

**SUPREME COURT ADVISORY COMMITTEE
RULES OF CRIMINAL PROCEDURE**

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OFFICE OF
APPELLATE COURTS

SEP 29 2003

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September 29, 2003

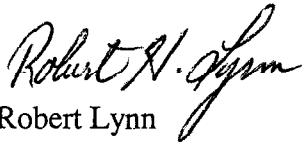
Chief Justice Kathleen Blatz
Minnesota Supreme Court
25 Constitution Avenue
St. Paul, MN 55155-6102

Justice Russell Anderson
Minnesota Supreme Court
25 Constitution Avenue
St. Paul, MN 55155-6102

Dear Chief Justice Blatz and Justice Anderson:

The Supreme Court Advisory Committee on Rules of Criminal Procedure submits herewith the original and fourteen copies of a Report and Proposed Amendments to Rule 5.02 of the Rules of Criminal Procedure Concerning Appointment of the Public Defender.

Respectfully yours,



Robert Lynn
Chair

RL/jld

Enc.

C1-84-2137
STATE OF MINNESOTA
IN SUPREME COURT

In Re:

Supreme Court Advisory Committee
On Rules of Criminal Procedure

REPORT AND PROPOSED AMENDMENTS
TO RULE 5.02 OF THE RULES OF
CRIMINAL PROCEDURE CONCERNING
APPOINTMENT OF THE PUBLIC DEFENDER

September 29, 2003

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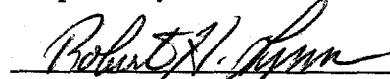
**REPORT TO THE MINNESOTA SUPREME COURT
FROM THE SUPREME COURT ADVISORY COMMITTEE
ON RULES OF CRIMINAL PROCEDURE**

The Supreme Court Advisory Committee on Rules of Criminal Procedure has reviewed the public defender eligibility standards of Rule 5.02 in light of the current serious funding problems of the public defender system. This review was also prompted by recent caselaw and legislation related to Rule 5.02. In the case of In Re Stuart, 646 N.W.2d 520 (Minn. 2002), the Supreme Court considered what constitutes a "liquid asset" under Rule 5.02 for purposes of appointing counsel. Additionally, the legislature recently amended various provisions in Ch. 611 of the Minnesota Statutes effective July 1, 2003, concerning provision of attorney and other defense services to indigents. Minn. Stat. §611.27 (Supp. 2003). Because of the urgency of this matter, the Advisory Committee believes it should be considered without delay.

The Advisory Committee on Rules of Criminal Procedure recommends that the Supreme Court adopt the Proposed Amendments to Rule 5.02 of the Rules of Criminal Procedure submitted herewith. These proposed amendments incorporate the holding of In Re Stuart, 646 N.W.2d 520 (Minn. 2002) and the standards set forth in Minn. Stat. §611.27 (Supp. 2003). The Advisory Committee at this time is not recommending any amendment of forms 47 (Application for Public Defender) and 48 (Order on Application for Public Defender) because of pending litigation concerning the constitutionality of public defender co-payments. The Advisory Committee will report to the court concerning those forms at a later date.

Dated: 9/29/03

Respectfully submitted,



Judge Robert Lynn, Chair
Supreme Court Advisory Committee
on Rules of Criminal Procedure

PROPOSED AMENDMENTS TO RULE 5.02 OF THE RULES OF CRIMINAL PROCEDURE

The Supreme Court Advisory Committee on Rules of Criminal Procedure recommends that the following amendments be made in the Minnesota Rules of Criminal Procedure. In the proposed amendments, except as otherwise indicated, deletions are indicated by a line drawn through the words and additions by a line drawn under the words.

1. Rule 5.02. Appointment of Public Defender.

Amend Rule 5.02 as follows:

Rule 5.02. Appointment of Public Defender

Subd. 1. Notice of Right to Counsel; Appointment of the Public Defender; Waiver of Counsel.

(1) Notice of Right to Counsel. If a defendant charged with a felony, gross misdemeanor, or misdemeanor punishable by incarceration appears without counsel, the court shall advise the defendant of the right to counsel and the appointment of the district public defender if the defendant has been determined to be ~~is~~ financially unable to afford counsel. The court shall also advise the defendant of the right to request counsel at any stage of the proceedings.

(2) Appointment of the Public Defender. Upon the request of a defendant charged with a felony, gross misdemeanor, ~~or~~ misdemeanor punishable by incarceration, extradition proceeding under section 629, or probation revocation proceeding, who is not represented by counsel and is financially unable to afford counsel, the judge or judicial officer shall appoint the district public defender for the defendant. The court shall not appoint a district public defender to a defendant who is financially able to retain private counsel, but refuses to do so. ~~In all other cases, the court may appoint an attorney for a defendant financially unable to afford counsel when requested by the defendant or interested counsel or when such appointment appears advisable to the court in the interests of justice to the parties.~~

(3) Waiver of Counsel, Misdemeanor. If a defendant appearing without counsel charged with a misdemeanor punishable upon conviction by incarceration does not request counsel and wishes to represent himself or herself, the defendant shall waive counsel in writing or on the record. The court shall not accept the waiver unless the court is satisfied that it is voluntary and has been made by the defendant with full knowledge and understanding of the defendant's rights. The court may appoint the public defender for the limited purpose of advising and consulting with the defendant as to the waiver.

(4) Waiver of Counsel, Felony, Gross Misdemeanor. If a defendant appearing without counsel charged with a felony or gross misdemeanor does not request counsel and wishes to represent himself or herself, the court shall ensure that a voluntary and intelligent written waiver of the right to counsel is entered in the record. If the defendant refuses to sign the written waiver form, the waiver shall be made orally on the record. Prior to accepting any waiver, the trial court shall advise the defendant of the following: the nature of the charges, the statutory offenses included within the charges, the range of allowable punishments, that there may be defenses, that there may be mitigating circumstances, and all other facts essential to a broad understanding of the consequences of the waiver of the right to counsel, including the advantages and disadvantages of the decision to waive counsel. The court may appoint the district public defender for the limited purpose of advising and consulting with the defendant as to the waiver.

Subd. 2. Appointment of Advisory Counsel. The court may appoint "advisory counsel" to assist the accused who voluntarily and intelligently waives the right to counsel.

(1) If the court appoints advisory counsel because of its concerns about fairness of the process, the court shall so state on the record. The court shall, on the record, then advise the defendant and counsel so appointed that the defendant retains the right to decide when and how the defendant chooses to make use of advisory counsel and that the decision on what type of role advisory counsel is permitted may affect a later request to allow advisory counsel to assume full representation of the accused.

(2) If the court appoints advisory counsel due to its concerns about delays in completing the trial because of the potential disruption by the defendant or because of the complexity or length of the trial, the court shall so state on the record. The court shall on the record then advise the defendant and counsel so appointed that advisory counsel will assume full representation of the accused if (a) the defendant becomes so disruptive during the proceedings that such conduct is determined to constitute a waiver of the right of self representation or (b) the defendant requests advisory counsel to take over representation during the proceeding.

Advisory counsel must be present in the courtroom during all proceedings in the case and must be served with all documents which must be served upon an attorney of record.

Subd. 3. Standards for District Public Defense Eligibility. A defendant is financially unable to obtain counsel if:

(1) The defendant, or any dependent of the defendant who resides in the same household as the defendant, receives means-tested governmental benefits; or

(2) The defendant, through any combination of liquid assets and current income, would be unable to pay the reasonable costs charged by private counsel in that judicial district for a defense of ~~a case of the nature at issue~~ the same matter; ~~or~~

~~(3) The defendant can demonstrate that due to insufficient funds or other assets: two members of a defense attorney referral list maintained by the court have refused to defend the case or, if no referral list is maintained, that two private attorneys in that judicial district have refused to defend the case.~~

Subd. 4. Financial Inquiry. An inquiry to determine financial eligibility of a defendant for the appointment of the district public defender shall be made whenever possible prior to the court appearance and by such persons as the court may direct. This inquiry may be combined with the pre-release investigation provided for in Rule 6.02, subd. 3. In no case shall the district public defender be required to perform this inquiry or investigate the defendant's assets or eligibility. The court has a duty to conduct a financial inquiry. The inquiry must include the following:

(1) the liquidity of real estate assets, including homestead;

(2) any assets that can be readily converted to cash or used to secure a debt;

(3) the value of all property transfers occurring on or after the date of the alleged offense; and

(4) the determination of whether transfer of an asset is voidable as a fraudulent conveyance.

The burden is on the accused to show that he or she is financially unable to afford counsel. Defendants who fail to provide the information necessary to determine eligibility shall be deemed ineligible.

Subd. 5. Partial Eligibility and Reimbursement. The ability to pay part of the cost of adequate representation at any time while the charges are pending against a defendant shall not preclude the appointment of the public defender for the defendant. The court , if after previously finding that the defendant is eligible for public defender services, determines that the defendant now has the ability to pay part of the costs, may require a defendant, to the extent able, to compensate the governmental unit charged with paying the expense of the appointed public defender.

2. Comments on Rule 5.02.

Amend the tenth paragraph of the comments on Rule 5 as follows:

~~This rule also allows the court to appoint counsel for a defendant charged with an offense which is not punishable by incarceration and who is financially unable to afford counsel upon the request of the defendant or interested counsel or upon the court's initiative when in the interests of justice to the parties. The United States Supreme Court in *Argersinger v. Hamlin*, 405 U.S. 348 (1972) did not decide that counsel was not required whenever incarceration was not authorized. Considerations other than the possibility of incarceration may make the case sufficiently serious to warrant the appointment of the public defender and this rule provides for that possibility.~~

3. Comments on Rule 5.02.

Amend the seventeenth paragraph of the comments on Rule 5 as follows:

These general reasons for the appointment of ~~the public defender~~ counsel to the pro se defendant suggest a natural expectation of the level of readiness of advisory counsel. If the court appoints advisory counsel as a safeguard to the fairness of the proceeding, it would not be expected that counsel would be asked to take over the representation of the defendant during the trial and counsel should not be expected and need not be prepared to take over representation should this be requested or become necessary. If this unexpected event occurred and a short recess of the proceeding were sufficient to allow counsel to take over representation, the court could enter that order. If the circumstances constituted a manifest injustice to continue with the trial, a mistrial could be granted and a date for a new trial, allowing counsel time to prepare, could be set. The court could also deny the request to allow counsel to take over representation if the circumstances would not make this feasible or practical.

4. Comments on Rule 5.02.

Amend the twenty-third paragraph of the comments on Rule 5 as follows:

Rule 5.02, subd. 3 prescribes the standard to be applied by the court in determining whether a defendant is financially eligible for the appointment of the public defender. This standard is based upon the

standards adopted by the Minnesota State Board of Public Defense on January 30, 1993 Legislature effective July 1, 2003 in Minn. Stat. §611.27 (Supp. 2003) except that the statute expressly prohibits the appointment of the public defender as advisory counsel. This rule also recognizes the limited resources of district public defenders.

5. Comments on Rule 5.02

Amend the twenty-sixth and twenty-seventh paragraphs of the comments on Rule 5 as follows:

~~Under part (3), the defendant is eligible for public defender representation if they are able to demonstrate that they have attempted to obtain private defense counsel and have been unsuccessful due to their financial circumstances. It is strongly recommended that the district court maintain a list of attorneys who wish to have cases referred to them and who are willing to try to make financial arrangements with defendants to permit them to accept representation. A number of organizations, including the Hennepin and Ramsey County Bar Associations and the Minnesota Association of Criminal Defense Lawyers, maintain lists of private attorneys who will accept criminal defense cases at a fee rate which will be determined after consideration of the defendant's ability to pay. The defendant may demonstrate eligibility for the public defender by being turned down by two attorneys from the court's referral list due to the defendant's financial circumstances. If no referral list is maintained by the court, the defendant may also prove eligibility by demonstrating that they have contacted two attorneys in the judicial district and that both have refused representation due to the defendant's financial circumstances. The existence of such a referral list may not, however, be a basis for failing to appoint counsel for a defendant who is financially eligible for public defender representation under Parts (1) or (2) of this rule.~~

To assist the court in deciding whether to appoint the public defender, Rule 5.02, subd. 4 provides that whenever possible a financial inquiry should be conducted before the defendant's appearance in court. Such an inquiry may be combined with the pre-release investigation provided for in Rule 6.02, subd. 3. The rule also emphasizes the court's obligation to jealously guard the resources of district public defense and outlines the extent to which the court must go to determine district public defense eligibility in accordance with *In Re Stuart*, 646 N.W.2d 520 (Minn. 2002). In order to avoid the creation of conflicts of interest and to focus limited public defender resources on client representation, the public defender shall not be permitted or required to participate in determining whether particular defendants are eligible for public defender representation.