



Wisconsin State Public Defender

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Clearinghouse Rule 12-018

SS 014-11

Analysis and Proposed Changes to Administrative Rule PD 6.025
Determination of Ability to Pay

The State of Wisconsin Public Defender Board (SPD) announces the revision of PD 6.025, determination of ability to pay, relating to whether persons subject for payment for legal representation have the ability to pay all, or part of, the costs of representation. 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

Explanation of Agency Authority

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.

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 freezes income eligibility for public defender representation at 115% of the 2011 federal poverty guidelines.

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.

February 1, 2012

WISCONSIN STATE PUBLIC DEFENDER BOARD

DANIEL M. BERKOS, Chair

Proposed Rule

No. 664, eff. 6-19-11.

PD 6.025 Determination of ability to pay. (1) The state public defender shall determine whether persons subject to payment for legal representation have the ability to pay all, or part of, the costs of representation. A person has the ability to pay some amount to these costs if the person has gross income in excess of the amount specified in 42 U.S.C. s. 9902(2) (2011) or has assets treated under s. PD 3.03(2) as available to pay the costs of legal representation with income in excess of the amount specified in s. 49.001 (5), Stats., or assets available to pay the costs of legal representation under s. PD 3.03 (2) has the ability to pay some amount toward these costs. The state public defender may defer the determination of ability to pay until after the time period for payment of the optional discount amount specified in s. PD 6.02 has expired.

(2) The state public defender may determine that a person has the ability to pay under any of the following circumstances:

(a) The person has gross income exceeding 115% of the amount specified in 42 U.S.C. s. 9902(2)(2011) or has assets treated under s. PD 3.03(2) as available to pay the costs of legal representation. ~~is determined to have income in excess of the amount specified in s. 49.001 (5), Stats., or assets available to pay the costs of legal representation under s. PD 3.03 (2).~~

(b) The person does not notify the state public defender by the date specified in the notice sent to them under s. PD 6.015 that they are unable to pay the specified periodic payments.

(c) The person does not comply with a request of the state public defender for information necessary to verify their financial circumstances.

(3) The state public defender may periodically review a person's ability to pay and may rely upon information obtained from employment and tax records to determine ability to pay. When a person originally unable to pay for legal representation is later determined to have the ability to pay, the state public defender shall send notice of a periodic payment schedule to the person's last known address.

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

History: Emerg. cr. eff. 11-20-95; cr. Register, March, 1996, No. 483, eff. 4-1-96; CR 04-038: r. (2) (a), renum. (2) (b) to (d) to be (2) (a) to (c) Register August 2005 No. 596, eff. 9-1-05; CR 09-068: cr. (4) Register May 2010 No. 653, eff. 6-1-10; CR 10-134: am (1), (2) (a), (3) Register April 2011 No. 664, eff. 6-19-11; correction in (2) (a) made under s. 13.92 (4) (b) 4., Stats., Register April 2011 No. 664.