

CHAPTER 977

STATE PUBLIC DEFENDER

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Cross-reference: See definitions in s. 967.02.

Cross-reference: See also PD, Wis. adm. code.

977.01 Definitions. In this chapter, unless the context requires otherwise:

(1) “Board” means the public defender board.

(2) “Public assistance” means relief provided by counties under s. 59.53 (21), Wisconsin works under ss. 49.141 to 49.161, medical assistance under subch. IV of ch. 49, low-income energy assistance under s. 16.27, weatherization assistance under s. 16.26, and the food stamp program under 7 USC 2011 to 2029.

History: 1977 c. 29; 2003 a. 33 ss. 1913, 2776, 2777.

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.

(2m) Promulgate rules regarding eligibility for legal services under this chapter, including legal services for persons who are entitled to be represented by counsel without a determination of indigency, as provided in s. 48.23 (4), 51.60, 55.105, 938.23 (4), or 980.03 (2) (a).

(3) Promulgate rules regarding the determination of indigency of persons entitled to be represented by counsel, other than children who are entitled to be represented by counsel under s. 48.23 or 938.23 or persons who are entitled to be represented by counsel under s. 51.60, 55.105, or 980.03 (2) (a), including the time period in which the determination must be made and the criteria to be used to determine indigency and partial indigency. The rules shall specify that, in determining indigency, the representative of the state public defender shall do all of the following:

NOTE: Sub. (3) (intro.) is shown as affected by 2017 Wis. Acts 184 and 359 and as merged by the legislative reference bureau under s. 13.92 (2) (i).

(a) Consider the anticipated costs of effective representation for the type of case in which the person seeks representation.

(b) Subject to par. (d), treat assets as available to the person to pay the costs of legal representation if the assets exceed \$2,500 in combined equity value. In determining the combined equity value of assets, the representative of the state public defender shall exclude the equity value of vehicles up to a total equity value of \$10,000 and shall exclude the first \$30,000 of the equity value of the home that serves as the individual’s homestead.

(c) Subject to par. (d), treat income as available to the person to pay the costs of legal representation only if the gross income exceeds 115 percent of the federal poverty guideline, as defined in 42 USC 9902 (2) (2011). In calculating gross income under this paragraph, the representative of the state public defender shall include all earned and unearned income of the person, except any amount received under section 32 of the Internal Revenue Code, as defined in s. 71.01 (6), any amount received under s. 71.07 (9e), any payment made by an employer under section 3507 of the Internal Revenue Code, as defined in s. 71.01 (6), any student financial aid received under any federal or state program, any scholarship used for tuition and books, and any assistance

received under s. 49.148. In determining the earned and unearned income of the individual, the representative of the state public defender may not include income earned by a dependent child of the person.

(d) Treat assets or income of the person’s spouse as the person’s assets or income, unless the spouse was the victim of a crime the person allegedly committed.

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

(4m) Promulgate rules for payments to the state public defender under s. 977.075.

(4r) Promulgate rules that establish procedures to provide the department of administration with any information concerning the collection of payment ordered under s. 48.275 (2), 757.66, 938.275 (2), 973.06 (1) (e) or 977.076 (1).

(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 for cases assigned by the state public defender 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.

(9) Promulgate rules establishing the maximum fees that the state public defender may pay for copies, in any format, of materials that are subject to discovery in cases in which the state public defender or counsel assigned under s. 977.08 provides legal representation. In promulgating the rules under this subsection, the board shall consider information regarding the actual, necessary, and direct cost of producing copies of materials that are subject to discovery.

History: 1977 c. 29; 1979 c. 221, 356; 1981 c. 20; 1985 a. 29; 1987 a. 82, 399; 1989 a. 31; 1993 a. 451; 1995 a. 27, 77; 2007 a. 20; 2009 a. 28, 164; 2011 a. 32; 2017 a. 184, 359; s. 13.92 (2) (i); s. 35.17 correction in (3) (intro.).

Cross-reference: See also PD, Wis. adm. code.

977.03 Board; powers. (1) 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.

(2) The board may promulgate rules to establish exceptions to limiting the amount that may be reimbursed for investigative or expert services under s. 977.05 (4r).

(2m) The board may promulgate rules that establish procedures to collect payment ordered under s. 48.275 (2), 757.66, 938.275 (2), 973.06 (1) (e) or 977.076 (1) from a prisoner's prison financial account.

(3) The state public defender may establish procedures by rule under which the state public defender may appoint attorneys without regard to s. 977.08 (3) (c) and (d) based on the state public defender's evaluation of the attorneys' performance.

History: 1977 c. 29; 1991 a. 269; 1993 a. 437; 1995 a. 27, 77.

Cross-reference: See also PD, Wis. adm. code.

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 of persons who claim or appear

to be indigent. If a referral is accepted and if the person is determined to be indigent, 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.

(gm) In accordance with the standards under pars. (h) and (i), accept referrals from judges and courts for the provision of legal services without a determination of indigency of children who are entitled to be represented by counsel under s. 48.23 or 938.23 or persons who are entitled to be represented by counsel under s. 51.60, 55.105, or 980.03 (2) (a), appoint counsel in accordance with contracts and policies of the board, and inform the referring judge or court of the name and address of the specific attorney who has been assigned to the case.

NOTE: Par. (gm) is shown as affected by 2017 Wis. Acts 184 and 359 and as merged by the legislative reference bureau under s. 13.92 (2) (i).

(h) Accept requests for legal services from children who are entitled to be represented by counsel under s. 48.23 or 938.23 or persons who are entitled to be represented by counsel under s. 51.60, 55.105, or 980.03 (2) (a) and from indigent persons who are entitled to be represented by counsel under s. 967.06 or who are 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.

NOTE: Par. (h) is shown as affected by 2017 Wis. Acts 184 and 359 and as merged by the legislative reference bureau under s. 13.92 (2) (i).

(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 who are entitled to counsel or are provided counsel at the discretion of the court under s. 48.23 or 938.23.

7. Cases involving paternity determinations, as specified under s. 767.83, in which the state is the petitioner under s. 767.80 (1) (g) or in which the action is commenced on behalf of the child by an attorney appointed under s. 767.407 (1) (c).

8. Cases involving individuals who are subject to petitions for protective placement or involuntary administration of psychotropic medication under ch. 55.

9. Cases involving persons who are subject to petitions under ch. 980.

(j) Subject to sub. (6) (e) and (f), 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 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. or 980.03 (2) (a).

(jm) At the request of an inmate determined by the state public defender to be indigent or upon referral of a court under s. 302.113 (9g) (j), represent the inmate in proceedings for modification of a bifurcated sentence under s. 302.113 (9g) before a program review committee and the sentencing 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.

(4r) SERVICES REIMBURSEMENT. (a) The state public defender may not provide reimbursement for investigative or expert services provided in a case assigned to a staff attorney or to private counsel under s. 977.08 unless the staff attorney or private counsel has received authorization from the state public defender to retain an investigator or expert.

(b) An authorization under par. (a) shall state a maximum amount that may be reimbursed, and the state public defender may not pay more than that amount except as allowed under the rules promulgated under s. 977.03 (2).

(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) RESTRICTIONS. (a) The state public defender may 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.

(b) The state public defender may not provide legal services or assign counsel for a person subject to contempt of court proceedings under s. 767.77 or 767.78 for failure to pay child or family support, if any of the following applies:

1. The action is not brought by the state, its delegate under s. 59.53 (6) (a) or an attorney appointed under s. 767.407 (1) (c).

2. The judge or circuit court commissioner before whom the proceedings shall be held certifies to the state public defender that the person will not be incarcerated if he or she is found in contempt of court.

(c) The state public defender may not provide legal services or assign counsel for a person who files a motion to modify sentence under s. 973.19 (1) (a), or for a person who appeals, under s. 973.19 (4), the denial of a motion to modify sentence filed under s. 973.19 (1) (a), unless the person does one of the following:

1. Files the notice of intent to pursue postconviction relief within the time limit specified in s. 809.30 (2) (b) or, if the time limit specified in s. 809.30 (2) (b) is enlarged under s. 809.82 (2), within the time limit specified in the order enlarging time.

2. Files the motion to modify sentence under s. 973.19 (1) (a) within 20 days after the sentence or order is entered.

(f) The state public defender may not provide legal services or assign counsel in cases involving an appeal or postconviction motion under s. 809.30 (2) if the notice of intent to pursue postconviction relief is not filed within the time limit specified in s. 809.30 (2) (b) or, if the time limit specified in s. 809.30 (2) (b) is enlarged under s. 809.82 (2), within the time limit specified in the order enlarging time.

(g) The state public defender may not provide legal services or assign counsel in a proceeding under s. 973.09 (3) to modify the conditions of a probationer's probation unless all of the following apply:

1. The probationer is contesting the modification of the conditions of probation.

2. The state or the court seeks to modify the conditions of probation to include a period of confinement under s. 973.09 (4).

(h) The state public defender may not provide legal services or assign counsel in parole or extended supervision revocation proceedings unless all of the following apply:

1. The parolee or person on extended supervision is contesting the revocation of parole or extended supervision.

2. The department of corrections seeks to have the parolee or person on extended supervision imprisoned upon the revocation of parole or extended supervision.

(i) The state public defender may not provide legal services or assign counsel in probation revocation proceedings unless all of the following apply:

1. The probationer is contesting the revocation of probation.

2. The department of corrections seeks to have the probationer imprisoned upon the revocation of probation or a stayed sentence of imprisonment will be imposed on the probationer upon the revocation of probation.

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; 1991 a. 263, 269; 1993 a. 318, 437, 451, 479, 481; 1995 a. 27, 77; 1997 a. 35, 283; 2001 a. 16, 61, 103, 109; 2005 a. 264; 2005 a. 443 s. 265; 2007 a. 20; 2009 a. 28; 2011 a. 38; 2017 a. 184, 359; s. 13.92 (2) (i); s. 35.17 correction in (4) (gm) and (h).

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]

Cross-reference: See also ch. PD 5, Wis. adm. code.

When the court of appeals refers a case under sub. (4) (j), representation is discretionary, and the public defender must explain its decision to the court in sufficient detail within a reasonable time. *State v. Alston*, 92 Wis. 2d 893, 288 N.W.2d 866 (Ct. App. 1979).

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

The public defender may not be ordered to represent non-indigent parties, except under unique and unusual circumstances. *State ex rel. Chiarkas v. Skow*, 160 Wis. 2d 123, 465 N.W.2d 625 (1990).

The public defender, not the county, was obligated to pay the costs of necessary expert witnesses hired by an appointed private attorney without prior approval, as required by rule. *Payment of Witness Fees in State v. Huisman*, 167 Wis. 2d 168, 482 N.W.2d 665 (Ct. App. 1992).

Sub. (4r) overrules the holding in *Huisman* that the public defender is liable for expert fees incurred by a private attorney without prior approval, but does not overrule *Huisman's* holding that the public defender, and not the county, is liable for expert services for indigent defendants. *Polk County v. State Public Defender*, 179 Wis. 2d 312, 507 N.W.2d 576 (Ct. App. 1993). See also *Polk County v. State Public Defender*, 188 Wis. 2d 665, 524 N.W.2d 389 (1994).

Read together, ss. 809.32 (4) and 977.05 (4) (j) create a statutory, but not constitutional, right to counsel in petitions for review and cases before any court, provided counsel does not determine the appeal to be without merit. If counsel fails to timely file a petition for review, the defendant may petition for a writ of habeas corpus and the supreme court has the power to allow late filing. *Schmelzer v. Murphy*, 201 Wis. 2d 246, 548 N.W.2d 45 (1996), 95–1096.

Although public defenders may be permitted to provide representation when the conditions of sub. (6) (h) are met, the statute does not require them to do so and does not mandate a per se right to assistance of counsel for filing a petition for certiorari review of an administrative appeal. However, petitioners were entitled to equitable relief when they timely asked counsel to file for certiorari, counsel promised to do so, and as a result of counsel's failure to timely file they were denied certiorari review. *Griffin v. Smith*, 2004 WI 36, 270 Wis. 2d 235, 677 N.W.2d 259, 01–2345.

The public defender has discretion under sub. (4) (j) to refuse appointment for indigents in conditions of confinement cases and in cases seeking postconviction and postcommitment remedies when there is no absolute right to counsel. 71 Atty. Gen. 211.

The public defender may represent an indigent material witness, subject to s. 969.01 (3) bail provisions, so long as that representation does not create a conflict of interest with another client, but it may not represent an indigent in a civil forfeiture action unless that action is reasonably related to one for which the indigent is entitled to counsel. 72 Atty. Gen. 61.

When the public defender declined to pursue a frivolous appeal, it did not violate the prisoner's constitutional rights. *Polk County v. Dodson*, 454 U.S. 312 (1981).

977.06 Indigency determinations; redeterminations; verification; collection. (1) **DUTIES.** The state public defender shall determine whether persons are indigent and shall establish a system to do all of the following:

(a) Verify the information necessary to determine indigency under rules promulgated under s. 977.02 (3). The information provided by a person seeking assigned counsel that is subject to verification shall include any social security numbers provided on

an application under sub. (1m), income records, value of assets, eligibility for public assistance, and claims of expenses.

(b) Redetermine indigency during the course of representation of persons receiving representation.

(c) Record the amount of time spent on each case by the attorney appointed under s. 977.08.

(d) Collect for the cost of representation from persons who are indigent or who have been otherwise determined to be able to reimburse the state public defender for the cost of providing counsel.

(1m) APPLICATION FOR REPRESENTATION. The state public defender shall request each person seeking to have counsel assigned for him or her under s. 977.08, other than a child who is entitled to be represented by counsel under s. 48.23 or 938.23, to provide the state public defender with his or her social security number and the social security numbers of his or her spouse and dependent children, if any.

(2) VERIFICATIONS. (a) A person seeking to have counsel assigned for him or her under s. 977.08, other than a child who is entitled to be represented by counsel under s. 48.23 or 938.23 or a person who is entitled to be represented by counsel under s. 51.60, 55.105, or 980.03 (2) (a), shall sign a statement declaring 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 rules promulgated under s. 977.02 (3) at its fair market value at the time it was disposed of, minus the amount of compensation received for the asset.

NOTE: Par. (a) is shown as affected by 2017 Wis. Acts 184 and 359 and merged by the legislative reference bureau under s. 13.92 (2) (i).

(am) A person seeking to have counsel assigned for him or her under s. 977.08, other than a child who is entitled to be represented by counsel under s. 48.23 or 938.23 or a person who is entitled to be represented by counsel under s. 51.60, 55.105, or 980.03 (2) (a), shall sign a statement declaring that the information that he or she has given to determine eligibility for assignment of counsel he or she believes to be true and that he or she is informed that he or she is subject to the penalty under par. (b).

NOTE: Par. (am) is shown as affected by 2017 Wis. Acts 184 and 359 and merged by the legislative reference bureau under s. 13.92 (2) (i).

(b) A person who makes a false representation that he or she does not believe is true for purposes of qualifying for assignment of counsel is guilty of a Class I felony.

(3) REDETERMINATIONS. (a) 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.

(b) The state public defender may petition a court that ordered payment under s. 757.66, 973.06 (1) (e) or 977.076 (1) to modify an order or judgment to adjust the amount of payment or the scheduled amounts at any time.

(c) Except as provided in ss. 48.275 (2) (b) and 938.275 (2) (b), an adjustment under this subsection shall be based on the person's ability to pay and on the fee schedule established by the board under s. 977.075 (3).

(4) OVERSIGHT. (a) 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 indi-

rectly in any criminal action, except in a criminal action regarding a subsequent charge of perjury or false swearing.

(b) The state public defender shall promptly release a copy of any statement, affidavit or other information provided by a person regarding financial eligibility under s. 977.07 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.

(bm) In response to a request for information under s. 49.22 (2m) made by the department of children and families or a county child support agency under s. 59.53 (5), the state public defender shall provide the name and address of an individual, the name and address of the individual's employer and financial information related to the individual, if the name, address or financial information is included in any statement, affidavit or other information provided by the individual regarding financial eligibility under s. 977.07 and if, at the time the request for information is made, the individual is represented by the state public defender or by counsel assigned under s. 977.08.

(c) Paragraphs (b) and (bm) do not limit the authority of the state public defender to release a copy of a statement, affidavit or other information regarding financial eligibility under s. 977.07 under other circumstances.

History: 1995 a. 27 ss. 7269 to 7272, 7274m to 7281; 1995 a. 77, 417; 1997 a. 191, 283; 2001 a. 109; 2003 a. 33; 2007 a. 20; 2009 a. 164; 2017 a. 184, 359; s. 13.92 (2) (i); s. 35.17 correction in (2) (a) and (am).

Cross-reference: See also ch. PD 3, Wis. adm. code.

Not Poor Enough: Why Wisconsin's System for Providing Indigent Defense is Failing. Velazquez—Aguilu. 2006 WLR 193.

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) and the system established under s. 977.06. No determination of indigency is required for a child who is entitled to be represented by counsel under s. 48.23 or 938.23 or a person who is entitled to be represented by counsel under s. 51.60, 55.105, or 980.03 (2) (a).

NOTE: Par. (a) is shown as affected by 2017 Wis. Acts 184 and 359 and merged by the legislative reference bureau under s. 13.92 (2) (i).

(b) For referrals not made under ss. 809.30, 974.06, and 974.07, 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 percent 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. 809.107, 809.30, 974.06 (3) (b) and 974.07 (11), except a referral of a child who is entitled to be represented by counsel under s. 48.23 or 938.23 or a person who is entitled to be represented by counsel under s. 51.60, 55.105, or 980.03 (2) (a), a representative of the state public defender shall determine indigency. For referrals made under ss. 809.107, 809.30 and 974.06 (3) (b), except a referral of a child who is entitled to be represented by counsel under s. 48.23 or 938.23 or a person who is entitled to be represented by counsel under s. 51.60, 55.105, or 980.03 (2) (a), the representative of the state public defender may, unless a request for redetermination

has been filed under s. 809.30 (2) (d) or the person'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.

NOTE: Par. (c) is shown as affected by 2017 Wis. Acts 184 and 359 and as merged by the legislative reference bureau under s. 13.92 (2) (i).

(d) If the representative of the state public defender or the county designee determines that a person is indigent or if no determination of indigency is required as provided in par. (a), the case shall be referred to or within the office of the state public defender for assignment of counsel under s. 977.08.

(2m) If the person is found to be indigent, the person shall be promptly informed of the state's right to payment or recoupment under s. 48.275 (2), 757.66, 938.275 (2), 973.06 (1) (e), or 977.076 (1), 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, 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. This subsection does not apply to persons who have paid under s. 977.075 (3m).

History: 1977 c. 29; 1979 c. 175 s. 53; 1979 c. 356; 1981 c. 20 s. 1833, 2202 (41) (a); Sup. Ct. Order, 123 Wis. 2d xi (1985); 1985 a. 29; 1987 a. 27, 61, 399; 1991 a. 39; 1993 a. 16, 451, 491; 1995 a. 27, 77; 2001 a. 16; 2005 a. 293; 2007 a. 20, 97; 2009 a. 164; 2017 a. 184, 359; s. 13.92 (2) (i); s. 35.17 correction in (1) (a) and (c).

Cross-reference: See also ch. PD 3, Wis. adm. code.

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]

The defendant must prove an inability to afford counsel by a preponderance of the evidence. *State v. Buelow*, 122 Wis. 2d 465, 363 N.W.2d 255 (Ct. App. 1984).

A determination of indigency by the public defender is not the end of a court inquiry of the right to counsel. *State v. Dean*, 163 Wis. 2d 503, 471 N.W.2d 310 (Ct. App. 1991).

In making its separate determination of whether a defendant is indigent for purposes of court-appointed counsel, the trial court should consider federal poverty guidelines. If a defendant has no assets and an income well below the poverty level, the trial court should set forth why it determined that the defendant could afford counsel. *State v. Nieves-Gonzales*, 2001 WI App 90, 242 Wis. 2d 782, 625 N.W.2d 913, 00–2138.

Under *Dean*, a trial court is only obligated to advise a defendant of the right to counsel. The trial court is not required to conduct a colloquy that includes specific advice to a defendant that the right to appointed counsel is broader than the right to counsel provided by the state public defender and includes the right to counsel appointed by the court and paid for by the county. *State v. Drexler*, 2003 WI App 169, 266 Wis. 2d 438, 669 N.W.2d 182, 02–1313.

The procedures set forth in *Dean* suggest that the inherent power of the circuit court shall be exercised to cover situations when a defendant cooperated with the SPD's financial analysis, was found not to be indigent under the legislative criteria, but based on the individual circumstances of the case, public justice, and sound policy was in fact indigent. The inherent power of the court should not be invoked when a defendant fails to seek SPD appointment, fails to cooperate with the SPD for the indigency assessment, or fails to submit the required information to make a proper assessment. A defendant in this position carries the burden of submitting proof to the circuit court to enable it to make such an assessment. *State v. Kennedy*, 2008 WI App 186, 315 Wis. 2d 507, 762 N.W.2d 412, 08–0435.

The state public defender may be denied access to jail inmates who have not requested counsel, and jail authorities need only provide by telephone that information necessary for the public defender to assess the need to make an indigency determination in person under s. 977.07 (1) for an inmate who has requested counsel and claims indigency. 78 Atty. Gen. 133.

977.075 Payment for legal representation. (1g) In this section, "client responsible for payment" means a client of the state public defender other than a client entitled to legal representation without a determination of indigency.

(3) The board shall establish by rule a fee schedule that sets the amount that a client responsible for payment shall pay for the cost of the legal representation if the client does not pay the applicable discount fee under sub. (3m). The schedule shall establish a fee for a given type of case, and the fee for a given type of case shall be based on the average cost, as determined by the board, for representation for that type of case.

(3m) The board shall establish by rule a fee schedule that sets the discount amount that a client responsible for payment may pay during a time period established by rule instead of paying the applicable fee under sub. (3). The fee schedule shall establish a discount fee for each type of case included in the schedule under sub. (3). If a client responsible for payment pays the applicable discount fee within the time period established under this section, the client may not be held liable for any additional payment for counsel.

(4) The board shall establish by rule a fee schedule that sets the maximum amount that a parent subject to s. 48.275 (2) (b) or 938.275 (2) (b) shall pay as reimbursement for legal services and sets the maximum amount that a person subject to s. 51.605, 55.107, or 980.0305 shall pay as reimbursement for legal services. The maximum amounts under this subsection shall be based on the average cost, as determined by the board, for each applicable type of case.

History: 1995 a. 27, 77; 2005 a. 129; 2007 a. 20; 2017 a. 184.

Cross-reference: See also ch. PD 6, Wis. adm. code.

977.076 Collections. (1) If the state public defender notifies the court in which the underlying action was filed that a person who is required to reimburse the state public defender for legal representation has failed to make the required payment or to timely make periodic payments, the court may issue a judgment on behalf of the state for the unpaid balance and direct the clerk of circuit court to file and docket a transcript of the judgment, without fee. If the court issues a judgment for the unpaid balance, the court shall send a notice to the person at his or her last-known address that a civil judgment has been issued for the unpaid balance. The judgment has the same force and effect as judgments issued under s. 806.10. Except as provided in ss. 48.275 (2) (b) and 938.275 (2) (b), the judgment shall be based on the person's ability to pay and on the fee schedule established by the board under s. 977.075 (3).

(2) The department of administration may collect unpaid reimbursement payments to the state public defender ordered by a court under sub. (1) or s. 48.275 (2), 757.66, 938.275 (2) (a) or 973.06 (1) (e). The department may contract with a private collection agency to collect these payments. Section 16.705 does not apply to a contract under this subsection.

History: 1995 a. 27, 77, 352, 417; 1997 a. 35.

977.077 Deposit of payments received. Payments for services provided by the state public defender or other counsel under this chapter that are received pursuant to s. 977.07, 977.075 or 977.076 shall be deposited in the state treasury and credited to the appropriation under s. 20.550 (1) (L).

History: 1995 a. 27.

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 or if a case is referred under s. 48.23 (4), 51.60, 55.105, 938.23 (4), or 980.03 (2) (a), 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 persons referred under s. 48.23 (4), 51.60, 55.105, 938.23 (4), or 980.03 (2) (a) and 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).

(e) Cases involving children who are entitled to counsel or are provided counsel at the discretion of the court under s. 48.23 or 938.23.

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

(h) Cases involving paternity determinations as provided in s. 767.83.

(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 a list of the names and qualifications submitted.

(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.

(f) The state public defender shall enter into as many annual contracts as possible, subject to par. (fg), with private local attorneys or law firms for the provision of legal representation. Under any such contract, the state public defender shall assign cases without regard to pars. (c) and (d), shall set a fixed-fee total amount for all cases handled and shall pay that amount, except that the state public defender may not pay an attorney more for a case than he or she would receive according to the rates under sub. (4m). The contract shall include a procedure authorizing the state public defender to make additional payments for a case or to reassign a case if the circumstances surrounding the case justify the additional payment or reassignment.

(fg) The total number of cases that may be subject to the annual contracts under par. (f) for a given year may not exceed 33 percent of the total number of cases at the trial level that are assigned by the state public defender to private counsel under this section for that year.

(g) The state public defender may appoint an attorney without regard to pars. (c) and (d) based on the state public defender's evaluation of that attorney's performance if the board promulgates rules under s. 977.03 (3).

(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) or a contract authorized under sub. (3) (f).

(4m) (a) Unless otherwise provided by a rule promulgated under s. 977.02 (7r), for cases assigned before December 1, 1992, 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 or if the trip requires traveling a distance of more than 30 miles, one way, from the attorney's principal office.

(b) Unless otherwise provided by a rule promulgated under s. 977.02 (7r) or by a contract authorized under sub. (3) (f), for cases assigned on or after December 1, 1992, and before July 29, 1995, private local attorneys shall be paid \$50 per hour for time spent in court; \$40 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 or if the trip requires traveling a distance of more than 30 miles, one way, from the attorney's principal office.

(c) Unless otherwise provided by a rule promulgated under s. 977.02 (7r) or by a contract authorized under sub. (3) (f), for cases assigned on or after July 29, 1995, and before January 1, 2020, private local attorneys shall be paid \$40 per hour for time spent related to a case, excluding travel, 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 or if the trip requires traveling a distance of more than 30 miles, one way, from the attorney's principal office.

(d) Unless otherwise provided by a rule promulgated under s. 977.02 (7r) or by a contract authorized under sub. (3) (f), for cases assigned on or after January 1, 2020, private local attorneys shall be paid \$70 per hour for time spent related to a case, excluding travel, 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 or if the trip requires traveling a distance of more than 30 miles, one way, from the attorney's principal office.

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

(bn) Except as provided in par. (br), any of the following constitutes an annual caseload standard for an assistant state public defender in the subunit responsible for trials:

1. Felony cases not specified in subd. 1m.: 184.5.
- 1m. First-degree intentional homicide cases: 15.
- 1r. Cases representing persons under s. 980.05: 15.
2. Misdemeanor cases: 492.
3. Cases not covered under subd. 1., 1m., 1r. or 2.: 246.

(br) Beginning on July 1, 2000, the state public defender may exempt up to 10 full-time assistant state public defenders in the subunit responsible for trials from the annual caseload standards under par. (bn) based on their need to perform other assigned duties.

(c) At the trial level, 67 percent of the felony and juvenile 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; 1991 a. 39, 263; 1993 a. 16, 318, 423, 451, 491; 1995 a. 27, 77; 1997 a. 27; 1999 a. 9; 2005 a. 443 s. 265; 2007 a. 20; 2017 a. 184; 2019 a. 9.

Cross-reference: See also chs. PD 1, 2, and 4, Wis. adm. code.

The courts' power to appropriate compensation for court-appointed counsel is necessary for the effective operation of the judicial system. In ordering compensation for court-ordered attorneys, a court should abide by the s. 977.08 (4m) rate when it can retain qualified and effective counsel at that rate, but should order compensation at the rate under SCR 81.01 or 81.02, or a higher rate when necessary, to secure effective counsel. *Friedrich v. Dane County Circuit Ct.* 192 Wis. 2d 1, 531 N.W.2d 32 (1995).

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) (a) 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) (a) for the remainder of the current fiscal year and for the next fiscal year.

(c) In all of the quarterly reports for fiscal years 1995–96 and 1996–97, information regarding the status of contracting under s. 977.08 (3) (f) and in the first 2 quarterly reports for fiscal year 1997–98, including information showing the cost savings achieved through the contracting.

(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) (a).

(2) If the projections under sub. (1) (b) indicate that moneys are being expended under s. 20.550 (1) (a) 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.

(3) The board shall provide quarterly reports to the joint committee on finance on the status of reimbursement for or recoupment of payments under ss. 48.275, 51.605, 55.107, 757.66, 938.275, 977.06, 977.075, 977.076, and 980.0305, including the amount of revenue generated by reimbursement and recoupment. The quarterly reports shall include any alternative means suggested by the board to improve reimbursement and recoupment procedures and to increase the amount of revenue generated. 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: 1987 a. 27; 1989 a. 31; 1993 a. 16; 1995 a. 27 ss. 7289, 7290p; 1995 a. 77; 2007 a. 20; 2009 a. 164; 2017 a. 59, 184.

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.