STATE OF WISCONSIN

SUPREME COURT

In the Matter of: Rule Petition 10-08

The Petition of 1,320 Wisconsin residents for an amendment to Supreme Court Rule 11.02 requiring that Circuit Court judges appoint attorneys at public expense for indigent persons in certain civil cases pursuant to the criteria set forth in the rule.

MEMORANDUM SUPPORTING RULE PETITION 10-08 FOR AMENDMENT OF SCR 11.02

TO: The Honorable Justices of the Wisconsin Supreme Court

INTRODUCTION

Petitioners, 1,320 Wisconsin residents, respectfully submit this memorandum in support of their petition to amend Supreme Court Rule 11.02. The amendment would create a new subsection (2), and would require that Circuit Court judges appoint attorneys at public expense for indigent litigants where the assistance of counsel is needed to protect those litigants= rights to basic human needs, including sustenance, shelter, safety, health and child custody. The amendment would also require that, in

making the determination as to whether the assistance of counsel is needed, the court consider the personal characteristics of the litigant, such as age, mental capacity, education and prior experience with the courts, and the complexity of the case:[1]

> *(2) Appearance by attorney. PROVIDED. Where a civil litigant is indigent (defined as below 200% of the federal poverty guidelines), the court shall provide counsel at public expense where the assistance of counsel is needed to protect the litigant=s rights to basic human needs, including sustenance, shelter, clothing, heat, medical care, safety and child custody and placement. In making the determination as to whether the assistance of counsel is needed, the court may consider the personal characteristics of the litigant, such as age, mental capacity, education and knowledge of the law and of legal proceedings, and the complexity of the case.*

Any consideration of the provision of counsel to indigent parties in civil cases at public expense raises an immediate question as to how much that provision costs and how those costs will be paid. Therefore, we will first discuss cost, next discuss this Court=s authority to issue this rule and the Circuit Courts= authority to appoint counsel, and then explain why the

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1 *See* Petition, Appendix p. 1.

common good warrants this public expenditure.

I. COST AND SOURCES OF FUNDS

A. Cost

We wish to stress at the outset that it is impossible to calculate an accurate cost of appointed civil counsel, and that it is difficult to calculate an approximate cost. We have attempted to arrive at a very rough cost estimate by using U.S. Census Bureau data and data from our experience at Legal Action of Wisconsin. The proposed rule contemplates the appointment of counsel for indigents who are in court, which is a smaller group than all indigents with legal needs. The proposed rule defines Aindigents@ as persons whose incomes are 200% of the federal poverty level or below.[2]

The assumptions for the cost calculations set forth below are:

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[2] The current eligibility for federally-funded legal services is 125% or below. 45 C.F.R. '1611.

There are 299,000 Wisconsin families below 200% of poverty.[3] Overall, 45% of the families in the State Bar of Wisconsin=s needs study confronted at least one serious legal problem. Of those families, the mean number of categories (legal issues) for which the family faced a problem or issue was 2.1.[4] Of the clients that Legal Action of Wisconsin represented on legal problems in 2009, 14.13% had Circuit Court cases.[5] Under the Supreme Court rule proposed by the petition, the Circuit Courts are likely to appoint attorneys in fewer than 14% of *pro se* court cases; we estimate 10%. The average hours per case spent by Legal Action attorneys on a range of court cases is 25 hours.[6] The rate of compensation to be paid to attorneys appointed under this rule is assumed to be $80 per hour. Thus:

AIndigent@: 200% of poverty and below

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3 U.S. Census Bureau; Current Population Survey; Annual Social and Economic Supplement: POV46: Poverty Status by State: 2009-Families-Weighted Person Count. Found at http://www.census.gov/hhes/www/cpstables/032010/pov/new46_185200_07.htm. *See* Appendix p. 4.

4 Bridging the Justice Gap: Wisconsin=s Unmet Legal Needs - Report at a Glance, pp. 1, 6; Appendix 2, pp. 9, 11. (State Bar of Wisconsin March 2007). *See* Appendix pp. 6-8.

5 Legal Action Closing Reasons by Percentage. *See* Appendix pp. 9-10.

6 Legal Action 2008-2009 Cost of Case by Closed Codes. *See* Appendix p. 11.

299,000 Wisconsin families below 200% of poverty

45% of Wisconsin families below 200% of poverty have at least 1 legal issue

299,000 families x 45% = 134,550 families with at least 1 legal issue

2.1 mean number of legal issues per family

134,550 families x 2.1 = 282,555 legal issues

14.22% of Legal Action clients with legal issues in court (1,256 court cases of 8,834 total cases = 14.22%)

10% estimated legal issues in court if Circuit Courts appoint less than Legal Action average[7]

282,555 legal issues x 10% court appointments = 28,256 court appointments

25 hours per case average - based on Legal Action 2008-09 data: (58,719 hours) 2,322 cases = 25.29 hours per case)

25 hours/case x 28,000 court appointments = 700,000 total hours per year

$80 per hour paid to court-appointed counsel[8]

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7 This is purely a guess, as there is no way to predict the percentage of cases for which courts will appoint.

8 $80 per hour is the rate requested for court-appointed lawyers in criminal cases by Rule Petition No. 10-03, heard by the Court on November 9, 2010. That rate also closely corresponds to Legal Action=s hourly cost for productive (nonvacation) time of its attorneys ($8,126,322 total 2010 expenses) 55 attorneys = $147,751 per attorney) 1,720 hours productive time = $85.90 per hour.

$80 per hour x 700,000 hours = $56,000,000

The cost of the petitioned-for rule change is, therefore, under the foregoing set of assumptions, approximately $56,000,000 per year. As any change in the set of assumptions would change the cost, we reiterate that it is very difficult to assign an accurate cost to the appointment of counsel without the benefit of actual experience. We will never gain that experience if counsel are never appointed, and counsel in the past have rarely been appointed in civil cases.

The Maryland Access to Justice Commission estimated the cost of a much broader civil right to counsel to be $106.6 million, so we are within the range of reasonableness.[9]

B. Where will the money come from?

The securing of equal justice under law and the ensuring of the fair and efficient operation of one of the three independent and co-equal

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9 Maryland Access to Justice Commission, AImplementing a Civil Right to Counsel in Maryland@ (2011) 9-10; *See* Appendix pp. 12, 23-24.

branches of government B the judiciary B is a public responsibility. This public responsibility may be shared between the taxpaying public and the Auser@ public (through fees), but it is still a public responsibility. This basic proposition has been recognized by this Court and by a State Bar President:

> *It may be that [an appointed attorney] is interested in seeing justice done, but really not more so than every other citizen.*[10]
>
> *Lawyers cannot solve these problems alone B any more than the medical profession can solve the public health problems of this country alone. In the end, the delivery of legal services to the poor must be accepted for what it is B a public responsibility, and a public trust.*[11]

We believe that the costs of court-appointed counsel would initially be borne by the counties, and that they would look to the legislature for reimbursement. This is why we discuss state sources of funds in this

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10 *Carpenter v. County of Dane*, 9 Wis. 274, 276 (1859).

11 State Bar of Wisconsin President John S. Skilton, AOur Justice System Can=t Afford Cuts to Legal Services for Poor,@ *Milwaukee Journal-Sentinel* (September 29, 1995). *See* Appendix p. 28.

section.

1. **Court Support Services Surcharge**

One potential source of funds for the payment of court-appointed attorneys in civil cases is the Court Support Services Surcharge. We are aware that the full revenue generated by this surcharge has in the past been sought by the courts and the counties to support court services, to no avail. Nevertheless, significant revenue is generated by this surcharge, and it should be fully used for its original purpose. Court appointment of counsel can be reasonably viewed as a court service, a service which benefits litigants and the courts.

The Court Support Services Surcharge is set forth in Wis. Stat. ' 814.85:

> *814.85 Court support services surcharge. (1)(i) (a) Except for an action for a financial responsibility violation under s. 344.62(2), or for a violation under s. 343.51 (1m)(b) or a safety belt use violation under s. 347.48(2m), the clerk of circuit court shall charge and collect a $68 court support services surcharge from any person, including any governmental unit as defined in s. 108.02(17), paying a fee under s. 814.61 (1)(a), (3), or (8) (am) or 814.63 (1).*

(b) Notwithstanding par. (a), the clerk of circuit court shall charge and collect a $169 court support services surcharge from any person, including any governmental unit, as defined in s. 108.02(17), paying a fee under s. 814.61 (1)(a) or (3) or 814.62 (1) or (2), if the party paying the fee seeks the recovery of money and the amount claimed exceeds the amount under s. 799.01(1)(d).

(c) Notwithstanding par. (a), the clerk of circuit court shall charge and collect a $51 court support services surcharge from any person, including any governmental unit, as defined in s. 108.02(17), paying a fee under s. 814.62(3)(a) or (b), or paying a fee under s. 814.51(1)(a) or (3) or 814.62(1) or (2) if the party paying the fee seeks the recovery of money and the amount claimed is equal to or less than the amount under s. 799.01(1)(d).

(d) The court support services surcharge is in addition to the other fees listed in this subsection.

(2) The clerk shall pay the moneys collected under sub. (1) to the county treasurer under s. 59.40(2)(m). The county treasurer shall pay those moneys to the secretary of administration under s. 59.25(3)(p).

This surcharge applies to many court actions.[12] In summary form, the

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[12] Wisconsin Circuit Court Fee, Forfeiture, Fine & Surcharge Tables, Table 4, p. 1; *see* Appendix p. 30. *Wisconsin Legislative Fiscal Bureau*, AWisconsin Court System,@ Informational Paper 81 (hereafter ALFB Informational Paper 81"),

surcharge is $51 for claims of $5,000 or less; $169 for claims over $5,000; and $68 for claims other than money damages.

The history and purpose of the Court Support Services Surcharge has been described by the Legislative Fiscal Bureau:

Appendix VII ACourt Surcharges and Payments@ (January 2009). *See* Appendix p. 33.

> *The surcharge that generates the most revenue for the state is the court support services surcharge. While funding for the circuit court support and GAL payment programs is provided from the general fund, the court support services surcharge was created in 1993 to offset the costs of these programs to the state. Revenue generated from the surcharge is deposited to the state=s general fund and not directly appropriated to the courts. The surcharge was originally a $20 fee on all forfeiture judgments and most civil court filings. Under 1995 Act 27, the surcharge was increased and modified according to the type of claim filed. The surcharge was increased 30% under 2001 Act 109. Under 2003 Act 33, the surcharge was further increased by 30% and is now: (a) $51 for various small claims filings; (b) $169 for various large claims filings; and (c) $68 for forfeiture action judgments, appeals from municipal courts or administrative decisions, and certain court filings not covered under (a) or (b) above. In 2007-08, the court support services surcharge generated $51,238,300 in revenue*.[13]

As the Court is aware, attempts to ensure that all Court Support Services Surcharge payments actually go to the courts for the purpose of supporting services have not met with success. The attempt to do so in 2009 Act 28, the 2009-2011 Biennial Budget Bill, was denied by the

[13] LFB Informational Paper 81 at p. 11. *See* Appendix p. 34.

Governor, Joint Finance and the Legislature. The purpose of this request was summarized in the Legislative Fiscal Bureau (ALFB@) budget papers:

> *This additional funding would represent a portion of the excess in CSSS revenues not currently supporting the court services that the CSSS was created to fund. Every year since 1993-94, more CSSS revenues have been collected and deposited to the General Fund than the amounts appropriated to fund the CCSP and GAL programs and to fund Public Defender transcripts. In 2000-01, the difference was $2.3 million. However, in 2001-02 and again in 2002-03 the CSSS was increased by a total of 69 percent without any increase to the court support programs. In 2007-08, CSSS revenues totaled $51.7 million, while only $24.8 million was appropriated for these programs. The remaining $22.3 million funded other State activities.*
>
> *In calendar year 2007, counties reported spending in total more than $157.6 million on eligible court expenditures, compared to the $18.7 million in CCSP payments. The additional funding would continue to be used by counties to partially offset circuit court costs as specified by statute.*
>
> *This request would provide additional State support to counties as part of the state/county partnership in funding circuit courts at a time counties are struggling to keep under their levy limits and hold down property taxes. Counties would continue to need to document their*

> *circuit court expenditures to receive payment and would never receive more CCSS funds than they expend on circuit courts. Under this proposal circuit courts would not necessarily receive dollar for dollar increases in their county budgets. However, it is expected circuit courts would benefit indirectly as a means to fend off county budget cuts or to justify increased court expenditures. The court support services surcharge would no longer be a misnomer. It would once again be directly used to provide financial support to counties for their circuit courts. Linking CSSS revenues to the CCSS program would provide a mechanism for ongoing increases in county circuit court services support payments and a more equitable formula for allocation of funds to ensure a continuing link between levels of circuit court activity and funding.*
>
> Governor/Joint Finance/Legislature: Deny request.[14]

Examples of this inequitable allocation of funds, which weakens the Alink between levels of circuit court activity and funding,@ are:

FY 2007-08 Court Support Services Surcharge Remitted to State[15]	Calendar Year 2007 Circuit Court Support Payments from State[16]

14 *Court-Related Provisions in 2009 Act 28: 2009-2011 Biennial Budget Bill - July 1, 2009,* at p. 5. *See* Appendix p. 37.

15 LFB Informational Paper 81, Appendix IX. *See* Appendix pp. 38-39.

Brown Co.	$1,506,400	$ 740,670
Burnett Co.	$ 273,100	$ 52,280
Dane Co.	$3,251,700	$1,487,410
Jefferson Co.	$ 845,700	$ 301,790
Marathon Co.	$1,203,600	$ 431,360
Milwaukee Co.	$8,129,400	$3,549,650
Outagamie Co.	$1,545,700	$ 581,910
Washington Co.	$ 765,900	$ 380,530

The Court Support Services Surcharge is one potential source of funding for court-appointed counsel B especially the portion that is not now returned to the courts.

2. **General Purpose Revenue**

A second source of funds for the payment of court-appointed lawyers in civil cases is General Purpose Revenue (hereafter AGPR@) appropriations. As this Court knows, GPR now funds, in whole or in part,

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16 *Id.* at Appendix IV. *See* Appendix pp. 40-41.

the following court functions:

Supreme Court general operations

State Law Library
- Milwaukee Legal Resource Center
- Dane County Legal Resource Center

Court of Appeals

Reserve Judges

Court Reporters

District Court Administrators

Bailiffs attending Court of Appeals

Circuit Court Judges

Judicial Education

Guardians ad Litem (Appointees)

Interpreters (Appointees)

Circuit Court Support

- juror fees
- witness fees
- judicial assistants
- security
- rent
- utilities

facilities maintenance
facilities rehabilitation
facilities construction[17]

In the case of some court appointees, namely interpreters and guardians *ad litem*, the counties pay these appointees directly, and are then reimbursed by the state with GPR funds.[18] County costs for court-appointed attorneys could be similarly reimbursed. At an annual cost of $56,000,000, and assuming no offsetting state GPR reductions (that is, all new taxes), the increased tax to each Wisconsin resident would be $9.85 ($56,000,000) 5,687,000 Wisconsin residents).[19] This amount is not excessive if it will ameliorate the unequal justice seen every day in our courts and relieve the courts of the crushing burden of *pro se* litigation.

Or, no new taxes may be necessary. The cost of appointed counsel could be paid simply by reallocating a small percentage of state GPR administrative expenses. The 2009-11 General Fund appropriations for

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17 *Id.* at 2-10. *See* Appendix pp. 42-50.

18 *Id.* at 8-9. *See* Appendix pp. 48-49.

19 U.S. Census, Resident Population Data. *See* Appendix p. 54.

State Operations is $7,528,288,000,[20] so for one year it is $3,764,144,000. Of that, $56,000,000 equals 1.49%.

3. **Reallocation of an Array of Fees**

California is instituting two three-year pilot projects wherein civil counsel will be provided at public expense in the courts of certain counties. That state, in the midst of its own $23 billion budget deficit, is creating a fund of $11,000,000 per year by reallocating a portion of an array of filing, transfer and other fees to these projects. It will take $10 from a set of $25 fees, and $10 from a set of $30 fees, and pool them to reach the $11,000,000 annual amount.[21]

This approach could be adopted in Wisconsin, although it would be significantly more complicated than allocating a combination of GPR and the Court Support Services Surcharge to fund appointed counsel. As an

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[20] Figure 8: 2009-11 General Fund Appropriations: State Operations, *See* Appendix p. 55.

[21] *See* Appendix pp. 56-60, for a list of the specific fees in each group, together with a summary of the California projects.

example, the fee for filing a foreign judgment set by Wis. Stat. '814.61(6) is $15. Of that, $5 could be allocated to the appointment of counsel. Another example: the fee for the filing of any petition, motion, or order to show cause to revise legal custody and physical placement orders set by Wis. Stat. '814.61(7)(b) is $50, of which $25 is to be deposited for Family Court Services, $12.50 goes to the county and $12.50 goes to the Department of Administration (hereafter ADOA@) for deposit in the General Fund. To fund court-appointed counsel, $10 might be taken from the Family Court Services amount, $5 from the $12.50 that goes to the county and $5 from the amount that goes to DOA for the General Fund. If this were done with regard to the array of fees set forth in Wis. Stat. ''814.60-814.86, significant funding could be garnered to support the appointment of counsel in civil cases.[22]

4. **Can we afford it?**

This question is frequently asked when appointment of civil counsel is discussed. The short answer is that we manage to afford to fund what we

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22 *See* Appendix pp. 61-67 for a complete listing of possible fee apportionments.

really want done. Three examples of this are the tax dollars spent to build a baseball stadium, to renovate a football stadium, and the Whistling Straits Golf Tournament highway interchange.

The Whistling Straits Golf Tournament freeway interchange was built this past summer by the state Department of Transportation to accommodate the Kohler Company and golf fans, many from out of state. The interchange will be used for only one week every five years.[23] The Department of Transportation used its eminent domain authority against two farm families to take their land and spent $671,000 in public funds. The exercise of eminent domain was recently affirmed by the Court of Appeals in *Van Stelle v. Wisconsin Department of Transportation*, 2010 AP 972 (Nov. 24, 2010). Though this highway interchange benefits only a corporation, a narrow slice of Wisconsinites and many nonWisconsinites, and though it will hardly ever be used, we wanted it, so we spent the public funds to get it in the midst of a budget crisis.

All three of these examples are expenditures of tax dollars for our entertainment. Surely, justice is just as important.

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[23] *See* Appendix pp. 68-73.

The Wisconsin Aall funds@ state budget for 2009-11 is $65,773,284,400.[24] For one year, it is $32,886,642,200. Of this, $56,000,000 amounts to .17%. Less than 2/10 of 1% of the state budget would buy us significant justice.

The question regarding the public funding of the appointment of attorneys to represent *pro se* litigants in the most critical civil cases is not whether we can afford it, but whether it is important enough to the common good B to justice B to find ways to afford it.

[24] Table 1: Summary of 2009-11 Appropriations and Authorizations. *See* Appendix p. 74.

II. THE WISCONSIN COURTS HAVE THE AUTHORITY TO INSTITUTE AND IMPLEMENT THIS RULE.

The petitioned-for amendment to SCR 11.02 requires Circuit Court judges to appoint attorneys for indigent civil litigants where, in the court=s own judgment, lawyers are necessary to protect legal rights affecting the basic human needs of those litigants. Under the proposed rule, the Circuit Court judges are directed to consider the characteristics of the litigants B essentially, their ability to competently prosecute or defend their own cases B but those judges are at liberty to exercise their own discretion in evaluating those characteristics. If a Circuit Court judge determines that a lawyer is necessary in a given case, s/he is required by the rule to appoint an attorney to represent the litigant or litigants.

A. The Wisconsin Supreme Court has the power and authority to institute this rule.

> *AIt is well-established that the Wisconsin Supreme Court has express, inherent, implied and incidental powers@ to manage the sound operation of the judicial system in our tripartite form of government.*

In the Interest of Jerrell C.J., 2005 WI 105, &66, 283 Wis.2d 145, 176, 699

N.W.2d 110, 126 (Abrahamson, C.J., concurring).

> *This court has grouped inherent power with implied and incidental powers and has defined them as those powers that are necessary Ato enable the judiciary to accomplish its constitutionally or legislatively mandated functions,@ (*citing *State ex rel. Friedrich v. Circuit Court for Dane County, 192 Wis.2d 1, 16, 531 N.W.2d 32 (1995)).*

Id. The Court=s inherent power Ahas long been recognized,@ and Amust necessarily be expansive enough to facilitate the performance of constitutional mandates.@ 2005 WI 105 at &154 (Prosser, J., concurring in part and dissenting in part.) Justice Prosser there cites five decisions, from 1874 to 1956, that constitute this recognition of the Court=s inherent power: *In re Janitor*, 35 Wis 410 (1874); *Stevenson v. Milwaukee County*, 140 Wis. 14, 121 N.W. 654 (1909); *State v. Cannon*, 196 Wis. 534, 221 N.W. 603 (1928); *In re Cannon*, 206 Wis. 374, 240 N.W. 441 (1932); and *Integration of the Bar*, 273 Wis. 281, 77 N.W.2d 602 (1956). 2005 WI 105 at &154.

Chief Justice Abrahamson, in her concurrence, cites *Integration of the Bar* and two more recent cases, *In the Matter of the Promulgation of a Code of Judicial Ethics*, 36 Wis.2d 252, 153 N.W.2d 873 (1967) and *In re Kading*, 70 Wis.2d 508, 235 N.W.2d 409 (1975), as examples of the

Court=s use, in the latter part of the 20th century, of inherent, implied, or superintending power, or a combination thereof, to exercise its power over courts, judges and attorneys Ato protect the state, the public, the litigants, and the due administration of justice.@ 2005 WI 105 at &87. Both Justices quote *State v. Holmes*, 106 Wis.2d 31, 45, 315 N.W.2d 703 (1982), as addressing the power of the Supreme Court. 2005 WI 105 at &66 and &134. These cases establish that this Court has inherent authority to promulgate the proposed rule.

In the earliest case, *In re Janitor*, the Court restored its appointee, the Janitor of the Supreme Court, to his position after he had been removed by the State Superintendent of Public Property. The Court stated:

> *It is a power inherent in every court of record, and especially courts of last resort, to appoint such assistants; and the court itself is to judge of the necessity. This principle is well settled and familiar, and the power so essential to the expedition and proper conducting of judicial business, that it may be looked upon as very doubtful whether the court can be deprived of it.*

35 Wis. at 419. Not only did the Court overturn the Superintendent=s order to remove its appointed official, it strongly indicated, though it did not command, that the legislature was to appropriate the funds necessary to

compensate him:

> A*. . . it will devolve upon the next legislature to make the requisite appropriation and likewise to provide against the recurrence of similar contingencies in the future. It is not within the range of presumption, or a supposition to be for a moment indulged, that any legislative body will neglect or refuse to make such appropriation . . .*@

Id. at 421.

Stevenson v. Milwaukee County also involved a court-appointed official, in that case a Abailiff and attendant@ to the Circuit Court. The Supreme Court stated:

> *The power to appoint necessary attendants upon the court is inherent in the court in order to enable it to properly perform the duties delegated to it by the Constitution.*

140 Wis. at 17. And, the Circuit Court judge has the power to decide when an appointment is necessary:

> *The power to determine the necessity must rest somewhere, and no place, we think, more appropriately than with the judge making the appointment, for it is for him to determine when a necessity exists in the administration of the business of his court . . .*

Id. at 19. This is, of course, is precisely where our proposed Rule 11.02(2)

places the power to Adetermine the necessity@ of appointing counsel B in the trial judge.

In *State v. Cannon*, 196 Wis. 534, 221 N.W. 603 (1928), the Court affirmed its inherent power to disbar a lawyer. In so doing, it explained the basis for inherent power of the courts:

> *In order that any human agency may accomplish its purposes, it is necessary that it possess power. . . . From time immemorial, certain powers have been conceded to courts because they are courts. Such powers have been conceded because without them they could neither maintain their dignity, transact their business, nor accomplish the purposes of their existence. These powers are called inherent powers.*

196 Wis. at 536. The Court rested the predominance of this inherent power over the power of county boards on a quotation from its decision in *In re Court Room*, 148 Wis. 109, 121, 134 N.W. 490:

> *. . . [A] constitutional court of general jurisdiction has inherent power to protect itself against any action that would unreasonably curtail its powers or materially impair its efficiency. A county board has no power to even attempt to impede the functions of such a court, and no such power could be conferred upon it.*

196 Wis. at 536. Thus, if a Circuit Court determines that appointment of counsel is necessary for it to do justice in a case and to operate efficiently, a county board does not have the power to impede by refusing to compensate the attorney.

The Court in *State v. Cannon* also recognized the importance of lawyers in doing justice. Attorneys:

> *. . . are responsible in no small degree for the quality of justice administered by the Courts. . . . It is the function of the bar to render assistance to the Courts in administering exact justice and not to frustrate the courts in the accomplishment of this high purpose.*

Id. at 539.

Four years later, in passing upon Attorney Cannon=s application for reinstatement as a member of the Bar, the Court elaborated on the nature of its inherent power:

> *The statement in the [State v. Cannon] opinion that it was a power that existed independent of the Constitution merely meant that it was a power which inhered in the courts established by the Constitution and existed by reason of their creation, independent of any affirmative power expressly conferred by the Constitution.*

In re Cannon, 206 Wis. 374, 392, 240 N.W. 441 (1932).

As it had in *State v. Cannon*, the Court stressed the importance of attorneys to the quality of justice dispensed by the courts and the concomitant responsibility of the courts to oversee the Bar. 206 Wis. at 382-83. Its scholarship underlying this point revealed just how medieval is the nature of our current justice system, in which thousands of people appear in court without lawyers:

> *In the Middle Ages there was no necessity for a bar. Either the King or his representative acted as the Judge. The subjects appeared in court, stated their grievances, and the King or his representative rendered the judgment. Later, it appears that a litigant was permitted to appear in court by an attorney, with the King=s special warrant by writ or letters patents.*

Id. at 384. Today, the AKing=s special warrant@ takes the form of the coin of the realm B the Aletters patents@ are dollars, without which a litigant is not permitted to appear in court by an attorney.

In the AIntegration of the Bar@ cases, the Court applied its inherent power beyond individual cases involving specific court appointees and attorneys. It applied that power to more general aspects of the justice system, holding that the Court, by reason of its inherent powers, may require the bar to act as a unit to Apromote high standards of practice and

the economical and speedy enforcement of legal rights.@ *In re Integration of the Bar*, 273 Wis. 281, 283, 77 N.W.2d 602 (1956). A major part of its rationale in exercising its inherent power in a systemic manner was, once again, the vital role that lawyers play in the Aproper and efficient administration of justice@:

> *We must reiterate, the primary duty of the courts as the judicial branch of our government is the proper and efficient administration of justice. Members of the legal profession by their admission to the Bar become an important part of that process and this relationship is characterized by the statement that members of the Bar are officers of the court. An independent, active and intelligent Bar is necessary to the efficient administration of justice by the courts. The labor of the courts is lightened, the competency of their personnel and the scholarship of their decisions are increased by the ability and the learning of the Bar. The practice of the law in the broad sense, both in and out of the courts, is such a necessary part of and is so inexorably connected with the exercise of the judicial power that this Court should continue to exercise its supervisory control of the practice of law.*

In re the Integration of the Bar, 5 Wis.2d 618, 622, 93 N.W.2d 601 (1958).

Given all of this language, it is hard to understand how lawyers

suddenly become unnecessary and irrelevant to Athe efficient administration of justice by the courts@ simply because the litigants are not affluent and cannot afford them.

The Court continued to apply its inherent power to the systemic aspects of justice in *In re the Promulgation of a Code of Judicial Ethics*, 36 Wis.2d 252, 254, 153 N.W.2d 873 (1967):

> *We hold this Court has an inherent and an implied power as the Supreme Court, in the interest of the administration of justice, to formulate and establish the Code of Judicial Ethics accompanying this opinion.*

Id. Then, in *In re Kading*, 70 Wis.2d 508, 235 N.W.2d 409 (1975), the Court enforced its systemic code of ethics. Once again, it invoked its inherent power, as well as its superintending control. 70 Wis.2d at 516-17. The Court made explicit its statewide power:

> *The function of the judiciary is the administration of justice, and this court, as the supreme court within a statewide system of courts, has an inherent power to adopt those statewide measures which are absolutely essential to the due administration of justice in the state.*

Id. at 518. The Court characterized the inherent power as adaptive rather

than rigid or static:

> *The inherent power of this court is shaped, not by prior usage, but by the continuing necessity that this court carry out its function as a supreme court.*

Id. at 519. The present long-enduring *pro se* litigation crisis constitutes just such a Acontinuing necessity,@ and proposed SCR 11.02(2) is Aabsolutely essential@ to the due administration of justice in Wisconsin.

In response to Judge Kading=s argument that the Asuperintending control,@ on which the Court also based its authority to promulgate and enforce a judicial code of ethics, applied only to matters between parties to a lawsuit, the Court stated that A[t]he rights of all litigants are protected by the code, since it ensures integrity and impartiality in the judiciary.@ *Id.* at 520. Impartiality and a lack of prejudice are heavily emphasized in the opinion. *Id.* at 518-24. Similarly today, one of the most oft-expressed concerns by Circuit Court judges about their management of *pro se* litigation is the danger that, in assisting the *pro se* litigant, the judge will appear to be an advocate rather than an impartial tribunal. Appointment of counsel will lift this burden from the courts.

This case authority supporting the exercise of Supreme Court power

to resolve systemic justice issues was succinctly summarized by then-Justice Abrahamson, with a concurrence by Justice Coffey, in *State v. Holmes*, 106 Wis.2d 31, 44, 315 N.W.2d 703 (1982):

> *It is well established that this court has express, inherent, implied and incidental judicial power. Judicial power extends beyond the power to adjudicate a particular controversy and encompasses the power to regulate matters related to adjudication. The nature of the constitutional grant of judicial power has been described by this court as follows: A. . . when the people by means of the constitution established courts, they became endowed with all judicial powers essential to carry out the judicial functions delegated to them. . . . But the Constitution makes no attempt to catalogue the powers granted. . . . These powers are known as incidental, implied or inherent powers, all of which terms are used to describe those powers which must necessarily be used by the various departments of government in order that they may efficiently perform the functions imposed upon them by the people.@ [*Quoting *State v. Cannon and* citing *Kading]*.
>
> *Thus the constitution grants the supreme court power to adopt measures necessary for the due administration of justice in the state, including assuring litigants a fair trial, and to protect the courts and the judicial system against any action that would unreasonably curtail the powers or materially impair the efficiency of the courts or judicial system. Such power, properly*

> *used, is essential to the maintenance of a strong and independent judiciary, a necessary component of our system of government. In the past, in the exercise of its judicial power this court has regulated this court=s budget, court administration, the bar, and practice and procedure, has appointed counsel at public expense, has created a judicial code of ethics and has disciplined judges.*[25]

106 Wis.2d at 44-45.

Thus, there can be no doubt that the Wisconsin Supreme Court has the authority to promulgate the rule requested in this petition.

Moreover, in his concurrence in *Holmes*, Justice Coffey stated that,

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[25] Citing *State ex rel. Moran v. Dept. of Admin.*, 103 Wis.2d 311, 316-17, 307 N.W.2d 658 (1981); *In re Kading*, 70 Wis.2d 508, 517, 235 N.W.2d 409, 238 N.W.2d 63, 239 N.W.2d 297 (1975); *Code of Judicial Ethics*, 36 Wis.2d 252, 254, 153 N.W.2d 873, 155 N.W.2d 565 (1967); *In re Integration of Bar*, 249 Wis. 523, 25 N.W.2d 500, 527-28 (1946); *Integration of Bar Case*, 244 Wis. 8, 40-41, 11 N.W.2d 604, 12 N.W.2d 699, 151 ALR 586 (1943); *In re Cannon*, 206 Wis. 374, 392-94, 240 N.W. 441 (1932); *State v. Cannon*, 199 Wis. 401, 402, 226 N.W. 385 (1929); *State v. Cannon*, 196 Wis. 534, 536, 221 N.W. 603 (1928); *In re Court Room*, 148 Wis. 109, 121, 134 N.W. 490 (1912); *City of Janesville v. Carpenter*, 77 Wis. 288, 302, 46 N.W. 128 (1890); *In re Janitor of Supreme Court*, 35 Wis. 410, 419 (1874); *Carpenter v. County of Dane*, 9 Wis. 274 (1859).

in view of the 1977 amendment to Art. VII, '3 of the Wisconsin Constitution, rule-making power over the administration of the courts now rests with the Supreme Court, not the legislature. 106 Wis.2d at 77.

B. Circuit Courts have the power to appoint counsel pursuant to the proposed rule.

The proposed rule contemplates that Circuit Courts will be required to exercise their power to appoint counsel for indigent litigants when, in the exercise of their discretion, they determine that counsel is necessary. Circuit Courts have the power to appoint counsel.

In Wisconsin, the power to appoint counsel and set fees has traditionally been considered a judicial function. *Friedrich v. Circuit Court for Dane County*, 192 Wis.2d 1, 18, n. 9, 531 N.W.2d 32, 38, n. 9 (1995) (citing cases). The judiciary=s power to appoint guardians *ad litem* and special prosecutors is an inherent power. 192 Wis.2d at 17.

Friedrich involved the power to set compensation for court-appointed attorneys. The Supreme Court there stated:

> *. . . courts have the power to set compensation for court-appointed attorneys and are the ultimate authority for establishing*

> *compensation for those attorneys. The courts derive this power and ultimate authority from their duty and inherent power to preserve the integrity of the judicial system, to ensure and if necessary to provide at public expense adequate legal representation, and to oversee the orderly and efficient administration of justice.*

Id. at 6-7. These are the same purposes that underlie proposed SCR 11.02(2).

The *Friedrich* Court emphasized the Circuit Court=s superior position in assessing the complexity of cases:

> *The judiciary, as the branch of government most intimately familiar with the complexity of cases and the qualifications of counsel, is in the best position to decide the compensation for court-appointed counsel.*

Id. at 18. Proposed rule 11.02(2) recognizes and relies on this advantage in its requirement that the Circuit Court consider the complexity of the case in determining the need for counsel.

The *Friedrich* Court viewed the power to set compensation as a power shared with the legislature, and accommodated both the Supreme Court rule and the statute which established compensation rates. It also, however, exercised its power to order Dane County and the Wisconsin

DOA to pay those court-appointed guardians *ad litem* and special prosecutors who had been appointed prior to the date of the *Friedrich* decision at the higher SCR or court-set rate. *Id.* at 41-42. Dane County and the DOA had both refused to pay at these rates, which refusal generated the *Friedrich* litigation. *Id.* at 9-10.

In *Joni B. v. State*, 202 Wis.2d 1, 549 N.W.2d 411 (1996), this Court looked to *Holmes* and *Friedrich* for the proper analysis of the separation of powers doctrine in a case in which the legislature had prohibited the Circuit Courts from appointing counsel for parents in certain civil (CHIPS) cases. 202 Wis.2d at 8-9.

The *Joni B.* Court stated that A[t]his Court has repeatedly found that the judiciary=s power to appoint counsel is inherent,@ and quoted in support *State ex rel. Fitas v. Milwaukee County*, 65 Wis.2d 130, 134, 221 N.W.2d 902 (1974):

> *[T]he appointment of counsel ought to be made by a judge or under the aegis of the judicial system. Attorneys are officers of the court and the duty to furnish representation derives from constitutional provisions that place the responsibility on courts. That responsibility has traditionally been discharged by courts. It is within the inherent power of the courts to*

> *appoint counsel for the representation of indigents.*

202 Wis.2d at 9. (Emphasis supplied). The Court also cited *State ex rel. Chiarkas v. Skow*, 160 Wis.2d 123, 137, 465 N.W.2d 625 (1991) and *Contempt in State v. Lehman*, 137 Wis.2d 65, 76, 403 N.W.2d 438 (1987) as authority. 202 Wis.2d at 9-10. These two cases ordered the counties to pay the fees of court-appointed counsel because the fees were necessary costs of the operation of the courts.

The *Joni B.* Court declined to decide whether the power to appoint counsel is exclusive to the judiciary or shared with the legislature, A. . . since the level of intrusion here is impermissible under any scenario.@ *Id.* at 10. The Court explained:

> *Any intrusion is prohibited if the judicial authority is exclusive, and even if the power is viewed as shared, the legislature may not place an unreasonable burden on or substantially interfere with the judiciary=s exercise of that power. The amended statute=s flat prohibition on appointment of counsel for anyone other than the child in CHIPS proceedings clearly intrudes upon the authority of the judiciary, as well as unreasonably burdens and substantially interferes with the judicial branch=s inherent power to appoint counsel in order to effect the efficient administration of justice.*

Id.

We currently have no statute that would prohibit the implementation of the proposed rule B the appointment of counsel B by the Circuit Courts, so we are not faced with an exercise of possibly shared power. We have only the question of whether the judicial branch will exercise its inherent authority and primary power Ain order to effect the efficient administration of justice.@ *Id.* Even were the legislature subsequently to enact a statute to contravene SCR 11.02(2), that level of intrusion would be impermissible under *Joni B.* Thus there is really no current or future separation of powers obstacle to the Circuit Courts= appointing counsel under proposed SCR 11.02(2). The courts= power to appoint is clear.

The problem for the efficient administration of justice is that the courts almost never use this power, and some courts are not even aware that it exists.[26] As a result, the courts are overwhelmed with *pro se* litigation. The *Joni B.* court spoke of Arare cases@ wherein a court may find a compelling judicial need for appointment of an attorney, but then went on

[26] *See* Section III.B.4., *infra*.

to describe a judicial need in CHIPS cases which is quite common and which is no different from the judicial need in many non-CHIPS civil cases. Indeed, the Acompelling judicial need@ has not been found to be rare in CHIPS cases following *Joni B.* In Milwaukee County Children=s Court, the courts have found a compelling judicial need to appoint counsel in over 90% of their cases.[27]

The Acompelling judicial need,@ as described by the *Joni B.* Court:

> *In CHIPS proceedings, courts sometimes face very special problems with unrepresented parents. These parents are often poorly educated, frightened and unable to fully understand and participate in the judicial process, thus sometimes creating exceptional problems for the trial court. When a parent obviously needs assistance of counsel to ensure the integrity of the CHIPS proceeding, the court cannot be legislatively denied the right to appoint counsel, thereby placing the individual judge in the untenable position of having to essentially serve as counsel for that parent*.[6]

Id. at 11. Footnote 6 states: AThe potential for complexity, both substantive and procedural, in CHIPS proceedings is further developed in the due process discussion that follows.@ *Id.*

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[27] Anecdotal approximation provided by Hon. Mary E. Triggiano, Circuit Judge.

These obstacles are hardly unique to CHIPS cases. One of the most commonly heard complaints by judges about *pro se* litigation in family courts and other non-CHIPS courts is that they are faced with the Hobson=s Choice of acting as impartial tribunal and not assisting the *pro se* litigant, or rendering assistance such that the judge is in danger of becoming the litigant=s counsel. Other proceedings, in addition to CHIPS proceedings, have the Apotential for complexity, both substantive and procedural,@ which is cited as an obstacle in *Joni B.*[28]

The Court in *Joni B.* then undertook a due process analysis. As to due process, we contend that, whether or not an analysis of the Due Process Clauses of the United States and Wisconsin Constitutions compels the conclusion that counsel must be appointed in a given case, there is no question but that it is the courts= responsibility to assure fairness in the proceedings before them. The fact that a *Mathews v. Eldridge*, 424 U.S. 319 (1976), balancing test might not *compel* a judge to appoint counsel under the Fourteenth Amendment does not *prohibit* her from appointing

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[28] *See* Section III, *infra*, for a fuller development of these obstacles to justice.

where she believes the appointment is essential to fairness. As the *Joni B.* Court stated through its quotation of *Lassiter v. Department of Social Services*, 452 U.S. 18, 33-34, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981):

> *A wise public policy, however, may require that higher standards be adopted than those minimally tolerable under the Constitution.*

202 Wis.2d at 16.

In its due process analysis, the *Joni B.* Court stated:

> *Although parents do not have a constitutionally protected right to counsel in all child protective hearings, the Petitioners contend that due process may require it in particular instances. Therefore, the circuit court must have the ability to make an individualized determination as to whether the facts of the case before it necessitates the appointment of counsel. Again, we agree with Petitioners.*

Id. at 12. And again, later in the decision:

> *We conclude that fundamental fairness requires that a circuit judge be given the discretion to make the determination of what due process requires on a case-by-case basis.*

Id. at 18. Among the factors that the Supreme Court recommended that the Circuit Courts consider were the personal characteristics of the parent, such as age, mental capacity, education and former contact with the court, and

the complexity of the case, including the likelihood of the introduction of medical or psychological evidence. *Id.* at 19.

This is exactly what proposed rule 11.02(2) does B it requires the Circuit Court to make an individualized determination as to whether the facts of the case before it necessitate the appointment of counsel to ensure fundamental fairness. Arguably, proposed rule 11.02(2) is already required by *Joni B.*

The *Joni B.* Court also discussed *Piper v. Popp*, 167 Wis.2d 633, 658-59, 482 N.W.2d 353 (1992). It stated that *Piper* held that due process required that an incarcerated indigent defendant in a civil tort action be given a meaningful opportunity to be heard:

> *In each case, the circuit court must determine what constitutes a meaningful opportunity to be heard and whether that requires appointment of counsel in the particular instance.*

202 Wis.2d at 13 (citing *Piper*).

In *Barland v. Eau Claire County*, 216 Wis.2d 560, 575 N.W.2d 691 (1998), this Court relied on the court=s inherent power to hold that a Circuit Court judge has the exclusive, inherent constitutional authority to prevent the unilateral removal of his or her judicial assistant (here, a legal secretary)

contrary to the terms of a collective bargaining agreement. 216 Wis.2d at 566. It did so in the face of the county=s notice to the judicial assistant that if she did not abandon her position and report for work in the Clerk of Courts= office, she would not be paid by the county. *Id.* at 570. Thus, under the *Barland* decision the Circuit Court had the inherent authority to compel the county to continue paying the assistant out of the county treasury and against the county=s wishes. Where necessary, then, the Circuit Court can compel a county expenditure in order to operate the court:

> *. . . a constitutional court of general jurisdiction has inherent power to protect itself against any action that would unreasonably curtail its powers or materially impair its efficiency. A county board has no power to even attempt to impede the functions of such a court, and no such power could be conferred upon it.*

Id. at 579, quoting *In re Court Room*, 148 Wis. 189, 121, 134 N.W. 490 (1912). It is thus clear that a Circuit Court has the power to compel a county to compensate appointed counsel where the appointment is made to protect its powers and functions, including conducting a fair hearing and promoting court efficiency. See *Chiarkas v. Skow* and *Contempt in State v. Lehman, supra*.

The *Barland* Court discussed the impairment to court efficiency caused by the need to train and orient a replacement legal secretary:

> *. . . when another branch unilaterally removes and replaces an already trained and qualified Court employee, the Court is forced not only to lose the efficiencies developed by the incumbent employee, but to spend valuable judicial time training and orienting the replacement employee. A positive, productive working relationship is not established overnight. The training time spent by the Court on the replacement staff member could be given to other pressing judicial responsibilities.*

216 Wis.2d at 581. If this be true, then the need of a court to train and orient each and every *pro se* litigant, throughout the course of each *pro se* lawsuit, is a far greater material impairment to the efficiency of the court, one which could be greatly lessened by the appointment of counsel.

Joni B., *Holmes* and *Friedrich* were among the authorities cited by the Court in *City of Sun Prairie v. Davis*, 226 Wis.2d 738, 595 N.W.2d 635 (1999), as establishing the inherent authority of the court to ensure A. . . that the court functions efficiently and effectively to provide the fair administration of justice.@ 226 Wis.2d at 749-50, &19. The *City of Sun Prairie* Court expressly stated that courts have inherent authority to appoint

counsel for indigent parties. *Id.* It further stated, with regard to all of its cited cases:

> *In each of these case [sic], the court determined that the function in question related to the existence of the court and the orderly and efficient exercise of its jurisdiction.*

Id.

In *State v. Crochiere*, 2004 WI 78, 273 Wis.2d 57, 67, 681 N.W.2d 524, this Court relied upon *Friedrich*, and *Crochiere* was in turn relied upon in *State v. Stenklyft*, 2005 WI 71, &38, 281 Wis.2d 484, 697 N.W.2d 769, for the following basic principle of inherent authority:

> *Courts have those inherent powers that are necessary Ato enable the judiciary to accomplish its constitutionally or legislatively mandated functions.@ [quoting Crochiere, and citing Friedrich]*.

2005 WI at &38.

And, most recently, the Court cited *Friedrich*, *Sun Prairie v. Davis*, *State v. Cannon* and *State v. Braunsdorf* as authority for the following summary of a Circuit Court=s inherent authority:

> *It is beyond dispute that Circuit Courts have Ainherent, implied and incidental powers@ [*quoting *Friedrich]. These powers are those*

> *that are necessary to enable courts to accomplish their constitutionally and legislatively mandated functions. Id. Wisconsin Courts have generally exercised inherent authority in three areas: (1) to guard against actions that would impair the powers or efficacy of the courts or judicial system; (2) to regulate the bench and bar; and (3) to ensure the efficient and effective functioning of the court, and to fairly administer justice [citing Sun Prairie v. Davis]. A court is understood to retain inherent powers when those powers are needed to Amaintain [the courts=] dignity, transact their business, [and] accomplish the purposes of their existence@ [*quoting *State v. Cannon]. A power is inherent when it Ais one without which a court cannot properly function@ [*quoting *State v. Braunsdorf]*.

State v. Henley, 2010 WI 97 at &73.

The power of the Circuit Courts to appoint counsel for indigent litigants in civil cases is thus clear and well-established.

Henley=s summary identifies two basic functions relevant to this petition: 1) the powers or efficacy of the courts or judicial system, also phrased as Athe efficient and effective functioning of the court@; and 2) the fair administration of justice. The next section will discuss why the appointment of counsel is necessary to both.

III. THE APPOINTMENT OF COUNSEL IS NECESSARY TO ENSURE THE EFFICIENT AND EFFECTIVE FUNCTIONING OF THE COURT AND THE FAIR ADMINISTRATION OF JUSTICE.

A. Two cases demonstrating counsel=s importance to both court functions: efficiency and fairness.

In examining the need to appoint counsel in civil cases, let us look at a hypothetical situation:

> *A woman is severely developmentally disabled, with a borderline IQ, but manages to live independently, gainfully employed as a waitress. She marries, gives birth to twin boys, and lovingly raises them. After two years of marriage, her husband seeks a divorce. The divorce is granted and the husband cedes her sole placement of the twins and does not pay child support. She continues to lovingly raise the children, providing for all of their necessities. But as the boys grow older, they mentally outstrip their mother; she does not have the capacity to help them with their homework, and they soon find ways they can Aoutfox@ her. There has been no abuse or neglect, but the father develops an interest in the boys, retains a lawyer, and files a petition for sole custody and placement. The mother desperately wants to keep her two children, whom she intensely loves, so she decides to oppose the father. She asks the judge to provide her with a lawyer to help her but the judge, either unaware of his power to appoint or mindful of the county treasury, denies her*

> *request. A court trial is set where the mother must appear alone to argue that she should be allowed to keep the boys and that the father should pay child support.*

At least three questions could be posed:

(1) How would the mother know how to match her facts to the statutory criteria?

(2) How would she cross-examine the psychiatrist who was brought in as an expert witness against her?

(3) How could such a proceeding possibly be fundamentally fair?

This is, of course, the hypothetical and two of the three questions posed by the Court in *Joni B. v. State*, 202 Wis.2d at 17, modified from a CHIPS to a family court case.

In this situation the mother, on receiving the father=s motion for change of placement, is likely to ask the court clerk or other court staff how she is supposed to respond. This raises impartiality and unauthorized practice of law problems for the clerks. When the case comes before him, the judge will likely be torn between impartiality and a desire to help the mother, if only to move the case along. The mother=s written responses will likely be hard for both the court and opposing counsel to decipher, and will probably be incorrect. Since the mother will not understand the

proceedings, hearings will be slow and onerous.

A real-life example of the need for counsel is *Shanee Y. v. Ronnie J. (In re Demetrius A.Y.*), 2004 WI App. 58, 271 Wis.2d 242, 677 N.W.2d 684 (Wis. App. 2004). Ronnie J. did not know how to prove that he was not the father of Demetrius A.Y. The evidence of his non-paternity included conclusive genetic testing and admissions from the mother. The mother had given perjured testimony that Ronnie was the father. 2004 WI App. 58 at &&7-8, 14. All the parties recognized that Ronnie J. had a meritorious defense to the two false claims of paternity. *Id.* at &19. Yet, Ronnie spent 12 years in a ANo Exit@ nightmare, caught in the court system engaged in vain attempts to present his defenses to a court. His last *pro se* motion was denied in part because he had failed to timely file. *Id.* at &8. Ronnie was trapped in a legal proceeding like that described in 1848 by a delegate to Wisconsin=s Constitutional Convention: A. . . a constant succession of pitfalls and traps . .. labyrinths which can never be threaded by the uninitiated [which] separates the people from justice.@[29]

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[29] Milo M. Quaife, *The Attainment of Statehood*, 699-700 (1928).

The record in Ronnie=s case was replete with inadequate service and notice, failures to respond, several appearances by only one party, fundamental deficiencies in the record, perjury, and totally inadequate attempts by Ronnie to represent himself. 2004 WI App. 58 at &&2-8, 13-17. It was only when Ronnie finally obtained a lawyer that the nightmare ended.

The Wisconsin Court of Appeals termed it an Aunderstatement@ to describe Ronnie as a A. . . less than sophisticated pro se litigant,@ *id.* at &19, and found it obvious that, A. . . through most of his travail, Ronnie was the victim of his own uninformed knowledge of the intricacies of the judicial system.@ *Id.*

Ronnie J. was not the sole victim of his lack of the guiding hand of counsel. The court system itself B its judges, staff, attorneys, and other litigants B also paid a heavy price. The court system wasted time and money for 12 years on a case that, had counsel been provided to Ronnie at the start, would have been over in less than a year.

B. <u>The Apowers or efficacy of the courts or judicial system@: The view from eleven trial court judges</u>.

The *Shanee Y. v. Ronnie J.* case was proffered as illustrative of the problems presented by unrepresented litigants by eleven Circuit Court judges as *amicus curiae* in support of our petition requesting that the Supreme Court take jurisdiction of an original right-to-counsel action in *Kelly v. Warpinski*, No. 04-2999-OA (2004). These trial court judges have, over their careers, cumulatively presided in civil, criminal, family, children=s and probate courts.[30] The judges began their amicus brief with this statement:

> *A lawyer who represents herself is said to have a fool for a client. That problem is compounded B and the effects and burdens extend well beyond the disadvantaged lawyer/client B when the Afool@ also lacks any legal training or experience. Yet, this predicament occurs every day in Wisconsin courts involving important and complicated matters vitally affecting the lives of the state=s citizens.*

They then argued four major points in their *amicus* brief:

1. ***Pro se litigants are a significant and growing part of state trial courts= caseloads.***

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30 Motion for Leave to File Brief *Amicus Curiae* by Eleven County Judges in Support of Petition Requesting Supreme Court Take Jurisdiction of Original Action, *Kelly v. Warpinski*, No. 04-2999-OA, together with brief in support. *See* Appendix pp. 75-105.

The judges cited statistics from the Wisconsin Pro Se Working Group=s 2000 Report and from other sources: In 1999, 70% of Milwaukee County family law cases involved *pro se* litigants, or 10,204 persons. In 2004, that proportion had risen to 76.6%. Of non-family cases in District 1 (Milwaukee) in 2004, 44.9% involved *pro se* litigants.

We have been unable to find more current numbers despite inquiries to the Office of Court Operations of the Director of State Courts Office, the Milwaukee County Court Administrator and the Milwaukee Justice Center. We were advised that the development of reports with the *pro se* data we seek is a new initiative, and that such reports will be ready by the end of February 2011, but that a completion date for the project could not be provided.

2. ***Unsophisticated and inexperienced pro se litigants complicate the process and burden the entire system.***

The eleven judges asserted that *pro se* litigants burden court staff, raise conflicts issues for court staff, and pose questions of the unauthorized practice of law for court clerks when assisting *pro se* litigants. The judges also stated that judges risk violation of the judicial code by providing help

to litigants, and that they must personally spend an inordinate amount of time deciphering pleadings. They asserted that, when properly scheduled, *pro se* hearings are slow and onerous.

3. ***Pro se litigants complicate not only their own cases, but can increase the burden and transaction costs of other parties, represented or not.***

The trial judges argued that, when faced with a *pro se* opponent, represented parties find it difficult to arrange for depositions and other discovery, to provide proper notice, to receive proper notice, and to respond to poorly articulated claims and defenses. These problems significantly increase the expense for the represented party.

4. ***The court=s inherent power to appoint counsel has not been an effective means of appointing counsel.***

The trial judges asserted that, although the courts have the inherent power to appoint counsel, this remedy does not adequately meet the needs of the litigants and the court system. They offered as reasons the facts that judges are mindful of funding limitations and that *pro se* litigants must request counsel, and most do not know that they can, or how to make such a request.

These eleven trial court judges are correct. As to their last point,

trial judges on occasion seem to be unaware that they possess this inherent power, declaring, when they refuse to appoint, that there simply is no right to counsel in civil actions. In *Piper v. Popp*, the trial court stated:

> *And there is absolutely nothing in the law that provides for free lawyers in civil cases. All kinds of provisions for free lawyers in criminal cases, but none in civil cases*.[31]

In *State v. Pultz*, 206 Wis.2d 112, 117, 556 N.W.2d 708 (1996), the trial court stated:

> *This is a civil case. It=s not a criminal proceeding and as a matter of law, the defendant is not necessarily required to have an attorney, or the Court is not required to appoint an attorney for him, in the event that he is indigent.*

In *State v. Dean*, 163 Wis.2d 503, 515, 471 N.W.2d 310 (1991), the Court stated:

> *One reason Judge Race resisted Dean=s argument that the trial court possesses inherent power to appoint counsel in the present situation was because he was reluctant to impose the cost on the county.*

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[31] Transcript of Proceedings, *Piper v. Popp*, Jefferson County Circuit Court Case File 85-CV-454 (March 28, 1989) p. 83. *See* Appendix p. 107.

In a recent Milwaukee case, the trial court denied the indigent party=s motion to have counsel appointed, stating in his orders that an indigent party in a civil suit, unlike an indigent party in a criminal case, does not have a constitutional right to the appointment of an attorney at public expense. The orders were silent as to the court=s inherent power to appoint.[32]

An examination of CCAP records showed that very few appointments are made in civil cases. In 2003, 264,048 civil cases were opened statewide.[33] Attorneys were appointed in only 803 non-CHIPS cases, or .3% of all opened civil cases. 36,233 divorce and other family cases were opened statewide. Attorneys were appointed in only 312 family cases, or .86% of all opened family cases.[34]

Circuit Courts thus have, without question, declined to exercise the

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32 *In re the Marriage of: Manuel Garcia, Jr. v. Pearl Garcia*, Milwaukee County Circuit Court Case No. 05A003434. Orders dated June 21 and July 6, 2005. *See* Appendix, pp. 108-109.

33 2003 Yearend Caseload Summary, Statewide Report. *See* Appendix p. 110.

34 2003 CCAP printout from Wisconsin Supreme Court, kindly facilitated by Mr. Robert Brick. *See* Appendix pp. 111-115.

power that they already possess to appoint counsel in civil cases, and thereby Ato ensure the efficient and effective functioning of the court, and to fairly administer justice.@ *State v. Henley*, 2010 WI 97 at &73.[35] It is important for the Wisconsin Supreme Court to issue a rule that will require that trial courts exercise that power where necessary, and that will provide guidance for that exercise.

5. ***Pro Se Working Group Report***

The trial judges= other three points were stated fully and forcefully by the Wisconsin *Pro Se* Working Group in its 2000 Report:

> *Challenges begin when self-represented litigants make their first contact with the court*

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35 The role and responsibility of judges to promote equality and fairness in the justice system in an environment of economic inequality and exclusion is the subject of debate. One scholar has concluded:

> In fact, it is now possible to worry that by focusing so much effort on the bar, on law schools, or in the halls of our legislatures, to press the cause of equal justice, we have managed to help insulate American judges from a breach of obligation that undermines the integrity of their processes as it wounds the nation. Judges are not immune from the huge chasm which exists between our asserted commitment to equal justice and the pervasive and continuing harsh reality of our economic exclusion. They=re responsible for it.

Gene R. Nichol, AJudicial Abdication and Equal Access to the Civil Justice System,@ *60 Case W. Res. L. Rev.*, 325, 361-62 (2010).

system. The difficulty arises out of the reality that the legal system is not designed to serve individuals without attorneys.

Confusing language, or Alegalese,@ and complicated rules and procedures can alienate litigants representing themselves in court. The frustration experienced by a litigant is often shared by court staff, attorneys, and judges as the pro se case works its way through the system.

In this era of emphasis on customer service, courts are facing unique challenges in serving this increasingly more common court user B the self-represented litigant. The self-represented litigant often seeks assistance from ***court staff*** *about how to start a legal proceeding. Court staff must balance the conflicting obligations to provide quality customer service, prioritize workload demands, and adhere to legal and ethical constraints concerning the unauthorized practice of law. As a result, court staff may become overwhelmed by pro se demands and often are not sure what information is appropriate to provide. This uncertainty frequently results in limited information being provided to self-represented litigants.*

Attorneys *also face challenges when opposing self-represented litigants. Self-represented litigants often have little knowledge of rules of evidence and procedures, or how to be properly prepared for court. This can result in frequent rescheduling of cases, failure to notify appropriate parties, and difficulties during*

discovery. These problems in turn can have a significant impact on the time and expense required to complete a case.

***Judges** expect to play the traditional role of arbiter in court, anticipating that both parties will understand and use established rules for disposing of cases. Self-represented litigants often cannot meet these expectations. Judges are then placed in the uneasy position of providing useful explanations of law and procedures without violating the judicial code. Judges are concerned about the appearance of impropriety if they intervene too much or too little. This balancing act is especially challenging when one litigant is represented and the other is not.*

***Court commissioners** also expect to play the traditional role of arbiter. As a result, court commissioners experience many of the same challenges as judges. Throughout this report, the reader can assume that court commissioners experience challenges similar to those ascribed to judges. However, court commissioners must regularly deal with the added challenge of dealing with litigants earlier in the court process.*

(Emphasis in original).[36]

C. The Afair administration of justice@: Fairness and equality

[36] The Wisconsin Pro Se Working Group, *Pro Se Litigation: Meeting the Challenge of Self-Represented Litigants in Wisconsin* 8 (December 2000).

require the appointment of counsel in crucial civil cases.

1. *AAll Men Are Created Equal@*

Concerns about the cost of appointing counsel can easily blind us to a serious consideration of the reasons for appointing counsel. Therefore, we think it important to remind ourselves of the fundamental principles that underlie America=s legal institutions. Such a remembrance always starts with the founding document: AWe hold these truths to be self-evident, that all men are created equal . . .@ The *Declaration of Independence* (1776). This principle has transcended its times. When the Declaration was signed it meant only men, and white men at that.[37] It did not include women, slaves, American Indians, Latinos or others. Indeed, when the Continental Congress was meeting to draw up the Declaration, Abigail Adams wrote to John Adams:

> *In the new Code of Laws which I suppose it will be necessary for you to make, I desire you would remember the ladies, and be more favorable to them than your ancestors. Do not put such unlimited power into the hands of husbands . . . That your sex are naturally tyrannical is a truth so thoroughly established*

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37 Garry Wills, ALincoln=s Black History,@ *New York Review of Books* (June 11, 2009).

> *as to admit of no dispute, but such of yours as wish to be happy willingly give up the harsh title of master for the more tender and endearing one of friend. Why then, not put it out of the power of the vicious and the lawless to use us with cruelty and indignity with impunity. Men of sense in all ages abhor those customs which treat us only as vassals of your sex.*

John Adams replied:

> *As to your extraordinary code of laws, I cannot but laugh*.[38]

John Adams laughed then, but in 1920, after a long struggle, women made the Declaration read AAll persons are created equal.@ This victory rendered accurate Lincoln=s statement in 1862 about the intent of the signers of the Declaration:

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[38] David McCullough, *John Adams* 104-105 (Simon & Schuster 2001).

> *. . . they meant to set up a standard maxim for free society, which should be . . . constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people of all colors everywhere.*[39]

The principle of equality *has* spread, and it *has* deepened its influence, so that now we never think that the declaration that Aall men are created equal@ excludes women, or African-Americans, or American Indians, or Latinos, or Asian-Americans, or any other group.

This spreading and deepening is found in two key pronouncements of the United States Supreme Court which constitute a recognition that the essential purpose of the courts is to deliver on this nation=s constitutional promise of equal protection of the laws to all persons. The first came in 1932, in the AScottsboro Boys@ case, *Powell v. Alabama*, 287 U.S. 45, 67-68 (1932):

> *There are 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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39 James M. McPherson, ALincoln Off His Pedestal,@ *New York Review of Books* (September 24, 2009).

The second came in 1956, in *Griffin v. Illinois*, 351 U.S. 12, 19 (1956):

> *There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.*

And, with regard to whether justice is affordable, the question was answered in the affirmative in Wisconsin=s Constitutional Convention by Delegate James Lewis:

> *But now they are so monstrous poor they must dispense with justice, because the people are too poor. No sir, this is no argument at all.*[40]

What is the state of equal justice in Wisconsin today? In the Wisconsin justice system, the kind of trial a person gets does depend on the amount of money s/he has. Thousands of low-income litigants go through court without the aid of counsel, and thus without justice. They are required to do so because the people, in the form of state and county government, are Aso monstrous poor@ that they must dispense with justice.

As to this: The power and the duty of the courts is to do justice, not

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[40] Milo M. Quaife, *The Attainment of Statehood* (1928) p. 653.

to guard the public purse. If attorneys are necessary to do justice, the courts should appoint them. The role and the duty of the counties and the state is to find a way to pay for this element of justice, as for every other element of justice and every other element of the common good.

2. ***Compulsory legal surgery***

The justice system requires that unrepresented litigants perform legal surgery on themselves. Suppose we did this in health care. It would look like this:

> *A man with a bursting appendix runs into a hospital. He has no money and no health insurance. He runs up to the counter and yells, AQuick, quick, I need a doctor! My appendix is bursting!@ The receptionist asks if he has an insurance card or money. He says he doesn=t. The receptionist hands him a pamphlet with anatomical sketches in it entitled ASelf-Help Appendix Removal.@ She says, AI=m sorry, without money or insurance we can=t give you a doctor, but if you=ll go down the hall to Room 4, you=ll find a scalpel, forceps and some other tools on a table. Just hop up on the operating table and do what the pamphlet shows you to do. You can take out your own appendix. Don=t worry. You=ll be fine.@*

Surely this man would not believe that he received medical care equal to the man in Operating Room 3 whose appendix was being removed by a

surgeon.

Yet this inequality is what we compel indigent litigants to undergo in our courts today. Providing counsel at public expense to those who need counsel provides equal justice to poor people caught up in the courts. We use the term Acaught up@ because, whether plaintiffs or defendants, indigent litigants have no choice but to have their rights determined by a court. If they are defendants or respondents, they have of course been Ahaled into@ court. Even if they are plaintiffs or petitioners, they have been told that they must go to court to resolve their disputes and their rights B they can=t simply get some guns and obtain relief through self-help.

3. ***An attorney is vitally important to real justice for indigent litigants in civil cases because of the fundamental nature of the interests at stake in those cases and the serious consequences of their loss.***

The interests that are at stake in civil actions, and the consequences of losing in those actions, are serious and long-enduring. They are, very often, as serious and long-enduring as the consequences of a criminal action. For poor people, the fundamental necessities of life are at stake: food, clothing, shelter, heat, medical care. While an unsuccessful criminal defendant has lost his freedom, which is certainly a very significant loss, he

at least is provided food, clothing and shelter. The domestic violence victim who cannot obtain a divorce, and thus cannot escape from her batterer, is as much a prisoner in her home as the criminal defendant is in his jail cell.[41]

Two examples of the vital interests at stake, and the incompetence of *pro se* litigants to protect their own interests, are the care, custody and love of one=s children in the *Joni B.* hypothetical, and the life-time of fraudulent paternity, accompanied by imprisonment for nonsupport, in *Shanee Y. v. Ronnie J.*, both discussed above at pages 45-49.

Another example is a mother=s interest in protecting her daughter from abuse in the home of the father and stepmother. Her daughter has expressed distress about the abuse to her mother to the extent that she has spoken of suicide. The mother has a bipolar condition so acute that her symptoms constantly interfere with the attention and concentration needed to perform even simple work tasks. She receives SSI. She lives four hours from the court of venue. She has an old truck as her only transportation.

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[41] *See* Lisa E. Martin, *Providing Equal justice for the Domestic Violence Victim: Due Process and the Victim=s Right to Counsel*, 34 Gonz. L. Rev. 329, 333 (1998-1999).

When it breaks down on the way to a court hearing, she frantically calls the court, asking for a postponement. The court doesn=t speak with her, and enters a default judgment against her on all counts, including denying a change of placement to protect her daughter and imposing child support payments on her. Obviously, this mother is not competent to represent herself.

Another vital interest is the warmth and shelter of one=s home. A 91-year-old woman who is illiterate and threatened with foreclosure on the house where she has lived all of her adult life cannot defend against that foreclosure. She cannot raise a defense that the plaintiff cannot prove title to the note, or that the loan is unconscionable because it was obtained by predatory mortgage brokers who lied about her income and the value of the house.

Another example is a mother and daughter evicted from their home, and consequently homeless, by a management company that brought the action in its own name, but that did not have title. This family is not competent to recognize a lack-of-title defense. Nor are they competent to obtain justice by bringing Fair Debt Collection Practices Act claims against

the management company.

An example of a vital health interest is that of a 91-year-old woman who must be on a ventilator 24 hours per day. Her private care organization summarily ends its ventilator nursing service to her in violation of its contract. As a result, she has to be placed in a hospital=s ICU unit. The hospital is desperate to kick her out. Her choice is to try to stay in the ICU unit or go home and die without the ventilator. She would know nothing about how to file an injunction action against the company to restore the home ventilator services. She couldn=t file, let alone prosecute the action to a conclusion.

These are but a few of the examples of civil actions involving interests which are absolutely critical to low-income people.

The interests at stake in civil actions were recently articulated by a Past President of the State Bar of Wisconsin, Patricia Ballman:

> *Civil legal services for the indigent must also be supported. Without representation, the indigent and working poor often cannot meet the most basic of human needs. Wrongful evictions make families homeless. Immigrants may be denied access to fair wages. Elderly people living on fixed incomes may go without disability benefits*

or health care.[42]

The mother who has her children taken from her in a custody battle certainly considers them to be more important than her own liberty.[43] The heartbreak and depression which results from the loss of her children=s love and affection is as searing as that of the prison inmate who has lost his criminal trial.

Testimony before the State Bar=s Commission on the Delivery of Legal Services (hereafter ASkilton Commission@) illustrated the serious

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[42] President=s Message, *Wisconsin Lawyer* 6 (January 2003).

[43] In a private divorce action where custody is contested, A . . . Christine Flores stands to lose a basic >liberty= just as surely as if she were being prosecuted for a criminal offense.@ *Flores v. Flores*, 598 P. 2d 893, 896 (Alaska 1979). The consequences need not rise to the TPR level; loss of custody or prolonged separation is enough to trigger the right to counsel. *Id.* at 897. *See also Matter of K.L.J.*, 813 P. 2d 276, 279 (Alaska 1991) (reaffirming *Flores*). *Danforth v. State Dept. Of Health and Welfare*, 303 A. 2d 794, 800 (1973): AIn some instances the loss of one=s child may be viewed as a sanction more severe than imprisonment.@ *Accord, Lemaster v. Oakley*, 157 W.Va. 590, 598, 203 S.E. 2d 140 (1974).

consequences of civil actions involving families. Judge Carl Ashley described the stakes in a Children in Need of Protection or Services (CHIPS) action:

> *It is the fundamental right to have your children.*[44]

Liz Marquardt,[45] Task Force on Battered Women and Children:

> *So oftentimes battered women face the loss of custody as well as financial support, refusal to pay family support, possible loss of their homestead, and without representation oftentimes feel as though they need to compromise what they know they deserve just to escape a violent relationship. . .* [46]

4. ***Indigent litigants are ill-equipped to litigate their rights without counsel.***

ALaw addresses itself to actualities.@ *Griffin v. Illinois*, *supra*, 351 U.S. at 23 (Frankfurter, J., concurring). This Court in *Joni B.* recognized

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[44] Skilton Commission, Milwaukee Hearing, August 15, 1995, p. 177.

[45] Current member of Wisconsin Access to Justice Commission.

[46] *Id.* at 27.

that unrepresented parents are often Apoorly educated, frightened and unable to fully understand and participate in the judicial process.@ 202 Wis. 2d at 11. AThe indigent are frequently the least able to cope with government in its official functions.@ *State v. Jamison*, 251 Or. 114, 116-117, 444 P. 2d 15, 17 (1968). Civil defendants are Aformally thrust into the judicial process.@ *Payne v. Superior Court*, 17 Cal. 3d 908, 917, 553 P. 2d 565 (Cal. 1976). Many indigent litigants come into court with one or more of the following limitations:

a. **Lack of Education**

Poor people are often poorly educated. Nationally, of 44,000,000 persons without a high school diploma, 52.8% had incomes below 200% of poverty. Of those with a high school diploma but no college, 35.9% were below 200% of poverty. Of those with some college, but less than a 4-year degree, 26.8% were below 200%. By contrast, of those with a 4-year degree or higher, only 12.2% were below 200% of poverty.[47] Of the 3,091,000 Americans not enrolled in school and without a high school

[47] U.S. Census Bureau, Current Population Survey, 2010 Annual Social and Economic Supplement, POV29: Years of School Completed by Poverty Status, Sex, Age, Nativity and Citizenship: 2009. Found at http://www.census.gov/hhes/www/cpstables/032010/pov/new29_200_01.htm. *See* Appendix p. 116.

diploma, 71.1% are below 200% of poverty.[48]

43% of people with the lowest literacy skills live in poverty. 17% of those with low literacy receive food stamps, and 70% have no job or a part-time job.[49]

Even for the general population in Wisconsin, 20% of adults between 18 and 64 years of age have not completed twelve years of schooling or earned a high school diploma. 50,620 Wisconsin residents are totally illiterate; 442,460 are functionally illiterate. 412,760 need to improve basic skills.[50]

b. **Inability to speak English**

In addition to a rudimentary education, many poor people do not speak or understand English -- the language of the courts -- with facility. One of every twenty out-of-school adults in Wisconsin is dominant in

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[48] *Id.* at POV30: School Enrollment by Poverty, Sex, and Age: 2009. *See* Appendix p. 119.

[49] Milwaukee Achiever Literacy Services: Adult Literacy and Workforce Development. www.milwaukeeachiever.org/blog/2008/03/05/literacy-and-poverty/ *See* Appendix p. 119.

[50] *Id. See* Appendix p. 120.

another language and speaks little English.[51] 220,000 people in Wisconsin speak Spanish. 117,317 speak other Indo-European languages, and 73,754 speak Asian and Pacific Islander languages. 427,828, or 7.9%, speak a non-English language at home.[52] 75,274 households are Alinguistically isolated,@ and 209,574 people live in households in which all members speak a non-English language.[53]

c. **Physical Disabilities**

Many impoverished persons have physical disabilities which make it very difficult for them to represent themselves in court. In 2006, among poor residents of Wisconsin, 26% were in fair or poor health, compared to 7% among higher-income people.[54] Of those adults in Wisconsin who are poor, 33% are unable or find it difficult to do one or more physical activities; 27% have physical limitations which keep them from working at

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51 *Id.*

52 U.S. Census Bureau American Factfinder: Wisconsin: Selected Social Characteristics in the United States: 2005-2009. Found at http://factfinder.census.gov/servlet/ADP Table?_bm=y-geo_id=04000us55-qr_name=A... . *See* Appendix p. 123.

53 U.S. Census Bureau, Census 2000, Summary File 3, Tables P19, PCT 13 and PCT 14.

54 Wisconsin Health Facts: Poverty and Health, 2006, Results from Wisconsin Family Health Survey, Wisconsin Department of Health and Family Services. *See* Appendix p. 125.

a job or at home, or going to school, and 6% have trouble eating, dressing, bathing or using the toilet. The percentages for the near-poor are 22%, 17% and 6%, respectively. For the Anot poor,@ they are 9%, 4% and 2%.[55] Thus, if one is poor, he is more likely to have significant health limitations.

Thomas E. Dixon, then an attorney for the Wisconsin Coalition on Advocacy (now Disability Rights Wisconsin), which represents disabled persons, testified to the Skilton Commission:

> *Working at the Coalition, I move into an area where the disabling conditions of the vast majority of the clients have additional barriers, from the ability to cognitively recognize what their rights are to the ability to communicate with anyone about those rights or access anyone because they happen to be institutionalized or don=t have a TV or whatever it might be. There are still a large number of people in institutions who are still subject to abuse and neglect, even in the nineties. It=s not a thing of the past.*[56]

d. **Distressed and Disoriented**

In addition to the foregoing disadvantages, impoverished

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55 AHealth-Related Limitations Among Adults,@ Wisconsin Family Health Survey 2005, p. 9. (Bureau of Health Information, Division of Health Care Financing, Wisconsin Department of Health and Family Services). *See* Appendix p. 128.

56 Skilton Commission, Madison Hearing, August 14, 1995, p. 80.

suitors are generally unsophisticated and, as this Court recognized, at a hearing or trial are A. . . thrust into a distressing and disorienting situation.@ *Joni B. v. State*, 202 Wis.2d at 16 (quoting Lassiter).[57] A dramatic example of this disorientation was provided to the Skilton Commission by Judge Thomas Donegan of the Children=s Division of the Milwaukee County Circuit Court:

> *MR. SKILTON: Let me probe the consequences to the system. Some would argue that that=s 5,400 less contentious litigations. What do you* suggest is the consequence of 5,400 parents not having lawyers to your court?
>
> *JUDGE DONEGAN: It introduces chaos where we have at least some semblance of order now. The day this bill was effective, I had a mother in a CHIPS case wander into my courtroom, the bailiff directed her to sit down, she did not realize that she was in the courtroom. She clearly did not know. We took ten minutes explaining to her this is the courtroom. I am a judge. This is what this piece of paper means. This is what that person sitting at that table*

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57 *See also Flores v. Flores*, 598 P. 2d 893, 896 (Alaska 1979) and *Matter of K.L.J.*, 813 P. 2d 276, 279 (Alaska 1991): A. . . when one considers the emotional nature of child custody disputes, and the fact that all of the principals are likely to be distraught.@

> *does, that=s the district attorney. Over here is a lawyer representing the child. You get no lawyer. You have a right to go out and get one if you can find one, but I can=t appoint one, and I can=t find one to represent you. That took, just as an initial appearance, 15 minutes. That normally would have been resolved in less than a minute on the record. That parent would have had a public defender meet with her before coming in, and would have gone through the petition with her, explained the allegations, explained these are allegations, not decisions, explaining her rights to her, then they=d come in somewhat calm and somewhat prepared to proceed.*
>
> *Our hearings result, even though there=s a right to jury trials in CHIPS cases, in stipulations in 99 percent of the cases when we have attorneys involved.*
>
> *I=ve been on the bench for three years. I=ve had one CHIPS jury trial, one, and without lawyers, I don=t know if those people are going to have a sense of justice, be able to state their case fairly, or even know whether it=s a good idea to ask for a trial or not. So it=ll exacerbate the system tremendously, and it won=t provide justice.*[58]

As this Court recognized in *Joni B., pro se* litigants are overwhelmed and intimidated. Pam Seri, Legal Advocacy Project of the Waukesha

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[58] Skilton Commission, Milwaukee Hearing, August 15, 1995, pp. 304-306.

Women=s Center:

> *We are noticing that what was traditionally a pro se process in the past has now involved attorneys more and more on a very regular basis, and it=s usually the respondents coming into court with attorneys, and the petitioner just seeing that she=s unrepresented, that there=s an attorney on the other side, you know, no matter how much preparation she=s gone through before walking into the courtroom, she just freezes and is so overwhelmed by the experience and intimidated. And there=s a good chance, and usually she doesn=t, get the order signed into effect. . .*[59]

Mary Bilburg, staffer for the Association of Retarded Children, testified similarly before the Skilton Commission:

> *MR. GOEPEL: What kind of problems do [pro se litigants] encounter with the probate court?*
>
> *MS. BILBURG: I guess having walked into probate court trying to do something pro se myself with another person who actually holds a law degree but is not currently practicing, our own experience was that rather if maybe one piece of paperwork was not included or was altered in some way, instead of receiving a little bit of redirection, it was like, you know, what*

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[59] *Id*. at 118. *See also* APour It On: Activists Cite Rising Need for Lawyers to Represent Domestic Violence Victims,@ *ABA Journal* 73 (Oct. 2004): AThe biggest need is to increase the numbers of lawyers and amount of legal work providing representation for these victims.@

> *are you doing here, get out of my court type of thing and get it right and come back type of thing. I think it=s just they=re used to dealing with attorneys and attorneys, you know, having things in place in the proper order. And the tolerance, I think, is just not . . .*[60]

e. **Not Knowing the Ropes**

The importance of Aknowing the ropes@ was stressed by 51 respondents to in-depth interviews with applicants for civil legal assistance in a mid-sized northeastern city:

> *Some informants agree that the most important asset a lawyer can offer is knowledge of the local legal culture in which their case is being disputed. Over fifty percent of the informants expressed the need for a legal advisor who knows the specific lawyers, judges and procedures with which the disputants are engaged, implying their own discomfort in legal situations. They verbalized the belief that lawyers know both the procedural eccentricities and the personalities involved. As legal system insiders, lawyers help their clients cope with the idiosyncratic nature of local legal officials and procedures. Litigants may lack an understanding of and familiarity with both the formal and informal processes necessary to move successfully within the legal system. Knowledge of court personnel, policies, and local practices can enhance success. AOne*

[60] Skilton Commission, Milwaukee Hearing, August 15, 1995, p. 30.

> *shotters,@ or novices, miss the comfort, experience and informal relationships that ease the dispute process for Arepeat players.@ Judges, hearing officers and mediators frequently overtly or implicitly describe the manner in which the dispute should be aired, even though the inexperienced litigant may have trouble hearing or comprehending the message. ALawyers often suggest that their most important contribution is knowledge of the ropes, not knowledge of the rules . . .@*[61]

It should not surprise if indigent *pro se* litigants emerge from our legal system singing to themselves, *sotto voce*, AI was hungry, and it was your world.@[62]

f. **Life is an Overwhelming Struggle**

Besides not Aknowing the ropes,@ impoverished suitors also have many demands on their time other than preparing litigation. For many, life is an overwhelming daily struggle. As this Court, quoting *Lassiter*, phrased it in *Joni B.*, they have A. . . uncommon difficulty in dealing with life.@[63] This difficulty is eloquently stated by Legal Action of Wisconsin client

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61 36 *Brandeis J. Fam L.* at 567-568.

62 Bob Dylan, AJust Like a Woman,@ Blonde on Blonde Album.

63 202 Wis. 2d at 16.

Kathy Baker:

> *There seem to be many people who don=t seem to grasp the width and breadth of our low-income client base. Low-income people are not just middle-income people down on their luck. Sometimes they are people for whom the world and its everyday living are just too difficult. Frequently they are stumbling through life the best they can, having crisis after crisis along the way. Often impoverished people are mentally ill. Many of them will never be able to cope with life well enough to pull themselves out of poverty. Often they are exhausted just trying to make ends meet and even sometimes literally stay alive. Many of our clients, who are deep in long-term poverty for a variety of reasons, will never be able to avail themselves of technology and they know it. They do not have the mental or physical resources to deal with pro se representation. They need our help.*[64]

As Judge Moria Krueger testified:

> *Lastly, sometimes they=re mentally ill. It is a total challenge to our system and one that I don=t think should be just through the State Bar. * * * This is a much larger problem.*[65]

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64 *Will Deep Waters Run Shallow?*, 4 *MIE Journal*, at 3, 9 (Winter 2001).

65 Skilton Commission, Madison Hearing, August 14, 1995, p. 56.

See, for example, the psychological evaluation of the respondent-appellant in *Xena X.D.-C. V. Tammy L.D.* 2000 WI App. 200, &26, 238 Wis. 2d 516, 530, 617 N.W. 2d 894 (2000): A. . . confused and disorganized thought processes and her irrational and illogical responses B all suggestive of a mental illness.@ Three years after *Joni B.*, in a CHIPS case, the court failed to appoint a lawyer for Xena X.D.-C.

g. **Opposed by an Attorney**

A *pro se* litigant is unequal to her adversary, whether that adversary is the government, an opponent who is represented by an attorney or an opponent who is an abuser or simply more sophisticated. This Court in *Joni B.*, quoting the United States Supreme Court in *Lassiter*, described justice as most likely to be obtained through Aan equal contest of opposed interests@ in *counseled* adversary proceedings. 202 Wis.2d at 15-16.[66] The contest is not equal when one party has an attorney and the other does not: A. . . [T]he contest of interests may become unwholesomely unequal.@ *Matter of K.L.J.*, 813 P. 2d 276 (Alaska 1991).

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66 *See also State v. Pultz*, 206 Wis.2d 112, 127, 556 N.W.2d 708, 714 (1996).

It is noteworthy that long ago this Court, through Chief Justice Luther S. Dixon, recognized the need for an equal contest of opposed interests:

> *[H]owever vigilant the court might be, or however upright and conscientious the prosecutor, it would, as a general practice, be most unsafe and hazardous [to entrust the protection of the rights of the indigent to the court itself]. The antagonism and conflict of opposing and experienced minds, each anxious and active to detect and expose the defects and weaknesses in the case of the other, are, in general, absolutely essential to the discovery and establishment of legal truth.*

County of Dane v. Smith, 13 Wis. 585, 587 (1861). Indeed, there is a grave risk of a miscarriage of justice when only one side is represented. Judges have indicated their concern about making an erroneous decision, one that is flawed because of the inadequate record before them, caused by one side=s not presenting its case effectively. The failure to provide counsel thus contaminates the fact-finding process, which in turn increases the risk of justice miscarrying. This was demonstrated in a recent case in which the *pro se* litigant attempted to show, but failed, that she had made a GAL payment as ordered. The court found as a fact that she had made no GAL

payments whatsoever, found her in contempt, and ordered her to jail.

As Jennifer Miller, of Friends of Abused Families in Washington County, put it:

> *There is pro se, but with that you face the problem of so many of the spouses get attorneys. Lots of people have come and said, well, I got divorced two years ago. He had an attorney and I didn=t. Is there any hope of changing this visitation arrangement or something now? And I think we would all agree that=s a fairly disadvantaged position to be in where the opposing party has an attorney and you don=t.*[67]

5. ***The legal obstacles encountered in litigating one=s own case make a lawyer essential.***

The impoverished civil litigants described by Kathy Baker, Jennifer Miller and Judge Krueger are not very different from the prisoners described by Dean Howard Eisenberg in his article in the *Southern Illinois Law Journal*:

> *For more than 50% of the inmates, attempting to read a law book would be akin to attempting to read a book written in a foreign language.@*[68]

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67 Skilton Commission, Milwaukee Hearing, August 15, 1995, p. 82.

68 Howard B. Eisenberg, ARethinking Prisoner Civil Rights Cases and the Provision of Counsel@, 17 *S. Ill. L.J.* 417, 442 (1993).

Law books, statutes and cases, even if they can be located, are no less foreign to impoverished civil litigants than they are to inmates. An indigent (and probably poorly educated) person whose rights have been violated, and who must litigate without a lawyer, faces formidable obstacles.[69] She must research the law B the Aforeign language@ -- to ascertain whether she does indeed have a legitimate cause of action or defense that the courts will recognize. She then must be able to adequately describe that cause of action or defense in a complaint or answer. She must determine who to sue, which is especially difficult with corporate entities.

If she is a plaintiff making a claim against a governmental entity, she will have to be very careful to follow the ANotice of Claim@ statute and its time periods. She will need to know where to file a claim. Chances are great that she will not even know about the ANotice of Claim@ statute. The chair of a State Bar Bench-Bar Survey Committee stated that these notice of claim A... procedures simply have become too complex, too time-

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[69] Courts have recognized these obstacles, some describing them in detail. *See Danforth v. State Dept. Of Health & Welfare*, 303 A. 2d 794, 799 (1973) (AThe entire proceedings are incomprehensible@); *Merritt v. Faulkner*, 697 F. 2d at 764 (AQuite often the factual and legal issues in a civil case are more complex than in a criminal case,@ citing 76 *Yale L. J.* 545, 548, followed by a detailed discussion of the obstacles).

consuming and a trap for the unwary.@[70]

If she is a defendant, she must ensure that the answer is properly served and properly filed. Once she has successfully answered, she will have to know what to do next. It may be that, as a defendant, she has good grounds to file a motion to dismiss based on improper service, or lack of jurisdiction, or failure to state a claim for relief. She may have grounds for a counterclaim or cross-claim. This impoverished defendant will need to be able to argue these claims, and to use statutory and case law authority to do so. If she does not prevail in this, the plaintiff may have grounds to move for judgment on the pleadings, and the *pro se* defendant will need to know what that means and how to resist that motion.

The plaintiff=s lawyer may eventually move for summary judgment, and file affidavits in support of his motion. The impoverished *pro se* defendant will need to understand that the law requires her to respond to his motion with her own affidavits, and will need to know what is the standard governing summary judgment. She will need to assert that there are

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[70] *Wisconsin Lawyer*, 12 (Nov. 2001).

material facts in dispute or, if there are not disputed material facts, that all of the facts taken together support judgment in her favor. Of course, in order to obtain such judgment, she will need to know enough to move for summary judgment herself.

If these and other preliminary skirmishes are successfully endured, the *pro se* defendant will need to know how to conduct effective discovery. If she does not conduct discovery, she will go to trial without knowing essential facts or without knowing much about the plaintiff=s case. She will need to know whether and how to take depositions, whether and how to issue interrogatories, whether and how to make a request for production of documents and whether and how to make a request for admission of material facts.[71] To do any of this, of course, she will need to know which are the key legal issues and the key facts, and which are not. She will also need to be familiar with the not-so-simple rules which govern discovery, including the deadlines. And, if the plaintiff=s lawyer performs discovery

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[71] For an example of the impossibility of compliance with discovery requests directed to an indigent civil defendant, *see Salas v. Cortez*, 24 Cal. 3d 22, 24-26, 593 P. 2d 226 (Cal. 1979).

on her, she will need to have the capacity to carefully answer interrogatories and the presence of mind to perform well in her deposition.

In order to use procedural rules to protect her, the *pro se* defendant will need to be familiar with local rules, and she doubtless has no idea that there *are* local rules. In a recent survey, Wisconsin lawyers complained that variations in local rules Aoften ensnare attorneys who come from outside to practice in a county.@[72] If they Aensnare@ attorneys, what do they do to lay litigants? This *pro se* litigant will need to know what to expect at the pretrial conference. She should also know the idiosyncracies of the particular judge which she has drawn.

She will need to know whether an expert witness is essential to her case, and whether her case fails without such an expert. If an expert is necessary, or helpful, she will need to know who she should contact as an expert, how to get in touch with that expert, how to persuade the expert to look at her case and testify on her behalf (which is not so easy) and, significantly, how she will pay that expert.

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[72] Bench-Bar Survey, *Wisconsin Lawyer* 12 (Nov. 2001).

She will need to know who will be the other witnesses, and will need to talk to them beforehand to assure herself that they will say at trial what she thinks they will say. Some of those witnesses may be reluctant, and she will need to know how to subpoena them to the trial so that they appear and she is not left with holes in her evidence. As to her friendly witnesses, it will be helpful to her case if she knows how to prepare them as to what to expect and give them the basic rules of testimony, such as Aonly answer the question you are asked@ and Adon=t guess,@ without suggesting what their testimony should be. As to the reluctant witnesses, it will be helpful to her to know how to persuade them to acknowledge that they have the information that she needs and that it is important for them to provide it at the trial.

She will need to know how to complete a pretrial report, including how to draft findings of fact and conclusions of law, or jury instructions.

As to all of the foregoing, experienced attorneys know how to do this; inexperienced and uneducated (in the law) lay people do not.

If there are settlement discussions prior to the trial, the indigent defendant needs to know how to negotiate with the plaintiff or, most likely,

his attorney, and what she is willing to settle for so that she will not have to go to trial. She may, without counsel, sign a stipulation to her severe disadvantage. The impoverished litigant also needs to know that, just because she is in the right, that doesn=t mean that she will prevail at trial, and that trial is a significant gamble.

If the case gets as far as trial, the indigent defendant needs to know how to make an opening statement. She needs to know how to conduct direct examination, which is often harder than cross-examination. She needs to know how she is going to get documents into evidence, and how to mark them. She needs to know how to cross-examine opposing witnesses. She needs to know the rules of evidence, so that she can keep harmful evidence out and ensure that her helpful evidence is admitted. Is there a key piece of evidence that is hearsay? Can she get it in as an exception to the prohibition against hearsay? Can she argue that it is not hearsay at all? Her entire case could turn on an issue such as this. Knowing these things is critical to the outcome of the case, and to justice.

If she is using an expert, she needs to know how to qualify that expert and what form of question to use to elicit his expert opinion in a

form that is not objectionable. She needs to know how to make a closing argument, and that she should have her closing argument outlined before the trial even begins.

If the indigent defendant is trying the case to a jury, the obstacles are even greater. She needs to know how to conduct *voir dire* and how to select jurors. She needs to know how to relate to those jurors throughout the trial, and what to say in opening and closing that will be most effective. She needs to know what her jury instructions will be.

The foregoing are some of the difficulties that an impoverished *defendant* in a standard civil action faces. These are all present to a greater or lesser degree in all actions, whether the indigent person is a plaintiff or a defendant. Many cases involve medical and psychiatric testimony, regarding which this Court in *Joni B.* stated A. . .few people are equipped to understand and fewer still to confute. . .@ 202 Wis.2d at 16. In any of these cases, the issues can be complex, the testimony Alaced with hearsay and evidentiary pitfalls.@ *Id.* As Dean Eisenberg wrote: A. . . when the case consists primarily of conflicting testimony so as to require skill in the presentation of evidence and in cross-examination [especially experts],

counsel should more readily be appointed.@[73]

Joni B. also recognized the need for the guidance of legal counsel to assist, not only with evidence, but in the interpretation of the import of other legal ramifications of the case. 202 Wis.2d at 5. One example of this is the tax implications of a divorce case.

Some proceedings do not have formal discovery; some do not have all of the rules of evidence applicable; some do not require the expert drafting of pleadings. All, however, require a thorough knowledge of one=s legal position, a knowledge of the relevant issues and facts, and the ability to discover, marshal and present those facts in a way which will persuade the tribunal, often against spirited resistance from one=s adversary in the particular proceeding. This is why the assistance of an attorney is not merely Ahelpful,@ but absolutely essential. The denial of that assistance leads to courts getting it wrong, and hence to injustice.

6. ***The importance of an attorney to real justice has long been recognized and is widely accorded.***

a. <u>The importance of counsel to ensuring justice is a</u>

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[73] 17 *S. Ill. L.J., supra* at 452.

notion that is not new, and is not confined to a few small pockets in the world.

The importance of counsel has long been recognized. In 1495, a statute of Henry VII, 11 Hen. 7, c. 12, codified the English practice of assigning counsel to plead the causes of poor people. That statute established a right to counsel for indigent civil plaintiffs with meritorious causes of action.[74]

In early America, slaves were provided counsel. See *Laneer v. Harding*, 2 Col. Rec. N.C. 550 (1724).[75] *Gregory v. Baugh*, 2 Leigh 665 (1831), quoted a transcript from a 1772 case:

> *On the motion of Sybill, who is detained in slavery by Joseph Ashbrooke . . . She is allowed to sue her master in forma pauperis, and Mr. Jefferson is assigned her counsel to prosecute the said suit.*[76]

In his 10-year quest for freedom, Dred Scott had counsel provided by

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74 66 *Colum. L. Rev.* 1322, 1326-27 (1966).

75 Quoted in Helen Tunnicliff Catterall, *Judicial Cases Concerning American Slavery and the Negro*, Vol. 2, p. 10 (1929).

76 Catterall, *supra*, at Vol. 1, p. 163 (1926).

others.[77] In 1857, Maine enacted a statute putting the legal services of county attorneys at the disposal of accused fugitive slaves.[78]

As did England and the American Colonies, the Wisconsin Supreme Court recognized very early on, in *Carpenter v. County of Dane*, 9 Wis. 249, 276 (1859), that an attorney is absolutely essential to real justice:

> *. . . And would it not be a little like mockery to secure to a pauper these solemn constitutional guaranties for a full and fair trial of the matter 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 guaranties of any real permanent value to him.*

This decision was written fully 104 years before *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792 (1963), was decided. On December 4, 2009, the State Bar=s Board of Governors cited *Carpenter* in a Public Policy Position Statement, using almost identical language: A state constitutional right would be Aa cruel mirage in the absence of legal counsel.@

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77 Donald E. Fehrenbacher, *The Dred Scott Case* 252, n. 10, 253-54, 256, 268, 270-71, 280, 281, n. 42-43 (Oxford Univ. Press 1978).

78 *Id.* at 432.

b. **The importance of an attorney to real justice is recognized in numerous statutes and decisions in the United States and in other countries.**

The Wisconsin legislature has, in at least 12 statutes, recognized the importance of an attorney.[79] Besides Wisconsin, there are a great many statutes in most of the states which recognize the importance of an attorney in various civil proceedings. For example, Illinois has at least four statutes, Indiana three, Kentucky two, Missouri three, New York three, North Carolina three, Tennessee two, Texas two, Virginia two and West Virginia one.[80]

The Alaska Supreme Court held that there was a right to counsel in private custody proceedings, basing this right on the Due Process Clause of

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79 Wis. Stat. ' 48.23
Wis. Stat. '48.42(4)(c) (TPR)
Wis. Stat. '51.20(3) (involuntary commitments)
Wis. Stat. '51.45(12)(c)(2) (emergency commitment of intoxicated persons)
Wis. Stat. '767.405 (GALs for minors)
Wis. Stat. '252.07(9)(d) (TB quarantine)
Wis. Stat. '767.82 (paternity)
Wis. Stat. '769.309 (Uniform Interstate Family Support Act)
Wis. Stat. '54.40(6)(b) (guardianship)
Wis. Stat. '938.23 (juvenile delinquency)
Wis. Stat. '977.08 (appointment of counsel)
Wis. Stat. '946.75 (denial of counsel is a Class A misdemeanor)

80 A listing and summary of the specific statutes is set forth at Appendix p. 130.

the Alaska Constitution.[81]

A federal court has declared a right to counsel under a state constitution. *Kenny A. v. Sonny Perdue*, 356 F.Supp.2d 1353 (N.D. Ga. 2005). That court held that, not only did foster children in Adeprivation@ actions have a right to counsel under the Georgia statute, but that the Due Process Clause of the Georgia Constitution, Art. I, '1, &1, also accorded them that right. *Id.* at 1359-61. This clause provides: ANo person shall be deprived of life, liberty or property except by due process of law.@ Finding an expansive liberty interest on the part of the children in the form of safety, health, well-being, integrity of the family unit and having a relationship with biological parents, id. at 1360, the court applied the test in *Mathews v. Eldridge*, 424 U.S. 319 (1976). It found there to be a significant risk that erroneous decisions would be made, and that it is in the state=s interest as *parens patriae* that counsel be appointed. This interest Afar outweighs any fiscal or administrative burden that a right to appointed counsel may entail.@ 356 F.Supp. 2d at 1361.

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81 *Flores v. Flores*, 598 P.2d 893, 896 (Alaska 1979).

In a 1995 Nebraska federal court decision, *Bothwell v. Republic Tobacco Co.*, 912 F.Supp. 1221 (D. Nebr. 1995), the court concluded that federal courts have the inherent power to compel an unwilling attorney to accept a civil appointment. In its rationale, the court discussed the importance of lawyers to justice:

> *Our governmental system is built partially upon the concept of citizens being able to redress their grievances and resolve their civil disputes in courts. A judiciary committed to observing notions of fairness, justice, and equality before the law is of paramount importance in maintaining public confidence in that system. Lawyers are essential in maintaining the system because the only realistic way the populace at large can obtain Aequal justice@ is through the advocacy of those trained in the law. If public confidence in the system wanes, in time, people will find, and indeed already have found, other, less civil methods of resolving their differences. * * * Thus, attorneys occupy a unique role in preserving the ordered liberty included in the concept of Adomestic tranquility.@ They are therefore vital to preserving the viability of the third branch of government. See David Luban, Lawyers and Justice: An Ethical Study (1988).*

912 F.Supp. at 1234-35.

c. **The European Court of Human Rights and Other Countries Grant the Right to Counsel.**

To paraphrase the United States Supreme Court in *Lawrence v. Texas*, 539 U.S. 558, 576, 123 S.Ct. 2472 (2003): to the extent that we rely on values we share with a wider civilization, we should note the decisions of the European Court of Human Rights and other nations. *See also Roper v. Simmons*, 543 U.S. 551, 575, 125 S.Ct. 1183 (2005).

There are at least forty-four countries which provide counsel to indigent litigants in civil matters, either through statute or constitutional law. Two other countries, Canada and Australia, leave it up to the individual provinces and states.[82]

Airey v. Ireland, 2 E.H.R.R. 305, 314-15 (1979), is the landmark European case giving indigent litigants a right to counsel in civil cases:

> *The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial. . . . The court concludes . . . that the possibility to appear in person before the [trial court] does not provide the applicant with an effective right of access.*

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82 *See* Appendix p. 132 for list of specific case law, statutes and constitutional provisions for these forty-six countries.

Id. at 314, n. 5, 315, 318. This language is very much like the Awould it not be a little like mockery@ language of the Wisconsin Supreme Court in *Carpenter v. County of Dane*, 9 Wis. at 276.

In a more recent case, the European Court of Human Rights extended the right to counsel to persons defending against defamation claims. The Court, relying on *Airey*, found that the denial of legal assistance to the defendants deprived them of the opportunity to effectively present their case before the English court. *Case of Steel and Morris v. The United Kingdom*, 41 E.H.R.R. 22, 403, 428-30 (2005).

Because these decisions were issued by the European Court of Human Rights and interpret the European Convention on Human Rights and Fundamental Freedoms, they are binding on all forty-five signatories to the Convention.

A third European case important to the right to counsel in civil cases is *Schefer-Heer contre Conseil d=Etat d=Appenzell Rhodes-Exterieures*, 8 Oct. 1937, Arrets du Tribunal Federal 63, 1, 209. In this 1937 case, the Swiss Supreme Court interpreted Article 4 of the Swiss Constitution, which states: A[a]ll Swiss are equal before the law. In Switzerland there is neither

subjection or privilege of locality, birth, family or person.@ The Court held that this article requires that Afree judicial assistance ought to be granted liberally in a civil matter where the handling of the trial demands knowledge of the law.[83] Hence, the Swiss Supreme Court recognized the necessity of a lawyer to securing equal justice in civil cases.

7. ***Conclusion***

Proposed Rule 11.02(2), by providing for the appointment of counsel in critical cases, will assure fairness and equality in the Wisconsin justice system.

IV. COMMITTEES, AGENCIES AND INDIVIDUALS THAT THE PETITIONER HAS CONSULTED ABOUT THE PROPOSAL

A. Individuals

Those of us who circulated and filed this petition consulted the 1,320 individuals who signed it. There were 1,286 persons who had signed the petition at the time of its filing on September 30, 2010. Since then, an

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83 Translated in Mauro Cappelletti, et. al., *Toward Equal Justice: a Comparative Study of Legal Aid in Modern Societies* 705 (1975).

additional 34 individuals have signed the petition via our website, www.wisgideon.org. These signers include 1,029 persons who are not lawyers and judges, 282 lawyers, and 9 judges and court commissioners. These persons live in 25 counties across the state.

B. Organizations

We consulted with 13 bar organizations, including the State Bar of Wisconsin. Most of these consultations consisted of a PowerPoint presentation followed by a request to read and sign the petition. Presentations were made as follows:

Serjeants= Inn of Court (Milwaukee)	March 19, 2009
La Crosse County Bar Association	October 12, 2009
Sheboygan County Bar Association	October 13, 2009
Senior Lawyers Division President Robert Swain - Discussion	October 22, 2009
Sauk County Bar Association	November 10, 2009
Green Bay Inn of Court	November 19, 2009
Monroe County Bar Association	November 25, 2009
Jefferson County Bar Association	December 1, 2009
Tri-County Bar Association	January 8, 2010

Marathon County Bar Association January 14, 2010

Milwaukee Bar Association January 15, 2010

Dane County Bar Association March 23, 2010

At these local bar association meetings, almost no one expressed disagreement with the need for court appointment of counsel in civil cases. There were questions as to the source of funds, but the most outspoken challenges were opinions that this could not be done politically. As we recall, two lawyers asked whether lawyers would be required to accept appointments.

We made a presentation to the State Bar of Wisconsin=s Board of Governors on December 3, 2010. Subsequent to that meeting, President-Elect James M. Brennan provided to us the State Bar=s 2009 Administration of Justice Positions, one of which states:

> *Inherent Judicial Power B The State Bar of Wisconsin supports the exercise of inherent judicial power to appoint attorneys to assist the Court in the fair administration of justice by service as counsel for parties, guardians ad litem and special prosecutors. The Bar recognizes and supports the Supreme Court=s paramount authority to regulate the fees of all court appointed attorneys. [2001 Senate Bill*

126] (Also see Regulation of the Practice of law.)

State Bar of Wisconsin *Administration of Justice*, p. 6.

Several Governors expressed support for the petition. Two Governors stated that the petition doesn=t go far enough. One of these suggested that the rule=s third line be amended by striking Awhere@ and inserting Aupon an express finding that.@

Some Governors expressed concerns about the kinds of cases in which counsel would be provided; whether lawyers would be required to accept appointments; the effect on *pro bono* initiatives; the impact on family law attorneys as opposed to government and corporate attorneys; whether personal injury cases would be included; whether first offense OWI would be included; and whether cases involving grandparents seeking custody against Airresponsible@ parents would be included.

John Ebbott, one of the petitioners, is a member of the Wisconsin Access to Justice Commission. He requested that the petition be placed on the Commission=s November 17, 2010 meeting agenda for discussion. He was advised that the petition could be a part of an Aannouncements@ agenda item, but that it would not be fully considered until it arose out of a

Commission committee with an explanatory memorandum. Ebbott has asked both the Commission=s Delivery of Legal Services Committee and its Courts and Administrative Tribunals Committee to consider the petition. Apparently, the Delivery of Legal Services Committee will take first consideration, once this memorandum is provided to its members.

We consulted with the Wisconsin Counties Association on January 11, 2011. That Association declined to support the petition due to the cost of appointed counsel to counties. We requested that the Association grant conditional support; that is, assuming that funding is supplied, would the Association support appointed counsel as good public policy? We were told that Association staff would have to consult with the appropriate committees and notify us.

We consulted with the Hamilton Consulting Group with regard to cost and sources of funds.

We consulted with the Milwaukee African-American community through a presentation to the Community Brainstorming Conference on September 26, 2009.

We also consulted and discussed the petition amongst ourselves, the

initial Wisconsin Right to Counsel Task Force. While not all of us thought that this petition was the best way to proceed, all of us believe that indigent *pro se* litigants should be provided counsel in critical civil cases. Subsequent to the discussion, the Task Force expanded. The current members of the Task Force are listed in the Appendix at p. 137.

We also consulted with the North Shore Rotary Club on April 13, 2009 and the Mitchell Field Rotary Club on July 22, 2009, through the PowerPoint presentation. The members of these groups were very interested in the issue, and none expressed opposition to the concept of court-appointed civil counsel.

V. CONCLUSION

Justice requires that the courts appoint attorneys to represent indigent pro se litigants in critical civil cases. Therefore, we respectfully ask that the Wisconsin Supreme Court grant our petition and adopt SCR 11.02(2). We thank the Court for its attention and its patience.

Dated: January 20, 2011

Respectfully submitted,

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