

FORM SUMMARY

Name of Form:	Order on Prisoner's Petition for Waiver of Prepayment of Fees/Costs
Form Number:	CV-439
Statutory Reference:	§814.29, Wisconsin Statutes
Benchbook Reference:	CV 46-3
Purpose of Form:	Order by the judge on whether the petitioner has met the requirements to proceed without prepayment of filing and service fees/costs.
Who Completes It:	Judge
Distribution of Form:	Original to clerk of court, copy to prisoner, copy to Department of Corrections and Department of Justice.
Accompanying Forms:	<p>If the affidavit of indigency is granted or conditionally granted, the clerk of court will authenticate the copies for service on the defendants/respondents and send them back to the prisoner. If denied, the clerk of court will not authenticate the copies for service but will return them to the prisoner. The prisoner can then decide if he/she wishes to pay the fees and costs with his/her own money.</p> <p>Regardless of whether the petition is granted or denied, a copy of the order should be sent to the Department of Justice and Department of Corrections. The other copy of the affidavit of indigency and accompanying documentation should be sent to the Department of Justice with its copy of the order.</p>
New Form/Modification:	Modification, last update 12/01.
Modifications:	In Distribution list, removed "with copy of affidavit of indigency and attachments" after Department of Justice, Civil Litigation Unit.
Comments:	<p>The new prison litigation law (1997 Wisconsin Act 133) became effective September 1, 1998. This law creates significantly different procedural requirements for a prisoner seeking to commence an action or special proceeding without prepayment of filing fees, costs, or security for costs. Because of the different decisions that must be made by the court, this specialized form must be used in lieu of:</p> <ul style="list-style-type: none">• CV-410, the general Petition for Waiver of Fees/Costs--Affidavit of Indigency and Order, and,• CV-441, the Order on Prisoner's Petition for Waiver of Fees/Costs Based on Imminent Danger. <p>This form is to be used when the prisoner is not making any claim that he/she is in imminent danger of serious physical harm. (CV-441 is used when there is a claim of imminent danger of serious physical harm). A prisoner who is not making a claim of imminent danger of serious physical harm is required to comply with the requirements to provide a certified copy of her/his trust account statement and is not exempt from the "three dismissals" determination.</p> <p>Two major aspects of the new law should be noted:</p> <ul style="list-style-type: none">• First, there is no "automatic eligibility" for indigency status. The prisoner must complete the financial information.

- Second, any waiver of filing fees or service costs is only temporary. Prisoners will ultimately be required to pay the fees and costs. The court's order directs the Department of Corrections to take certain action with respect to the prisoner's trust fund account in order to pay the fees and costs in installments.

In order to guide the judge in making the indigency determination, the form has been drafted to follow the steps the judge must consider in the order in which they must be considered. After reviewing the documentation that the prisoner has attached for completeness (see above Document Review Determination), the judge proceeds to the following:

Exhaustion of administrative remedies determination:

- The court must determine whether or not the prisoner has exhausted his/her available administrative remedies. If the prisoner has done so, box 3 should be checked and the court should go on to "three dismissals determination."
- If the prisoner has not fully exhausted all available administrative remedies, box 4 should be checked denying the petition to proceed without prepayment of filing fees and costs. The court is not required to go on to any of the other issues and should return the materials to the prisoner.

Three dismissals determination:

- The court must determine whether or not the prisoner has accumulated "three or more dismissals" as defined in §802.05(3)(b)1-4, Wisconsin Statutes. If the prisoner has three or more such dismissals, the court is required to deny the petition and require prepayment of fees. A dismissal that "counts" in this determination is one in which the court determined that a prior case:
 - was frivolous, as determined under §814.025(3), Wisconsin Statutes,
 - was used for an improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation,
 - was seeking monetary damages from a defendant who is immune from such relief, or,
 - fails to state a claim upon which relief may be granted.

This procedural requirement is designed to discourage prisoners who have shown a prior history of improper litigation to file new actions without prepaying the fees.

The Department of Justice, pursuant to §802.05(3)(c), Wisconsin Statutes, will be maintaining a database of dismissals that meet the criteria. The Department has created its own form (JD-SL-22) for submission by the prisoner to the court (see above discussion in the "document review determination" section).

- If the court is satisfied from a review of that certificate that the prisoner has not had three or more dismissals, the judge is to check box 5 and go on to the economic status determination.
- If the court finds that the prisoner has had three or more dismissals, the judge is to check box 6 denying the petition. The court need not go on to the economic status determination and should return the prisoner's

materials to the prisoner.

Economic status determination:

- If the court reaches the economic status determination, the court should then review the prisoner's affidavit of financial information (CV-438), including the certified copy of the prisoner's trust fund account, and make a determination of eligibility. A judge has three choices: granting the petition, conditionally granting the petition, or denying the petition. It should be noted that granting the petition, whether outright or conditionally, will still require the prisoner to ultimately pay the filing fee and costs. The legislation is intended to end the "free ride" for prisoners in litigation.
- **Granting the petition.** If the court grants the petition,
 - The prisoner can proceed without prepayment of fees and costs.
 - A copy of the form must go to the agency having custody of the prisoner's trust fund account to freeze that account. If the prisoner is being housed out of state, the notice goes to the Dodge Correctional Institution at Waupun.
 - Each time the prisoner's trust fund account reaches \$10.00 the agency must send that \$10.00 to the clerk of court until the total fees and costs are paid.
 - The clerk of court must send notice to the agency of the total amount of fees and costs as soon as that information is known (after service fees are known) on CV-443.
- **Conditionally granting the petition.** If the court conditionally grants the petition because the prisoner has some funds in the trust fund account, but not enough to cover the total fees and costs,
 - The prisoner is required to pay to the clerk of court the balance in the trust fund account at the time of the affidavit. The judge must insert that dollar amount into the blank on the form.
 - A copy of the form must go to the agency having custody of the prisoner's trust fund account to freeze that account after the money has been sent to the clerk.
 - Upon receipt of the amount designated by the judge in the order, the clerk files the pleading and they are served on the opposing parties.
 - The clerk of court must send notice to the agency of the total amount of fees and costs as soon as that information is known (after service fees are known) on CV-443.
 - When the prisoner's trust fund account accumulates a sufficient amount to pay the balance owed, the agency is to forward that to the clerk of court. Note that this procedure is different from the prior situation in which the court grants the petition outright. In that situation, the agency sends \$10.00 every time that amount is accumulated; in the "conditionally grant" situation, the agency holds all of the funds until the total remaining balance is accumulated. RMC has no explanation for this distinction by the legislature.
- **Denying the petition.** If the court denies the petition because the prisoner is not indigent, the prisoner must prepay all fees and costs.

It should be noted that this form does not give the court the option of denying the affidavit of indigency on the grounds that the action is frivolous, as is found on the general Affidavit of Indigency/Order in CV-410. ***This is NOT an oversight.*** If a

judge believes an action may be frivolous the judge is to make that decision *after* the judge has granted the indigency status and allowed the action to be filed.

The prisoner litigation law specifically provides that the court is to "review the initial pleading as soon as practicable *after* the action or special proceeding is filed with the court . . ." §802.05(3)(a), Wisconsin Statutes, (emphasis added). Thus, the pleading is to be reviewed after the court has granted the affidavit of indigency and allowed the matter to be filed. This may create what some might consider a curious situation: the court, reviewing the documentation, finds the prisoner to have met the basic requirements for filing without prepayment and authorizes the filing by signing this form (CV-439). The court then dismisses the action by signing form CV-444. However, this is not so curious if one understands two points intended by the legislature:

- The dismissal after filing constitutes a dismissal under the "three dismissals" standard (if it were dismissed prior to filing, it would not count as one of the proscribed "dismissals"), and,
- The prisoner will be required to pay the full filing fee from her/his trust account over time. If the dismissal had occurred before filing, there would be no filing fee.

Upon dismissal, materials do not need to be returned to the prisoner. However, the Clerk may return the materials if desired..

About this form:

This form is the product of the Wisconsin Records Management Committee, a committee of the Director of State Court's Office and a mandate of the Wisconsin Judicial Conference.

If you have additional information that does not change the meaning of the form, attach it on a separate page. The form itself shall not be altered.