

IN THE SUPREME COURT OF THE STATE OF ALASKA

ORDER NO. 1351

Amending Criminal Rule 39 and adopting new Criminal Rule 39.1 concerning appointment of counsel for indigent defendants.

IT IS ORDERED:

1. Criminal Rule 39 is amended to read as follows:

Criminal Rule 39. Appointment of Counsel.

(a) Informing Defendant of Right to Counsel. The court shall advise a defendant who appears without counsel for arraignment, change of plea, or trial of the right to be represented by counsel, and ask if the defendant desires the aid of counsel. The court shall not allow a defendant to proceed without an attorney unless the defendant understands the benefits of counsel and knowingly waives the right to counsel.

(b) Appointment of Counsel for Persons Financially Unable to Employ Counsel.

(1) If a defendant desires the aid of counsel but claims a financial inability to employ counsel, the court or its designee shall determine whether the defendant is eligible for court-appointed counsel under Criminal Rule 39.1 an "indigent person," as defined by statute, by placing defendant under oath and asking about defendant's financial status, or by requiring defendant to complete a signed sworn financial statement. The court shall order defendant to execute a general waiver authorizing release of income information to the court. The court may require defendant to attempt to arrange private representation before the court makes a final determination on indigency.

(2) Before the court appoints counsel for an indigent defendant at public expense, the court shall advise the defendant that the

defendant will be ordered to repay the prosecuting authority for the cost of appointed counsel, in accordance with paragraph (d) of this rule, if the defendant is convicted of an offense. The court may enter such orders as appear reasonably necessary to prevent the defendant from dissipating assets to avoid payment of this cost.

(3) If the court or its designee determines that the a defendant is eligible for court-appointed counsel under Criminal Rule 39.1, an "indigent person," the court shall appoint counsel pursuant to Administrative Rule 12 and notify counsel of the appointment.

(4) In the absence of a request by a defendant otherwise entitled to appointment of counsel, the court shall appoint counsel unless the court finds that the defendant understands the benefits of counsel and knowingly waives the right to counsel.

(5) If the trial court denies a defendant's request for appointed counsel, the defendant may request review of this decision by the presiding judge of the judicial district by filing a motion with the trial court within three days after the date of notice, as defined in Criminal Rule 32.3(c), of the denial. The trial court shall forward the motion, relevant materials from the court file, and a cassette tape of any relevant proceedings to the presiding judge. The presiding judge or his or her designee shall issue a decision within three days of receipt of these materials.

(c) **Costs of Appointed Counsel.**

(1) *Entry of Judgment.*

(A) Upon conviction of an offense, revocation of probation, denial of a motion to withdraw plea, and denial of a motion brought under Criminal Rule 35.1, the court shall prepare a notice of intent to enter

judgment for the cost of appointed counsel in accordance with paragraph (d) of this rule, provide a copy of the notice to the defendant, and order the defendant to apply for permanent fund dividends every year in which the defendant qualifies for a dividend until the judgment is paid in full.

(B) A defendant ~~Defendant~~ may oppose entry of judgment by filing a written opposition within 10 days after the date of notice, as defined in Criminal Rule 32.3(c), of the court's intent to enter judgment. The opposition ~~shall~~ must specifically set out the grounds for opposing entry of the judgment. The prosecuting authority may oppose the amount of the judgment by filing a written opposition ~~within~~ by the same deadline.

(C) If no opposition is filed within the time specified in section 39(c)(1)(B), the clerk shall enter judgment against the defendant for the amount shown in the notice. If a timely opposition is filed, the matter must be decided by the court. The court may in its discretion set the matter for a hearing ~~the court may set the matter for a hearing and shall have authority to enter the judgment.~~

(D) The judgment must be in writing. A copy of the judgment ~~shall~~ must be mailed to the defendant's address of record. The judgment ~~shall~~ bears interest at the rate specified in AS 09.30.070(a) from the date judgment is entered.

(2) *Collection.*

(A) The judgment has the same force and effect as a judgment in a civil action in favor of the prosecuting authority and is subject to execution.

(B) All proceedings to enforce the judgment shall be in accordance with the statutes and court rules applicable to civil judgments. The judgment is not enforceable by

contempt. Payment of the judgment may not be made a condition of a defendant's probation. Default or failure to pay the judgment may not affect or reduce the rendering of services on appeal or any other phase of a defendant's case in any way. A defendant does not have a right to be represented by appointed counsel in connection with proceedings under ~~sub~~paragraph 39(c) or any proceedings to collect the judgment.

(C) Upon showing of financial hardship, the court shall allow a defendant subject to a judgment under this rule to make payments under a repayment schedule. A defendant may petition the court at any time for remission, reduction or deferral of the unpaid portion of the judgment. The court may remit or reduce the balance owing on the judgment or change the method of payment if the payment would impose manifest hardship on the defendant or the defendant's immediate family.

(D) Notwithstanding section 39(c)(2)(B), a defendant may be held in contempt for failing to comply with an order under this rule to apply for a permanent fund dividend.

(3) *Appeal.*

(A) If the defendant appeals the conviction, enforcement of the judgment may be stayed by the trial court or the appellate court upon such terms as the court deems proper.

(B) If the defendant's conviction is reversed, the clerk shall vacate the judgment and order the prosecuting authority to repay all sums paid in satisfaction of the judgment, plus interest at the rate specified in AS 09.30.070(a).

(d) **Schedule of Costs.** The following schedules govern the assessment of costs of appointed counsel under paragraph 39(c). If a defendant is convicted of more than one

offense in a single dispositive court proceeding, costs shall be based on the most serious offense of which the defendant is convicted. If a defendant is otherwise convicted of more than one offense, costs shall be separately assessed for each conviction. For good cause shown, the court may waive the schedule of costs and assess fees up to the actual cost of appointed counsel, including actual expenses.

Misdemeanors

Trial	\$500.00
Change of plea	200.00
Post-conviction relief or contested probation revocation proceedings in the trial court	250.00

Felonies

	Class B & C	Class A and Unclassified (Except (Murder)	Murder in the 1st and 2nd Degrees
Trial	\$1,500.00	\$2,500.00	\$5,000.00
Change of plea after substantive motion work and hearing and before trial commences	1,000.00	1,500.00	2,500.00
Change of plea post-indictment but prior to substantive motion work and hearing	500.00	1,000.00	2,000.00
Change of plea prior to indictment	250.00	500.00	750.00
Post-conviction			

relief or probation
revocation
proceeding

in trial court 250.00 500.00 750.00

(e) **Review of Defendant's Financial Condition.**

(1) The court may review a defendant's financial status at any time after appointment of counsel to determine (A) whether the defendant continues to be eligible for court-appointed counsel under Criminal Rule 39.1 an "indigent person," as defined by statute; or (B) whether the defendant was eligible for court-appointed counsel when the appointment was made an indigent person at the time counsel was appointed.

(2) If the court determines that a defendant is no longer eligible for court-appointed counsel under Criminal Rule 39.1 an indigent person, the court may

(A) terminate the appointment; or

(B) continue the appointment and, at the conclusion of the criminal proceedings against the defendant in the trial court, enter judgment against the defendant for the actual cost of appointed counsel, including actual expenses, from the date of the change in the defendant's financial status through the conclusion of the trial court proceedings.

(3) If the court determines that a defendant was not eligible for court-appointed counsel when the appointment was made an indigent person at the time counsel was appointed, the court may

(A) terminate the appointment and enter judgment against the defendant for the actual costs of appointed counsel, including actual expenses, from the date of appointment through the date of termination; or

(B) continue the appointment and, at the conclusion of the criminal proceedings against the defendant in the trial court, enter judgment against the defendant for the actual cost of appointed counsel from the date of the appointment through the conclusion of the trial court proceedings.

(4) A defendant may request review of the court's decision to terminate the appointment according to the procedure set out in subparagraph 39(b)(5).

(5) Judgment may be entered against a defendant under this paragraph regardless of whether the defendant is convicted of an offense.

* * * *

~~NOTE: AS 18.85.170(4) defines "indigent person" for purposes of public defender appointments as "a person who, at the time need is determined, does not have sufficient assets, credit, or other means to provide for payment of an attorney and all other necessary expenses of representation without depriving the party or the party's dependents of food, clothing, or shelter and who has not disposed of any assets since the commission of the offense with the intent or for the purpose of establishing eligibility for assistance under this chapter."~~

2. The Criminal Rules are amended to include new Rule 39.1, which reads as follows:

Criminal Rule 39.1. Determining Eligibility for Court-Appointed Counsel.

(a) Scope of Application. This rule specifies the procedure courts shall follow to assess whether a defendant is eligible for court-appointed counsel in a criminal case.

(b) Eligibility for Appointment.¹

(1) Standard. A defendant is eligible for court-appointed counsel if the court finds that the total financial resources available to the defendant are not sufficient to pay allowable household expenses and the likely cost of private representation through trial.

(2) Exception. The court may determine that a defendant is ineligible for court-appointed counsel under AS 18.85.170(4) if the defendant has disposed of assets in order to qualify for appointed counsel.

(c) Financial Resources Defined.

(1) Resources to be Considered. In assessing the defendant's ability to pay the likely cost of private representation through trial, the court shall consider all resources available to the defendant, including all sources of expected income, cash, the value of assets readily convertible to cash, and credit or borrowing ability.

(2) Parents' Resources. If the defendant is a minor or an adult who cannot live independently, the court shall consider the resources of both the defendant and the defendant's parents, unless the parents were victims of the alleged offense or the court finds other good cause to treat their resources as being unavailable to the defendant.

(3) Income. Income includes all categories of income listed in Section II, Parts A and B of the Commentary to Civil Rule 90.3, including permanent fund dividends.

(4) Cash. Cash includes cash on hand and accounts in financial institutions. All savings should be considered, except where the use of the savings would deprive the defendant or the defendant's family of food, clothing, shelter, or necessary medical care.

(5) Assets. The court shall consider the value of all assets that are readily convertible to cash, other than health aids, clothing, and ordinary household furnishings. With the following exceptions, in valuing an asset, the court shall consider either the amount the defendant would realize if the asset

were sold or the amount the defendant could borrow using the asset as collateral, whichever is greater.

(A) The court shall consider the loan value of tools and equipment essential to employment or to subsistence activity. Tools and equipment are essential only if the defendant could not earn a living or provide basic necessities without them. If the defendant cannot borrow against these assets while continuing to have use of them, the court shall disregard their value in calculating the defendant's available resources.

(B) In valuing the defendant's principal residence, the court shall consider the entire loan value or the amount of the sale value that exceeds the homestead exemption allowed under the Alaska Exemptions Act.² If the defendant cannot borrow against the residence and would realize less than the homestead exemption amount if the residence were sold, the court shall disregard the value of the residence in calculating the defendant's available resources.

(C) In assessing the loan value of essential tools and equipment and the principal residence, the court shall consider only the amount the defendant can realistically afford to repay.

(6) Credit. Available credit includes amounts available on credit cards and amounts that can be borrowed against life insurance policies or from pension or savings plans. In assessing available credit, the court shall consider only the amount the defendant can realistically afford to repay.

(d) Likely Cost of Private Representation. (1) For purposes of this rule, the following amounts represent the likely cost of private representation through trial:

Estimated Total Cost of
Representation

<u>Misdemeanor</u>	<u>\$ 2,000</u>
<u>C Felony</u>	<u>5,000</u>
<u>B Felony</u>	<u>7,500</u>
<u>A or Unclassified Felony</u>	<u>20,000</u>

(2) The court may adjust these amounts under the following circumstances:

(A) If the court finds that the scheduled amount differs from the amount charged by local attorneys, the court may use the amount charged locally.

(B) If the court finds that no local attorneys are available to handle the case, the court may adjust the scheduled amount to include the additional fees and travel costs that an out-of-town attorney would charge.

(C) If the court finds that the case has special characteristics that are likely to increase the cost of private representation, such as the need for expert witnesses, special investigations, or expensive tests, the court may adjust the scheduled amount to include this additional expense.

(3) In assessing a defendant's ability to pay the likely cost of private representation, the court should assume that at least 50 percent of the likely fee must be paid immediately and that the total fee must be paid within four months.

(e) Determining Eligibility. The court or its designee shall determine whether a defendant is eligible for court-appointed counsel by placing the defendant under oath and asking about the defendant's financial status, or by requiring the defendant to complete a signed sworn financial statement. A defendant who requests appointed counsel must execute a general waiver authorizing the

release of financial information to the court as required by AS 18.85.120.

(f) Presumptive Eligibility. The court may appoint counsel without further inquiry if:

(1) the defendant currently receives public assistance benefits through a state or federal program for indigent persons, such as Aid to Families with Dependent Children, the Alaska Temporary Assistance Program, Adult Public Assistance, General Relief, Food Stamps, Medicaid, or Supplemental Security Income (SSI);

(2) counsel was appointed for the defendant within the past twelve months based on an examination of the defendant's financial circumstances, and the defendant's financial condition has not significantly improved; or

(3) the gross annual income available to the defendant is less than the adjusted federal poverty guidelines amount for the defendant's household size, and other financial resources (cash, assets, and credit) available to the defendant are worth less than 50 percent of the amount shown in (d)(1) (the likely cost of private representation through trial).

(g) Other Eligibility. If the court does not find that the defendant is presumptively eligible under paragraph (f), the court shall conduct an inquiry sufficient to determine whether the defendant is eligible for court-appointed counsel under the standard stated in paragraph (b). The court may make this determination based on the information then available to the court or, when appropriate, may

(1) require the defendant to submit a completed financial resources affidavit with supporting documentation of income;

(2) require the defendant to submit information or documentation concerning particular assets or expenses;

(3) require the defendant to appear at a representation hearing or a pretrial services interview; or

(4) require the defendant to make reasonable efforts to retain private counsel and to report these efforts to the court orally or in writing.

(h) Allowable Household Expenses. (1) Allowable Expenses. The following household expenses are allowable to the extent they are reasonable:

(A) housing;

(B) utilities;

(C) food;

(D) health care;

(E) child care;

(F) insurance;

(G) transportation (for one vehicle for each person whose income is considered);

(H) minimum loan and credit card payments; and

(I) mandatory child support and other court-imposed obligations; and

(J) other expenses that the court deems essential.

(2) Alternative to Calculating Actual Expenses. As an alternative to calculating actual household expenses, the court may assume that these expenses are approximately equal to the adjusted federal poverty guidelines amount for the defendant's household size.

(3) Expenses Paid by Other Persons. The expenses described in (h)(1) and (h)(2) are allowable only to the extent they are paid (or were supposed to be paid) by the defendant. If another person, such as a spouse, relative, or roommate, pays some or all of the household

expenses, the court shall disregard the portion of the expenses paid by that person. If the defendant is married, the court should assume, absent a showing of good cause, that each spouse pays an amount proportionate to that spouse's relative income.

(i) Adjusted Federal Poverty Guidelines.
The "adjusted federal poverty guidelines amount" is the federal poverty guidelines amount for Alaska increased by the geographic cost-of-living adjustment established in AS 39.27.020 for the court location nearest the defendant's residence.

(j) Responsibilities of Administrative Director. The administrative director shall

(1) publish annually an administrative bulletin specifying the adjusted federal poverty guidelines amount for each court location; and

(2) periodically review the efficacy of the appointment procedure established by this rule.

Notes

¹ AS 18.85.170(4) defines "indigent person" for purposes of public defender appointments as "a person who, at the time need is determined, does not have sufficient assets, credit, or other means to provide for payment of an attorney and all other necessary expenses of representation without depriving the party or the party's dependents of food, clothing, or shelter and who has not disposed of any assets since the commission of the offense with the intent or for the purpose of establishing eligibility for assistance under this chapter."

² For the current homestead exemption amount, see 8 AAC 95.030. This Department of Labor regulation, rather than AS 09.38.010, establishes the amount of the homestead exemption. See AS 09.38.115.

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Effective Date: May 15, 1999
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DATED: December 17, 1998

EFFECTIVE DATE: May 15, 1999

/s/
Chief Justice Matthews

/s/
Justice Eastaugh

/s/
Justice Fabe

/s/
Justice Bryner

/s/
Justice Carpeneti