

PUBLIC NOTICE: REQUEST FOR PUBLIC COMMENTS ON THE ECONOMIC IMPACT OF PROPOSED RULE AMENDING PD 2

Introduction and purpose

This is a request for comments on the economic impact of draft proposed rule in ch. PD 2, relating to repeal Wis. Admin. Code § PD 2.11 and amend the definition in § PD 2.01(2) of “regular assignment”

This request is made by the Public Defender Board under s. 227.137, Stats., to solicit information and advice from individuals, businesses, associations representing businesses, and local governmental units who may be affected by the proposed rules for use in analyzing and determining the economic impact that the rules would have on businesses, individuals, public utility rate payers, local governmental units, and the state’s economy as a whole.

The comments will be considered when the State Public Defender prepares the Economic Impact Analysis pursuant to § 227.137

Submitting Comments:

Written comments may be submitted to: Jaclyn Shelton, Legal Counsel, P.O. Box 7923, Madison, WI 53707-7923 or at spdboardstaff@opd.wi.gov

Commenting period

Comments on the economic impact of draft proposed rules will be accepted by the State Public Defender Board, beginning on July 16, 2026, and ending on August 1, 2026.

Confidentiality

Comments are voluntary. Your name and comment, or a summary thereof, may be made available to the public.

Related Scope Statement:

For more details, review the Statement of Scope SS 85-25

Proposed:

The State Public Defender Board proposes an order to repeal PD 2.11 and to amend PD 2.01 (2), relating to the definition of “regular assignment” and the reassignment of appellate cases.

RULE ANALYSIS

Statutes interpreted:

Wis. Stat. ch. 977.

Statutory authority:

Wis. Stat. §§ 977.02 (2m), (6), and (8); and 977.08 (1) and (3).

Explanation of agency authority:

The Board is authorized to promulgate rules regarding the assignment of counsel and representation of clients. Wis. Stat. § 977.02 (6) specifically directs the Board to handle potential conflict cases without requiring the automatic referral of all such cases to private counsel.

Related statutes or rules:

Wisconsin Rules of Professional Conduct for Attorneys, SCR 20:1.7 and 20:1.9.

Plain language analysis:

The rule repeals Wis. Admin. Code § PD 2.11, removing the "bright-line" requirement for automatic reassignment of appellate cases to private counsel when an "arguable" claim of ineffective assistance of a staff trial attorney is present. It also amends § PD 2.01 (2) to clarify that "regular assignment" includes both trial and appellate representation.

Summary of, and comparison with, federal regulations:

The federal system under the Criminal Justice Act (18 U.S.C. § 3006A) manages assignments internally without mandatory bright-line disqualification rules for ineffective assistance claims. The proposed rule aligns Wisconsin with this flexible, case-by-case assessment model.

Summary of comments from preliminary period:

No preliminary public hearing was held.

Comparison with rules in adjacent states:

State	Policy and Structural Comparison
Illinois	Under <i>People v. Banks</i> , 121 Ill. 2d 36 (1987), Illinois rejects a <i>per se</i> conflict of interest rule when one agency attorney alleges the ineffectiveness of another; it instead requires a case-by-case determination of actual conflict.

Iowa	Iowa utilizes a State Appellate Defender to handle indigent appeals. Assignments are governed by ethical "material limitation" standards rather than automatic administrative triggers for potential ineffective assistance claims.
Michigan	Michigan relies on the Michigan Rules of Professional Conduct (MRPC 1.7 and 1.9) to govern conflicts. There is no administrative mandate for automatic reassignment to the private bar solely based on an ineffective assistance allegation. In addition, Michigan has a separate entity for appeals.
Minnesota	Minnesota employs a unique structure with a separately appointed Chief Appellate Attorney overseeing the appellate office, distinct from trial-level staff. Reassignment is determined by whether a "concurrent conflict of interest" exists under the Rules of Professional Conduct, rather than an automatic mandate.

Summary of factual data and analytical methodologies:

The Appellate Division of the SPD raised the issue and staff did a review of current ethics rules and published opinions. Based on that the SPD recommended to the Board and it reviewed operational data indicating that the current "bright-line" rule limits efficiency and causes delays in appellate appointments. In addition, it requires duplication of effort as cases have to be reassigned once it is determined that an ineffective assistance of counsel claim is appropriate. Information about other states was found through each state's website, rules of ethics, and related caselaw.

Analysis and supporting documents for effect on small business:

The proposed rule will be posted for a period of 15 days to solicit public comment on economic impact, including how the proposed rules may affect businesses, local government units, and individuals.

Section 227.114 (1), Stats., defines a "small business" as an "entity, including its affiliates, which is independently owned and operated and not dominant in its field, and which employs 25 or fewer full-time employees or which has gross annual sales of less than \$5,000,000." Based on this definition, most attorneys certified to take SPD appointments would qualify as a small business. To determine the effect, the agency reviewed appellate caseload distributions and determined the rule reflects an internal administrative change to improve operational flexibility. Given the current number of cases and attorneys who are certified to take SPD appellate appointments, this change is not expected to have an effect on small businesses as there are currently significantly more cases available than certified attorneys.

Effect on small business:

The rule is anticipated to have no to minimal economic impact on small businesses.

Department of Veterans Affairs:
Not applicable.

Agency contact person:
Jaclyn Shelton, Legal Counsel, P.O. Box 7923, Madison, WI 53707-7923 or at
spdbboardstaff@opd.wi.gov

TEXT OF RULE

SECTION 1. PD 2.01(2) is amended to read:

PD 2.01(2) “Regular assignment” means any ~~situation~~ assignment for trial or appellate proceedings in which counsel is required other than under sub. (1).

SECTION 2. PD 2.11 is repealed.

SECTION 3. EFFECTIVE DATE. This rule takes effect on the first day of the month following publication in the Wisconsin Administrative Register, as provided in s. 227.22 (2) (intro.), Stats.