

CHAPTER 977

STATE PUBLIC DEFENDER

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977.001 Sunset. The office of the state public defender shall cease operations on November 15, 1985, or the effective date of the 1985-87 biennial budget act, whichever is later.

History: 1979 c. 356.

977.01 Definitions. In this chapter, unless the context requires otherwise, "board" means the public defender board.

History: 1977 c. 29.

977.02 Board; duties. The board shall:

(1) Appoint the state public defender and establish the state public defender's salary under s. 20.923 (4) (d) 10m.

(2) Submit the budget of the state public defender to the governor after such budget is submitted to the board by the state public defender and approved by the board.

(3) Promulgate rules regarding the determination of indigency of persons entitled to be represented by counsel, including the time period in which the determination must be made.

(4) 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.

(6) Promulgate rules to accommodate the handling of certain potential conflict of interest cases by the office of the state public defender. The rules shall not provide for the automatic referral of all potential conflict of interest cases to private counsel.

(7) Review 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.

(7m) Establish agreements with the state bar association, local bar associations, law firms and private counsel designed to encourage a certain amount of legal representation under

this chapter without compensation as a service to the state.

(8) Perform all other duties necessary and incidental to the performance of any duty enumerated in this chapter.

History: 1977 c. 29; 1979 c. 221, 356; 1981 c. 20.

977.03 Board; powers. The board may remove the state public defender pursuant to the procedure under s. 977.05 (2). The board may enter into contracts with federal governmental agencies and local public defender organizations for the provision of legal services under this chapter.

History: 1977 c. 29.

977.04 Board; restrictions. The board shall not make any decision regarding the handling of any case nor interfere with the state public defender or any member of his or her staff in carrying out professional duties.

History: 1977 c. 29.

977.05 State public defender. (1) APPOINTMENT. The board shall appoint a state public defender, who shall be a member of the state bar of Wisconsin. The state public defender shall serve for a period of 5 years and shall continue until a successor is appointed, except that at the conclusion of the 5-year term of the state public defender in office as of July 1, 1980, the state public defender shall be appointed to serve at the pleasure of the board. He or she shall devote full time to the performance of duties as state public defender.

(2) **REMOVAL.** During a 5-year term commencing prior to July 1, 1980, the state public defender may be discharged only for cause by the board after a public hearing. If the state public defender is serving at the pleasure of the board, he or she is subject to removal under s. 17.07.

(3) **SALARY.** The salary of the state public defender shall not be decreased while he or she serves in that position.

(4) DUTIES. The state public defender shall:

(a) Supervise the operation, activities, policies and procedures of the office of the state public defender.

(am) Establish a case management system for use by the trial and appellate staff attorneys of the office of the state public defender. The system shall require the attorneys to record time spent on each case and to classify or describe the type of work done. The public defender shall comply with this paragraph by September 1, 1984.

(b) Be the chief legal officer of the office of the state public defender and make all final decisions regarding the disposition of any case handled by the office.

(c) Prepare and submit to the board for its approval the biennial budget of the office of the state public defender.

(d) Prepare and submit to the board for its approval such personnel and employment policies as the board shall require.

(e) Prepare and submit to the board and such other persons as may be appropriate an annual report of the activities of the office in such form as the board shall direct.

(f) Determine when and where it is necessary to establish offices for the state public defender and arrange for the rental of such space consistent with the policy and procedure of the department of administration.

(g) In accordance with the standards under pars. (h) and (j), accept referrals from judges, courts or appropriate state agencies for the determination of indigency. If a referral is accepted and if the person is determined to be indigent in full or in part, the state public defender shall appoint counsel in accordance with contracts and policies of the board, and inform the referring judge, court or agency of the name and address of the specific attorney who has been assigned to the case.

(h) Accept requests for legal services from indigent persons entitled to counsel under s. 967.06 or otherwise so entitled under the constitution or laws of the United States or this state and provide such persons with legal services when, in the discretion of the state public defender, such provision of legal services is appropriate.

(i) Provide legal services in:

1. Cases involving persons charged with a crime against life under ss. 940.01 to 940.12.
2. Cases involving persons charged with a felony not specified under subd. 1.
3. Cases involving persons charged with a misdemeanor not specified under subd. 1.
4. Cases involving persons subject to emergency detention or involuntary civil commitment under ch. 51.

5. Cases involving children subject to adjudication as a delinquent.

7. Cases involving paternity determinations under ch. 767 where the state is the petitioner under s. 767.45 (1) (g) or where the petitioner is represented by the district attorney, corporation counsel or other state or county attorneys under s. 767.45 (6).

(j) At the request of any person determined by the state public defender to be indigent or upon referral of any court, prosecute a writ of error, appeal, action or proceeding for habeas corpus or other postconviction or post-commitment remedy or attack the conditions of confinement on behalf of the person before any court, if the state public defender determines the case should be pursued.

(k) Represent members of the staff of the office of the state public defender who are named as defendants in lawsuits arising from their duties within the office. The attorney general may also, if appropriate, represent such staff members in such litigation. In cases where a member could be represented by either the public defender or the attorney general, the public defender shall determine who shall represent the member.

(l) Commence actions in the name of the state public defender or any client or group of clients to seek declaratory judgment on any matter of concern to persons being represented by the office.

(m) Perform all other duties necessary or incidental to the performance of any duty enumerated in this chapter.

(5) POWERS. The state public defender may:

(a) Delegate the legal representation of any person to any member of the state bar of Wisconsin certified under s. 977.08.

(b) Designate persons as representatives of the state public defender for the purpose of making indigency determinations and appointing counsel, if applicable.

(c) Negotiate contracts with the United States or any executive, legislative or judicial branch thereof to provide legal services to persons appearing before the federal district courts located in this state or who are incarcerated in federal custody in this state and to take whatever legal action such representation requires, including appeal or the commencement of any appropriate original actions.

(d) Negotiate contracts with local public defender organizations as directed by the board.

History: 1977 c. 29; 1979 c. 34, 352, 356; 1981 c. 20, 27, 289; 1983 a. 377

Judicial Council Note, 1981: Reference in sub. (4) (j) to a "writ" of habeas corpus has been removed because the remedy is now available in an ordinary action. See s. 781.01, stats., and the note thereto. [Bill 613-A]

Where court of appeals refers case under (4) (j), state public defender must explain its decision to court within reason.

able time. *State v Alston*, 92 W (2d) 893, 288 NW (2d) 866 (Ct. App. 1979).

Public defender has discretion under (4) (j) to refuse appointment for indigents in conditions of confinement cases and in cases seeking post-conviction and post-commitment remedies where there is no absolute right to counsel. 71 Atty Gen. 211.

Public defender may represent indigent material witnesses subject to 969.01 (3) bail provisions so long as this does not create conflict of interest with another client, but may not represent indigent in civil forfeiture action unless that action is reasonably related to one for which indigent is entitled to counsel. 72 Atty Gen. 61.

Public defender who declined to pursue frivolous appeal did not violate prisoner's constitutional rights. *Polk County v Dodson*, 454 US 312 (1981).

977.06 Personnel. (1) APPOINTMENT. The state public defender shall appoint all staff necessary for the carrying out of the duties of the office, all of whom shall be under the classified service except 2 division administrators and the attorney positions in the office. The state public defender shall designate one of the division administrators as the deputy state public defender.

History: 1977 c. 29; 1979 c. 34, 356.

977.07 Determination of indigency. (1) (a) Determination of indigency for persons entitled to counsel shall be made as soon as possible and shall be in accordance with the rules promulgated by the board under s. 977.02 (3).

(b) For referrals not made under ss. 809.30 and 974.06:

1. A representative of the state public defender is responsible for making indigency determinations unless the county becomes responsible under subds. 2 and 3.

2. On or before October 1, 1980, counties not covered under s. 977.08 (5) (a) may decide by resolution to be responsible for indigency determinations under this paragraph beginning January 1, 1981.

3. On and after October 1, 1980, counties covered under s. 977.08 (5) (a) are responsible for making indigency determinations. On and after January 1, 1981, counties enacting ordinances under subd. 2 are responsible for making indigency determinations. The county board for the county shall designate any of the following to make indigency determinations:

a. The county social service department or public welfare department or the corporation counsel.

b. With the approval of the state public defender, any other office, officer, board, department or agency. If the designee is not a county office, officer, board, department or agency, the county board must have the approval of the designee.

(bn) Notwithstanding par. (b), if the state public defender board determines that timeliness standards under s. 977.02 (3) are not being met or that there is a pattern of improper denial

of indigency findings in a county, the state public defender board shall transfer indigency determination authority to the state public defender.

(c) For all referrals made under ss. 809.30 and 974.06 (3) (b), a representative of the state public defender shall determine indigency.

(d) If the representative of the state public defender or the county designee determines that a person is indigent, the case shall be referred to or within the office of the state public defender for assignment of counsel under s. 977.08.

(2) The representative of the state public defender or the authority for indigency determinations specified under s. 977.07 (1) making a determination of indigency shall ascertain the assets of the person which exceed the amount needed for the payment of reasonable and necessary expenses incurred, or which must be incurred to support the person and the person's immediate family. The assets shall include disposable income, cash in hand, stocks and bonds, bank accounts and other property which can be converted to cash within a reasonable period of time and is not needed to hold a job, or to shelter, clothe and care for the person and the person's immediate family. Assets which cannot be converted to cash within a reasonable period of time, such as a person's home, car, household furnishings, clothing and other property which has been declared exempt from attachment or execution by law, shall be calculated to be assets equivalent in dollars to the amount of the loan which could be, in fact, raised by using these assets as collateral. If the person's assets, less reasonable and necessary living expenses, are not sufficient to cover the anticipated cost of effective representation when the length and complexity of the anticipated proceedings are taken fully into account, the person shall be determined to be indigent in full or in part. The determination of the ability of the person to contribute to the cost of legal services shall be based upon specific written standards relating to income, assets and the anticipated cost of representation. If found to be indigent in full or in part, the person shall be promptly informed of the state's right to recoupment under s. 48.275 (2) or 757.66, and the possibility that such payment of attorney fees may be made a condition of probation, should the person be placed on probation. Furthermore, if found to be indigent in part, the person shall be promptly informed of the extent to which he or she will be expected to pay for counsel, and whether such payment shall be in the form of a lump sum payment or periodic payments. The payment and payment schedule shall be set forth in writing. Payments for services of the state public defender or other

counsel provided under this chapter shall be paid to the state public defender for deposit in the state treasury. Under this subsection, reasonable and necessary living expenses equal the applicable payment amount under s. 49.19 (1) (a) 1 plus other specified, emergency or essential costs and the cost of posting bond to obtain release. The representative or authority making the determination of indigency shall consider any assets of the spouse of the person claiming to be indigent as if they were assets of the person, unless the spouse was the victim of a crime allegedly committed by the person.

(3) A circuit court may review any indigency determination upon its own motion or the motion of the defendant and shall review any indigency determination upon the motion of the district attorney or the state public defender.

(4) The state public defender shall provide reimbursement from the appropriation under s. 20.550 (1) (e) for costs of counties regarding indigency determinations.

History: 1977 c. 29; 1979 c. 175 s. 53; 1979 c. 356; 1981 c. 20 s. 1833, 2202 (41) (a)

977.08 Appointment of counsel. (1) If the representative or the authority for indigency determinations specified under s. 977.07 (1) refers a case to or within the office of the state public defender, the state public defender shall assign counsel according to subs. (3) to (6). If a defendant makes a request for change of attorney assignment, the change of attorney must be approved by the circuit court.

(2) All attorneys in a county shall be notified in writing by the state public defender that a set of lists is being prepared of attorneys willing to represent indigent clients in the following:

(a) Cases involving persons charged with a crime against life under ss. 940.01 to 940.12.

(b) Cases involving persons charged with a felony not specified under par. (a).

(c) Cases involving persons charged with a misdemeanor not specified under par. (a).

(d) Cases involving persons subject to emergency detention or involuntary civil commitment under ch. 51.

(e) Cases involving children subject to adjudication as a delinquent.

(f) Cases involving persons attacking the conditions of their confinement.

(g) Cases involving persons entitled to counsel under ch. 48.

(h) Cases involving paternity determinations as provided in s. 767.52.

(3) (a) Attorneys notified under sub. (2) shall have a reasonable time to submit their names for inclusion on any or all of the lists. Attorneys shall, in submitting their names, set forth their legal education and experience which qualifies

them to provide representation in the types of cases they have expressed an interest in handling. The state public defender shall compile the names and qualifications submitted, and submit such names and qualifications to the district attorney of that county, all judges presiding regularly in that county and the president of the county bar association. Such persons may submit written comments on the attorneys named on such lists.

(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.

(c) A person appointed from the set of lists prepared under par. (b) shall be appointed in order from the top of each list; if any attorney thus appointed states in writing that he or she cannot accept the appointment, he or she shall be placed on the bottom of the list, and the attorney thus elevated to the top of the list shall be appointed.

(d) Whenever the director of a local public defender organization is appointed as counsel, he or she may assign the case to any qualified attorney or attorneys employed by the local public defender organization.

(e) An attorney may be appointed without regard to pars. (c) and (d) if the attorney is currently or has previously represented the defendant. Any appointment out of order shall serve in lieu of an appointment in the regular order.

(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 rate 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).

(4m) Private local attorneys shall be paid \$35 per hour for time spent in court and \$25 per hour for other time spent related to a case.

(5) Except as provided in sub. (6), the percentage of cases under sub. (2) shall be as follows:

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(a) In Buffalo, Burnett, Calumet, Crawford, Douglas, Green, Lafayette, Langlade, Lincoln, Marinette, Marquette, Menominee, Monroe, Oconto, Pepin, Pierce, Price, Rusk, Sauk, Sawyer, Sheboygan, Taylor, Trempealeau, Vernon and Washburn counties, 100% of the cases shall be handled by private counsel.

(b) For the counties not specified in par. (a), not less than 75% of the total cases shall be handled by the office of the state public defender and the balance shall be handled by private counsel.

(f) Each county specified in subds. 1 to 3 shall establish a sum sufficient appropriation to cover its costs under this paragraph. If the county elected under s. 59.077, 1979 stats., to be covered under par. (a), the method of indigency determination under s. 977.07 (1) (b) 3 shall be established by the state public defender board, and the county board's ordinance shall be in accordance with that method. The county is liable for all costs under this chapter for trial representation, including costs under sub. (6) (b), for that county for vouchers submitted by private counsel between July 1, 1981, and June 30, 1983, which exceed the amount specified in this paragraph:

1. Douglas: \$326,200.
2. Monroe: \$143,000.
3. Sheboygan: \$300,800.

(6) (a) The percentage requirements under sub. (5) do not apply to cases under s. 809.30 or 974.06.

(b) The percentage requirements under sub. (5) need not be complied with if:

1. There are no available private counsel who are certified under sub. (3) (b) to handle the case.

2. The client is a member of a racial or ethnic group specified under 29 CFR 1607.4B in effect on July 1, 1980 and the county is covered under sub. (5) (a). In that case, the client may request that an attorney from the office of the state public defender be assigned the case, and the state public defender may do so.

History: 1977 c. 29, 354; 1979 c. 352, 356; 1981 c. 20; 1983 a. 377.

977.09 Confidentiality of files. The files maintained by the office of the state public defender which relate to the handling of any case shall be considered confidential and shall not be open to inspection by any person unless authorized by law, court order, the board or the state public defender.

History: 1977 c. 29

977.10 Reports on recoupment and repayment. On or before each January 15, the state public defender shall report to the joint committee on finance on the status of reimbursement for or recoupment of payments under ss. 48.275, 757.66 and 977.07 (2). The department of justice, district attorneys, circuit courts and applicable county agencies shall cooperate by providing any necessary information to the state public defender.

History: 1983 a. 377.