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September 28, 2010

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CLERK OF SUPREME COURT
OF WISCONSIN

Ms. Carrie Janto
Deputy Clerk
Clerk of Supreme Court
P O Box 1688
Madison WI 53701-1688

Re: Rule Petition No. 10-03

Dear Ms. Janto:

I am the Executive Director of Legal Action of Wisconsin, a poverty law firm which represents, in civil cases, poor people in the southern 39 counties of Wisconsin, elderly persons in 6 southeastern counties, and migrant farmworkers statewide. Legal Action of Wisconsin supports the rule amendment requested in Rule Petition No. 10-03: Changing the hourly rate of compensation for court-appointed lawyers to \$80, adding provisions indexing that rate to the Consumer Price Index, and specifying that the payment of an hourly rate less than the rate set forth in SCR 81.02(1) for legal services rendered pursuant to appointment by the State Public Defender under Wis. Stat. §977.08 is unreasonable.

In both civil and criminal cases, the aid of counsel is essential to due process of law and the equal protection of the law. As the United States Supreme Court declared in *Powell v. Alabama*:

There are certain fundamental principles of liberty and justice which lie at the base of all our civil and political institutions . . . the right to the aid of counsel is of this fundamental character.

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287 U.S. 45, 67-68 S(1932). As the Wisconsin Supreme Court stated, 104 years before *Gideon v. Wainwright*:

. . . And would it not be a little like mockery to secure to a pauper those solemn constitutional guarantees for a full and fair trial of the matters with which he is charged, and yet say to him when on trial, that he must employ his own counsel, who could alone render these guarantees of any real permanent value to him.

Carpenter v. County of Dane, 9 Wis. 249, 276 (1859).

Where compensation rates for appointed counsel are so low that few attorneys can afford to accept appointments, the result is the denial of the “aid of counsel” to low-income litigants.

Neither revenue for the State Public Defender (“SPD”) nor compensation for private appointed counsel is even close to adequate. The result is, metaphorically speaking, like a balloon filled with water. When one end, the SPD, is clamped via inadequate funding, the water is forced toward the other end, the private attorney end. Thus, in recent years the private bar has been asked to handle an increased allocation of indigent representation: 60,000 cases per year, about 40-45%. When the other end of the balloon is clamped via inadequate private attorney compensation, the water is forced to the middle, the balloon explodes, and the system is flooded with unrepresented indigents.

Very few lawyers can sustain a practice wherein they charge clients only \$70 per hour. Staying in business becomes impossible at \$40 per hour. This leads either to an attorney’s declining future appointments, or his trying to do it on volume, which leads inevitably to low-quality representation, certainly lower quality than that enjoyed by affluent defendants. For a recent investigation and description of this syndrome on a national level, see Amy Bach’s *Ordinary Injustice: How America Holds Court* (Metropolitan Books 2009).

The increase from \$70/hour to \$80/hour sought by the petition is a most modest increase. Tying the compensation rate to the Consumer Price Index makes a great deal of sense. To do anything less would, to apply the 1859 words of *Carpenter v. County of Dane* to our modern situation, render our solemn constitutional guarantees for a full and fair trial “a little like mockery.”

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We at Legal Action are concerned with equal justice and due process in the criminal courts as well as in the civil courts. We believe *Powell's* "aid of counsel" to be essential in both systems. We vigorously urge the Court to adopt the rule change sought by Rule Petition No. 10-03.

Thank you for your consideration of these comments.

Yours truly,

A handwritten signature in black ink, appearing to read "John F. Ebbott". The signature is written in a cursive style with a large, sweeping initial "J".

John F. Ebbott
Executive Director
Wisconsin Bar No. 1012871

JFE:caj