



---

---

**WISCONSIN LEGISLATIVE COUNCIL  
RULES CLEARINGHOUSE**

---

---

**Ronald Sklansky**  
*Clearinghouse Director*

**Richard Sweet**  
*Clearinghouse Assistant Director*

**Terry C. Anderson**  
*Legislative Council Director*

**Laura D. Rose**  
*Legislative Council Deputy Director*

**CLEARINGHOUSE REPORT TO AGENCY**

[THIS REPORT HAS BEEN PREPARED PURSUANT TO S. 227.15, STATS. THIS IS A REPORT ON A RULE AS ORIGINALLY PROPOSED BY THE AGENCY; THE REPORT MAY NOT REFLECT THE FINAL CONTENT OF THE RULE IN FINAL DRAFT FORM AS IT WILL BE SUBMITTED TO THE LEGISLATURE. THIS REPORT CONSTITUTES A REVIEW OF, BUT NOT APPROVAL OR DISAPPROVAL OF, THE SUBSTANTIVE CONTENT AND TECHNICAL ACCURACY OF THE RULE.]

**CLEARINGHOUSE RULE 02-110**

AN ORDER to amend PD 1.04 (5), relating to provisional appointment of private attorneys seeking certification for appellate appointments.

Submitted by **PUBLIC DEFENDER BOARD**

07-26-2002 RECEIVED BY LEGISLATIVE COUNCIL.

08-20-2002 REPORT SENT TO AGENCY.

RNS:AS

**LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT**

This rule has been reviewed by the Rules Clearinghouse. Based on that review, comments are reported as noted below:

1. STATUTORY AUTHORITY [s. 227.15 (2) (a)]

Comment Attached YES  NO

2. FORM, STYLE AND PLACEMENT IN ADMINISTRATIVE CODE [s. 227.15 (2) (c)]

Comment Attached YES  NO

3. CONFLICT WITH OR DUPLICATION OF EXISTING RULES [s. 227.15 (2) (d)]

Comment Attached YES  NO

4. ADEQUACY OF REFERENCES TO RELATED STATUTES, RULES AND FORMS [s. 227.15 (2) (e)]

Comment Attached YES  NO

5. CLARITY, GRAMMAR, PUNCTUATION AND USE OF PLAIN LANGUAGE [s. 227.15 (2) (f)]

Comment Attached YES  NO

6. POTENTIAL CONFLICTS WITH, AND COMPARABILITY TO, RELATED FEDERAL REGULATIONS [s. 227.15 (2) (g)]

Comment Attached YES  NO

7. COMPLIANCE WITH PERMIT ACTION DEADLINE REQUIREMENTS [s. 227.15 (2) (h)]

Comment Attached YES  NO



---

---

## WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

---

---

Ronald Sklansky  
Clearinghouse Director

Terry C. Anderson  
Legislative Council Director

Richard Sweet  
Clearinghouse Assistant Director

Laura D. Rose  
Legislative Council Deputy Director

### CLEARINGHOUSE RULE 02-110

#### Comments

**[NOTE: All citations to "Manual" in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated September 1998.]**

#### 2. Form, Style and Placement in Administrative Code

a. The introductory clause to the rule should end with a relating clause such as "relating to provisional appointment of private attorneys seeking certification for appellate appointments." [See s. 1.02 (1), Manual.]

b. The rule-making order would be more concisely presented if it were divided into two SECTIONS. The first SECTION would create s. PD 1.04 (5) (bc), and the last SECTION would amend s. PD 1.04 (5) (d) 3. and (e) 3. Current rules that are unaffected should not be shown.

c. The paragraph title to par. (bc) should be italicized.

d. The rule-making order should include an effective date clause at the end.

e. In s. PD 1.04 (5) (bc) (intro.), the introductory paragraph either should introduce the subsequent subdivisions by ending in a colon and leading into the subdivisions or should be numbered subd. 1.

#### 4. Adequacy of References to Related Statutes, Rules and Forms

In s. PD 1.04 (5) (d) 3. and (e) 3., should the citation be to par. (c) 2.? It does not appear that all of par. (c) is relevant to the education requirement.

**5. Clarity, Grammar, Punctuation and Use of Plain Language**

a. In s. PD 1.04 (5) (bc) (intro.) and 2., it appears that the information could be condensed into one subdivision. For example, the subdivisions could be redrafted to read, "The appellate division director, or his or her designee, shall provisionally certify attorneys who are granted appellate certifications after January 1, 2003."

b. In s. PD 1.04 (5) (bc) 1., it appears that this information should be placed in s. PD 1.06 relating to decertification, unless this action would occur prior to initiating a decertification action. This should be clarified.

c. Section PD 1.04 (5) (bc) 3. and 4. could be combined. In addition, in subd. 4., "but not limited to" should be deleted.

d. In s. PD 1.04 (5) (bc) 5., "to be" should be deleted. Also, "on year" should be replaced with "one year."

e. In s. PD 1.04 (5) (bc) 6., should "paragraph" replace "subsection"?

**Proposed Order of the State Public Defender Board  
Amending Rules**

The Wisconsin State Public Defender Board proposes an order to amend PD 1.04(5). *rel. to...*

**Analysis**

Sec. 977.02 (5) requires that the State Public Defender Board promulgate rules "establishing procedures to assure that representation of indigent clients by the private bar at the initial stages of cases assigned under this chapter is at the same level as the representation provided by the State Public Defender." PD 1.04 (5) is the original rule relating to appellate certification that was promulgated as required by statute. Based on agency experience and research the OSPD considers it a "best practice" to provide a period of provisional certification during which supervisory staff review private bar performance on appellate appointments. This review of performance of private bar attorneys would be similar to that required for staff attorneys. The proposed amendment would help to assure that representation by the private bar is at the same level as representation provided by the State Public Defender.

The proposed rule would amend PD 1.04 (5) to provide for provisional certification of private attorneys seeking to be certified for appellate appointments to allow for performance reviews by agency supervisors. The proposed rule would also allow the Director of the Appellate Division to place an attorney previously certified for appellate cases on provisional certification status in lieu of decertification.

The proposed rule would also correct two cross references in PD1.04(5).

**Statutory authority for rule:** sec. 977.02(5) Stats.

**Statutes interpreted:** sec. 977.08(3) Stats.

*only of law  
off. provisions* (2)

PD 1.04(5) is amended, *to read:*

PD1.04 (5) (a) Certification for appellate cases in general. An attorney shall be certified for appellate cases if he or she meets all of the following requirements:

1. The attorney has requested certification.

2. The attorney is licensed in good standing to practice law in this state.

3. The attorney meets the applicable qualifications in pars. (c) to (f).

(b) Power of appellate division director. Notwithstanding pars. (c) to (f), the director of the appellate division may determine whether an attorney's education or experience may be substituted for compliance with the qualifications under pars. (c) to (f) and may deny certification for good cause.

*cr.* (bc) Provisional appellate certification. The appellate division director, or his or her designee, may provisionally certify attorneys to receive appointments for appellate cases.

1. The appellate division director may change an attorney's certification status to provisional certification in lieu of decertification.

2. All appellate certifications granted after January 1, 2003, shall be provisional certifications.

3. After one year of provisional certification, the appellate division director, or his or her designee, shall review the performance of the attorney and determine whether the provisional certification should continue, the provisional certification should become non-provisional, or the attorney should be excluded from the appellate certification list.

4. The review may include but is not limited to file reviews, brief reviews, phone conferences, personal conferences, client communications, and reviews of court records. Appellate division performance standards shall provide a guide to determining whether the provisional certification should be continued, discontinued, or converted to non-provisional certification, but the determination of certification status is at the discretion of the appellate division director, or his or her designee.

5. If the provisional certification is continued under subd. 3., the attorney's performance shall be reviewed again after a period of time to be set by the appellate division director, or his or her designee, not to exceed one year.

6. Appeals from decisions under this subsection shall proceed as provided in PD 1.05.

↑  
Par. 3

(c) Level one. Level one certification means the attorney is certified for misdemeanor cases, sentencings after revocation of probation or parole and any pleas to class E felonies. An attorney is qualified for certification at this level if the attorney has done either of the following:

1. Filed one brief-in-chief in any appellate court in the United States in the 5 years immediately preceding application for certification. A copy of the brief must accompany the application for certification.

2. Completed 3 credits of state public defender approved legal education on appellate procedure, or its equivalent, including a law school course, clinical program or judicial clerkship, in the 3 years immediately preceding application for certification.

(d) Level 2. Level 2 certification means the attorney is certified for level one cases and cases involving any pleas to class B, C, or D felonies, and trials in which the defendant was convicted of a class C, D, or E felony. An attorney is qualified for certification at this level if the attorney has done all of the following:

1. Filed a minimum of 2 briefs-in-chief in Wisconsin appellate courts that complied with s. 809.30 or 809.40, Stats., in the 5 years immediately preceding application for certification. A copy of one of the briefs must accompany the application for certification.

2. Conducted a minimum of 3 contested trial court hearings, including one evidentiary hearing, in the 5 years immediately preceding application for certification.

3. Met the criteria of ~~sub. (2) (e)~~ par. (c), or attended 6 hours of state public defender approved legal education in criminal law within one year immediately preceding application for certification.

(e) Level 3. Level 3 certification means the attorney is certified for level 2 cases, cases involving any pleas to class A felonies and trials in which the defendant was convicted of a class A or B felony. An attorney is qualified for certification at this level if the attorney has done all of the following:

1. Filed a minimum of 3 briefs-in-chief in the Wisconsin Supreme Court or the Wisconsin Court of Appeals that complied with s. 809.30 or 809.40, Stats., in the 5 years immediately preceding application for certification. At least one

of the briefs must have been in a felony jury trial case and this brief must accompany the application for certification.

2. Conducted a minimum of 3 evidentiary hearings in criminal cases, one of which must have been a trial or postconviction hearing, in the 5 years immediately preceding application for certification.

3. Met the criteria of ~~sub. (2) (e)~~ par. (c) or attended 6 hours of state public defender approved legal education in criminal law in the year immediately preceding application for certification.

(f) Specialized areas of certification. Specialized areas of certification include any of the following:

1. Termination of parental rights cases. An attorney is qualified for certification in termination of parental rights cases if the attorney meets the criteria of par. (e), and:

a. Has completed 4 credits of state public defender approved legal education in termination of parental rights cases in the year immediately preceding application for certification; or

b. Has been sole trial or appellate counsel of record in at least one contested termination of parental rights case in the 3 years immediately preceding application for certification.

2. Other juvenile cases under chs. 48 and 938, Stats. An attorney is qualified for certification in other juvenile cases under chs. 48 and 938, Stats., if the attorney meets the criteria of par. (c), and:

a. Has been sole trial counsel of record in at least 5 completed juvenile cases in the 3 years immediately preceding application for certification; or

b. Has completed 4 credits of state public defender approved legal education in cases under chs. 48 and 938, Stats., in the year immediately preceding application for certification.

3. Cases under chs. 51 and 55, Stats. An attorney is qualified for certification in cases under chs. 51 and 55, Stats., if the attorney meets the criteria of par. (c), and:

a. Has been sole trial counsel of record in 5 cases under chs. 51 and 55, Stats., in the 3 years immediately preceding application for certification; or

b. Has completed 2 credits of state public defender approved legal education in cases under chs. 51 and 55, Stats., in the 3 years immediately preceding application for certification.

4. Cases under ch. 980, Stats. An attorney is qualified for certification in cases under ch. 980, Stats., if the attorney meets the criteria of par. (e), and:

a. Has completed a minimum of 2 credits of state public defender approved education in cases under ch. 980, Stats., in the year immediately preceding application for certification; or

b. Has been sole trial or appellate counsel of record in at least one contested commitment under ch. 980, Stats., in the 3 years immediately preceding application for certification.

2

### Fiscal Estimate — 2001 Session

- Original       Updated  
 Corrected       Supplemental

LRB Number	Amendment Number if Applicable
Bill Number	Administrative Rule Number PD 1.04(5)

**Subject**  
 Amendment of the rule relating to appellate certification

**Fiscal Effect**

State:  No State Fiscal Effect

Check columns below only if bill makes a direct appropriation or affects a sum sufficient appropriation.

- Increase Existing Appropriation       Increase Existing Revenues  
 Decrease Existing Appropriation       Decrease Existing Revenues  
 Create New Appropriation

- Increase Costs — May be possible to absorb within agency's budget.  
 Yes       No  
 Decrease Costs

Local:  No Local Government Costs

1.  Increase Costs  
 Permissive       Mandatory  
2.  Decrease Costs  
 Permissive       Mandatory  
3.  Increase Revenues  
 Permissive       Mandatory  
4.  Decrease Revenues  
 Permissive       Mandatory

5. Types of Local Governmental Units Affected:  
 Towns       Villages       Cities  
 Counties       Others  
 School Districts       WTCS Districts

Fund Sources Affected

- GPR       FED       PRO       PRS       SEG       SEG-S

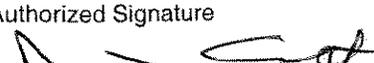
Affected Chapter 20 Appropriations

Assumptions Used in Arriving at Fiscal Estimate

The rule change provides for provisional certification status for attorneys seeking to take appellate appointments. The performance review described in the proposed rule change can be accomplished with current staffing.

**Long-Range Fiscal Implications**

There is no long range fiscal implication of the proposed rule change.

Prepared By: Deborah M Smith	Telephone No. 261-8856	Agency Office of State Public Defender
Authorized Signature 	Telephone No.	Date (mm/dd/ccyy) 07/26/02

**Fiscal Estimate Worksheet — 2001 Session**  
 Detailed Estimate of Annual Fiscal Effect

Original       Updated  
 Corrected       Supplemental

LRB Number	Amendment Number if Applicable
Bill Number	Administrative Rule Number PD 1.04(5)

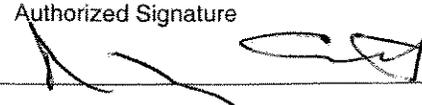
Subject  
 Amendment of the rule relating to appellate certification

One-time Costs or Revenue Impacts for State and/or Local Government (do not include in annualized fiscal effect):  
 \$0

Annualized Costs:	Annualized Fiscal Impact on State Funds from:	
	Increased Costs	Decreased Costs
<b>A. State Costs by Category</b>		
State Operations — Salaries and Fringes	\$ 0	\$ - 0
(FTE Position Changes)	( 0.00 FTE )	( - 0.00 FTE )
State Operations — Other Costs	0	- 0
Local Assistance	0	- 0
Aids to Individuals or Organizations	0	- 0
<b>Total State Costs by Category</b>	\$ 0	\$ - 0
<b>B. State Costs by Source of Funds</b>		
GPR	\$ 0	\$ - 0
FED	0	- 0
PRO/PRS	0	- 0
SEG/SEG-S	0	- 0
State Revenues	<b>Increased Revenue</b>	<b>Decreased Revenue</b>
GPR Taxes	\$ 0	\$ - 0
GPR Earned	0	- 0
FED	0	- 0
PRO/PRS	0	- 0
SEG/SEG-S	0	- 0
<b>Total State Revenues</b>	\$ 0	\$ - 0

**Net Annualized Fiscal Impact**

	State	Local
Net Change in Costs	\$ 0	\$ 0
Net Change in Revenues	\$ 0	\$ 0

Prepared By: Deborah M Smith	Telephone No. 261-8856	Agency Office of State Public Defender
Authorized Signature 	Telephone No.	Date (mm/dd/ccyy) 07/26/2002



**Wisconsin State Public Defender**

---

**To:** Senate and Assembly Chief Clerks  
**Date:** August 27, 2002  
**From:** Deborah Smith, Legal Counsel  
**Re:** Notice of Rule in Final Draft Form

Pursuant to s. 227.19(2), Stats., please provide notice to the presiding officers of the Senate and the Assembly that the attached proposed rule relating to provisional appointment of private attorneys seeking certification for appellate appointments is in final draft form and is hereby accompanied by a report, as specified in s. 227.19(3), Stats.

Thank you.



## Wisconsin State Public Defender

---

**To:** Legislative Committees  
**Date:** August 27, 2002  
**From:** Deborah Smith, Legal Counsel  
**Re:** Report on Clearinghouse Rule 02-110

### Analysis and Need

Sec. 977.02 (5) requires that the State Public Defender Board promulgate rules establishing procedures to assure that representation of indigent clients by the private bar at the initial stages of cases assigned under this chapter is at the same level as the representation provided by the State Public Defender." PD 1.04 (5) is the original rule relating to appellate certification that was promulgated as required by statute. Based on agency experience and research the OSPD considers it a "best practice" to provide a period of provisional certification during which supervisory staff review private bar performance on appellate appointments. This review of performance of private bar attorneys would be similar to that required for staff attorneys. The proposed amendment would help to assure that representation by the private bar is at the same level as representation provided by the State Public Defender.

The proposed rule would create PD 1.04(5)(bc) to provide for provisional certification of private attorneys seeking to be certified for appellate appointments to allow for performance reviews by agency supervisors. The proposed rule would also allow the Director of the Appellate Division to place an attorney previously certified for appellate cases on provisional certification status in lieu of initiating decertification.

The proposed rule would also correct two cross references in PD 1.04(5).

**Statutory authority for rule:** sec. 977.02(5) Stats.

**Statutes interpreted:** sec. 977.08(3) Stats.

### Public Hearing

A public hearing was held on August 26, 2002. There were no appearances or registrations for or against the proposed rule. The agency did not receive any testimony or written comments on the proposed rule.

### **Legislative Council Staff Recommendations**

The Legislative Council staff made several recommendations. All of the recommendations have been accepted and incorporated into the proposed rule except their comment 5.a. After review of the comment and consultation with the director of the appellate division, we have concluded that PD 1.04(5)(bc)(intro) and 2. should not be condensed into one subdivision. The OSPD believes that keeping the information in two separate parts makes it clear that the appellate division director may change the status of an attorney previously certified to provisional certification regardless of when the attorney was first certified.

### **Flexibility Analysis**

The proposed amendment would not have a regulatory effect on small businesses.

Thank you for your attention to this matter. If you have any questions about the proposed rule, please feel free to call me at 261-8856.

## Proposed Order of the State Public Defender Board Amending Rules

The Wisconsin State Public Defender Board proposes an order to amend PD 1.04(5)(d)3. and (e)3, and create PD 1.04(5)(bc), relating to provisional appointment of private attorneys seeking certification for appellate appointments.

### Analysis

Sec. 977.02 (5) requires that the State Public Defender Board promulgate rules establishing procedures to assure that representation of indigent clients by the private bar at the initial stages of cases assigned under this chapter is at the same level as the representation provided by the State Public Defender." PD 1.04 (5) is the original rule relating to appellate certification that was promulgated as required by statute. Based on agency experience and research the OSPD considers it a "best practice" to provide a period of provisional certification during which supervisory staff review private bar performance on appellate appointments. This review of performance of private bar attorneys would be similar to that required for staff attorneys. The proposed amendment would help to assure that representation by the private bar is at the same level as representation provided by the State Public Defender.

The proposed rule would amend PD 1.04 (5) to provide for provisional certification of private attorneys seeking to be certified for appellate appointments to allow for performance reviews by agency supervisors. The proposed rule would also allow the Director of the Appellate Division to place an attorney previously certified for appellate cases on provisional certification status in lieu of decertification.

The proposed rule would also correct two cross references in PD1.04(5).

**Statutory authority for rule:** sec. 977.02(5) Stats.

**Statutes interpreted:** sec. 977.08(3) Stats.

Section 1. PD 1.04(5)(bc) is created.

PD 1.04(5)(bc) *Provisional appellate certification.* The appellate division director, or his or her designee, may provisionally certify attorneys to receive appointments for appellate cases;

1. The appellate division director may change an attorney's certification status to provisional certification in lieu of initiating decertification.

2. All appellate certifications granted after January 1, 2003, shall be provisional certifications.

3. After one year of provisional certification, the appellate division director, or his or her designee, shall review the performance of the attorney and determine whether the provisional certification should continue, the provisional certification should become non-provisional, or the attorney should be excluded from the appellate certification list.

4. The review may include file reviews, brief reviews, phone conferences, personal conferences, client communications, and reviews of court records. Appellate division performance standards shall provide a guide to determining whether the provisional certification should be continued, discontinued, or converted to non-provisional certification, but the determination of certification status is at the discretion of the appellate division director, or his or her designee.

5. If the provisional certification is continued under subd. 3., the attorney's performance shall be reviewed again after a period of time set by the appellate division director, or his or her designee, not to exceed one year.

6. Appeals from decisions under this paragraph shall proceed as provided in PD 1.05.

Section 2. PD 1.04(5)(d)3. and (e)3. are amended.

PD 1.04(5)(d)3. Met the criteria of sub. (2) (e) par. (c)2 or attended 6 hours of state public defender approved legal education in criminal law within one year immediately preceding application for certification.

PD 1.04(5)(e)3. Met the criteria of sub. (2) (e) par. (c)2 or attended 6 hours of state public defender approved legal education in criminal law in the year immediately preceding application for certification.

This rule shall take effect on the first day of the month commencing after the date of publication, pursuant to s. 227.22 (2) (intro.), Stats.

### Fiscal Estimate — 2001 Session

- Original       Updated  
 Corrected       Supplemental

LRB Number	Amendment Number if Applicable
Bill Number	Administrative Rule Number PD 1.04(5)

**Subject**  
 Amendment of the rule relating to appellate certification.

**Fiscal Effect**

State:  No State Fiscal Effect

Check columns below only if bill makes a direct appropriation or affects a sum sufficient appropriation.

- Increase Existing Appropriation       Increase Existing Revenues  
 Decrease Existing Appropriation       Decrease Existing Revenues  
 Create New Appropriation

- Increase Costs — May be possible to absorb within agency's budget.  
 Yes       No  
 Decrease Costs

Local:  No Local Government Costs

1.  Increase Costs  
 Permissive       Mandatory  
2.  Decrease Costs  
 Permissive       Mandatory  
3.  Increase Revenues  
 Permissive       Mandatory  
4.  Decrease Revenues  
 Permissive       Mandatory

5. Types of Local Governmental Units Affected:  
 Towns       Villages       Cities  
 Counties       Others  
 School Districts       WTCS Districts

**Fund Sources Affected**  
 GPR       FED       PRO       PRS       SEG       SEG-S

Affected Chapter 20 Appropriations

**Assumptions Used in Arriving at Fiscal Estimate**

The rule change provides for provisional certification status for attorneys seeking to take appellate appointments. The performance review described in the proposed rule change can be accomplished with current staffing.

**Long-Range Fiscal Implications**

There is no long range fiscal implication of the proposed rule change.

Prepared By: Deborah M Smith	Telephone No. 261-8856	Agency Office of State Public Defender
Authorized Signature	Telephone No.	Date (mm/dd/ccyy) 07/26/02

**Fiscal Estimate Worksheet — 2001 Session**  
 Detailed Estimate of Annual Fiscal Effect

- Original       Updated  
 Corrected       Supplemental

LRB Number	Amendment Number if Applicable
Bill Number	Administrative Rule Number PD 1.04(5)

Subject  
 Amendment of the rule relating to appellate certification

One-time Costs or Revenue Impacts for State and/or Local Government (do not include in annualized fiscal effect):  
 \$0

Annualized Costs:	Annualized Fiscal Impact on State Funds from:	
	Increased Costs	Decreased Costs
<b>A. State Costs by Category</b>		
State Operations — Salaries and Fringes	\$ 0	\$ - 0
(FTE Position Changes)	( 0.00 FTE )	( - 0.00 FTE )
State Operations — Other Costs	0	- 0
Local Assistance	0	- 0
Aids to Individuals or Organizations	0	- 0
<b>Total State Costs by Category</b>	<b>\$ 0</b>	<b>\$ - 0</b>
<b>B. State Costs by Source of Funds</b>	<b>Increased Costs</b>	<b>Decreased Costs</b>
GPR	\$ 0	\$ - 0
FED	0	- 0
PRO/PRS	0	- 0
SEG/SEG-S	0	- 0
State Revenues	<b>Increased Revenue</b>	<b>Decreased Revenue</b>
GPR Taxes	\$ 0	\$ - 0
GPR Earned	0	- 0
FED	0	- 0
PRO/PRS	0	- 0
SEG/SEG-S	0	- 0
<b>Total State Revenues</b>	<b>\$ 0</b>	<b>\$ - 0</b>

**Net Annualized Fiscal Impact**

	State	Local
Net Change in Costs	\$ 0	\$ 0
Net Change in Revenues	\$ 0	\$ 0

Prepared By: Deborah M Smith	Telephone No. 261-8856	Agency Office of State Public Defender
Authorized Signature	Telephone No.	Date (mm/dd/ccyy) 07/26/2002