

## Statement of Scope

Office of the State Public Defender

**Rule No.:** PD 1.03 (2), PD 1.03 (4), PD 1.05 (6)

**Relating to:** The state public defender and state public defender Board's authority to impose conditions on an attorney's application for recertification and timeframe for an attorney to appeal the state public defender's decision to temporarily suspend an attorney's certification pending investigation.

**Rule Category:** Permanent

### 1. Finding/nature of emergency (Emergency Rule only):

Not applicable.

### 2. Detailed description of the objective of the proposed rule:

The state public defender is responsible for providing legal services to indigent individuals in criminal, juvenile, mental health, termination of parental rights, and other enumerated proceedings under s. 977.05, Wis. Stats. Under s. 977.08, the state public defender may delegate the legal representation of any person to any member of the State Bar of Wisconsin who is certified by the state public defender to take cases. The state public defender certifies attorneys to represent clients under ch. PD 1.

The state public defender may take a number of actions regarding an attorney's certification status. For cause, the state public defender may deny an attorney's application for certification or recertification; return an attorney to provisional certification; exclude an attorney from any certification list under s. PD 1.04; suspend an attorney's certification status; caution an attorney; impose conditions upon an attorney's continued certification; or take any other action that is consistent with the best interests of clients, the interests of justice, or the interests of the state public defender.

The proposed rule would authorize the state public defender to impose conditions on an attorney's application for recertification, including a specified time period before the attorney may apply for recertification. The proposed rule would require an attorney to comply with all conditions imposed by the state public defender before submitting an application for recertification.

An attorney may appeal the state public defender's certification decision to the state public defender Board. After the Board hears the matter, the board issues a written decision constituting findings of fact and conclusions of law. The board may affirm, reverse or modify the state public defender's certification decision. The proposed rule would explicitly authorize the Board to

impose conditions on an attorney's continued certification or application for recertification, including a specified time period before the attorney may apply for recertification. The proposed rule would require an attorney to comply with all conditions imposed by the state public defender Board under those circumstances.

The objective of the proposed rule is to prevent an attorney who has been decertified from immediately reapplying for recertification without addressing any of the issues that led to the decertification. The state public defender is currently authorized to take any action that is consistent with the best interests of clients, the interests of justice, or the interests of the state public defender; the proposed rule would make clear that one of the actions the state public defender may take is to place particular conditions on an attorney's application for recertification, including a specified time period before an attorney may reapply. The proposed rule would provide the state public defender Board with the same explicit authority.

The state public defender is authorized to suspend an attorney from its certification lists pending the outcome of an investigation of the attorney's performance; an investigation of alleged fraudulent, unreasonable, or inaccurate billing practices or other misconduct; of failure to comply with any provisions of chapter PD 1; or in response to a request for decertification. The state public defender may suspend an attorney pending investigation for 120 days, exclusive of any time attributable to the lack of cooperation from the attorney under investigation. The state public defender may extend the suspension by a period not to exceed an additional 30 days in order to complete the investigation. The current rule states that "[s]uspensions that exceed these time limits may be appealed under s. PD 1.05."

The proposed rule would clarify that an attorney may appeal a suspension under s. PD 1.03 (3) (b) 120 days after the notice of suspension. The proposed rule allows the state public defender to complete its investigation before an attorney may appeal the suspension. If the investigation is completed sooner than 120 days and results in an adverse certification decision, the attorney may appeal the adverse decision pursuant to s. PD 1.05.

### **3. Description of the existing policies relevant to the rule, new policies proposed to be included in the rule, and an analysis of policy alternatives:**

The state public defender certifies attorneys to represent clients under s. PD 1. The state public defender may take a number of actions regarding an attorney's certification status. For cause, the state public defender may deny an attorney's application for certification or recertification; return an attorney to provisional certification; exclude an attorney from any certification list under s. PD 1.04; suspend an attorney's certification status; caution an attorney; impose conditions upon an attorney's continued certification; or take any other action that is consistent with the best interests of clients, the interests of justice, or the interests of the state public defender.

The state public defender Board hears appeals by private bar attorneys on bill cuts and certification decisions pursuant to s. 977.02 (7), Wis. Stats., and s. PD 1.05. Under s. PD 1.05, the Board issues a written decision affirming, reversing or modifying the decision of the state public defender's certification decisions.

The proposed rule would clarify the state public defender's authority to impose conditions on an attorney's application for recertification, including a specified time period before the attorney

may apply for recertification. The proposed rule would also provide the Board with the explicit authority to impose conditions on an attorney's continued certification or application for recertification, including a specified time period before the attorney may apply for recertification.

The proposed rule would require an attorney seeking reinstatement following decertification to comply with all conditions imposed by the state public defender or the state public defender Board before submitting an application for recertification.

The proposed rule does not create new policy. Under the current rules, the state public defender may impose conditions upon an attorney's continued certification and may take any action that is consistent with the best interests of clients, the interests of justice, or the interests of the state public defender. Because the Board has the authority to modify the state public defender's certification decision, it can, in theory, modify the decision to impose its own conditions for an attorney to remain certified or to apply for certification or recertification. The proposed rule would make that authority explicit.

The proposed rule would also clarify that an attorney may appeal a suspension under s. PD 1.03 (3) (b) 120 days after the notice of suspension. The proposed rule allows the state public defender to complete its investigation before an attorney may appeal the suspension. If the investigation is completed sooner than 120 days and results in an adverse certification action, the attorney may appeal the adverse action.

There are no clear policy alternatives. Current rules provide the state public defender with the authority to impose conditions on an attorney's continued certification. Although the current rules provide the state public defender Board with the implicit authority to impose conditions on an attorney's continued certification or application for recertification, the Board seeks the proposed modification to the rules to make clear that the Board has the authority to impose conditions on an attorney's continued certification, and that both the state public defender and the state public defender Board have the authority to impose conditions on an attorney's application for recertification, including a specified time period before the attorney may apply for recertification. The proposed rule would improve the policy regarding appeals of suspensions by clarifying the timing of those appeals.

#### **4. Detailed explanation of statutory authority for the rule (including the statutory citation and language):**

The state public defender is governed by ch. 977, Wis. Stats. The state public defender provides legal services for indigent individuals involved in criminal, juvenile, mental health, termination of parental rights, and other enumerated proceedings under s. 977.05, Wis. Stats. Under s. 977.08, the state public defender may delegate the legal representation of any person to any member of the State Bar of Wisconsin who is certified by the state public defender to take cases. The state public defender certifies attorneys to represent clients under s. PD 1.

The state public defender is overseen by the state public defender Board; the Board's duties are outlined in s. 977.02. One of the Board's duties is to review decisions of the state public defender's certification decisions pursuant to s. 977.02 (7) and s. PD 1.05. Under s. PD 1.05 (6), the Board must issue a written decision affirming, reversing or modifying the decision of the state public defender.

The proposed rule would explicitly authorize the state public defender Board to impose conditions on an attorney's continued certification and authorize both the state public defender and the state public defender Board to impose conditions on an attorney's application for recertification, including a specified time period before the attorney may reapply for recertification. The proposed rule would also require an attorney seeking reinstatement following decertification to comply with all conditions imposed by the state public defender or the state public defender Board before submitting an application for recertification. The proposed rule would also clarify the timing for appeals of suspensions.

**5. Estimate of amount of time that state employees will spend developing the rule and of other resources necessary to develop the rule :**

Development of the proposed rule will require minimal state employee time. The proposed rule would make limited changes to s. PD 1.03 and s. PD 1.05.

**6. List with description of all entities that may be affected by the proposed rule :**

The proposed rule would apply only if the state public defender or the state public defender Board placed conditions on the application of an attorney seeking recertification or if an attorney decided to appeal a suspension pending investigation. The state public defender anticipates the proposed rule would impact fewer than five attorneys per year.

**7. Summary and preliminary comparison with any existing or proposed federal regulation that is intended to address the activities to be regulated by the proposed rule :**

The state public defender is not aware of any existing or proposed federal regulation that is intended to address the activities to be regulated by the proposed rule.

**8. Anticipated economic impact of implementing the rule (note if the rule is likely to have a significant economic impact on small businesses):**

There is no anticipated economic impact of implementing this rule, and this rule is not likely to have a significant economic impact on small businesses. The proposed rule would likely impact fewer than five private bar attorneys per year.

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