Howard B. Eisenberg: Dean at Marquette Law School 1995–2002

“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

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Howard by reputation only—a brilliant, hardworking 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. 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
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 leveraged 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 trammeled 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

Howard 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.”