



Wisconsin State Public Defender

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CR 10-133

Order of the Office of the State Public Defender

The State Public Defender proposes an order repealing and recreating PD 3.01, amending PD 3.015, repealing and recreating PD 3.02, repealing and recreating PD 3.03, repealing PD 3.038 and 3.039, creating PD 3.04, amending PD 3.05, renumbering PD 3.06, repealing and recreating PD 3.07, creating PD 3.08, relating to determining, collecting and processing the payments received from persons as payment for legal representation.

Analysis prepared by the State Public Defender

The Office of the State Public Defender (SPD) provides constitutionally-mandated legal representation to persons who meet financial eligibility standards. Those persons charged with crimes, who do not qualify for State Public Defender Representation, but cannot afford to hire an attorney, must be provided an attorney at county expense. This is commonly referred to as a “Dean” appointment. See, *State v. Dean*, 163 Wis.2d 503 (CA 1991).

SPD eligibility standards have not been updated since 1987. Thus, with continued rise in the cost of living, there has been an increase in the number of individuals applying to the counties for Dean appointments. Wisconsin counties reported spending nearly \$7.6 million in 2008 to appoint counsel for these indigent individuals.

Recognizing the financial burden to the counties, and need to revise the financial eligibility criteria for SPD representation, 2009 Wisconsin Act 164, published March 29, 2010, mandated that financial eligibility standards for public defender representation be consistent with income guidelines of Wisconsin Works (W2). To carry out these changes, Act 164 directs the Wisconsin State Public Defender Board to promulgate rules regarding the revised determination of indigency. In promulgating these rules Act 164 directs the SPD to consider the costs of effective representation for the type of case in which a person seeks representation, and to consider a person’s assets in the manner described in s. 49.145 (Wisconsin Works).

Tying eligibility for representation to W2 (sec. 49.145(3)(a) Stats.) increases the number of clients served by the State Public Defender Agency. An increase in the number of persons who qualify for representation by the State Public Defender has a corresponding decrease in the costs to counties. Act 164 shifts, to a large extent, the responsibility of providing representation for the “working poor” from the counties to the State.

To implement the Act 164 changes, which go into effect June 19, 2011, the SPD has drafted revisions to Administrative Rules PD 3 (indigency criteria) and PD 6 (reimbursement of legal fees).

Text of Proposed Rule
Chapter PD 3
INDIGENCY CRITERIA

SECTION 1. PD 3.01 is repealed and recreated to read:

PD 3.01 General rule. Except as provided in s. 977.07 (1), Stats., an applicant for appointment of counsel by the state public defender shall meet the financial criteria set forth in this chapter.

SECTION 2. PD 3.015 is amended to read:

PD 3.015 Verification. In order to screen the eligibility of applicants and collect amounts owed as ~~reimbursement for legal services~~ payment for representation, the state public defender may verify ~~the following financial information:~~ related to eligibility, including social security numbers, income records, and proof of eligibility for income-based programs, and proof of emergency or essential expenses. ~~The state public defender shall report annually to the board on verification.~~

SECTION 3. PD 3.02 (1), (2), (3) and (4) are repealed and recreated to read:

PD 3.02 (1) The anticipated cost of retaining counsel shall be determined by this schedule:

1 st degree intentional homicide	\$17,500
Appellate category I	\$9,000
Appellate category II	\$4,500
Other class A/B/C felony	\$5,000
Ch. 980 Original petition	\$6,000
Ch. 980 Post-commitment	\$3,500
Involuntary TPR	\$4,500
Other felony	\$2,200
Felony delinquency	\$1,500
Revocation	\$1,400
Chapter 55	\$1,200
Paternity	\$1,000
Misdemeanor	\$750
Traffic misdemeanor	\$750
Special proceeding	\$750
Other juvenile	\$600
Chapter 51	\$600

(2) The state public defender shall establish the cost of retaining counsel for any proceeding not covered by the schedule in sub. (1).

(3) The state public defender shall periodically review the actual cost of retaining private counsel and report these findings to the state public defender board. The state public defender board may revise the schedule of the anticipated cost of retaining counsel.

(4) The state public defender may consider, in the case of an applicant who is the subject of two or more separate proceedings, the anticipated cost of retaining counsel in multiple proceedings.

SECTION 4. PD 3.03 is repealed and recreated to read:

PD 3.03 Determination of financial eligibility. (1) An applicant is financially eligible for appointment of counsel by the state public defender if both of the following criteria are met:

(a) *Asset limitations.* The anticipated cost of retained counsel under s. PD 3.02 exceeds the applicant's family assets deemed available under sub. (2) to pay the costs of legal representation.

(b) *Income limitations.* The anticipated cost of retained counsel under s. PD 3.02 exceeds the applicant's family income deemed available under sub. (3) to pay the costs of legal representation.

(2) The state public defender shall consider assets in the manner described in s. 49.145 (3) (a) Stats., and shall consider assets as available to pay the costs of legal representation if the assets exceed the resource limitations of s. 49.145 (3) (a) Stats., except that the exclusion from consideration for the applicant's homestead shall be limited to the first \$30,000 of equity.

(3) Subject to subs. (4) and (5), the state public defender shall consider income as available to pay the costs of legal representation if the income exceeds the income limitations of s. 49.145 (3) (b) Stats.

(4) For the purpose of the calculations under this section, the state public defender shall consider the applicant's anticipated income for the time period beginning at the time of the application and continuing for the following time:

- (a) For felony cases and cases under Chapter 980, Stats., six months.
- (b) For appellate cases, eight months.
- (c) For cases under Chapters 51 and 55, Stats., two months.
- (d) For all other cases, four months.

(5) (a) Notwithstanding the criteria in sub. (1), an applicant is financially eligible for appointment of an attorney by the state public defender if the applicant's only income is derived from one or more of the following sources:

1. A Wisconsin works employment position under s. 49.148 (1) (a), (b), or (c), Stats.
2. Wisconsin works benefits under s. 49.148 (1m), Stats.

3. Supplemental security income for the aged, blind, and disabled under 42 U.S.C. ss. 1381-1383c, relief as defined in s. 49.01 (3), Stats., or any other similar needs-based financial assistance program.

(b) Notwithstanding sub. (1), an applicant is financially eligible for appointment of appellate counsel if the applicant has filed a notice of intent to pursue post-conviction relief under s. 809.30 (2) (b) Stats., indicating that:

1. The state public defender has appointed counsel in the case.
2. His or her financial circumstances have not materially changed since the date on which the applicant was determined to be eligible for the appointment of counsel in that case.

(6) For the purpose of the calculations under this section, the state public defender shall consider assets and income of the applicant's spouse as the applicant's assets and income, unless the spouse is alleged to be the victim of a crime allegedly committed by the applicant.

(7) If a parent subject to s. 48.275 (2) (b) or 938.275 (2) (b), Stats., has available income or assets greater than \$100, but less than the anticipated cost of counsel, the parent shall be determined to be indigent in part.

(8) If a person subject to s. 51.605 (1) or s. 55.107 (1), Stats., has available income or assets greater than \$100, but less than the anticipated cost of counsel, the parent shall be determined to be indigent in part.

(9) The state public defender shall annually review the standards specified in this chapter and shall revise these standards as required.

SECTION 5. PD 3.038 and 3.039 are repealed.

SECTION 6. PD 3.04 is created to read:

PD 3.04 Information provided to applicants. Before asking an applicant for financial information, the state public defender shall inform the applicant of all of the following:

(1) The applicant will be required to certify, under s. PD 3.05 (1), the truthfulness of the financial information provided.

(2) The financial information provided by the applicant is not protected by the attorney-client privilege.

(3) The applicant may be prosecuted for a felony offense if the applicant intentionally provides false information.

SECTION 7. PD 3.05 (1) is repealed and recreated to read:

PD 3.05 Certified statement. (1) Except as provided in s. 977.07 (1), Stats., all applicants for appointment of counsel by the state public defender shall be required to provide truthful information in a financial evaluation form as required under this chapter. Except as provided in

s. 977.06(2) Stats., all such applicants shall sign a completed financial evaluation form certifying that the financial information that they have provided is accurate to the best of their knowledge and belief, and that they have not disposed of any assets for the purpose of qualifying for the appointment of counsel.

SECTION 8. PD 3.05 (2) and (3) are amended to read:

PD 3.05 (2) The state public defender may appoint counsel pursuant to telephone eligibility interviews, in which cases the clients shall sign the ~~indigency~~ financial evaluation form as soon thereafter as practicable.

(3) The state public defender shall retain for three years all ~~indigency~~ financial evaluations. After such time they shall be maintained ~~by state records custodians~~ pursuant to s. 16.61 (4), Stats.

SECTION 9. PD 3.055 is renumbered PD 3.055 (1) and PD 3.055 (1), as renumbered, is amended to read:

PD 3.055 Voluntary termination of employment or disposal of assets. (1) If an applicant voluntarily terminates employment within the 90 days following the date of application for representation and for the purpose of having the state public defender appoint counsel, the state public defender shall calculate the applicant's income on the basis of the applicant's wages before the voluntary termination of employment.

SECTION 10. PD 3.055 (2) is created to read:

PD 3.055 (2) If an applicant disposes of assets for the purpose of having the state public defender appoint counsel, the state public defender shall count the asset at its fair market value at the time it was disposed of minus the amount of compensation received for the asset.

SECTION 11. PD 3.06 is repealed and recreated to read:

PD 3.06 Access to financial evaluations. (1) Subject to s. 977.06 (4), Stats., access to financial evaluations of applicants for appointment of counsel by the state public defender may not be granted to any person, except the applicant, a person authorized by the applicant, staff of the state public defender, counsel appointed by the state public defender, or a court in which the applicant has a pending proceeding.

(2) Requests for access to financial evaluations made by a court in which the applicant has a pending proceeding or by any person not specified in sub. (1) shall be referred to the applicant's counsel, if one has been appointed by the state public defender, and to the state public defender regional supervisor for the county in which the proceeding occurred or is pending.

(3) If the state public defender regional supervisor believes that the financial evaluation contains information that is privileged under s. 905.03, Stats., or confidential under the Supreme Court Rules, chapter 20, the supervisor shall redact the privileged or confidential information before providing the evaluation to the court under sub. (1). If the state public defender regional supervisor determines that a requestor is not entitled to access to a financial evaluation, the supervisor shall promptly notify the requestor of the denial of the request.

(4) During the pendency of the proceeding for which the financial evaluation was completed, questions regarding eligibility may be resolved pursuant to s. 977.06 (4) (a), Stats.

(5) Notwithstanding subs. (1) to (4), and subject to any motion, writ, or other process that the state public defender deems appropriate to contest an order or subpoena, the state public defender shall comply with any court order or subpoena for production of a financial evaluation.

SECTION 12. PD 3.07 is created to read:

PD 3.07 Change of circumstances. (1) If a client has complied with the requirements of this chapter and qualified financially for appointment of an attorney by the state public defender, the client remains eligible for continued representation in a pending matter notwithstanding a change in financial circumstances.

(2) Notwithstanding sub. (1), the state public defender may adjust, pursuant to s. PD 6.045, as created in Clearinghouse Rule 10-134, the payment amount, subject to s. 977.075 (3m), Stats., for a client whose financial circumstances change during the course of state public defender representation.

This rule shall take effect on June 19, 2011.

Dated: _____

Agency: _____

Dan Berkos, Chair
Wisconsin State Public Defender Board