



Wisconsin State Public Defender

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Clearinghouse Rule 24-042

SS 038-22

Notice of Proposed Order of the Office of the State Public Defender

The State of Wisconsin Public Defender Board (SPD) proposes an order to amend PD 1.05(2), 4.02(2), and 4.03(1)(c); and to create PD 1.05(3m), (5m), (5r), and (7m) and PD 4.02(2) and PD 4.03(5m), (5r), and (7m) relating to the state public defender and the state public defender Board's authority to review appeals to agency actions regarding private bar certification and bill payment.

Statutes Interpreted

Sections 977.02(5) and (7), Wis. Stats.

Statutory Authority

Sections 977.02 (5) and (7), Wis. Stats.

Agency Authority

The state public defender is governed by ch. 977, Wis. Stats. The state public defender provides legal services for indigent individuals involved in criminal, juvenile, mental health, termination of parental rights, and other enumerated proceedings under s. 977.05, Wis. Stats. Under s. 977.08, the state public defender may delegate the legal representation of any person to any member of the State Bar of Wisconsin who is certified by the state public defender to take cases. The state public defender certifies attorneys to represent clients under s. PD 1.

The state public defender is overseen by the state public defender Board; the Board's duties are outlined in s. 977.02. One of the Board's duties is to review decisions of the state public defender's certification decisions pursuant to s. 977.02 (7) and s. PD 1.05. Under s. PD 1.05 (6), the Board must issue a written decision affirming, reversing or modifying the decision of the state public defender.

The proposed rule would codify current practice and procedure into the administrative code. The proposed rule would provide clarity to private bar members who regularly conduct business with the State Public Defender. Such clarity will aid with the ease in conducting business and is intended to create less barriers to representation.

Related Statutes or Rules

None

Plain Language Analysis

The state public defender is responsible for providing legal services to indigent individuals in criminal, juvenile, mental health, termination of parental rights, and other enumerated proceedings under s. 977.05, Wis. Stats. Under s. 977.08, the state public defender may delegate the legal representation of any person to any member of the State Bar of Wisconsin who is certified by the state public defender to take cases. The state public defender certifies attorneys to represent clients under ch. PD 1.

The state public defender may take a number of actions regarding an attorney's certification status. For cause, the state public defender may deny an attorney's application for certification or recertification; return an attorney to provisional certification; exclude an attorney from any certification list under s. PD 1.04; suspend an attorney's

certification status; caution an attorney; impose conditions upon an attorney's continued certification; or take any other action that is consistent with the best interests of clients, the interests of justice, or the interests of the state public defender.

An attorney may appeal the state public defender's certification decision to the state public defender Board under s. PD 1.05. After the Board hears the matter, the board issues a written decision constituting finding of fact and conclusions of law. The board may affirm, reverse, or modify the state public defender's certification decision. The proposed rule would explicitly designate the parties to any appeal, create tailored and standardized procedures for appeal hearings, clarify the rules of evidence apply at any appeal hearing, and require each decision to include notice of the right to petition for further review.

The objective of the proposed rule is to clarify procedures, and increase accessibility for private bar members seeking to conduct business with the State Public Defender. Creating clear process requirements for certification appeals represents a codification of current practices and policies.

An attorney may appeal the state public defenders' denial or reduction of a bill under ss. PD 4.02, 4.03. When the state public defender receives a bill submission from a private attorney, the agency reviews it to "insure that attorney time billed reflects reasonable attorney practice." The proposed PD 4.02(2) would delineate considerations the agency will utilize when determining whether the billed time is reasonable. If the attorney submitting the bill wishes to appeal any decision they are to follow the procedures outlined in PD 4.03. Proposed Rule s. PD 4.03 creates tailored and standardized procedures for bill appeal hearings and clarifies the rules of evidence, as governed by s. 22.47, Stats., applies. Finally, Proposed rule s. PD 4.03 requires each decision provide notice of the right for rehearing and administrative or judicial review of adverse decisions.

Summary of, and Comparison with, Existing or Proposed Federal Statutes and Regulations

Appointment of private counsel to indigent defendants in the Federal system is governed by the Criminal Justice Act, codified at 18 U.S.C. § 3006A. These appointments are administered by District Judge in a geographical district. Nationwide court policy, Guide to Judiciary Policy, Vol 7 Defender Services, Part A Guidelines for Administering the CJA and Related Statutes, Chapter 2: Appointment and Payment of Counsel, sets the rates and review guidelines for submitted attorney bills. This system limits bill reductions only to: (1) mathematical errors, (2) billed work is not compensable; (3) billed work was not undertaken or completed; or (4) hours billed are clearly in excess of what is reasonably required to complete the task. Challenges to bill reductions and certification decisions follow a similar system to what is implemented in Wisconsin, including clear notice requirements and the opportunity for independent review.

Comparison with Rules in Adjacent States

Illinois: Illinois does not have a Statewide Public Defender System and indigent defense funding is appropriated at the County level, which leaves a patchwork of systems as it relates to assignment of private attorneys to indigent defense. 55 ILCS 5/3-4011. This makes comparison of the Illinois approach uninformative due to the incongruity of the systems.

Iowa: Chapter 815 of the Iowa Code addresses "Costs - Compensation and fees - Indigent Defense" governs payment for privately retained attorneys representing indigent persons. Iowa Code § 815.1 details requirements for payment, which is acted upon by the Court in a given case. Implicit in the Iowa code is the fact that each representation shall be evaluated and there may be variation not only in hours but in rate billed. This is not comparable to the Wisconsin system as there is a standard rate available for Public Defender cases. Aside requirements in Iowa Code § 815.1 relating to submission of "the attorney's fee agreement for the representation, including hourly rate [,]" which are inapplicable to Wisconsin. Conversely, Iowa code, like Wisconsin, provides for the requirement that the bill must be "reasonable." Unlike Wisconsin, in Iowa the fee agreement as a whole - including hourly rate - must be examined for reasonableness. Proposed Rule PD 4.02 includes factors for consideration in determining reasonableness is tailored to "whether attorney time billed reflects reasonable attorney practice."

Michigan : A Statewide Michigan Indigent Defense Commission was created in 2013 in an effort to address the problem of having disparate practices across the State. This Commission implements minimum standards for indigent defense services. These services are, however, implemented and provided by local government entities with some limited oversight from the judiciary. A review of Wayne County, which includes Detroit, illustrates there are analogous Attorney training and certification standards and criteria in deterring reasonableness for an invoice. This includes a "Payment Inquiry" which is submitted when there is a perceived missing or underpayment. This process requires similar data that would address the criteria in amended ss. PD 4.02, 4.03.

Minnesota: Private Bar attorneys in Minnesota are compensated "in a manner prescribed by the chief district public defender" Minn. Stat. s. 611.27(12). This statute further requires the chief judge of each judicial district to establish, after consultation with criminal justice stakeholders, a reimbursement rate for attorneys' fees and costs associated with the representation of any defendant in connection with the appeal initiated by the prosecuting attorney of any pre-trial order in a criminal proceeding. Minn. Stat. s. 611.27(16). This creates varying rates throughout the state, with higher rates being paid in geographical markets with increased demand. This is not comparable to the Wisconsin system. The Minnesota statute limits fees to those which are "reasonable" and requires approval if the attorney bill exceeds \$5,000 exclusive of reimbursable expenses. The review of attorney bills is similar to what the procedure of proposed rules ss. PD 4.02, 4.03, with the main difference being Minnesota reviews these decisions on a local level while Wisconsin Statute requires review at the State level.

Summary of Factual Data and Analytical Methodologies

Reviewed historical data of private bar appeals of certification and billing decisions.

Analysis and Supporting Documents Used to Determine Effect on Small Business or in Preparation of an Economic Impact Analysis

The rule has minimal impact on small businesses. The rule will impact only those private bar attorneys who appeal the state public defender's certification and billing decisions. Given the number of appeals of certification and billing decisions the state public defender Board considers, the rule is likely to impact, on average, less than one private bar attorney per year.

Effect on Small Business

Minimal

Agency Contact Person

Nicholas Smith, smithn@opd.wi.gov or (608) 261-5417
Office of the State Public Defender
17 S. Fairchild Street, 5th Floor
Madison, WI 53703

Place to Submit Comments

Comments may be submitted to Nicholas Smith at smithn@opd.wi.gov, or 17 S. Fairchild Street, 5th Floor, Madison, WI 53703

Text of Proposed Rule

SECTION 1:

PD 1.05(2) is amended to read:

- (2)** Any attorney may appeal the state public defender's certification decision under s. PD 1.03 (2) by servicing a letter of appeal to the state public defender within 30 days of the notice of the decision. The attorney shall state in the letter the certification from which the attorney has been excluded or the decision from which the attorney intends to appeal. The letter shall state the reasons why the attorney believes the decision was improper. Service may be accomplished by mail or email.

Note: The mailing address and email for service is:
17 S. Fairchild St., 5th Floor
Madison, WI 53703
SPDBoardStaff@opd.wi.gov

SECTION 2:

PD 1.05(3m), (5m), (5r), and (7m) are created to read:

- (3m) The parties for any appeal shall be the appealing attorney, the state public defender, and the public defender board per 227.47(1), Stats.
- (5m)(a) The state public defender board shall open the hearing and may make a concise statement of the hearing's scope and purposes. Appearances shall be entered on the record. The board may permit clear and concise opening statements if it deems appropriate.
- (b) The agency shall proceed first with the presentation of evidence and shall bear the burden of proving the allegations by a preponderance of the evidence.
- (c) All witnesses for and against the attorney, including the attorney, shall have a chance to speak and respond to questions. All witnesses shall be sworn in accordance with s. 906.03.
- (5r) Rules governing the admission of evidence are governed by s. 227.45, Stats. Any argument before the board on objections to receipt of evidence or on motions to strike will be recorded. The parties will be afforded the opportunity to make an offer of proof, which shall be in the form directed by the board. The board may permit oral argument and oral testimony communicated on the record by telephone or live audiovisual means as provided in s. 807.13, Stats.
- (7m) Each decision shall include notice of any right of the parties to petition for rehearing and administrative or judicial review of adverse decisions, the time allowed for filing each petition and identification of the party to be named as respondent per 227.48, Stats.

SECTION 3:

PD 4.02 (1) is amended to read:

- (1) Within 6 months of the conclusion of the case, the private attorney shall submit ~~the billing form to the local office of the state public defender~~ their bill pursuant to the state public defender posted procedure. The state public defender, or its designee, shall promptly review the bill to insure that attorney time billed reflects reasonable attorney practice in such a case, as determined by the state public defender, and, except as provided for in s. PD 4.06, promptly authorize payment at the rate established under s. 977.08 (4m), Stats. The "conclusion of the case" means the conclusion of trial-level representation for trial cases and the conclusion of appellate-level representation for appellate cases. If the bill is not submitted within 6 months of the conclusion of the case, the state public defender is not required to pay the bill promptly.

SECTION 4:

PD 4.02 (2) is created to read:

- (2) The state public defender's exercise of discretion and determination whether attorney time billed reflects reasonable attorney practice under this chapter may include consideration of any of the following factors:
- (a) The novelty, difficulty, and complexity of the appointed case.
- (b) The skill required to provide zealous and competent representation.
- (c) The fee customarily charged in the locality for similar legal services.
- (d) Tim requirements imposed by the circumstances of the appointed case.

(e) Other factors the state public defender deems important or necessary to consider under the circumstances of the appointed case.

SECTION 5:

PD 4.03(1)(c) is amended to read:

- (1)** Any attorney may appeal the state public defender's reduction or denial of any submitted bill. An appeal shall conform with all of the following:
- (a)** Notice of the appeal is in writing;
 - (b)** Notice is submitted within 30 days of the receipt of the reduced or denied payment; and
 - (c)** Delivery of the notice is by mail, email, or in person.

Note: The mailing address of the state public defender is:

17 S. Fairchild St., 5th Floor
Madison, WI 53703
SPDBoardStaff@opd.wi.gov

SECTION 6:

PD 4.03(5m), (5r), and (7m) are created to read:

- (5m)(a)** The state public defender board shall open the hearing and may make a concise statement of the hearing's scope and purposes. Appearances shall be entered on the record. The board may permit clear and concise opening statements if it deems appropriate.
- (b)** The agency shall proceed first with the presentation of evidence and shall bear the burden of proving the allegations by a preponderance of the evidence.
- (c)** All witnesses for and against the attorney, including the attorney, shall have a chance to speak and respond to questions. All witnesses shall be sworn in accordance with s. 906.03.
- (5r)** Rules governing the admission evidence are governed by s. 227.45, Stats. Any argument before the board on objections to receipt of evidence or on motions to strike will be recorded. The parties will be afforded the opportunity to make an offer of proof, which shall be in the form directed by the board. The board may permit oral argument and oral testimony communicated on the record by telephone or live audiovisual means as provided in s. 807.13, Stats.
- (7m)** Each decision shall include notice of any right of the parties to petition for rehearing and administrative or judicial review of adverse decisions, the time allowed for filing each petition and identification of the party to be named as respondent per 227.48, Stats.

SECTION 7: EFFECTIVE DATE. This rule shall take effect on the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22 (2) (intro.), Stats.