

RULES OF THE COUNTY COURT OF
THE THIRD JUDICIAL DISTRICT

NOVEMBER 15, 2000.

RULE I

APPOINTMENT OF COUNSEL; INDIGENT PARTIES;
STANDARDS AND PROCEDURES

SECTION 1

Applicability. These rules shall apply in every criminal proceeding in which the laws of the United States or the laws of the State of Nebraska establish a right to be represented by counsel. All parties who have a right to be represented by an attorney, including juveniles, shall have their eligibility for appointment of an attorney at public expense determined in conformance with these rules.

SECTION 2

Definition of Terms. The following definitions shall be applied in connection with these rules:

1) "Anticipated Cost of Counsel" shall mean the cost of retaining private counsel for representation on the matter before the court, as estimated by the court with reference, when applicable, to actual fees and retainers quoted for representation in the case by attorneys who practice in the area.

2) "Available Funds" shall mean a party's "liquid assets" and "disposable net monthly income" calculated after provision is made for the party's bail obligations. For the purpose of determining "available funds," the following definitions shall apply:

a) "Basic Living Costs" shall mean the average amount of money spent each month for reasonable payments, including loan payments, toward living costs such as shelter, food, utilities, health care, transportation, clothing, education and child support, alimony, or other support payments.

(b) "Disposable Net Monthly Income" shall mean the income remaining each month after deducting amounts paid for income taxes, Social Security taxes, contributory retirement, union dues, and basic living costs.

(c) "Income" shall mean salary, wages, interest, dividends, rental income, and other earnings and cash payments such as amounts received from pensions, annuities, Social Security, and public assistance programs, and child support, alimony, and other support payments.

(d) "Liquid Assets" shall mean all real and personal property that is cash or that can be reasonably converted into cash, including pensions, deferred compensation plans, and individual retirement plans, cash on hand, funds provided by friends and relation for the purpose of providing legal services, savings accounts, stocks, bonds, certificates of deposit, and equity in any real or personal property. Any motor vehicle necessary to maintain employment shall not be considered a liquid asset.

(3) "Indigent" for purposes of this rule shall mean:

(a) A party who is:

(i) Receiving one of the following types of public assistance: Aid to Families with Dependent Children (AFDC), Emergency Aid to Elderly, Disabled and Children (EAEDC), poverty related veteran's benefits, food stamps, refugee resettlement benefits, medicaid, Supplemental Security Income (SSI), or County General Assistance Funds; or

(ii) Receiving an annual gross income of 125% or less of the current federally established poverty level; or

(iii) Residing in a public mental health facility or is the subject of a proceeding in which admission or commitment to such a facility is sought, provided that where the County Board of Mental Health or the Judge has reason to believe the party is not indigent, a determination of indigency shall be made in accordance with these Rules; or

(iv) Serving a sentence in a correctional institution and has no available funds;
or

(v) Held in custody in jail and has no available funds; or,

(b) A party who the court determines is unable to retain legal counsel without prejudicing the party's ability to provide economic necessities for the party or the party's family based on a comparison of the party's available funds and anticipated cost of counsel.

(4) "Party" shall mean a defendant, including a juvenile, in a criminal proceeding, in which a person has a right to counsel.

SECTION 3

Judicial Advisement of the Right to Counsel. Whenever a party initially appears before the court without an attorney in any criminal proceeding where the right to counsel attaches, the judge shall advise the party, or if the party is a juvenile or is under guardianship, the party and a parent or legal guardian, where appropriate, that:

(1) The party has a right to be represented by an attorney in the proceeding and that

(2) If the court determines that the party, or the party's parent or guardian where appropriate, wants but cannot afford the services of an attorney, that an attorney will be provided at public expense.

SECTION 4

Waiver of the Right to Counsel. If the court determines that a party has knowingly, intelligently, and voluntarily decided to waive the right to be represented by an attorney in the proceeding, the party shall be asked to sign a written waiver of that right, and the judge shall sign a certificate that states that the party effectively waived that right. If the party refuses to sign the waiver, the judge shall note that fact on the certificate. The waiver, if applicable, and the certificate shall be executed on forms consistent with Appendix A and Appendix B of these Rules and shall be filed with the papers in the case.

SECTION 5

Affidavit of Indigency. A party who desires to proceed as an indigent with an attorney appointed by the court shall complete an affidavit under oath concerning his or her financial resources on a form consistent with Appendix C of these Rules. The affidavit shall require the party to list all financial resources relevant to a determination of indigency. The party shall be advised of the penalties for perjury.

SECTION 6

Determination of Indigency. If the court finds that the party has not effectively waived his or her right to counsel, and the party has not arranged to obtain counsel, the court shall receive the affidavit of indigency and may question the party under oath. After reviewing the information contained in the affidavit and, if applicable, the party's testimony, the court shall determine whether the party is indigent based on § 2(3)(a), indigent based on § 2(3)(b), or not indigent. The court first shall determine whether a party is indigent based on § 2(3)(a). If the court finds that a party is not indigent under § 2(3)(a), the court shall next determine whether the party is indigent under § 2(3)(b). The court shall record its findings, including its comparison of the party's anticipated cost of counsel and available funds when applicable, on a form consistent with Appendix B of this Rule, that is filed with the papers in the case.

SECTION 7

Assignment of Counsel/Notice of Assignment. If the court finds that a party is indigent, the court shall appoint an attorney to provide representation for the party. The Clerk of the Court shall promptly complete and transmit a notice of assignment of counsel form consistent with Appendix B of this Rule and shall file a copy in the case file. That form shall include the name of the attorney assigned to represent the party or shall note that the office of the public defender was appointed.

SECTION 8

Review of Indigency Determination.

(1) A party's indigency status may be reviewed in a formal hearing at any stage of a court proceeding if additional information regarding financial circumstances becomes available to the court.

(2) A party has a right to reconsideration in a formal hearing of the findings and conclusions regarding the party's indigency.

SECTION 9

Payment of Cost of Counsel. While determined to be indigent, a party may not be ordered, required, or solicited to make any payment toward the cost of counsel.

SECTION 10

Inadmissibility of Information Obtained From a Party. No information provided by a party pursuant to this rule may be used in any criminal or civil proceeding against the party except:

(1) in a prosecution for perjury or contempt committed in providing such information; or

(2) in an attempt to enforce an obligation to reimburse the state for the cost of counsel.

COMMENT

The intent of this rule is to create uniform standards and procedures for the determination of when a party is "indigent" and thus entitled to be represented by court-appointed counsel in criminal cases where the right to counsel applies.

Section 1. This section emphasizes that the rule is intended to cover the determination of indigency in all criminal cases where a party has a right to be represented by an attorney. That approach will enhance uniform indigency determinations regardless of the form of the action.

Section 2. Formerly, the only definition of indigency was the statutory standard that indigency " shall mean the inability to retain legal counsel without prejudicing one's financial ability to provide economic necessities to one's self or one's family." Neb. Rev. Stat. § 29-3901(3) (Reissue 1995). In addition to the statutory standard, which is retained

in § 2(3)(b), § 2(3)(a) adds several specific objective standards by which a party can be found to be "indigent." Those standards are meant to reduce the need for the court to conduct a more detailed analysis of the financial circumstances of the party in cases where the party clearly cannot afford to hire counsel. If the party is not indigent under § 2(3)(a), the court should consider possible indigency under § 2(3)(b). The definitions of "anticipated cost of counsel," "available funds," and "liquid assets" are consistent with considerations currently taken into account by Nebraska courts meant to guide the court's determination of indigency when the party does not meet the objective standard, replacing the categories formerly used. E.g., *State v. Masilko*, 226 Neb. 45, 403 N.W.2d 322 (1987) (trial court must consider seriousness of offense, defendant's income, availability to defendant of other resources, including real and personal property, bank accounts, Social Security, and unemployment or other benefits, normal living expenses, outstanding debts, and number and age of dependents).

"Available funds" under subsection (2) include only resources presently assessable to the party even if third parties owe duties of support to the party. Thus a juvenile's "available funds" are determined on the basis of the juvenile's financial assets, not those of his or her parent or guardian.

Section 3. This section reflects the notice provisions in Neb. Rev. Stat. §§ 29-3902 and 29-3903 (Reissue 1995) and 43-272 (Reissue 1998), and extends to the use of the process to all cases where a right to counsel exists. Subsection (2) recognizes a right to counsel at public expense for juvenile parties or their parents or guardians who cannot afford to pay for counsel. The section should not be read to suggest that counsel will not be appointed if juvenile parties desire counsel and are themselves indigent and their parents or guardians are able to pay for counsel but refuse to do so. In such cases, the decision to appoint counsel is made on the basis of the juvenile's financial resources, not those of the parent or guardian. See Sections 5 and 6, *infra*. Reimbursement actions against financially able parents or guardians can be maintained to recover the costs of counsel appointed to represent the juvenile.

Section 4. This section addresses whether a defendant has waived his right to counsel. The section requires a written waiver by the party and certification of the process by the judge.

Section 5. This section requires those seeking indigency status to prepare an affidavit of indigency. The affidavit details information concerning the party's finances. The completed affidavit may be filed with the papers in the case. The determination of indigency is to be made entirely from the party's finances without regard for potential third-party obligors.

Section 6. This section modifies former Nebraska practice concerning the court's formal determination of a party's indigency status. As an initial matter, this section stresses that the court is now required to find that a party is indigent if the party fits within any of the categories defined in § 2(3)(a) of this rule. Additionally, the language directing the court, when necessary, to base its indigency inquiry on a comparison of the party's "available

funds" and "anticipated cost of counsel" modifies the formerly applicable structure of the court's inquiry into the party's financial circumstances. E.g., *State v. Masilko*, 226 Neb. 45, 409 N.W.2d 322 (1987). One further requirement is that the court is required to fill out a form stating the basis of its indigency determination, including findings concerning its comparison of the party's "available funds" and "anticipated cost of counsel" when the indigency determination is made under § 2(3)(b). That requirement is designed to ensure complete and accurate recording of the basis of the court's decision.

The decision whether or not to appoint counsel is for the court without input from the prosecution or defense counsel.

Section 7. This section is meant to ensure accessible and uniform records of appointed counsel.

Section 8. This section formalizes review of a party's indigency status.

Section 9. This section articulates the consequences of indigency status.

Section 10. This section is intended to protect the party's right against self-incrimination and to ensure that the information contained in the affidavit is as accurate and complete as possible.

[Appendix A](#)

[Appendix B](#)

[Appendix C](#)