPD staff, (2) SPD private bar, 3) privately retained attorneys, 4) pro-se defendants and 5) Dean appointments.
 - o The case types are: 1) second degree sexual assault (all varieties) 2) Misdemeanor Battery - domestic violence 3) Delivery of THC and 4) Class H & I felonies (focus on whether expungement (expunction) was ordered.
 - o With regard to the other three case types, want to analyze: was there a trial, and the outcome; was there a plea to the original charge(s) or an amended charge(s); finally, look the sentencing of those three case types - i.e. probation, jail, prison.
- By the end of 2014, Court Data Technologies determines that the data initiative cannot happen without obtaining SPD data.
- In January 2015, WACDL emailed the SPD asking for SPD to send data directly to CDT. Data needed is summarized as follows:
 - o For all cases appointed by the SPD from the start of TIS II (2/1/2003) to the present:
 1. Name
 2. Case Number
 3. Defendant name
 4. Bar numbers of all Attorneys and dates of representation;
 5. Whether that bar number is a Staff or private bar attorney
- After initial decision to make data available to CDT/WACDL issues begin to arise.
- In February 2015 WACDL is told that SPD will not give them client names or case numbers. SPD will not include the CCAP case numbers. SPD will apparently give WACDL everything else in their system. CDT indicates it has identified a work-around using the SPD internal case number.
- By March 2015, WACDL still did not have the data. A March 4, 2015 email from SPD to WACDL, responding to “multiple phone calls” stated: “ We are working on it as quickly as possible. It is not an easy task to pull over a decade’s worth of data, particularly with only 1 out of 4 IT staff who is able to access the data. Yesterday morning Devon and I met with the IT staffer to make sure he is pulling the right fields. It looks like he is on the right track in compiling the necessary data.”
- On a March 6, 2015 phone call between CDT and WACDL, CDT describes in an email the

need for the SPD internal case number as critical for the work-around that CDT will use to analyze the data, critical because it contains coding for the attorney assigned to the case (staff vs assigned counsel) Since the SPD internal case number is only used in the SPD database, it can't be used to identify the defendant in any way, and therefore is considered "safe".

- On March 23, 2015 an email from WACDL to CDT describing a meeting that day with SPD, stated that SPD has pulled 20 fields from data in Dane County as a "preliminary sample" to prove usability. WACDL writes: "The SPD is worried about the largely theoretical possibility that someone could trace the SPD file number back to an individual client if they disclosed the whole number. WACDL argued that that was far-fetched, and they said that they have pulled other fields that have the other, non-confidential information (County, staff vs. private and case type), and they are willing to give those to us." WACDL asks in the meeting if SPD could provide SPF file numbers with the last portion redacted (the sequential file number that appears to be of concern to SPD) SPD states that they thought they could do that easily enough.
- The back and forth continues and the 6AC publishes Justice Shortchanged with this data to analyze (May 2015).
- After the publication of the report, SPD makes data available in June 2015.
- WACDL engages CDT to conduct a data analysis on the SPD data. Although, CDT has received data from SPD, SPD substituted a random file number that ties counts of single cases together rather than using the SPD internal file number with coding., CDT to WACDL tells them that they cannot use the data for analysis.
- In July 2015, SPD relates that it does not want to release any case identifier, since that potentially could expose client confidentiality. CDT responds that this is confusing logic, since case numbers and defendant names are public record, even for cases handled by the SPD. The only thing CDT can't get from public records is the attorney categorization (staff vs assigned counsel). CDT comes up with the idea of providing the case numbers to SPD -- so there is no reveal of this information by SPD - and SPD would simply match the provided case numbers with an attorney category.
- By August 2015, WACDL advises SPD that the randomized file number prevents the analysis WACDL is trying to do. WACDL proposes that WACDL provide SPD with case numbers, and that SPD simply return the case numbers with an attorney category: "Maybe there is a work-around that preserves client confidentiality and gets WACDL what it needs." WACDL can generate a list of specific cases by county and circuit court case number. It might run to a million cases over a term of 10-years but should be relatively simple to query in eOPD. If we were to generate that list and get it you, your IT people could write a query to answer for each case whether the SPD:
 1. appointed a staff lawyer;
 2. appointed a private attorney;
 3. appointed to a contractor; or
 4. did not appoint.

Would this be acceptable to the SPD?"
- Later that month, SPD asks for a one year-one county sample of the data that WACDL would provide. Three hours later, CDT provides WACDL with the sample Excel file with three columns: county name, county number (e.g. Milwaukee 40) and case number (e.g.

2015CF1234) which is sent to SPD.

- In September 2015 SPD informs WACDL that after internal consultation, “Answering the question via the spreadsheet example spreadsheet you sent appears to us as still a confidentiality issue.”
- Although WACDL and CDT thinks their last offer was simple and straight forward (“We give you a case number, you tell us if the attorney was staff or assigned, or not SPD. What is confidential about that?”) WACDL suggest to SPD that they would sign a non-disclosure agreement. Whatever “ethics” are involved with disclosing this information, it does not mean that people do not see this information. Lots of people have access to this information, they just agree not to make it public.
- This too is not acceptable to SPD and the data project is officially terminated in November 2015.

When the Supreme Court of Wisconsin voted to proceed with a public hearing on assigned counsel compensation rates at its open hearing on June 21, 2017, the 6AC put forth another proposal to WACDL detailing the data likely needed to convince the Court to raise the rates. It was our opinion that the Court likely will not declare the current rate unreasonable unless it has hard evidence that the low rate is affecting the representation provided. We proposed the following data efforts:

The petitioners need to establish firm evidence that there are fewer lawyers willing to take cases. SPD should gather annual data over a 10-year time frame showing the attorneys willing to take cases and which county panel lists these attorneys are on. Also, this effort needs to identify attorneys removed for disciplinary reasons (as opposed to removing their names from panels voluntarily) and any known disciplinary actions and IAC litigation against current panel attorneys.

Simultaneously, SPD should establish the following annual data points over the same 10-year time period, by county:

- Total number of indigent defense cases by case type (felony, misdemeanor, and delinquency);
- Number of indigent defense cases represented by SPD by case type;
- Number of indigent defense cases represented by assigned counsel at \$40/hour rate or lower by case type;
- Number of cases where the defendant was determined not indigent by SPD and represented by \$70/hour county-paid attorney by case type;
- Number of cases where defendant proceeded pro se by case type; and
- Number of cases where defendant retained an attorney by case type.

These data sets will help establish that certain counties are being forced into a choice of either paying \$70 per hour when SPD cannot provide counsel, or actually denying counsel to indigent defendants altogether. Currently available information suggests that the latter option is far more common.

In June 2017, Measures for Justice released initial data for the years 2009-2013, indicating that on average in Wisconsin: a) 3.16% of all people pleading guilty to a felony do so without an attorney⁸⁶; and b) 28.91% of all people pleading guilty to a misdemeanor do so without a lawyer.⁸⁷ However, the two large metropolitan areas of Madison and Milwaukee significantly skew these averages. When one looks at northern Wisconsin, in particular, the numbers are alarming. For example, more than half (52.75%) of all misdemeanor defendants in Burnett County plead guilty without a lawyer.⁸⁸ In Bayfield County, 30.51% of felony defendants plead guilty without a lawyer.⁸⁹

If petitioners can prove that attorneys who were once willing to take cases in the northern part of the state are no longer willing to travel at the current rate and that has resulted in the actual denial of counsel, the Court may be willing to declare the rates unreasonable.

However, this data initiative hit the same hurdles as earlier efforts. First, Measures for Justice were unwilling to share data with us. Thus, the efforts had to be duplicated by CDT.

In July 2017, the 6AC first contacted SPD with data requests. There were delays associated with other priorities and a focus on working with counties to get \$70/hour case information. In early December 2017, the 6AC formally requested that SPD provide:

Total number of cases by county that were handled by SPD by case type for each year from 2014 through 2016. Ideally, you could breakdown the SPD numbers into two broad categories: those cases handled by staffed attorneys and those cases handle by assigned counsel. “Case type” should be defined as top charge at the time of arraignment (not disposition). Also, I understand that the attorney of record may change during the life of a case (e.g., if a conflict is found late or if the defendant retains counsel after initial appointment). To remain consistent, the “attorney type” (I.e., public defender or assigned counsel) should be the attorney of record at the start of the case.

In mid-December the 6AC was told by SPD that the request could be filled “in relative short order.” The data was received in February 2018. However, the 6AC was not able to use the data as we intended. A concerted effort should be made in Wisconsin to ensure that courts are collecting uniform indigent defense data about all public defense providers regardless of how they are paid and reporting it to a central publicly-available repository.

⁸⁶ MEASURES FOR JUSTICE, *Guilty Plea Without Attorney in Felony Cases, Wisconsin*, <https://measuresforjustice.org/portal/exploration?!=WI&m=42> (last visited Jun. 28, 2017).

⁸⁷ MEASURES FOR JUSTICE, *Guilty Plea Without Attorney in Misdemeanor Cases, Wisconsin*, <https://measuresforjustice.org/portal/exploration?!=WI&m=15> (last visited Jun. 28, 2017).

⁸⁸ MEASURES FOR JUSTICE, *Guilty Plea Without Attorney in Misdemeanor Cases, Wisconsin*, <https://measuresforjustice.org/portal/exploration?!=WI&m=15&sl=WI007&sm=15&fg=1&f=1&c=m&p=WI007&md=0&ref=15.1> (last visited Jun. 28, 2017).

⁸⁹ MEASURES FOR JUSTICE, *Guilty Plea Without Attorney in Misdemeanor Cases, Wisconsin*, <https://measuresforjustice.org/portal/exploration?!=WI&m=15&sl=WI013&sm=15&fg=1&f=1&c=m&p=WI013&md=0&ref=15.1> (last visited Jun. 28, 2017).



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