

## Crucial changes to court form make it easier for courts to waive fees for indigent litigants

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Recent revisions to court form CV-410 make it easier for indigent litigants to obtain a waiver of court fees and easier for courts to determine whether the litigant is indigent. In 2010, the form was twice revised in a manner that made it more difficult for courts to make the indigency determination.

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By [Korey C. Lundin](#), Legal Action of Wisconsin Inc., Madison

July 6, 2011 – Recent changes to a standard court form will hopefully make it easier for indigent litigants to obtain a waiver of court fees and make it easier for courts to determine whether the litigant is indigent.

Wisconsin’s Constitution fully embraces the concept of free access to justice in Article 1, Section 9:

“Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws.”

Many litigants cannot afford to pay the filing fees for starting a court action. The cost of filing a divorce action, for example, starts at \$184.50 (not including paying for service of paperwork, mediation expenses, guardian ad litem fees, or other costs). There are many other examples of the high cost of justice in Wisconsin, but the bottom line is there is a cost to obtaining justice and not everyone can afford these fees. Wisconsin’s Constitution guarantees the right of access to justice to everyone, even those who cannot afford to start a court action.

Wisconsin has long had a fee waiver statute which is simple in operation for both courts and litigants.<sup>1</sup> To obtain an order waiving court fees, an indigent litigant first completes a standard court form.<sup>2</sup> The fee waiver statute presumes if a litigant receives means-tested public assistance they are indigent.<sup>3</sup> The fee waiver statute also presumes indigency for litigants represented by a legal services firm.<sup>4</sup> If the litigant does not receive any of these benefits, the court can determine indigency based on the federal poverty guidelines, and the person is required to submit detailed financial information.

The Wisconsin Supreme Court established this statute nearly 20 years ago at the request of the Wisconsin Judicial Council.<sup>5</sup> The statute set up a uniform and simple process for determining indigency. As the Judicial Council notes to the statute state:

“The amendments to sub. (1) are intended to simplify and make more uniform the procedure for determining when costs and fees for indigent persons should be waived by the court. The form of the affidavit and court finding and order is to be prescribed by the Judicial Conference. To simplify the determination of indigency, detailed financial statements are not necessary if the person is receiving means-tested public assistance or legal services based on indigency.”

If a litigant submits an affidavit, which avers they receive means-tested public assistance or are represented by a legal services firm, the court is required to waive fees.<sup>6</sup> Indigent litigants who are presumptively indigent under the statute are not required to submit – and courts should not demand – detailed financial information. While the fee waiver statute is designed to make it simple for an indigent litigant to receive a waiver of their fees, it is also designed to make it simple for the courts to make a determination of indigency. If someone avers they receive means-tested public assistance or representation through a legal services firm, courts should not be spending their limited time and resources pouring over detailed financial information trying to determine if someone is indigent. Judges and court commissioners should not be expected to know all of the details of the eligibility screening criteria for these public benefits. The presumptive eligibility section of the fee waiver statute saves courts time, money, and resources.

### Confusion in the courts

For many years, the required court form went unchanged and tracked the statute.<sup>7</sup> In 2010, however, the form was twice revised in a manner which made it more difficult for litigants to obtain the waiver of fees and complicated the indigency determination for courts. The first revision was to the form summary accompanying the form. It stated courts could require proof from the litigant that they received means-tested public assistance. This change ran contrary to the statute, which does not place such a requirement on litigants.<sup>8</sup> It also resulted in some counties placing this requirement on litigants and others not requiring additional documentation. This, too, ran contrary to a statute that was intended to establish a uniform process statewide for indigency determinations. A second change to the form required all litigants to complete the form’s detailed financial information section. This also ran contrary to the statute and complicated the process for litigants and for courts.

My firm, [Legal Action of Wisconsin Inc.](#), represents low-income litigants in civil matters throughout southern Wisconsin. By the end of 2010, our firm’s six offices had seen an increasing number of courts which were either requiring proof of indigency or additional financial information from litigants who received means-tested public assistance or representation through our firm. The vast majority of courts were following the statute and granting the waiver of fees without asking for this additional information. Some courts, however, were refusing to follow the clear and unambiguous wording of the state: If someone submits an affidavit averring they receive means-tested public assistance or representation through a legal

services firm, the court “shall” find they are indigent and “shall” grant the waiver of fees. The result of this disparate administration of the fee waiver statute was in some counties, indigent litigants could obtain their constitutionally guaranteed access to the courts, and in some counties, they could not.

Legal Action recommends a solution

In order to correct the form, at the end of 2010, Legal Action submitted a request to the Records Management Committee to again revise the form to bring it in compliance with the statute. Myself and another attorney from my firm, Robert J. Andersen, met with the Records Management Committee at its February 10, 2011, meeting. We explained our concerns with the recent revisions to the form and outlined our experience with some courts being increasingly unlikely to grant fee waiver requests. The committee was receptive to these concerns and revised the form to bring it back in compliance with the statute.

The new form was issued this spring, and advocates should use this current version of the form available on the [court's website](#). No longer are indigent litigants required to submit proof or documentation of their means-tested public assistance to the court.<sup>9</sup> No longer are litigants who are presumptively indigent under the statute required to submit detailed financial information to the court. If the statute was not clear enough, at the suggestion of a judicial member of the committee, the following sentence was added to the form summary: “The Court shall grant this petition if Section 1 is completed for purposes of §814.29(1)(a), Wis. Stats.”<sup>10</sup> These changes will hopefully make the administration of the fee waiver statute more uniform in courts across the state.

Legal Action has also used litigation to seek to enforce the provisions of the fee waiver statute, including the filing of petitions for supervisory writs in the Court of Appeals. In one of the cases seeking a petition for supervisory writ, the Attorney General's office agreed our client was entitled to a waiver of her fees, and the Court of Appeals (District IV) ordered the Circuit Court to grant our client's request for waiver of fees.<sup>11</sup>

In another of these cases, the Court of Appeals (District II) just recently issued an unpublished opinion and order which agreed with Legal Action's interpretation of the fee waiver statute.<sup>12</sup> The opinion held that the language of the fee waiver statute was plain and unambiguous, the circuit court had a clear legal duty to grant our client's petition for waiver of fees, and that the circuit court was violating a plain legal duty by failing to grant our client's petition. The Court of Appeals granted our petition for supervisory writ and ordered the Circuit Court to grant our client's fee waiver. Now that the fee waiver form has been modified, this sort of litigation should no longer be necessary, however if any readers have concerns about the uniform administration of the fee waiver statute, I would encourage them to contact me to discuss the issue.

## About the author

Korey C. Lundin is the Family Law Priority Coordinator for [Legal Action of Wisconsin Inc.](#), a nonprofit law firm that provides free representation to low-income clients in civil matters. Based in Legal Action's Madison office, he heads the firm's family law practice and works with its six offices to coordinate family law litigation and advocacy. He can be contacted at [kcl@legalaction.org](mailto:kcl@legalaction.org).

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## Endnotes

<sup>1</sup> Wis. Stat. § 814.29(1). The statute covers not only filing and service fees, but “any fee that is required to prosecute or defend an action.” There is also a separate statute which covers the waiver of fees for prisoner, an issue outside the scope of this article. See Wis. Stat. § 814.29(1m).

<sup>2</sup> Wis. Stat. § 814.29(1)(b).

<sup>3</sup> Wis. Stat. § 814.29(1)(d)1.

<sup>4</sup> Wis. Stat. § 814.29(1)(d)2.

<sup>5</sup> S.Ct. Order 93-15.

<sup>6</sup> The statute uses the clearest and least ambiguous language possible “the court shall make a finding of poverty and issue an order [granting the waiver of fees].” Wis. Stat. § 814.29(1)(d) (emphasis added). The statute provides the court can deny the fee waiver only if the pleadings fail to state a claim upon which the court could grant relief. Wis. Stat. § 814.29(1)(c).

<sup>7</sup> [CV-410](#), Petition and Waiver of Fees/Costs, Affidavit of Indigency and Order. There is a separate form for use for obtaining a waiver of fees in an appellate case, [AP-010](#).

<sup>8</sup> Indeed, the litigant is signing the affidavit under oath and penalty of perjury. If the court later discovered the person lied on the form and was not receiving means-tested public assistance, the fee waiver statute allows the court to order the litigant to repay the fees and even allows the court to dismiss the litigant's case. Wis. Stat. § 814.29(2).

<sup>9</sup> Milwaukee County Local Rule 1.16 does still require proof of identity and proof of assistance. As this rule arguably conflicts with the fee waiver statute and the Wisconsin Constitution's right of free access to the courts, this local rule is open to challenge.

<sup>10</sup> [CV-410 Form Summary](#).

<sup>11</sup> *Dahlila H. v. Circuit Court for Waukesha County* (Appeal No. [2010AP001550-W](#)).

<sup>12</sup> The unpublished opinion and order was entered on June 30, 2011, in the case of *Thresher v. Circuit Court for Green Lake County* (Appeal No. [2011AP1150-W](#)) and was before District II judges Brown, Neubauer, and Reilly. Please contact Attorney Lundin to request a copy of the opinion.