



# Wisconsin State Public Defender

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## Notice of Hearing State Public Defender Rule PD 3

The State of Wisconsin Public Defender Board (SPD) announces that it will hold a public hearing on the revision of PD 3, Indigency Criteria, relating to the determination of eligibility for the assignment of publicly appointed counsel.

The State Public Defender will hold a public hearing at the time and place shown below:

December 13, 2010: 9:30 am to 11:30  
SPD Administrative Office, Banoul Conference Room  
315 N. Henry Street, 2<sup>nd</sup> Floor  
Madison WI 53703

Handi-cap accessibility is in the rear of the building. If you require communication accommodation at the hearing, please call Kathy Pakes, (608) 261-0087, at least 10 days prior to the hearing date.

### **Appearances at Hearing and Submission of Written Comments**

Interested persons are invited to attend the hearing and comment on the rule. Persons appearing may make an oral presentation and are requested to submit their comments in writing. Written comments on the rule will be accepted into the record and receive the same consideration as testimony presented at the hearing if they are received by December 13 at 9:30. Written comments should be addressed to: Kathy Pakes, SPD, PO Box 7923, Madison, WI 53707-7923, or by email: [pakesk@opd.wi.gov](mailto:pakesk@opd.wi.gov).

### **Copies of Rule**

To view the rule online, go to: <http://www.wisspd.org/CAR.asp>

To view the rule fiscal note online, go to:

<http://legis.wisconsin.gov/2009/data/fe/AB-395fe.pdf>

You may contact Kathy Pakes at [pakesk@opd.wi.gov](mailto:pakesk@opd.wi.gov) or by telephone at (608) 266-0087 to request a copy (at no cost) of the rule and fiscal note be sent to you by U.S. mail. Copies of the rule and fiscal note will also be available, at no cost, at the hearing.

### **Statutes Interpreted**

Sections 977.02 (5); 977.06(1), 977.07(1) Stats.

### **Statutory Authority**

Sections 977.02(3) and (5), 977.08(1); 977.06(1a) and (2a); 977.02(3)(a-d) Stats.

## **Explanation of Agency Authority**

The State Public Defender's Office (SPD) provides constitutionally-mandated legal representation to persons who meet financial eligibility standards. Under the current eligibility standards, which have not been updated since 1987, a person charged with a felony offense, grossing \$290 per week (working 40 hours a week at minimum wage of \$7.25 per hour), with two children, assets of \$300, and a car worth \$2,000, does not qualify for the State Public Defender.

Those who do not qualify for State Public Defender Representation and cannot afford an attorney are provided an attorney, at county expense. Since 1987, as the cost of living has increased, the number of persons who do not meet the SPD eligibility standards, and who are unable to afford counsel, has increased. Wisconsin counties reported spending nearly \$7.6 million in 2008 to appoint counsel for these indigent individuals.

Recognizing the burden to the counties and need to revise the financial eligibility criteria, 2009 Wisconsin Act 164, published March 29, 2010, mandated that financial eligibility standards for public defender representation be consistent with income guidelines of Wisconsin Works (W2). To carry out these changes, Act 164 directs the Wisconsin State Public Defender Board to promulgate rules regarding the revised determination of indigency. In promulgating these rules Act 164 directs the SPD to consider the costs of effective representation for the type of case in which a person seeks representation, and to consider a person's assets in the manner described in s. 49.145 (Wisconsin Works).

## **Related Statute or Rule**

None

## **Plain Language Analysis**

Tying eligibility for representation to W2 (sec. 49.145(3)(a) Stats.) increases the number of clients served by the State Public Defender Agency.

An increase in the number of persons who qualify for representation by the State Public Defender has a corresponding decrease in the costs to counties. This is because counties are required to provide counsel for those individuals who do not qualify for state public defender representation and cannot afford to retain an attorney. Act 164 shifts, to a large extent, the responsibility of providing representation for the "working poor" from the counties to the State.

## **Summary of, and Comparison with, Existing or Proposed Federal Regulations**

There are no existing or proposed federal regulations that address the activities of the proposed rules.

## **Comparisons with Rules in Adjacent States**

Iowa: Iowa Code sec. 815.9

Eligibility for public defender representation is tied to the United State poverty level as defined by the most recently revised poverty income guidelines published by the United States department of health and human services. Generally, a person with an income level at or below 125% of the federal poverty guidelines will qualify for public defender representation. Persons with an income of 125% to 200% of the federal poverty

guidelines may qualify for public defender representation if the court finds not appointing counsel would cause the person substantial hardship.

### Illinois

Does not have a statewide public defender system. The counties bear the cost of representation. Indigency determinations are made on a county by county basis.

### Michigan

Does not have a statewide public defender system. The counties bear the cost of representation. Indigency determinations are made on a county by county basis.

### Minnesota

Has a statewide public defender system. Guidelines for those persons who qualify for representation may be viewed at:

<http://www.house.leg.state.mn.us/hrd/pubs/ss/ssmpds.htm>

In Minnesota a defendant is financially unable to obtain counsel if the defendant, or a defendant's dependent (residing in the same household), receives means-tested governmental benefits, or, considering the defendant's liquid assets and current income, the defendant would be unable to pay the reasonable costs charged by a private attorney.

Upon disposition of the case, the defendant must pay a \$28 co-payment, unless the court waives the co-payment. The statute does not indicate when a court should exercise its discretion to waive the co-payment. In 2003, the Minnesota Court of Appeals held that a defendant is exempt from the co-payment and the court must waive the co-payment when a defendant is indigent or when the co-payment would cause manifest hardship on a defendant.

### **Summary of Factual Data and Analytical Methodologies**

Act 164 directs the SPD to consider the costs of effective representation for the type of case in which a person seeks representation, and to consider a person's assets in the manner described in s. 49.145 (Wisconsin Works).

In determining the estimated cost of counsel the SPD looked to the State Bar of Wisconsin 2008 "Economics of Law Practice in Wisconsin".

Methodology used by state bar:

The Wisconsin State Bar, along with a consulting agency, and with input from members representing various practice areas developed a questionnaire designed to determine the cost of counsel in various types of cases. The questionnaire was mailed to a geographically stratified random sample of 6,160 active members. Questionnaires and reply envelopes were not coded in any way to ensure confidentiality. A follow-up reminder postcard was mailed to all members of the original sample with an email reminder. The response deadline was June 6, 2008, and questionnaires received as of June 12, 2008 were included in the analysis. A total of 1,024 total usable questionnaires were returned by members, for a 17 percent overall response rate: including 618 from private practitioners, 257 from government or public service attorneys, and 102 from corporate/in-house counsels. The response rate is what would be expected from a busy,

professional audience when no monetary incentive is included and no follow-up mailing of the questionnaire is done. All usable questionnaires were audited, data entered and analyzed by Gene Kroupa & Associates, a Madison based marketing research firm that has assisted the State Bar with other projects. The questionnaire was designed so that all attorneys were to answer Section 1, private practitioners were to answer Section II, government attorneys were to answer Section III, and corporate/in-house counsels were to answer Section IV. The results for each section are based only on those who were instructed to answer that particular section. The analysis focused on differences related to practice setting, location, size, and respondent demographics.

**Analysis and Supporting Documents Used to Determine Effect on Small Business or in Preparation of Economic Impact Report**

N/A

**Effect on Small Business**

None

**Fiscal Estimate**

<http://legis.wisconsin.gov/2009/data/fe/AB-395fe.pdf>

**Agency Contact Person**

Questions regarding these rules may be directed to Kathy Pakes at [pakesk@opd.wi.gov](mailto:pakesk@opd.wi.gov) or 315 N. Henry Street, 2<sup>nd</sup> Floor, Madison, WI 53703.

**Place to Submit Comments**

Comments may be submitted to Kathy Pakes at [pakesk@opd.wi.gov](mailto:pakesk@opd.wi.gov) or 315 N. Henry Street, 2<sup>nd</sup> Floor, Madison, WI 53703.

Dated: November 16, 2010

WISCONSIN STATE PUBLIC DEFENDER BOARD

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DANIEL M. BERKOS, Chair

Text of Proposed Rule  
Chapter PD 3

INDIGENCY CRITERIA

PD 3.01 Repealed and Recreated: General Rule. Except as provided in sec. 977.07(1), Stats., an applicant for appointment of **counsel** by the state public defender must meet the financial criteria set forth in this chapter.

PD 3.015 Verification. In order to screen the eligibility of applicants and collect amounts owed as ~~reimbursement for legal services~~ payment for representation, the state public defender may verify ~~the following financial information related to eligibility, including~~ social security numbers, income records, and proof of eligibility for income-based programs, ~~and proof of emergency or essential expenses. The state public defender shall report annually to the board on verification.~~

PD 3.02 Cost of Retained Counsel.

(1) Repealed and Recreated: The anticipated cost of retaining counsel shall be determined by this schedule:

1 <sup>st</sup> degree intentional homicide	\$17,500
Appellate Category I	\$9,000
Appellate Category II	\$4,500
Other class A/B/C felony	\$5,000
Ch. 980 Original Petition	\$6,000
Ch. 980 Post-commitment	\$3,500
Involuntary TPR	\$4,500
Other Felony	\$2,200
Felony delinquency	\$1,500
Revocation	\$1,400
Chapter 55	\$1,200
Paternity	\$1,000
Misdemeanor	\$750
Traffic misdemeanor	\$750
Special Proceeding	\$750
Other juvenile	\$600
Chapter 51	\$600

(2) The state public defender shall establish the cost of retaining counsel for any proceeding not covered by the schedule in sec. (1).

(3) The state public defender shall periodically review the actual cost of retaining private counsel and report these findings to the state public defender board. The state public defender board may revise the schedule of the anticipated cost of retaining counsel.

(4) The state public defender may consider, in the case of an applicant who is the subject of two or more separate proceedings, the anticipated cost of retaining counsel in multiple proceedings.

PD 3.03 Repealed and Recreated.

Determination of financial eligibility.

(1) An applicant is financially eligible for appointment of counsel by the state public defender if both of the following criteria are met:

(a) Asset limitations: the anticipated cost of retained counsel under sec. PD 3.02 exceeds the applicant's family assets deemed available under sec. (2) to pay the costs of legal representation.

b) Income limitations: the anticipated cost of retained counsel under sec. PD 3.02 exceeds the applicant's family income deemed available under sec. (3) to pay the costs of legal representation.

(2) The state public defender shall consider assets in the manner described in sec. 49.145(3)(a) Stats., and shall consider assets as available to pay the costs of legal representation if the assets exceed the resource limitations of sec. 49.145(3)(a) Stats., except that the exclusion from consideration for the applicant's homestead shall be limited to the first \$30,000 of equity.

(3) Subject to secs. (4) and (5), the state public defender shall consider income as available to pay the costs of legal representation if the income exceeds the income limitations of sec. 49.145(3)(b) Stats.

(4) For the purpose of the calculations under this section, the state public defender shall consider the applicant's anticipated income for the time period beginning at the time of the application and continuing for the following time:

(a) For felony cases and cases under Chapter 980, Stats., 6 months.

(b) For appellate cases, 8 months.

(c) For cases under Chapters 51 and 55, Stats., 2 months.

(d) For all other cases, 4 months.

(5)(a) Notwithstanding the criteria in sec. (1), an applicant is financially eligible for appointment of an attorney by the state public defender if the applicant's only income is derived from one or more of the following sources: a Wisconsin works employment position under sec. 49.148(1)(a), (b), or (c), Stats., Wisconsin works benefits under sec. 49.148(1m), Stats., supplemental security income for the aged, blind, and disabled under 42 U.S.C. secs. 1381-1383c, relief as defined in sec. 49.01(3), Stats., or any other similar needs-based financial assistance program.

(5)(b) Notwithstanding sec. (1), an applicant is financially eligible for appointment of appellate counsel if the applicant has filed a notice of intent to pursue post-conviction relief under sec. 809.30(2)(b) Stats., indicating that 1) the state public defender has appointed counsel in the case and 2) his or her financial circumstances have not materially changed since the date on which the applicant was determined to be eligible for the appointment of counsel in that case.

(6) For the purpose of the calculations under this section, the state public defender shall consider assets and income of the applicant's spouse as the applicant's assets and income, unless the spouse is alleged to be the victim of a crime allegedly committed by the applicant.

(7) If a parent subject to sec. 48.275(2)(b) Stats., or sec. 938.275(2)(b) Stats., has available income or assets greater than \$100, but less than the anticipated cost of counsel, the parent shall be determined to be indigent in part.

(8) If a person subject to sec. 51.605(1) Stats., or sec. 55.107(1) Stats., has available income or assets greater than \$100, but less than the anticipated cost of counsel, the parent shall be determined to be indigent in part.

(9) The state public defender shall annually review the standards specified in this chapter and shall revise these standards as required.

PD 3.038 is repealed.

PD 3.039 is repealed.

PD 3.04 is created to read: Information provided to applicants.

Before asking an applicant for financial information the state public defender shall inform the applicant of all of the following:

- (1) The applicant will be required to certify, under sec. PD 3.05(1), the truthfulness of the financial information provided.
- (2) The financial information provided by the applicant is not protected by the attorney-client privilege.
- (3) The applicant may be prosecuted for a felony offense if the applicant intentionally provides false information.

PD 3.05 Certified statement. ~~(1) All persons provided with publicly compensated counsel shall be required to give a truthful statement of their assets, liabilities, and expenses. All such persons shall sign the completed indigency evaluation form certifying that the financial information that they have provided is accurate to the best of their knowledge and belief. Except as provided in sec. 977.07(1), Stats., all applicants for appointment of an attorney counsel by the state public defender shall be required to provide truthful information in a financial evaluation form as required under this chapter. Except as provided in sec. 977.06(2) Stats., All such applicants shall sign the completed financial evaluation form certifying that the financial information that they have provided is accurate to the best of their knowledge and belief, and that they have not disposed of any assets for the purpose of qualifying for the appointment of counsel.~~

(2) The state public defender may appoint counsel pursuant to telephone eligibility interviews, in which cases the clients shall sign the ~~indigency~~ financial evaluation form as soon thereafter as practicable.

(3) The state public defender shall retain for 3 years all ~~indigency~~ financial evaluations. After such time they shall be maintained by ~~state records custodians~~ pursuant to sec. 16.61 (4), Stats.

~~PD 3.055~~ 3.06 Voluntary termination of employment or disposal of assets. (1) If an applicant voluntarily terminates employment within 90 days of applying for representation and for the purpose of having the state public defender appoint counsel, the state public defender shall calculate the applicant's income on the basis of the applicant's wages before the voluntary termination of employment.

(2) If an applicant disposes of assets for the purpose of having the SPD appoint counsel, the SPD shall count the asset at its fair market value at the time it was disposed of minus the amount of compensation received for the asset.

PD 3.07 is repealed and recreated: Access to financial evaluations.

(1) Subject to sec. 977.06(4), Stats., access to financial evaluations of applicants for appointment of counsel by the state public defender may not be granted to any person, except the applicant, a person authorized by the applicant, staff of the state public defender, counsel appointed by the state public defender, or a court in which the applicant has a pending proceeding.

(2) Requests for access to financial evaluations made by a court in which the applicant has a pending proceeding or by any person not specified in sec. (1) shall be referred to the applicant's counsel, if one has been appointed by the state public defender, and to the state public defender regional supervisor for the county in which the proceeding occurred or is pending.

(3) If the state public defender regional supervisor believes that the financial evaluation contains information that is privileged under sec. 905.03, Stats., or confidential under the Supreme Court Rules, chapter 20, the supervisor shall redact the privileged or confidential information before providing the evaluation to the court under sec. (1). If the state public defender regional supervisor determines that a requestor is not entitled to access to a financial evaluation, the supervisor shall promptly notify the requestor of the denial of the request.

(4) During the pendency of the proceeding for which the financial evaluation was completed, questions regarding eligibility may be resolved pursuant to sec. 977.06(4)(a), Stats.

(5) Notwithstanding secs. (1)-(4), and subject to any motion, writ, or other process that the state public defender deems appropriate to contest an order or subpoena, the state public defender shall comply with any court order or subpoena for production of a financial evaluation.

PD 3.08 is created to read: Change of Circumstances.

(1) If a client has complied with the requirements of this chapter and qualified financially for appointment of an attorney by the state public defender, the client remains eligible for continued representation in a pending matter notwithstanding a change in financial circumstances.



(2) Notwithstanding sec. (1), the state public defender may adjust, pursuant to sec. P.D. 6.045, the payment amount, subject to sec. 977.075(3m), Stats., for a client whose financial circumstances change during the course of state public defender representation.