

NOTICE OF PUBLIC COMMENT PERIOD ON ECONOMIC IMPACT ANALYSIS PUBLIC DEFENDER BOARD

NOTICE IS HEREBY GIVEN of the time period for public comment on the economic impact of the proposed rule of the Public Defender Board on Wis. Admin. Code ch. PD 8, relating to repealing s. PD 8.02 (1) (b) and (d) and (3); amending s. PD 8.02 (1) (a); and creating s. PD 8.02 (1) (e), (f), (g), and (h), regarding maximum rates for discovery materials, including how this proposed rule may affect businesses, local governmental units, and individuals.

The comments will be considered when the Public Defender prepares the Economic Impact Analysis pursuant to Wis. Stat. § 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 October 13, 2026, and ending on October 29, 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 031-26](#)

PROPOSED ORDER OF THE PUBLIC DEFENDER BOARD TO ADOPT PERMANENT RULE

The Public Defender Board proposes an order to repeal PD 8.02 (1) (b) and (d) and 8.02 (3); to amend PD 8.02 (1) (a); and to create PD 8.02 (1) (e), (f), (g), and (h), relating to maximum rates for discovery materials.

RULE ANALYSIS

Statutes interpreted:

Sections 971.23 (10) and 977.02, Stats.

Statutory authority:

Sections 227.11 (2) (a) and 977.02 (9), Stats.

Explanation of agency authority:

The Public Defender Board (“Board”) is authorized to promulgate rules establishing the maximum fees that the state public defender may pay for copies, in any format, of materials that are subject to discovery in cases in which the state public defender or counsel assigned under s. 977.08 provides legal representation. The Board shall consider information regarding the actual, necessary, and direct cost of producing copies of materials that are subject to discovery.

Related statutes or rules:

Sections 971.23 and 19.35 (3), Stats; Wisconsin Administrative Code Chapter PD 8.

Plain language analysis:

This rule updates Wis. Admin. Code PD 8.02 to address contemporary methods and costs of discovery. The current rates in PD 8.02 are long outdated, and are much higher than direct costs district attorney offices incur in providing discovery materials. The updated rule will bring the rates in 8.02 into line with the current costs of various types of media, and will also take into account the contemporary ability to transfer large amounts of data electronically at little or no cost.

Summary of, and comparison with, federal regulations:

The Federal Department of Justice has a continuous duty to provide discovery under *Brady v. Maryland*, 373 U.S. 83 (1963) and Rule 16 of the Federal Rules of Criminal Procedure. In general the government provides discovery digitally with no cost to the federal public defender’s office through a cloud-based platform. If a hard drive is required for massive files, typically the federal defenders office provides the required hard drive.

Summary of comments from preliminary period:

No preliminary public hearing was held.

Comparison with rules in adjacent states:

Illinois: Under Illinois Supreme Court Rule 412, prosecutors have an explicit, mandatory, and continuing duty to disclose police reports, witness statements, and investigative files to defense counsel. Prosecutors generally provide discovery without seeking reimbursement. These disclosure obligations are treated as routine operational costs of the prosecution.

Iowa: Under Iowa Rule of Criminal Procedure 2.14, the prosecuting attorney is required, upon request, to permit a defendant to inspect, copy, or photograph designated discoverable materials within the state's possession or control. In modern practice, when a defendant is represented by a public defender or court-appointed counsel, prosecutors typically fulfill this requirement at no cost to the defendant by transmitting discovery electronically via secure digital portals or electronic file shares. Litigation expenses and defense costs associated with indigent representation are funded pursuant to Iowa Code § 815.11, which mandates that state appropriations pay for legal services and necessary expenses through the State Public Defender. The State Public Defender is required to review all submitted claims to ensure that charges are appropriate, reasonable and not excessive. See Iowa Code § 13B.4(4)(c)(1) and (4).

Michigan: The Michigan Indigent Defense Commission pays reasonable and necessary discovery reproduction fees. If there is a dispute over a fee Michigan Court Rule (MCR) 6.201(A)(6) allows a party to request a hearing before the court to address the cost of reproduction. The Attorney General or local prosecutor typically provides electronic discovery directly to the public defender's office via secure digital portals at no cost to the defendant. If reproduction fees or hard drive costs arise for massive files, those expenses are absorbed by the public defender's office budget or submitted as a court expense.

Minnesota: Prosecuting attorneys of counties and municipalities, and the law enforcement agencies of the state and its political subdivisions shall furnish, upon the request of the district public defender, the state public defender, or an attorney working for a public defense corporation, copies of any documents in their possession at no charge to the public defender. (Minn. Stat. §611.271, Minn. R. Crim. P. 9.05)

Summary of factual data and analytical methodologies:

The SPD reviewed historical discovery billing data, current commercial prices for physical storage media (flash drives and external hard drives), standard open records copying cost across Wisconsin government entities including the guidance provided by the Wisconsin Department of Justice, and the operational capabilities of modern secure file transfer platforms provided available to all district attorney's offices. We also reached out to the Federal public defender offices in Wisconsin and state public defender offices to determine what they are charged for discovery.

Copying: The agency analyzed actual direct costs for paper reproduction, lowering per-page rates from \$0.20/\$0.35 to \$0.10/\$0.15 to align with actual reproduction expenses and established state public record fee standards.

Physical Storage Media (Flash Drives and Hard Drives): The agency conducted market rate surveys of commercial data storage media. Proposed fee caps for flash drives (\$5.00 to \$33.00 depending on capacity) and hard drives (\$70.00 to \$91.00) were established by benchmarking the average retail cost of baseline hardware, ensuring reimbursement reflects actual hardware costs without inflated administrative surcharges.

Electronic Delivery: The agency evaluated the marginal cost of electronic data transmission (email, secure portals, and digital download links). Because electronic delivery incurs no incremental material or physical reproduction costs, the maximum fee was set at \$0.00.

Least Expensive Format Rule: The agency analyzed total discovery expenditures against its legislative budget allocation. By requiring reimbursement at the rate of the least expensive format available when multiple formats are provided or supported, the rule eliminates redundant charges and ensures fiscal sustainability while maintaining full defense access to discoverable materials. Further, currently the agency and the State through Department of Enterprise Technology provide digital platforms to all district attorneys' offices in the state that would allow for the transfer of electronic discovery at no cost to the district attorneys' offices.

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 rule may affect businesses, local government units, and individuals.

Effect on small business:

The amended rule is anticipated to have no 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
spdboardstaff@opd.wi.gov

TEXT OF RULE

SECTION 1. PD 8.02 (1) (a) is amended to read:

PD 8.02 (1) (a) For paper copies of written or printed materials, ~~\$0.20~~ \$0.10 per single-sided page, or ~~\$0.35~~ \$0.15 per double-sided page.

SECTION 2. PD 8.02 (1) (b) is repealed.

SECTION 3. PD 8.0 (1) (d) is repealed.

SECTION 4. PD 8.02 (1) (e) is created to read:

PD 8.02 (1) (e) For copies provided on flash drives, \$5.00 per drive up to 64 GB, \$8.00 per drive between 65 and 128 GB, \$17.00 per drive between 129 and 256 GB, and \$33.00 per drive between 257 and 512 GB.

SECTION 5. PD 8.02 (1) (f) is created to read:

PD 8.02 (1) (f) For copies provided on hard drives, \$70.00 per 1 TB hard drive and \$91.00 per 2 TB hard drive.

SECTION 6. PD 8.02 (1) (g) is created to read:

PD 8.02 (1) (g) For discovery materials delivered electronically via email, a secure electronic transfer portal, or a digital download link, the maximum fee is \$0.00.

SECTION 7. PD 8.02 (1) (h) is created to read:

PD 8.02 (1) (h) Notwithstanding subs. (a) through (g), if a prosecuting attorney provides discovery materials in multiple formats, or if an electronic format, including via a secure electronic transfer portal, email, or digital download link, is available to the prosecuting attorney the maximum fee that the state public defender may pay for the discovery materials in any format in that case is the rate established under this section for the least expensive format available.

SECTION 8. PD 8.02 (3) is repealed.

SECTION 9. 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.