



Wisconsin State Public Defender

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Report From Agency

PROPOSED ORDER OF THE STATE OF WISCONSIN OFFICE OF THE PUBLIC DEFENDER CREATING RULES

CR 10-22

The Office of the State Public Defender proposes an order to create PD8, related to payments for copies of discovery material provided to staff and private attorneys appointed to represent state public defender clients in legal proceedings.

REPORT OF THE STATE PUBLIC DEFENDER ON THE FINAL RULE DRAFT

This report is submitted to the chief clerks of the Senate and Assembly for referral to the appropriate standing committees. The report consists of the following parts:

- Part 1—Analysis prepared by the Office of the State Public Defender
- Part 2—Rule text in final draft form.
- Part 3—Recommendations of the Legislative Council.
- Part 4—Analysis prepared pursuant to the provisions of s. 227.19(3), Stats.

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PART 1

Analysis Prepared by the Wisconsin State Public Defender

Statutes Interpreted

Sections 20.001(3)(a), 971.23 (10), 977.02 (9), and 980.036 (10)

Statutory Authority

Sections 20.001(3)(a), 971.23 (10), 977.02 (9) and 980.036 (10)

Explanation of Agency Authority

Wis. Stats. s. 977.02 (9), effective July 1, 2009, directs the State Public Defender Board to promulgate rules establishing the maximum fees the state public defender may pay for copies of materials that are subject to discovery in cases in which the state public defender or counsel assigned under s. 977.08 provides representation.

Related Statute or Rule

Emergency Rule 09-26 was promulgated to address the shortfall in the state public defender's appropriation for transcripts, discovery, and interpreters in both years of the current biennium.

Plain Language Analysis of the Rule

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 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. Subsections 971.23 (10) and 980.036 (10) require the state public defender to pay for the copies of these discovery materials.

2009 Wisconsin Act 28 requires the state public defender board to 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 is intended to address two problems related to the state public defender appropriation for transcripts, interpreter fees, and discovery costs: 1) this appropriation has been insufficient since Fiscal Year 2001-2002, and 2) local governments (counties and municipalities) charge 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 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 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 that the state public defender may 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.

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 single-sided page and begin to pay \$0.35 per double-sided 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.

Effect on Small Business, and If Applicable, any Analysis and Supporting Documents Used to Determine Effect on Small Business or in Preparation of Economic Impact Report

Small businesses are not affected by the rule.

Fiscal effect:

Counties and municipalities are currently billing for discovery, although the rates vary among the various jurisdictions in the State. This rule standardizes the amounts paid to municipalities.

Economic Impact Report: None
Report Prepared by DOA: None
Energy impact report: None

Agency contact person and copies of proposed rule: To view the rule online, go to: <http://www.wisspd.org/PropAdminRulesPD8.pdf>; or, you may contact Kathy Pakes at pakesk@opd.wi.gov or by telephone at (608) 266-0087 to request a copy (at no cost) of the rule and fiscal note be sent to you by U.S. mail.

PART 2
TEXT OF RULE

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 single-sided page, or \$0.35 per double-sided 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 Temporary reduction or suspension of payment 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 rule first applies to discovery material charges that are submitted to the public defender for payment on the effective date of this rule.

SECTION 3. EFFECTIVE DATE.

This rule shall take effect on the first day of the month commencing after the date of publication in the Wisconsin administrative register, as provided in s. 227.22 (2) (intro.), Stats.

**PART 4
CR10-22**

ANALYSIS OF FINAL DRAFT OF PD8

(a) **Basis and Purpose of Rule:** 2009 Wisconsin Act 28 requires the state public defender board to promulgate administrative rules establishing the maximum fees that the state public defender may pay for copies of discovery materials in any format. This directive is intended to address two problems related to the state public defender appropriation for transcripts, interpreter fees, and discovery costs: 1) this appropriation has been insufficient since Fiscal Year 2001-2002, and 2) local governments (counties and municipalities) charge 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.

(b) **Modifications as a Result of Testimony at Public Hearing.** The public hearing was held on March 29, 2010. No modifications were made as a result of testimony at the hearing.

(c) **List of Persons who appeared at Public Hearing*:**

Wendy Carns appeared on behalf of the Sauk County Sheriff's Department.

*Note: On November 16, 2009 a public hearing was held on ER 09-26, which is almost identical to the permanent rule. At that hearing, one person appeared: Joe DeCecco, Sheboygan County District Attorney.

(d) **Summary of public comments* and agency response to those comments:**

No written comments were submitted for the permanent rule. Ms. Carns, who attended the public hearing for informational purposes, indicated that the proposed rates were similar to what the Sauk County Sheriff's Department currently pays.

*At the November 16, 2009 hearing on the emergency rule, District Attorney DeCecco testified that he felt the rates established in the emergency rule were too low, and that according to a time study his office performed, the SPD should pay 56.8 cents per page of discovery. District Attorney DeCecco indicated that the SPD should pay \$ 0.25 per page and \$15 per CD, DVD, or VHS video.

Agency response: The state public defender board considered the comments and concluded that the amounts set in the proposed rule were reasonable under the circumstances. The SPD does not have a sum sufficient appropriation for discovery costs and previous requests for additional discovery funds have been unsuccessful. (See the *Plain Language Analysis* and *Summary of Methodology* sections above.)

(e) **Explanation of any Changes Made to the Plain Language Analysis or Fiscal Estimate:**

Changes were made to the *Plain Language Analysis* and to the title of proposed section PD 8.03 to clarify the source of the SPD's authority to suspend or reduce payments.

(f) **Response to Legislative Council Recommendations:**

1. Statutory Authority: What statutory authority allows the state public defender to temporarily reduce or suspend payments required under ss. 971.23(10), Stats. as contained in s. PD 8.03?

Response: Section 20.001(3)(a) provides that "[a]nnual appropriations ... are expendible only up to the amount shown in the schedule and only for the fiscal year for which made."