

OFFICE OF THE STATE PUBLIC DEFENDER



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MEMORANDUM

To: Public Defender Commission

From: Bill Hooks, Chief Public Defender

Re: Background for Discussion on Revising Current ARMs and Drafting Proposed New ARMs

Date: 2/12/14

Title 47

Section 47-1-104(4), MCA provides that a court may order the Office of the State Public Defender to assign counsel "in cases in which a person is entitled to assistance of counsel at public expense because of financial inability to retain private counsel, subject to a determination of indigence" pursuant to §47-1-111, MCA. This statute imposed a number of requirements on the process for determining a defendant's eligibility.

When a court orders the office to assign counsel, the office shall immediately assign counsel prior to a determination of eligibility. A person for whom counsel is assigned is entitled to the full benefit of public defender services until the court's order requiring the assignment is rescinded. Secs. 47-1-111(1)(a), (c), MCA.

An applicant who is eligible for a public defender because the applicant is indigent shall provide a detailed financial statement and sign an affidavit. The application, financial statement, and affidavit must be on a form prescribed by the Public Defender Commission. Secs. 47-1-111(2)(a),(b), MCA.

If the person for whom counsel has been assigned is later determined pursuant to this section to be ineligible for public defender services, the office shall immediately notify the court so that the court's order may be rescinded. A determination may be modified by the office or the court if additional information becomes available or if the applicant's financial circumstances change. Secs. 47-1-111(1)(b), (5), MCA.

The office may not withhold the timely provision of public defender services for delay or failure to fill out an application. Sec. 47-1-111(2)(d), MCA.

The judge may inquire into the truth of the information contained in the affidavit. Information disclosed in the application, financial statement, or affidavit is not admissible in a civil or criminal action except when offered for impeachment purposes or in a subsequent prosecution of the

applicant for perjury or false swearing. A court may find a person in civil contempt of court for a person's unreasonable delay or failure to comply with the provisions which require submission of an application and financial information. Secs. 47-1-111(2)(b), (c), (d), MCA.

ARMs

The Administrative Rules of Montana (ARM) are the rules that state agencies make to implement legislation passed by the Legislature. Currently, ARM 2.69.301 sets out procedures for implementing the Title 47 requirements that OPD screen persons for eligibility, and OPD moves to rescind in those cases in which we determine the client is not indigent.

Current ARM: 2.69.301 DETERMINATION OF INDIGENCY

- (1) The office shall prepare forms to capture financial information from an applicant for public defender services.
- (2) The office shall distribute the forms to courthouses, jails, and other venues determined appropriate by the office.
- (3) The applicant will complete the forms in accordance with instructions provided on the forms and forward them to the appropriate regional office.
- (4) The staff of the regional office shall review an applicant's forms and determine whether, based on the provisions of 47-1-111 , MCA, an applicant is indigent and qualifies for public defender services. The applicant will be notified of this determination, regardless of outcome.
- (5) All information collected on the forms shall be treated as confidential except:
 - (a) as required in 47-1-111 , MCA; or
 - (b) when judicial review of the determination is requested by the applicant. At that time, the forms shall be submitted to the court for *in camera* inspection.

Proposed new administrative rules:

2.69.203 DEFINITIONS (suggested new subsections in *italics*)

- (1) "Applicant" means a person who seeks public defender services.
- (2) "Regional office" means an office authorized under 47-1-104 (2), MCA.
- (3) *For purposes of determining whether a person qualifies as "an individual of a household" such that his or her income is to be considered in determining the eligibility of the defendant for public defender services, the following considerations apply:*
 - (a) *Spouse's Income--The spouse's financial status shall be considered unless the spouse is the alleged victim;*
 - (b) *Parent's Income--The natural or adoptive parent's income should be considered if they support the defendant and the defendant is under eighteen (18) years of age unless a parent is an alleged victim of the charged offense. Defendants eighteen (18) years or older shall be considered*

independent from family income unless they are full-time students or are dependent upon their parents.

Source: 18 Missouri Code of State Regulations (CSR) 10-3.010

(New Rule)

2.69.xxx Voluntary termination of employment or disposal of assets

(1) If an applicant voluntarily terminates employment within the 90 days following the date of application for representation and for the purpose of having the Office of the State Public Defender assign counsel, the Office of the State Public Defender shall calculate the applicant's income on the basis of the applicant's wages before the voluntary termination of employment.

(2) If an applicant disposes of assets for the purpose of having the Office of the State Public Defender appoint counsel, the Office of the State Public Defender shall count the asset at its fair market value at the time it was disposed of minus the amount of compensation received for the asset.

Source: Wis. Adm. Code PD 3.055

(New Rule)

2.69.xxx Court's review of indigency determination

- (1) If the Office of the State Public Defender determines that a defendant is not eligible for public defender services, the regional office shall file with the court having jurisdiction over the case a motion to rescind the order to assign counsel.
- (2) The defendant may request that the court conduct a hearing on the Office of the State Public Defender's rescission motion. If the defendant does request a hearing, the court shall grant that person an opportunity to be heard.
- (3) At a hearing, the defendant may be compelled to testify only as to his or her financial eligibility under Title 47.
- (4) If the defendant does not request a hearing on the Office of the State Public Defender's motion to rescind, does not appear at a hearing on a motion to rescind, or refuses to testify at a hearing on a motion to rescind, the court may find the defendant is not eligible to have counsel assigned for him or her under Title 47.
- (5) If the defendant testifies at this hearing, his or her testimony as to his or her financial eligibility under this section may not be used directly or indirectly in any criminal action, except in a criminal action regarding a subsequent charge of perjury or false swearing.

- (6) If the Office of the State Public Defender files a motion to rescind the order to assign counsel on the ground the defendant is not eligible for services, the court shall determine whether the court agrees with the Office of the State Public Defender's evaluation and determination of eligibility, or whether the defendant is entitled to be represented by assigned counsel.

Sources: Wis. Adm. Code PD 2.08; *State v. Dean*, 471 N.W.2d 310, 313 (Wis. Ct. App. 1991) (“the court’s ‘review [of] any indigency determination’ is limited to determining whether the public defender properly followed the legislative criteria.”); *State v. Kennedy*, 2008 WI App 186, * 9 (Wis. Ct. App. 2008) (“The criminal defendant has the burden of proving that he/she is unable to afford counsel by a preponderance of the evidence.”);¹ Wis. Stat. § 977.06; Colorado Chief Justice Directive 04-04; *People v. Steinbeck*, 186 P.3d 54 (Colo.App. Div. 4 2007).

The Montana Supreme Court recently indicated that a court may consider the propriety of an assignment of counsel, and may deny an assignment, even without objection by the state, pursuant to the provisions of § 47-1-111(1)(d), MCA. *Christ v. Hon. John Larson, Missoula Fourth Jud. Dist. Court Judge*, OP 13-0542 (1/28/14).

(*New Rule*)

2.69.xxx Access to Financial Information.

- (1) Subject to § 47-1-111, MCA, access to a defendant's application or financial information may not be granted to any person, except the applicant, a person authorized by the applicant, staff of the Office of the State Public Defender, counsel assigned by the Office of the State Public Defender, or a court in which the applicant has a pending proceeding.
- (2) An application or other financial information shall be submitted to the court for *in camera* inspection.

Source: Wis. Adm. Code PD 3.06; ARM 2.69.301.

¹ It is the defendant's burden to submit documentation sufficient and current so that an accurate assessment of financial circumstances can be made. ... Although *Kennedy* submitted exhibits purporting to show that he does not have any income and is unemployed, he also submitted evidence showing ownership of three properties but failed to document income from the properties. Like the trial court, with only this documentation, we cannot conclude that the SPD erred in rendering its non-indigency determination. Accordingly, we must conclude that the trial court did not err in its review of the SPD determination. Based on the circumstances presented to it, this was the only reasonable determination it could make.

State v. Kennedy, 2008 WI App 186, * 15 (Wis. Ct. App. 2008)