ARC 2233C

STATE PUBLIC DEFENDER[493]

Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)*"b."*

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 13B.4(8), the State Public Defender hereby gives Notice of Intended Action to amend Chapter 1, "Administration," Chapter 11, "Attorney Fee Contracts," Chapter 12, "Claims for Indigent Defense Services," and Chapter 13, "Claims for Other Professional Services," Iowa Administrative Code.

These proposed amendments establish measures to promote fairness in the review of claims of contract attorneys and other professionals who render services on behalf of indigent clients. These measures include:

1. Adding an "undue burden" exception to the enforcement of the 45-day time limit for the submission of attorney fee claims;
2. Changing the current rule providing that any attorney fees "shall be denied" in the event of noncompliance with the State Public Defender's attorney designation to read that attorney fees "may be denied, in whole or in part" in the event of noncompliance;
3. Expanding the circumstances in which substitute counsel will be permitted;
4. Increasing the threshold amount before a parking receipt is required for reimbursement to attorneys;
5. Allowing court interpreters' claims for payment to be timely if submitted within 45 days of the court order approving payment;
6. Excluding weekends and state holidays from the calculation of the 24-hour prior notice required before a deposition can be canceled without cancellation fees to the court reporter;
7. Allowing and requiring additional process for attorney claimants under certain circumstances; and
8. Allowing the State Public Defender additional discretion in determining whether minimum qualification requirements are sufficient for an attorney to contract to accept court appointments in felony cases.

The proposed amendments also make other technical and substantive revisions to promote fairness in the claims review process. In addition, the proposed amendments conform the types of misdemeanor cases for indigent persons to whom the state public defender system provides representation to the Iowa Supreme Court decision in *State v. Young,* 863 N.W.2d 249 (Iowa 2015) and extend the purposes for which evaluations may be court ordered to conform with the Iowa Supreme Court decision in *State v. Lyle,* 854 N.W. 2d 378 (Iowa 2014).

Any interested person may make written suggestions or comments on the proposed amendments on or before December 4, 2015. Such written comments should be sent to Kurt Swaim, First Assistant State Public Defender, Fourth Floor, Lucas State Office Building, 321 E. 12th Street, Des Moines, Iowa 50319; by fax to (515)281-7289; or e-mail to kswaim@spd.state.ia.us.

A public hearing will be held on December 4, 2015, at 10 a.m. in Conference Room 424, Fourth Floor, Lucas State Office Building, 321 E. 12th Street, Des Moines, Iowa, at which time persons may present their views orally or in writing. At the hearing, persons will be asked to give their names and addresses for the record and to confine their remarks to the subject of the amendments.

Any persons who intend to attend the hearing and have special requirements, such as those related to hearing or mobility impairments, should contact the State Public Defender and advise of specific needs.

The Agency does not believe that the proposed amendments pose a financial hardship on any regulated entity or individual.

After analysis and review of this rule making, no adverse impact on jobs has been found.

These amendments are intended to implement Iowa Code chapters 13B and 815.

The following amendments are proposed.

ITEM 1. Amend paragraph **1.3(2)"b"** as follows:

b. Misdemeanors, if ~~there exists a potential for jail sentence~~ an accused faces the possibility of imprisonment under the applicable criminal statute;

ITEM 2. Amend subrule 11.3(4) as follows:

11.3(4) *Class A and B felonies.* To be eligible to contract to represent indigent persons in Class A and Class B felony cases at the trial level, an attorney must:

a. Have practiced criminal law for four years or more in any state or federal court;

b. Have tried at least five criminal jury trials to completion either as lead counsel or as a pro bono second attorney in a criminal jury trial if the service as pro bono second attorney is approved in advance for credit under this rule by the state public defender;

c. Participate in five hours of continuing legal education related to criminal law each calendar year in which the attorney has an active indigent defense contract and in the year prior to entering into the contract; and

d. Provide the names of at least three judges or magistrates who can discuss the qualifications and effectiveness of the attorney to represent indigent persons in Class A and Class B felony cases.

If an attorney satisfies the requirements for Class C and Class D felonies, the attorney may contract to serve as the second attorney representing an indigent person in a Class A felony in a case where the first appointed attorney meets these requirements. An attorney who does not meet all the requirements of this subrule ~~but who has previously tried a Class A or Class B felony case to completion as lead counsel~~ may provide the state public defender additional detail regarding the attorney's experience and qualifications and the circumstances preventing the attorney from meeting all the requirements and may be approved for contracting by the state public defender at the state public defender's sole discretion.

ITEM 3. Amend subrule 11.3(5) as follows:

11.3(5) *Class C and D felonies.* To be eligible to contract to represent indigent persons in Class C and Class D felony cases at the trial level, an attorney must:

a. Have practiced criminal law for two years or more in any state or federal court;

b. Have tried at least one criminal jury trial to completion either as lead counsel or as a pro bono second attorney in a criminal jury trial if the service as pro bono second attorney is approved in advance for credit under this rule by the state public defender;

c. Participate in five hours of continuing legal education related to criminal law each calendar year in which the attorney has an active indigent defense contract and in the year prior to entering into the contract; and

d. Provide the names of at least three judges or magistrates who can discuss the qualifications and effectiveness of the attorney to represent indigent persons in felony cases.

An attorney who has not met all requirements ~~except for the jury trial requirement set forth in paragraph 11.3(5)*"b"*~~ may provide the state public defender additional detail regarding the attorney's experience and qualifications and the circumstances preventing the attorney from ~~obtaining jury trial experience~~ meeting all the requirements and may be approved for contracting by the state public defender at the state public defender's sole discretion.

ITEM 4. Amend paragraph **11.7(2)"c"** as follows:

c. *Improper billing practices.* The state public defender may notify the attorney that the state public defender is considering the exercise of the state public defender's contract right to terminate the contract for improper billing practices. The notification shall explain the basis for the state public defender's concern and provide the attorney at least 14 days to provide a response. After consideration of the response, the state public defender may terminate the contract for improper billing practices if

the state public defender determines that the attorney has engaged in a pattern of willful, intentional, reckless, or negligent submission of false, abusive, or unreasonably excessive fee claims. An attorney may seek reconsideration of the state public defender's decision to terminate a contract for improper billing practices in the manner described in rule 493—11.9(13B).

ITEM 5. Amend subrule 11.9(1) as follows:

11.9(1) *Written notice.* A request for reconsideration is perfected by giving written notice of the request for reconsideration to the state public defender within ten business days of the date of mailing of the notice of denial of an initial or renewal contract~~,~~ or the notice of termination ~~following issuance of a notice of default~~. A request for reconsideration must be in writing and must specify the factual or legal errors the attorney contends were made by the state public defender. The attorney may provide such additional information, explanation or documentation as the attorney believes would be relevant to the reconsideration decision. The request for reconsideration is deemed made on the date of the United States Postal Service nonmetered postmark or the date of personal service on the state public defender.

ITEM 6. Amend subrule 11.9(2) as follows:

11.9(2) *Exhaustion of administrative remedies.* A request for reconsideration of the state public defender's decision to deny or terminate a contract ~~for cause~~ is an administrative prerequisite to seeking any form of judicial review pursuant to Iowa Code chapter 17A.

ITEM 7. Amend subrule 12.2(3) as follows:

12.2(3) *Timely claims required.* Claims submitted prior to the date of service shall be returned to the claimant unpaid and may be resubmitted to the state public defender after the date of service. Claims that are not submitted within 45 days of the date of service as defined in this subrule ~~shall~~ may be denied, in whole or in part, as untimely unless the delay in submitting the claim is excused by paragraph 12.2(3)*"f."* Attorney fees and expenses that are submitted on a claim denied as untimely under this subrule may be resubmitted on a subsequent claim that is timely submitted with respect to a subsequent date of service in the same case. For purposes of this subrule, a probation, parole, or contempt proceeding is not the "same case" as the underlying proceeding.

a. Adult claims. For adult claims, "date of service" means the date of filing of an order indicating that the case was dismissed or the client was acquitted or sentenced, the date of a final order in a postconviction relief case, the date of mistrial, the date on which a warrant was issued for the client, or the date of a court order authorizing the attorney's withdrawal from a case prior to the date of a dismissal, acquittal, sentencing, or mistrial ~~or the issuance of a warrant~~. The filing of a notice of appeal is not a date of service. If a motion for reconsideration is filed, the date on which the court rules on that motion is the date of service. For interim adult claims authorized by subrule 12.3(3) or 12.3(4), the date of service is the last day on which the attorney claimed time on the itemization of services.

b. Juvenile claims. For juvenile claims, "date of service" means the date of filing of an order as a result of the dispositional hearing or most recent postdispositional hearing that occurs while the client is still an active party in the case, the date on which the client ceased to be a party, the date of a court order authorizing the attorney's withdrawal from a case prior to the filing of the final ruling with respect to the client, the date jurisdiction is waived to adult court, the date on which the venue is changed, the date of dismissal, or the file-stamped date of a procedendo resulting from a petition on appeal. The date of a family drug court meeting, family team meeting, staffing, or foster care review board hearing is not a date of service.

c. Appellate claims. For appellate claims, "date of service" means the date on which the case was dismissed, the date of a court order authorizing the attorney's withdrawal prior to the filing of the proof brief, the date on which the proof brief was filed, or the date on which the procedendo was issued.

d. Notices of action and returned claims. For claims of any type that are filed as a result of a notice of action letter or a returned fee claim letter, "date of service" means the date of the notice of action letter or returned fee claim letter. But a claim that is denied as untimely does not become timely merely because it was resubmitted within 45 days of a returned fee claim letter. A timely claim returned to the attorney for additional information shall continue to be deemed timely only if resubmitted with the required information within 45 days of being returned by the state public defender.

e. Court orders. For claims of any type that are filed as a result of a court order after hearing for review of the fee claim, "date of service" means the file-stamped date of the order.

f. Exceptions to the 45-day rule. The state public defender may in the state public defender's sole discretion approve a claim that was not submitted within 45 days of the date of service only if the delay in submitting the claim was caused by one of the following circumstances:

(1) The death of the attorney;

(2) The death of the spouse of the attorney, a child of the attorney, or an employee of the attorney who was responsible for assisting in the preparation of the attorney's fee claims;

(3) A serious illness, injury, or other medical condition that prevents the attorney from working for more than 3 consecutive days and occurs in the last 5 days before the expiration of the 45-day period for timely claims;

(4) The attorney's need to care for the attorney's spouse or child with a serious illness, injury, or other medical condition that prevents the spouse or child from working, attending school, or performing other regular daily activities for more than 3 consecutive days and occurs in the last 5 days before the expiration of the 45-day period for timely claims.

(5) Other circumstances in which the state public defender determines, in the sole discretion of the state public defender, that enforcement of the 45-day rule would impose an undue burden and that payment of the claim should in fairness be made, in whole or in part. The state public defender, in the exercise of such discretion, may consider factors including, but not limited to:

1. The extent to which the 45-day rule was violated;

2. The justification provided by the attorney;

3. The attorney's claim history;

4. The extent of prejudice likely to be experienced by the attorney, the state public defender, and any party to the proceeding, including the attorney's client.

Any claim submitted pursuant to subparagraph (1) must be submitted within 45 days of the death of the attorney. Any claim submitted pursuant to subparagraph (2) must be submitted within 30 days of the death that caused the delay. Any claim submitted pursuant to subparagraph (3) or (4) must be submitted within 15 days of the end of the illness, injury, or medical condition that caused the delay. An attorney claiming an exception to the 45-day rule shall submit with the claim a letter explaining the applicable exception and written documentation supporting the exception.

ITEM 8. Amend subrule 12.2(4) as follows:

12.2(4) *Valid appointment required.* Claims for compensation from an attorney appointed as counsel or guardian ad litem may be denied if the attorney was appointed contrary to Iowa Code section 814.11 or 815.10. Claims for which court-appointed counsel at state expense is not statutorily authorized or which are not payable from the indigent defense fund created by Iowa Code section 815.11 shall be denied.

a. Appellate appointments. Claims for compensation from an attorney whose appointment as counsel or guardian ad litem at the appellate level does not comply with Iowa Code section 814.11 ~~shall~~ may be denied in whole or in part.

b. Trial-level designations. Claims by an attorney whose appointment in a case as counsel or guardian ad litem at the trial level was made on or after July 1, 2009, ~~shall~~ may be denied in whole or in part if the state public defender filed a designation effective at the time of the appointment designating a local public defender, nonprofit corporation, or attorney to represent indigent persons in that type of case in the county in which the case was filed, unless the appointment order and any supporting documentation submitted with the claim demonstrate that:

(1) The state public defender's designee and any successor designee have withdrawn from the case or have been offered and declined to take the case; or

(2) The state public defender's designee and any successor designee would have withdrawn from or would have declined to take the case had the appointment been offered.

c. Trial-level contract attorney preference. Claims by an attorney whose appointment in a case as counsel or guardian ad litem at the trial level was made on or after February 1, 2012, ~~shall~~ may be denied in whole or in part unless:

(1) At the time of the appointment, the attorney had a contract with the state public defender to represent indigent persons in that specific type of case and that county in which the action was pending; or

(2) The appointment order includes a specific finding that no attorney with a contract to represent indigent persons in that specific type of case and that county in which the action was pending is available or a finding that the state public defender was consulted and consented to the appointment; or

(3) After the appointment, the attorney entered into a contract with the state public defender, or amended the attorney's existing contract, to represent indigent persons in the specific type of case and the county in which the action was pending, in which case only the portion of the claim for the services performed prior to the effective date of the contract shall be denied.

ITEM 9. Amend subrule 12.5(5) as follows:

12.5(5) *Substitute counsel time.* Work performed by substitute counsel on behalf of an attorney appointed as counsel or guardian ad litem is payable only as provided for under this subrule. The appointed attorney is at all times personally responsible for the representation of the client and must ensure that substitute counsel is qualified to perform the work directed and that the client is effectively represented at all times. The appointed attorney is responsible for compensating substitute counsel. Claims for payment directly by substitute counsel or claims for payment by the appointed attorney that are inconsistent with this subrule shall be denied.

a. Court time. An attorney appointed as counsel or guardian ad litem must handle all court appearances unless the appointed attorney has ~~an unavoidable~~ a scheduling conflict, an illness, or other personal emergency, in which case the matter may be covered by substitute counsel. ~~Unless substitute counsel appears for the sole purpose of alerting the court of the appointed attorney's unavailability and requesting a continuance, substitute counsel may not cover for the appointed attorney at a trial in any criminal, juvenile, or postconviction relief case, or in any other hearing in which the court determines that the appointed attorney's personal participation is required.~~ Substitute counsel may never cover for oral arguments in appellate cases.

b. Out-of-court time. Substitute counsel ~~must not~~ may perform out-of-court legal services, except that ~~substitute counsel may perform out-of-court legal services to prepare for handling a payable court appearance, and in a juvenile case, substitute counsel may attend a department of human services staffing or family team meeting if appointed counsel has an unavoidable scheduling conflict, illness, or other personal emergency. Time~~ time spent by substitute counsel that duplicates work performed by the appointed attorney and time spent receiving direction from or conferencing with the appointed attorney ~~is~~ are not payable.

c. Exceptional circumstances. Substitute counsel may be used in situations that would otherwise be impermissible if the state public defender concludes that use of such substitute counsel would be in the best interest of the client and the administration of justice and provides prior written consent to the appointed attorney.

d. Supervisory time. Time spent by the appointed attorney directing, reviewing, or correcting the work of substitute counsel is not payable.

e. Qualification of substitute counsel. Unless the state public defender has given prior written consent to use the attorney as substitute counsel, substitute counsel must have an active contract with the state public defender to perform indigent defense services, although the contract need not cover the type of case or county of the case for which the claim is submitted.

f. Inapplicability to co-counsel in Class A felonies. The previous paragraphs of this subrule do not apply to a co-counsel who is separately appointed in a Class A felony. Each separately appointed co-counsel in a Class A felony shall submit a separate indigent defense fee claim that claims only the work actually performed by the appointed attorney submitting the claim. The use of substitute counsel is not permissible in a Class A felony in which co-counsel has been separately appointed.

ITEM 10. Amend paragraph **12.8(1)"e"** as follows:

e. Ordinary and necessary postage, toll calls, collect calls, and parking for the actual cost of these expenses. Toll and collect calls will be reimbursed at 10 cents per minute or the actual cost. A receipt

for the actual cost of the toll or collect call must be attached to the claim form. A statement from a correctional facility or jail detailing a standard rate for such calls shall constitute a receipt for purposes of this paragraph. For parking expenses in excess of ~~$2~~ $5, a receipt must be attached to the claim form. Claims for the cost of a parking ticket shall be denied. Unless a receipt is provided, any postage, toll calls, collect calls, or parking expenses shall be separately itemized on the itemization of services, specifying the date on which the expense was incurred and, if it is not otherwise clear from the itemization, the purpose of the expense.

ITEM 11. Amend paragraph **13.2(2)"c"** as follows:

c. One copy of each of the following documents is attached to the claim:

(1) The application and order appointing the interpreter. This appointment is presumed to continue until the conclusion of the matter, unless limited by the court or modified by a subsequent order.

(2) The order appointing counsel. This order is unnecessary if the attorney is not court-appointed but the court, in granting the application for the appointment of the interpreter, makes one of the following specific findings:

1. The client is indigent, or

2. Although the client is able to employ counsel, funds are not available to the client to pay for necessary interpreter services.

(3) An itemization of the interpreter's services detailing the expenses incurred, the services rendered, the date(s) on which the services were rendered, the time spent on each date including the time services began and ended on each day, and the manner in which the amount of the claim for services was calculated. With regard to expenses and services, the following shall apply:

1. Receipts for parking expenses are ~~required for actual costs of $2 or more per day~~ reimbursed pursuant to the Judicial Branch Administrative Directive on Court Interpreter and Translator Compensation Policies.

2. Claims for translating documents will be paid ~~by the hour, not by the word or line~~ pursuant to the Judicial Branch Administrative Directive on Court Interpreter and Translator Compensation Policies.

(4) A court order setting the maximum dollar amount of the claim.

ITEM 12. Amend paragraph **13.2(2)"d"** as follows:

d. Timely claims required. Claims for services are timely if, within 45 days of completion of services, either the claim is submitted to the state public defender for payment ~~within 45 days of completion of services~~ or the Fee Itemization Form and Court Order Approving Claim for Court Interpreter Services is filed with the clerk of court in the case. Claims that are not timely submitted shall be denied.

ITEM 13. Amend subparagraph **13.2(4)"d"(6)** as follows:

(6) Cancellation fees. No cancellation fees will be paid as long as the certified shorthand reporter is given notice of cancellation at least 24 hours before the time scheduled for a deposition. Weekends and state holidays shall not be included when calculating the 24-hour prior notice of cancellation contained in this subparagraph. If the deposition is canceled with less than 24 hours' notice, a fee for two hours or the actual time that the certified shorthand reporter is present at the site of the deposition including setup and takedown of equipment, whichever is greater, is payable at the rate set forth in subparagraph 13.2(4)*"d"*(1). A certified shorthand reporter is deemed to have been given notice of cancellation when an attorney or representative of the attorney delivers notice of a cancellation to the e-mail address provided by the certified shorthand reporter or leaves a message on voicemail or with a representative of the certified shorthand reporter at the telephone number provided by the certified shorthand reporter, not when the certified shorthand reporter actually hears or reads the message. No cancellation fee will be paid related to the transcription of an audio or video recording.

ITEM 14. Amend subrule 13.2(5) as follows:

13.2(5) *Claims for court-ordered evaluations.* The state public defender shall review, approve and forward for payment claims for necessary and reasonable evaluations requested by an appointed attorney only if the purpose of the evaluation is to establish a defense, ~~or~~ to determine whether an indigent is

competent to stand trial, or to evaluate a defendant at sentencing or resentencing who has been charged as an adult for a felony alleged to have been committed while a juvenile, if the offense has a potential mandatory minimum sentence of imprisonment, and not for any other purpose ~~such as~~ nor in any other circumstance for sentencing or placement~~,~~. Additionally, a claim for a court-ordered evaluation will be approved only if the following conditions are met:

a. The person performing the evaluation submits a signed original and one copy of a claim containing the following information:

(1) The case name, case number and county in which the action is pending.

(2) The name of the attorney for whom the services were provided.

(3) The date on which services commenced.

(4) The date on which services ended.

(5) The total number of hours claimed.

(6) The total amount of the claim.

(7) The claimant's name, address, social security number or federal tax identification number, and telephone number.

b. Court approval to conduct the evaluation was obtained before any expenses for the evaluation were incurred.

c. One copy of each of the following documents is attached to the claim:

(1) The application and order granting authority to conduct the evaluation. This order must specify that the purpose of the evaluation is ~~either to establish a defense to a pending charge or to determine whether an indigent is competent to stand trial~~ for a permissible purpose under this subrule.

(2) The order appointing counsel. This order is unnecessary if the attorney is not court-appointed but the court, in granting the application noted above, determines that, although the client is able to employ counsel, funds are not available to the client to pay for the evaluation.

(3) An itemization of the evaluator's services detailing the expenses incurred, the services rendered, the date(s) on which the services were rendered, the time spent on each date, and the manner in which the amount of the claim for services was calculated.

(4) A court order setting the maximum dollar amount of the claim. For purposes of this subrule, if the court order authorizing the evaluation sets a limit for the claim, this court order is unnecessary.

(5) If the evaluator charges a "minimum" amount for services based on a specific time, a certification by the evaluator that no other services have been performed or charges made by the evaluator for any portion of that specific time.