

## ADMINISTRATIVE RULES FISCAL ESTIMATE AND ECONOMIC IMPACT ANALYSIS

Type of Estimate and Analysis

Original     Updated     Corrected

Administrative Rule Chapter, Title and Number

PD 3.03; PD 6.025

Subject

Eligibility Guidelines for Public Defender Representation

Fund Sources Affected

Chapter 20 , Stats. Appropriations Affected

GPR    FED    PRO    PRS    SEG SEG-S

20.550(1)

Fiscal Effect of Implementing the Rule

No Fiscal Effect

Increase Existing Revenues

Increase Costs

Indeterminate

Decrease Existing Revenues

Could Absorb Within Agency's Budget

Decrease Costs

The Rule Will Impact the Following (Check All That Apply)

State's Economy

Specific Businesses/Sectors

Local Government Units

Public Utility Rate Payers

Would Implementation and Compliance Costs Be Greater Than \$20 million?

Yes     No

Policy Problem Addressed by the Rule

Wis. Stats. Sec. 977.02 authorizes the State Public Defender Board to promulgate rules regarding indigency and eligibility for legal services. In determining indigency, Sec. 977.02(3) directs the State Public Defender to consider a person's available assets and income. Sec. 977.02(3)(c) directs the SPD to consider as income only that income which exceeds the income limitations in s. 49.145(3)(b). The executive budget act of the 2011 legislature, Act 32, sections 3559d and 3559h, made the following changes to the way by which the SPD considers the assets and income of persons applying for public defender representation.

Assets:

Prior legislation, 2009 Act 164, directed the State Public Defender, in determining whether someone was eligible for public defender representation, to consider assets in the manner described in s. 49.145(3)(a) (Wisconsin Works). 2011 Act 32 changed these Act 164 provisions relating to W2, and directs the SPD to make the eligibility determination based on a combined equity value of available assets, without regard to asset valuation under Wis. Stats. Sec. 49.145(3)(a).

Income:

Prior legislation, 2009 Act 164, tied eligibility to the federal poverty guidelines. Under prior legislation, eligibility for public defender representation would automatically change if the federal poverty guidelines were adjusted.

Pursuant to 2011 Act 32, eligibility will not automatically change when the federal poverty guideline is updated. Instead, income eligibility is frozen at 115% of the 2011 federal poverty guideline. Thus, in the event the federal poverty guideline changes, eligibility for state public defender representation will still be determined by the 2011 rate.

Summary of Rule's Economic and Fiscal Impact on Specific Businesses, Business Sectors, Public Utility Rate Payers, Local Governmental Units and the State's Economy as a Whole (Include Implementation and Compliance Costs Expected to be Incurred)

As the federal poverty guideline is adjusted upward, and the eligibility for public defender representation remains stagnant at the 2011 level, local governments (counties) will pick up the cost to represent those defendants who earn more than the 2011 federal poverty guidelines, but do not have funds to hire a lawyer and are deemed eligible by the courts for representation..

Benefits of Implementing the Rule and Alternative(s) to Implementing the Rule

N/A

Long Range Implications of Implementing the Rule

As the federal poverty guideline is adjusted upward, and the eligibility for public defender representation remains stagnant at the 2011 level, the counties will pick up the cost to represent those defendants who earn more than the 2011 federal poverty guidelines, but do not have funds to hire a lawyer and are deemed eligible by the courts for representation.

Compare With Approaches Being Used by Federal Government

In the federal system, the Criminal Justice Act (CJA) requires that representation be provided to financially eligible persons for proceedings and matters covered by the CJA.

The determination of eligibility for representation under the CJA is a judicial function to be performed by the court or U.S. magistrate judge after making appropriate inquiries concerning the person's financial condition. Unless it will result in undue delay, fact-finding concerning the person's eligibility for appointment of counsel should be completed prior to the person's first appearance in court. [\[Guide, § 210.40.20\(a\), \(b\)\]](#)

A person is considered "financially unable to obtain counsel" within the meaning of the CJA [\[18 U.S.C. § 3006A\(b\)\]](#) if the person's net financial resources and income are insufficient to obtain qualified counsel. In determining whether such insufficiency exists, consideration should be given to:

- the cost of providing the person and the person's dependents with the necessities of life, and
- the cost of the defendant's bail bond if financial conditions are imposed, or the amount of the deposit defendant is required to make to secure release on bond.

Any doubts as to a person's eligibility should be resolved in the person's favor; erroneous determinations of eligibility may be corrected at a later time. At the time of determining eligibility, the court or U.S. magistrate judge should inform the person of the penalties for making a false statement, and of the obligation to inform the court and the person's attorney of any change in financial status.

Compare With Approaches Being Used by Neighboring States (Illinois, Iowa, Michigan and Minnesota)

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.

#### Name and Phone Number of Contact Person

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