



**WISCONSIN LEGISLATIVE COUNCIL
RULES CLEARINGHOUSE**

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CLEARINGHOUSE REPORT TO AGENCY

[THIS REPORT HAS BEEN PREPARED PURSUANT TO S. 227.15, STATS. THIS IS A REPORT ON A RULE AS ORIGINALLY PROPOSED BY THE AGENCY; THE REPORT MAY NOT REFLECT THE FINAL CONTENT OF THE RULE IN FINAL DRAFT FORM AS IT WILL BE SUBMITTED TO THE LEGISLATURE. THIS REPORT CONSTITUTES A REVIEW OF, BUT NOT APPROVAL OR DISAPPROVAL OF, THE SUBSTANTIVE CONTENT AND TECHNICAL ACCURACY OF THE RULE.]

CLEARINGHOUSE RULE 02-109

AN ORDER to repeal PD 2.08 (3) and 3.038 (1) (b); to renumber and amend PD 3.038 (1) (c); to amend PD 2.01, 2.02, 2.03, 2.08, 3.03, 3.038 (1) (a), 3.039, 3.05, 3.055 and 3.06, relating to financial eligibility of prospective clients.

Submitted by: **PUBLIC DEFENDER BOARD**

- 07-26-2002 RECEIVED BY LEGISLATIVE COUNCIL.
- 08-22-2002 REPORT SENT TO AGENCY.

RS:DLS

LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT

This rule has been reviewed by the Rules Clearinghouse. Based on that review, comments are reported as noted below:

1. STATUTORY AUTHORITY [s. 227.15 (2) (a)]

Comment Attached YES NO

2. FORM, STYLE AND PLACEMENT IN ADMINISTRATIVE CODE [s. 227.15 (2) (c)]

Comment Attached YES NO

3. CONFLICT WITH OR DUPLICATION OF EXISTING RULES [s. 227.15 (2) (d)]

Comment Attached YES NO

4. ADEQUACY OF REFERENCES TO RELATED STATUTES, RULES AND FORMS [s. 227.15 (2) (e)]

Comment Attached YES NO

5. CLARITY, GRAMMAR, PUNCTUATION AND USE OF PLAIN LANGUAGE [s. 227.15 (2) (f)]

Comment Attached YES NO

6. POTENTIAL CONFLICTS WITH, AND COMPARABILITY TO, RELATED FEDERAL REGULATIONS [s. 227.15 (2) (g)]

Comment Attached YES NO

7. COMPLIANCE WITH PERMIT ACTION DEADLINE REQUIREMENTS [s. 227.15 (2) (h)]

Comment Attached YES NO



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CLEARINGHOUSE RULE 02-109

Comments

[NOTE: All citations to "Manual" in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated September 1998.]

1. Statutory Authority

The analysis to the rule notes that certain amendments in the rule reflect that the concept of partial indigency is no longer relevant to adult applicants for state public defender assignment of counsel. According to the analysis, prior to 1996, applicants found indigent paid nothing for services and applicants found partially indigent were required to pay some amount towards the cost of representation. After 1996, all eligible applicants have been subject to the collections program. Section 977.07 (2m), Stats., appears to support the applicability of the collections program to all eligible applicants by stating that a person found to be indigent in full or in part must be promptly informed of the state's right to payment or recoupment. However, ch. 977, Stats., contains a number of references to the notion of partial indigency. For example, s. 977.02 (4), Stats., requires the Public Defender Board to promulgate rules regarding the determination of payments required of persons found to be indigent in part. [See also ss. 977.05 (4) (g), 977.06 (1) (d), and 977.07 (2), Stats.] If the concept of partial indigency is no longer meaningful, the state public defender should consider proposing appropriate amendments to the statutes. Finally, if the concept of partial indigency is to be abandoned, should appropriate amendments be made to ss. PD 6.025 (2) (a) and 6.05 (1) (b)?

2. Form, Style and Placement in Administrative Code

a. Almost the entire rule needs to be redone using the appropriate drafting format as set forth in the "Manual." First, the rule provisions have to be set forth in the order in which they are affected (e.g., PD 2.01 (5) is the first provision affected by the rule and should be in SECTION

1 and not in SECTION 4 as it appears in the draft). The entire rule needs to be revised to place these provisions affected in the proper order. In general, the rule should be in the following format (the following shows revision of only part of the rule to provide an example of what the format should look like, but does not show the necessary reordering of the SECTIONS and provisions affected, as referred to in the preceding sentence). It is not proper drafting form to include an entire section or subsection or other division when only part of that provision is being affected. Only the affected part needs to be shown. The following suggested format follows the rule provisions as they appear in the draft [these will have to be renumbered in the appropriate sequence]:

SECTION __. PD 2.08 (3) is repealed.

SECTION __. PD 3.038 (1) (b) is repealed.

SECTION __. PD 3.038 (1)(c) is renumbered PD 3.038 (1) (b) and amended to read:

PD 3.038 (1) (b) if the available assets ... counsel, the person is not indigent eligible.

SECTION __. PD 2.01 (5) is amended to read:

PD 2.01 (5) "County designee" means ... state public defender, to do indigency eligibility determinations pursuant to ... Stats.

SECTION __. PD 2.02 (1) is amended to read:

PD 2.02 (1) In any emergency ... the person for indigency eligibility as soon as possible.

SECTION __. PD 2.03 (1) and (3) are amended to read:

PD 2.03 (1) The state public ... appears to be indigent eligible ... eligibility questionnaire.

(3) The state public defender ... eligibility.

SECTION __. 2.08 (title) and 2.08 (1) are amended to read:

PD 2.08 (title) **Court's right to review indigency eligibility determination.** (1) Any person ... determination.

SECTION __. PD 3.03 (1) (c), (2), and (3) are amended to read:

PD 3.03 (1) (c) The amount which could ... category of the applicant's case.

(2) The amount required ... an essential cost.

(3) The state public defender ... as required.

SECTION __. PD 3.038 (title) and 3.038 (1)(a) are amended to read:

PD 3.038 (title) **Calculation of indigency eligibility.** (1) (a) If the available ... eligible.

Section __. PD 3.039 (title) and (intro.), (1), (2), and (4) are amended to read:

b. The amendment to s. PD 3.03 (1) (c) is somewhat awkward. The first sentence provides that the computation of available assets will include an amount that could be raised by a loan on a person's nonliquid assets, except any automobiles or real estate, with a total value of \$2,500 or more. However, the remainder of the paragraph treats the equity in certain automobiles and in certain real estate. The subsection would be clearer if the first sentence in sub. (1) (c) continued to make an exception for any automobiles or real estate and a new paragraph were created to take into account the amount of funds that could be raised by a loan for which the collateral was certain automobiles or certain real estate.

c. In s. PD 3.05 (1) (a), the word "chapters" should be replaced by the notation "ch."

d. The rule does not contain an effective date provision. [See s. 1.02 (4), Manual.]

Proposed Order of the State Public Defender Board Amending Rules

The Wisconsin State Public Defender Board proposes an order to repeal PD 2.08(3) and 3.038(1)(b); to renumber and amend PD 3.038(1)(c); to amend PD 2.01, 2.02, 2.03, 2.08, 3.03, 3.038(1)(a), 3.039, 3.05, 3.055 and 3.06.

Analysis

The proposed changes to the administrative code comply with chapter 977 Stats. and serve to clarify and simplify the process of determining the financial eligibility of prospective clients. A number of the amendments replace references to indigency or indigent with eligibility or eligible. Chapter 977 provides a statutory financial eligibility standard for appointment of counsel by the agency, which is different from a constitutional determination of indigency by a court. The purpose of these amendments is to resolve the confusion between the constitutional concept of indigency and the use of the word in the context of state public defender representation.

The amendments to PD 3.03(1)(c) and 3.03(2) are intended to simplify the form and process of eligibility determinations. Simplification of the form and process of eligibility determinations allows more cost-effective use of staff time. The amendments to PD 3.03(1)(c) affect few applicants according to our database of eligibility determinations. In addition, a survey of lending institutions has demonstrated that money is rarely loaned on the basis of vehicles of \$10,000 or less in equity. The amendments are consistent with the treatment of non-liquid assets by W2. Likewise, the amendments to PD 3.03(2) remove expenses that are rarely determinative of eligibility. Further, if these debts are reduced to formal court judgments they may be considered under the general category of court-ordered obligations.

The amendment to PD 3.055 simply clarifies that the state public defender should treat voluntary reduction in hours the same as quitting a job when the action is motivated by the intent to qualify for state public defender assigned counsel.

The repeal of PD 3.038(1)(b) conforms the rule to current law and practice. The repeal of PD 3.038(1)(b) reflects the fact that the concept of partially indigent is no longer relevant to adult applicants for state public defender assignment of counsel. The concept of a partially indigent applicant predated the collections program initiated in 1996. Prior to 1996, applicants found

indigent paid nothing and applicants found partially indigent were required to pay something towards the cost of representation. Under the current collections program all eligible applicants are subject to the collections program.

The amendment to PD 3.05(1) conforms the rule to current law and practice. At one time children entitled to appointment of counsel under the juvenile or mental health laws were required to complete an eligibility evaluation. Current law does not require a determination of eligibility for children entitled to appointment of counsel. The adult applicant for appointment of counsel who lacks the mental capacity to understand the contents of the eligibility evaluation form or the process presents a difficult situation for staff. Unlike the applicant who is unwilling to provide the required information, the mentally ill or developmentally disabled client is usually unable to provide reliable information. It is often possible for staff to obtain reliable information from family or medical staff regarding the person's income and assets. Providing this exception to subsection (1) allows staff to be more efficient in their eligibility determinations.

Statutory authority: sec. 977.02(2m), 977.02(3)

Statutes interpreted: sec. 977.07

Section 1. PD 2.08(3) is repealed.

PD 2.08 Court's right to review indigency determination.

(1) Any person determined by the state public defender not to be eligible for publicly compensated counsel may request that the court having jurisdiction over the case review the state public defender's indigency determination.

(2) After affording the defendant and a staff attorney of the state public defender the opportunity to be heard, such court may order the state public defender to provide representation, and the state public defender shall assign counsel.

~~(3) Court-ordered representation shall not preclude a finding of partial indigency and the requirement that the person make partial payment to the state public defender as provided by ch. PD 6.~~

Section 2. PD 3.038(1)(b) is repealed.

PD 3.038 Calculation of indigency.

(1) Except as provided in sub. (2), a person's available assets as determined under s. PD 3.03 shall be compared to the anticipated cost of retaining counsel as specified under s. PD 3.02 as follows:

(a) If the available assets are less than or equal to \$100, the person is indigent.

~~(b) If the available assets are greater than \$100, but less than or equal to the anticipated cost of retaining counsel, the person is partially indigent.~~

(c) If the available assets are greater than the anticipated cost of retaining counsel, the person is not indigent.

Section 3. PD 3.038(1)(c) is renumbered PD 3.038(1)(b) and amended to read:

PD 3.038 Calculation of indigency.

(1) Except as provided in sub. (2), a person's available assets as determined under s. PD 3.03 shall be compared to the anticipated cost of retaining counsel as specified under s. PD 3.02 as follows:

(a) If the available assets are less than or equal to \$100, the person is indigent.

(b) If the available assets are greater than the anticipated cost of retaining counsel, the person is not ~~indigent~~ eligible.

Section 4. PD 2.01, ⁽⁵⁾ 2.02, ⁽¹⁾ and ^{(1) and (3)} 2.03 are amended to read:

PD 2.01 Definitions.

In this chapter:

(1) "Emergency assignment" means assignment of counsel outside of normal business hours or when regular assignment will not provide both effective and early representation.

(2) "Regular assignment" means any situation in which counsel is required other than under sub. (1).

(4) "Board" means the state public defender board.

(5) "County designee" means the person, department, office, officer, board or agency selected by the county board and, where appropriate, approved by the state public defender, to do indigency eligibility determinations pursuant to s. 977.07 (1), Stats.

PD 2.02 Emergency assignment procedure.

(1) In any emergency situation the state public defender or county designee shall evaluate the person for indigency eligibility as soon as possible.

(2) In any emergency situation, the representative of the state public defender shall assign the attorney most readily available to handle the emergency situation, whether that attorney is a staff public defender or private attorney.

(3) Unless the interests of justice require otherwise, the person shall be provided regular counsel under s. PD 2.03 and the attorney who provides emergency representation need not continue on the case and need not be permanently assigned.

(4) If it subsequently appears that the person provided emergency representation was not entitled to publicly compensated counsel, that person shall be required to compensate the state public defender for those services at the hourly rate in existence at the time of appointment of counsel and, in no case in excess of the maximum cost determined by the state public defender to be the value of those legal services.

PD 2.03 Regular assignment procedure.

(1) The state public defender or county designee shall contact any person who claims or appears to be indigent eligible or has requested counsel for the purposes of assisting that person in completing the indigency eligibility questionnaire.

(2) The state public defender and county designee shall be available 24 hours per day including weekends and legal holidays.

(3) The state public defender or county designee shall have immediate access in person or by phone to any individual held in custody, including but not limited to city or county jails, detention facilities, or mental health facilities, upon request by the state public defender or county designee, to advise the

person of the right to a free determination of indigency eligibility and for the purpose of determining indigency eligibility.

(4) The county designee shall, upon finding a person eligible, immediately contact the state public defender for purposes of assignment of counsel.

(5) The state public defender or county designee shall advise all persons charged with a crime, detained for purposes of juvenile or involuntary civil commitment proceedings, or otherwise facing a legal proceeding which is within the scope of representation provided by the state public defender, prior to their initial court appearance, that they have a right to be represented by an attorney in the proceeding if found eligible. The state public defender or county designee shall advise all persons of the applicable repayment obligation specified in s. PD 6.01 and the optional prepayment amount specified in s. PD 6.02. The state public defender or county designee shall also advise all persons prior to their initial appearance that they have a right to a determination of their eligibility for those legal services. The county designee shall forward to the state public defender on a monthly basis the names, addresses, and case numbers of these persons and the dates on which the contacts were made.

(6) If the person is eligible for publicly compensated counsel, a representative of the state public defender shall appoint counsel pursuant to s. 977.08, Stats. If no certified counsel is available in a county governed by s. 977.08 (5) (a), Stats., appointment shall be to certified private counsel in another county.

(7) If the case is to be assigned to a staff attorney, a representative of the state public defender shall notify the supervising attorney in the appropriate office of the state public defender who shall designate a certain attorney to represent that person.

(8) If the case is assigned to local private counsel, a representative of the state public defender shall immediately contact the attorney whose name appears on the top of the appropriate certification list and assign that attorney to represent that person. If that attorney cannot accept the assignment, the next attorney on the list shall be contacted and the first attorney's name shall be placed on the bottom of the list as required by s. 977.08 (3) (c), Stats. If the attorney accepts the assignment, that attorney's name shall be placed on the bottom of the list. The director of the assigned counsel division may authorize a specific representative of the state public defender to make group assignments of cases. Group assignments may be made by number of cases or by designating an attorney to take all cases assigned during a given time period. The director's

authorization shall designate the maximum number of cases in a group or the maximum time period the representative may assign. Each attorney on the list of the state public defender shall be offered an equal opportunity at group assignment of cases. In all other respects, group assignments shall be made in the manner specified for individual assignments.

(9) If the case is assigned to local private counsel on a specialized list under s. PD 1.04 (6), the assignment shall serve in lieu of that attorney's next appointment from the regular list.

Section 5. PD 2.08 (title) and 2.08(1) are amended to read:

PD 2.08 ^(title) Court's right to review ~~indigency~~ ^{bold} eligibility determination. ^{format}

(1) Any person determined by the state public defender not to be eligible for publicly compensated counsel may request that the court having jurisdiction over the case review the state public defender's indigency eligibility determination.

Section 6. PD 3.03(1)(c), ~~3.03(2)~~ and ~~3.03(3)~~ are amended to read:

PD 3.03 Computation of available assets.

(1) A person's "available assets" shall be determined by adding together:

(a) The person's liquid assets as defined in s. 977.07 (2), Stats.;

(b) Any money belonging to the person and expended to post bond to obtain release regarding the current alleged offense;

(1) (c) The amount which could be raised by a loan on the person's non-liquid assets, except any automobiles or real estate, with a total value of ~~\$500~~ \$2500 or more as provided in s. 977.07 (2), Stats., which, unless otherwise apparent, shall be computed as one-fourth the person's equity in that property. Equity in automobiles totaling \$10,000 or less shall be considered as having no loan value. If the applicant has equity in real estate of \$30,000 or more, the applicant shall present verification to the state public defender that the applicant has unsuccessfully offered that equity to at least 2 qualified private attorneys as a retainer. In this paragraph, a "qualified private attorney" means an attorney who is certified in the applicable county to accept state public defender appointments for the case category of the applicant's case; and

e

e

split out

(d) The amount of income or other money the person anticipates receiving during the pendency of the case, and subtracting from that sum the amount required to provide the necessities of life for that person and those dependent on that person, during the pendency of the case.

(2) The "amount required to provide the necessities of life," means the payment amount specified in s. 49.19 (11) (a) 1., Stats., plus other specified, emergency, or essential costs. The following emergency or essential costs may be added to the cost of living amount specified in s. 49.19 (1)(a) 1., Stats; court-ordered obligations; ~~student loan payments~~; utility bill arrearages; ~~arrears on taxes, rent payments or mortgage payments~~; payments for health insurance, medical care, and dental care; ~~social service agency bills~~, work-related child care costs; payments for automobile insurance necessary to maintain employment; and payments by incarcerated persons as a condition of work-release privileges. Among other costs, the amount paid to a person under a state and federal grant of supplemental security income for the aged, blind, and disabled program pursuant to 42 U.S.C. § 1381 to 1383c is considered an essential cost.

(3) The state public defender shall annually review the indigency eligibility standards specified herein and revise those standards as required.

Section 7. PD 3.038 (title) and 3.308⁽¹⁾(a) are amended to read:

PD 3.038^(title) Calculation of indigency eligibility. ^{Format}

(1) Except as provided in sub. (2), a person's available assets as determined under s. PD 3.03 shall be compared to the anticipated cost of retaining counsel as specified under s. PD 3.02 as follows:

(1)(a) If the available assets are less than or equal to \$100 the anticipated cost of retaining counsel, the person is indigent eligible.

Section 8. PD 3.039^{(title) and (intro.)} is amended to read: ^{(1), (2) and (4) are}

PD 3.039^(title) Change of circumstances and redetermination of indigency eligibility; ^{bold} withdraw from representation. ^{Format}

If a client has originally qualified for appointment of counsel by a determination of indigency eligibility, the state public defender shall apply the

following financial guidelines when a client or client's spouse obtains a higher level of income or receives liquid assets:

(1) When a change in income from employment occurs within 30 days from the date that counsel was appointed, the same eligibility standards shall apply as applied to the original determination of indigency eligibility. When a change resulting in increased income other than from employment or a change resulting in increased liquid assets occurs, the same eligibility standards shall apply as applied to the original determination of indigency eligibility.

(2) If the change in income from employment occurs more than 30 days from the date that counsel was appointed, the client remains eligible for representation by the state public defender if the income does not exceed the gross monthly amount stated in the table included in sub. (3). If the gross monthly income exceeds that amount, the client is considered not indigent eligible.

(3) The gross income eligibility table in this subsection applies to those individuals who originally qualified for public defender representation under this chapter, but who obtained employment that increased their income. Continuing eligibility is based on client income remaining below gross monthly amounts in the following table:

Gross Income Eligibility Table

Family Size	Hourly Amount	Gross Monthly
1	\$7.50	\$1,200.00
2	\$8.70	\$1,392.00
3	\$9.18	\$1,469.00
4	\$9.81	\$1,569.00
5	\$10.38	\$1,660.00
6	\$10.74	\$1,718.00
7	\$11.13	\$1,781.00

8	\$11.44	\$1,831.00
9	\$11.70	\$1,872.00
10	\$11.84	\$1,895.00

(4) When the state public defender determines that a client is not ~~indigent~~ indigent eligible, the state public defender shall move the court to withdraw from representation. The state public defender shall develop procedures for seeking to withdraw from cases in which clients have been determined not to be ~~indigent~~ indigent eligible, including procedures to notify and instruct private attorneys assigned to cases by the state public defender.

Section 9. PD 3.05 is amended to read:

PD 3.05 Certified statement.

(1) All persons provided with publicly compensated counsel shall be required to give a truthful statement of their assets, liabilities, and expenses. ~~All such persons~~ and shall sign the completed indigency eligibility evaluation form certifying that the financial information that they have provided is accurate to the best of their knowledge and belief. Exceptions to this section are limited to the following:

- (a) children who are entitled to counsel assigned by the state public defender under chapters 48, 51, 55, or 938, Stats.
- (b) the state public defender may waive the requirements of subsection (1) when the state public defender determines that a person is otherwise eligible for assignment of counsel under chapter 977, Stats., determines that the person lacks the mental capacity to understand the contents of the eligibility evaluation form, and obtains reliable financial information about the person from another source

Note: Revised indigency eligibility evaluation forms can be obtained at no charge from the Office of the State Public Defender, Administration, 315 N. Henry Street, 2nd Floor, Madison, WI 53707.

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

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

Section 10. PD 3.055 is amended to read:

PD 3.055 Voluntary termination of employment.

If an applicant voluntarily terminates or reduces hours of employment 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 11. PD 3.06 (title) and ~~3.06~~(1) are amended to read:

PD 3.06 ^(title) Access to indigency eligibility evaluations. ^{bold}

(1) Access to indigency eligibility evaluations of persons provided with publicly compensated counsel may not be granted to any person, except the client, staff of the state public defender, counsel appointed by the state public defender, or the trial court, upon request of the court, during the pendency of the action for which they are prepared. If the client's attorney believes that release of the statement may violate the legal rights of the client or the attorney's ethical obligations, the attorney may seek a protective order under sub. (4) (b).

Fiscal Estimate Worksheet — 2001 Session
 Detailed Estimate of Annual Fiscal Effect

Original Updated
 Corrected Supplemental

LRB Number	Amendment Number if Applicable
Bill Number	Administrative Rule Number PD 2 and 3

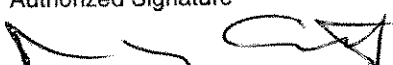
Subject
 Amendment of the rule relating to determinations of indigency

One-time Costs or Revenue Impacts for State and/or Local Government (do not include in annualized fiscal effect):
 \$0

Annualized Costs:	Annualized Fiscal Impact on State Funds from:	
	Increased Costs	Decreased Costs
A. State Costs by Category		
State Operations — Salaries and Fringes	\$ 0	\$ - 0
(FTE Position Changes)	(0.00 FTE)	(- 0.00 FTE)
State Operations — Other Costs	0	- 0
Local Assistance	0	- 0
Aids to Individuals or Organizations	0	- 0
Total State Costs by Category	\$ 0	\$ - 0
B. State Costs by Source of Funds:	Increased Costs	Decreased Costs
GPR	\$ 0	\$ - 0
FED	0	- 0
PRO/PRS	0	- 0
SEG/SEG-S	0	- 0
State Revenues: Complete this only when proposal will increase or decrease state revenues (e.g., tax increase, decrease in license fee, etc.)	Increased Revenue	Decreased Revenue
GPR Taxes	\$ 0	\$ - 0
GPR Earned	0	- 0
FED	0	- 0
PRO/PRS	0	- 0
SEG/SEG-S	0	- 0
Total State Revenues	\$ 0	\$ - 0

Net Annualized Fiscal Impact

	State	Local
Net Change in Costs	\$ 0	\$ 0
Net Change in Revenues	\$ 0	\$ 0

Prepared By: Deborah M Smith	Telephone No. 261-8856	Agency Office of State Public Defender
Authorized Signature 	Telephone No.	Date (mm/dd/ccyy) 07/26/02

Fiscal Estimate — 2001 Session

- Original Updated
 Corrected Supplemental

LRB Number	Amendment Number if Applicable
Bill Number	Administrative Rule Number PD 2 and 3 - see attached

Subject
 Amendment of the rule relating to indigency determinations

Fiscal Effect

State: No State Fiscal Effect

Check columns below only if bill makes a direct appropriation or affects a sum sufficient appropriation.

- Increase Existing Appropriation Increase Existing Revenues
 Decrease Existing Appropriation Decrease Existing Revenues
 Create New Appropriation

- Increase Costs — May be possible to absorb within agency's budget.
 Yes No
 Decrease Costs

Local: No Local Government Costs

1. Increase Costs
 Permissive Mandatory
2. Decrease Costs
 Permissive Mandatory
3. Increase Revenues
 Permissive Mandatory
4. Decrease Revenues
 Permissive Mandatory

5. Types of Local Governmental Units Affected:
 Towns Villages Cities
 Counties Others
 School Districts WTCS Districts

Fund Sources Affected

- GPR FED PRO PRS SEG SEG-S

Affected Chapter 20 Appropriations

Assumptions Used in Arriving at Fiscal Estimate

The proposed rule changes that change references to "indigency" or "indigent" to "eligibility" or "eligible" will not affect which applicants qualify or do not qualify for legal services. These changes have no fiscal impact.

Based on a study of applications for services conducted by the agency, the changes relating to the treatment of certain assets and expenses should have no fiscal impact. The changes affect assets and expenses which are rarely determinative of whether the individual qualifies for services. The change is seen as one that promotes staff efficiency. Because these changes affects both some assets and some expenses, the agency assumes that they will cancel each other out and result in no fiscal impact. The cost of any nominal increase in cases the changes might cause can be absorbed by the agency

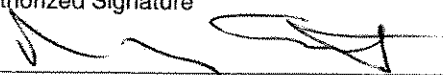
The proposed change which treats a reduction in work hours the same as quitting a job when the motivation is to qualify for appointment of counsel should have no fiscal impact. Instances of such conduct are rare.

The repeal of PD 3.038(1)(b) reflects that partial indigency no longer exists and that every person who qualifies for services has a repayment obligation. Eliminating this obsolete provision will have no fiscal impact.

The amendments to PD 3.05(1) relating to eligibility evaluations of juveniles reflects that such evaluations are no longer required by statute. This is not a new statutory change and there will be no fiscal impact from the rule change. The amendments to PD 3.05(1) that relate to eligibility evaluations of adult mentally ill persons do not change the eligibility criteria. The amendments are seen as staff efficiencies and should have no fiscal impact.

Long-Range Fiscal Implications

It is anticipated that the rule change will not result in any long range fiscal impact.

Prepared By: Deborah M Smith	Telephone No. 261-8856	Agency Office of State Public Defender
Authorized Signature 	Telephone No.	Date (mm/dd/ccyy) 07/26/02



Wisconsin State Public Defender

To: Senate and Assembly Chief Clerks
Date: August 27, 2002
From: Deborah Smith, Legal Counsel
Re: Notice of Rule in Final Draft Form

Pursuant to s. 227.19(2), Stats., please provide notice to the presiding officers of the Senate and the Assembly that the attached proposed rules relating to eligibility determinations is in final draft form and is hereby accompanied by a report, as specified in s. 227.19(3), Stats.

Thank you.



Wisconsin State Public Defender

To: Legislative Committees
Date: August 27, 2002
From: Deborah Smith, Legal Counsel
Re: Report on Clearinghouse Rule 02-109

Analysis and Need

The proposed changes to the administrative code comply with chapter 977 Stats. and serve to clarify and simplify the process of determining the financial eligibility of prospective clients. A number of the amendments replace references to indigency or indigent with eligibility or eligible. Chapter 977 provides a statutory financial eligibility standard for appointment of counsel by the agency, which is different from a constitutional determination of indigency by a court. The purpose of these amendments is to resolve the confusion between the constitutional concept of indigency and the use of the word in the context of state public defender representation.

The amendments to PD 3.03(1)(c) and 3.03(2) are intended to simplify the form and process of eligibility determinations. Simplification of the form and process of eligibility determinations allows more cost-effective use of staff time. The amendments to PD 3.03(1)(c) affect few applicants according to our database of eligibility determinations. In addition, a survey of lending institutions has demonstrated that money is rarely loaned on the basis of vehicles of \$10,000 or less in equity. The amendments are consistent with the treatment of non-liquid assets by W2. Likewise, the amendments to PD 3.03(2) remove expenses that are rarely determinative of eligibility. Further, if these debts are reduced to formal court judgments they may be considered under the general category of court-ordered obligations.

The amendment to PD 3.055 simply clarifies that the state public defender should treat voluntary reduction in hours the same as quitting a job when the action is motivated by the intent to qualify for state public defender assigned counsel.

The repeal of PD 3.038(1)(b) conforms the rule to current law and practice. The repeal of PD 3.038(1)(b) reflects the fact that the concept of partially indigent is no longer relevant to adult applicants for state public defender

assignment of counsel. The concept of a partially indigent applicant predated the collections program initiated in 1996. Prior to 1996, applicants found indigent paid nothing and applicants found partially indigent were required to pay something towards the cost of representation. Under the current collections program all eligible applicants are subject to the collections program.

The amendment to PD 3.05(1) conforms the rule to current law and practice. At one time children entitled to appointment of counsel under the juvenile or mental health laws were required to complete an eligibility evaluation. Current law does not require a determination of eligibility for children entitled to appointment of counsel. The adult applicant for appointment of counsel who lacks the mental capacity to understand the contents of the eligibility evaluation form or the process presents a difficult situation for staff. Unlike the applicant who is unwilling to provide the required information, the mentally ill or developmentally disabled client is usually unable to provide reliable information. It is often possible for staff to obtain reliable information from family or medical staff regarding the person's income and assets. Providing this exception to subsection (1) allows staff to be more efficient in their eligibility determinations.

Statutory authority: sec. 977.02(2m), 977.02(3)

Statutes interpreted: sec. 977.07

Public Hearing

A public hearing was held on August 26, 2002. There were no appearances or registrations for or against the proposed rule. The agency did not receive any testimony or written comments on the proposed rule.

Legislative Council Staff Recommendations

The Legislative Council staff made several recommendations. All of the recommendations have been accepted and incorporated into the proposed rule.

Flexibility Analysis

The proposed amendment would not have a regulatory effect on small businesses.

Thank you for your attention to this matter. If you have any questions about the proposed rule, please feel free to call me at 261-8856.

Proposed Order of the State Public Defender Board Amending Rules

The Wisconsin State Public Defender Board proposes an order to repeal PD 2.08(3) and 3.038(1)(b); to renumber and amend PD 3.038(1)(c); to amend PD 2.01(5), 2.02(1), 2.03(1), 2.03(3), 2.08(title), 2.08(1), 3.03(1)(c), 3.03(2), 3.03(3), 3.038(title), 3.038(1)(a), 3.039, 3.05, 3.055, 3.06(title) and 3.06(1), relating to eligibility determinations.

Analysis

The proposed changes to the administrative code comply with chapter 977 Stats. and serve to clarify and simplify the process of determining the financial eligibility of prospective clients. A number of the amendments replace references to indigency or indigent with eligibility or eligible. Chapter 977 provides a statutory financial eligibility standard for appointment of counsel by the agency, which is different from a constitutional determination of indigency by a court. The purpose of these amendments is to resolve the confusion between the constitutional concept of indigency and the use of the word in the context of state public defender representation.

The amendments to PD 3.03(1)(c) and 3.03(2) are intended to simplify the form and process of eligibility determinations. Simplification of the form and process of eligibility determinations allows more cost-effective use of staff time. The amendments to PD 3.03(1)(c) affect few applicants according to our database of eligibility determinations. In addition, a survey of lending institutions has demonstrated that money is rarely loaned on the basis of vehicles of \$10,000 or less in equity. The amendments are consistent with the treatment of non-liquid assets by W2. Likewise, the amendments to PD 3.03(2) remove expenses that are rarely determinative of eligibility. Further, if these debts are reduced to formal court judgments they may be considered under the general category of court-ordered obligations.

The amendment to PD 3.055 simply clarifies that the state public defender should treat voluntary reduction in hours the same as quitting a job when the action is motivated by the intent to qualify for state public defender assigned counsel.

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assignment of counsel. The concept of a partially indigent applicant predated the collections program initiated in 1996. Prior to 1996, applicants found indigent paid nothing and applicants found partially indigent were required to pay something towards the cost of representation. Under the current collections program all eligible applicants are subject to the collections program.

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Statutory authority: sec. 977.02(2m), 977.02(3)

Statutes interpreted: sec. 977.07

Section 1. PD 2.01(5) is amended to read:

PD 2.01(5) "County designee" means the person, department, office, officer, board or agency selected by the county board and, where appropriate, approved by the state public defender, to do ~~indigency~~ eligibility determinations pursuant to s. 977.07 (1), Stats.

Section 2. PD 2.02(1) is amended to read:

PD 2.02(1) In any emergency situation the state public defender or county designee shall evaluate the person for ~~indigency~~ eligibility as soon as possible.

Section 3. PD 2.03 (1) and (3) are amended to read:

PD 2.03(1) The state public defender or county designee shall contact any person who claims or appears to be ~~indigent~~ eligible or has requested counsel

for the purposes of assisting that person in completing the indigency eligibility questionnaire.

PD 2.03(3) The state public defender or county designee shall have immediate access in person or by phone to any individual held in custody, including but not limited to city or county jails, detention facilities, or mental health facilities, upon request by the state public defender or county designee, to advise the person of the right to a free determination of indigency eligibility and for the purpose of determining indigency eligibility.

Section 4. PD 2.08 (title) and 2.08(1) are amended to read:

PD 2.08 Court's right to review indigency eligibility determination.

PD 2.08(1) Any person determined by the state public defender not to be eligible for publicly compensated counsel may request that the court having jurisdiction over the case review the state public defender's indigency eligibility determination.

Section 5: PD 2.08(3) is repealed.

Section 6. PD 3.03(1)(c), 3.03(2) and 3.03(3) are amended to read:

PD 3.03(1)(c) The amount which could be raised by a loan on the person's non-liquid assets, except any automobiles or real estate, with a total value of ~~\$500~~ \$2500 or more as provided in s. 977.07 (2), Stats., which, unless otherwise apparent, shall be computed as one-fourth the person's equity in that property. Equity in automobiles totaling \$10,000 or less shall be considered as having no loan value. If the applicant has equity in real estate of \$30,000 or more, the applicant shall present verification to the state public defender that the applicant has unsuccessfully offered that equity to at least 2 qualified private attorneys as a retainer. In this paragraph, a "qualified private attorney" means an attorney who is certified in the applicable county to accept state public defender appointments for the case category of the applicant's case; and

PD 3.03(2) The "amount required to provide the necessities of life," means the payment amount specified in s. 49.19 (11) (a) 1., Stats., plus other specified, emergency, or essential costs. The following emergency or essential costs may be added to the cost of living amount specified in s. 49.19 (1)(a) 1., Stats; court-ordered obligations; ~~student loan payments~~; utility bill arrearages; ~~arrears on taxes~~, rent payments or mortgage payments; payments for health insurance,

medical care, and dental care; ~~social service agency bills~~, work-related child care costs; payments for automobile insurance necessary to maintain employment; and payments by incarcerated persons as a condition of work-release privileges. Among other costs, the amount paid to a person under a state and federal grant of supplemental security income for the aged, blind, and disabled program pursuant to 42 U.S.C. 1381 to 1383c is considered an essential cost.

PD 3.03(3) The state public defender shall annually review the indigency eligibility standards specified herein and revise those standards as required.

Section 7. PD 3.038 (title) and 3.308(1)(a) are amended to read:

PD 3.038 Calculation of indigency eligibility.

PD 3.038(1)(a) If the available assets are less than or equal to \$100 the anticipated cost of retaining counsel, the person is indigent eligible.

Section 8. PD 3.038(1)(b) is repealed.

Section 9. PD 3.038(1)(c) is renumbered PD 3.038(1)(b) and amended to read:

PD 3.038(1)(b) If the available assets are greater than the anticipated cost of retaining counsel, the person is not indigent eligible.

Section 10. PD 3.039 is amended to read:

PD 3.039 Change of circumstances and redetermination of indigency eligibility; withdraw from representation.

If a client has originally qualified for appointment of counsel by a determination of indigency eligibility, the state public defender shall apply the following financial guidelines when a client or client's spouse obtains a higher level of income or receives liquid assets:

(1) When a change in income from employment occurs within 30 days from the date that counsel was appointed, the same eligibility standards shall apply as applied to the original determination of indigency eligibility. When a change resulting in increased income other than from employment or a change resulting in increased liquid assets occurs, the same eligibility standards shall apply as applied to the original determination of indigency eligibility.

(2) If the change in income from employment occurs more than 30 days from the date that counsel was appointed, the client remains eligible for representation by the state public defender if the income does not exceed the gross monthly amount stated in the table included in sub. (3). If the gross monthly income exceeds that amount, the client is considered not indigent eligible.

(4) When the state public defender determines that a client is not indigent eligible, the state public defender shall move the court to withdraw from representation. The state public defender shall develop procedures for seeking to withdraw from cases in which clients have been determined not to be indigent eligible, including procedures to notify and instruct private attorneys assigned to cases by the state public defender.

Section 11. PD 3.05 is amended to read:

PD 3.05 Certified statement.

- (1) All persons provided with publicly compensated counsel shall be required to give a truthful statement of their assets, liabilities, and expenses. ~~All such persons~~ and shall sign the completed indigency eligibility evaluation form certifying that the financial information that they have provided is accurate to the best of their knowledge and belief. Exceptions to this section are limited to the following:
- (a) children who are entitled to counsel assigned by the state public defender under chapters 48, 51, 55, or 938, Stats.
 - (b) the state public defender may waive the requirements of subsection (1) when the state public defender determines that a person is otherwise eligible for assignment of counsel under chapter 977, Stats., determines that the person lacks the mental capacity to understand the contents of the eligibility evaluation form, and obtains reliable financial information about the person from another source

Note: Revised indigency eligibility evaluation forms can be obtained at no charge from the Office of the State Public Defender, Administration, 315 N. Henry Street, 2nd Floor, Madison, WI 53707.

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

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

Section 12. PD 3.055 is amended to read:

PD 3.055 Voluntary termination of employment.

If an applicant voluntarily terminates or reduces hours of employment 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 13. PD 3.06 (title) and 3.06(1) are amended to read:

PD 3.06 Access to indigency eligibility evaluations.

PD 3.06(1) Access to indigency eligibility evaluations of persons provided with publicly compensated counsel may not be granted to any person, except the client, staff of the state public defender, counsel appointed by the state public defender, or the trial court, upon request of the court, during the pendency of the action for which they are prepared. If the client's attorney believes that release of the statement may violate the legal rights of the client or the attorney's ethical obligations, the attorney may seek a protective order under sub. (4) (b).

This rule shall take effect on the first day of the month commencing after the date of publication, pursuant to s. 227.22 (2) (intro.), Stats.

Fiscal Estimate — 2001 Session

- Original Updated
 Corrected Supplemental

LRB Number	Amendment Number if Applicable
Bill Number	Administrative Rule Number PD 2 and 3 - see attached

Subject
 Amendment of the rule relating to indigency determinations

Fiscal Effect

State: No State Fiscal Effect

Check columns below only if bill makes a direct appropriation or affects a sum sufficient appropriation.

- Increase Existing Appropriation Increase Existing Revenues
 Decrease Existing Appropriation Decrease Existing Revenues
 Create New Appropriation

- Increase Costs — May be possible to absorb within agency's budget.
 Yes No
 Decrease Costs

Local: No Local Government Costs

1. Increase Costs
 Permissive Mandatory
2. Decrease Costs
 Permissive Mandatory
3. Increase Revenues
 Permissive Mandatory
4. Decrease Revenues
 Permissive Mandatory

5. Types of Local Governmental Units Affected:
 Towns Villages Cities
 Counties Others
 School Districts WTCS Districts

Fund Sources Affected

- GPR FED PRO PRS SEG SEG-S

Affected Chapter 20 Appropriations

Assumptions Used in Arriving at Fiscal Estimate

The proposed rule changes that change references to "indigency" or "indigent" to "eligibility" or "eligible" will not affect which applicants qualify or do not qualify for legal services. These changes have no fiscal impact.

Based on a study of applications for services conducted by the agency, the changes relating to the treatment of certain assets and expenses should have no fiscal impact. The changes affect assets and expenses which are rarely determinative of whether the individual qualifies for services. The change is seen as one that promotes staff efficiency. Because these changes affects both some assets and some expenses, the agency assumes that they will cancel each other out and result in no fiscal impact. The cost of any nominal increase in cases the changes might cause can be absorbed by the agency.


The proposed change which treats a reduction in work hours the same as quitting a job when the motivation is to qualify for appointment of counsel should have no fiscal impact. Instances of such conduct are rare.

The repeal of PD 3.038(1)(b) reflects that partial indigency no longer exists and that every person who qualifies for services has a repayment obligation. Eliminating this obsolete provision will have no fiscal impact.

The amendments to PD 3.05(1) relating to eligibility evaluations of juveniles reflects that such evaluations are no longer required by statute. This is not a new statutory change and there will be no fiscal impact from the rule change. The amendments to PD 3.05(1) that relate to eligibility evaluations of adult mentally ill persons do not change the eligibility criteria. The amendments are seen as staff efficiencies and should have no fiscal impact.

Long-Range Fiscal Implications

It is anticipated that the rule change will not result in any long range fiscal impact.

Prepared By: Deborah M Smith	Telephone No. 261-8856	Agency Office of State Public Defender
Authorized Signature 	Telephone No.	Date (mm/dd/ccyy) 07/26/02

Fiscal Estimate Worksheet — 2001 Session
 Detailed Estimate of Annual Fiscal Effect

Original Updated
 Corrected Supplemental

LRB Number	Amendment Number if Applicable
Bill Number	Administrative Rule Number PD 2 and 3

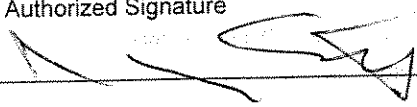
Subject
 Amendment of the rule relating to determinations of indigency

One-time Costs or Revenue Impacts for State and/or Local Government (do not include in annualized fiscal effect):
 \$0

Annualized Costs:		Annualized Fiscal Impact on State Funds from:	
		Increased Costs	Decreased Costs
A. State Costs by Category			
State Operations — Salaries and Fringes		\$ 0	\$ - 0
(FTE Position Changes)		(0.00 FTE)	(- 0.00 FTE)
State Operations — Other Costs		0	- 0
Local Assistance		0	- 0
Aids to Individuals or Organizations		0	- 0
Total State Costs by Category		\$ 0	\$ - 0
B. State Costs by Source of Funds			
GPR		\$ 0	\$ - 0
FED		0	- 0
PRO/PRS		0	- 0
SEG/SEG-S		0	- 0
State Revenues Complete this only when proposal will increase or decrease state revenues (e.g., tax increase, decrease in license fee, etc.)		Increased Revenue	Decreased Revenue
GPR Taxes		\$ 0	\$ - 0
GPR Earned		0	- 0
FED		0	- 0
PRO/PRS		0	- 0
SEG/SEG-S		0	- 0
Total State Revenues		\$ 0	\$ - 0

Net Annualized Fiscal Impact

	State	Local
Net Change in Costs	\$ 0	\$ 0
Net Change in Revenues	\$ 0	\$ 0

Prepared By: Deborah M Smith	Telephone No. 261-8856	Agency Office of State Public Defender
Authorized Signature 	Telephone No.	Date (mm/dd/ccyy) 07/26/02