

Appendix Form 6

COMMENTS on Rule 3-13

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 A. 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 B. 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 2008). In addition to the statutory standard, which is retained in § B(7)(b), § B(7)(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 § B(7)(a), the court should consider possible indigency under § B(7)(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 § B 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 C. This section reflects the notice provisions in Neb. Rev. Stat. §§ 29-3902, 29-3903, and 43-272 (Reissue 2008), 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 §§ E and F, *infra*. Reimbursement actions against financially able parents or guardians can be maintained to recover the costs of counsel appointed to represent the juvenile.

Section D. 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 E. 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 with regard of those potential third-party obligors.

Section F. 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 § B(7)(a). 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 § B(7)(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 G. This section is meant to ensure an accessible and uniform records of appointed counsel.

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

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

Section J. 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.

Approved June 23, 2010.