

CHAPTER 977

STATE PUBLIC DEFENDER

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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.

(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 and the criteria to be used to determine indigency and partial indigency.

(4) Promulgate rules regarding the determination of payments required of persons found to be indigent in part.

(5) 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.

(7r) (a) Promulgate rules to allow the reduction of payment rates under s. 977.08 (4m) for any of the following:

1. A reduction of not more than \$2 per hour for time spent in court.
2. A reduction of not more than \$2 per hour for time spent out of court, excluding travel.

(b) Any reduction under par. (a) applies to cases assigned on or after the effective date of the applicable rule promulgated under par. (a).

(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; 1985 a. 29; 1987 a. 82, 399; 1989 a. 31.

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.

(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.

(cm) Appoint one deputy, the number of division administrators specified in s. 230.08 (2) (e) 8m and all staff attorneys in the unclassified service and appoint all other employees in the classified service.

(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 that is punishable by imprisonment but is 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 s. 48.18 or to adjudication as a delinquent and persons subject to s. 48.366.

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. The state public defender must pursue the case of any indigent person entitled to counsel under s. 971.17 (7) (b) 1.

(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.

(e) Sponsor conferences and training for attorneys and may charge tuition for attendance at the conferences and

training. All moneys received shall be deposited in s. 20.550 (1) (i).

(6) RESTRICTION. The state public defender shall not provide legal services or assign counsel for cases involving a person subject to contempt of court proceedings involving the alleged failure of the person to pay a forfeiture to a county or municipality.

History: 1977 c. 29; 1979 c. 34, 352, 356; 1981 c. 20, 27, 289; 1983 a. 377; 1987 a. 27; 1989 a. 12, 31, 56, 334.

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

Public defender's refusal to act under (4) (j) was explained in sufficient detail to demonstrate proper exercise of discretion. State ex rel Payton v. Kolb, 135 W (2d) 202, 400 NW (2d) 285 (Ct. App. 1986)

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).

977.07 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, a representative of the state public defender is responsible for making indigency determinations unless the county became responsible under s. 977.07 (1) (b) 2 or 3, 1983 stats., for these determinations. Subject to the provisions of par. (bn), those counties may continue to be responsible for making indigency determinations. Any such county may change the agencies or persons who are designated to make indigency determinations only upon the approval of the state public defender.

(bn) Notwithstanding par. (b), if the state public defender board determines that 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 in the county to the state public defender. In addition, if less than 100% of the cases at the trial level are assigned to private bar attorneys in a county, the public defender board may transfer indigency determination authority in the county 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, and may, unless a request for redetermination has been filed under s. 809.30 (2) (d) or the defendant's request for representation states that his or her financial circumstances have materially improved, rely upon a determination of indigency made for purposes of trial representation under this section.

(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) (a) The representative of the state public defender or the authority for indigency determinations specified under sub. (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. Assets also include any money expended by the person to post bond to obtain release regarding the current alleged offense. 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 payment or recoupment under s. 48.275 (2), 757.66 or 973.06 (1) (e), and the possibility that the 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 the payment shall be in the form of a lump sum payment or periodic payments. The person shall be informed that the payment amount may be adjusted if his or her financial circumstances change by the time of sentencing. 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 made pursuant to this subsection 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 (11) (a) 1 plus other specified, emergency or essential costs. 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.

(b) Unless the court has made an adjustment under s. 973.06 (1) (e), upon determination at the conclusion of a case that a person's financial circumstances are changed, the state public defender may adjust the amount of payment for counsel under par. (a) in accordance with par. (a) and sub. (1) (a).

(c) A person seeking to have counsel assigned for him or her under s. 977.08 shall certify under oath that he or she has not disposed of any assets for the purpose of qualifying for that assignment of counsel. If the representative or authority making the indigency determination finds that any asset was disposed of for less than its fair market value for the purpose of obtaining that assignment of counsel, the asset shall be counted under par. (a) at its fair market value at the time it was disposed of, minus the amount of compensation received for the asset.

(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. The court, district attorney or state public defender may summon the defendant. The defendant may be compelled to testify only as to his or her financial eligibility under this section. If the

defendant refuses to testify, the court may find the defendant is not eligible to have counsel assigned for him or her under s. 977.08. If the defendant testifies at this hearing, his or her testimony as to his or her financial eligibility under this section may not be used directly or indirectly in any criminal action, except in a criminal action regarding a subsequent charge of perjury or false swearing.

(3m) (a) The state public defender shall promptly release a copy of any affidavit or other information provided by a person regarding financial eligibility under this section only if the state public defender or a circuit court finds all of the following:

1. The person is not eligible to have counsel assigned under s. 977.08.

2. The person disposed of an asset for less than its fair market value for the purpose of obtaining assignment of counsel.

(b) Paragraph (a) does not limit the authority of the state public defender to release a copy of the affidavit or other information under other circumstances.

History: 1977 c. 29; 1979 c. 175 s. 53; 1979 c. 356; 1981 c. 20 s. 1833, 2202 (41) (a); Sup. Ct. Order, 123 W (2d) xv; 1985 a. 29; 1987 a. 27, 61, 399.

Judicial Council Note, 1984: Sub. (1) (c) is amended by dispensing with redeterminations of indigency unless the notice under s. 809.30 (2) (b) indicates that the defendant's financial circumstances have materially improved or the district attorney timely requests a redetermination under s. 809.30 (2) (d). The intent is to limit the cost and delay associated with indigency redeterminations to cases in which there is reason to believe that the defendant no longer qualifies for public defender assistance. [Re order effective July 1, 1985]

Defendant must prove by preponderance of evidence inability to afford counsel. *State v. Buelow*, 122 W (2d) 465, 363 NW (2d) 255 (Ct. App. 1984).

See note to 967.06, citing 78 Atty. Gen. 133

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) and (4). 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 that is punishable by imprisonment but is 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 s. 48.18 or to adjudication as a delinquent and persons subject to s. 48.366.

(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 rates 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) For cases assigned prior to December 1, 1987, private local attorneys shall be paid \$40 per hour for time spent in court; \$30 per hour for time spent out of court, excluding travel, related to a case; and \$25 per hour for time spent in travel related to a case if any portion of the trip is outside the county in which the attorney's principal office is located. Unless otherwise provided by a rule promulgated under s. 977.02 (7r), for cases assigned on or after December 1, 1987, private local attorneys shall be paid \$45 per hour for time spent in court; \$35 per hour for time spent out of court, excluding travel, related to a case; and \$25 per hour for time spent in travel related to a case if any portion of the trip is outside the county in which the attorney's principal office is located.

(5) (a) The purpose of this subsection is to provide standards for use in budgetary determinations.

(b) Any of the following constitutes an annual caseload standard for an assistant state public defender in the subunit responsible for trials:

1. Felony cases: 184.5.

2. Misdemeanor cases: 492.

3. Cases not covered under subd. 1 or 2: 246.

(c) At the trial level, 76% of the felony cases shall be handled within the office.

History: 1977 c. 29, 354; 1979 c. 352, 356; 1981 c. 20; 1983 a. 377; 1985 a. 29 ss. 2473 to 2476a, 3202 (42); 1985 a. 120; 1987 a. 27, 399; 1989 a. 12.

977.085 Quarterly report procedure. (1) The board shall provide quarterly reports to the department of administration and the joint committee on finance regarding all of the following:

(a) Private bar and staff case loads at the trial and appellate levels and expenditures of moneys under s. 20.550 (1) (b) to (d) for the current fiscal year.

(b) Projections for the private bar and staff case loads at the trial and appellate levels and for expenditures of moneys under s. 20.550 (1) (b) to (d) for the remainder of the current fiscal year and for the next fiscal year.

(1m) The projections under sub. (1) (b) shall include the number of cases projected to be assigned to the private bar and the number of cases for which reimbursement will be made under s. 20.550 (1) (d).

(2) If the projections under sub. (1) (b) indicate that moneys are being expended under s. 20.550 (1) (d) at a rate which will deplete the appropriation prior to the end of the current fiscal year, the board shall include in the report a plan to address the problem. The plan shall include proposals for one or more of the following:

(a) Agency actions, including whether the reduced payment rates established by rules promulgated under s. 977.02 (7r) (a) will be put into effect.

(b) Requests for appropriation changes under s. 13.101.

(c) Legislation.

History: 1987 a. 27; 1989 a. 31.

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.