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May 2, 2018

Ms. Julie Ann Rich  
Supreme Court Commissioner  
Supreme Court of Wisconsin  
110 East Main St. Suite 440  
Madison, WI 53703

**Re: Rule Petition 17-06, In Re: the Petition to Amend SCR 81.02**

Dear Commissioner Rich:

Thank you again for extending the deadline for the National Association of Criminal Defense Lawyers (NACDL) to file comments to the Rule Petition 17-06.

NACDL is a non-profit voluntary professional bar association that promotes a society where all individuals receive fair, rational, and humane treatment within the criminal justice system. To that end, NACDL seeks to identify and reform flaws and inequities in the criminal justice system, redress systemic racism, and ensure that its members and other in the criminal defense system are fully equipped to serve all accused persons at the highest level. Founded in 1958, NACDL's thousands of direct members and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys-including private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors, and judges are dedicated to advancing the proper, efficient and fair administration of justice. As the nation's preeminent criminal defense bar, NACDL is keenly interested in the issues raised by the petition and the Court's corresponding questions.

As an organization, NACDL has authored numerous reports relating to the state of public defense, including state focused reports in Louisiana ([State of Crisis](#)), South Carolina ([Summary Injustice](#)) and [Rush to Judgment](#)), and Florida ([3 Minute Justice](#)); a three-part examination of public defense in America ([Gideon at 50](#))

Parts 1, 2 and 3); and an examination of the Federal Indigent Defense System ([Federal Indigent Defense 2015: The Independence Imperative](#)). NACDL has also served as amicus on numerous filings related to the provision of indigent defense services in state and local courts including [Hurrell-Harring v. State of New York](#), [Tucker v. Idaho](#) and [Kuren v. Luzerne County \(PA\)](#). NACDL hopes that its national perspective drawn from sixty years of advocacy, investigation, training, and public defense reform efforts will be helpful to the Court.

### **The Federal System**

The Court inquired about federal compensation standards. The current federal public defense system, which was put in place by the Criminal Justice Act of 1964 (CJA), provides both structure and a reasonably dependable funding stream. Consistent with Principle 2 of the ABA [Ten Principles of a Public Defense Delivery System](#), the federal system utilizes a healthy mix of both institutional defenders and private counsel.

Private attorneys represent indigent defendants in the federal system as members of CJA panels. The hourly rate of compensation for panel lawyers is set by statute. Under 18 U.S.C. [§3006A\(d\)\(1\)](#), the Judicial Conference is authorized to increase annually all hourly rate maximums by an amount not to exceed the federal pay comparability raises given to federal employees. Hourly rate maximums are adjusted automatically each year according to any federal pay comparability adjustment, contingent upon the availability of sufficient funds. The new rates apply with respect to services performed on or after the effective date. The legislation sets a maximum hourly rate, but the Judicial Conference, under the current structure, oversees the defender budget and decides what it will seek as the hourly rate. As a result, the authorized legislative amount may be greater than the hourly rate that is actually paid. The current CJA panel hourly rate for non-capital cases is \$140.00.

For work done as of:	Hourly Rate
May 1, 2002	\$90
January 1, 2006	\$92
May 20, 2007	\$94
January 1, 2008	\$100
March 11, 2009	\$110
January 1, 2010	\$125
September 1, 2013	\$110
March 1, 2014	\$126
January 1, 2015	\$127
January 1, 2016	\$129
May 5, 2017	\$132
March 23, 2018	\$140

Although the federal system is superior to most state systems for the provision of indigent defense, it has persistent deficiencies. Prompted by constricted federal spending known as “sequestration” which exposed serious flaws that existed in the infrastructure of the nation’s

federal public defense system, NACDL in 2013 established a Federal Indigent Defense Task Force to conduct a focused review of federal public defense. The report from that study documented profound problems in the system, many of which arose from undue judicial influence, inadequate funding, interference with the independence of the defense function, and a pervasive lack of transparency. Among other recommendations, NACDL called for a thorough review of the federal public defense system, something which had not occurred for more than two decades.

On the eve of the publication of NACDL's report, Chief Justice Roberts announced the creation of the Committee to Review the Criminal Justice Act Program (CJA Review Committee). Beginning in 2015 the CJA Review Committee conducted numerous public hearings across the country. The findings and recommendation from the CJA Review Committee are anticipated to be released this fall.

### **The Right to Counsel Means More than a Warm Body with a Bar Card**

“That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command... an accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.” Majority opinion by Justice O'Connor in [Strickland v. Washington](#), 466 U.S. 668, 686 (1984).

The right to counsel as guaranteed by the Sixth Amendment has various crucial components. Counsel must have the requisite skill, experience and knowledge to provide meaningful representation in the case to which they are assigned. *Id.* Counsel must also have adequate resources and reasonable caseloads<sup>1</sup> that allow the lawyer to meet the standards for constitutionally effective representation.<sup>2</sup>

Having adequately resourced, skilled and trained counsel present helps protect against wrongful convictions, because they are able to conduct thorough investigations and make meaningful challenges to improper forensic sciences. Attorneys with proper caseloads and support have the ability to assure meaningful examinations of government conduct, preserving the Fourth, Fifth and Sixth Amendment rights of the community. Counsel with time, education, and experience can assist in identifying and addressing underlying conditions such as substance abuse, mental illness, and trauma, allowing for the use of treatment, services and diversions which help reduce recidivism. The intervention and actions of counsel can help mitigate the myriad of [collateral consequences](#) that often attend convictions of even the most minor of crimes. Collectively, the presence of meaningful representation protects the state's coffers and increases the community's confidence in the justice system.

The right to counsel also encompasses the right to have conflict free counsel. This means not only counsel free of a traditional conflict of interest but includes having counsel whose

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<sup>1</sup> [Securing Reasonable Caseloads: Ethics and Law in Public Defense](#), Norman Lefstein, ABA SCLAIID (2011). See also the NACDL and ABA joint report [The Rhode Island Project](#) (2017).

<sup>2</sup> Meaningful representation guidelines can be found in the [ABA Standards for Defense Function](#), Standards 4-3.2, 4-3.6, 4-4.1, and 4-1.3(e).

commitment to his or her client does not compete against the attorney's financial interests in operating their practice and earning a living wage.<sup>3</sup>

The right to counsel applies to all critical stages of the proceedings. [\*Rothgery v. Gillespie County\*](#), 554 U.S. 191 (2008). Important rights are inevitably lost when counsel is not available or able to be secured in the early stages of a case. Without the representation of counsel accused often experience extended time in custody as there is no attorney to file bond motions, speedy trial rights are forced to be waived to allow counsel to be prepared, and critical evidence is lost as bruises heal, video footage is erased and witnesses are unable to be located.

It is easy to understand that excessively low compensation results in poor quality representation. Low rates of pay force many attorneys to take on more cases than they can properly handle in an effort to earn sufficient income. Low rates of pay also discourage higher quality, more experienced counsel from even accepting court appointments. Moreover, inadequate rates of pay will lead to counsel devoting minimal time to their work if they are losing money throughout the representation. If, as in Wisconsin, the rate is less than the hourly overhead, each hour worked on appointed cases is simply time that the attorney is losing money.

Flat fee contracts do not cure the problem. Flat fee contracts often operate at less than the hourly rate, encouraging minimal investments of time and resources because it is inevitable that time spent working on a case will result in reduced or lost profits for the attorney. While flat fee contracts may create a sense of predictability in budgeting, it comes at the intolerable expense of quality representation.

### **Courts Have the Obligation to Protect and Enforce the Constitutional Right to Effective Assistance of Counsel**

As this Court well knows, judges have a unique role and responsibility for the quality of justice in our democracy and with it the obligation to assure that the Sixth Amendment right to counsel is not a mere aspiration but rather a zealously safeguarded protection.

Individual case litigation in a post-conviction setting has proven to be an ineffective model to assure compliance with the constitutional right to effective assistance of counsel when the underlying problem is systemic. The recent flood of exonerations makes clear that post-conviction relief does not protect the innocent who may be eventually vindicated but not before great personal and systemic costs are incurred. Nor does post-conviction relief protect attorneys who perform constitutionally sufficient work but at great personal expense. Furthermore, post-conviction litigation can take many years, and therefore wrongful conviction leaves the actual perpetrator free to commit additional crimes against the community

Other profound problems exist when relying solely on post-conviction relief in individual cases to effectuate the constitutional right to effective assistance of counsel. For example, post-

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<sup>3</sup> According to the [ABA's Task Force on the Financing of Legal Education](#), those graduating law school in academic year 2012-2013 had an average student loan debt of \$88,000 if attending a public school and \$127,000 if attending a private school. By contrast, in AY 2005-06, student debt for public and private law school graduates was \$66,000 and \$102,000 respectively.

conviction records are often irreparably harmed by systemic flaws because evidence is lost, witnesses are not interviewed, and counsel is often not timely secured – all of which makes it difficult and sometimes impossible to demonstrate that the outcome would have been different but for the ineffective assistance of counsel. Moreover, post-conviction records are often irreparably harmed by the systemic flaws because unskilled, under-skilled or overburdened lawyers fail to create an adequate record. As Justice Blackman said in his dissent in *McFarland v. Scott*, , “Evidence not presented at trial cannot later be discovered and introduced; arguments and objections not advanced are forever waived... ten years after the articulation of that standard, practical experience establishes that the *Strickland* test, in application, has failed to protect a defendant’s right to be represented by something more than ‘a person who happens to be a lawyer.’” [McFarland v. Scott](#), 512 U.S. 1256, 1259 (1994).

As a co-equal branch of government, courts have a shared obligation to ensure the proper functioning of the government, especially the judicial system. When other government actors have failed to act, the court must. Following this Court’s ruling in 2011 on the prior petition regarding rates, this Court put the legislature on notice of the concerns and need for action. The legislature did nothing. Subsequently, the Sixth Amendment Center produced its report, [Justice Shortchanged](#), focusing on the inadequacies in Wisconsin connected to the low rate of compensation. In 2013 NACDL produced its [Gideon at 50](#) report, which detailed the fact that Wisconsin has the lowest hourly pay rate in the country. To date, no branch of the government has taken any remedial action. There is little question that the current rate of compensation provided by the state, one that has remained unchanged for decades, is insufficient. When the hourly rate of compensation is below the hourly cost of overhead, the rate is fundamentally unreasonable. At such a rate, the state is forcing those who accept court appointments to personally subsidize the state’s constitutional obligation to its citizens, and does so in manner that likely leads to substandard representation. The state public defender in Wisconsin has repeatedly sought additional funding in its budget to properly compensate assigned counsel. Those efforts have been rejected and since the filing of this petition, additional legislation to address the unreasonable pay rates has been proposed and failed. It is time for this Court to act.

### **Courts Have the Authority to Act**

Across the nation, courts have acted when other branches of government have failed to protect fundamental fairness in the judicial system. State cases where courts have acted regarding assigned counsel rates are discussed in [The Constitution, Compensation, and Competence: A Case Study](#), 27 Am. J. Crim. L.1, Robert Rigg, 1999. Cases demonstrating the court’s authority to act include:

- Alabama: [Wright v. Childree](#), 972 So.2d 771 (Ala.2006): attorneys entitled to overhead plus a reasonable fee.
- Alaska: [DeLisio v. Alaska](#), 740 P.2d 437 (Alaska 1987): “Requiring an attorney to represent an individual criminal defendant for only nominal compensation unfairly burdens the attorney by disproportionately placing the cost of a program intended to benefit the public upon the attorney rather than upon the citizenry as a whole.” The *DeLisio* court found that the state cannot deny reasonable

compensation to appointed counsel; to do so constitute taking without just compensation.

- Arizona: *Zarabia v. Bradshaw*, 912 P.2d 5 (Az.1996): court held that a flat fee contracting system used in Yuma County was invalid as it appointed attorneys without consideration of their skill or experience. In so ruling the court also found the contract failed to pay counsel the “reasonable and equitable compensation” the Arizona Rules of Criminal Procedure required because a “compensation scheme that allows lawyers significantly less than their overhead expense is obviously unreasonable.”
- Florida: *In Re Order on Prosecution of Criminal Appeals by 10th Judicial Circuit Public Defender*, 561 So.2d 1130 (Fla.1990): Court directs if legislature did not provide sufficient funds within 60 days to provide counsel the court would entertain habeas petitions and order immediate release of the accused;
- Kansas: *State v. Smith*, 747 P.2d 816 (Kan.1987): Kansas Supreme Court recognized that the state has an obligation to pay court appointed counsel at a rate which includes consideration for both out-of-pocket expenses and overhead. The Court found the current system in place in Kansas violated several provisions of the U.S. and Kansas Constitutions including violating the Takings Clause when legal services are provided without adequate compensation.
- Iowa: *Hulse v. Wifvat*, 306 N.W.2d 707 (Iowa 1981): case addressed what is “reasonable compensation” as authorized by the statute in effect. The Iowa Supreme Court directed in doing so the trial court must “put itself in the position of a reasonable attorney at the time the services were undertaken. The court must recognize the high standards of diligence and preparation which is [sic] demanded of counsel in criminal cases.”
- Louisiana: *State v. Peart*, 621 So.2d 780 (La.1993): the Louisiana Supreme Court created a rebuttable presumption that certain indigent defendants were not receiving effective assistance of counsel because the attorneys in those areas were carrying excessive caseloads and thus were unable to properly fulfil their obligations. “We take reasonably effective assistance of counsel to mean that the lawyer not only possesses adequate skill and knowledge, but also that he has the time and resources to apply his skill and knowledge to the task of defending each of his individual clients.”  
*State v. Wigley*, 624 So.2d 425, 429 (La.1993): the Louisiana Supreme Court found that requiring attorneys to represent an accused without compensation (at all) was an abusive extension of their professional obligations and directed such attorneys were entitled to receive reimbursement for out-of-pocket expenses, overhead expenses and a fee for their services. “[B]udget exigencies cannot serve as an excuse for the oppressive and abusive extension of attorneys’ professional responsibilities.”
- Massachusetts: *Lavallee v. Justices in Hampden Superior Court*, 812 N.E.2d 895 (Mass.2004): low level of compensation for appointed counsel left county with shortage of attorneys willing to accept appointments, resulting in lengthy delays in appointing counsel. The court concluded there was a high likelihood accused would not receive effective assistance of counsel (and that the current lack of counsel violated his right to assistance of counsel in having bail set and in lost

opportunities for investigation). The court found the accused could not meaningfully prove prejudice; therefore the court had to provide prospective protection. The court entered an order for the attorney general to explain why any petitioner held more than seven days without bail should not be released and those charged with felonies without counsel for more than 30 days should not have their charges dismissed without prejudice until counsel is provided.

- Mississippi: [\*Wilson v. State\*](#), 574 So.2d 1338 (Miss.1990): counsel was entitled to costs of overhead as part of their “actual expenses” in addition to the hourly rate set by the legislature. The court set the overhead compensation rate at \$25/hour.
- New Mexico: [\*State v. Young\*](#), 172 P.3d 138 (N.M.2007): capital counsel operating under flat-fee contracts are so inadequately funded they cannot recoup overhead makes it “unlikely that any lawyer could provide effective assistance of counsel.”
- New York: [\*NY County Lawyers Association v. State\*](#), 192 Misc. 2d 424 (N.Y.2003): the court raised assigned counsel rates because the current amount did not cover normal hourly overhead expenses.
- Oklahoma: [\*State v. Lynch\*](#), 796 P.2d 1150, 1163 (Okla.1990): court appointed counsel challenged the statutory fee caps. The Oklahoma Supreme Court took jurisdiction, setting guidelines for compensation until such time as the legislature acted. In finding it had the authority and obligation to act, the court cited its “constitutional responsibilities relating to the managerial and superintending control of the district courts and the practice of law” and “the inherent power of the court to define and regulate the practice of law.” The Oklahoma Supreme Court also recognized while compensation is something that also lies within the sphere of the legislature, until the legislature acted, the court had a responsibility to address the constitutional claim raised.
- West Virginia: [\*Jewell v. Maynard\*](#), 383 S.E.2d 536 (W.Va.1989): the court found court appointed counsel were being forced to “involuntarily subsidize the state” when they were paid a rate that was below the cost of overhead.

The national trend in class action litigation has confirmed the court’s role assuring the criminal justice system operates fairly. Courts therefore have been proactive in assuring systematic flaws do not result in injustice. A movement away from a post-conviction examination of the quality of representation in a single case allows systemic flaws to be examined and addressed. Cases demonstrating this national trend include:

- [\*Duncan v. State of Michigan\*](#), 775 N.W.2d 745 (Mich. 2009): the court allowed a class action to proceed, rejecting suggestions that the only means by which to consider ineffective assistance of counsel issues is through a post-conviction analysis.
- [\*Hurrell-Harring v. New York\*](#), 930 N.E.2d 217 (N.Y.2010): class action permitted to proceed on a claim of constructive denial of effective assistance of counsel due to systemic deficiencies. The case asserted that the mere existence of a public defender office did not meet the minimum requirements of the Sixth Amendment when such office lacked sufficient skill and experience to provide constitutional representation. The resulting settlement included establishing caseload standards,

state sharing responsibility for paying for counsel, and an agreement to the timely provision of counsel at first appearance/arraignment.

- *Wilbur v. City of Mount Vernon*, 989 F.Supp.2d 112 (W.D.Wash.2013): the court found a Sixth Amendment violation based on counsel routinely meeting clients for the first time at court and defendants being regularly advised to plead guilty without meaningful communications with their counsel. The court concluded this was “represent[ing] the client in name only . . . having no idea what the client’s goals are, whether there are any defenses or mitigating circumstances that require investigation, or whether special considerations regarding immigration status, mental or physical conditions or criminal history exist.” The court indicated while the majority of defendants may have received reasonable resolutions of their cases, they did not have the meaningful relationship with their attorney required by *Gideon*.
- *Kuren v. Luzerne County*, 146 A.3d 715 (Pa.2016): constructive denial of counsel lies where systemic deficiencies create an imminent risk that the right to counsel will be violated. The challenges included routine underfunding of the public defender preventing the provision of constitutionally sufficient representation. The court recognized that sufficient facts had been alleged to pursue an injunction to force the county to adequately fund the county public defender office.
- *Tucker v. Idaho*, 394 P.3d 54 (Idaho 2017): case alleges Idaho fails to provide adequate resources, training and oversight of its public defenders thus neglecting its responsibility to ensure constitutionally adequate representation. Litigation still ongoing. In April 2017 the Idaho Supreme Court ruled that the case could proceed holding “the counties have no practical ability to effect statewide change” so the “state must implement the remedy.” Case was certified as a class action in January 2018.

As these cases demonstrate, as part of its role in assuring compliance with the constitutional right to effective assistance of counsel, courts can act to set a minimum threshold of compensation because the provision of indigent defense services is part of a state obligation. For example, courts may set specific rates as a floor for adequate compensation. Courts could also opt to tie adequate compensation rates to other indicators such as the federal CJA rate or to call for increases that mirror those provided to other judicial system actors such as prosecutors or judges. Another possibility would be for courts to conclude that when attorney compensation is at or below a particular threshold, there is a presumption that the representation is ineffective and the burden shifts to the state to overcome that presumption. Such a threshold could be determined by examination of overhead and the average cost of operating a criminal defense practice within the state.

In addition to inadequate compensation, there are also persistent shortcomings in the provision of indigent defense services which result in fundamental unfairness. Courts can identify such practices and if such systemic deficiencies exist, the court can create a presumption of unconstitutional representation and place the burden upon the state to prove otherwise. For example, courts can act to direct that prejudice can be assumed when the wait for counsel to be identified and secured exceeds a specific amount of time and thereby creates a presumption of prejudice to the accused.

## **The Cost of The State's Obligation to Provide Constitutionally Required Counsel Cannot Be Placed on the Backs of the Counties or the Private Bar**

*Gideon* made clear the obligation to provide counsel for those unable to afford it lies with the state. Although the court did not prescribe a specific manner in which counsel was to be provided it is clear the responsibility lies with the state.

Low hourly rates are an abdication of the state's responsibility. Low rates force a small segment of the private bar to personally shoulder the true cost of the criminal justice system. Not all lawyers take appointments, nor should they since many lack the requisite training, skill and expertise to handle criminal matters. The burden of inadequate compensation therefore falls on a small segment of the private bar.

Low hourly rates also artificially deceive the community as to the true costs of the criminal justice system. That deception in turn prevents the public from making informed policy decisions relating to the legal system. Uninformed about the true cost of the criminal justice system, voters lack crucial knowledge to make informed decisions when voting for prosecutors, law enforcement officials and legislators. If the public is deceived about the true costs of the criminal justice system, it also prevents informed voting on criminal justice issues such as enforcement priorities, criminal penalties, use of mandatory minimum sentencing and issues in general relating to reform of the criminal justice system.

### **Justice Delayed is Justice Denied**

One of the inevitable consequences of low pay for court appointed counsel is delay in the criminal justice system. Low pay causes delay for multiple reasons. The difficulty in securing properly qualified and experienced counsel willing to accept appointments at low rates builds in delay at the beginning of the case. If counsel is required to take large numbers of cases in order to cover overhead and other operating expenses, that large volume negatively impacts case outcomes. Excessive caseload also often leads to the need for additional continuances in the case because counsel simply lacks the time to be prepared in a timely fashion.

The delay in any part of the court system caused by inadequate pay impacts all aspects and all actors in the court system. Victims do not get timely closure or resolution of their cases and can experience delays in obtaining restitution or the return of property held as evidence.

Witnesses are also impacted by these delays. Repeated continuances cause disruption in day to day life as witnesses must try to adjust their schedules to the court's docket. As time passes, memories fade and/or change over time.

These delays also impact the operation of trial court dockets. Repeated continuances and rescheduling affect not only the case at hand but also other cases on the court's calendar. Repeated court appearances to address the need for continuances unnecessarily add to crowded court dockets. The failure to reasonably compensate court appointed counsel increases the risk and number of ineffective assistance of counsel claims, preventing finality and further impacting court dockets by the additional time required to deal with post-conviction claims.

Delay caused by inadequate compensation, of course, also directly impacts the accused. Delays in an accused meeting with counsel can result in the loss of physical evidence – video tapes that are lost or physical injuries that heal. Similarly, delays in appointing counsel can result in the inability to locate witnesses and for those witnesses located, the passage of time can result in loss of details in memory or the alterations to memory that naturally occur over time.

An accused suffering from a delay in obtaining appointed counsel also will experience a dramatic increase in the amount of pretrial incarceration which in turn, impacts the budget of local authorities who bear the increased cost of unnecessary extended incarceration. This increase in pretrial incarceration also impacts the family of the accused, and increases the likelihood of losing housing and employment.

Finally, delay in the criminal justice system negatively impacts the community. The community's confidence and trust in the criminal justice system is damaged when cases take an extended period of time to reach conclusion. Delay also results in increased cost to the various players in the criminal justice system because law enforcement officers and sheriffs must repeatedly come to court on cases that are continued and court personnel must deal repeatedly with the same case creating overcrowded court dockets.

### **Conclusion**

Again, NACDL is grateful for the opportunity to participate in this important process. There is no doubt the state of public defense in Wisconsin has reached a crisis point. NACDL is hopeful the Court will agree that it is time to act.

Sincerely,



Rick Jones  
President  
National Association of Criminal Defense Lawyers



Norman L. Reimer  
Executive Director  
National Association of Criminal Defense Lawyers