



State Public Defender Kelli S. Thompson leaves the state public defender's office in Shawano, Wis., after meeting with staff members.

# "UNLESS COUNSEL IS PROVIDED"

**Life on the job with five Wisconsin public defenders shows the rewards and value of the work, amid stresses and complexities that have grown.**

By Alan J. Borsuk and Tom Kertscher

In the Bible story of Gideon, told in the book of Judges, the Jews are threatened by a much larger force of Midianites. God instructs Gideon, a military leader and judge, to take 300 soldiers and give them each a trumpet (in Hebrew, a *shofar*) and a torch. They approach the Midianite camp in the night, light the torches, and blow the trumpets. Fearing that the attackers are a larger and more fearsome force than in fact is the case, the Midianites flee.

And so Gideon's trumpet became a symbol of small, even under-resourced efforts to take on the numerous and powerful in the cause of justice.

In January 1962, the Supreme Court of the United States received a handwritten petition from a long-time petty criminal named Clarence Earl Gideon. He had asked for but been denied a lawyer while being tried for breaking and entering a pool room in Panama City, Fla. He was given a sentence of five years, the fifth time he was being sent to prison.

Gideon wanted the Court to rule that he had been

entitled to a lawyer. That would require overturning a 1942 decision, *Betts v. Brady*, holding that defendants were entitled to a lawyer only in a small number of more serious instances.

The odds are always against the Court's agreeing to consider any petition—to say nothing of one from an indigent person, without a lawyer, seeking to overturn a precedent. But the U.S. Supreme Court took the case.

In March 1963, it issued a unanimous opinion in *Gideon v. Wainwright*, ruling under the Sixth and Fourteenth Amendments to the U.S. Constitution that people who can't afford lawyers are entitled to legal representation in criminal matters. Justice Hugo L. Black wrote for the Court that "reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."

Nearly six decades later, Gideon's trumpet—as it was called in the title of a 1964 book by Anthony Lewis—continues to sound across America.

There are big challenges to how the instrument is played. Public defenders assume key roles in the range of criminal law cases involving people who do not have the resources to hire an attorney. But the public defender system is stressed—underfunded, understaffed, close to overwhelmed by the tide of cases, facing larger societal forces, and sometimes confronting political headwinds.

It depends on lawyers who remain dedicated, even idealistic, about the work, who believe that Gideon's trumpet is an essential instrument in a harmonious society, one in which notes consonant with criminal justice are sounded. This article profiles five of the lawyers in Wisconsin's public defender orchestra; numerous other examples could be adduced, even just from the ranks of Marquette lawyers.

"... reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."

Justice Hugo L. Black, for the Court, in *Gideon v. Wainwright* (1963)

Photos by Gary Porter





**Kelli Thompson listens during a meeting with members of the public defender's office in Shawano, Wis.**

"I know what it's like to stand out at Stanley [prison] and, because of a shortage of staff, wait to see a client; I never want to forget that part of it. I think that's so very important."

Kelli Thompson

### **Kelli Thompson: A boss who works in the trenches**

On a day not long ago, someone calling the state public defender's office that serves two less-populated counties in Wisconsin found the phone answered by an attorney who was, in fact, an expert. The attorney was so well trained and experienced that she is the head of the entire public defender operation in Wisconsin—with 378 staff attorneys, a total of 615 staff, 40 offices around the state, and an annual budget of \$113.5 million.

"I probably did a terrible job, and they'll probably never ask me again," jokes Kelli S. Thompson, L'96. "But you know what? I did intake in two different counties, and I talked to clients all day."

As the leader of public defenders statewide, Thompson felt that the small staff in those counties needed a half day to focus on ways to do their work more effectively. And as part of her no-job-is-too-menial approach, Thompson knew that someone had to answer the phones. The options were few in the understaffed public defenders' realm.

"The staff were so grateful because they got to do something that they never, ever get to do, and that was all to be together for half a day at a meeting, and that meant a lot to them," Thompson says. "So, if I can do that, great."

Thompson didn't expect to become involved with court work when she was a law student, but she signed up to work in Marquette Law School's public defender clinic. She loved the work and became a public defender after completing law school. She left after several years for other

positions but eventually returned. In 2011, the state public defender board selected her to be the state public defender—that is, to lead the statewide operation. She remains tirelessly dedicated to the job.

A reporter for this journal recently observed a typical day for her. Thompson was at the office from 7:45 a.m. until 6 p.m. By late afternoon, in lieu of coffee and seemingly in lieu of food, Thompson had sipped her way through at least four cans and bottles of Diet Mountain Dew.

As she was nearly every day through the COVID-19 shutdowns, Thompson was on duty in a fairly nondescript downtown Madison state office building, across from a newer and more impressive-looking state office building named the Tommy G. Thompson Center. Yes, the longest-serving governor in state history, a Republican, is Thompson's father. Colleagues say that her lineage is a non-issue at work. "She's always just Kelli," one person says.

A \$113,048-per-year administrator, much of Thompson's day is spent in meetings. But what she shoeorns in later in the afternoon might be more revealing about the condition of her agency.

The meetings are about keeping all the balls in the air. On this day, the trial division director in the public defender's office, who doubles as its top recruiter, spends 20 minutes via Zoom updating Thompson about staffing. Applications for attorney positions "are way, way down, and they have been way down for a while now," the director reports. Thompson notes later that when she took over the agency in 2011, "we'd have hundreds of applicants for one job."

For 45 minutes, the appellate division director briefs Thompson in-person on friend-of-the-court briefs that the office is filing, including one in a Marsy's Law (victims' rights) case before the Wisconsin Supreme Court. There follow 15-minute in-person meetings with the agency's administrative services director and with its information technology director, giving updates on automating the downloading and management of bodycam videos of police officers and on improving the sometimes-lousy Wi-Fi in the Milwaukee County Courthouse.

Another 15 minutes on Zoom follow, with the Milwaukee-based deputy trial division director. In addition to supervising trial attorneys, that director is handling, by Zoom, the intake calendar in the Ashland County Circuit Court—some 350 miles to the northwest, about as far from Milwaukee as you can get in Wisconsin. The director is also preparing

to go to court herself as a lawyer in a homicide trial in Milwaukee.

All of Thompson's "lieutenants" speak freely, seemingly at ease with telling the boss whatever is on their minds. Another key aide, legislative liaison Adam Plotkin, is in Thompson's office nearly the entire day, keeping her on task.

All of this is aimed at keeping the agency charged with representing indigent criminal defendants running effectively. Yet is it meeting the mark? As of July 1, 2022, an average of 165 cases were open for every public defender in Wisconsin. And the number of private attorneys taking appointments involving cases that public defenders can't handle has dropped by one-third in two years. Partly as a result, some new criminal defendants can wait in jail, unrepresented, for weeks while the public defender's office makes hundreds of calls before a private attorney is found to take a case. (See sidebar on page 15.)

In an effort to address some of the excess, Thompson herself picks up tasks that even the greenest attorneys could handle—and she also takes on more difficult cases with the aim of freeing up time for attorneys who are grappling with more than 100 cases at a time.

On this day, at 3:18 p.m., Thompson is on Zoom doing intake court for a county in central Wisconsin. For a criminal defendant, especially one being held in jail, an initial appearance is important, since a judge will decide on bail. But for an attorney, intake is elementary work. Thompson appears separately for two individuals who have drug-related cases; cash bail is set at \$500 for one and \$250 for the other. In another case, the prosecutor tells the judge that the defendant likely broke his mother's nose in a domestic abuse incident. Thompson requests a signature bond or a low cash bond, noting the defendant is scheduled to start chemotherapy in several days for testicular cancer that has spread to his lymph nodes. The judge goes with the prosecutor's recommendation, setting bail at \$5,000. Twenty-seven minutes pass before Thompson's intake work is done.

Thompson also has a regular caseload—about a dozen clients, including three who are in prison. She takes those cases knowing that prison clients are more difficult for assistant public defenders, who carry far heavier caseloads, to visit in person. To see one client at the state prison in Stanley, 180 miles northwest of Madison, means six hours of driving roundtrip. And taking cases means any number of other commitments, including hours of

phone calls for Thompson over the Memorial Day weekend.

Thompson is firm about balancing her administrative duties with attorney tasks. "Having a connection with clients, I think, makes me better at my job," she says. "If times were normal, I probably would not be handling a lot of prison cases; I'd work on a couple homicide cases. But we have a shortage of staff, we have so many clients who are so desperate, we have a shortage of private bar attorneys, we have clogged court systems, and if my little bit can make a difference in some of these rural counties, it's worth it."

Thompson also recognizes that this part of her work earns her credibility with her lawyers and with the legislature. "The staff are more willing to talk to me about issues if they see I'm in it with them, which makes a big difference. The work makes sure I never forget who our clients are," she says. "It can be very difficult to go up to the Capitol and try and explain something if I've been so far removed. I know what it's like to stand out at Stanley [prison] and, because of a shortage of staff, wait to see a client; I never want to forget that part of it. I think that's so very important."

A framed quote on the wall over Thompson's left shoulder is from *Just Mercy: A Story of Justice and Redemption*, a book by public interest lawyer Bryan Stevenson: "The true measure of our character is how we treat the poor, the disfavored, the accused, the incarcerated, and the condemned."

In the moments between meetings and phone calls, Thompson expresses pride in her staff, who show such dedication. "I think public defenders and defense attorneys are the most important players in the criminal justice system because they stand next to the individuals accused of a crime with the threat of losing their liberty, their family, in many respects their lives," Thompson says. "Public defenders get to tell their story and advocate for the right outcome in their individual cases. The government essentially has all the power, and public defenders get to try and level that playing field just a little bit by standing up for the individual."

But how much stamina is there?

"There isn't anyone who doesn't just step forward and say, 'Sure, I can take more,'" she says. "But I'll tell you, our emails go until midnight. You say, 'You can't work on the weekends,' and everyone works on the weekends. And that's my biggest concern for young staff. It's one thing for me and the people up here to make that decision.

"If times were normal, I probably would not be handling a lot of prison cases; I'd work on a couple homicide cases. But we have a shortage of staff, we have so many clients who are so desperate, we have a shortage of private bar attorneys, we have clogged court systems . . ."

Kelli Thompson

So many of our young staff work all seven days of the week. Those offices are running all weekend long because they have trials constantly.

"We have one attorney, she had 14 trials set in Milwaukee County. You can't do 14 trials in one week; you can do one. But she had to prepare. So, they're working around the clock. And these are people who are public defenders. They are committed. This is all they ever wanted to do, and I'm losing them. That's my biggest fear—that they are burning out because of the workload. And I don't see a slowdown in that.

"People don't mind working hard if there was ever a break," Thompson says. "There's never a break. I just need my attorneys to breathe, and none of them are breathing."

### Luis Gutierrez: "People want to be heard"

By 7 a.m. on a Wednesday, Luis Gutierrez, L'20, has eaten breakfast and is reviewing case files at the kitchen counter in his apartment in downtown Milwaukee. It's the same one-bedroom loft he called home as a law student. Gutierrez is preparing for appearances later that morning. "I just don't want to miss things," Gutierrez explains.

But with a caseload of 100 to 120 clients, and a total of 120 to 150 cases, even a disciplined attorney striving for order must know when to relent. "When you're within your first year working in the public defender's office, you don't have a routine; every day is completely different," Gutierrez says. "As much as you want to be in control, you're not in control.



Luis Gutierrez in the public defender's office in Waukesha.

The best thing you can do for yourself is to do the best you can."

Gutierrez grew up in Miami Springs, Fla., near Miami International Airport, the son of political exiles from Cuba. Now he is an assistant public defender mainly handling misdemeanor criminal cases in Waukesha County Circuit Court, about 20 miles west of downtown Milwaukee.

On this Wednesday, he has several clients scheduled to appear in courtroom SC-G020. Gutierrez is 30 years old; the presiding judge has 22 years on the bench. What's it like to be an early-career public defender? Sit in on some of Gutierrez's cases on this day and you get a look at the nitty-gritty of the legal process and the role a defense attorney plays.

Gutierrez's first client is charged with third-offense operating a vehicle while intoxicated, a misdemeanor. Court begins late, at 9:17 a.m. The woman is not present, but her voice is heard over a microphone: "I don't know how to use Zoom." She is appearing by telephone.

"You're going to have to learn," the judge instructs. He grants Gutierrez's request for a court date 60 days out for a plea and sentencing. It's easy to see how caseloads grow as cases elongate: A five-minute

hearing to schedule another hearing 60 days out is a common occurrence; that's how Gutierrez's next case this morning goes, too.

After a few more cases and a couple of short recesses, Gutierrez is back at the defense counsel table just after 11 a.m. He's accompanied by a large man charged with resisting an officer in Brookfield, a suburb in Waukesha County, just west of Milwaukee.

The man, wearing a suit and tie, admits that he and his brother, who have a history of feuding, got into an argument during a Memorial Day family gathering at a cemetery. Police were called, and the man was tasered. "I know I wasn't thinking straight; I did resist," he tells the judge.

"I sense you're an intense gentleman," the judge replies. "I'm satisfied you're a person of good character."

The prosecutor recommends a fine, and the judge agrees, setting it at \$100. No jail time is a relief, but, with fees and court costs, the total tab for the man, who works in the gig economy, is \$443. The judge gives him 60 days to pay.

Outside of court, Gutierrez reflects on the hearing: "This was entirely a family dispute between two brothers, and cops got involved, and this is what leads us to where we are today."

"... part of what's going to make me a better attorney moving forward is listening to my clients and fighting for them and representing them in the way that they want to be represented."

Luis Gutierrez



His court appearances complete, Gutierrez checks his phone and finds he has missed calls from eight clients. It's 11:40 a.m. He goes into a conference room next to the courtroom and starts calling them back. It's time to play the roles not only of defense attorney but also, to a necessary extent to do the job, of friend and counselor.

Gutierrez talks to one woman who lives far from the county and has been charged with three misdemeanors: theft of less than \$50 of items from a grocery store, along with possession of a controlled substance and drug paraphernalia. The woman doesn't drive. No, Gutierrez tells her, she can't make a payment to get rid of her arrest warrant, and, no, she can't appear by Zoom. Yes, she could get locked up if she has even a minor run-in with police.

"I don't want to go to jail," she says. A friend can drive her to Waukesha for a court date, she agrees.

Next, Gutierrez talks with a man dealing with a second offense for operating a vehicle while intoxicated. Gutierrez tells him that the court has been informed that he recently tested positive for marijuana. Staying clean was a condition of bail for him. The man also relates that he just tested positive for COVID-19. Gutierrez says he'll probably represent the man in a pending misdemeanor battery case also. "He's a good guy; he's had a rough couple of months," Gutierrez says.

Legal strategy is the focus of the next call-back. Should the client proceed to trial on misdemeanor domestic violence charges involving his girlfriend? The girlfriend has told the court she won't testify, but the prosecutor has given no indication that he'll offer a plea deal. The client is agitated, and Gutierrez needs to show compassion but also to center the client.

The client sounds firm that he won't plead guilty. But the mood shifts when he and Gutierrez are in court the next day. The man pleads guilty to one misdemeanor. A conviction and a fine, but no jail, no probation, and there's closure of the case. "He left court happy," Gutierrez says.

Gutierrez knows he's still on the lower rungs of the ladder. "I'm still very young and very naïve," he says, "but part of what's going to make me a better attorney moving forward is listening to my clients and fighting for them and representing them in the way that they want to be represented."

By early afternoon, it is time to head back to the office to return calls to more than half a

## Caseloads Double for Public Defenders in Wisconsin

The number of open cases for public defenders in Wisconsin more than doubled in five years. The table shows the number of open felony, misdemeanor, juvenile, family, and commitment cases per authorized attorney position.

Date	# open cases	Per attorney position
July 1, 2017	28,808	77
July 1, 2018	30,337	81
July 1, 2019	32,906	88
July 1, 2020	40,130	107
July 1, 2021	51,868	138
July 1, 2022	62,081	165

## Turnover Doubled

Turnover among attorneys in the Wisconsin State Public Defender's Office essentially doubled after the start of the COVID pandemic. About 10 percent of the attorneys left during the fiscal year ending June 30, 2020; the rate exceeded 20 percent during the year ending June 30, 2022. ("FTEs" in the table refers to "full-time equivalents.")

FY	Departing FTEs	#FTEs	Turnover
2018	41.0	374.2	10.96%
2019	42.8	374.2	11.44%
2020	36.8	374.2	9.83%
2021	67.0	374.2	17.90%
2022	77.0	377.7	20.39%

## Public Defender Pay

The starting pay for an assistant state public defender in Wisconsin is \$54,912 per year. The national median entry-level salary for public defenders is \$59,700, according to the NALP/PSJD 2022 *Public Service Attorney Salary Survey Report*.

The table below shows the average pay for an assistant public defender in Wisconsin during the past five years. Of course, the *average* depends on who is in the pool, and it is likely that much of the increase from 2017 to 2021 derives from departures of junior attorneys, with lower-than-average salaries. Cf. the immediately preceding table concerning turnover.

FY	Annual
2017	\$68,494
2018	\$71,510
2019	\$74,339
2020	\$73,986
2021	\$82,514

Source: Wisconsin State Public Defender's Office

# WORKLOAD AND STAFF SHORTAGES ARE BIGGEST CONCERNS IN FOLLOWING PUBLIC DEFENSE SYSTEM PRINCIPLES

What are the goals and duties of public defenders and the systems that have developed in the states, since the U.S. Supreme Court's landmark 1963 ruling in *Gideon v. Wainwright*, in order to ensure legal representation for all defendants in criminal cases who cannot afford to hire an attorney? And how does Wisconsin measure up?

A good summary of the goals and duties comes from a 2002 report from the American Bar Association on public defender systems. It included what was titled "Ten Principles of a Public Defense Delivery System." Here (to the left) are the principles, verbatim:

1. The public defense function, including the selection, funding, and payment of defense counsel, is independent.
2. Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.
3. Clients are screened for eligibility, and defense counsel is assigned and notified of appointment as soon as feasible after a client's arrest, detention, or request for counsel.
4. Defense counsel is provided sufficient time and a confidential space within which to meet with the client.
5. Defense counsel's workload is controlled to permit the rendering of quality representation.
6. Defense counsel's ability, training, and experience match the complexity of the case.
7. The same attorney continuously represents the client until completion of the case.
8. There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.
9. Defense counsel is provided with and required to attend continuing legal education.
10. Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.

Wisconsin's adherence to the principles is generally regarded as adequate to good. A big sore spot is the workload of public defenders. The average number of cases for each public defender in the state has risen in recent years, as has the total number of cases being handled through the public defender system. There are also increasing impacts from changes in the work itself. This includes time-consuming obligations in many cases to review video recordings from body cameras, dashboard cameras, and surveillance cameras—modern phenomena, especially in their prevalence.

Asked for comment on Wisconsin's record in meeting the standards, State Public Defender Kelli Thompson said, "As we periodically review the Wisconsin system's adherence to the principles, I'm frequently reminded that despite all of our challenges, Wisconsin has a system that incorporates the themes of the principles from political separation to quality of representation. We operate a nationally recognized training program (Principle 9) and have supervisors monitoring the quality and effectiveness of attorneys (Principle 10)."

The declining number of private-practice lawyers who will take public defender cases is a growing issue, in light of the principles, which prominently set forth "the active participation of the private bar" as an essential part of "the public defense delivery system." The pay for such attorneys has been increased in recent years but, at \$70 an hour, remains lower than the rate for other appointments in the legal system.

dozen other clients. Phone calls, Gutierrez estimates, take up the largest share of his time. "People want to be heard," he says. "It's important that you give them, as their attorney, an ear so that they can air out either their grievances or their comments or concerns. And they do also have a lot of questions." Eventually, all the calls are returned. Some files are packed up to bring home to review for the next morning.

## Rick Jones: Seeing clients as potential butterflies

For one thing in Rick Jones's childhood, there was Perry Mason on television. Jones says he would watch the show where Mason—handsome, intense, and dressed in great suits—would find ways in each episode to show his client was not guilty, and smart legal work would prove it. "Yeah, I want to do that," Jones recalls thinking.

For another—and more real-life—thing, there was Jones's uncle, a police officer in Racine, Wis., where Jones grew up. The uncle was a role model for Jones and many other Black people in Racine. But, Jones says, his uncle was accused of involvement in an incident in which money was stolen. The accusation was false, and his uncle was exonerated, but it ruined the uncle's life. Jones says he decided then that he wanted to do what he could to make sure that this didn't happen to others.

Then there was Jones's mother, a single parent who raised Jones and Jones's sister. His mother had serious health problems, and the family went on welfare. But she gave her children love and guidance. She told them, "School is your way out."

Jones says, "We believed her,

and she was right.” The three of them remain close, talking on the phone, if not in person, almost every day.

And add in that Jones was tall, athletic, and a good basketball player. After graduating from high school in Racine, he was given an academic scholarship to the University of Wisconsin–Eau Claire. After three semesters, he transferred to Beloit College, where he thought he would get more playing time. What he says he also got were professors and coaches who challenged him academically and socially, urging him to focus on what his best role in life could be. Beloit College was “one of the greatest places on my journey,” Jones says.

That led him to Marquette Law School. He says it took some time for him to “get comfortable” in law school, but he came to regard it as a great experience. “I loved my professors at Marquette,” he says. He graduated in 1989. He worked for Marquette University for two years and, in 1991, joined Wisconsin’s public defender’s office. He left in 2004 to become the pastor of a church in Madison, Wis. (Jones has a master’s in divinity from Northern Baptist Theological Seminary in Lombard, Ill.)

In 2013, he returned to work as a public defender. In his life, he says, God is his first love, his family is second, and then comes basketball and being a public defender and everything else. He continues to run a basketball mentoring program for boys and girls—mostly high school juniors—in Madison.

Based in Madison, Jones specializes in cases involving people who have served sentences for sexually violent

crimes and who, under Wisconsin law, can be committed through civil proceedings to continued confinement indefinitely. He takes those cases and other major cases such as homicides all around Wisconsin, in large part because there is a shortage of public defenders statewide with experience in such cases.

The work means he deals with a lot of people who many would assume are unsavory. Jones disagrees, not only because he believes strongly that all defendants deserve a strong presentation of their story in legal proceedings but also because he likes a lot of his clients. Building relationships with them is a key to how he does his job. He puts it this way: He was once reading on the back deck of his house. A butterfly landed near him, and then several more. They were “absolutely beautiful,” he says. He got interested in learning more about the life cycle of butterflies. He was particularly interested in the way

they go through metamorphoses from caterpillars.

Many of his clients go through their own metamorphoses, he says. Jones often tells judges that the person sitting next to him in court is not the same as the person who offended. “Sex offenders can change, and the numbers back me up,” Jones says.

In any case, he says of his clients, “I don’t judge. I just fight. Everyone is entitled to justice.”

Jones says he begins most days as early as 4:30 a.m. with up to an hour of reading the Bible and prayer. Then, using an iPad, he catches up on what is going on in the world and reads legal documents related to his cases. “That’s when I create my theories for my cases,” he says—theories of how to tell a client’s story, how to respond to what prosecutors are expected to do, and how to make sure he has a full grasp of what is called for by the law. He says he never goes into a case without a theory.

Then he gets ready to go to his office in downtown Madison



**Rick Jones at his desk in the main offices of the state public defender system, a block from the state Capitol in Madison.**

“I don’t judge. I just fight. Everyone is entitled to justice.”

Rick Jones



"... I did not want to have to worry about whether or not someone has paid me in order for me to file a certain motion, or in order for me to feel like I'm justified in doing what I'm supposed to do as an attorney, or having to choose between being ethical and holding back because I don't feel as though I've been rewarded enough for doing my job."

Jade Hall

or wherever his schedule takes him. During a day in the office, he says, he spends much of his time reading whatever he thinks is relevant to a case. He calls himself "obsessive" about knowing the details of a client's story and the relevant law. These days, the work also involves viewing sometimes lengthy surveillance video records. And then there are court appearances, status conferences, motion hearings, trials. And "a decent amount of client time."

"You can't tell a story unless you know a story," Jones says. He often talks to his clients by phone or by Zoom. He also visits them in prison. He says his goal is to know the client as a person, and to build bonds with the person. "We're a team together," he says. "It's our job to tell your story, to take your story and package it . . . and then sell your story" to judges, juries, or prosecutors.

It's frequently an uphill battle. In a recent motions hearing, Jones's client was a Black man charged with murdering a woman in central Wisconsin. There had been comments in news stories from media outlets and in social media that brought race and politics into describing the case. Jones moved for the trial to be held somewhere other than in the nearly all-white county or for the jury to be selected from elsewhere. Jones says it was relevant that he and the defendant were the only Black people involved in the hearing on the motions.

The judge didn't accept Jones's arguments. He doubted the publicity had reached the attention of many people in that county and was confident that an impartial jury could be picked through the jury selection process. He said that there had been other cases in the county involving "dark-skinned people." Motions denied.

Jones says he promises clients that he will work hard for them, not that they will win. The American dream, he says, is that the doors of justice are open to everyone. But, he says, the doors don't swing the same way for everyone. He has "a belief that justice ought to look the same for everybody," but it's not always easy to get that.

"One of the greatest documents ever written is the United States Constitution," he says. "It promises liberty and justice to all. . . . We're the defenders of justice."

And the work is not easy and not for everyone. Finding people to work as public defenders has become harder and harder. There has been increased politicization of the justice system, Jones

says. Pay and workload are factors that make it harder to draw people to jobs such as his. "I don't remember a time when we had such a struggle getting lawyers," he says.

Now 59, he remains committed to the work and passionate about it. He says, "I'm still fiery."

### Jade Hall: Aiming to do "the most good" as a lawyer

Before she arrives at the Milwaukee County Courthouse early in the workday, Jade (pronounced juh-DAY) Hall, L'19, has already put in an hour of work at home, writing a motion for an upcoming case. The courthouse is where the 28-year-old assistant state public defender spends most of her day.

Hall's first court appearance this day is a preliminary hearing for a young woman who is charged with attempted robbery of a business. Like Hall, the defendant is a young Black woman. The defendant is irritated that she has had to return to court for a repeat of her preliminary hearing because the charges against her have been amended.

Before the proceedings start, Hall lets the young woman vent to her. "Someone has to be the punching bag, and it can't be the judge," Hall explains afterward. A police detective's testimony dominates the 30-minute hearing, which results in the woman's case being bound over for trial. The testimony paints a picture of the defendant at a turning point. On one hand, the woman, then a teenager, was charged with entering the business and handing the attendant a note with a demand for cash; according to the detective, she wanted to "impress a male." On the other hand, the woman, who rocks back and forth throughout the hearing, was unarmed and has no other adult criminal record. How this case turns out seems pivotal to her future.

"I think we're all really one bad day away from being in the same place," Hall says afterward. This isn't a cliché to Hall. She grew up in Milwaukee's central city, less than two miles from the young woman's home, places many poor Black people don't rise up from.

"I'll call it an infection," Hall recalls of the environment. "It feels as though no one else wants you to do better; if they're not doing okay, then you can't be. So, most of my childhood, it was, 'I don't want to raise a family in this; I don't want to have someone else experience what I experienced.'" She says, "The feeling was like,

‘I can’t be better or do better because no one else has’—like, ‘I haven’t gotten out, so why should you?’ That for me was very toxic.”

Hall succeeded in doing better. She knew in elementary school that she wanted to be a lawyer, in high school that she wanted to be a defense attorney—after seeing family members helped by defense attorneys—and, at Marquette Law School, that she wanted to be a public defender. “I realized this is where I could do the most good,” she says. “I’m not going to get paid the greatest, no; but I also knew that [in private practice] I would be more focused on the money than I would be on the client. And that’s me—there are some people who may not feel that way. But for me, I did not want to have to worry about whether or not someone has paid me in order for me to file a certain motion, or in order for me to feel like I’m justified in doing what I’m supposed to do as an attorney, or having to choose between being ethical and holding back because I don’t feel as though I’ve been rewarded enough for doing my job.”

How big a workload is Hall handling at this point? She points to a list of clients 146 rows long. Some of the clients have more than one case, so the total is actually higher. Reading just partway down one column, the list becomes numbing: Felony, felony, felony, felony, misdemeanor, misdemeanor, misdemeanor, felony, misdemeanor traffic, felony, felony, felony, felony, felony.

“I actually thought it was more,” Hall says, surprised the total wasn’t closer to 200. Her caseload neared 300 when the court system virtually ground



to a halt during pandemic shutdowns. She’s confident that, if given a name, she more than likely could remember the key facts of that client’s case, since she typically has a client’s case for a year or more.

But can you effectively represent so many people?

“You can,” Hall insists, “but you also can’t expect to be only 9 to 5.” That means taking files home for work in the evening, or early morning, in addition to days that can feel as if you’re simply chasing from one courtroom to another.

Before the pandemic, Hall would log as many as 13,000 steps a day making court appearances in the courthouse as well as in two adjacent buildings. These days, with judges still holding many proceedings via Zoom, she might take 5,000 steps.

Following the hearing for the young woman in the robbery case, other cases are lined up. After a short hearing in which a judge refuses to lower the \$500 bail for one of Hall’s clients who’s in jail, it’s time to dash to another courtroom. Running is part of Hall’s job, but so is

waiting; this time it’s 25 minutes before the judge is ready to hear an operating-while-intoxicated fourth-offense case. The judge decides to ease restrictions for Hall’s 44-year-old client, which means fewer trips to downtown Milwaukee to meet with the agency that is monitoring his bail conditions. Wearing a cast on his right arm and a medical boot on his right foot, he’s grateful.

Hall goes back to her office in the nearby Milwaukee State Office Building to change into her “non-court shoes” to walk to lunch, then it’s back into heels before returning to the courthouse. There’s disappointment following a 30-minute hearing in which she fails to persuade a judge to throw out evidence against her client, a man who was parking his car with no license plate, near one of Hall’s childhood neighborhoods. He was approached by two bicycle officers who said they then saw drugs and a gun inside the car, leading to the charges. The judge ruled that the way the officers questioned the defendant and searched his vehicle was proper. Afterward, the man is

**Jade Hall visits a Milwaukee neighborhood where she grew up.**

But can you effectively represent so many people?

“You can,” Hall insists, “but you also can’t expect to be only 9 to 5.”



"Justice is not a possession; it is a thing that you do. You need to do it every day."

Thomas Reed

dejected: the case is more than a year old. The suppression motion and the hearing only delayed the case more. "I almost feel like I'm making it worse," Hall says, as her client walks away.

There aren't more than a few minutes for regrets. Hall's client for the final court appearance of the day is a young resident of Milwaukee's south side. According to the charges against him, the man was refused service in a bar on the lower east side. He left and returned with a gun. He fired several shots into the air and into the ground outside the bar, later telling an officer he was too "blackout drunk" to remember what had happened.

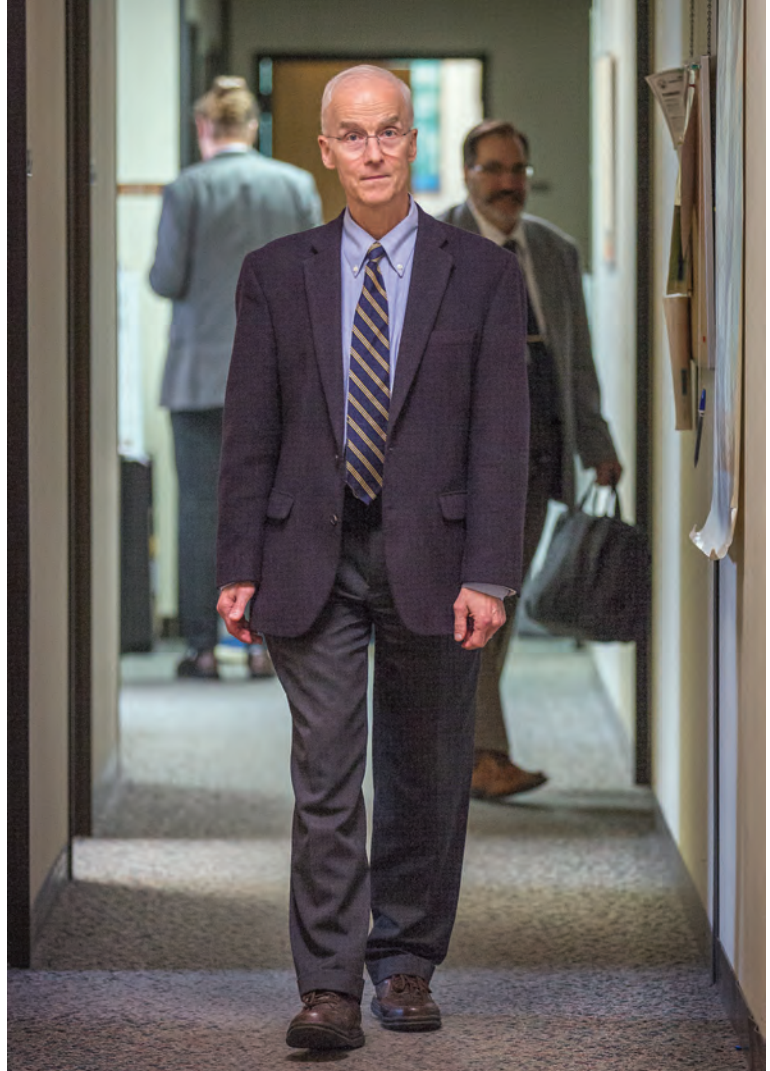
The man had no prior criminal record. He may have been fortunate to be charged with five misdemeanors but no felonies. He decided to plead no contest to two of the misdemeanors and is hoping that the judge won't put him behind bars. "There are a lot of things that could have gone extremely wrong," the prosecutor says. Hall counters by saying that the defendant is in alcohol treatment and has taken responsibility for the incident and that "I really don't see this happening again."

The judge begins sternly. "To go get a gun and come back is just completely out of line," he tells the man. "It's just unacceptable. And then to fire that gun." But the judge spares the man any jail time, so long as he follows conditions of his sentence, including continuing treatment.

For the client and for Hall, that's a win.

### Thomas Reed: Idealist and problem solver

Tom Reed was, is, and surely always will be a student of people



Thomas Reed in the downtown Milwaukee offices for state public defenders.

and society. That shaped what he studied when he was an undergraduate at Northwestern University in Evanston, Ill. It shaped the areas of law that he was drawn to as a student at Cornell University's law school in Ithaca, N.Y.

And it has shaped his career in a big way. "It was an intellectual path that led me here," he says. "Here" is the public defenders' offices in the Wisconsin state government office building in downtown Milwaukee. Reed began working as a public defender in Milwaukee in 1982 and has headed the office, with about 50 attorneys and 100 employees, since 2000.

Reed is many things. He is a bureaucrat whose long days are filled with meetings upon

meetings and a steady stream of big and little problems that he is responsible for solving. He is a leader, one of the central figures dealing with the big challenges of keeping the court system in Milwaukee functioning and (Reed hopes) serving people better.

He is an intellectual and idealist—cerebral, almost straight-laced, but motivated by ambitious visions for how the justice system can help more people stabilize their lives and stay on the right side of the law, making communities as a whole safer.

He is a believer in following the rules of the system. But rules, he says, are only as good as how much people adhere to the spirit of them. You can have great legal rules, but courts and the system as a whole need to have justice

*continued on page 16*



# DELAYS IN APPOINTING DEFENSE ATTORNEYS RAISE CONCERNS

In some ways, across Wisconsin, the overall picture of appointing attorneys in criminal cases to represent defendants who qualify for free legal representation has improved in recent years. At the same time, delays are the most pressing general issue facing the public defender system.

According to the Wisconsin State Public Defender's Office, the average time it takes to assign a defense attorney to a case following the filing of charges was 13 days in 2019. It was 11 days in 2021, and, in the first five months of 2022, it was 7 days. State law calls for a preliminary hearing—where a defendant is entitled to be represented by an attorney—to be held within 10 days.

Within the time period of these years, the percentage of cases in which an attorney was appointed within 10 days has varied from 81 percent to 86 percent. That means that in about one in six cases across Wisconsin, the defendant does not have an attorney within the time set by law. And with about 140,000 cases annually coming into the public defender system, this means that thousands of defendants are not receiving representation promptly. And in some cases, representation is not being secured for periods of weeks or even months.

Up to a point, judges will generally go along with delays in assigning an attorney to a defendant, if representatives of the State Public Defender's Office say they haven't been able to find an attorney. Too many cases, too few attorneys, is the simple explanation.

State Public Defender Kelli Thompson says that the problem of finding attorneys to take cases has intensified statewide and affects both rural and urban areas. In some rural areas, almost no private lawyers are willing to take "public defender cases," while in places such as Milwaukee, the number of private attorneys who will take such cases has declined by more than a third in recent years.

"No place in Wisconsin is untouched by this," Thompson says. In September 2022, the public defender's office submitted a state budget request for 2023–2025 that includes a raise of approximately 30 percent for the lowest-paid (starting) staff attorneys, an additional 65 staff support positions, and an increase in pay for private bar attorneys who take cases from \$70 an hour to \$125 per hour for in-court work and \$100 per hour for out-of-court work.

A legal challenge based on delays in naming attorneys also has been mounted. On August 23, 2022, a lawsuit was filed in Brown County Circuit Court on behalf of eight people who, the suit says, had experienced delays in receiving legal representation in criminal cases pending against them. The suit names Governor Tony Evers, State Public Defender Kelli Thompson, and the members of the Wisconsin Public Defender Board as defendants.

Characterizing the situation as a "constitutional crisis," the complaint alleges that Wisconsin "consistently takes longer than

14 days to provide counsel" to indigent criminal defendants. "[T]here are at least hundreds—if not thousands—of people charged with criminal offenses in Wisconsin waiting for the assistance of an attorney," the complaint alleges. "For many of these defendants, it will be months before they receive counsel." Voluminous records attached to the complaint list instances of delays from across Wisconsin.

The complaint asks the court to certify a class of current and future indigent defendants who have not received or do not receive appointed counsel within 14 days after their initial appearances. The requested relief includes an order requiring the defendants to immediately appoint counsel for the class members or, "if timely appointment of counsel is not feasible," to enter an order "dismissing the class members' [criminal] cases with prejudice." The lawsuit appears intended in part to increase public or political attention to the issue.

The Wisconsin Supreme Court recently passed up one opportunity to rule in a case of delay. In 2018, Nhia Lee, 45, unable to pay \$25,000 bail, spent his first 101 days in jail in Marathon County without a lawyer, after being charged with felony drug possession and identity theft. Once appointed, his lawyer filed a motion to dismiss, arguing that the delay had violated Lee's Sixth Amendment rights. The state appeals court ordered that the charges be dismissed without prejudice, but the state petitioned for review of the ruling in the Wisconsin Supreme Court. After initially agreeing to hear the case, the court changed its mind in May 2022, dismissing the case from its docket by a 5–2 vote. ■

## Delays in Appointing Public Defenders

This chart shows that delays in appointing attorneys have declined overall statewide from an average of 13 days in 2019 to 7 days in the first five months of 2022. The percentage of cases where an attorney is appointed within 10 days has varied during these years, from a low of 81 percent to a high of 86 percent. The situation varies from county to county, but delays are common across the state, as the chart shows through a list of seven of Wisconsin's 72 counties (almost all of which have their own circuit court).

	2019	2019	2020	2020	2021	2021	2022	2022
Location	Average Days	% Appt w/in 10 days	Average Days	% Appt w/in 10 days	Average Days	% Appt w/in 10 days	Average Days	% Appt w/in 10 days
Statewide	13	83%	9	86%	11	81%	7	83%
Ashland	11	87%	16	86%	11	79%	5	81%
Brown	31	62%	23	73%	22	70%	9	80%
Eau Claire	2	96%	1	97%	5	87%	6	77%
Grant	4	90%	6	88%	6	91%	4	87%
Kenosha	5	79%	9	81%	13	71%	5	84%
Marathon	9	70%	9	80%	15	72%	9	78%
Milwaukee	16	79%	15	78%	21	61%	16	67%

Source: Wisconsin State Public Defender's Office

"We're not just about doing cases. We have to be a voice for a more rational criminal justice system."

Thomas Reed

in their hearts. "Justice is not a possession; it is a thing that you do," he says, adding, "You need to do it every day."

What does it mean for him to do it every day? Consider a log he kept of a recent workday:

He is at work by 7:15 a.m., a few minutes earlier than usual. This day, there is a 7:45 a.m. meeting of a committee, chaired by Milwaukee County Circuit Court Chief Judge Mary Triggiano, of leaders of law enforcement agencies, the county jail, the House of Correction, children's court, and others. The group meets regularly to assess the functioning of the justice system as a whole system and to coordinate responses to problems. The discussion covers how many people are being held in the several incarceration facilities serving Milwaukee County and staffing issues at those facilities. Also on the agenda: How to move ahead with using \$16 million in federal pandemic-response money to reduce backlogs and delays in the whole system.

By 8:30, Reed is handling one of his more troubling current duties: appearing before various judges to tell them that the public defender's office hasn't come up with an attorney yet to represent defendants who are in jail and awaiting proceedings before the judges. The goal of speedy trials and prompt assignment of defense lawyers yields frequently to the facts that the full-time public defender staff is stretched thin and that the number of private attorneys willing to take public defender cases has declined.

At 9:45, there is a conference call with leaders of the state public defender's office. Like the early morning meeting, a central subject is how to use pandemic funds to help with backlogged cases. Staffing needs also are discussed.

At 11:15, Reed meets with Wisconsin State Capitol Police representatives about security procedures in the office building where the public defenders have their offices.

At 12:25 p.m., it's a monthly meeting with key players involved in setting bail for incarcerated people awaiting trial. Crowding in the jail and other facilities and heavy caseloads mean increased pressure to release people from jail. In general, people are entitled to be released on bail if they are not considered to be a threat to others. But deciding whom to release and on what terms is important—as well as politically sensitive, indeed sometimes even explosive. Reed has been a leading advocate of using "risk assessment" protocols to assess individuals. Like other aspects of the system,

those protocols have strong advocates and strong critics.

Reed personally handles the defense of a small number of people, generally involving defendants who have serious mental problems or are difficult to deal with. At 2 p.m., he has a phone call with a client at a state prison who has refused to cooperate with attorneys and wants to represent himself (generally a constitutional right but not usually exercised). Judges have found the person incapable of that and have asked Reed to try to convince the defendant to accept an attorney's representation.

At 2:30, it's a conversation with a former judge who is now in private practice and is willing to represent some people in criminal proceedings.

A two-hour meeting of the Milwaukee Mental Health Task Force starts at 3 p.m. This is a consortium of agency leaders and advocates involved in mental health services. Many of the people represented by public defenders have mental health needs, and the issue is important to Reed. He is on the steering committee of the task force.

And throughout the day, there is a stream of conversations and calls with staff members, clients, family members of clients, and others about most anything—from minor procedural issues to big decisions about handling particular cases to complaints of all kinds and personal crises for both employees and defendants. In general, if there's a problem in the Milwaukee operation, broadly conceived, it ends up before Reed, either directly or through his assistant or leaders of the several teams of public defenders in the office.

Reed says a central part of his job is "managing relationships"—relationships involving staff members, clients, other parts of government, and the community as a whole. "I call it the foreign policy around the public defender's office," he says.

At 5:45 p.m., more than 10 hours after the workday starts, Reed leaves the office. It's a fairly typical day—and he has worked like this for 40 years.

Reed says "the most compelling and interesting work" for him is advocating for what he calls a rational criminal justice system and improvements in the performance of the system as a whole. That puts him in the thick of some issues such as advocating for bail reform and treatment courts that aim to help people with problems such as drug addiction.

*continued on page 18*

# "EVERYONE FEELS IT" WHEN THE PUBLIC DEFENDER SYSTEM STRUGGLES

**A**s chief judge of the Milwaukee County Circuit Court, Mary Triggiano faces a lot of challenges in leading the operation of all 47 judges and 23 court commissioners. This is not to mention that, especially since the COVID pandemic began, her title might equally well be "chief coordinator of everything that needs to be done to keep the judicial system going."

Restrictions on access to courts because of pandemic rules, implementation of major changes in technology (many of them on a rushed basis), ballooning backlogs of cases, controversies over issues such as bail policies, and staff shortages in many parts of the system—Triggiano deals with all of them.

And the shortage of public defenders and private attorneys willing to represent criminal defendants who can't afford lawyers? This is among her biggest concerns.

"We're this one big ecosystem," Triggiano says. "When one part of the system is down or struggling, everyone else feels it. And that is really true when it comes to the public defender's office."

From the start of any case, someone facing criminal charges is entitled to an attorney. This means that all such defendants need a public defender if, like thousands of people each year, they can't afford to hire their own attorney. "If you don't have that [representation] at the start, it certainly has led to significant delays in moving a case forward to completion," Triggiano says. "Part of our backlog right now is because of the inability to timely appoint counsel in these criminal matters."

That is especially true in complex cases, where more challenging and extensive legal work is required, she says. That's one reason there have recently been about 170 people incarcerated in Milwaukee County while awaiting proceedings related to homicide charges.

Milwaukee County has received \$16 million in federal pandemic relief money to increase efforts to reduce backlogs of cases. Triggiano says that much of it is going to the district attorney's office and to the Wisconsin State Public Defender's Office to hire additional lawyers and support staff. But, she says, it is one thing to have funding for additional



**Mary Triggiano, chief judge of the Milwaukee County Circuit Court, says, "Part of our backlog right now is because of the inability to timely appoint counsel in these criminal matters."**

positions, and it is another thing to find people to fill them.

Overall, though, some positions have been filled, the system is working better, and the backlog of cases is declining from high levels at the start of 2022. "We've made incremental progress, though not the progress we wanted," she says.

The district attorney's staff has had high turnover and shortages, Triggiano says, but the situation with public defenders is more challenging. In both situations, principal factors are pay that is low compared to other available positions for lawyers and workloads that are large and increasing.

Particularly comparing public defender caseloads to several years ago, Triggiano says, "You're doing a lot more work for the same pay. On some level, that's more crushing."

And, she says, private bar lawyers who take appointments from the public defender's office are paid \$70 an hour, which in many instances is not enough to cover the lawyer's overhead. Triggiano says that if a judge makes the appointment, the lawyers get \$100 an hour—and if they take a case in federal court, it is higher. It will take legislative action to change factors such as these, Triggiano says.

There are still lawyers who want the jobs, in large part because of their desire to serve people who truly need help and because of their overall sense of serving justice in the system. "You've got to want to do public defender work," Triggiano says. ■



Why is the word *justice* repeated? Among interpretations by Biblical scholars, two stand out: The word is repeated to emphasize the importance of justice. And the word is repeated to teach that not only should a person pursue justice, but the pursuit itself needs to be done in just ways.

"I'd like to go out of business," Reed says. He grants that this sounds "naïve and almost ridiculous," but he is driven by the goal of using criminal proceedings less and solution-oriented programs more. When he started as a public defender, there were no treatment courts or diversion programs. Many people were just cycling through the system repeatedly, he says. Now there are such programs, which means there has been some progress, in Reed's estimation. But heavy caseloads, the great stresses on the justice system, and broad public fears about crime and safety show there is a long way to go.

"We're not just about doing cases," Reed says. "We have to be a voice for a more rational criminal justice system."

Reed says there is an intersection between public safety issues and public health issues. Better public health, including wide availability of mental treatment, would reduce crime, he says. He has been deeply involved in efforts to make changes in the system, including work in Milwaukee County supported by major foundations such as the John D. and Catherine T. MacArthur Foundation.

The stresses on the public defender's office—and on the lawyers themselves—have increased in recent years. "The job has become more difficult for staff, for a variety of reasons," Reed says. One reason that many people might not realize is how time consuming it is to conduct "electronic discovery" involving surveillance videos. And, Reed says, the criminal justice system as a whole has unstable staffing and also staff shortages. There are a lot of prosecutors and judges with limited experience, and staff shortages in multiple facets of the system (among court reporters, for example) can slow up work. "It's just harder to get to the bottom" of what a case involves, Reed says.

Compared to the past, there are more turnover among public defenders and fewer applicants for jobs. And there are 35 percent fewer private lawyers than several years ago who are willing to take public defender cases. Overall, Reed says, "it's just a math problem"—more cases, fewer lawyers to take them.

The impact of the COVID pandemic has intensified the issues, including the impact of working conditions in the Milwaukee County Courthouse and case backlogs that boomed during the height of the pandemic and have not returned to the preceding levels, let alone diminished.

A longtime and important part of Reed's

efforts to encourage lawyers to join in the work is his service as an adjunct professor at Marquette Law School, where he oversees the public defender clinic that gives students work experience in the field. But, in line with other trends related to staffing, student interest in the clinic has declined in recent years. Reed and others involved in the program hope to be able to reverse that trend.

Reed remains eager to promote the value and satisfactions of work as a public defender. He talks up the reasons to consider taking these jobs. And he does what he can to maintain the morale of those who already do the work, including everything from efforts to reduce work-related stress to encouraging birthday parties for staff members. He is concerned that, with limited resources, too often those doing the work get "a half a loaf" when it comes to what they really need. But dedication and commitment still run strong. Reed says there is an old saying that "nothing great is accomplished without high spirits."

### "Justice, justice shalt thou pursue"

When Howard B. Eisenberg was dean of Marquette Law School from 1995 until his death in 2002, a poster hung in his office with the Biblical verse, "Justice, justice shalt thou pursue." It comes from the book of Deuteronomy.

Eisenberg was dedicated to the work of public defenders in Wisconsin and nationwide. He was a public defender, he led public defenders, and he was one of the key figures in creating the public defender system Wisconsin uses to this day. He was, in many ways, a public defender all his life.

What does it mean to live by the words that Eisenberg kept so nearby? Why is the word *justice* repeated? Among interpretations by Biblical scholars, two stand out: The word is repeated to emphasize the importance of justice. And the word is repeated to teach that not only should a person pursue justice, but the pursuit itself needs to be done in just ways.

Eisenberg surely knew—and lived according to—both interpretations. Neither he, nor the five public defenders profiled here, nor their colleagues, past, present, and future, are perfect in their embrace of these words. But for all the challenges, stresses, and ups and downs, they know the ideals and why they themselves are doing this work. ■

# BOARD CHAIR DESCRIBES CHALLENGES FOR THOSE DOING “NOBLE WORK”

It's been almost half a century since James M. Brennan first got involved with the work of public defenders in Wisconsin. In 1973, he was a student at Marquette Law School and took part in the school's now-longstanding public defender's clinic. The program allows interested students, as part of their upper-level curriculum, to work alongside attorneys representing people involved in criminal proceedings who are unable to afford a lawyer.

Brennan never lost his interest in serving low-income people, both with their legal problems and with other needs, and he has an unusually long-term perspective on the development of public defender services in Wisconsin across the decades. Most recently, since 2003, he has been a member of the legislatively created board that oversees the Wisconsin State Public Defender's Office, serving as chair of the board since early 2021.

How would he describe public defender services across Wisconsin now? “The state of the system is spotty,” he says.

Brennan names three problems: First, in rural areas, there is difficulty finding attorneys who will take cases. This can leave defendants waiting in jail for weeks while dozens of attorneys are contacted. Second, an important leg on which the system stands—involvement of the private bar in representing some clients statewide—has weakened. The pay for private attorneys was increased in 2020 from \$40 an hour—then the lowest in the nation—to \$70 an hour; this has helped to some degree but not solved the problem. And third, the impact of the COVID pandemic “has really thrown the whole system into a tizzy and has caused a backlog.”

“Of course, we could use more staff,” Brennan adds. The caseloads for public defenders statewide have grown in recent years—something that concerns Brennan. “Quality and caseload interact very closely,” he says.

But in the broad picture, public defender work has improved over the decades, and the system serves many people well, Brennan says. Furthermore, legislative support for public defenders has been more stable than it once was, although issues including salaries and the number of positions remain.

Brennan says that when he had his initial involvement with the system, the statewide public defender office dealt only with appellate cases, and attorneys serving at the local level were appointed on a county-by-county



**James Brennan, chair of the Wisconsin Public Defender Board, says public defenders are committed to their work and loyal to their clients, but the stresses on the overall system mean quality in the broad picture is “spotty.”**

basis by judges. The quality of the appointment process was uneven. By 1977, Brennan recalls, the statewide office had been created. Since then, appointments have been handled through an administrative process and not by judges. The effectiveness, quality, and stability of the work improved in following years.

Brennan never practiced as a public defender, but his work always involved service to people in need. He was a lawyer for the Legal Aid Society of Milwaukee for 31 years, most of the time as chief staff attorney. That meant his practice involved civil litigation, not criminal matters. In 2007, he became Family and Children's Ministries director of Catholic Charities of the Archdiocese of Milwaukee, followed by several years as the organization's executive director. He is also a past president of the State Bar of Wisconsin.

In 2012, he retired from full-time work. He and his wife live in Ashland County in far northern Wisconsin. Among his current interests, he has qualified as a “master naturalist” at Copper Falls State Park.

Despite the current stresses on the system, Brennan remains enthusiastic about public defender work and the people doing it. “Most of our attorneys are extraordinarily committed and absolutely loyal to their clients,” he says. They are doing “the noble work of being a lawyer, the good work of being a lawyer, which is representing the marginalized and the indigent.” ■

# HOWARD B. EISENBERG: DEAN AT MARQUETTE LAW SCHOOL 1995–2002



Howard B. Eisenberg in the 1970s. “Representing the clients, seeking justice—nothing else was as important. Everything that he did in those years fostered that outcome,” wrote Ronald L. Brandt.

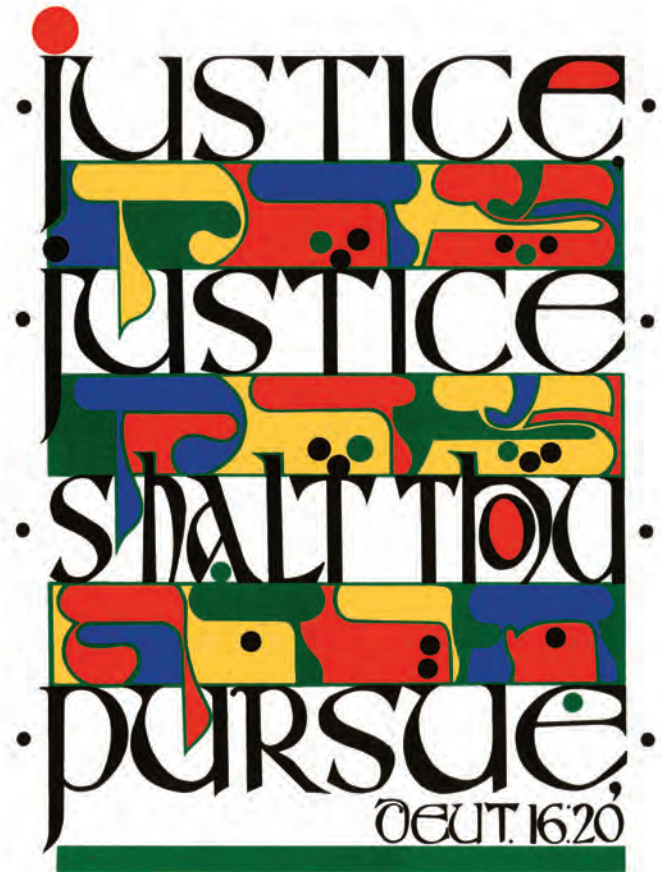
**“But in a very real and tangible way, Howard never stopped being a public defender.”**

Howard B. Eisenberg held academic positions at several law schools and was dean of Marquette Law School from 1995 until his death in 2002 at age 55. Earlier in his career, he was a public defender and a leader in improving and expanding the role of public defenders in Wisconsin and nationwide. The work of public defenders always remained close to his heart. Following his death, a special issue of the *Marquette Law Review* later that year included remembrances or tributes to Eisenberg from many who worked with him or were close to him.

The full memorial issue is available online (86 Marq. L. Rev. 203–400) and covers Eisenberg’s entire career. Here, in light of the focus of the cover story of this *Marquette Lawyer*, we print below lightly edited contributions to the issue by three of Eisenberg’s colleagues during his time as the state public defender; the first entry appears in full (save footnotes), and the latter two are excerpts.

**By Ronald L. Brandt**

After graduating from the University of Wisconsin Law School in June 1972, I was hired as an assistant state public defender by James H. McDermott, who had been the state public defender for many years. He had manned the office alone until hiring Howard Eisenberg as an assistant state public defender in 1972, following Howard’s graduation from UW and his clerkship at the Wisconsin Supreme Court. I had known



A framed illustration identical to this hung in the office of Dean Howard B. Eisenberg at Marquette University Law School from 1995 until his death in 2002. The Biblical quotation is from the book of Deuteronomy (see page 18 of the previous article). The artwork is by Mordechai Rosenstein and appears here by special permission.

Further information about the print is available at [rosensteinarts.com](http://rosensteinarts.com).



Howard by reputation only—a brilliant, hard-working law student who was head and shoulders above everybody else. Quite frankly, I was amazed that Jim hired me when he could attract lawyers of Howard's caliber. Three days after I started work, Jim informed me that he was resigning to take a position in the attorney general's office.

I am not sure if my memory is correct, but my recollection is that Howard and I had done nothing but exchange handshakes at that point. I do remember that in those first three days Howard wrote a brief, argued a case before the Wisconsin Supreme Court, and made a trip to the Wisconsin state prison. My biggest accomplishment in those three days was to find the law library. At that point, I believed my career as an assistant state public defender was waning.

Within a few days, Howard was named acting state public defender, while the court selected Jim's successor. That afternoon, Howard came into my office, and we had our first real conversation. If it is possible to be businesslike and casual at the same time, Howard mastered it. He simply sat down and told me that my job was safe and that he was eager to work with me. He then assigned almost all of Jim's caseload to me, along with my first case to be argued before the supreme court, in the October 1972 session. From that moment, I knew that I would be challenged in ways that I had never conceived. A few weeks later, the court appointed Howard to be the state public defender.

It wasn't Howard's assurance of job security that struck me. Rather, it was his confidence that I was up to the task and his genuine desire to include me in a new adventure. For the next six months, Howard and I were the only full-time appellate defenders in Wisconsin. And I knew that I was probably the luckiest young lawyer in Wisconsin. I was working one-on-one with a person whom I and everybody else knew to be a brilliant, passionate lawyer who was dedicated to providing the best possible legal representation for every indigent client he represented. And he was prolific, writing brief after brief, many involving complex legal issues, at a speed that boggled my imagination. Howard could read a trial transcript, review the exhibits, and prepare a brief in an afternoon. He would visit a prison, see a half-dozen or more clients in the morning, find time to write a dozen clients (typing the letters himself), and

be home for dinner by 6:00 p.m. At first, I could not believe the pace—then I found myself drawn into it. Our work never seemed to end, but the satisfaction from it never diminished. Howard loved his job, which was infectious.

We often rode to the prisons together, either to Waupun or Green Bay, to see clients. During those long trips, we often talked about why we had become public defenders. Fundamental to Howard was making sure that each client got no less than all the process due and guaranteed by the Fourteenth Amendment. Guilt or innocence, while important, was not our focus. Was the case done right? If not, was the client's case prejudiced? Was the error serious enough to warrant a new trial? What could we do to make the justice system work better? Indeed, if the system fails the poorest, then how can it function effectively at all?

And so we worked. The supreme court appointed us to more and more cases, and by February 1973, Howard hired a second assistant. At about the same time, both the United States Supreme Court and the Wisconsin Supreme Court determined that due process protections attached to probation/parole revocation proceedings. Howard believed that our task as appellate defenders included responsibility for providing representation in those actions, and, by 1974, our caseload was skyrocketing, which led to expansion of the state public defender's office. Howard convinced the Wisconsin Supreme Court to increase our budget to allow hiring five more assistants and to open a branch office in Milwaukee in 1975. For the next two years, I supervised the Milwaukee office, working with two other assistants.

Our experience as appellate defenders led Howard to the conclusion that the lack of statewide resources and of a uniform method of appointing counsel created a wide disparity in the quality of appointed-counsel services throughout the state. Feeling that even well-intentioned judges failed to provide counsel to all who might be eligible, Howard believed that the power to appoint lawyers for indigent defendants should not be in the hands of the courts but, rather, with an independent public defender, whose responsibility should include devising standards by which eligibility would be determined and matching a client's needs with an experienced lawyer, whether public defender or appointed private counsel. It was

"If it is possible to be businesslike and casual at the same time, Howard mastered it."

Ronald L. Brandt

"Howard Eisenberg provided us all with a different model: one of consuming generosity, self-sacrifice, and devoted public service. He was a man of incredible energy [and] an acute sense of justice . . ."

Robert J. Paul

a vision that was the culmination of the many conversations we had on so many trips to the prisons from 1972 to 1975.

Quite honestly, I told Howard that his utopian vision would never become reality. Why would the court system give up its power to appoint counsel? The public defender's constituency hardly had the lobbying power to persuade the legislature to follow that course. As only Howard could do, he acknowledged my concerns, drafted the legislation, shepherded the bill through the legislature, and obtained Governor Patrick J. Lucey's signature to it. By 1977, the blueprint for a revolution in indigent legal services in Wisconsin was in place. Howard's passion for justice, his ability to bridge the economic issues associated with such an all-encompassing law, and his commitment to the poor were the sole reasons that Wisconsin became the first state to have a completely independent public defender system dedicated to providing the best possible representation. No other person could have persuaded the court, the legislature, and the governor to adopt such a system.

After the legislation passed, Howard asked me to assume responsibility for setting up the trial division. From 1977 through 1978, we opened more than 30 offices throughout Wisconsin, took over existing county-funded public defender programs, and established a system with more than 100 lawyers, which handled more than 50,000 cases annually. Looking back, it seems incomprehensible to me that, in six years, Howard took a small, two-person appellate program and catapulted the state public defender's office to a multimillion-dollar program dedicated to making certain that the wheels of justice turned properly, and that all who were eligible obtained the best possible legal representation.

Those six years defined what Howard was all about. Despite the crushing burden of creating a vibrant, dedicated agency, Howard carried a full caseload, as did each of the lawyers he selected to assist him in fulfilling this vision. His purpose was not to create another state bureaucracy. Resting upon the laurels of a statewide program did not interest him. Representing the clients, seeking justice—nothing else was as important. Everything that he did in those years fostered that outcome. He developed a better way of providing legal services to the indigent defendant. It was fair, and it leveled the playing field. It is a testament to his character that by the time he was 30, Howard had redefined

the manner in which public defender services were provided in Wisconsin. That this public defender system continues to provide those services throughout the state 25 years later demonstrates the wisdom of his vision.

I cannot adequately express what it meant to work so closely with Howard in those years and all that I learned from him. Even though we were the same age, Howard was my mentor. The years passed so quickly, but the experience defined my career and my life. Every employee of the state public defender was a member of Howard's extended family. As he did with me, Howard nurtured all who shared his path, leading by example. He wanted us to share that path and to love the challenge as much as he did. He demanded nothing less than one's best effort and a commitment to justice. He challenged by assigning difficult tasks. He never criticized; rather, he taught. He always carried a caseload. And so many are much better for all he did. I know that I am a better person and a better lawyer for sharing his path in those years.

## Setting an Example with Self-Sacrifice and Wit

By Robert J. Paul

Everyone has at least one "Howard story." It is significant in itself that this is so. Among those mentioned was one that displayed Howard's very keen sense and appreciation for the right of every person accused of a crime to a vigorous defense. He never lost sense of who his client was or how each was entitled to his or her own independent counsel. Prior to 1978, when there was only a public defender appellate unit, Howard carried a caseload of about 70 to 80 open appellate cases in addition to his administrative responsibilities and work with the legislature. At that time, the court of appeals did not exist and all appellate work (except county court appeals to circuit courts) was in the state supreme court. With his caseload, in argument week, Howard might have six cases scheduled for oral argument. One day, as he was midway through his second argument, one of the justices interrupted him to say, "Mr. Eisenberg, isn't the argument you are making on behalf of this client just the opposite of the argument you made in the last case?" Without skipping a beat, Howard rejoined, "Oh, that was the other Howard Eisenberg!"

Doing criminal defense appellate work means losing, a lot. But this never seemed to get Howard down. It was another bright facet of Howard's personality that he leavened his work representing some of society's most dangerous individuals with the light touch of his wit. Occasionally, in talks he gave to various criminal defense, bar, and student groups back then, he would begin by saying, "I'm Howard Eisenberg, state public defender, which the Supreme Court thinks is Latin for 'Judgment Affirmed.'"

....

In this age when accumulation of wealth or power is its own sufficient end, when basic civil rights and the rule of law are officially trampled and political meanness seems even more rampant, Howard Eisenberg provided us all with a different model: one of consuming generosity, self-sacrifice, and devoted public service. He was a man of incredible energy, an acute sense of justice, and while he occasionally preached ("Do well and do good!") and, I'm sure, lectured in class, he mostly led by example, by doing.

## "Howard Believed Lawyers Have a Higher Calling..."

By Jack E. Schairer

**H**oward Eisenberg was an amazing man. I will remember Howard most warmly for his extraordinary energy, remarkable spirit, and devotion to family, and for his unwavering and tireless commitment to helping those who are among society's most helpless and hopeless: indigent criminal defendants.

Howard's exuberance for the sometimes Sisyphean aspects of public defender work could be both inspiring and intimidating. Howard was a self-described appellate junkie. His legendary work ethic, legal brilliance, and compassionate manner with clients at times left you feeling as though you should be doing a little more and doing it better. And usually you did. Working with Howard invariably caused you to become not only a better professional, a better lawyer, but also a better person.

....

It is not unusual for attorneys of Howard's caliber who work in defender agencies to stay for a few years and then move on in pursuit of greater prestige or treasure. Howard did move on to be executive director at the National Legal

Aid and Defender Association, director of clinical education at Southern Illinois University School of Law, dean of the University of Arkansas at Little Rock Law School, and, of course, dean of Marquette University Law School. But in a very real and tangible way, Howard never stopped being a public defender. While each of these jobs no doubt brought enormous challenges and demands, Howard always maintained a caseload representing indigent criminal defendants, pro bono. By the time Howard returned to Wisconsin in 1995, his state public defender statute had been changed, eliminating the agency's authority to litigate prison-conditions issues on behalf of inmates. Howard filled the void with his pro bono work representing individual inmates who asked for his help and by playing a key role in a class-action suit challenging, as cruel and unusual punishment, conditions at Wisconsin's "supermax" prison in Boscobel.

After Howard's passing, a speech he had given on several occasions titled "What's a Nice Jewish Boy Like Me Doing in a Place Like This?" that addressed his thoughts on spirituality and the legal profession received press attention. In it, Howard took the legal profession to task for its general state of incivility and took lawyers to task for trying to win cases by being personally offensive, snide, unreasonable, and unpleasant to deal with. Howard believed lawyers have a higher calling to pursue ultimate good for society. His view of *cura personalis* meant that the Golden Rule is operative even in law offices. He urged students and lawyers, as a start, simply to be nicer, to treat people, all people, better. I can tell you this was not, as is often the case, the product of someone's looking back over his career with perhaps some regret and urging others to learn from his experience and take a better path. Howard was always this way.

Howard, somewhat incongruously for a public defender, particularly in the early 1970s, seemed as though he were the kind of person who had been born wearing a jacket and tie. His demeanor in the office was generally formal, but he also had a humorous side. One of his secretaries who still works in his old Madison appellate office relates that Howard dictated prodigious amounts of legal work and would often end each document on the tape by signing off with a fictitious name. In one instance the secretary typed exactly what Howard dictated. He signed it and, much to the secretary's horror, put it in the mail for filing, unknowingly, as "State Public Rhinoceros, Howard B. Eisenberg." ■

"His legendary work ethic, legal brilliance, and compassionate manner with clients at times left you feeling as though you should be doing a little more and doing it better. And usually you did."

Jack E. Schairer