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Supreme Court Petition 10-03 regarding SCR 81.02

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Good morning. My name is John Birdsall and I represent the Wisconsin Association of Criminal Defense Lawyers (WACDL) - a statewide organization of defense attorneys dedicated to the administration of justice, representation of the accused and protecting constitutionally guaranteed rights.

As a former president and current Chair of our Special Committee on Indigent Defense Funding, I have spent hundreds of hourts during 2010 working to educate policymakers on the need for prompt action to raise the rate paid to assigned counsel who take appointments from the State Public Defender's Office (SPD). In that capacity, I have had the opportunity to speak with not only legislators but also countless judges, prosecutors and other defense counsel about the urgency of the situation particularly as it relates to poorly represented clients.

As a private practice criminal defense attorney for nearly 20 years, I am naturally hesitate to speak ill of the performance of any colleagues. But it is clear to me and my organization that the abysmal rate mandated by law - which is only a few dollars more than the $35/hour paid when the SPD was created - has resulted in widespread injury to the interests of far too many clients.

While the petition before the court deals, appropriately, with the "reasonableness" of the rate paid through court appointments, it is tied directly to the SPD rate. More importantly, the performance of counsel who accept SPD and Dean appointments as a primary business model are so constrained by the rate that client's interests are commonly compromised.

The idea behind the petition is simple: higher pay for appointed counsel in criminal cases - aside from the obvious fairness of it all - will result in higher quality and more competent representation. To be frank about the state of affairs regarding indigent representation in this state - many on the assigned counsel list and those receiving "Dean" appointments have become plea machines. While that is certainly efficient for the courts, it is not what the true administration of justice is really about. To put it bluntly, poor citizens accused of crimes deserve - indeed, have the 6th Amendment right - to be represented with the same effectiveness as those rich enough to hire their own lawyer.

The pressure is high for appointed counsel to resolve cases with early pleas because of the low rate they are paid. This is compounded by the annual problem of shortfalls in funding that results from the insufficient funding requests to the legislature. It is typical for the SPD's

assigned counsel division to run short of funds well short of the end of a bienium - anywhere from 3-7 month during which time no vouchers are paid unless "emergency" funding is approved. One cannot expect these business owners to conduct thorough investigations, interview experts and witnesses or conduct jury trials when they are in danger of going out of business.

Unfortunately, many of these attorneys are solo practitioners - a/k/a small business owners - who, to the extent that they have an office at all, simply can't meet their overhead demands and still do competent work on criminal cases. The net affect of this is that of the 1500 attorneys on the assigned counsel list, only a small fraction regularly take cases and, of those, many are very young and inexperienced. Whether old or young, if we look at the performance of many on the list honestly, they are unable to meet the basic levels of competence that our ethical rules and the constitution require due to the rate mandated by law.

By "competent," I am not talking, necessarily, about *Strickland* type ineffective assistance of counsel. Most of the rate-induced poor representation never rises through the appellate courts since much of it is at the misdemeanor or lower felony level. "Competence" is directed, rather, at representation that falls markedly below both Wisconsin's ethic duties of diligence (SCR 20:1.3)[1], competence (SCR 20:1.1)[1], communication (SCR 20:1.4)[2] and conflicts of interest (SCR 20:1.7)[3].

These rules, couched in "reasonableness" terms, are difficult to quantify. However, we can take direction from national standards such as the ABA Criminal Justice Standards: Defense Function[4]. A criminal defense lawyer is expected to meet these standards whether they are public defenders, assigned counsel or privately retained - regardless of the amount of money paid to the attorney or his/her workload. This includes, in addition to the above duties, an unequivocal duty to investigate (Standard 4.1),[5] to avoid financial conflicts (Standard 3.5 (a)),[6] or coerce a client into taking a "deal." (Standard 5.1(b)).[7]

In each of these areas, the economic necessity to move cases to completion vastly undercuts the attorneys above obligations to the client. It is a common sight in most Wisconsin courtrooms - particularly in larger urban areas - to see lawyers meeting their appointed clients just minutes before court. Not having prepared properly or spending more than a few hurried minutes talking to the client and/or the family, the attorney goes through a few well-worn talking points about court procedure. The client, usually, wants to talk about the case - witnesses they want interviewed, special circumstances, things the witnesses or police got wrong or even lied about. The rushed lawyer oftentimes takes no note of these or pays lip service assuring the client that all of his/her concerns will be addressed.

In reality, they never are because the focus is on resolving cases. The simple fact is that private practitioners relying on appointed cases often feel that they cannot afford the time to

conduct jury trials even when the client wants it. This is mostly out of economic necessity.. The annual overhead per Wisconsin attorney, according to a 2008 State Bar survey, averages $89,981.00 with solo practitioners averaging $60,383. Assuming full time dedicated work of 2000 *billable* hours per year, the attorney has $30.19 of overhead per *billable* hour for an annual pre-tax income of $19,600.00. Obviously the $40.00/hour earned on an appointed case is not going to suffice if the attorney wants to earn a living. Moreover, the attorney would likely need to work several hundred additional hours on office tasks such as accounting, bar activities and other administrative matters - further reducing his/her hourly income. This also leave little to no time for family life, vacation or community involvement.

I am unable to reference for the court a Wisconsin specific study that directly correlates the low rate paid assigned counsel to incompetent representation because none exists. However, anecdotal evidence abounds. While not obvious to the lay person, those prosecutors, judges and defense counsel who are well versed in criminal practice see this level of representation every day. And all of these players in the resource poor system pay the price when allegations are made about a lawyer "working with the DA," never returning calls, never visiting the client in jail, not interviewing witnesses, not showing the client any police reports, not retaining experts when needed, and giving misinformation about what a likely "deal" or ultimate sentence will be.

The result is *Machner* hearings that tie up trial courts and ineffective assistance of counsel appeals that clog appellate dockets. Worse, there is the damage to the client's interests - who expect, at a minimum, to have a meaningful day in court. In addition, the long term damage to the reputation of the profession and the legitimacy of the court system itself should be of concern to us all. I can tell this court that my practice is statewide and I have seen first hand the above scenario in courts in small counties and large. From the overloaded courts in Milwaukee, Dane and Brown counties to the less congested ones in Pepin, Green, Marinette, Sheboygan and Kenosha.

I can also represent that is my efforts over the past year to have WACDL take a stand on this issue, that countless judges have commented on the poor quality of representation they see at the trial court level in too many appointed cases. Sadly, however, to most people, $40/hour sounds like a lot of money. Thus, the rate has not been changed since 1995 - when it was cut from $50/hour in court and $40/hour out of court to the current flat rate of $40/hour. Those of us in the business of helping citizens accused of crimes know that with even minimal overhead you would either eke out a living or operate at a loss if appointed cases are a significant portion of your practice. Thus, the lack of contact, rushed meetings and arm-twisting pleas.

This court is in the unique position to review and amend its own rate and, in the process, send a message that this third branch of our government, in discharging it's duties to administer Wisconsin's court system, will not tolerate a serious deterioration of our constitutional and ethical obligations to citizens accused of crimes.

Thank you.

1. " A lawyer shall act with reasonable diligence and promptness in representing a client." Comment: "A lawyer must also act with commitment and dedication to *the interests of the client* and with zeal in advocacy upon the client's behalf."

2. " (a) A lawyer shall:

(1) Promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in SCR 20:1.0(f), is required by these rules;

(2) *reasonably consult with the client about the means by which the client's objectives are to be accomplished*;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests by the client for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) *A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation*."

Comment: " [3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives." and " [5] *The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued*, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. *For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement*."

3. "(a) Except as provided in par. (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) *there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a* ***personal interest*** *of the lawyer*.

(b) Notwithstanding the existence of a concurrent conflict of interest under par. (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in a writing signed by the client."

4. ABA Standards for Criminal Justice, Third Edition: Prosecution Function and Defense Function, 1993.

5. (a) "Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the

prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.

(b)Defense counsel should not seek to acquire possession of physical evidence personally or through use of an investigator where defense counsel's sole purpose is to obstruct access to such evidence."

6. (a) "Defense counsel should not permit his or her professional judgment or obligations to be affected by his or her own political, financial, business, property, or personal interests."

7. "(b) Defense counsel should not intentionally understate or overstate the risks, hazards, or prospects of the case to exert undue influence on the accused's decision as to his or her plea."