

IN THE SUPREME COURT FOR THE STATE OF ALASKA

ORDER NO. 1088

Amending Criminal Rule 39,
Appellate Rule 209(b) and
Administrative Rule 12
concerning appointment of
counsel for indigent persons.

IT IS ORDERED:

1. Criminal Rule 39 is rescinded and re-promulgated as follows:

(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 defendant desires the aid of counsel. The court shall not allow a defendant to proceed without an attorney unless 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 defendant desires the aid of counsel but claims a financial inability to employ counsel, the court or its designee shall determine whether defendant is 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 defendant that 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 shall order defendant to execute assignments of defendant's permanent fund dividends to the prosecuting authority for a sufficient number of years to ensure that the maximum judgment that may be entered against defendant under the schedules in paragraph (d) is paid in full. If defendant refuses to execute the assignments, the court shall direct the clerk to execute the assignments pursuant Civil Rule 70. The court may enter such orders as appear reasonably necessary to prevent defendant from dissipating assets to avoid payment of the judgment.

(3) If the court or its designee determines that defendant is 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 defendant understands the benefits of counsel and knowingly waives the right to counsel.

(5) If the trial court denies defendant's request for appointed counsel, 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 defendant, and order defendant to

(i) execute assignments of defendant's permanent fund dividends to the prosecuting authority for a sufficient number of years to ensure that the judgment is paid in full; and

(ii) apply for permanent fund dividends every year in which the defendant qualifies for a dividend until the judgment is paid in full.

If defendant refuses to execute assignments of defendant's permanent fund dividends, the court shall direct the clerk to execute the assignments pursuant to Civil Rule 70.

(B) 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 specifically set out the grounds for opposing entry of judgment. The prosecuting authority may oppose the amount of the judgment by filing a written opposition within 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 defendant for the amount shown in the notice. If a timely opposition is filed, 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 be mailed to defendant's address of record. The judgment shall bear 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, except that no action may be taken to enforce the judgment for three years after defendant is released from incarceration unless, for good cause shown, the court considers it appropriate to enforce the judgment earlier.

(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 defendant's case in any way. A defendant does not have a right to be represented by appointed counsel in connection with proceedings under subparagraph 39(c) or any proceedings to collect the judgment.

(C) Upon a 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 payment would impose manifest hardship on defendant or 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 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 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 defendant's financial status at any time after appointment of counsel to determine (A) whether defendant continues to be an "indigent person," as defined by statute; or (B) whether defendant was an indigent person at the time counsel was appointed.

(2) If the court determines that defendant is no longer an indigent person, the court may

(A) terminate the appointment; or

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

(3) If the court determines that defendant was not an indigent person at the time counsel was appointed, the court may

(A) terminate the appointment and enter judgment against 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 defendant in the trial court, enter judgment against 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.

(6) Action may be taken at any time to enforce a judgment entered under this paragraph.

2. Paragraph (b) of Appellate Rule 209 is rescinded and re-promulgated as follows:

(b) Criminal Matters.

(1) In criminal matters the trial court shall authorize appeals at public expense on behalf of defendants who are "indigent," as defined by statute, in accordance with the rules and decisions of the appellate courts of Alaska and where such appeals are required to be provided by state courts by decisions of the Supreme Court of the United States. Where an appeal at public expense is authorized by the trial court, the costs which shall be borne at public expense include those of providing counsel and of preparing a transcript and briefs.

(2) After a trial court has authorized an appeal at public expense, the appellate clerk shall send defendant a written notice and order, to the address provided under Appellate Rule 204(b), that

(A) advises defendant that, if defendant's conviction is not reversed, defendant will be ordered to repay the prosecuting authority for the cost of appointed appellate counsel, in accordance with the schedule of costs set out in subparagraph 209(b)(8);

(B) orders defendant to execute assignments of defendant's permanent fund dividends to the prosecuting authority for a sufficient number of years to ensure that the maximum amount of the judgment that could be entered under subparagraph 209(b)(8) is paid in full, and to file the assignments with the appellate clerk;

(C) orders defendant to apply for permanent fund dividends every year in which the defendant qualifies for a dividend until the judgment is paid in full; and

(D) advises defendant that if, at the conclusion of the case, defendant's conviction is reversed, the permanent fund dividend assignments are void.

(3) If defendant refuses to execute assignments of defendant's permanent fund dividends, the clerk shall execute the assignments pursuant to Civil Rule 70.

(4) A defendant authorized to proceed at public expense in the trial court is presumed to be entitled to proceed at public expense on appeal.

(5) The action of the trial court in authorizing or declining to authorize an appeal at public expense is reviewable by a motion in the appellate court, ancillary to the appeal.

(6) Counsel appointed to represent a defendant in the trial court pursuant to Criminal Rule 39 shall remain as appointed counsel throughout an appeal at public expense authorized under this paragraph and shall not be permitted to withdraw except upon the grounds authorized in Administrative Rule 12. In addition, an attorney appointed by the court under Administrative Rule 12(b)(1)(B) will be permitted to withdraw upon a showing that either the public defender agency or the office of public advocacy is able to represent defendant on appeal. If an appeal is to be taken, trial counsel will not be permitted to withdraw until the notice of appeal and the documents required to be filed with the appeal by Rule 204(b) have been accepted for filing by the clerk of the trial courts.

(7) At the conclusion of the appellate proceeding, the appellate clerk shall enter judgment against defendant for the cost of representation on appeal unless defendant's

conviction was reversed by the appellate court. The amount of the judgment shall be determined by reference to the schedule in subparagraph 209(b)(8). Before entering judgment, the clerk shall mail, to the defendant's address of record, a notice that sets out the amount of the proposed judgment. Defendant may oppose entry of the judgment by filing a written opposition within 45 days after the date shown in the clerk's certificate of distribution on the notice. The opposition shall specifically set out the grounds for opposing entry of judgment. The prosecuting authority may oppose the amount of the judgment by filing a written opposition within the same deadline. Criminal Rule 39(c)(1)(D) and (c)(2) shall apply to judgments entered under this subparagraph.

(8) The following schedule governs the cost of representation on appeal:

<u>Type of Appellate Proceeding</u>	<u>Misdemeanor</u>	<u>Felony</u>
Sentence Appeal	250	500
Merit Appeal and Appeals from Post-Conviction Relief Proceedings	750	1,500
Combined Merit and Sentence Appeal	1,000	2,000
Other Appellate Actions (Petition for Review, Petition for Hearing, etc.)	500	1,000

3. Subparagraph (b)(3) of Administrative Rule 12 is amended as follows:

(3) *Assessment of Costs.* When counsel is appointed for a child when the child's parents or custodian are financially able but refuse to employ counsel to assist the child, the court may, when appropriate, assess as costs against the parents, guardian or custodian the cost to the state of providing counsel.

4. Subparagraph (d)(2) of Administrative Rule 12 is amended by adding a new section (J) as follows:

(J) When counsel is appointed for a person in a case described in subsections 12(d)(2)(B)(i)-(vi), the court shall order the person, or if the person is a child, the person's parents, guardian or custodian, to pay the costs incurred by the court in providing representation. Before appointing counsel, the court shall advise the person that the person will be ordered to repay the state for the cost of appointed counsel and shall advise the person of the maximum amount that the person will be required to repay. At the conclusion of the proceedings, the court shall require the person to execute assignments of the person's permanent fund dividends to the State of Alaska for a sufficient number of years to cover the maximum amount of the judgment and shall order the person to apply for permanent fund dividends every year in which the

person qualifies for a dividend until the judgment is paid in full. If the person refuses to execute the assignments, the court shall direct the clerk to execute the assignments pursuant to Civil Rule 70. The clerk shall determine the cost of representation, and shall mail to the person's address of record a notice informing the person that judgment will be entered against the person for the actual cost of representation or for \$500, whichever is less. The person may oppose entry of the judgment by filing a written opposition within 10 days after the date shown in the clerk's certificate of distribution on the notice. The opposition shall specifically set out the grounds for opposing entry of judgment. The clerk shall enter judgment against the person for the amount shown in the notice if the person does not oppose entry of the judgment within the 10 days. If the person files a timely opposition, the court may set the matter for a hearing and shall have authority to enter the judgment. Criminal Rule 39(c)(1)(D) and (c)(2) shall apply to judgments entered under this section.

5. New paragraph (e) is added to Administrative Rule 12 as follows:

(e) Responsibilities of Appointed Counsel.

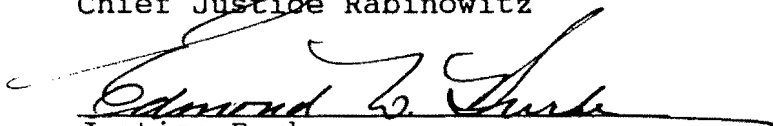
(1) An attorney appointed to represent an indigent person must advise the court if the attorney learns of a change in the person's financial status that would make the person financially ineligible for appointed counsel.

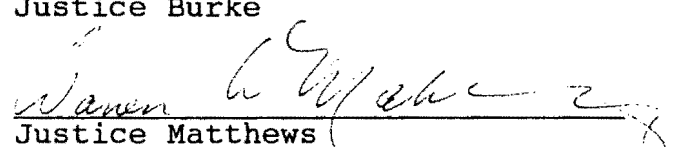
(2) An attorney appointed to represent an indigent person must move to withdraw if the attorney reasonably believes that the person has made a material misrepresentation of the person's financial status to the court. A material misrepresentation is a misrepresentation of facts that would make the person financially ineligible for appointed counsel. The attorney is not required to disclose to the court the existence or nature of the misrepresentation unless disclosure is necessary to prevent the person from fraudulently securing the services of appointed counsel.

DATED: January 17, 1992

EFFECTIVE DATE: July 1, 1992

Chief Justice Rabinowitz


Justice Burke



Justice Matthews

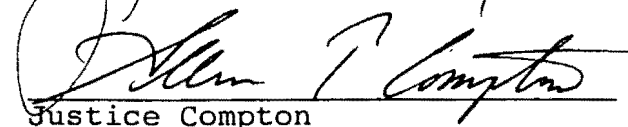
Justice Compton


Justice Moore

RABINOWITZ, Chief Justice, with whom COMPTON, Justice, joins, dissenting:

I am not persuaded that either existing Criminal Rule 39, or Appellate Rule 209, requires amendment. I think it can be safely predicted that these amendments will have a chilling effect on an indigent defendant's obtaining the services of appointed counsel as well ^{AS} on an indigent defendant's decision whether or not to seek review or to appeal.


Chief Justice Rabinowitz


Justice Compton