



Wisconsin State Public Defender

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Clearinghouse Rule 09-067

PROPOSED ORDER OF THE STATE OF WISCONSIN OFFICE OF THE STATE PUBLIC DEFENDER ADOPTING RULES (Wis. Admin. Code Chapter PD 1 Certification)

The Wisconsin State Public Defender Board proposes an order to repeal PD 1.06, to renumber and amend PD 1.03, to amend PD 1.03 (title), PD 1.05, PD 1.07 and PD 1.08, to repeal and recreate PD 1.035 and PD 1.04, and to create PD 1.03 (2), PD 1.03 (3), PD 1.03 (4), PD 1.03 (5), PD 1.037 and PD 1.075, relating to the certification of private bar attorneys to accept appointments to provide legal representation to state public defender clients.

Statutes Interpreted

Sections 977.02 (5) and (6), 977.03 (3), 977.05 (4) and (5), and 977.08 (1) to (3), Stats.

Statutory Authority

Sections 977.02 (5), (6) and (8), and 977.03 (3), Stats.

Explanation of Agency Authority

Sections 977.05 (4) and (5) and 977.08 (1) require the state public defender to appoint attorneys to represent indigent clients in specified cases. Section 977.08 (2) and (3) require the state public defender to notify all attorneys that they may be appointed to provide legal representation to state public defender clients, to review the qualifications of attorneys seeking appointment, and to certify lists of attorneys qualified to accept appointments. Section 977.02 (5) allows the state public defender board to promulgate rules that establish procedures to assure that the legal representation of indigent clients by the private bar at the initial stages of cases assigned under ch. 977 is at the same level as the representation provided by the state public defender. Section 977.02 (6) allows the state public defender board to establish rules to accommodate the handling of certain potential conflict of interest cases by the office of the state public defender. Section 977.03 (3) allows the state public defender board to promulgate rules to establish procedures under which the state public defender may appoint attorneys based upon the state public defender's evaluation of the attorneys' performance. Section 977.02 (8) allows the state public defender board to perform all other duties necessary and incidental to the performance of any duty enumerated in ch. 977, Stats.

Related Statute or Rule

None

Plain Language Analysis

The ethical rules in Supreme Court Rules Chap. 20, Rules of Professional Conduct for Attorneys, prohibit conflicts of interest and require zealous representation. Consequently, the state public defender appoints some cases to private attorneys who are not employees. Because the state public defender does not have direct oversight of the legal

representation provided in these cases, the state public defender uses other means, including certification lists, to ensure that the private attorneys are competent to represent clients in different types of cases.

These rules modify certification criteria and procedures to:

- Update the certification lists to reflect changes in substantive and procedural law.
- Permit the state public defender to exercise discretion to certify, recertify, sanction, suspend, caution, place conditions upon or decertify a private attorney for cause.
- Establish criteria for the exercise of discretion.
- Permit the state public defender to consider an attorney's prior disciplinary record and other conduct, in addition to experience and education, when making certification decisions.
- Require an attorney to reapply for certification after decertification or voluntary removal from any certification list.
- Permit the state public defender to require a period of provisional certification to allow the state public defender to monitor the representation provided to clients.
- Permit the state public defender to suspend case appointments to an attorney pending an investigation into performance or billing.
- Permit the SPD to disclose information about an investigation after the investigation is concluded.

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

There are no existing or proposed federal regulations that address the activities of the proposed rules.

Comparisons with Rules in Adjacent States

The qualifications that private attorneys must meet in order to represent public defender-type clients vary in the adjacent states (Illinois, Iowa, Minnesota and Michigan). Some have court appointments only, some have county, rather than state, defender systems. In some states, a private attorney is simply required to have a law license, while in other states, the attorney's experience is taken into consideration before the attorney is appointed to represent an indigent person.

Summary of Factual Data and Analytical Methodologies

None

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

None

Effect on Small Business

None

Agency Contact Person

Questions regarding these rules may be directed to Marla Stephens at stephensm@opd.wi.gov or 315 N. Henry Street, 2nd Floor, Madison, WI 53703.

Place to Submit Comments

Comments may be submitted to Marla Stephens at stephensm@opd.wi.gov or 315 N. Henry Street, 2nd Floor, Madison, WI 53703.

SECTION 1. PD 1.03 (title) is amended to read:

PD 1.03 PD 1.03 Certification application and decisions.

SECTION 2. PD 1.03 is renumbered and amended to read:

PD 1.03 (text) **(1) APPLICATION FORM.** The state public defender shall prepare an application form to be completed by attorneys seeking certification or recertification as provided in s. 977.08 (3), Stats. The state public defender shall notify in writing each attorney who has submitted an application of the county or counties and the cases for which the attorney is certified to accept appointments, if any.

SECTION 3. PD 1.03 (2), 1.03 (3), 1.03 (4) and 1.03 (5) are created to read:

PD 1.03 **(2) PUBLIC DEFENDER'S CERTIFICATION DECISION.** For cause, the state public defender may take any of the following actions regarding an attorney's certification status: deny an application for certification or recertification, return an attorney to provisional certification under s. PD 1.037, exclude an attorney from any certification list in s. PD 1.04, suspend an attorney's certification status under sub. (3), decertify an attorney under sub. (4), 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. The state public defender shall inform the attorney in writing of the reasons for the adverse certification decision and the manner by which the attorney may appeal the decision.

PD 1.03 **(3) SUSPENSION.** The state public defender may suspend the attorney from any or all of the certification lists in s. PD 1.04 pending the outcome of the investigation into the attorney's performance; or into an allegation of fraudulent, unreasonable or inaccurate billing practices, of other misconduct, or of failure to comply with any provision of this chapter; or in response to a request for decertification. The suspension may not exceed 120 days, exclusive of any time attributable to the lack of cooperation from the attorney under investigation. The state public defender may extend the suspension by a period not to exceed an additional 30 days in order to complete the investigation. Suspensions that exceed these time limits may be appealed under s. PD 1.05.

PD 1.03 **(4) DECERTIFICATION.** Any interested party may request in writing that an attorney, previously certified to accept cases from the state public defender, be decertified for cause. Upon receipt of a request, the state public defender shall conduct an investigation. Upon a finding of cause, the state public defender may decertify the attorney and exclude the attorney from any or all of the certification lists in s. PD 1.04. An attorney seeking reinstatement to a certification list following decertification shall submit an application as provided in sub. (1).

PD 1.03 (5) DISCRETIONARY CONSIDERATIONS. The state public defender's exercise of discretion and determination whether cause exists to take any action under this chapter may include, but is not limited to, consideration of the following factors:

(a) The attorney is or has been disbarred, the attorney's license to practice law is or has been suspended, or the attorney has surrendered a license to practice law, in this or any other state or jurisdiction.

(b) The attorney fails or has failed to meet the education or experience requirements under this chapter.

(c) The attorney's conduct while employed by the state public defender, another law office or another governmental agency in Wisconsin or in another jurisdiction raises a concern about the attorney's character, performance, ability or behavior.

(d) The attorney engages or has engaged in fraudulent, unreasonable or inaccurate billing to the state public defender or any other governmental agency or organization.

(e) The attorney fails or has failed to meet minimum attorney performance standards adopted by the state public defender or to comply with the Supreme Court Rules of Professional Conduct for Attorneys.

(f) The attorney fails or has failed to follow the state public defender's procedures for billing or for approval of expenses.

(g) The attorney is or was the subject of a formal complaint filed by the Office of Lawyer Regulation with the Wisconsin Supreme Court or filed with an organization that is responsible for enforcement of lawyer regulation in any other jurisdiction.

(h) The attorney is or was the subject of a finding of dishonesty or incapacity by the Client Protection Fund in an award to a claimant.

(i) The attorney is adjudicated for any crime that reflects adversely on the attorney's honesty, trustworthiness or fitness as a lawyer.

(j) The attorney engages in conduct contrary to the interests of clients, the interests of justice, or the interests of the state public defender.

(k) The attorney is barred by statute from engaging in criminal or other public defender case representation.

(L) The attorney fails or has failed to cooperate with an investigation under this chapter.

(m) The conduct of an attorney that formed the basis for voluntary removal or for an investigation or decision regarding the attorney's license to practice law, certification to accept appointments, or billing practices, in Wisconsin or in any other jurisdiction continues to raise a concern about the attorney's character, performance, ability or behavior.

(n) The attorney requests to be removed from any or all certification lists at a time when the attorney is the subject of a pending inquiry or investigation concerning performance or billing practices.

(o) The attorney fails to comply with this chapter.

(p) The state public defender learns of any other information that raises a concern about the attorney's character, performance, ability or behavior.

SECTION 4. PD 1.035 is repealed and recreated to read:

PD 1.035 Requirements for certification. In order to obtain and retain certification under this chapter, an attorney must satisfy all of the following requirements:

(1) APPLICATION. The attorney must submit an application under s. PD 1.03 (1).

(2) LICENSE TO PRACTICE. The attorney must be licensed to practice law in Wisconsin and must be a member in good standing of the State Bar of Wisconsin.

(3) RESIDENCE. (a) The attorney must reside in or maintain his or her principal office in Wisconsin. A post office box in Wisconsin does not constitute a residence or a principal office in Wisconsin.

(b) An attorney may be certified or recertified for trial division cases in only those counties in which he or she resides or maintains his or her principal office, except that in counties with less than 10 attorneys on any certification list, an attorney residing or maintaining his or her principal office in one or more adjacent counties may also be certified.

(c) Notwithstanding par. (a) and (b), the state public defender may, on a case-by-case basis, certify an attorney to handle a case if such certification is necessary for effective client representation. Relevant considerations include, but are not limited to, caseload, availability of other counsel, proximity to the court, and cost-effectiveness.

(4) CONTINUING LEGAL EDUCATION. (a) The attorney must complete six credits of continuing legal education each calendar year in courses approved by the state public defender. This requirement shall apply beginning in the first full calendar year following an attorney's graduation from law school.

(b) The attorney must report compliance with this requirement under the procedures established by the state public defender. The state public defender shall calculate continuing education credits in the same manner as the Board of Bar Examiners.

(c) The state public defender shall offer training for attorneys seeking certification under this chapter. As used in s. 977.05 (5) (e), Stats., "sponsor" means to use state public defender resources to produce and promote state public defender conferences and training programs. As used in s. 977.05 (5) (e), Stats., "tuition" means all revenue realized from state public defender conferences and training programs and materials.

(5) COOPERATION WITH INQUIRIES. (a) An attorney must cooperate with inquiries from the state public defender regarding the status of appointed cases, and regarding performance or billing in appointed cases.

(b) An attorney who receives a written request to provide a response must respond in writing and within the deadlines presented with the request. An attorney who fails to do so may be suspended from further appointments under s. PD 1.03 (3) until an adequate response is provided.

SECTION 5. PD 1.037 is created to read:

PD 1.037 **PD 1.037 Provisional certification.**

PD 1.037 (1) APPLICABILITY. The state public defender may provisionally certify an attorney. All attorneys who have not been previously certified and all attorneys whose certification status is reinstated shall be provisionally certified under this section.

(2) REVIEW. After one year of provisional certification, the state public defender shall review the attorney's performance and determine the attorney's future certification status. The public defender may continue provisional certification, grant non-provisional certification, or discontinue provisional certification and exclude the attorney from any or all certification lists.

(a) The state public defender may require a provisionally certified attorney to provide a letter from at least one judge supporting non-provisional certification.

(b) The state public defender's determination may be based upon, but is not limited to: a review of briefs and client files, billing records, client communications, court records; telephone or personal conferences, and recommendations of judges and attorneys.

(c) The state public defender's determination shall consider the extent to which the provisionally certified attorney has satisfied the Supreme Court Rules of Professional Conduct for Attorneys and the minimum attorney performance standards adopted by the state public defender.

(3) CONTINUATION. If provisional certification is continued, the attorney's performance shall be reviewed again under sub. (2) after a period of time set by the state public defender, not to exceed one year.

(4) APPEAL. An attorney may appeal the state public defender's decision to discontinue provisional certification and to exclude the attorney from any or all certification lists as provided in s. PD 1.05. An attorney has no right to appeal the state public defender's decision to provisionally certify an attorney or to continue provisional certification.

(5) PROVISIONAL CERTIFICATION IN LIEU OF DECERTIFICATION. The state public defender may change an attorney's certification status to provisional certification in lieu of pursuing decertification as provided in s. PD 1.03 (4).

SECTION 6. PD 1.04 is repealed and recreated to read:

PD 1.04 Certification lists. An attorney may be placed on the list to accept an appointment to represent state public defender clients in the following case types if the attorney requests appointments in the case type, satisfies the requirements of s. PD 1.035, and satisfies the following additional criteria:

(1) MISDEMEANORS. No additional criteria.

(2) PATERNITY CASES. No additional criteria.

(3) FELONIES. (a) *Class G, H or I.* Within the last five years, the attorney has satisfied both of the following criteria:

1. Been trial counsel, alone or with other trial counsel.

2. Has litigated a significant portion of one completed jury trial, two trials to a court of record, or four testimonial hearings before a court of record, but not including a proceeding to revoke probation, parole or extended supervision.

(b) *Class D, E and F.* Within the last five years, the attorney has satisfied either of the following criteria:

1. Been sole trial counsel in at least one felony case tried to a jury to final resolution.
2. Been trial counsel, alone or with another attorney, and litigated a significant portion of three civil or criminal cases tried to a jury to final resolution.

(c) *Class B and C.* Within the last five years, the attorney has been sole trial counsel in at least four cases tried to a jury to final resolution, at least one of which was a felony.

(d) *Class A.* The attorney has satisfied all of the following criteria:

1. The attorney maintained a significant portion of his or her practice in criminal law in the five years immediately preceding the submission of his or her application for class A felony certification.
2. Within the last five years, the attorney has been sole or lead trial counsel in at least two class D or more serious felony cases tried to a jury to final resolution.
3. The attorney submitted to peer review, including reference checks with other criminal defense attorneys, prosecutors, judges and public defender staff.
4. The attorney submitted a writing sample, consisting of a court memorandum or brief concerning criminal law issues that was written within the past two years, which was reviewed and approved by the state public defender.
5. The attorney submitted any requested information relevant to a determination of the attorney's qualifications.

(4) UNCLASSIFIED CRIMES. The attorney satisfies the certification criteria for the case type with a corresponding penalty.

(5) WRITS AND EXTRADITIONS. The attorney satisfies the certification criteria for the case type alleged in the extradition request or that is the subject of the writ.

(6) CHAPTER 980 SEXUALLY VIOLENT PERSON COMMITMENTS. Within the last five years, the attorney has been sole trial counsel in at least four cases tried to a jury to final resolution, at least one of which was a felony.

(7) CHAPTER 48 CHILDREN'S COURT CASES AND CHAPTER 938 JUVENILE COURT CASES THAT WOULD BE MISDEMEANORS IF PROSECUTED IN CRIMINAL COURT. The attorney has satisfied either of the following criteria:

(a) Completed four credits of state public defender approved legal education pertaining to legal representation in ch. 48 or ch. 938, Stats., cases.

(b) Agreed in writing to complete four credits of state public defender approved legal education pertaining to legal representation in ch. 48 or ch. 938, Stats., cases during the initial period of his or her provisional certification.

(8) CHAPTER 938 JUVENILE COURT CASES OR CASES SEEKING TO WAIVE A JUVENILE INTO CRIMINAL COURT IN WHICH THE MOST SERIOUS ALLEGATION WOULD BE A CLASS E - I FELONY IF PROSECUTED IN CRIMINAL COURT. The attorney has satisfied the criteria in sub. (3) (a) and is certified for cases under sub. (5).

(9) CHAPTER 938 JUVENILE COURT CASES OR CASES SEEKING TO WAIVE A JUVENILE INTO CRIMINAL COURT IN WHICH THE MOST SERIOUS ALLEGATION WOULD BE A CLASS B - D FELONY IF PROSECUTED IN CRIMINAL COURT. The attorney has satisfied the criteria in sub. (6); and has been sole trial counsel in at least three trials to the court in ch. 938, Stats., cases in which the most serious allegation would be a felony if prosecuted in criminal court.

(10) TERMINATION OF PARENTAL RIGHTS CASES. The attorney has satisfied all of the following criteria:

(a) Satisfied the criteria in sub. (3) (a).

(b) Completed four credits of state public defender approved legal education pertaining to the legal representation of persons in ch. 48, Stats., cases.

(c) Completed four credits of state public defender approved legal education pertaining to the legal representation of persons in termination of parental rights cases.

(11) CHAPTER 51 AND CHAPTER 55 CIVIL COMMITMENT CASES. The attorney has satisfied either of the following criteria:

(a) Completed two credits of state public defender approved legal education pertaining to legal representation in ch. 51 or ch. 55, Stats., cases.

(b) Agreed in writing to complete two credits of state public defender approved legal education pertaining to legal representation in ch. 51 or ch. 55, Stats., cases during the initial period of his or her provisional certification.

(12) PROCEEDINGS TO REVOKE PROBATION, PAROLE OR EXTENDED SUPERVISION STATUS.

(a) The offense of conviction is a misdemeanor and the attorney has satisfied either of the following criteria:

1. Completed two credits of state public defender approved legal education pertaining to legal representation in revocation cases.

2. Agreed in writing to complete two credits of state public defender approved legal education pertaining to legal representation in revocation cases during the initial period of his or her provisional certification.

(b) The offense of conviction is a felony and the attorney has satisfied both of the following criteria:

1. Satisfied the criteria of sub. (3) (a).

2. Completed two credits of state public defender approved legal education pertaining to legal representation in revocation cases.

(13) APPELLATE DIVISION CASES. (a) *Level one appellate certification.* Level one certification includes appellate appointments in all misdemeanor cases, all unclassified

crimes, all sentencing after revocation cases, and class G-I felony cases. The attorney has satisfied either of the following criteria:

1. Submitted a brief-in-chief that was filed in any appellate court in the United States within the five years immediately preceding the application for certification and which was reviewed and approved by the state public defender.

2. Completed 3 credits of state public defender approved legal education pertaining to appellate procedure, or its equivalent; including a law school course, clinical program or judicial clerkship; within the three years immediately preceding the application for certification.

(b) *Level two appellate certification.* Level two certification includes appellate appointments in level one cases, in class A-F felony cases, and in ch. 980, Stats., civil commitment cases. The attorney has satisfied all of the following criteria:

1. Filed a minimum of two briefs-in-chief in Wisconsin appellate courts that complied with s. 809.30, Stats., within the five years immediately preceding the application for certification.

2. Submitted one brief-in-chief satisfying the criteria in subd. 1 which was reviewed and approved by the state public defender.

3. Conducted a minimum of three contested circuit court hearings, including one evidentiary hearing, within the five years immediately preceding the application for certification.

4. Either has satisfied the criteria of par. (a); or attended six hours of state public defender approved legal education pertaining to criminal law or ch. 980, Stats., within one year immediately preceding the application for certification.

(c) *Termination of parental rights appellate certification.* The attorney has satisfied both of the following criteria:

1. Satisfied the criteria of par. (a).

2. Either has completed four credits of state public defender approved legal education in termination of parental rights cases in the year immediately preceding application for certification; or has been sole trial or appellate counsel of record in at least one contested termination of parental rights case in the three years immediately preceding the application for certification.

(d) *Juvenile appellate certification.* The attorney has satisfied either of the following criteria:

1. Been sole trial counsel of record in at least five completed cases filed under ch. 48 or ch. 938, Stats., in the three years immediately preceding application for certification.

2. Completed four credits of state public defender approved legal education in cases under chs. 48 and 938, Stats., in the year immediately preceding the application for certification.

(e) *Civil commitment appellate certification.* The attorney has satisfied both of the following criteria:

1. Satisfied the criteria of par. (a).

2. Either completed two credits of state public defender approved legal education in chs. 51 and 55, Stats., cases in the year immediately preceding application for certification; or has been sole trial counsel of record in five cases under chs. 51 and 55,

Stats., in the three years immediately preceding application for certification.

(14) OTHER SPECIALIZED CERTIFICATION LISTS. The state public defender may develop other specialized lists under this section that may be based upon additional certification criteria to be developed by the state public defender.

(15) PUBLIC DEFENDER'S AUTHORITY TO WAIVE CRITERIA. The state public defender may allow an attorney's education, training or experience to substitute for any requirement set forth in s. PD 1.035 or this section. The state public defender may waive the requirements in this section to assign a case to an attorney who has a prior pending case with the same client.

SECTION 7. PD 1.05 is amended to read:

PD 1.05 **PD 1.05 Appeal of certification decisions.** ~~(1) The state public defender shall notify each attorney who has submitted a certification application of the counties or county and categories for which the attorney is eligible. Upon request by that attorney, the state public defender shall inform the attorney excluded from a particular list of the reasons for the exclusion from a particular list and the manner by which the attorney may appeal the decision or reapply for recertification.~~

(2) Any attorney may appeal the state public defender's certification decision under s. PD 1.03 (2) by mailing a letter of appeal to the state public defender within 30 days of the notice of ~~exclusion~~ 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 ~~may also~~ shall state the reasons why the attorney believes the ~~exclusion~~ decision was improper.

(3) Upon receipt of an appeal letter, the state public defender shall place the matter on the agenda of the next state public defender board meeting unless that meeting is less than 10 days from the receipt of the appeal letter, in which case the matter may be scheduled for the following meeting. The state public defender shall, at least 10 days ~~prior to~~ before the hearing, inform the attorney of the time and place of the board meeting at which the appeal will be considered.

(4) The state public defender shall transmit to the board and the attorney all material relied upon in reaching the certification decision, including the certification application and all written comments received under s. 977.08 (3), Stats.

(5) The attorney may submit to the board any material that he or she believes is relevant to the appeal. The hearing before the board shall be considered a "class 3" proceeding and is governed by ch. 227, Stats.

(6) The state public defender board may deliberate the matter in executive session pursuant to the provisions of s. 19.85 (1) (a), Stats. The board shall issue a written decision ~~either affirming or reversing~~ or modifying the decision of the state public defender. The written decision shall be mailed to the attorney within 20 days ~~of~~ after the board meeting and shall be signed by an officer of the board.

(7) The board's written decision shall constitute findings of fact and conclusions of law within the meaning of s. 227.47, Stats.

(8) The board may appoint a panel of board members to conduct the hearing specified in subs. (5) and (6). After reviewing the record of the hearing and receiving the panel's recommendation, the entire board shall issue a written decision.

SECTION 8. PD 1.06 is repealed.

SECTION 9. PD 1.07 is amended to read:

PD 1.07 **PD 1.07 Voluntary removal.** Any attorney may request to be removed from any ~~certified certification list for a specified period of time~~, and the state public defender shall remove the attorney ~~until notified in writing by the attorney that the attorney wishes to be placed back on the list~~. If an attorney is inactive for more than 3 years, the attorney shall reapply for certification. An attorney seeking reinstatement to a certification list after voluntary removal shall submit an application as provided in s. PD 1.03 (1).

SECTION 10. PD 1.075 is created to read:

PD 1.075 **PD 1.075 Inactive status.**

SECTION 11. PD 1.075 is created to read:

PD 1.075 (1) An attorney may decline to accept appointments and request in writing to be placed in inactive status. If an attorney has not been appointed in a case for more than one year, the state public defender may place the attorney in inactive status and shall notify the attorney of the change. Except as provided in sub. (2), the state public defender shall return the attorney to active status upon request.

(2) If an attorney has been in inactive status for more than 2 years, and seeks reinstatement to active status, the attorney shall submit an application as provided in s. PD 1.03 (1).

SECTION 12. PD 1.08 is amended to read:

PD 1.08 **PD 1.08 Access to files.**

(1) The state public defender may not disclose ~~to any person except the subject, any comments made by any person who has initiated or responded to an inquiry relating to the fitness of an attorney for certification~~ the contents or substance of any review or investigation prior to issuing a decision under s. PD 1.03, unless ordered to do so by the chairperson of the public defender board or a court, or unless the attorney who is the subject of the review or investigation first discloses the contents or the substance of the review or investigation.

(2) Only ~~certified certification lists~~, board proceedings and decisions under these rules shall be considered public documents and open to public inspection.

SECTION 13. Initial Applicability.

These rules shall first apply to applications for certification and to decisions of the state public defender made on or after the effective date.

SECTION 14. Effective Date.

This rule shall take effect on July 1, 2010, as provided in s. 227.22 (2) (a), Stats.

Dated: Wisconsin State Public Defender Board

By: _____
DANIEL M. BERKOS, Chair