



State Bar of Wisconsin  
Policy Positions  
2012



STATE BAR OF WISCONSIN

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## **Introduction**



The State Bar of Wisconsin is committed to the important role it plays in positively impacting the legislative process on issues of importance to the courts, the legal profession and the public. This book represents the continuing effort of the Board of Governors and the Government Relations Team to keep members apprised of positions taken by the State Bar of Wisconsin.

It is our hope that this book will provide our members with information on the guiding principles under which the State Bar of Wisconsin's Board of Governors directs the Government Relations Program to operate. Please feel free to contact any member of the Government Relations Team if you have questions.

Thank you,

The Government Relations Team  
Public Affairs Department



## **Regulation of the Practice of Law**



The Wisconsin Constitution clearly grants the Supreme Court administrative authority over all courts, as defined in Article VII. Through the strong constitutional authority, the Court has an inherent supervisory power over the practice of law.

In the 1974 majority opinion in *Herro, McAndrews & Porter v. Gerhart*, Justice Leo Hanley reiterated the Courts jurisdiction over the practice of law provided in *re: Integration of Bar* (1958):

“The practice of law in the broad sense, both in and out of the court, 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 the law.”

The Supreme Court defines a lawyer as a representative of clients, an officer of the legal system and a public citizen who has a special responsibility for the quality of justice. These professional ideals are set forth in the Preamble of Supreme Court Rule 20 titled, “A Lawyer’s Responsibility.” Through Supreme Court Rule the Court establishes the high professional standards and expectations for those practicing law in Wisconsin, encompassing an attorney’s role in client advocacy, service in the justice system and duties as a public citizen.

Concluding the Preamble the Court asserts that lawyers “play a vital role in the preservation of society.” It is in fulfilling this role that a strong relationship with the Court and the justice system is necessary.

The State Bar of Wisconsin supports the Court’s inherent supervisory power over the practice of law.



### **Issues Related to the Regulation of the Practice of Law**

- **Attorney-Client Privilege** - The State Bar of Wisconsin strongly supports the preservation of the attorney-client privilege and work product doctrine as essential to maintaining the confidential relationship between client and attorney required to encourage clients to discuss their legal matters fully and candidly with their counsel. [U.S. Senate Bill 186 (2007)] [adopted February 2008]
- **Clinical Practicum** - The Board of Governors on behalf of the State Bar of Wisconsin recommends that the legislature not pass Assembly Bill 819, regarding clinical practicum. The Board/State Bar is not expressing an opinion on the advisability of requiring a clinical practicum, but is of the strong opinion that this is a decision to be made by the University of Wisconsin Law School, under the authority and action of the Board of Regents of the University of Wisconsin System, and not by the legislature. [2005 Assembly Bill 819] [Adopted December 2005]
- **Contingent Fees** - The State Bar of Wisconsin supports enforcement of contingent fees on amounts paid or "agreed in writing" regardless of duration of representation. Attorney fees are a matter of contract subject to judicial review and control; they should not be regulated by the Legislature. Furthermore, limits on contingent fees may adversely affect the ability of an impecunious victim to get representation to prosecute a claim. For many, the contingent fee is the key to the courthouse door. [2005 Assembly Bill 1074; U.S. House Bill 5 (2003)] (*Also Civil Practice and Procedure*) [adopted January 1988]
- **Federal Trade Commission "Red Flags" Rule** - The State Bar of Wisconsin urges the Federal Trade Commission and Congress to clarify that the Commission's Red Flags Rule imposing requirement on creditors relating to identify theft is not applicable to lawyers while they are providing legal services to clients. [adopted June 26, 2009]

- **Health Insurance Portability & Accountability Act** - The State Bar of Wisconsin supports repeal of Section 217 of the 1996 Health Insurance Portability and Accountability Act which makes it a criminal act for an attorney to advise a client on eligibility for Medicaid. The provision undermines senior citizens' access to information and encroaches on the First Amendment free speech guarantees applicable to lawyer-client communications. [adopted January 1998]
- **Judicial Requirement** – The State Bar supports the requirement that any judges, including municipal judges, be lawyers. [adopted June 2012]
- **OLR Lapse** - The State Bar of Wisconsin opposes any requirement that the Wisconsin Supreme Court lapse any lawyer regulation funds to the state. **2009 Wisconsin Act 28** (2007 Senate Bill 40 – State Budget Bill) [adopted May 2010]
- **Real Estate Practice** - The State Bar of Wisconsin opposes efforts to expand the powers of real estate brokers under Chapter 452 of the Wisconsin Statutes, as outlined by the Wisconsin Realtors Association's License Law Task Force Report. Such expansion would be detrimental to the public in that it would allow brokers, who are not licensed to practice law by the Wisconsin Supreme Court, to provide legal advice, including enhanced abilities to negotiate and draft contracts and explain the consequences of actions taken during transactions. Furthermore, the Bar is concerned that the proposed amendments to Chapter 452 authorize activities that are intended to be precluded under Sec. 757.30(2). [2005 WI Act 87; 2005 Assembly Bill 783 & 2005 Senate Bill 401] [adopted July 2005]
- **Regulation of the Bar** - The State Bar of Wisconsin opposes transfer of the regulation of the Bar from the Supreme Court to other branches of government. [2007 Assembly Joint Resolution 56] [adopted August 1984]

- **State Bar Membership** - The State Bar of Wisconsin actively opposes this initiative on the principle that it is an attempt to amend the Constitution in an improper way and is also an attempt to usurp the authority of the Court to regulate the legal profession in the State of Wisconsin. [2007 Assembly Joint Resolution 31] [adopted March 2007]
- **Supervision of Paralegals** - The State Bar of Wisconsin supports attorney supervision of paralegals licensed pursuant to law. SCR Petition 04-03 [adopted June 2000, amended April 2011]
- **Tax on Legal Services** - The State Bar of Wisconsin opposes a professional tax on legal services. The State Bar of Wisconsin supports access to legal services as the essential operation of an ordered society and a tax on legal services would further increase legal fees and decrease low-income and moderate-income individuals' access to justice. [adopted August 1984 and June 1999]
- **Unauthorized Practice of Law** -- The State Bar of Wisconsin believes that unqualified, untrained, and unlicensed persons who engage in the unauthorized practice of law are harmful to consumers of services in Wisconsin. The Board of Governors supports any efforts to give meaningful enforcement to unauthorized practice of law a means of redress for any damages caused. [September 2010]

## **Delivery of Legal Services**



SCR 10.02 (2) charges the State Bar of Wisconsin to improve the administration of justice, to create opportunities for legal education and “to promote the innovation and development and improvement of means to deliver legal services to the people of Wisconsin; to the end that the public responsibility of the legal profession may be more effectively discharged.”

The Supreme Court, in *In Matter of State Bar of Wisconsin*, 169 Wis.2d 21 (1992) better describes the purpose of the State Bar of Wisconsin:

“All lawyers have a special responsibility to society. That responsibility involves far more than merely representing a client. Lawyers are the guardians of the rule of law. The rule of law forms the very matrix of our society. Without the rule of law, there is chaos. Lawyers not only have a responsibility to their clients, they have an equal responsibility to the courts in which the rule of law is practiced, and to society as a whole to see that justice is done.” 169 Wis. 2d at 26 (1992) (Bablitch, J., concurring)

In accepting this responsibility, the State Bar of Wisconsin supports policies which encourage or enhance the quality and availability of legal services to the public. The Bar supports policies which enhance the public’s safety and protects the public’s privacy while involved with the legal system, to the extent that it is possible under the law and consistent with the fair and efficient administration of justice.

### **Issues Related to the Delivery of Legal Services**

- **Access to Justice** - The Board of Governors supports all recommendations of the March 2007 final report of the State Bar's Access to Justice Committee, "Bridging the Justice Gap: Wisconsin's Unmet Legal Needs." These recommendations include, but are not limited to: (1) Establishing a permanent Access to Justice Commission under the auspices of the Supreme Court; (2) State funding of civil legal services for low-income residents; (3) State funding of self-help centers in every courthouse; (4) Permitting paralegals to advocate in court and before agencies on a limited basis; (5) Requiring low-income clients to pay for a portion of the services they receive, based on their ability to pay; (6) Opposing any increase in filing fees to fund civil legal services; (7) Making permanent the current WisTAF assessment on lawyers; (8) Permitting qualified nonlawyers to appear and advocate on behalf of low-income clients before state and federal agencies. [adopted May 2007]
- **Civil Legal Services Funding/Legal Services Corporation Funding** - The State Bar of Wisconsin supports state general purpose revenue funding to provide civil legal assistance by lawyers to low-income citizens and supports federal funding for the Legal Services Corporation to adequately provide low-income citizens access to the legal system. Further, the State Bar of Wisconsin supports participation of the private bar in state and federal civil legal services programs. The State Bar of Wisconsin recognizes that legal needs of low-income individuals go largely unmet and that access to legal services removes obstacles for low-income individuals in obtaining and maintaining employment, health care and child care. **2009 Wisconsin Act 28** (2007 Senate Bill 40 – State Budget Bill) [2005 Assembly Bill 100 – State Budget Bill; U.S. House Bill 2862 (2005); U.S. Senate Bill 2778 (2002); 2001 Senate Bill 55 - State Budget Bill] [adopted August 1984, January 1992 and November 1998]

The State Bar of Wisconsin favors a legal aid system that does not interfere with poor persons' full access to the courts or deny advocacy that is available to others in our society. [Adopted June 26, 2009]

- **Group/Prepaid Legal Service Plans** - The State Bar of Wisconsin supports maintaining employer contributions to group legal services tax-free for employees [Section 120 of the Internal Revenue Code]. Tax exemptions for group legal service plans provide workers with legal services that would not otherwise be available. If Section 120 is not revived, employers will likely discontinue legal service plans and channel pre-tax dollars into other statutory benefits resulting in no new gains in tax revenues and a substantial diminution of employee benefits and new plans contemplated by employers will be inhibited. [U.S. House Rule 973 (2003); U.S. Senate Bill 654(2001); U.S. House Rule 1434 (2001)] [adopted June 1993]
- **Pro Bono Legal Services** - The State Bar of Wisconsin supports removing legal impediments to government attorneys performing pro bono legal services. Attorneys employed by government have the same professional obligations to perform pro bono as do private practitioners but impediments in state statutes, administrative codes, local ordinances and local bargaining agreements may exist that make fulfilling this obligation difficult, if not impossible. [adopted June 1996]



## **Administration of Justice**



Article VII of the Wisconsin Constitution establishes the judicial branch of government and provides, "the Supreme Court shall have superintending and administrative authority over all courts."

In *State v. Holmes*, 106 Wis. 2d 31 (1982) the court described its superintending and administrative authority:

"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 efficacy 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." 106 Wis. 2d at 44

Lawyers, as an essential component of the state's justice system, have a responsibility to work for an efficient and effective justice system. Therefore, the State Bar supports efforts to ensure that judges are well-qualified, that the judicial system has available to it necessary resources and facilities, that litigants are assured fair trials and that the Supreme Court's role as a superintending authority is respected.

### **Issues Related to Administration of Justice**

- **Access to County Records** - The State Bar of Wisconsin supports ready access to county records and opposes approaches to privacy protection that would curtail access and hamper the efficient operations of the clerk of courts offices in counties throughout the state. [2007 Assembly Bill 418] [adopted April 1999]



- **Administrative Law Hearings** - The State Bar of Wisconsin supports independent agencies for state hearing examiners and federal administrative law judges. Public perception of fairness of administrative law hearings could be impacted by suspicions that agency officials may exert improper influence on the decisions of agency personnel that conduct the hearings. The transfer of state hearing examiners and federal administrative law judges to separate agencies would bolster public confidence in the independence of their decisions. [adopted August 1984]
- **Civic Education** - The State Bar of Wisconsin supports any legislation designed to provide funding for civic instruction in schools as a means of increasing awareness and understanding of our civic responsibilities and freedom. [U.S. Senate Bill 1238 (2001)] [adopted September 2001]
- **Court Assessments** - The State Bar of Wisconsin actively opposes this initiative on the principle that it is an attempt to amend the Constitution in an improper way and is also an attempt to usurp the authority of the Court to regulate the legal profession in the State of Wisconsin. [2007 Assembly Joint Resolution 56; 2007 Assembly Joint Resolution 30] [adopted March 2007]
- **Diversity** - The State Bar of Wisconsin encourages gender, ethnic and racial diversity in the judiciary and other government offices. [adopted January 1990 and January 1994]
- **Immigration** - The State Bar of Wisconsin opposes any state efforts to regulate actions that conflict with Article VI, Clause 2 of the United States Constitution whenever the federal government is acting in pursuit of its constitutionally authorized powers. Consequently, the State Bar opposes any state efforts related to immigration that encourage a conflict to arise between federal law and either the state constitution or state law. [adopted September 2011]

- **Independent Judiciary** - We, the State Bar of Wisconsin, hereby express our solidarity in support of the independence of our Nation's judges and courts. While the Constitution guarantees the right to disagree with a decision of a jury or judge, physical attacks, personal threats, demeaning epithets and false and misleading accusations, create an atmosphere of contempt and disrespect which is unacceptable in a constitutional democracy. We all need to fear a day when legal rights are determined by public opinion. The right to be judged by an independent judge or jury must be protected. [adopted July 2005]
- **Indian Child Welfare Act** - The State Bar of Wisconsin opposes requirements that state courts hold evidentiary hearings to determine whether either parent has "significant social, cultural, or political affiliation" with Indian tribe of which either parent is a member at the time of custody hearing. The purpose of the Indian Child Welfare Act (ICWA), 25 U.S. 1901 et seq., is to protect the integrity of Indian families by creating a procedural framework for child custody proceedings involving Indian children. This position responds to legislative initiatives that seek to amend the ICWA to require the test of "significant social, cultural, or political affiliation" in state court proceedings. This would gut the ICWA by making application of ICWA more subjective and it would make the process more time consuming and costly for the state, delay the placement of children, and deprive them of numerous tribal services. [adopted June 1996]
- **Inherent Judicial Power** - 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] [adopted September 1994]
- **Judge Disqualification** - The State Bar of Wisconsin opposes requiring judges to disqualify themselves on the objective grounds that a judge's impartiality might be questioned by others. The grounds may be reasonable for federal judges, but they would create considerable difficulties for judges under an elective system. [adopted June 1991]

- **Jurisdictional Tampering** - The State Bar of Wisconsin opposes legislative efforts to strip courts of jurisdiction in response to unpopular and controversial decisions. The independence of the judiciary should not be undermined by jurisdictional tampering. [adopted October 1985]
- **Juror Information** - The State Bar of Wisconsin supports parties' and counsel's access to personal juror identifying information balanced by reasonable and fair restrictions on the type of information jurors are required to provide to the clerks of courts as part of the juror registration process. [adopted January 1999]
- **Open Records** - In order to prevent concealment of public hazards, the State Bar of Wisconsin supports court files as open records subject to legitimate privacy concerns, proprietary information, and trade secrets or as otherwise protected by law. [adopted June 1991]
- **Substitution of Judges** - The State Bar of Wisconsin opposes restrictions on the substitution of judges. Judges are substituted to insure a fair trial. Public confidence in the judicial system rests on the public's belief that they will receive a fair trial before an impartial judge. If a person perceives, for whatever reason, that the judge may be less than fair, public confidence will be eroded. [2007 Assembly Bill 336; 2001 Senate Bill 55 – State Budget Bill] (*Also see Criminal Practice and Procedure*) [adopted April 1989]
- **Supreme Court Authority** - The State Bar of Wisconsin supports the Wisconsin Supreme Court's authority to determine the support agencies, structures and services - like the Judicial Council - needed to maintain its independence and effectiveness as a separate branch of government. [2001 Senate Bill 55 - State Budget Bill; 2001 Assembly Bill 444] [adopted April 1995]

- **Supreme Court Campaigns** - The State Bar of Wisconsin supports public financing for Supreme Court campaigns from state general purpose revenue to help maintain the integrity and independence of Wisconsin's courts, where even the perception of bias destroys public trust and confidence in the justice system. **2009 Wisconsin Act 89** (2009 Senate Bill 40) [2007 Assembly Bill 250; 2007 Senate Bill 171; 2002 Special Session Assembly Bill 1 - Budget Reform Bill; 2001 Senate Bill 115; 2001 Assembly Bill 303] [adopted May 2001]
- **Supreme Court Conferences** - The State Bar of Wisconsin actively opposes this initiative on the principle that it is an attempt to usurp the authority of the Court to regulate the legal profession in the State of Wisconsin. [2007 Assembly Joint Resolution 24] [adopted March 2007]
- **Temporary Service in Supreme Court** - The State Bar of Wisconsin supports a constitutional amendment providing for temporary service on the Supreme Court as a fair way to provide litigants who reach the Supreme Court with a resolution of a dispute in a situation where a justice does not participate in the case, leaving the Court without a majority. [2003 Assembly Joint Resolution 44] [adopted November 2003]
- **Violence & the Justice System** - The State Bar of Wisconsin supports the recommendations of the State Bar of Wisconsin's 1997 Commission on Violence and the Justice System to require safety features on newly manufactured handguns sold in Wisconsin, develop accurate firearm tracking, ban "junk" guns and maintain current law prohibiting concealed weapons. The Commission studied how violence wastes the resources of the judicial branch and developed strategies to help the judiciary handle the increase in criminal, juvenile and domestic violence cases. [adopted April 1997]



## Funding of the Justice System



Wisconsin courts have constitutional functions and obligations that require funding at a level sufficient to meet those responsibilities. Since the legislature has the constitutional power to tax (*LaCrosse Foundation v. Town of Washington*, 182 Wis. 2d 490, 494 (Ct. App. 1994) ) it has the ultimate power over funding. Thus, the judiciary is dependent on the other branches of government, especially the legislature, to provide adequate funding to properly perform its constitutional duties.

The State Bar of Wisconsin believes that adequate funding is of critical importance to provide a system of justice which is fairly administered and impartial to all people, regardless of financial circumstance.

### Issues Related to Funding of the Justice System

- **Attorney Consolidation** – The State Bar of Wisconsin opposes proposals to consolidate state attorney positions into one department. **2007 Wisconsin Act 20** [Adopted Sept. 2007]
- **Circuit Court Branches** - The State Bar of Wisconsin supports increases in Circuit Court branches when the Director of State Courts determines, after an analysis of caseload standards, that the Circuit Court needs a new branch - whenever: the county board of the county involved has adopted a resolution supporting the request; the weighted caseload statistics support the request; or the local bar association (if any) involved supports the request. [2007 Assembly Bill 393; 2007 Senate Bill 199] [2005 Assembly Bill 705; 2005 Senate Bill 443; 2001 Assembly Bill 310] [adopted November 1994]

- **Circuit Court Operations** - The State Bar of Wisconsin supports state funding of Circuit Court operations including supplies and services such as law libraries and including all personnel directly related to court operations such as deputy and assistant clerks of court, secretaries, law clerks, court commissioners and non-security assistants. [2001 Senate Bill 55 - State Budget Bill; 2001 Assembly Bill 444] [adopted October 1987 and September 1990]
- **Court Interpreters** - The State Bar of Wisconsin supports the establishment and funding of a court interpreter program. The goal is to create a certification and educational program for court interpreters so that they are sufficiently able to understand court procedures, terms and processes, and to be able to interpret that for individuals with a variety of language barriers is a necessity as Wisconsin continues to address the growing problem of language barriers in our courts. [2005 Assembly Bill 100 - State Budget Bill; 2003 Senate Bill 44 - State Budget Bill; 2001 Assembly Bill 444]
- **Court Personnel** - The State Bar of Wisconsin supports sufficient state funding of court operation for all personnel directly related to court operations. (9/90) Brief rationale: The state should fund all personnel directly related to the functions of the courts, such as deputy and assistant clerks of court, secretaries, law clerks, court commissioners and non-security assistants. Security functions should remain with the counties, though the lack of security in some courtrooms remains a concern. [2003 Senate Bill 44 - State Budget Bill] [adopted September 1990]
- **Court Supplies & Services** - Provide sufficient state funding for all supplies and services including law libraries) directly related to court operations. (9/90) Brief rationale: These are services directly related to the operations of the courts. Computers already have been provided through CCAP, the Circuit Court Automation Project. [adopted September 1990]

- **Department of Justice Funding** – The State Bar of Wisconsin supports adequate funding for the Wisconsin Department of Justice to ensure that it can maintain its responsibilities to support the legal community and the justice system in order to ensure the protection of Wisconsin's citizens. **2009 Wisconsin Act 28** (2007 Senate Bill 40 – State Budget Bill) [Adopted June 26, 2009]
- **Department of Workforce Development ALJ Positions and No Probable Cause Hearings** – The State Bar of Wisconsin opposes the elimination of ALJ positions as it relates to no probable cause hearings in the Equal Rights Division. **2009 Wisconsin Act 28** (2007 Senate Bill 40 – State Budget Bill) [Adopted May 5, 2009]  
  
The State Bar of Wisconsin opposes the elimination of administrative hearings on no probable cause findings regarding complaints alleging discrimination in employment, housing, public accommodations; and other applicable statutes. **2009 Wisconsin Act 28** (2007 Senate Bill 40 – State Budget Bill) [Adopted February 27, 2009]
- **Filing Fees** – The State Bar of Wisconsin fundamentally believes the Judicial Branch of government should be funded through general purpose revenue. The State Bar also believes increases in filing fees make access to justice very difficult. In any case, any increase in filing fees must go to support the justice system [adopted June 2012]
- **Judicial Compensation** - The State Bar of Wisconsin supports judicial compensation, including benefits packages, in both state and federal courts that is adequate to attract and retain judges capable of administering justice fairly and efficiently. [adopted August 1984, January 1999 and amended May 2007]
- **Judicial Compensation Commission** - The State Bar of Wisconsin supports creation of an independent Judicial Compensation Commission to set judicial compensation and to serve the link between judicial salaries and legislative salaries as recommended by the State Bar of Wisconsin's 1997 Commission on the Judiciary as a Co-Equal Branch of Government. [adopted April 1997]



- **Law Library** - The State Bar of Wisconsin supports full state funding of law library services. (1/89) Brief rationale: The practice of law should start with a level playing field in which all lawyers have access to the same information. The development of a state funded statewide library system that employs the latest technology will assure that information is available throughout the state at the most reasonable cost. [adopted January 1989]
- **Sum-Sufficient Funding** - The State Bar of Wisconsin supports sum-sufficient funding for state courts. To assure an independent and effective judiciary, it should not be subjected to any pressures from the other branches of government that control the "purse strings" of government. A sum sufficient appropriation rather than a fixed amount permits the court to function without fear of fiscal intimidation. [adopted August 1984]
- **Trial Court Funding** - The State Bar of Wisconsin supports funding the state trial court from general purpose revenue and recognizes that it is the responsibility of all Wisconsin citizens to support the justice system. [adopted September 1990]

## **Criminal Practice and Procedure**



A basic underpinning of a quality criminal justice system is access to effective representation for both the public and the defendant. No one is served unless justice is served.

The right of indigent defendants to counsel has been upheld by both the United States Supreme Court (*Gideon v. Wainwright*, 372 U.S. 355, 334, 9 L.Ed. 2d 799, 83 S.Ct. 792 (1963)) and the Wisconsin Supreme Court (*Carpenter and Another v. County of Dane*, 9 Wis. 249 (1858)). In fact, Wisconsin has recognized the right for over 140 years. The court reasoned that the right enumerated in Article 1, Section 7 of the Wisconsin Constitution—to be heard by counsel, to demand the nature and cause of the accusation, to meet witnesses face to face—would be a cruel mirage in the absence of legal counsel.

Case law at both the federal and state level have set the standard for effective assistance of counsel as providing the client with zealous, competent, and independent representation. The State of Wisconsin was among the first in the country to recognize the necessity of compensating attorneys who represent indigents in criminal proceedings in order to guarantee the defendant fully adequate representation (*State v. Beals*, 52 Wis. 2d 599, 612 (1971)).

For the prosecution, the district attorney is a constitutional officer (Article VI, sec. 4(1) of the Wisconsin Constitution). Wisconsin statute section 978.05 (1) establishes the district attorney shall prosecute all criminal actions before any court within his or her county.

The courts further define the role of the prosecution in *Application of Bentine*, 181 Wis. 579, 587, 196 N.W. 213 (1923): “A public prosecutor is a quasi-judicial officer, retained by the public for the prosecution of persons accused of crime, in the exercise of a sound discretion to distinguish between the guilty and the innocent, between the certainly and the doubtfully guilty.”

The State Bar of Wisconsin supports the principle that both the public and the defense are entitled to effective representation to assure that justice is served.

#### **Issues Related to Criminal Practice and Procedure**

- **Age of Juvenile Court Jurisdiction** - The State Bar of Wisconsin strongly supports this proposed change because we know, from our experience and our training, that 17-year-olds, no matter how big and tough they may appear to be, are children. We also know that the best way to protect society against further crimes by 17-year-olds is to treat them in the juvenile justice, not the criminal justice system.

Recent national research shows that juveniles who are treated in the juvenile justice system are less likely to recidivate than those who are tried in the adult criminal justice system. The experience of the members of the Children & the Law Section is that the national research seems to be true in Wisconsin. Yes, the juvenile justice system is more expensive, but the adult criminal system is just not equipped to handle 17-year-olds. Long term, like the investments we make in education, the juvenile justice system investment in teenagers is cost preventive in both human and monetary terms for the citizens of our state. [2009 Senate Bill 674; 2009 Assembly Bill 732; 2007 Assembly Bill 746; 2007 Senate Bill 401] [adopted March 2007]

- **Caseload Standards: Prosecutors** - The State Bar of Wisconsin supports reasonable caseload standards for prosecutors that will ensure effective representation of the public in criminal cases. The State Bar of Wisconsin supports adequate funding for additional staff necessary to maintain reasonable caseloads in District Attorney offices. Understaffing of District Attorney's offices threatens the quality of justice in the criminal justice system by depriving the public of effective representation. [2009 Assembly Bill 891 and 2009 Senate Bill 636; 2003 Senate Bill 44 - State Budget Bill] [adopted January 1999; amended February 2010]

- **Caseload Standards: Public Defender Staff** - The State Bar of Wisconsin supports caseload standards for individual Public Defender staff attorneys which reasonably allow attorneys time to provide ethical, effective representation to each client, which are based upon objective standards recognized by the American Bar Association. The integrity of the justice system requires that litigants be fairly and effectively represented regardless of economic resources. Overworked Public Defenders are forced by too-high caseloads to cut corners in their representation of their clients. [adopted November 1990]
- **Compensation Rates** - The State Bar of Wisconsin supports private practice lawyers' compensation for public defender appointments at a rate that fairly compensates lawyers for their time. Rates of compensation should be equal to those set by the Wisconsin Supreme Court for court-appointed attorneys. In 2000, the State Public Defender private bar rate was \$40 per hour. A 1998 State Bar of Wisconsin survey on the economics of practice shows that the average attorney's office overhead was nearly \$60 per hour. [2009 Assembly Bill 224; 2007 Assembly Bill 434; 2002 Special Session Assembly Bill 1 - Budget Reform Bill; 2001 Senate Bill 55 - State Budget Bill] [adopted January 1991]
- **Criminal Penalty Legislation** - The State Bar of Wisconsin supports fiscal estimates on all legislation creating or enhancing penalties providing for prison or jail incarcerations. A full discussion of legislation is impossible without all relevant information including the fiscal impact criminal penalty legislation has on the administration of justice and the justice system. [2002 Special Session Assembly Bill 1 - Budget Reform Bill; 2001 Senate Bill 172; 2001 Senate Bill 55 - State Budget Bill] [adopted October 1993]
- **Death Penalty** - The State Bar of Wisconsin opposes reinstatement of the death penalty in Wisconsin. Judicial administration of the death penalty is significantly more expensive than other criminal litigation and other sentencing alternatives, including life without parole. These added costs would strain Wisconsin's already limited resources. The death penalty disproportionately affects the poor and also reflects racial disparity, which raises grave constitutional and administrative

concerns. The serious risk of executing innocent people cannot be eliminated in the criminal justice system. Appellate review of death penalty cases will prevent the Supreme Court from adequately fulfilling its law-developing function, to the detriment of all other litigants. Homicide rates in states with the death penalty average almost twice the homicide rates as states without the death penalty. There is no persuasive data to indicate that the death penalty deters murder. Finally, the personal and emotional toll on judges, prosecutors, and defense counsel who are involved in death penalty cases will be great. [2007 Senate Bill 115; 2005 Senate Joint Resolution 5; 2003 Senate Bill 2; 2001 Senate Bill 328] [adopted April 1995]

- **Eligibility for Appointed Counsel** - The State Bar of Wisconsin supports use of federal poverty guidelines as minimum financial criteria for determination of eligibility to receive constitutionally mandated appointment of counsel and, in determining an individual's eligibility for appointed counsel, the cost of counsel should accurately reflect the actual cost of hiring local counsel. **2009 Wisconsin Act 164** (2009 Senate Bill 263) [2005 Assembly Bill 1219; 2003 Senate Bill 44 - State Budget Bill] [adopted April 1996]
- **Federal Defender Services** - The State Bar of Wisconsin supports full funding of the private bar budget for Federal Defender Services, even though there is a Federal Defender in the Eastern District. Wisconsin's private bar attorneys accept assignment for defending indigent clients in federal criminal cases. In some cases the private bar attorneys wait extended periods of time for payment due to lack of sufficient funds in the Federal Defender Services budget. [adopted September 1992]

- **Habeas Corpus** - The Board of Governors of the State Bar of Wisconsin adopts a public policy position in support of the American Bar Association's opposition to the elimination of habeas corpus under certain circumstances, and directs staff to prepare/send letters to Wisconsin's Congressional delegation, asking them to oppose the Graham-Levin Amendment. [U.S. Senate Bill 1088 (2005) & U.S. House Bill 3035 (2005)] [adopted December 2005]
- **Private Bar Representation** - The State Bar of Wisconsin opposes all forms of contract bidding and flat rate payment for private bar representation in State Public Defender cases. Contract bidding and fixed fee per case arrangements, including fixed overall prices for certain types of cases regardless of the conflicts, raises serious concerns about the quality of representation as all financial incentives will be against zealous investigation, motion practice and representation. Over time, restricted competition means fewer attorneys will be qualified for criminal cases; the result is increased contract costs which runs contrary to the argument for contracting lower costs. [adopted April 1987 and September 1992]
- **Public Defender Representation** - The State Bar of Wisconsin supports a State Public Defender program with representation by both staff attorneys and the private bar. The State Bar of Wisconsin supports a goal of 75% of cases handled by State Public Defender staff attorneys with assignment of approximately 25% of the cases to the private bar. State Public Defender staff attorneys provide an economy of scale, leadership training and information-dissemination in the area of criminal law, much as the Attorney General's office does with District Attorneys. Private representation is an efficient way of handling ethical conflicts, involving the private bar in the development of criminal law and providing experience and opportunity for sharing of ideas and interaction. [2003 Senate Bill 44 - State Budget Bill; 2002 Special Session Assembly Bill 1 - Budget Reform Bill; 2001 Senate Bill 55 - State Budget Bill] [adopted August 1984 and April 1987]

- **Racial Profiling** - The State Bar of Wisconsin supports state and federal efforts that seek to end racial and ethnic profiling. For the public to have trust and confidence in the justice system, it must believe that all persons are treated equally. The State Bar supports the collection of analysis and data with regard to racial and ethnic profiling; upon the empirical evidence of such practices, mandates to end such practices; and funding for training of law enforcement to address such practices. [2005 Assembly Bill 216; 2001 Senate Bill 238; U.S. Senate Bill 989 (2001); U.S. House Bill 2074 (2001)] [adopted January 2002]
- **Recoupment of Costs** - The State Bar of Wisconsin supports recoupment of costs for public defender representation from financially able adults by civil means, but not as a condition of probation. It is appropriate to ask those who are able to pay for representation, but the threat of incarceration in the collection process compromises the attorney-client relationship. [adopted November 1984]
- **Right to Counsel** - In response to recent statements made in connection with a dispute over Supreme Court campaign ads, the State Bar of Wisconsin reaffirms its commitment to the right to counsel. The right of indigent defendants to counsel has been upheld by both the United States Supreme Court (*Gideon v. Wainwright*, 372 U.S. 355, 334, 9 L.Ed. 2d 799, 83 S.Ct. 792 (1963)) and the Wisconsin Supreme Court (*Carpenter and Another v. County of Dane*, 9 Wis. 249 (1858)). In fact, Wisconsin has recognized the right for over 140 years. The court reasoned that the right enumerated in Article 1, Section 7 of the Wisconsin Constitution—to be heard by counsel, to demand the nature and cause of the accusation, to meet witnesses face to face—would be a cruel mirage in the absence of legal counsel.

Vigorous representation by defense attorneys for *all* criminal defendants is important not only as a matter of justice for the accused, but also as a check in the adversarial process to ensure that only the truly guilty are convicted, to ensure that case dispositions are appropriate, and, indeed, to ensure that justice is served.

Every defendant, regardless of crime or prior record, is entitled under the Constitution to the assistance of counsel, and it is such counsel's

sworn duty to represent every client with undivided loyalty and zeal. To suggest that the function of criminal defense lawyers is simply to try to put criminals on the street, or that attorneys for accused individuals work to “subvert” justice, betrays either a lack of understanding of the adversarial process, or a lack of fidelity to constitutional principles.

Assertions to the contrary have no place in a judicial system committed to the rule of law, fairness, and impartial justice. As the United States Supreme Court has reminded us, “Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.” *Brady v. Maryland*, 373 U.S.83, 87 (1963). [December 2009]

- **Substitution of Judges** - The State Bar of Wisconsin opposes restrictions on the substitution of judges. Judges are substituted to insure a fair trial. Public confidence in the judicial system rests on the public’s belief that they will receive a fair trial before an impartial judge. If a person perceives, for whatever reason, that the judge may be less than fair, public confidence will be eroded. [2007 Assembly Bill 336; 2001 Senate Bill 55 – State Budget Bill] (*See also Administration of Justice*) [adopted April 1989]







Article I, §9 of the Wisconsin Constitution states that “every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws.” Although §9 may not give individuals the exact remedy they may be seeking, it does provide them with their “day in court” and establishes the constitutional underpinning to the right of redress.

The Wisconsin Constitution specifically identifies the need for redress for “all injuries or wrongs which he may receive in his person, property, or character,” indicating the importance of this right even as our state was founded over 150 years ago.

Its very inclusion as a separate and distinct section of the Wisconsin Constitution underscores its importance to the citizens of this state. Accordingly, the State of Wisconsin should seek to preserve at the state level the constitutional right of redress for all injuries or wrongs.

The Wisconsin Constitution’s directive to provide individuals an avenue to obtain justice “freely” and “completely” and “without denial” when they have been wronged cannot be overemphasized. The Constitution acknowledges the role of statutory laws in setting the boundaries of §9. Any limitation of these constitutional rights should be strictly limited so as to ensure that justice is “completely” rendered.

The overarching principal in §9 is best served in today’s legal system by a court of law and the gradual evolution of legal principals by a case by case method of legal rule making and not by statutory fiat. Predetermined legislative limits and special exceptions to the gradual development of the common law should be rare. Determining each case on its own merits rather than through a prescribed formula or directive is the best means to protect citizens’ constitutional rights to remedy for all injuries and wrongs. The historic position of the State Bar of Wisconsin is that the judicial branch of government is a co-equal branch. The Court’s historic role in the development of remedies for injuries and

wrongs should be preserved and protected from the pressures of special interests, lobbyists, or those who seek to influence the development of law for their short-sighted benefit. Remedies are best defined by the careful, thoughtful application of historical traditions of the common law on a case by case basis.

Finally, to ensure justice through our civil courts, those courts must operate with efficiency and effectiveness. Remedies must be sought to correct civil procedures that are ineffective, inefficient, arbitrary, or unduly delay in the rendering of justice.

### **Issues Related to Civil Practice and Procedure**

- **Auto Policy Limits** - The State Bar of Wisconsin supports the ability of insureds to stack automobile policy limits. Anti-stacking laws work against the consumer by limiting coverage while providing no visible reduction in premiums. **2009 Wisconsin Act 28** (2007 Senate Bill 40 – State Budget Bill) [2009 Assembly Bill 525][adopted September 1993]
- **Collateral Source Rule** - The State Bar of Wisconsin supports the collateral source rule which bars reduction of awards by payments from collateral sources that do not have subrogation rights. The fact that payments are received from a collateral source is irrelevant in the determination of negligence or the amount of damages. The responsibility of a tort-feasor to pay damages caused should not be lessened by the victim's prudence in planning for contingencies. [2005 Assembly Bill 764; 2005 Assembly Bill 1072] [adopted January 1988]
- **Consolidation of Mass Litigation** - The State Bar of Wisconsin supports consolidation of multi-state mass tort litigation and creating a special federal jurisdiction based on minimal diversity to consolidate major related multi-party, multi-forum litigation. [adopted January 1990]

- **Contingent Fees** - The State Bar of Wisconsin supports enforcement of contingent fees on amounts paid or "agreed in writing" regardless of duration of representation. Attorney fees are a matter of contract subject to judicial review and control; they should not be regulated by the Legislature. Furthermore, limits on contingent fees may adversely affect the ability of an impecunious victim to get representation to prosecute a claim. For many, the contingent fee is the key to the courthouse door. [2005 Assembly Bill 1074; U.S. House Bill 5 (2003)] (*See also Regulation of the Practice of Law*) [adopted January 1988]
- **Cost Statutes** - The State Bar of Wisconsin supports costs statutes (Sec. 814.04 and 814.07) which adequately provide for recovery of actual costs. Under law, certain expenses are awarded to successful litigants and those amounts should reflect actual costs and expenses for up-to-date technologies. [2003 Wisconsin Act 138] [adopted November 1998]
- **Counterclaims** - The State Bar of Wisconsin supports clarifying the counterclaims statute under Chapter 802, Wis. Stats., except in family law cases under Chapter 767. State statutes are permissive on counterclaims. However, in *A.B.C.G. Enterprises Inc. v. First Bank Southeast N.A.*, 189 Wis. 2d 465, 515 N.W. 2d 904 (1994), the Wisconsin Supreme Court held that the principles of res judicata (claim preclusion) preclude a defendant who could, but did not counterclaim in a prior action from bringing a later action on the claim if it "would nullify the initial judgment" or "impair rights established in the initial action." Clarification is needed to remove guesswork as to which claims are mandatory counterclaims and to provide finality and equity by ensuring certain claims are litigated when appropriate. [2001 Assembly Bill 198] [adopted November 1999]
- **Expert/Lay Witness Testimony** - The State Bar of Wisconsin opposes 2003 Senate Bill 49 because it believes that any such changes to rules relating to expert/lay witness testimony are best addressed by Supreme Court rules, not legislatively. [2007 Assembly Bill 121; 2007 Senate Bill 60; 2005 Senate Bill 70; 2005 Assembly Bill 203; 2005 Assembly Bill 278; 2003 Senate Bill 49] [adopted March 2003]

- **Joint & Several Liability** - The State Bar of Wisconsin supports return to the common law rule of joint and several liability prior to its revision by 1995 Wis. Act 17. The rule of joint and several liability allows an injured party to recover damages from a joint tort-feasor whose greater comparative negligence caused the injury rather than suffer the costs as well as the injury. Defendants who pay disproportionate amounts have certain rights to contribution from other tort-feasors. The burden of sharing the responsibility with an uncollectible tort-feasor should be shared by the party(s) who are found most negligent, regardless of whether the negligent party is a plaintiff or defendant. [2007 Senate Bill 40 – State Budget Bill] [adopted January 1988]
- **Liability for Defective Products** – The State Bar of Wisconsin opposes severely limiting the liability of manufacturers, assemblers, distributors and sellers of defective products because such limitations are overreaching, rolling back 40 years of common law and severely limiting the right to recover damages. [2007 Assembly Bill 147; 2007 Senate Bill 59; 2005 Senate Bill 58 and 2005 Assembly Bill 101; 2003 Senate Bill 126 and 2003 Assembly Bill 317] [adopted October 2003]
- **Medical Malpractice: Loss of Companionship** - The State Bar of Wisconsin supports any legislation which would permit a parent to recover for loss of society and companionship of an adult child. [2009 Assembly Bill 291 and 2009 Senate Bill 203; 2007 Senate Bill 138; 2005 Senate Bill 456; 2003 Senate Bill 187; 2001 Senate Bill 193; 2001 Assembly Bill 638] [adopted September 2001]
- **Medical Malpractice: State Notification** - The State Bar of Wisconsin supports any legislation which would remove the requirement that a person injured by medical malpractice involving a state officer, employee, or agent serve notice of claim in that attorney general office within 180 days of the injury so as to provide for notice of an action on a claim consistent with existing statutes governing private medical care providers. **2009 Wisconsin Act 278** (2009 Senate Bill 127) [2007 Assembly Bill 247; 2007 Senate Bill 126; 2002 Special Session Assembly Bill 1 - Budget Reform Bill; 2001 Senate Bill 170] [adopted September 2001]

- **No-fault Auto Insurance** - The State Bar of Wisconsin opposes no-fault automobile insurance. No-fault automobile insurance policies include unconstitutional restrictions on the right to recover damages. Furthermore, federal preemption in this area is an undesirable entry of the federal government into a field of tort law that has traditionally fallen within the province of the state. [adopted August 1984]
- **Non-Economic Damages** - The State Bar of Wisconsin opposes legislatively set limits on non-economic damages, including wrongful death awards for loss of society and companionship. The State Bar of Wisconsin supports raising or eliminating legislatively set limits on non-economic damages. Caps on non-economic damages have been ruled unconstitutional in other jurisdictions and run counter to the right of obtaining justice "completely and without denial." Such caps set in place an arbitrary pretrial limit when those decisions are best decided by a jury and a court of law. Caps on non-economic damages place an unnecessary hardship on the most seriously injured. Statutory caps are inconsistent with the nature of non-economic damages which are more difficult to quantify. [2005 Assembly Bill 766 2005 Senate Bill 393; 2005 Assembly Bill 960; 2005 Assembly Bill 1073; U.S. House Bill 5 (2003); 2001 Senate Bill 217] [adopted August 1984 and January 1988]
- **Open Records** - In order to prevent concealment of public hazards, the State Bar of Wisconsin supports court files as open records subject to legitimate privacy concerns, proprietary information, and trade secrets or as otherwise protected by law. [adopted June 1991]

- **Product Liability** - The State Bar of Wisconsin supports the development of product liability law at the state level rather than the federal level. The field of tort law has traditionally remained within the exclusive province of the states and should remain that way. [2007 Assembly Bill 147; 2007 Senate Bill 59] [adopted August 1984]
- **Self-Help Repossession** - The State Bar opposes attempts to weaken protections provided by the Wisconsin Consumer Act that require creditors to use judicial process to seek repossession of personal property. The State Bar opposes replacing current provisions of the Wisconsin Consumer Act with provisions that would allow creditors to employ self-help repossession methods because such methods deny Wisconsin citizens access to judicial process, thwart the administration of justice, and are likely to lead to acts in breach of the peace. [2005 WI. Act 255; 2005 Assembly Bill 594 & 2005 Senate Bill 387] [adopted September 2005]

## Archived Positions



Archived positions are older State Bar of Wisconsin policy positions that have already been enacted, were adopted in response to specific pieces of legislation or, in the judgment of Government Relations staff, do not seem likely to become active public policy issues in the future.

Archiving is merely a record-keeping procedure. All public policy positions adopted by the Board of Governors remain the position of the State Bar of Wisconsin until modified or rescinded by BOG.

Should an issue addressed by an archived position resurface at the Legislature or in Congress, the Government Relations staff would bring the archived position to the attention of the Legislative Oversight Committee and the BOG. If timing on addressing legislation is such that it would be impractical to wait for a meeting of the BOG, staff will present the archived position to the Executive Committee.

- **Apprenticeship Programs** - The State Bar of Wisconsin opposes apprenticeship programs as an alternative to formal legal education. (8/84) Brief rationale: "Reading the Law" in law offices was abandoned in favor of formal legal education as a means of qualifying for bar admission. Formal law school education provides greater assurance that a full range of legal subjects will be taught and that supervision of students will be adequate. [adopted August 1984]
- **Mileage Reimbursement** - The State Bar of Wisconsin supports private bar attorney compensation and reimbursement for mileage if attorney's office is more than 30 miles from the courthouse. (1/94) Brief rationale: The Board adopted this position in response to 1993 Senate Bill 297 that sought to change the travel reimbursement language in 977.08 (4m) to being effective when the attorney's principal office is a certain distance from the courthouse rather than being in another county. This corrects the inequity that occurs mainly in northern counties where an attorney's office may be in the same county as a courthouse but a greater distance from the courthouse than another attorney's office that is across the county boundary. [adopted January 1994]



- **Unpublished Decisions** - The State Bar of Wisconsin supports citation of unpublished Court of Appeals decisions rule by adopting the following statute change. [WI Statute 809.23(3)]  
"(3) An unpublished opinion is of no precedential value and, except as provided in this section, may not be cited in any court of this state as precedent or authority. An unpublished opinion may be cited to support a claim of res judicata, collateral estoppel or law of the case. Unpublished opinions may also be cited for both persuasive and information purposes, if the person making reference to the unpublished opinion contemporaneously provides the court and all opposing parties with a copy of the opinion and copies of all other unpublished opinions of the Court of Appeals of which the attorney has knowledge, the holdings of which are directly adverse to the cited opinion upon the issue for which it is cited." Brief rationale: Citation of unpublished appellate court opinions aids the courts in maintaining doctrinal consistency. Unpublished opinions are readily available through computer databases, commercial tabloid publication, and microfiche from the State Law Library. [adopted April 1989]
- **Vouchers** - The State Bar of Wisconsin supports payment of vouchers submitted by private practitioners within 45 days. Brief rationale: Delays in payment are discouraging participation by private practitioners in the Public Defender Program. [adopted August 1986]



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