



RESOLUTION OF THE SOUTH CAROLINA ACCESS TO JUSTICE COMMISSION

Certificate of Action Taken by Written Consent

December 16, 2022

The members of the South Carolina Access to Justice Commission consent to adopt and take the following resolutions as the action of the Commission:

Proposed Amendment of Rule 3 of the South Carolina Rules of Civil Procedure To Include a Presumption of Indigence

WHEREAS the Commission recognizes that Rule 3 of the South Carolina Rules of Civil Procedure provides for litigants who cannot afford to participate in our system of justice to proceed *in forma pauperis*, that is, proceed without payment of usual fees associated with a lawsuit or appeal, and

WHEREAS the Commission recognizes that the South Carolina Bar, with its petition submitted on August 24, 2022, has requested that the South Carolina Supreme Court amend Rule 3 of the South Carolina Rules of Civil Procedure to include a presumption of indigence if the plaintiff's "net family income is less than or equal to the Poverty Guidelines established and revised annually by the United States Department of Health and Human Services and published in the Federal Register,"¹ and

¹ Petition of the South Carolina Bar, Ex Parte: Proposed Amendment of Rule 3 of the South Carolina Rules of Civil Procedure, August 24, 2022.

WHEREAS the Commission recognizes that, in 2019, 15.2% of South Carolinians were living in poverty² and, to be eligible for subsidized civil legal help, an individual or family's income must be at or below 125-200% of the federal poverty guidelines, depending on the organization providing assistance,³ and

WHEREAS the Commission recognizes that in 2022, 100% of the federal poverty guidelines is \$13,590 for an individual and \$27,750 for a family of four, and 200% of the federal poverty guidelines is \$27,180 for an individual and \$55,500 for a family of four,⁴ and

WHEREAS the Commission recognizes that there is a significant gap in access to justice in South Carolina, with both parties being represented by an attorney in only 27% of civil cases in Circuit Court in fiscal year 2019,⁵ and

WHEREAS the Commission recognizes that there is currently no bright-line rule for determining *in forma pauperis* status in South Carolina, and, while a standard reflecting a percentage of the federal poverty guidelines consistent with the standards of South Carolina Legal Services, the South Carolina Bar Pro Bono Program, and our state's other legal aid providers might be more appropriate, the Commission also recognizes the immediate need for an explicit standard giving rise to a presumption of *in forma pauperis* status in South Carolina courts.

THEREFORE BE IT RESOLVED that the Commission supports the amendment to Rule 3 of the South Carolina Rules of Civil Procedure proposed by the South Carolina Bar to add a presumption of indigence if the plaintiff's net family income is less than or equal to 100% of the federal poverty guidelines.

The above resolutions are taken by a majority of the members of the South Carolina Access to Justice Commission as of December 16, 2022.

² SOUTH CAROLINA ACCESS TO JUSTICE COMM'N, MEASURING SOUTH CAROLINA'S JUSTICE GAP 4 (2021), *available at* <https://www.scaccesstojustice.org/the-sc-justice-gap>.

³ *Id.* at 7.

⁴ Annual 2022 Income Guidelines for the 48 Continental United States, <https://sclegal.org/income-guidelines/> (last visited Dec. 13, 2022).

⁵ SOUTH CAROLINA ACCESS TO JUSTICE COMM'N, *Supra* note 2, at 12.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

Aug 24 2022

PETITION
South Carolina Bar
Ex Parte

S.C. SUPREME COURT

IN RE: Proposed Amendment of Rule 3 of the South Carolina Rules of Civil Procedure

J. Hagood Tighe
President
South Carolina Bar
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803-799-6653

1. The South Carolina Bar is empowered under Rule 410, SCACR, with the specific purposes set forth in section b. The undersigned, as President of the Bar, has general charge of the affairs of the organization and is thus empowered to seek this relief in this Court.
2. The South Carolina Bar's Practice and Procedure Committee was approached by Kate Weaver Patterson, who is a member of the South Carolina Bar and Deputy Director of National Programs for Root & Rebound,¹ about the possibility of the Committee proposing an amendment to Rule 3, SCRCPP, to set forth an indigency determination process to be used when filing and ruling on motions for leave to proceed *in forma pauperis*.² Root & Rebound's goals in requesting

¹ Root & Rebound South Carolina seeks to increase access to justice and opportunity for people with criminal records. They help clients, upon reentry, navigate legal issues and barriers that result from having a criminal record, including expungement, housing, employment, family and children, court-ordered debt, obtaining IDs, public benefits, and voting rights.
<https://www.rootandrebound.org/locations/south-carolina/>.

² Root & Rebound proposed the following:

Indigency for civil cases shall be established in any of the following four ways:

- (1) The income of the applicant, after deductions as listed on the financial declaration form, falls below 150% of the Federal Poverty Guidelines, and the applicant's assets are valued at less than \$10,000;
- (2) The applicant provides documentation showing receipt or qualification for SSI, SSDI, Medicaid, TANF, SNAP, or poverty-related veterans benefits;
- (3) The applicant is represented by a civil legal services attorney or volunteer pro bono attorney; or

the Committee explore such an amendment were two-fold: to increase access to justice for low-income individuals who may currently be denied *in forma pauperis* status in civil matters, and to increase transparency in the indigency determination process.

3. Currently, there are no bright-line rules for determining *in forma pauperis* status in South Carolina, such as a means-based or public benefits eligibility test. Instead, section (b)(1) of Rule 3, SCRCP, simply states that a plaintiff who desires to file an action *in forma pauperis* should file a motion, together with the complaint proposed to be filed and "an affidavit showing the plaintiff's inability to pay the fee required to file the action."³

While section (b)(2) allows certification in lieu of a motion and court approval, the only legal aid providers who qualify under the terms of the rule to provide certification are South Carolina Legal Services (SCLS) and the South Carolina Bar Pro Bono Program. Presumably, this is because those organizations determine clients' eligibility by comparing their income to the Federal Poverty Guidelines. Other legal service providers do not have those same funding strictures but serve similar populations. However, even if the certification is not expanded to all civil legal services attorneys or volunteer pro bono attorneys, but the rule is amended to set forth a means-based standard or allow for adjunctive eligibility through public benefits programs, other legal service providers across the state would have clear guidance as to which individuals qualify for *in forma pauperis* status. Root & Rebound indicated that is their top priority, as those two methods would benefit their clients and make the indigency determination more transparent.

Such an amendment would also provide much clearer guidance to self-represented plaintiffs in civil matters, which is particularly important in a state with limited civil legal aid resources.⁴

4. In the fall of 2020, the Committee formed a subcommittee to study the creation of a uniform rule governing the determination of indigence for *in forma pauperis* applications. The

(4) The Court, in its discretion, grants indigency status or waives part of the fees associated with a civil case based on other factors.

The proposal was based largely on research summarized in the following article: <https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1905&context=facultypub>. The article identifies four key ways to determine indigency for civil lawsuits: means-based tests based on the Federal Poverty Guidelines, adjunctive eligibility through public benefit programs, eligibility through legal aid representation, and court discretion. Other states have various combinations, with 26 states using a means-based test as at least one method.

³ The combined Motion and Affidavit to Proceed In Forma Pauperis on the Judicial Branch website simply requires the plaintiff to attest that they "do not have the funds available to pay the costs of filing and service in the [] matter." The judge has the option of granting the motion as to filing fees and/or the cost of service or denying the motion.

⁴ South Carolina has a ratio of 0.44 civil legal aid attorneys per 100,000 indigent people. See The Justice Index 2021, Nat'l Center for Access to Justice at Fordham Law School, available at <https://ncaj.org/state-rankings/2020/attorney-access>.

Committee voted unanimously in favor of a proposal to amend Rule 3 to include a presumption of indigence if the plaintiff's "net family income is less than or equal to the Poverty Guidelines established and revised annually by the United States Department of Health and Human Services and published in the Federal Register." This proposed revision tracks similar language used for determining indigence in Rules 602 and Rule 608, SCACR.

5. The Committee believes this rule revision, in addition to providing guidance to litigants petitioning to proceed *in forma pauperis*, will be helpful to our courts by providing uniform standards to be applied throughout our state in ruling on those petitions.

6. The proposal was presented to the House of Delegates in May 2022. After presentation of the proposal, the House of Delegates approved the proposed amendment. The language approved by the House of Delegates is included in Attachment A hereto.

WHEREFORE, the South Carolina Bar prays that the Supreme Court of South Carolina adopt the requested amendment to Rule 3, SCRCP as set forth in Attachment A.



J. Hagood Tighe
President

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Aug 24 2022

ATTACHMENT A

Rule 3: Commencement of Action

S.C. SUPREME COURT

(a) **Commencement of civil action.** A civil action is commenced when the summons and complaint are filed with the clerk of court if:

- (1) the summons and complaint are served within the statute of limitations in any manner prescribed by law; or
- (2) if not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing.

(b) **Filing *In Forma Pauperis*.**

- (1) Except as provided in (2) below, a plaintiff who desires to file an action *in forma pauperis* shall file in the court a motion for leave to proceed *in forma pauperis*, together with the complaint proposed to be filed and an affidavit showing the plaintiff's inability to pay the fee required to file the action. If the motion is granted, the plaintiff may proceed without further application and file the complaint in the court without payment of filing fees.

In making a determination whether the plaintiff is unable to pay the fee required to file the action, all factors concerning the plaintiff's financial condition should be considered including income, debts, assets, and family situation. A presumption that the plaintiff is unable to pay the fee required to file the action shall be created if the plaintiff's net household income is less than or equal to the Poverty Guidelines established and revised annually by the United States Department of Health and Human Services and published in the Federal Register. Net income shall mean gross income minus deductions allowed by law.

- (2) Where a party is represented in a civil action by an attorney working on behalf of or under the auspices of a legal aid society or a legal services or other nonprofit organization funded in whole or substantial part by funds appropriated by the United States Government or the General Assembly of the State of South Carolina, which has as its primary purpose the furnishing of legal services to indigent persons, or the South Carolina Bar Pro Bono Program, fees related to the filing of the action shall be waived without the necessity of a motion and court approval. Before the filing fees will be waived, the attorney representing the party must file with the clerk a written certification that representation is being provided on behalf of or under the auspices of the society, organization or program, and that the party is unable to pay the filing fees.

Note to 2022 Amendment:

This amendment added language to subsection (b) to provide guidance and create uniformity regarding who may proceed *in forma pauperis*. The language tracks that used for determining indigency in Rule 602, SCACR, and Rule 608, SCACR.