



Wisconsin State Public Defender

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Clearinghouse Rule 12-017

SS 013-11

Notice of Revision of Administrative Rules
State Public Defender

Rule PD 3.03 Determination of Financial Eligibility Analysis and Rule

The State of Wisconsin Public Defender Board (SPD) announces the revision of PD 3.03, determination of financial eligibility, relating to the determination of eligibility for the assignment of publicly appointed counsel. The proposed rule brings an existing rule into conformity with Wis. Stats. §977.02(3)(b) and (c), enacted pursuant to 2011 Act 32.

Interested persons are invited to comment on the rule by March 15, 2012. Written comments should be addressed to: Kathy Pakes, SPD, PO Box 7923, Madison, WI 53707-7923, or by email: pakesk@opd.wi.gov.

Copies of Rule

To view the rule online, go to: <http://www.wisspd.org/CAR2.asp>

To view the rule fiscal note online, go to: <http://www.wisspd.org/CAR2.asp>

You may contact Kathy Pakes at 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.

Statutes Interpreted

Sections 977.02

Statutory Authority

Sections 977.02(3)(b) and (c); 977.06; Wis. Stats. § 977.02(3) authorizes the State Public Defender Board to promulgate rules regarding indigency and eligibility for legal services. In determining indigency, Wis. Stats. § 977.02(3)(b) & (c) directs the State Public Defender to consider a person's available assets and income.

Explanation of Agency Authority

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 § 49.145(3)(a) (Wisconsin Works). 2011 Act 32, s. 3559d 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. § 49.145(3)(a). *See* Wis. Stats. §977.02(3)(b).

Income:

Prior legislation, 2009 Act 164, directed the SPD to use 115% of the federal poverty guidelines as the applicable cost of living when making a determination of eligibility. Under prior legislation, eligibility for public defender representation would automatically change if the federal poverty guidelines were adjusted.

Pursuant to 2011 Act 32, s. 3559h eligibility will not automatically change when the federal poverty guideline is updated. Instead, for purposes of determining eligibility, the cost of living is frozen at 115% of the 2011 federal poverty guideline. Thus, in the event the federal poverty guideline changes, the state public defender will still use 115% of the 2011 rate in its determination of financial eligibility. *See*, Wis. Stats. §977.02(3)(c).

Related Statute or Rule

None

Plain Language Analysis

2011 Act 32 froze income eligibility for state public defender representation at 115% of the 2011 federal poverty guidelines. These changes bring the administrative rules into conformity with Act 32.

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

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.

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

N/A

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://www.wisspd.org/CAR2.asp>

Agency Contact Person

Questions regarding these rules may be directed to Kathy Pakes at pakesk@opd.wi.gov or 315 N. Henry Street, 2nd Floor, Madison, WI 53703.

Place to Submit Comments

Comments may be submitted to Kathy Pakes at pakesk@opd.wi.gov or 315 N. Henry Street, 2nd Floor, Madison, WI 53703.

Dated: February 1, 2012

WISCONSIN STATE PUBLIC DEFENDER BOARD

DANIEL M. BERKOS, Chair

Proposed Rule

PD 3.03 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 s. PD 3.02 exceeds the applicant's family assets deemed available under sub. (2) to pay the costs of legal representation.
- (b) *Income limitations.* The anticipated cost of retained counsel under s. PD 3.02 exceeds the applicant's family income deemed available under sub. (3) to pay the costs of legal representation.

(2) The state public defender shall ~~consider assets in the manner described in s. 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 s. 49.145 (3) (a), Stats.,~~ treat assets as available to the person to pay the costs of legal representation if the assets exceed \$2500 in combined equity value except that the state public defender shall exclude the equity value of vehicles up to a total equity value of \$10,000 and shall exclude the first \$30,000 of the equity value of the home that serves as the individual's homestead. ~~exclusion from consideration for the applicant's homestead shall be limited to the first \$30,000 of equity.~~

(3) Subject to subs. (4) and (5), the state public defender shall consider income as available to pay the costs of legal representation if the gross income exceeds 115 percent of the amount specified in 42 U.S.C. s. 9902(2) (2011) ~~the income limitations of s. 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 ch. 980, Stats., six months.
- (b) For appellate cases, eight months.
- (c) For cases under chs. 51 and 55, Stats., two months.
- (d) For all other cases, four months.
- (5)** (a) Notwithstanding the criteria in sub. (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:
 - 1. A Wisconsin works employment position under s. 49.148
 - (1) (a), (b), or (c), Stats.
 - 2. Wisconsin works benefits under s. 49.148 (1m), Stats.
 - 3. Supplemental security income for the aged, blind, and disabled under 42 U.S.C. 1381–1383c, relief as defined in s. 49.01
 - (3), Stats., or any other similar needs-based financial assistance program.
- (b) Notwithstanding sub. (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 s. 809.30
- (2) (b), Stats., indicating that:
 - 1. The state public defender has appointed counsel in the case.

10 PD 3.03 WISCONSIN ADMINISTRATIVE CODE

Unofficial Text (See Printed Volume). Current through date and Register shown on Title Page.

Register, April, 2011, No. 664

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 s. 48.275 (2) (b) or 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 s. 51.605 (1) or 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.

History: Cr. Register, August, 1978, No. 272, eff. 9-1-78; am. (2), Register, August, 1981, No. 308, eff. 9-1-81; am. (1) (b), (2) and (4), Register, November, 1984, No. 347, eff. 12-1-84; renum. (1) (b) and (c) to be (1) (c) and (d), cr. (1) (b), am. (2), Register, April, 1990, No. 412, eff. 5-1-90; am. (2) and (4), Register, August, 1990, No. 416, eff. 9-1-90; emerg. am. (1) (c), (2) and (4), cr. (2m), eff. 5-12-95; am. (1) (c), (2) and (4), cr. (2m), Register, January, 1996, No. 481, eff. 2-1-96; **CR 10-133: r. and recr. Register April 2011 No. 664, eff. 6-19-11.**