



## Wisconsin State Public Defender

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**CR 09-068**

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### Final Draft

## PROPOSED ORDER OF THE STATE OF WISCONSIN OFFICE OF THE STATE PUBLIC DEFENDER ADOPTING RULES

### (Chaps. 51 and 55 Eligibility and Reimbursement)

The Wisconsin State Public Defender Board proposes an order to amend PD 2.03 (1), (3), (5), 3.01, ~~3.03 (4)~~, 6.01, 6.02 (1), and 6.08 and to create PD 6.025 (4) and 6.055, relating to representation by the state public defender of persons detained under chapters 51 or 55 or subject to involuntary administration of psychotropic medication without a predetermination of financial eligibility.

#### **Statutes Interpreted**

Sections 51.60, 51.605, 55.105, 55.107, 977.075 (1g), (4), 977.085(3), Stats.

#### **Statutory Authority**

Sections 51.60, 51.605, 55.105, 55.107, 977.02 (2m), (3), (4m) and (4r), and 977.075, Stats.

#### **Explanation of Agency Authority**

Section 977.02 (2m) allows the state public defender board to promulgate rules regarding eligibility for legal services for persons who are entitled to be represented by counsel without a determination of indigency. Sections 977.02 (4m) and 977.075 allow for the state public defender board to establish rules setting the maximum amount a person subject to sec. 51.605 or 55.107 must pay as reimbursement for legal services. Section 977.02 (4r) allows the state public defender board to promulgate rules that establish procedures to provide the department of administration with any information concerning collection of payments.

#### **Related Statute or Rule**

The proposed rules implement statutory changes relating to the appointment of counsel without a determination of indigency and the payment for representation in chapter 51 and 55 cases. Similar statutes include ss. 48.23 (4) and 938.23 (4) relating to the appointment of counsel in juvenile cases without a determination of indigency. Other similar statutes and rules related to the payment for representation in chapter 48 and 938 cases include ss. 48.275, 938.275 and 977.075 and chapter PD ~~6-related to the payment for representation in chapter 48 and 938 cases.~~

#### **Plain Language Analysis**

The proposed rules implement the 2007 Act 20 statutory changes that became effective July 1, 2008, affecting the state public defender's office in proceedings under chapters 51 and 55, Stats.

The specific actions proposed include:

- Removing the requirement of financial eligibility by the state public defender before legal counsel is appointed for chapter 51 and 55 clients
- Removing the prepayment options for chapter 51 and 55 case types
- Creating a new rule for reimbursement rates for chapter 51 and 55 case types

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- Requiring a report be provided to the joint committee on finance and the department of administration regarding the collection of payments ordered under chapter 51 and 55

2007 Wisconsin Act 20 removed the requirement that persons subject to ~~civil commitment or proceedings of chapters 51 or 55~~ proceedings complete a pre-representation indigency evaluation and required the state public defender to appoint counsel without a determination of indigency. At the conclusion of the proceeding, the circuit court may inquire as to the person's ability to reimburse the state for the cost of representation. ~~The court may require the state public defender to conduct a determination of indigency and report the results of that determination to the court.~~ If the court determines that the individual is able to make reimbursement for the costs of representation, the court may order the person to reimburse the state an amount not to exceed the maximum amount established by the public defender board, currently established in Wisconsin Administrative Code PD 6.01.

~~The court may require the state public defender to conduct a determination of indigency and report the results of that determination to the court.~~

Any reimbursement is made to the clerk of courts for the county where the proceedings took place. The clerk of each county deposits 25% of the reimbursement payments to the county treasury and transmits the remaining 75% to the Secretary of the Department of Administration to be credited in the state public defender's private bar and investigator reimbursement appropriation. The clerks of court for each county are required to report to the state public defender by January 31 the total amount of court-ordered reimbursements under chapters 51 and 55 for the previous calendar year. The effective date of these statutory provisions is July 1, 2008.

#### **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**

For all ~~adjacent~~-states adjacent to Wisconsin, if neither the respondent nor others provide counsel for ~~the~~ civil commitment hearing, the ~~respective~~ court appoints counsel for ~~him or her~~ the respondent. To compensate the attorneys for their services in the states of Minnesota, Iowa, and Illinois, the ~~applicable~~ court enters an order upon directing the county to pay the entire fee or such an amount as the respondent is unable to pay. In Michigan, the court compensates appointed counsel from court funds in an amount that is reasonable and is based upon time and expenses.

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

The proposed rules implement statutory changes that went into effect on July 1, 2008.

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

None.

#### **Effect on Small Business**

None.

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### Agency Contact Person

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

SECTION 1. PD 2.03 (1) is amended to read:

**PD 2.03 Regular assignment procedure. (1)** The state public defender or county designee shall contact any person who claims or appears to be indigent, ~~or has requested counsel, or has been referred by the court to the state public defender to determine the person's eligibility for appointment of an attorney by the state public defender for the purposes of assisting that person in completing the indigency questionnaire.~~

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SECTION 2. PD 2.03 (3) is amended to read:

**PD 2.03 (3)** The state public defender or county designee shall have immediate access in person or by phone to any individual held in custody, including but not limited to city or county jails, detention facilities, or mental health facilities, upon request by the state public defender or county designee, to advise the person of the right to a free determination of ~~indigency and for the purpose of determining indigency~~ the person's eligibility for appointment of an attorney by the state public defender.

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SECTION 3. PD 2.03 (5) is amended to read:

**PD 2.03 (5)** The state public defender or county designee shall advise all persons charged with a crime, detained for purposes of juvenile or involuntary civil commitment proceedings, or otherwise facing a legal proceeding which is within the scope of representation provided by the state public defender, prior to their initial court appearance, that they have a right to be represented by an attorney in the proceeding if found eligible. The state public defender or county designee shall advise all persons of the applicable repayment obligation specified in ~~s. ss.~~ PD 6.01, PD 6.05 or PD 6.055 and, if applicable, the optional prepayment amount specified in s. PD 6.02. The state public defender or county designee shall also advise all persons prior to their initial appearance that they have a right to a determination of their eligibility for those legal services. The county designee shall forward to the state public defender on a monthly basis the names, addresses, and case numbers of these persons and the dates on which the contacts were made.

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SECTION 4. PD 3.01 is amended to read:

**PD 3.01 General rule.** A person shall be eligible for the assignment of publicly compensated counsel if the anticipated cost of retaining counsel exceeds the person's available assets, or if otherwise provided by law.

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SECTION 5. ~~PD 3.03 (4) is amended to read:~~

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~~PD 3.03 (4) For the purposes of determining a person's eligibility for the assignment of publicly compensated counsel, felony cases and cases under s. 980.02, Stats, are pending 6 months, appellate cases are pending for 8 months, cases under chs. 51 and 55, Stats, for 2 months, and all other cases are pending for 4 months.~~

~~Section 6.~~ PD 6.01 is amended to read:

**PD 6.01 Repayment of attorney costs.** Except as provided in ss. PD 6.02 to ~~6.05~~ 6.055, a person who is responsible for payment for legal representation provided by the state public defender shall reimburse the state public defender for the cost of the legal representation according to the following schedule:

Type of Case	Amount	Type of Case	Amount
First Degree Intentional Homicide	\$7500	Misdemeanor	\$ 240
Other Class A or B Felony	\$1200	Parole/Probation Revocation	\$ 240
Sexual Predator (s. 980.02)	\$1200	Juvenile Felonies/TPRs	\$ 480
Other Felony	\$ 480	Other Juveniles	\$ 240
Commitment (including ss. 980.08, 980.09)	\$ 120	Special Proceeding	\$ 120
Chapter 55	\$ 480	Paternity	\$ 240
Appellate/Trial	\$1200	Appellate/Plea	\$ 480

~~SECTION 67.~~ PD 6.02 (1) is amended to read:

**PD 6.02 Prepayment option. (1)** A client may elect to prepay, within 60 days of appointment of counsel by the state public defender, the optional prepayment amount for the cost of representation specified in the following prepayment fee schedule:

Type of Case	Amount	Type of Case	Amount
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First Degree Intentional Homicide	\$600	Misdemeanor	\$ 60
Other Class A or B Felony	\$120	Parole/Probation Revocation	\$ 60
Sexual Predator (s. 980.02)	\$120	TPR	\$ 60
Other Felony	\$ 60	Special Proceeding	\$ 30
<u>Commitment (including ss. 980.08, 980.09) Chapter 980 Post-commitment Proceeding</u>	\$ 30	Paternity	\$ 60
<del>Chapter 55</del>	<del>\$60</del>	Appellate/Plea	\$ 60
		Appellate/Trial	\$120

SECTION ~~78~~. PD 6.025 (4) is created to read:

**PD 6.025 (4)** This section does not apply to persons subject to reimbursement under PD 6.05 or PD 6.055.

SECTION ~~89~~. PD 6.055 is created to read:

**PD 6.055 Reimbursement from persons ~~detained-represented in civil commitment or under chapter 51 or 55 civil commitment proceedings.~~ (1) Pursuant to ss. 51.605 and 55.107, Stats. Except as provided in sub. (2), when the court orders reimbursement under s. 51.605 or 55.107, Stats. by from a person for whom the state public defender has appointed an attorney in a proceeding under chapter 51 or ~~chapter~~ 55, Stats., the amount of the reimbursement fee shall be the amount specified in the fee schedule in s. PD 6.01 for a commitment, if the case was filed under chapter 51, or for a ~~chapter 51 or 55~~ case-, whichever is applicable.**

**(2)subject to the following: --**

**(a)** Upon the court's request at or after the conclusion of the proceedings, the state public defender shall conduct a determination of indigency ~~and report the results to the court.~~ **in**

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~~completing this determination of indigency, the state public defender will consider that cases under chapters 51 and 55 are pending for two months from the date of the evaluation. If the state public defender is unable to obtain the necessary financial information or if the person is determined not to be indigent, the reimbursement fee shall not exceed the amount specified in the fee schedule in s. PD 6.01.~~

~~(b) If the person is determined to be partially indigent as provided in s. PD 3.038 (1)(b), the state public defender shall recommend that the reimbursement fee not exceed 25% of the amount specified in the fee schedule in s. PD 6.01.~~

~~(c) If the person is determined to be indigent, no reimbursement fee shall be assessed.~~

~~(2) The state public defender shall and report the results of the determination to the court that ordered reimbursement the result of the indigency determination and the recommended maximum amount of the reimbursement fee to be assessed.~~

~~(a) If the state public defender is unable to obtain the necessary financial information or if the person is determined not to be indigent, the reimbursement fee may not exceed the amount specified in the applicable fee schedule in s. PD 6.01.~~

~~(b) If the person is determined to be partially indigent as provided in s. PD 3.038 (1) (b), the reimbursement fee may not exceed 25% of the amount specified in the applicable fee schedule in s. PD 6.01.~~

~~(c) If the person is determined to be indigent, the state public defender shall report to the court that the person is unable to make reimbursement for the costs of representation, no reimbursement fee may be assessed under pursuant to ss. 51.605 or 55.107, Stats.~~

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~~SECTION 940.~~ PD 6.08 is amended to read:

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**PD 6.08 Reports on status of collections.** The state public defender shall submit quarterly reports to the joint committee on finance and to the department of administration regarding the collection of payments ordered under ss. 48.275 (2), ~~51.605, 55.107,~~ 757.66, 938.275, 977.06, 977.07 (2), 977.075, and 977.076, Stats. These reports shall include the amount collected and the amount of accounts receivable referred to the department of administration during each reporting period.

~~SECTION 104.~~ Effective Date.

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This rule shall take effect on the first day of the month commencing after the date of publication in the Wisconsin administrative register, as provided in s. 227.22 (2) (intro.), Stats.

Dated: June 26, 2009

Wisconsin State Public Defender Board

By: \_\_\_\_\_  
DANIEL M. BERKOS, Chair

Clearinghouse Rule 09-068  
Revised 2/17/10