

JAMES J. CONNOLLY
d/b/a Connolly Law Offices, LLC
2051 W. Wisconsin Avenue
Milwaukee, WI 53233,

Petitioner

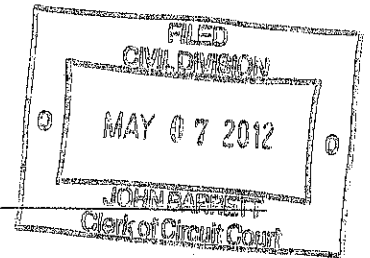
HON. WILLIAM SCOSNAY, BR. 08
CIVIL P

v.

APPEAL FROM ADMINIS-
TRATIVE DECISION
CODE: 30601

PUBLIC DEFENDER BOARD
c/o Board Chairman,
Atty Daniel M. Berkos
Berkos Law Office
104 W. State St.
Mauston, WI 53948-2111,

Respondent



PETITION FOR JUDICIAL REVIEW

NOW COMES the Petitioner, James J. Connolly, pursuant to §227.53, Wis. Stats., petitioning the Court to reverse or modify the attached decision, dated March 30, 2012, of the Respondent, the Public Defender Board, in James J. Connolly v. State Public Defender, Kelli S. Thompson, as follows:

PARTIES

1. Petitioner, James J. Connolly, is an attorney licensed to practice law in the State of Wisconsin since 1987 and a resident of Milwaukee County.
2. Respondent, the Public Defender Board ("Board"), is an agency of the executive branch of Wisconsin State Government, created

under §15.78, Wis. Stats., which is to consist of 9 members, 5 of whom must be members of the State Bar of Wisconsin, all of whom are appointed by the Governor for staggered 3 year terms. At all times relevant, there were only 8 members because the 9th, Joe Morales, died during his term but the Governor did not appoint anyone to fill the post. The longest continuously serving member of the Board, and its Chairman since 1988, is Attorney Daniel Berkos, who was originally appointed to it by his friend and former law firm co-member, Governor Tommy Thompson.

3. Kelli S. Thompson, former Governor Tommy Thompson's daughter, appointed State Public Defender on April 1, 2011 by the Board pursuant to its authority under §977.02(1), Wis. Stats., is a "party who appeared before the agency in the proceeding in which the decision sought to be reviewed was made" under §227.53(1)(a)(3)(c), Wis. Stats., who, therefore, although not the named Respondent, must be served with a copy of this Petition and, pursuant to §227.53(2), Wis. Stats., may participate in this case upon serving, within 20 days thereafter, a:

. . . notice of appearance clearly stating the person's position with reference to each material allegation in the petition and to the affirmance, vacation or modification of the order or decision under review.

NATURE OF PETITIONER'S INTEREST

4. Prior to July 6, 2011, by virtue of having previously been certified to accept paid private bar appointments from the State Public Defender's office pursuant to §977.08, Wis. Stats., being in compliance with all associated annual Continuing Legal Education requirements, maintaining a principal law practice location in Milwaukee County, and being registered with the Milwaukee SPD Trial Office as an attorney available for private bar appointments to represent indigent defendants in misdemeanor and felony criminal cases in Milwaukee County, Petitioner had a vested right, subject to being validly decertified for cause, to accept periodic case appointments on a rotating basis and thereby earn fee income from SPD in exchange for representing indigent defendants.

5. On July 6, 2011, State Public Defender Thompson, at the instigation of Attorney Deborah Smith, Director of the Assigned Counsel Division of the State Public Defender's Office, decertified Petitioner indefinitely.

6. On 3/30/12, Board Chairman Berkos drafted and signed a written decision on behalf of the Board which affirmed Thompson's 7/6/11 decertification action, ostensibly on the basis of the following "Findings of Fact":

9. Attorney Smith presented credible evidence that Attorney Connolly's billings were substantially out of the average billed by other private bar attorneys in similar circumstances.

10. Attorney Connolly has a pattern of submitting unreasonably high bills since 2006.

7. Petitioner, as more particularly stated below, contends that decertification was improper and has a property and reputational interest in reversal or modification of the Board's decision.

**GENERAL STATEMENT OF FACTS SHOWING THAT
PETITIONER IS AGGRIEVED BY BOARD'S DECISION**

8. In approximately 1992, Petitioner was originally certified to accept private bar appointments by then State Public Defender Nicholas Chiarkis. Shortly thereafter, Petitioner accepted Milwaukee County appointments to represent a 16 year old defendant, who had been waived by the Juvenile Court into Adult Court, in a felony *Reckless Endangerment While Armed* case and an unrelated misdemeanor *Criminal Damage to Property* case. Petitioner completed both case assignments, including an interlocutory appeal of the waiver decision [See State v. Antonio M., 175 Wis.2d 626 (Ct. App. 1993) (unpublished)] and a jury trial in the misdemeanor case which resulted in dismissal of all charges at the close of the State's case-in-chief. Petitioner did not take any further SPD appointments for the time being and, concentrating on civil litigation, allowed his SPD certification to lapse.

9. In approximately 2003, in the interim having opened a solo law office in Milwaukee, Petitioner applied for SPD re-recertification and resumed accepting a limited number of private bar SPD case appointments annually, while continuing to handle civil matters. Between 2003 and early 2011, Petitioner handled approximately 40 SPD appointed cases in Milwaukee County Circuit Court, a majority of which involved felony charges, including the jury trial of an unusual, complicated, and difficult *Theft by Trustee* case involving a novel Confrontation Clause issue which became a subject of published opinions by the Wisconsin Court of Appeals and the Wisconsin Supreme Court. See State v. Doss, 2007 WI App 208, 305 Wis.2d 414 (reversing judgment of conviction on basis of finding that Confrontation Clause was violated by the admission of banking records over defense objection); 2008 WI 93, 312 Wis.2d 570 (repudiating Court of Appeals' Confrontation Clause violation analysis and reinstating conviction).

10. On July 6, 2011, at the instigation of Attorney Deborah Smith, a longtime employee of the State Public Defender's Office occupying the Assigned Counsel Division Director post, then recently appointed State Public Defender Thompson, without any independent factual inquiry whatsoever about the particular circumstances of the representation or the specific character of the services rendered in any individual case ever handled by

Petitioner, and without any prior warning, notice, or other communication of any kind by her or any prior State Public Defender to Petitioner, sent him an abrupt letter stating:

Please find enclosed a report and attached documents provided to me by the Director of our Assigned Counsel Division, Deborah Smith. I have read her report and I agree with her recommendations. Be advised that effective today you are decertified from all appointment lists. If you are unable to meet your responsibilities to your clients in the matters previously appointed to you, please contact our Milwaukee office to arrange for cases to be reassigned.

You may appeal my decision by submitting a letter of appeal to me within 30 days pursuant to PD 1.05.

The "report" enclosed was a July 1, 2011 memo, from Smith to Thompson, which stated:

Mr. Connolly has been certified for appointments since 1992. However, we have no records of any appointments before 2003. Between 2003 and today he has taken only about 40 cases. He is based in Milwaukee and takes primarily felonies. My correspondence with Mr. Connolly regarding his high billing began in 2006. I cut one very large bill. I believe he appealed that cut to the Board and lost. I cautioned him on another bill. In 2007, I cut another large bill and cautioned him again about his high billing. He took no cases in 2008. When his bills for 2009 case came in we had the same problem with high billing. I made cuts to a large bill which were the same kinds of cuts we made in the previous bills. Another bill was referred to me in 2010. I made cuts again and warned him again about his high billing. He appealed these cuts. Due to my health issues, I asked Kathy Pakes to settle this matter. We had no sooner settled that matter when he submitted two additional high bills. I made an offer to him to pay those bills in full if he would remove himself from our appointment lists. He did not respond. I made minimal cuts to those bills only because I had determined that decertification was necessary.

Also attached is the most recent report comparing Mr. Connolly's averages to other attorneys in Milwaukee.

Also enclosed were copies of letters Smith had sent to Petitioner in past years pronouncing her decisions to make de facto cuts to bills and her generic criticism about supposedly "high" or "above average" billing and/or a supposed lack of "efficiency" in 4 felony cases: *Dyson* (closed in 2006, after Petitioner obtained voluntary dismissal of all charges shortly before trial); *Michel* (closed in 2006, after Petitioner obtained voluntary dismissal of all charges following initial involuntary dismissals without prejudice on motions and subsequent "refilings" by Prosecutor); *Dedrew* (closed in 2007, after Petitioner was effectively forced to withdraw by mentally ill but legally competent client on day of scheduled trial); and *Washington* (closed in 2010, after Petitioner obtained a plea-bargained-for reduction of 2 felony charges to a single misdemeanor on the 2nd scheduled trial date). While long prior to 7/1/11 Petitioner had answered each of Smith's letters with very detailed written explanations of the special circumstances and results in each of those cases, Smith omitted them from the materials she chose to present to Thompson in support of her decertification initiative.

11. On 8/5/11, pursuant to Wis. Admin. Code § PD 1.05, Petitioner commenced an appeal of Thompson's decertification action to the Board by filing a 14 page appeal letter with 10 attached exhibits (including copies of the detailed explanatory letters referred to in the immediately preceding paragraph).

12. The Appellee in the appeal proceedings, State Public Defender Thompson, was represented by Attorney Kathy Pakes, who held the position of Legal Counsel for the Office of State Public Defender.

13. Petitioner retained Attorney Mark DesRochers to assist him in the appeal and, on 10/31/11, DesRochers filed a Notice of Retainer with the Board.

14. Between the commencement of the appeal process on 8/5/11 and an initial hearing session before the Board coinciding with its regularly scheduled quarterly meeting on 11/4/11, there were multiple written submissions to the Board by both parties, as follows:

DATE	PARTY WHO SUBMITTED	SUMMARY DESCRIPTION
10/17/11	Thompson	Pakes Letter (with 2 page attachment purporting to show summary billing info re 14 cases closed 2009-2011)
10/18/11	Thompson	Pakes Letter, with voluminous enclosures to be marked as exhibits and testified about at hearing by Deborah Smith: -2008 "Rotational Cost per Case" report (for private appointed attorneys-Milwaukee County) -2009 "Rotational Cost per Case" report (for private appointed attorneys-Milwaukee County) -2010 "Rotational Cost per Case" report (for private appointed attorneys-Milwaukee County)

		-2008 "Attorney Case Time Report" (for SPD Staff attorneys-Milwaukee County) -2009 "Attorney Case Time Report" (for SPD Staff attorneys-Milwaukee County) -2010 "Attorney Case Time Report" (for SPD Staff attorneys-Milwaukee County) -2011 "Attorney Case Time Report" (for SPD Staff attorneys-Milwaukee County) ----- -Connolly Bills Paid 2009 -Connolly Bills Paid 2010 -Connolly Bills Paid 2011
10/20/11	Thompson	Pakes Letter to JJC, with copy to Board, re 11/4/11 hearing date and re-listing (in more detail) the same exhibits referred to above. (Includes the names of the defendants in the 14 cases closed 2009-2011)
10/28/11	Connolly	Connolly Letter to Board with: I. Objection to Overbroad Scope of Smith's Proposed Hearing Testimony II. Recusal Request (Berkos) III. Request for Court Rptr IV. Suggestion that Board Designate a Hearing Examiner in Advance (and enclosing copy of hearing subpoena duces tecum served upon Thompson)
11/1/11	Thompson	Pakes Response to 10/28/11 Connolly Letter
11/2/11	Connolly	Connolly Reply to Pakes 11/1/11 Letter
11/3/11	Connolly	DesRochers Email, supplementing 11/2/11 Connolly Letter, with copy of <u>Guthrie</u> case (re recusal)

15. Petitioner's written appeal-related submissions before the initial hearing session on 11/4/11 contended, in summary, that:

A) Deborah Smith improperly, arbitrarily and capriciously urged Petitioner's decertification because he had challenged her subjective "cuts" of his billed time in *Washington* by filing an appeal with the Board pursuant to

§977.08(4) and a compromise settlement of that appeal reached by Attorney Pakes and Petitioner on 3/21/11 had effectively reversed some of her "cuts".

B) Smith presented a grossly unfair picture to State Public Thompson in support of her decertification initiative on 7/1/11 when, having decided to present Thompson with copies of letters she had written to Petitioner in the past containing generic criticisms about the amount of time billed in 4 long closed cases, she omitted copies of the letters with which Petitioner had answered her criticisms.

C) Smith's characterizations, in the memo and other self-serving letters she submitted to Thompson on 7/1/11, of Petitioners' bills in old closed case as "high", "large", "excessive", or "unreasonable" begged the question and were not, themselves, legally effective findings of legitimate cause for decertification because Wisconsin law does not confer any authority upon a Division Director to determine reasonableness of attorney bills.

D) The materials Smith supplied to Thompson 7/1/11 in support of her decertification initiative wrongly insinuated that, in the immediate wake of the settlement of the appeal in *Washington*, Petitioner had attempted to take unfair advantage of Smith's "health issues" by quickly

submitting supposedly "high" bills in *Lewis* and *Gonzalez*, as the *Lewis* and *Gonzalez* bills had actually been submitted weeks before Attorney Pakes offered to settle the *Washington* appeal.

E) There was no rational basis for any claim that, prior to decertifying Petitioner on 7/6/11, Thompson had validly determined that supposedly improper billing for "administrative tasks" in *Lewis* or *Gonzalez* supplied necessary legitimate "cause" for decertification because neither the bills themselves, nor anything which purported to duplicate actual time entries from them, had been supplied to and reviewed by Thompson.

F) Having a statistical higher than average individual "average cost per case" was not a legitimate cause for decertifying Petitioner because group "average cost per case" had never been promulgated by any proper authority as a ceiling or other criteria governing billing on appointed cases.

G) State Public Defender Thompson's July 6, 2011 decertification action was an uninformed "rubber stamping" of what, in actuality, was an arbitrary and capricious pronouncement by Smith in her July 1, 2011 memo that "decertification was necessary" and was legally void

because, contrary to the requirements of Wis. Admin. Code § PD 1.03(4)-(5), it was taken by Thompson without any meaningful independent investigation, without consideration of any appropriate relevant factors, and without any legitimate finding of any "cause".

H) The Board should not admit or consider any billing/statistical information from exhibits concerning the 14 old cases which Attorney Pakes submitted on 10/17/11-10/18/11 because to do so would deprive Petitioner of Due Process.

I) Board Chairman Berkos should be recused from any participation in the pending appeal in order to avoid subjecting Petitioner to an unfair risk of bias in favor of the State Public Defender, given that Berkos was SPD appointed defense counsel in at least 8 open and active felony cases, Berkos had a financial interest in getting paid as much as possible of his accrued and future fees for services in such cases, and the State Public Defender would have authority to determine how much of such fees would be voluntarily paid.

J) The Board should appoint a Hearing Examiner to conduct any hearing at which testimony would be taken.

16. During the initial hearing session on 11/4/11:

A) Petitioner and Atty DesRocher orally explained the motion for Chairman Berkos's recusal, including a supplemental argument that his participation under the circumstances would be contrary to at least the spirit of that portion of §15.78, Wis. Stats., governing Board membership, which states:

No member may be, or be employed on the staff of, a judicial or law enforcement officer, district attorney, corporation counsel, or the state public defender.

B) Chairman Berkos declined to recuse himself.

C) The Board declined, for the time being, to require Chairman Berkos's recusal but stated that it would seek an opinion from outside counsel about "conflict of interest".

When Petitioner then asked:

(W)hen when you say that the Board is gonna be asking for an outside opinion about conflict-of-interest. What does that mean? ,

Board Secretary, Nancy C. Wettersten, responded:

It means that we'll be making a motion, but we will-- we will choose a lawyer licensed in Wisconsin who we believe that is experienced in the issues of ethics. We'll present both your arguments and any other information that that person may deem necessary and that person's being hired by the Board or consulted by the Board to serve as outside counsel to the Board to advise us as to whether or not Mr. Berkos has a conflict-of-interest and after receiving that-- and after receiving that advice, we will then determine, as a Board, whether or not Mr. Berkos should be recused.

D) The Board set 1/27/12 as a continued hearing date.

E) The Board ruled that all materials that either side submitted 10 or more business days prior to the 1/27/12 hearing would be considered by the Board, including all statistical information, because the rules of evidence did not apply.

F) The Board ruled that each side had 30 days in which to file and serve any motions and 15 days, thereafter, to file and serve any response to such motions.

G) With regard to the suggestion that it appoint a Hearing Examiner, Secretary Wettersten explained the Board's decision as follows:

(T)he Board, as a whole, will hear the case and deliberate and as a matter of internal housekeeping, we may choose one of our members to conduct a hearing to make it procedurally smoother.

. . . .

Internally, we may-- we may choose one of our own members to actually, you know, swear witnesses and conduct the-- the hearing just to make it procedurally a little more efficient, but that's something we'll decide among ourselves and it will be one of us.

17. Between the initial hearing session on 11/4/11 and the hearing on 1/27/12, there were multiple additional written submissions to the Board by both parties, as follows:

DATE	PARTY WHO SUBMITTED	SUMMARY DESCRIPTION
12/4/11	Connolly	<p>Connolly Letter with:</p> <p>I. Supplemental Brief in Support of Motion for Recusal of Daniel Berkos</p> <ol style="list-style-type: none"> 1. Clarification: "Unfair Risk of Bias" 2. Actual Bias <p>II. Motion for Summary Reversal of Decertification</p> <ul style="list-style-type: none"> -Burden of Proof is on Thompson -Inherently Unfair -Excess average payment per case rationale was never properly promulgated as an applicable rule or policy -Retroactive application of Excess average payment per case rationale violates Due Process <p>III. Motion for Reconsideration of Objection to Overbroad Scope of Smith's Proposed Hearing Testimony</p> <p>(The statistical info from 14 cases is excludable as "irrelevant" under 227.45(1) because the payments in 12 were approved by SPD prior to decertification.)</p> <p>[With Exhibit 1: 11/4/11 hearing transcript; and Exhibit 2: Board Email string with Berkos remarks showing actual bias]</p>
12/14/11	Thompson	<p>Pakes Response to 12/4/11 Connolly Letter-Brief</p> <ul style="list-style-type: none"> -Burden is on Connolly -Authority to Cut Bills/Delegation
1/13/12	Connolly	<p>Connolly Reply Brief re Motion for Summary Reversal of Decertification</p>
1/13/12	Connolly	<p>"Overview of Diligent Representation in The 14 Cases . . . Smith . . . Characterizes . . . as Exemplifying Unreasonable Billing"</p>
1/13/12	Connolly	<p>Appendix to "Overview of Diligent Representation"</p> <p>(Copies of selected defense filings from the cases)</p>

18. Petitioner's 12/4/11 Supplemental Brief in Support of Motion for Recusal of Daniel Berkos expanded on the "Unfair Risk of Bias" argument previously presented. It also added an "Actual Bias" alternative argument, which was based upon new information in an Email string concerning Petitioner's appeal between certain Board members, including Chairman Berkos, that was started after the 11/4/11 hearing session. The first communication in the Email string was from former Dane County Judge Patrick Fiedler to Nancy Wettersten on 11/21/11:

This confirms our phone conversation held earlier this morning.

My office did a conflicts check re: Atty. James J. Connolly and all of the SPD Board members; there are no conflicts. Please advise the Board and Atty. Connolly that I have been on the editorial board of the "Wisconsin Defender" since 1997 although I have not attended a meeting for a couple of years. I do not feel that this presents a conflict situation but I did want all involved to be aware of it. Assuming that there is no objection to this, then I accept the offer of representation tendered by the SPD Board.

Please advise in writing as to the particulars of my representation of the Board. My legal assistant, Sally Kramer, will also be in touch with you. Thank you.

Ms. Wettersten then forwarded Atty Fiedler's Email to all of the other Board members with the following message of her own:

Hi all,

I spoke with Pat Fiedler this morning about his representing us regarding the Connolly allegation of conflict of interest. He is willing to take us on as a

client. Unfortunately, he isn't in a position to do this *pro bono*, which is understandable since he's just starting out in private practice with a fairly large firm. His hourly rate is \$250, which is very reasonable in the Madison market.

I'd like to hear back from all of you as to whether you want us to go ahead and retain Pat. Dan, do you know whether the Board has a line item in the SPD budget? Should we ask Pat to contact us if his fees will exceed X amount? (I'm thinking we'd want approval before he went over \$1,000.) When he was a judge, Pat had a reputation for wasting no time. That should keep the cost down.

I look forward to hearing from each of you.

thanks,

Chairman Berkos, who on 11/4/11 had declined to recuse himself but had voted "aye" in open session on a motion to "seek outside counsel" on the recusal issue, replied:

We do not have a specific fund to hire counsel that I am aware of. Kathy Pakes has reviewed this conflict issue already and also received an informal opinion. Since Fiedler clearly sees this conflict issue the same way, that should be sufficient for our purposes and I see no reason to go any further on that. I am comfortable going forward with denying their request based upon these opinions and allow Nancy to conduct the hearing to avoid any claims that I was biased in conducting the proceedings.

Danny

With his 12/4/11 Supplemental Brief, Petitioner included a complete copy of the Email string involving Board members and argued that, given the context in which they were made, Chairman Berkos's Email comment reflected actual bias in favor of Atty Pakes/State Public Defender Thompson.

19. Petitioner's 12/4/11 Motion for Summary Reversal of Decertification explained that, regardless whether any evidentiary considerations foreclosed Smith and Thompson's attempt to justify the decertification after the fact using statistical information from 14 old cases which had not been reviewed by Thompson as of the time of decertification, the Board should summarily reverse the decertification without requiring Petitioner to contradict or rebut the statistical information because the "average cost per case" analysis they would rely upon involved a standard which was inherently unfair, was not properly promulgated, and was being retroactively applied in violation of Petitioner's right to Due Process.

20. Petitioner's 12/4/11 Motion for Reconsideration of Objection to Overbroad Scope of Smith's Proposed Hearing Testimony sought to persuade the Board to change its prior decision to consider statistical information from all of the 14 old cases, as follows:

While the "common law or statutory rules of evidence" do not apply per se, the applicable statute does provide that the presiding official "shall exclude. . . irrelevant testimony" See §227.45(1), Wis. Stats. Statistical information from the 12 of 14 cases which were the subject of the prior letter-brief should be excluded as irrelevant because the payments received on bills in those cases were effectively approved in advance by the State Public Defender's office prior to the decertification action.

21. On 1/13/12, recognizing that the Board might not be persuaded by either his 12/4/11 Motion for Summary Reversal of Decertification or his 12/4/11 Motion for Reconsideration of Objection to Overbroad Scope of Smith's Proposed Hearing Testimony and that he might, therefore, be forced to try and rebut Smith/Thompson's implicit claim that the cases were all "average cases" or "run of the mill cases" which should, therefore, not have reasonably required the expenditure of more than an "average" amount of time, Petitioner compiled and submitted a chart summarizing relevant details about unusual circumstances and the results in the 14 old case which tended to distinguish them from Smith/Thompson's implicit hypothetical "average" case. Accompanying it was an Appendix with copies of selected defense motions/briefs/other filings from the cases.

22. The hearing on 1/27/12 commenced after a lengthy delay beyond the scheduled time not attributable to Petitioner.

23. At the outset, Chairman Berkos stated he was "turning the Appeal over to Nancy Wettersten to conduct the hearing."

Immediately, thereafter, Attorney Wettersten introduced herself on the records and started to talk about what she termed "housekeeping matters." After noting the time and the reason for the delay, she issued a surprise and apparently sua sponte ruling:

We want to make sure that we've got a couple of things straight. One is we understand that Mr. Connolly is appealing. Mr. DesRochers is his attorney; correct? We are going to conduct this hearing accordingly. So, Mr. DesRochers, you will be asking questions. You will be doing the direct examination, the cross-examination. Mr. Connolly, I understand that you are the -- you know, that you are the client here and that you will probably be a witness, but I'm not going to allow both of you to ask questions. I'm not going to allow both of you to make arguments. That's going to be Mr. DesRochers' job.

Attorney DesRochers objected to the surprise ruling, explaining that he and Petitioner had divided up hearing duties but were not planning to "double-team" any witness. A very brief recess was taken to allow Attorney DesRochers and Petitioner to confer privately out in the hallway. Attorney DesRochers resumed arguing against the unexpected limitation Wettersten was imposing and, when she signaled the end of the colloquy stating ". . . I note your objection, Mr. DesRochers. It -- it doesn't change my position and my ruling", Attorney DesRochers indicated that given the surprise limitations being imposed, Petitioner would have no choice but to proceed pro se and that he was withdrawing, under protest, as Petitioner's attorney.

24. Ms. Wettensen next announced that the Board was denying Petitioner's original motion for the recusal of Chairman Berkos:

There is, pending before the Board, a motion to recuse Mr. Berkos. When the Board discussed this after that motion was made, several other Board members who have either in the past taken public defender appointments, which includes, I think, every lawyer on this Board, or who have

members of their law firms who currently take public defender appointments, we enlarged our consideration of the motion to include the whole group. To that end, we sought independent legal advice from Professor Ralph Cagle at the University of Wisconsin Law School. I provided him with the motion and supporting documents which you filed, Mr. DesRochers. And Professor Cagle provided us with an opinion letter which advises us that in his professional opinion, that we do not have a conflict of interest and that the motion is not with -- does not have legal merit. And so we will be denying the motion that Mr. Berkos recuse himself.

A vote, in favor of denying the motion to recuse Berkos was recorded, and Petitioner immediately objected:

For the record, acting as my own attorney, I want the record to reflect that I think that this is a procedural maneuver that is unwarranted. I never asked any other Board member, other than Dan Berkos to recuse themselves. And to go and get a ruling from somebody based on a consideration that the Board somehow enlarged my motion, I mean, I'm the only one that can make a motion for me; and I didn't enlarge it, other than, Mr. Berkos and for very clear reasons that distinguish his position from other people's position.

25. Petitioner then requested a ruling on his motion to recuse Chairman Berkos for Actual Bias. Strangely, *Wettersten*, rather than Berkos, offered a lengthy explanation of what was in Berkos' mind when he made his contributions to the 11/21/11 Email string. The gist of the explanation seemed to be that Chairman Berkos mistakenly thought that Fiedler *had already given an informal opinion* that there was no "conflict of interest" and that, therefore, the motion to recuse Berkos should be denied. The only statement Berkos made on the record

about his state of mind was "That is correct", when, after finishing her lengthy comments, Wettersten asked him the leading question: "Is that correct Mr. Berkos?"

26. No explanation was offered on the 1/27/12 hearing record for the inconsistency between Chairman Berkos's original position at the the 11/4/11 hearing that he was not biased in favor of Thompson and his comment in the 11/21/11 Email that he was:

. . . comfortable going forward . . . (yet would) allow Nancy to conduct the hearing to avoid any claims that I was biased in conducting the proceedings.

A vote, in favor of denying the motion to recuse Berkos for acutual bias, was then recorded.

27. At the 1/27/12 hearing, Petitioner asked for a ruling on his 12/4/11 Motion for Summary Reversal of Decertification. Even though deadlines for filing motions had been set at the 11/4/11 hearing, Wettersten denied the Motion, without any indication that she or any other Board member had or would consider its content, asserting in part: "I don't think that is a proper way to bring that issue before the Board."

28. At the 1/27/12 hearing, Petitioner asked for a ruling on his 12/4/11 Motion for Reconsideration of Objection to Overbroad Scope of Smith's Proposed Hearing Testimony. Once again, even though deadlines for filing motions had been set at the 11/4/11

hearing, Wettersten denied the Motion, this time with a self-contradictory explanation:

Mr. Connolly, I'm going to stop you right there. I'm construing this as a motion in limine. I don't think it's appropriate to bring a motion in limine on relevance grounds. So if and when those statistics come in through Ms. Pakes's case, I will entertain a motion as to relevance. I'm not going to let you argue that for five minutes because you've already pretty much done that. But if and when it comes in, I will allow you to object as to relevance and we'll rule on it at that time. But right now, it's a motion in limine, and that motion in limine is denied. Anything else for housekeeping?

Later, when Petitioner effectively objected on the relevance grounds already raised in writing to the admission of individual statistical exhibits offered by Atty Pakes during her direct examinations of her witnesses, Ms. Wettersten overruled all objections.

29. During the 1/27/12 hearing, Petitioner objected to the admission of information about the average amount of time staff SPD attorneys spend per case defended on the ground that it was not relevant to how much time it was reasonable for a private appointed attorney to spend on any particular case. Wettersten overruled the objection.

30. During the 1/27/12 hearing, Wettersten and/or other members of the Board repeatedly interrupted and tried derail Petitioner's cross-examinations of adverse witnesses on their own initiative. For example, during Petitioner's attempted

cross-examination of Deborah Smith, Ms. Wettersten refused to allow Petitioner to pursue a line of questioning designed to lead to an acknowledgement that a higher than average "average cost per case" was not necessarily evidence of "unreasonable billing" on the part of an individual privately appointed attorney and could, instead, reflect a combination of superior attorney performance on more difficult than average cases:

Q Okay. You're not aware of any complaint to the OLR or the state Public Defender's Office against me by any client, witness, court or prosecutor regarding my professional performance in any criminal defense case over the course of the twenty years that I've been certified for appointments; correct?

A I am not aware of any such complaint.

Q And you're not -

MS. PAKES: I was going to say. I'll stipulate -- we're not arguing that he's at all defective, and I'll stipulate that there's no reason to believe that he's giving ineffective counsel.

MS. WETTERSTEN: The issue is not the quality of the representation. The issue is the amount of the bills?

MS. PAKES: Correct.

MS. WETTERSTEN: Okay. Anything else, Mr. Connolly?

MR. CONNOLLY: Yeah, quite a bit.

Q Would you agree that my record suggests that I've consistently performed competently and effectively?

MS. WETTERSTEN: I'm going to object on my own, Mr. Connolly. We've just stipulated to the fact that the quality of the representation that you have provided is not an issue here. They've stipulated to the fact that you provided, apparently, high quality representation. The only

issue is the amount of the bills.

MR. CONNOLLY: Well, the -- the two issues are intertwined.

MS. WETTERSTEN: I don't believe they are.

MR. CONNOLLY: Well -

MS. WETTERSTEN: I understand your argument that to do a good job you have to spend a lot of time.

Q And, in fact, you yourself have acknowledged on at least a couple of occasions that I obtain good results for clients, even in cases where you felt that the State Public Defender needed to cut time from the bills; isn't that true?

A I don't recall if I put that in my correspondence. But if I did, then I did.

MS. WETTERSTEN: Mr. Connolly, I'm not going to let you go any further down that road. The stipulation is what the stipulation is. We understand your argument, and we have very limited amount of time. And I'm not going to let you continue to cross-examination or ask questions about whether or not the quality of your work was high. We acknowledge the quality of your work was high. We acknowledge your argument that it takes a lot of time to do as good a job as you did. The issue was whether or not it was appropriate for the State Public Defender to decertify you on the basis of continued high billings.

Petitioner eventually formally objected to the continuing interruptions by Board Members and suggested Wettersten, as Hearing Examiner, should discourage them. Wettersten, in effect, overruled Petitioner's protest against Board member "objections", ignored the suggestion, and thereby effectively encouraged further interruptions:

Q One of the two occasions on which you spoke to me was after the appeal hearing before this same Board in the Dison case. Do you recall talking to me?

A I do not.

Q Okay. In any event, after I challenged your fee cuts in that Dison case and lost, as a matter of fact, before the Board, you began to closely -

UNIDENTIFIED SPEAKER: Madam Chairperson, she just testified she doesn't recall. Now he's testifying. He's not questioning. I'm willing to let this go as long as it needs to, but I don't really care whether these folks had a verbal or a hand-holding relationship. I just want to get to the core of the issue that you've already addressed.

MS. WETTERSTEN: I'll take that as an objection.

UNIDENTIFIED SPEAKER: If I'm allowed to object as a Board member.

MS. WETTERSTEN: Sure you are. Sure you are.

MR. CONNOLLY: For the record, I submit that Board members are not allowed to object. You're the hearing examiner. We have the parties. It's not supposed to be twelve against one here.

UNIDENTIFIED SPEAKER: I'd be happy to address that. I think that an administrative hearing that includes me as a trier of fact, unlike a jury with a courtroom, allows me to raise issues for the chair to rule. And that's what I'm asking the chair to do.

MR. CONNOLLY: Could I have a ruling from the hearing examiner, please?

MS. WETTERSTEN: Sure. To the extent that you are questioning -- attempting to question Ms. Smith about a conversation to which she has no recollection, I am going to sustain Mr. Drengler's objection and ask you to move on.

31. Later during the 1/27/12 hearing, Petitioner was prevented by one or more Board member "objections" from following cross-

examination lines of questioning which sought to establish that SPD inability, due to budget constraints, to pay for all the time that it took to do superior work did not, logically, mean that the attorney who spent more time on his files than the average attorney in order to superior work had engaged in "unreasonable billing" providing legitimate cause for decertification.

32. During the 1/27/12 hearing, Petitioner was prevented from fully pursuing lines of cross-examination designed to establish that the level of work being performed by the "average" SPD appointed attorney was not necessarily up to appropriate standards and that, therefore, it made no sense to use average "average cost per case" as a measuring stick in determining whether Petitioner's billing was "unreasonable."

33. The Board declared the proceedings closed on 1/27/12 before Petitioner completed his cross-examination of State Public Defender Thompson and without his having an opportunity to give sworn testimony in his own case-in-chief.

34. After allowing 5 minutes to each side for "closing argument", the Board briefly adjourned to closed executive session, reconvened in open session, and then passed a motion to "approve the decision of the Public Defender to decertify."

35. On 3/30/12, Board Chairman Berkos, drafted and signed a written decision on behalf of the Board which purported to affirm State Public Defender's 7/6/11 decertification action.

GROUND'S SPECIFIED IN §227.57 UPON WHICH PETITIONER CONTENDS THAT THE DECISION SHOULD BE REVERSED OR MODIFIED

36. The Court should reverse or, in the alternative modify, the decision of the Board on more of the following grounds:

A. Pursuant to §227.57(8), the Board's decision should be reversed because decertification on the basis of the average "average cost per case" analysis offered by Smith/State Public Defender Thompson was arbitrary, capricious, contrary to Wisconsin statutes and denied Due Process, as argued in Petitioner's 12/4/11 Motion for Summary Reversal of Decertification.

B. Pursuant to §227.57(6), the Board's decision should be reversed because its action depends on findings of fact that were not supported by substantial evidence in the record.

C. Pursuant to §227.57(8), the Board's decision should be reversed because its action was outside the range of discretion delegated to the agency by law.

D. Pursuant to §227.57(8), the Board's decision should be reversed and remanded on the grounds that the prior proceedings denied Petitioner Due Process because:

- i) Chairman Berkos should have been recused from any and all proceedings;
- ii) Hearing Examiner Wettersten's surprise ruling at the outset of the 1/27/12 hearing limiting the division of hearing responsibilities as between Petitioner and Attorney DesRochers had no rational basis and unfairly effectively forced Petitioner to proceed, unexpectedly, entirely pro se.
- iii) The manner in which the 1/27/12 hearing was conducted, including allowing Board members to object to questions, was unfairly oppressive to Petitioner.
- iv) Petitioner was unfairly prevented from pursuing legitimate lines of cross-examination.
- v) Terminating the hearing proceedings without allowing Petitioner to finish cross-examination or testify under oath on his own behalf was arbitrary and capricious.