

STATEMENT OF SCOPE

PUBLIC DEFENDER BOARD

Rule No.: PD 1.05, 4.02, and 4.03

Relating to:

Appeals to the Board for certification and billing decisions of the State Public Defender for Private Bar Attorneys and what considerations the State Public Defender must consider before adjusting a bill.

Rule Type: 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 Board (Board) proposes to amend Wisconsin Administrative Code PD 1.05 and 4.03 as authorized by Wis. Stats. s. 977.02(7), 977.08(3)(b), 977.08(4) and Chapter 227 to clarify the process for private bar attorneys to appeal decisions made by the State Public Defender regarding certification and bill payments. The objective is to codify the current practice, make the burden of proof clear, and clean up existing rules to conform to current practice and requirements of Chapter 227.

The Board also proposes to amend PD 4.02 to clarify how a bill should be submitted to the State Public Defender and what criteria the State Public Defender should consider prior to amending or rejecting a bill submitted by a private attorney as required by Wis. Stat. s. 977.08(4). This amendment will help the board in making any decisions it needs to make during an appeal. This change will codify factors that the State Public Defender currently considers prior to any bill adjustment.

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 Board hears appeals by private bar attorneys on bill adjustments and certification decisions pursuant to Wis. Stats. s. 977.02(7), 977.08(3)(b), 977.08(4), Chapter 227 and PD 1.05 and 4.03. Under PD 1.05, the Board issues a written decision affirming, reversing or modifying the decision of the State Public Defender's certification decisions. Under PD 4.03 the Board issues a written decision affirming or modifying the decision of the State Public Defender regarding paying bills submitted by private bar attorneys.

The proposed rule does not create new policy, but rather seeks to clarify the process for the Board and the parties to the appeal. The proposed rule change will explicitly spell out the appeal process including burden of proof, process for appearing and presenting evidence, and process for requesting an adjourned hearing.

The Board further looks to modify PD 4.02 to codify current practice and clarify factors considered by the State Public Defender before a bill is adjusted as that will give the Board clear guidance for any appeal. Current code states that the billing form should be submitted to the local office. The Board looks to update this to conform to current practice of electronic billing.

Further, current Code says that the State Public Defender shall promptly review bills to ensure that the time billed reflects “reasonable attorney practice in such a case.” The Board is seeking to codify factors that the State Public Defender currently considers before adjusting a bill. The Board seeks this change so that if an attorney appeals the decision it is clear what factors were to be considered. This is not a change in policy, but rather codifies current practice and makes clear for private bar attorneys what factors are being considered. These are similar to the factors that judges consider under Wis. Stat. s. 814.045 in determining reasonableness of attorneys fees in civil matters.

There are no clear policy alternatives as these rule changes are not meant to change policy but rather codify current practice. The current rules indicate the process for an appeal and that an appeal is governed by chapter 227. The goal of the changes to PD 1.05 and 4.03 is to be sure the process is the same for both types of appeals.

The rules also indicated the State Public Defender is to consider the reasonableness of a bill before adjusting a bill. These rule changes would clarify what factors are being used to determine reasonableness of a bill. If a private attorney does not agree with the State Public Defender’s decision regarding certification or a bill adjustment, these rule changes would then make clear the process for appealing that decision. The alternative of not conducting this evaluation and update would be to leave the rules unchanged, which would result in lack of clarity about the process.

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

Wis. Stat. s. 977.02 states the board shall:

[r]eview decisions of the state public defender regarding bill payments, as provided under s. 977.08 (4). The board may affirm, modify or reject the decision of the state public defender.

[p]erform all other duties necessary and incidental to the performance of any duty enumerated in this chapter.

Wis. Stat. s. 977.08(3)(b) A final set of lists for each county shall be prepared, certified and annually updated by the state public defender. Persons may not be excluded from any list unless the state public defender states in writing the reasons for such action in the context of existing rules adopted by the state public defender board. Any attorney thus excluded shall then have the opportunity to appeal the state public defender's decision to the board, which shall issue a final decision in writing.

Wis. Stat. s. 977.08(4) At the conclusion of each case, any private local attorney who has been appointed shall submit a copy of his or her bill to the state public defender. The state public defender shall review the bill and reject it or approve it in whole or in part. The state public defender shall then pay the bill according to the rates under sub. (4m). Any attorney dissatisfied with the decision of the state public defender regarding the bill may have the decision reviewed by the board. This subsection does not apply if the attorney is working under an agreement authorized under s. 977.02 (7m) or a contract authorized under sub. (3) (f).

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

100 hours. Staff time will largely be required to draft the rule, work with partners and stakeholders, have public hearings, and to follow the rules promulgation process.

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

The proposed rule changes apply to private bar attorneys who accept appointments from the State Public Defender. These changes are not anticipated to change policy or practice therefore these changes are not anticipated to substantially impact attorneys who appeal agency decisions to the Public Defender Board. Appeals of State Public Defender decisions to the Board are rare, less than five a 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:

N/A

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

The proposed rule will have no to minimal economic impact on small businesses and the state's economy as a whole.

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