

**Notice of Proposed Order of the Office of the State Public Defender Adopting Rules
(Wis. Admin. Code Chapter PD 1.03 (2), PD 1.03 (3), PD 1.03 (4), PD 1.05 (2), and PD 1.05 (6))**

The State of Wisconsin Public Defender Board (SPD) proposes an order to amend PD 1.03 (2) (a) 7., PD 1.03 (3) (b), PD 1.03 (4), PD 1.05 (2), and PD 1.05 (6), relating to the state public defender and the 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.

Statutes Interpreted

Sections 977.02 (7)

Statutory Authority

Sections 977.02 (7)

Agency Authority

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.

Related Statutes or Rules

None

Plain Language Analysis

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(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.

Summary of, and Comparison with, Existing or Proposed Federal Statutes and Regulations

There are no existing or proposed federal regulations that address the activities of the proposed rules.

Comparison with Rules in Adjacent States

Adjacent states (Illinois, Iowa, Michigan, and Minnesota) have different structures from Wisconsin's and do not have comparable rules.

Summary of Factual Data and Analytical Methodologies

None

Analysis and Supporting Documents Used to Determine Effect on Small Business or in Preparation of an Economic Impact Analysis

The rule has minimal impact on small businesses. The rule will impact only those private bar attorneys who appeal the state public defender's certification decision and on whose certification the state public defender or state public defender Board determines it is necessary to place specific conditions. Given the number of appeals of certification decisions the state public defender Board considers, the rule is likely to impact less than one private bar attorney per year.

Effect on Small Business

Minimal

Agency Contact Person

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Place to Submit Comments

Comments may be submitted to Devon Lee at leede@opd.wi.gov, or 17 S. Fairchild Street, 5th Floor, Madison, WI 53703

Text of Proposed Rule

SECTION 1:

PD 1.03 is amended to read:

PD 1.03 Certification application and decisions.

(1) APPLICATION FORM. The state public defender shall prepare an application form to be completed by attorneys seeking certification or recertification as provided in s. 977.08 (3), Stats. The state public defender shall notify in writing each attorney who has submitted an application of the county or counties and the cases for which the attorney is certified to accept appointments, if any.

Note: Certification application forms and information are published as ch. PD 1 Appendix A to E and are available on the public defender website, www.wisspd.org, or from the Assigned Counsel Division, Office of the State Public Defender, P.O. Box 7923, Madison, WI 53707-7923, phone 608-266-0087. The link to the current certification application is: <http://www.wisspd.org/html/acd/certform.pdf>.

(2) PUBLIC DEFENDER'S CERTIFICATION DECISION.

(a) For cause, the state public defender may take any of the following actions regarding an attorney's certification status:

1. Deny an application for certification or recertification.
2. Return an attorney to provisional certification under s. PD 1.037.
3. Exclude an attorney from any certification list in s. PD 1.04.
4. Suspend an attorney's certification status under sub. (3).
5. Decertify an attorney under sub. (4).
6. Caution an attorney.
7. Impose conditions upon an attorney's continued certification or application for recertification, including a specified time period before the attorney may reapply following decertification.
8. 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.

(b) The state public defender shall inform the attorney in writing of the reasons for the adverse certification decision and the manner by which the attorney may appeal the decision.

(3) SUSPENSION.

(a) The state public defender may suspend the attorney from any or all of the certification lists in s. PD 1.04 under any of the following circumstances:

1. Pending the outcome of the investigation into the attorney's performance; an allegation of fraudulent, unreasonable or inaccurate billing practices or other misconduct; or of failure to comply with any provision of this chapter.
2. In response to a request for decertification.

(b) The suspension under par. (a) may not exceed 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. Suspensions may not be appealed until 120 days after the notice of suspension. If the investigation is completed sooner than 120 days and results in an adverse certification decision, the attorney may immediately appeal the decision under s. PD 1.05 that exceed these time limits may be appealed under s. PD 1.05.

(4) DECERTIFICATION. Any interested party may request in writing that an attorney, previously certified to accept cases from the state public defender, be decertified for cause. Upon receipt of a request, the state public defender shall conduct an investigation. Upon a finding of cause, the state public defender may decertify the attorney and exclude the attorney from any or all of the certification lists in s. PD 1.04. An attorney seeking reinstatement to a

certification list following decertification shall comply with all conditions imposed under s. PD 1.03(2)(a)(7) and s. PD 1.05(6) before the attorney may submit an application as provided in sub. (1).

(5) DISCRETIONARY CONSIDERATIONS. The state public defender's exercise of discretion and determination whether cause exists to take any action under this chapter may include consideration of any of the following factors:

(a) In this or any other jurisdiction, the attorney is or has been disbarred, has or has had his or her license to practice law suspended, or has surrendered his or her license to practice law.

(b) The attorney fails or has failed to meet the education or experience requirements under this chapter.

(c) The attorney's conduct while employed by the state public defender, another law office or another governmental agency in Wisconsin or in another jurisdiction raises a concern about the attorney's character, performance, ability or behavior.

(d) The attorney engages or has engaged in fraudulent, unreasonable or inaccurate billing to the state public defender or any other governmental agency or organization.

(e) The attorney fails or has failed to meet minimum attorney performance standards adopted by the state public defender or to comply with the supreme court rules of professional conduct for attorneys.

(f) The attorney fails or has failed to follow the state public defender's procedures for billing or for approval of expenses.

(g) The attorney is or has been the subject of a formal complaint filed by the office of lawyer regulation with the supreme court or filed with an organization that is responsible for enforcement of lawyer regulation in any other jurisdiction.

(h) The attorney is or has been the subject of a finding of dishonesty or incapacity by the client protection fund in an award to a claimant.

(i) The attorney is convicted of any crime that reflects adversely on the attorney's honesty, trustworthiness or fitness as a lawyer.

(j) The attorney engages in conduct contrary to the interests of clients, the interests of justice, or the interests of the state public defender.

(k) The attorney is barred by statute from engaging in criminal or other public defender case representation.

(L) The attorney fails or has failed to cooperate with an investigation under this chapter.

(m) The conduct of an attorney that formed the basis for voluntary removal or for an investigation or decision regarding the attorney's license to practice law, certification to accept appointments, or billing practices, in Wisconsin or in any other jurisdiction continues to raise a concern about the attorney's character, performance, ability or behavior.

(n) The attorney requests to be removed from any or all certification lists at a time when the attorney is the subject of a pending inquiry or investigation concerning performance or billing practices.

(o) The attorney fails to comply with this chapter.

(p) The state public defender learns of any other information that raises a concern about the attorney's character, performance, ability or behavior.

SECTION 2.

PD 1.05 is amended to read:

PD 1.05 Appeal of certification decisions.

(2) Any attorney may appeal the state public defender's certification decision under s. PD 1.03 (2) by mailing a letter of appeal to the state public defender within 30 days of the notice of the decision. Appeals of suspensions are subject to the provisions in s. PD 1.03 (3)(b). The attorney shall state in the letter the certification from which the attorney has been excluded or the decision from which the attorney intends to appeal. The letter shall state the reasons why the attorney believes the decision was improper.

(3) Upon receipt of an appeal letter, the state public defender shall place the matter on the agenda of the next state public defender board meeting unless that meeting is less than 10 days from the receipt of the appeal letter, in which case the matter may be scheduled for the following meeting. The state public defender shall, at least 10 days before the hearing, inform the attorney of the time and place of the board meeting at which the appeal will be considered.

- (4) The state public defender shall transmit to the board and the attorney all material relied upon in reaching the certification decision, including the certification application and all written comments received under s. 977.08 (3), Stats.
- (5) The attorney may submit to the board any material that he or she believes is relevant to the appeal. The hearing before the board shall be considered a "class 3" proceeding and is governed by ch. 227, Stats.
- (6) The state public defender board may deliberate the matter in executive session pursuant to the provisions of s. 19.85 (1) (a), Stats. The board shall issue a written decision affirming, reversing or modifying the decision of the state public defender. The board may impose conditions on an attorney's application for recertification, including a specified time period before the attorney may apply for recertification. The written decision shall be mailed to the attorney within 20 days after the board meeting and shall be signed by an officer of the board.
- (7) The board's written decision shall constitute findings of fact and conclusions of law within the meaning of s. 227.47, Stats.
- (8) The board may appoint a panel of board members to conduct the hearing specified in subs. (5) and (6). After reviewing the record of the hearing and receiving the panel's recommendation, the entire board shall issue a written decision.

SECTION 4: EFFECTIVE DATE. This rule shall take effect on the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22 (2) (intro.), Stats.