pd008_EmR0926.pdf **Public Defender Board – Creates Ch. PD 8 – EmR0926**

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Effective Dates: **October 3, 2009 through March 1, 2010**

PROPOSED ORDER OF THE STATE OF WISCONSIN PUBLIC DEFENDER BOARD CREATING EMERGENCY RULES
(Wis. Admin. Code Chapter PD 8 Discovery Payments)

The Wisconsin State Public Defender Board proposes an emergency order to create Chapter PD 8, Discovery Payments, relating to the maximum fees that the state public defender may pay for copies of discovery materials in criminal proceedings, proceedings under Wis. Stat. Chapter 980, and other proceedings in which the state public defender provides legal representation.

Analysis Prepared by the Office of the State Public Defender

Statutes Interpreted
Sections 971.23, 977.02 (9), 977.05, 977.08, 980.036 (10)

Statutory Authority
Sections 227.24, 971.23 (10), 977.02 (9), 980.036 (10)

Explanation of Agency Authority
Section 977.02 (9), Stats., effective July 1, 2009, directs the state public defender board to promulgate rules "establishing the maximum fees that the state public defender may pay for copies, in any format, of materials that are subject to discovery in cases in which the state public defender or counsel assigned under s. 977.08 provides legal representation."

Related Statute or Rule
None

Plain Language Analysis
The state public defender appoints attorneys to represent financially eligible persons in cases where they have a constitutional or a statutory right to an attorney at state expense. *See* Chapter 977, Stats. Sections 971.23 and 980.036, Stats., require a district attorney or other prosecuting attorney to disclose certain materials and information, referred to generally as "discovery materials," to an opposing party or his or her counsel within specified time limits. Subsections 971.23 (10) and 980.036 (10) require the state public defender to pay for the copies of discovery materials disclosed to appointed counsel if the provider charges a fee for them.

This emergency rules order implements the 2009 Wisconsin Act 28 requirement that the state public defender board promulgate administrative rules establishing the maximum fees that the state public defender may pay for copies of discovery materials in any format.

This rulemaking authority responds to two problems that the state public defender has encountered regarding the specific appropriation for transcripts, interpreter fees, and discovery costs: 1) this appropriation has been insufficient since Fiscal Year 2001-2002, and 2) the counties and municipalities have charged different amounts for similar items, such as photocopies and DVDs, resulting in disputes over the reasonableness of some of the bills submitted to the state public defender.

The emergency rules provide notice to the counties and municipalities of the applicable fees that will be paid, ensure consistency among all providers of discovery materials, and establish a procedure for the state public defender to follow if the applicable appropriation is depleted before the end of the biennium. The emergency rules:

- Establish maximum rates for the common formats in which the state public defender presently receives discovery materials;
- Specify that the state public defender does not pay for the labor costs, postage costs, transmittal costs, or other ancillary costs related to compiling, preparing, or providing discovery materials to the attorneys, staff or private, appointed under s. 977.08;
- Provide the state public defender with the authority to reduce or suspend payments for discovery materials when the applicable appropriation is insufficient to continue payments at the maximum rate; and
- Specify that the state public defender may set a maximum rate not to exceed the actual, necessary, and direct cost of producing discovery materials that are provided in a format not directly addressed in the rule.

Finding of Emergency
These rules are promulgated under s. 227.24 (1) (a), Stats., because the magnitude of the shortfall in the state public defender's appropriation for transcripts, discovery, and interpreters in both years of the current biennium constitutes an emergency that requires implementation of a rule earlier than a permanent rule could take effect if the agency were to comply with the applicable notice, hearing, legislative-review, and publication requirements.

The state public defender was initially provided a base budget of $60,000 in 1995 for discovery payments, which at that time consisted mostly of photocopies and some photographs. In the 1999-2001 budget act, this appropriation was increased to $150,000, based on a presumptive rate for photocopies of $0.20 per page. In the 2001-2003 biennial budget act, this appropriation was subjected to a five percent funding reduction, leaving a base budget for discovery payments of $142,500.

The public defender received discovery bills totaling $717,000 for the fiscal year that ended June 30, 2009. Although discovery costs are caseload driven, this represents a nearly five-fold increase since 2001 and is due primarily to two factors. First, in the past many counties and municipalities did not bill the state public defender for copies of discovery materials. Because local budgets have come under increasing pressure, most now do so. Second, 2005 Wisconsin Act 60 resulted in more widespread use of audio and video recordings of interrogations by law enforcement, copies of which must be provided to the defense.

The public defender board's requests for cost-to-continue budget increases for discovery payments in 2007-2009 and in 2009-2011 were not funded. Instead, the FY 2009-2011 budget act reduced this appropriation by 1%, leaving a base budget of $141,100, and directed the board to promulgate rules to address the funding shortfall.

Summary of, and Comparison with, Existing or Proposed Federal Regulations
There are no existing or proposed federal regulations that address the activities of the proposed rules.

Comparisons with Rules in Adjacent States
In general, most states require prosecutors to provide copies of all discovery materials under mandatory discovery laws.

Minnesota and Iowa have implemented statewide public defender programs, but only Minnesota has a statute relating to public defenders and discovery costs. Specifically, Minnesota statutes section 611.271 (2008) states that when discovery materials are requested by a public defender, no fee can be charged for police reports, photographs, copies of existing grand jury transcripts, audiotapes, videotapes, copies of existing transcripts of audiotapes or videotapes, and, in child protection cases, reports prepared by local welfare agencies. Iowa public defenders, on the other hand, are charged for most discovery materials obtained from the prosecutor. The cost of discovery varies depending on the county prosecutor.

In Michigan and Illinois, the individual counties themselves establish public defender programs. In Michigan counties, the public defenders do not typically pay for any discovery costs. When they do have to pay, the public defenders only pay for the cost of copies and not the cost of labor. In the Illinois

counties surveyed, when the public defenders receive discovery from the prosecutor, they do not pay any fees.

Summary of Factual Data and Analytical Methodologies
Pursuant to s. 977.02 (9), Stats., the public defender board "shall consider information regarding the actual, necessary, and direct cost of producing copies of materials that are subject to discovery" when establishing the maximum fees that the public defender may pay for them.

A significant portion of the direct cost of any copy is the media (e.g., the paper or the blank disc) on which it is provided.

In its biennial budget request for FY 2009-2011, the public defender board requested funding to increase the rate to be paid for paper discovery materials from $0.20 to $0.25 per page. This request was neither included in the Governor's budget, nor added to the budget bill by the legislature. The state public defender board interprets the omission of the requested funding as tacit agreement that $0.20 per page meets or exceeds the "actual, necessary and direct cost" criteria for paper copies of discovery materials. Compare FedEx/Kinko's current retail price of $0.08 each for up to 100 letter- or legal-size copies, and $0.07 each for 101 to 1,000 copies. The Department of Justice charges $0.15 per page for paper copies furnished in response to a public records request under ch. 19, Stats. Under the proposed rule, the state public defender would continue to pay up to $0.20 per page.

The charges submitted for discovery materials provided in electronic formats vary greatly among the state's prosecutors and law enforcement agencies. For example, bills for a single compact disc (CD) range from $3 to $35. The retail cost of blank CDs and digital videodiscs (DVDs) is currently less than $0.80 each. Large suppliers such as Corporate Express offer discounts to governmental units, bringing the unit cost down to less than $0.40 each. The Department of Justice charges $1.00 per disc for copies furnished in response to a public records request under ch. 19, Stats. Under the proposed rule, the state public defender would pay up to $5.00 per disc.

The charges submitted for copies of photographs range from $1.50 to $25.00 for digital prints, from $1.00 to $2.00 for black and white photos, and from $0.35 to $2.00 for color photos. The retail cost of photograph reproductions depends upon their size. Walgreen's, a national retailer, charges $0.19 each for less than 100 4x6 prints, $0.15 each for 100 or more 4x6 prints, $1.59 each for 5x7 prints and $2.99 each for 8x10 prints. The Camera Company in Madison charges $0.43 each for photos up to 4x6. Under the proposed rule, the state public defender would pay up to $0.50 each for copies of photos that are 5x7 and smaller, and $1.00 each for copies of larger photos.

The charges submitted for copies of audio and video tapes also vary greatly. Bills for a single video tape range from $5.00 to $46.00, and for a single audio tape from $1.00 to $25.00. If purchased from a state contract office supply vendor, blank audio cassette tapes range in price from $0.42 to $1.07 each and blank VHS video tape prices range from $1.22 to $3.00 each. If purchased from a retailer (Best Buy), a four-pack of audio cassette tapes costs $5.99 ($1.50 each), and a four-pack of VHS video tapes costs $10.99 ($2.75 each). Under the proposed rule, the state public defender would pay up to $5.00 per tape.

Analysis and Supporting Documents Used to Determine Effect on Small Business or in Preparation of Economic Impact Report
The impact on counties and municipalities that provide copies of discovery materials is unknown.

Effect on Small Business
Small businesses are not affected by the rule.

Agency Contact Person
Questions regarding these rules may be directed to Marla Stephens at 608-516-1232, stephensm@opd.wi.gov or 315 N. Henry Street, 2nd Floor, Madison, WI 53703.

Place to Submit Comments

Comments may be submitted to Marla Stephens at stephensm@opd.wi.gov or 315 N. Henry Street, 2nd Floor, Madison, WI 53703.

SECTION 1. Chapter PD 8 is created to read:

CHAPTER PD 8
DISCOVERY PAYMENTS

PD 8.01 Scope of chapter on discovery payments. (1) In this chapter, "discovery materials" means the materials and information that a district attorney or other prosecuting attorney is required to disclose by ss. 971.23 and 980.036, Stats., or by the constitution and laws of this state or the United States.

(2) This chapter applies to all discovery materials provided to any attorney appointed by the state public defender, staff or private, whether or not the attorney has filed a demand for discovery or made any other formal request for discovery materials.

PD 8.02 Maximum rates for copies of discovery materials. (1) The following rates are the maximum fees that the state public defender may pay for copies of discovery materials in any case or proceeding in which the state public defender appoints counsel:
(a) For paper copies of written or printed materials, $0.20 per page.
(b) For copies of digital videodiscs (DVDs), digital audio recordings, and compact discs (CDs), $5.00 per disc.
(c) For copies of photographs, $0.50 per print for a print that is 5x7 inches or less, and $1.00 per print for all others.
(d) For copies of videocassette recorder (VCR) tapes and audio cassette tapes, $5.00 per recording.

(2) The state public defender may not pay a fee for ancillary expenses related to the provision of discovery materials, including fees for the following:
(a) Labor costs, postage, shipping, equipment costs, or other costs that would result in a fee exceeding the amount specified in sub. (1).
(b) Compiling, preparing, reviewing, or transmitting paper or electronic documents.
(c) Duplicate items, unless specifically requested by the attorney appointed by the state public defender.
(d) Items that the state public defender has advised the provider not to include within discovery materials.

(3) Except as provided in sub. (2), the state public defender may establish temporary maximum fees for copies of discovery materials in formats not specified in sub. (1). The state public defender shall report any fees established under this subsection to the board, which may consider promulgating rules to revise the rates in sub. (1).

PD 8.03 Authority of state public defender when appropriation for discovery is insufficient. (1) When the appropriation under s. 20.550 (1) (f), Stats., that includes funds for payments under this chapter is insufficient to pay for copies of all the discovery materials that the state public defender anticipates will be required during the biennial budget period, the state public defender may temporarily reduce or suspend payments.

(2) The state public defender shall notify the affected discovery provider of the nature and anticipated duration of any reduction or suspension of payment under sub. (1).

(3) If the appropriation specified in sub. (1) was insufficient in two consecutive fiscal years to pay for all discovery materials that the state public defender required, the state public defender shall report the insufficiency to the board, which may consider promulgating rules to revise the rates in s. PD 8.02.

SECTION 2. INITIAL APPLICABILITY.

This emergency rule first applies to discovery material charges that are submitted on the effective date of this rule.

SECTION 3. EFFECTIVE DATE.

This emergency rule takes effect upon publication in the official state newspaper as provided in s. 227.24 (1) (c), Stats.

Dated: September 25, 2009

WISCONSIN STATE PUBLIC DEFENDER BOARD

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DANIEL M. BERKOS, Chair

OFFICE OF STATE PUBLIC DEFENDER **STATE OF WISCONSIN**
Office of Legal Counsel

ADMINISTRATIVE RULES – FISCAL ESTIMATE

1. **Fiscal Estimate Version**
☒ Original ☐ Updated ☐ Corrected

2. Administrative Rule Chapter Title and Number
Wisconsin Administrative Code Chapter PD 8 Discovery Payments

3. Subject
Maximum amounts payable by the State Public Defender for discovery materials

4. **State Fiscal Effect:**

☐ No Fiscal Effect ☒ Indeterminate	☐ Increase Existing Revenues ☐ Decrease Existing Revenues	☐ Increase Costs ☐ Yes ☐ No ☐ Decrease Costs

5. Fund Sources Affected: ☐ GPR ☐ FED ☐ PRO ☐ PRS ☐ SEG ☐ SEG-S	6. Affected Ch. 20, Stats. Appropriations:

7. **Local Government Fiscal Effect:**

☐ No Fiscal Effect ☒ Indeterminate	☐ Increase Revenues ☐ Decrease Revenues	☐ Increase Costs ☐ Decrease Costs

8. Local Government Units Affected:
☐ Towns ☐ Villages ☒ Cities ☒ Counties ☐ School Districts ☐ WTCS Districts
☐ Others:

9. **Private Sector Fiscal Effect (small businesses only):**

☒ No Fiscal Effect ☐ Indeterminate	☐ Increase Revenues ☐ Decrease Revenues ☐ Yes ☐ No May have significant economic impact on a substantial number of small businesses	☐ Increase Costs ☐ Yes ☐ No May have significant economic impact on a substantial number of small businesses ☐ Decrease Costs

10. Types of Small Businesses Affected:

11. **Fiscal Analysis Summary**

The State Public Defender (SPD) is statutorily authorized and required to appoint attorneys to represent indigent defendants in criminal proceedings. The SPD plays a major role in ensuring that the Wisconsin justice system complies with the right to counsel provided by both the state and federal constitutions. Any legislation that creates a new criminal offense or expands the definition of an existing criminal offense has the potential to increase SPD costs.

These administrative rules do not create a new offense, expand the scope of any criminal offense, or change any criminal penalties. The rules provide maximum rates that the SPD will pay for discovery materials, such as photocopies of police reports and audio or video recordings of interrogations. In the vast majority of cases in which the SPD provides representation, the appointed attorney must obtain and review discovery materials as part of adequate case preparation.

The SPD does not anticipate any significant fiscal impact from these rules. The SPD has a separate appropriation for discovery, interpreters, and transcripts. For the last few years, this appropriation has been insufficient to pay the necessary costs incurred by the SPD in the course of providing representation. The deficit in this appropriation has been growing, as more counties and municipalities have been recording interrogations of defendants and then billing the SPD for copies of the recordings. In some counties, these rules will lower the costs of each individual recording; however, the number of jurisdictions providing the recordings may continue to increase.

The SPD has been paying all counties $0.20 per page for photocopies provided as discovery materials. The SPD has been paying varying amounts for other forms of discovery, such as DVDs and CDs. Some bills for recordings come from municipalities and others from counties. The SPD does not have data to estimate the specific impact of these rules on individual municipalities and counties. However, because the SPD's annual appropriation for transcript, discovery and interpreter payments was not changed as a result of this provision of 2009 Wis Act 28, the biennial budget bill, it appears that the legislative intent is that these rules will neither increase nor decrease the SPD's total payments for discovery materials.

12. **Long-Range Fiscal Implications**

The rules provide a mechanism for the SPD Board to reduce the maximum rates if the appropriation in question is depleted in two consecutive years (following adoption of the rules). Thus, the rules arguably provide a safety valve to limit the total payment obligations of the SPD for discovery. The rules may also help to resolve issues that might otherwise arise regarding the rates that counties and municipalities may charge for new formats in which they provide discovery materials.

13. Name - Prepared by Michael Tobin	Telephone Number 608-266-8259	Date October 1, 2009
14. Signature –Secretary or Designee Marla Stephens	Telephone Number 608-264-8573	Date October 1, 2009