



Wisconsin State Public Defender

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Report for Legislative Review Prior to Rule Promulgation

(Wis. Admin. Code Chapter PD 1 Certification)

Proposed rules relating to the certification of private attorneys to accept appointments to provide legal representation for state public defender clients.

Basis and Purpose of Proposed Rules

Sections 977.05 (4) and (5) and 977.08 (1), Stats., require the state public defender to appoint attorneys to represent indigent clients in specified cases. Sections 977.08 (2) and (3) require the state public defender to notify all attorneys that they may be appointed to provide legal representation to state public defender clients, to review the qualifications of attorneys seeking appointment, and to certify lists of attorneys qualified to accept appointments. Section 977.02 (5) allows the state public defender board to promulgate rules that establish procedures to assure that the legal representation of indigent clients by the private bar at the initial stages of cases assigned under ch. 977 is at the same level as the representation provided by the state public defender. Section 977.02 (6) allows the state public defender board to establish rules to accommodate the handling of certain potential conflict of interest cases by the office of the state public defender. Section 977.03 (3) allows the state public defender board to promulgate rules to establish procedures under which the state public defender may appoint attorneys based upon the state public defender's evaluation of the attorneys' performance. Section 977.02 (8) allows the state public defender board to perform all other duties necessary and incidental to the performance of any duty enumerated in ch. 977, Stats.

The ethical rules in Supreme Court Rules Chap. 20, Rules of Professional Conduct for Attorneys, prohibit conflicts of interest and require zealous representation. Consequently, the state public defender appoints some cases to private attorneys who are not employees. Because the state public defender does not have direct oversight of the legal representation provided in these cases, the state public defender uses other means, including certification lists, to ensure that the private attorneys are competent to represent clients in different types of cases.

The current certification rule was written over 30 years ago. Since that time, the criminal justice system has changed and the practice of law has changed. The tools available to the state public defender must also change. The state public defender must be able to fulfill its responsibility to protect the interests of clients by monitoring the private attorneys appointed to represent them. The state public defender sought input from and reviewed the collective experience of its managing attorneys, supervisory staff in the Trial and Appellate Division local offices, Assigned Counsel Division staff in the Administration office, stakeholders in the legislature, the courts and prosecution offices, and the Assigned Counsel Advisory Committee (comprised of private attorneys appointed in public defender

cases). They identified problems with the current certification rules and suggested solutions. The proposed rules are the result. They include changes in training and experience requirements that are needed to practice criminal law as it exists today. And they give the state public defender the flexibility to fashion an appropriate response to problems with private attorney performance.

The rules modify certification criteria and procedures to:

- Update the certification lists to reflect changes in substantive and procedural law.
- Permit the state public defender to exercise discretion to certify, recertify, sanction, suspend, caution, place conditions upon or decertify a private attorney for cause.
- Establish criteria for the exercise of discretion.
- Permit the state public defender to consider an attorney's prior disciplinary record and other conduct, in addition to experience and education, when making certification decisions.
- Require an attorney to reapply for certification after decertification or voluntary removal from any certification list.
- Permit the state public defender to require a period of provisional certification to allow the state public defender to monitor the representation provided to clients.
- Permit the state public defender to suspend case appointments to an attorney pending an investigation into performance or billing.
- Permit the state public defender to disclose information about an investigation after the investigation is concluded.

Public Comment

The state public defender held a public hearing in Madison on November 30, 2009 from 1:00 to 3:00 p.m. No one attended the hearing or submitted written comments on the proposed rule.

The proposed rule was posted on the Wisconsin Administrative Rules website on September 4, 2009, and on the state public defender website on October 31, 2009. Persons who were not able to attend a public hearing were able to submit comments on the proposed rules by e-mail, regular mail and the Wisconsin Administrative Rules website. The public comment period closed on December 7, 2009.

Comments from state public defender staff resulted in changes to the final draft of the rule to adopt uniform language and construction throughout the chapter; to reverse unintended changes in the Appellate case certifications; and to decrease the time within which an applicant may satisfy the education requirement (from three years to one year), increase the number of legal education hours (from two to four), and allow experience in appellate cases to satisfy the legal experience requirement in some Appellate certifications. Staff comments also resulted in changes to the final drafts of the certification application and request forms that correct cross-referencing errors and adopt uniform language, construction and content.

Changes in Plain Language Analysis

None

Changes in Fiscal Estimate

No fiscal estimate was required.

Response to Legislative Council Staff Recommendations

All recommendations were adopted in the final draft.

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