

COMMONWEALTH OF MASSACHUSETTS

At the Supreme Judicial Court holden at Boston within and for said Commonwealth on the twentieth day of July, in the year two thousand and sixteen:

present,

<u>HON. RALPH D. GANTS</u>)	Chief Justice
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<u>HON. FRANCIS X. SPINA</u>)	
)	
)	
<u>HON. ROBERT J. CORDY</u>)	Justices
)	
)	
<u>HON. MARGOT BOTSFORD</u>)	
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<u>HON. FERNANDE R.V. DUFFLY</u>)	
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<u>HON. BARBARA A. LENK</u>)	
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<u>HON. GERALDINE S. HINES</u>)	

ORDERED: That Chapter Three of the Rules of the Supreme Judicial Court is hereby amended as follows:

Rule 3:10 By striking the current Rule 3:10 and inserting in lieu thereof the new Rule 3:10, attached hereto.

The amendment accomplished by this order shall take effect on November 1, 2016.

ORDERED:

<u>RALPH D. GANTS</u>)	Chief Justice
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<u>FRANCIS X. SPINA</u>)	
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<u>ROBERT J. CORDY</u>)	Justices
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<u>MARGOT BOTSFORD</u>)	
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<u>FERNANDE R.V. DUFFLY</u>)	
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<u>BARBARA A. LENK</u>)	
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<u>GERALDINE S. HINES</u>)	

Rule 3:10. Assignment of Counsel

Section 1. Definitions. The following definitions apply in this rule:

(a) **Available funds** -- A **party's liquid assets** and **disposable net monthly income** calculated after providing for the **party's** bail obligations. A **party's available funds** shall include the **liquid assets** and **disposable net monthly income** of the **party's** spouse (or person in substantially the same relationship), provided that person lives in the same residence as the **party** and contributes substantially towards the household's **basic living costs**, unless that person has an adverse interest in the proceeding (e.g. is the victim, complainant, or petitioning **party**, is a prospective prosecution witness, or, in a civil matter, is a **party**) or unless the inclusion of the income of the **party's** spouse would be contrary to the interests of justice.

(b) **Basic living costs** -- The average monthly amount spent for reasonable payments toward living costs, such as shelter, food, utilities, health care, transportation, clothing, education, child care, alimony and child support payments, and payments and interest on loans for such living costs.

(c) **Child welfare proceeding** -- Where the party is a **juvenile**, a care and protection proceeding, termination of parental rights proceeding, child requiring assistance proceeding, adoption, guardianship of a minor, or permanency hearing. Where the party is a **young adult**, a permanency hearing.

(d) **Contribution fee** -- A fee imposed by a judge pursuant to Section 10 on a **party** who has been determined to be **indigent but able to contribute**. The **contribution fee** shall not include the **indigent counsel fee**, but shall be an amount above and beyond the indigent counsel fee that the **party** is able to pay without substantial financial hardship for the cost of any attorney appointed to represent the **party**.

(e) **Disposable net monthly income** -- The **income** remaining each month after deducting income taxes, social security and Medicare taxes, ordinary retirement contributions, union dues, and **basic living costs**.

(f) **Income** -- Salary, wages, interest, dividends, rental income, and other earnings and regular cash payments, such as amounts received from pensions, annuities, social security, alimony, and child support. Irregular or infrequent income (e.g., earnings from day labor, seasonal, or on-call work) that a **party** can reasonably be expected to receive shall count as **income** under this rule. Irregular or infrequent **income** that cannot reasonably be anticipated to continue shall not count as **income**.

(g) **Indigency verification process** -- The attempt by **probation** to verify a claim of indigency, in accordance with G. L. c. 211D, § 2A(c), by a **party** or, where appropriate, a parent or guardian, by accessing wage, tax, and asset information in the possession of the Department of Revenue, information regarding benefits received from the Department of Transitional Assistance, and any information relevant to the determination of indigency in the possession of the Registry of Motor Vehicles.

(h) **Indigent** -- A **party** who is:

(i) receiving one of the following types of public assistance: Transitional Aid to Families with Dependent Children (TAFDC), Emergency Aid to Elderly, Disabled and Children (EAEDC), need-based veterans' benefits, Supplemental Nutrition Assistance Program (SNAP) benefits, Refugee Cash Assistance, or SSI State Supplemental Program;

(ii) receiving an annual **income**, after taxes, of one hundred twenty-five percent or less of the current poverty guidelines referred to in G. L. c. 261, § 27A(b);

(iii) (1) residing in a tuberculosis treatment center, a mental health facility or a facility for individuals with intellectual or developmental disabilities, including the Bridgewater State Hospital and Massachusetts Treatment Center; or (2) the subject of a proceeding

regarding admission or commitment to such a center or facility, a proceeding to make a substituted judgment determination concerning treatment, a proceeding under G. L. c. 190B, § 5-309(g) to admit to a nursing facility defined in G. L. c. 190B, § 5-101(15), or a civil commitment proceeding under G. L. c. 123, § 35; provided, however, that when the judge has reason to believe that the **party** is not **indigent**, a determination of indigency shall be made in accordance with Section 5 and other applicable provisions of this rule; or

(iv) a **juvenile**, a child who is in the care or custody of the Department of Children and Families, or a **young adult** provided, however, that when a judge has reason to believe that the **juvenile** or **young adult** is not **indigent**, a determination of indigency shall be made in accordance with Section 5 and other applicable provisions of this rule.

(i) **Indigent but able to contribute** -- A **party** who:

(i) has an annual **income**, after taxes, of more than one hundred twenty five percent and less than two hundred fifty percent of the current poverty guidelines referred to in G. L. c. 261, § 27A(b), or

(ii) (1) is charged with a felony solely within the jurisdiction of the Superior Court or is the parent, guardian, or custodian of a juvenile or young adult who is the subject of a **child welfare proceeding**, subject to the exception in Section 6A for a parent or guardian who has had custody of the **juvenile** removed by a court of competent jurisdiction, or who has an interest adverse to the **juvenile or young adult**, and (2) has an annual **income**, after taxes, of more than two hundred fifty percent of the current poverty guidelines referred to in G. L. c. 261, § 27A(b); and (3) whose **available funds** are insufficient to pay the anticipated cost of counsel for this representation, but are sufficient to pay part of that cost. The anticipated cost of counsel shall be the cost of retaining private counsel for, as applicable, the defense of a felony charge within the jurisdiction of the Superior Court, or a **child welfare proceeding**, as estimated and published from time to time by the Committee for Public Counsel Services; or

(iii) is over the age of eighteen and is claimed as a dependent for tax purposes by a parent or guardian who is not **indigent**.

(j) **Indigent counsel fee** -- A fee assessed on a person provided counsel pursuant to G. L. c. 211D, § 2A(f).

(k) **Intake report** -- The report provided to the judge by **probation** regarding the **party's** or, where appropriate, the **party's** parents' or guardians', responses to biographical and financial questions asked by **probation**.

(l) **Juvenile** -- A child under the age of 18 who is the subject of a **child welfare proceeding** or a delinquency or youthful offender proceeding.

(m) **Juvenile legal fee** -- The fee assessed on a parent or guardian to pay for the cost of any attorney appointed to represent a **party** under the age of 18. The fee shall not exceed the fee set forth in G.L. c. 119, § 29A or G.L. c. 119, § 39F.

(n) **Liquid assets** -- Cash, savings accounts, bank accounts, stocks, bonds, certificates of deposit, equity in real estate, and equity in a motor vehicle or other tangible property, provided that any equity in real or personal property is reasonably convertible to cash. Any motor vehicle necessary to maintain employment, including travel to and from the **party's** employment, shall not be considered a **liquid asset**. Expenses associated with the liquidation of assets, including penalties for early withdrawal and tax burdens, shall not be included as **available funds**.

(o) **Party** -- Any person who may be entitled to the appointment of counsel in relation to any court proceeding on the basis of indigency under the law of the Commonwealth.

(p) **Probation** -- The Office of the Commissioner of Probation or any member of its staff.

(q) **Young adult** -- A person between the ages of 18 and 22 who is the subject of a **child welfare proceeding**.

Section 2. Advice as to Right to Counsel.

If any **party** to a proceeding appears in court without counsel where the **party** has a right to be represented by counsel under the law of the Commonwealth, the judge shall advise the **party** or, if the **party** is a **juvenile**, the **party** and a parent or legal guardian, where appropriate, that: (a) the **party** may be entitled to the appointment of counsel at public expense; and (b) the Committee for Public Counsel Services will provide counsel to the **party** at no cost or at a reduced cost if the court finds that the **party** wants but cannot afford counsel.

Section 3. Waiver of Counsel.

If the **party** elects to proceed without counsel, the **party** shall sign a written waiver and the judge shall certify in writing that the **party** executed the waiver in the judge's presence after the judge informed the **party** of the right of counsel. If the **party** elects to proceed without counsel but refuses to sign the written waiver, the judge shall so certify in writing.

Before allowing a waiver of counsel, the judge, after conducting a colloquy with the **party**, shall make written findings that the **party** is competent to waive counsel and that the **party** has knowingly and voluntarily elected to proceed without counsel.

Section 4. Standby Counsel.

Notwithstanding a **party's** waiver of counsel, where the interests of justice so require, the judge may assign standby counsel to assist the **party** in the course of the proceedings regardless of whether the **party** is **indigent**.

Section 5. Determination of Indigency Status.

(a) If the **party** requests appointment of counsel, or if counsel is appointed under Section 6 or 6A of this rule, or if the judge for any reason finds that the **party** has not knowingly and voluntarily elected to proceed without counsel, **probation** shall provide the judge with an

intake report. **Probation** shall attempt to verify the self-reported information on the **intake report** through the **indigency verification process.**

(b) Unless the party is a **juvenile**, or is a person over eighteen who is claimed as a dependent for tax purposes, **probation** shall make a recommendation as to the indigency of the **party.** **Where** the **party** is a **juvenile, probation** shall make a recommendation as to the indigency of the parents or guardian in accordance with Sections 1, 6 and 6A of this rule and G.L. c. 119, § § 29A and 39F. Where a person over eighteen is claimed as a dependent for tax purposes, **probation** shall make a recommendation as to the indigency of the parents or guardian.

(c) After reviewing the **intake report** and recommendation and questioning the **party**, as appropriate, the judge shall make a determination that:

(i) the **party** is **indigent**,

(ii) the **party** is **indigent but able to contribute**, or

(iii) the **party** is not **indigent.**

The clerk shall enter the judge's determination on the court docket.

(d) In order to determine a **party's** current financial status, the judge shall evaluate (1) the **party's income** in the current calendar quarter (i.e., January-March, April-June, July-September, October-December), and (2) the **party's income** in the three preceding calendar quarters.

(e) Any **party** seeking appointment of counsel shall bear the burden of proving indigency by a preponderance of the evidence.

(f) Even where a **party** meets or fails to meet the definitions of "**indigent**" or "**indigent but able to contribute,**" the judge retains the discretion to determine that the interests of justice require a different determination based on the **party's available funds** in relation to the **party's basic living costs**, or special circumstances, or

both. A judge may consider, for example, receipt of Medicaid benefits as one factor in assessing whether the interests of justice would require a different determination. Where a judge exercises this discretion, the judge shall set forth on the record the reason for doing so.

Section 6. Assignment of Counsel/Notice of Assignment.

If under Section 5 the judge finds that a **party** is **indigent** or **indigent but able to contribute**, the judge shall assign the Committee for Public Counsel Services to provide representation for the **party**, unless exceptional circumstances, supported by written findings, necessitate a different procedure that is consistent with G. L. c. 211D and the rules of the Supreme Judicial Court. The clerk or register shall promptly notify the **party** of the assignment of counsel.

If a judge has determined that a **party** is not **indigent**, and the **party** after a reasonable time has not waived counsel, procured counsel, or petitioned for the appointment of counsel on the ground that, despite reasonable efforts, the **party** has been unable to afford the cost of counsel, the case may be ordered to proceed without appointed counsel. In proceedings where there is an entitlement to the appointment of counsel pursuant to General Laws, chapter 111, §§ 94C and 94G, chapter 123, chapter 123A, and chapter 190B, the judge shall appoint counsel immediately upon the filing of a petition and entry of any requisite findings. If, before the hearing, the judge determines that the **party** is not **indigent**, assigned counsel may be dismissed, and the **party** shall be advised to retain private counsel without delay; provided, however, that the judge shall authorize the continued services of appointed counsel at public expense where the interests of justice so require. The interests of justice may require such appointment if, for example, the **party** is incompetent to obtain counsel, unable to access funds, or unable to retain counsel. If, after the hearing has commenced, the judge determines that the **party** is not **indigent**, appointed counsel shall continue to represent the **party** and the judge may order the **party** to reimburse the Commonwealth for the cost of counsel.

Section 6A. Assignment of Counsel for **Juveniles**.

All **juveniles**, regardless of the financial status of their parents or guardians, shall be entitled to the appointment of counsel. Unless the **juvenile** is represented by retained private counsel, the judge shall assign the Committee for Public Counsel Services to represent the **juvenile** in accordance with Section 6. If the **juvenile** is provided with appointed counsel and the judge determines that the **juvenile's** parent or legal guardian is not **indigent**, the judge shall assess the **juvenile legal fee** against the parent or guardian as payment toward the cost of counsel supplied by the Committee for Public Counsel Services. If the parent or guardian is determined to be **indigent but able to contribute**, the court shall order the parent or guardian to pay a reasonable amount toward the cost of appointed counsel, provided that the amount shall not exceed the **juvenile legal fee** and shall not cause substantial financial hardship. This section shall not apply to a parent or guardian who has had custody of the **juvenile** removed by a court of competent jurisdiction, or who has an interest adverse to the **juvenile**. The failure of a **juvenile's** parent or guardian to pay any fee assessed under this Section shall not be grounds for withholding or revoking the **juvenile's** appointed counsel.

Section 7. Review of Indigency Determination.

(a) The judge may review indigency status at any stage of a proceeding if information regarding a change in financial circumstances is obtained by **probation** through the **indigency verification process** or from some other source, including the **party**.

(b) There shall be a right to an evidentiary hearing to reconsider the judge's findings and determination as to the **party's** entitlement to appointed counsel. The judge shall schedule the evidentiary hearing promptly after it is requested. If requested by the **party**, the judge shall appoint counsel to represent the **party** at the evidentiary hearing. Before the hearing, the judge shall provide the **party** with a copy of **probation's intake report** and recommendation described in Section 5(a) and any records in the court's possession relating to the **party's** financial status. The judge may issue any protective orders needed to protect the privacy of the **party** or any third parties. The **party** shall have the opportunity to introduce any relevant evidence and to call

witnesses to testify. The **party** shall bear the burden of proving indigency by a preponderance of the evidence. At the conclusion of the hearing, the judge shall make written findings regarding whether the **party** is entitled to appointed counsel. These findings shall be part of the case record and maintained in the official file of the case.

Section 8. Inadmissibility of Information Obtained from a **party**.

(a) No information provided by a **party** pursuant to this rule may be used in any proceeding against the **party** except in a prosecution for perjury or contempt committed in providing such information or at an evidentiary hearing conducted under Section 7(b).

(b) No **party** shall be asked or required to provide any information regarding his or her immigration or citizenship status as part of intake, indigency determination, or verification.

Section 9. Counsel for **parties who are indigent or indigent but able to contribute**.

(a) Appearance of Counsel. Counsel assigned by the Committee for Public Counsel Services to represent a **party** pursuant to this rule shall file an appearance within forty-eight hours after receipt of notification of the assignment.

(b) Withdrawal of Appearance. If counsel assigned by the Committee for Public Counsel Services has filed an appearance and is unable or unwilling to represent a **party**, counsel shall move to withdraw the appearance. If the judge allows the motion for withdrawal, the clerk or register shall immediately notify the Committee for Public Counsel Services to make a new assignment of counsel.

Section 10. Contribution toward Cost of Counsel.

(a) If a judge determines that a **party** is **indigent**, the judge may not order, require, or solicit the **party** to make any payment toward the cost of counsel, except for an **indigent counsel fee**. The **indigent counsel fee** shall be waived where a judge, after the **indigency**

verification process, determines that the **party** is unable without substantial financial hardship to pay the **indigent counsel fee** within 180 days. Where the **indigent counsel fee** is not waived, the judge may authorize the **party** to perform community service in lieu of payment of the **indigent counsel fee** in accordance with G. L. c. 211D, § 2A(g). The clerk shall enter the judge's determination on the court docket.

(b) If a judge determines that a **party** is **indigent but able to contribute**, the judge shall order the **party** to pay the **indigent counsel fee** plus a **contribution fee** based on the financial circumstances of the **party**, provided that the amount of the **contribution fee** shall not cause substantial financial hardship. The **party** shall be given an opportunity to be heard and to present information, including witness affidavits or testimony, regarding whether the **contribution fee** would cause substantial financial hardship.

(c) If a **party** over the age of eighteen is determined to be **indigent but able to contribute** under Section 1(h)(iii) because the **party** is claimed as a dependent for tax purposes by a parent or guardian who is not **indigent**, the **contribution fee** shall be based on the financial circumstances of the parent or guardian. The parent or guardian shall be solely responsible for paying any **contribution fee** assessed under this subsection.

Section 11. Collection of Fees and Contributions.

(a) All payments toward the cost of counsel, including the **indigent counsel fee**, the **contribution fee**, and the **juvenile legal fee**, shall be made to the office of the clerk of court and shall be deposited with the State Treasurer in accordance with law.

(b) The clerk shall inform the judge at each court event for a case whether the **party** has failed to pay an **indigent counsel fee** or **contribution fee**. If the **party** has failed to pay an **indigent counsel fee** or **contribution fee** within sixty days of appointment of counsel, the clerk, unless otherwise ordered by the judge, shall report the unpaid

amount to the Department of Revenue, the Department of Transitional Assistance, and the Registry of Motor Vehicles as required by G. L. c. 211D, § 2A.

(c) The failure of a **party**, parent, or guardian to pay an **indigent counsel fee**, a **contribution fee**, or a **juvenile legal fee** shall not be grounds for withholding or revoking appointed counsel.

(d) **Probation** shall not be responsible for monitoring or enforcing payment of any **indigent counsel fee**, **contribution fee**, or **juvenile legal fee**.

(e) No **party** may be subject to incarceration for failing to pay an **indigent counsel fee** or a **contribution fee**.