

Part 1

Rules for the Continued Delivery of Services in Non-Capital Criminal and Non-Criminal Cases at the Trial Level

This first part addresses the procedure for appointing and compensating counsel in all cases subject to the oversight of the Office of Indigent Defense Services (IDS Office), except for capital cases, which are covered by Part 2 of these rules, appellate cases, which are covered by Part 3 of these rules, and cases in which the State is obligated to provide legal assistance and access to the courts to inmates in the custody of the Department of Correction, which are covered by Part 4 of these rules. Parts 1 through 3 of these rules are authorized by the Indigent Defense Services Act of 2000 (IDS Act), S.L. 2000-144, Senate Bill 1323, and apply to cases pending on or after July 1, 2001. Part 4 of these rules is authorized by § 14.9(a) of S.L. 2005-276, Senate Bill 622.

The principal aim of this first part is to ensure that the system for appointing and compensating counsel at the trial level in non-capital criminal and non-criminal cases is not disrupted. Because of the sheer number of such cases handled by appointed counsel, these rules continue most of the current practices and procedures, allowing the IDS Office to consider and implement changes over time after considering the suggestions and advice of the bar, bench, and other interested persons.

The rules are drawn in large part from the North Carolina General Statutes (G.S.), as revised by the IDS Act, and Section D.0400 and D.0500 of the Rules and Regulations of the North Carolina State Bar (State Bar Rules). That section of the State Bar Rules is no longer effective beginning July 1, 2001, because the authorization for those rules, in former G.S. 7A-459, was repealed effective that date.

Whenever the term “IDS Director” is used in these rules, it means the Director of the Office of Indigent Defense Services or his or her designee. Whenever the term “IDS Office” is used in these rules, it means the Office of Indigent Defense Services or its designee. Whenever the term “IDS Commission” is used in these rules, it means the Commission on Indigent Defense Services or its designee.

These rules may be changed by the IDS Commission pursuant to its authority.

1.1 Coverage and Definitions

(1) This part applies to all non-capital criminal and non-criminal cases at the trial level, including cases in which a court has appointed counsel pursuant to G.S. 7A-451(a)(3) and G.S. 15A-1421 and the applicable case law to investigate, and, if appropriate, prepare, file, and litigate a non-capital motion for appropriate relief or other non-capital post-conviction motion in state court. The terms “non-capital criminal case” and “non-criminal case” refer only to such cases in which the IDS Office is responsible for the provision and oversight of legal representation. The term “trial level” includes all cases in district or superior court.

(2) Except as otherwise provided in these rules, this part does not apply to capital cases, as defined in Part 2 of these rules, at the trial, appellate, or post-conviction level. The term “capital offense” means any case involving a first-degree murder charge or charge in which the degree of murder is undesignated, except cases in which the defendant was under 18 years of age at the time of the offense and not potentially punishable by death, and any non-capital criminal charge brought contemporaneously with or subsequently joined with such murder charge. The term “capital appeal” means

any appeal of right taken from a sentence of death, any appeal from offenses joined with a capital appeal, and any petition for extraordinary writ that is filed in the Appellate Division prior to the entry of final judgment in the Trial Division on behalf of a defendant charged with a capital offense. The term “capital post-conviction” mean any case in which a death sentence has been affirmed on direct appeal by the Supreme Court of North Carolina.

(3) Except as otherwise provided in these rules, this part does not apply to appellate cases, as defined in Part 3 of these rules. The term “appellate case” means any case in which a person is entitled to representation in the appellate courts pursuant to G.S. 7A-451 and Part 3 of these rules, including a petition for writ of certiorari or other extraordinary writ that is filed in the Appellate Division prior to the entry of final judgment in the Trial Division.

(3a) Except as otherwise provided in these rules, this part does not apply to cases in which the State is obligated to provide legal assistance and access to the courts to inmates in the custody of the Department of Correction pursuant to G.S. 7A-498.3(a)(2a), as defined in Part 4 of these rules.

(4) When these rules describe the functions that a court performs, the term “court” includes clerks of superior court.

[Subsection (1) amended effective March 15, 2010]

[Subsection (2) amended effective May 6, 2005]

[Subsection (3) amended effective February 27, 2009]

[New subsection (3a) adopted effective March 15, 2010]

[*Commentary* to Rule 1.1, subsection (1) amended effective November 4, 2005 and July 1, 2009]

Authority: G.S. 7A-452(c)(1); 7A-498.3(a)

Commentary

Subsection (1): G.S. 7A-498.3(a) places virtually all cases in which a person is entitled to counsel at state expense under the oversight of the IDS Office. The cases covered are:

1. cases in which an indigent person is entitled to legal representation under G.S. 7A-451 and G.S. 7A-451.1;
2. cases in which the IDS Office is designated by other statutes as responsible for providing legal representation; and
3. cases in which an indigent person is subject to a deprivation of liberty or other constitutionally protected interest, and is entitled by law to legal representation.

Most of the cases in which a person has a right to counsel fall within the first category—that is, cases designated in G.S. 7A-451 and 7A-451.1. Readers should consult those statutes for a complete listing of proceedings.

The General Assembly has recognized a right to counsel in miscellaneous proceedings not covered by G.S. 7A-451 and 7A-451.1, and with respect to most of those proceedings the provision of counsel is subject to the oversight of the IDS Office. The covered cases include:

- cases in which the parent, guardian, or custodian of a juvenile who has run away petitions a court for issuance of a requisition for the juvenile's return, and the juvenile is subsequently brought before a court pursuant to a detention order under G.S. 7B-2804(a);
- cases in which a delinquent juvenile has absconded from probation or parole supervision, or escaped from institutional custody, and the juvenile is subsequently brought before a court pursuant to a detention order under G.S. 7B-2805(a);
- cases in which a law enforcement officer has seized property from an unknown or unapprehended defendant, or from a defendant willfully absent from the jurisdiction, and the lawful owner petitions a court for return of the property pursuant to G.S. 15A-11.1(b);
- cases in which a person is subject to a non-testimonial identification procedure under G.S. 15A-279(d);
- cases in which a material witness appears for a hearing on a motion for an order assuring his or her attendance at a criminal proceeding under G.S. 15A-803(d);
- cases in which a criminal defendant elects to represent himself or herself and the court determines that standby counsel should be appointed pursuant to G.S. 15A-1243;
- cases in which a person is taken or charged on any order of arrest for default of bail, or on surrender of bail, or in execution of arrest for any debt or damages rendered in any action, and such person petitions the court for provisional release pursuant to G.S. 23-30.1; and
- cases in which a minor has been voluntarily admitted to a mental health or substance abuse facility pursuant to G.S. 122C-224.1.

The third category of cases under IDS oversight are cases in which the courts have recognized a right to appointed counsel. For example, the defendant has a constitutional right to counsel in child support contempt proceedings in which the defendant faces a sentence of actual imprisonment. *See McBride v. McBride*, 334 N.C. 124, 431 S.E.2d 14 (1993) (finding right to counsel whether contempt proceeding is designated as civil or criminal).

Subsections (2) and (3): Capital cases are addressed in a separate part because of the differing treatment of those cases in the IDS Act. In non-capital criminal cases, the court appoints counsel pursuant to rules adopted by the IDS Office. In capital cases, the IDS Director appoints counsel directly. *See* G.S. 7A-452(a) (generally); *see also* G.S. 7A-451(c) (capital post-conviction cases). Appellate cases are also dealt with separately because of the relatively small number of such cases. The IDS Office is in a position to establish and administer procedures for the appointment and compensation of appellate counsel, relieving trial judges of that burden.

Effective May 6, 2005, subsection (2) was amended to clarify that the term "capital case" refers only to cases in which the defendant is eligible to receive the death penalty, and does not refer to those cases in which life imprisonment without parole is the maximum possible punishment because the defendant was under the age of 18 at the time of the offense. *See* G.S. 14-17; *Roper v. Simmons*, 2005 U.S. LEXIS 2200, 125 S. Ct. 1183 (2005). Effective February 27, 2009, subsection (3) was amended to clarify the definition of an "appellate case" and to provide that litigation of an extraordinary writ in the Appellate Division prior to the entry of a final judgment in the Trial Division is not within the scope of appointed trial counsel's representation.

1.2 Entitlement to Counsel

[No rules adopted; reserved for future use]

Commentary

Under revised G.S. 7A-452(a), the court continues to determine whether a person is entitled to counsel at state expense. In making this determination, the court must decide, first, whether the person is indigent, although in some matters, such as juvenile delinquency proceedings, the person is presumed to be indigent. Second, the court must determine whether the person is entitled to counsel in the particular proceeding.

Rule 1.4, below, governs the first inquiry concerning indigency. The IDS Office has not adopted rules concerning the second inquiry, the right to counsel in particular proceedings, because the IDS Act did not change the extent of a person's rights under the United States and North Carolina constitutions, statutes, and case law; it only transferred to the IDS Office the authority to oversee the provision of legal representation in such cases. For a list of cases subject to IDS Office oversight, *see* commentary to Rule 1.1, above. In cases subject to this part, once the court determines that a person is indigent and has a right to counsel, appointment of counsel is governed by Rule 1.5, below.

In some instances, North Carolina law authorizes someone other than a judge to make at least a preliminary determination of indigency and entitlement to counsel. The IDS Act did not materially change those provisions, although it did provide that appointment of counsel is subject to rules adopted by the IDS Office. For example, G.S. 7A-452(c) continues to authorize the clerk of court to determine whether a person is indigent and entitled to counsel, subject to review by a judge. *See also* G.S. 122C-269(b) (describing clerk's responsibilities in involuntary commitment proceedings). In counties with a public defender office, G.S. 7A-452(a) continues to provide that the Public Defender may make this determination preliminarily and may assign himself or herself or an assistant public defender to represent the person, subject to review by the court.

1.3 Notice of Rights

(a) Generally

[No rules adopted; reserved for future use]

(b) Responsibilities of Public Defenders and Clerks for In-Custody Defendants

In counties with a public defender office, the authority having custody of a person who is without counsel for more than 48 hours after being taken into custody shall so inform the Public Defender. The Public Defender shall make a preliminary determination of the person's entitlement to his or her services and shall proceed accordingly, including notifying the court of the person's status or appointing himself or herself to represent the person pending a determination of the court. The court shall make the final determination. In counties without a public defender office, the authority having custody of a person who is without counsel for more than 48 hours after being taken into custody shall so inform the clerk of superior court, who shall proceed accordingly, including bringing the person's situation to the attention of a district court judge for determination of the right to counsel and review of pretrial release conditions.

Authority: G.S. 7A-452; 7A-453

Commentary

Subsection (a): A number of statutes obligate judicial officials to notify individuals of their right to counsel, describing the timing and basic content of the notice. In criminal cases, for example, *see* G.S. 15A-511 (notice by magistrate at initial appearance); G.S. 15A-603 (notice by district court judge at first appearance in felony case); G.S. 15A-942 (notice by superior court judge at arraignment); G.S. 15A-1101 (procedure for trial of misdemeanors in district court is in accordance with trial procedure in superior court, including requirement that district court judge notify defendant of right to counsel when arraigning defendant). The IDS Act did not alter these requirements. The IDS Office is considering adopting additional procedures to assist judicial officials in notifying individuals of their right to counsel, after considering the suggestions and advice of the bar, bench, and other interested persons.

Subsection (b): This subsection implements the requirements of revised G.S. 7A-453, which deals with the situation in which a person has been in custody for more than 48 hours and has no counsel. Revised G.S. 7A-453 is not materially different than the former version of that statute; it has always required that notice be given, either to the Public Defender or clerk, concerning in-custody defendants without counsel. The revised statute merely provides that in counties designated by the IDS Office, the custodian of the person must notify the IDS Office's designee. In counties not designated by the IDS Office, the custodian must notify the clerk of superior court. Through the above rule, the IDS Office makes the Public Defender its designee in counties that have a public defender office. In counties that do not have a public defender office, the IDS Office makes no designation; therefore, the custodian should continue to notify the clerk of court.

If a person is in custody without counsel, the Public Defender should bring the person's situation to the attention of the court, which may appoint counsel in accordance with Rule 1.5, below. The Public Defender also may tentatively assign himself or herself to represent the person pursuant to G.S. 7A-452(a).

Likewise, the clerk of court should bring the person's situation to the attention of a judge as soon as feasible; pursuant to G.S. 7A-452(c) and Rule 1.5, below, the clerk also may appoint counsel. If the clerk does not appoint counsel for an in-custody defendant, it is particularly important for the clerk to alert a district court judge, especially in cases involving probation violations, orders for arrest for failing to appear, surrenders by sureties, and misdemeanors in those judicial districts that do not routinely hold first appearances. In those cases, a defendant's first-scheduled court date may be several days or even weeks after he or she is taken into custody. If counsel is not appointed until that first court date, the case will likely have to be continued to a later date, resulting in inefficient use of court time, longer pretrial custody for defendants, and greater demands on limited jail resources.

1.4 Indigency

(a) Standard

An indigent person is a person who is financially unable to secure legal representation or provide other necessary expenses of representation at the time the expenses are required.

(b) Procedure for Determining Indigency

(1) Before appointing counsel in cases in which indigency is a condition of appointment, the court shall require the defendant or respondent to complete and sign under oath an affidavit of indigency on a form approved by the IDS Director.

(2) The court shall make reasonable inquiry of the defendant or respondent under oath to determine the truth of the statements made in the affidavit of indigency.

(3) The affidavit of indigency shall be filed in the records of the case.

(4) Based on the affidavit of indigency, the affiant's statements to the court on this subject, and such other information as may be brought to the attention of the court during the proceedings, the court shall determine whether the defendant or respondent is indigent.

(5) The question of indigency may be determined or redetermined by the court at any stage of the action or proceeding.

(6) If at any stage in the action or proceeding a person previously determined to be indigent becomes financially able to secure legal representation and provide other necessary expenses of representation, he or she must inform counsel appointed to represent him or her of that fact, who must promptly inform the court.

Authority: G.S. 7A-450; 7A-452; 7A-498.3(b); 7A-498.5(c)(8)

Commentary

Revised G.S. 7A-452 continues to require the court in most cases to determine whether a person is indigent for purposes of receiving counsel at state expense; however, under G.S. 7A-498.3(b) and 7A-489.5(c)(8), the determination is to be made in accordance with policies and procedures adopted by the IDS Office.

Subsection (a): The IDS Act did not alter the basic statutory definition of indigency in G.S. 7A-450(a), which is set forth in this rule. The court should continue to follow that definition and the North Carolina cases interpreting it. *See, e.g., State v. Hoffman*, 281 N.C. 727, 190 S.E.2d 842 (1972) (“An indigent is one who does not have available, at the time they are required, adequate funds to pay a necessary cost of his defense.”).

The North Carolina cases direct that various factors, such as the person’s employment, income, and assets, be weighed in determining whether a person is indigent. The cases do not establish a precise measure of indigency, however. The specific dollar amounts discussed in older cases are not particularly useful guides in assessing a person’s ability to hire a lawyer now. To assist judicial officials and others in determining indigency, the IDS Office is working on developing more detailed standards and expanding on the basic statutory definition of indigency.

Subsection (b): Subsections (1) through (4) substantially repeat the procedure for determining indigency in former Rule D.0402 of the State Bar Rules. The form affidavit of indigency referred to in subsection (1) is the same form that has been used by the AOC (AOC-CR-226). Subsections (5) and (6) substantially repeat the requirements in G.S. 7A-450(c) and (d). Courts should continue to follow any other statutory requirements to assure that counsel is provided as appropriate. For example, although a district court judge reviews indigency at the defendant’s first appearance in a felony case, a superior court judge must re-examine the question if the defendant appears without counsel in superior court. *See* G.S. 15A-942 (requiring superior court to do so at arraignment).

Subsection (b) also recognizes that in some cases, indigency is not a condition of appointment of counsel, for example, in cases in which a juvenile is alleged to be delinquent. *See* G.S. 7B-2000.

1.5 Appointment Procedure

(a) Districts Without a Public Defender Office

(1) In judicial districts that do not have a public defender office, each judicial district bar or county bar association shall adopt a plan or plans for the appointment by the court of qualified members of the private bar to represent indigent persons in all cases subject to this part. Any plan adopted by a judicial district bar or county bar association shall provide for appointment of counsel on a systematic and impartial basis. To the extent a judicial district bar or county bar association plan does not address any categories of cases, the court shall appoint counsel in those cases on a systematic and impartial basis. A plan may be applicable to the entire district, or, at the election of the judicial district bar or county bar association, separate plans may be adopted for use in each separate county within the district.

(2) Except as otherwise provided by the IDS Office, the plan or plans for a district or county in effect on June 30, 2001, shall govern the method by which counsel are thereafter selected in that district or county for appointment in non-capital criminal and non-criminal cases at the trial level. A plan is considered to be “in effect” on June 30, 2001, if by that date it has been adopted by the judicial district bar or county bar

association, approved by the North Carolina State Bar, and certified to the clerk of superior court of the county to which the plan is applicable by the Secretary of the North Carolina State Bar.

(3) Beginning July 1, 2001, any revisions in a district or county plan must be adopted by the judicial district bar or county bar association and approved by the IDS Commission, following which the IDS Director shall certify the revised plan or plans to the clerk of superior court to which the plan or plans are applicable.

(4) Any provisions in district or county plans concerning appointment of counsel in capital or appellate cases, as defined in Parts 2 and 3 of these rules, shall be of no effect as of July 1, 2001.

(5) Any provisions in district or county plans that are inconsistent with rules now or hereafter adopted by the IDS Office shall be of no effect as of July 1, 2001.

(b) Districts with a Public Defender Office

(1) No later than November 1, 2001, in judicial districts with a public defender office, the Public Defender shall submit to the IDS Director a proposed plan for the appointment of counsel in all cases subject to this part. The proposed plan shall provide for the making of appointments under the oversight of and pursuant to procedures adopted by the Public Defender.

(2) In developing the proposed plan, the Public Defender shall consult with the IDS Director and with the judicial district bench and bar in which the public defender's office is located. The IDS Director shall thereafter submit the proposed plan to the IDS Commission, which may approve the plan as submitted, modify it, or reject it. The plan adopted by the IDS Commission shall become the plan for appointment of counsel in that judicial district.

(3) After the Commission has adopted the initial plan for a judicial district with a public defender office, the IDS Director may, after consulting with the Public Defender, modify the plan and the requirements and procedures for appointing counsel in that judicial district as necessary to effectuate the purposes of the IDS Act. If any modifications being considered by the IDS Director substantially change the plan, the IDS Director shall submit the proposed changes to the IDS Commission for approval.

(4) Until a Public Defender's plan is approved by the IDS Commission, the court shall continue to appoint counsel in accordance with current procedure.

(5) The Public Defender shall not be appointed to represent, and shall not assign counsel to represent, a juvenile alleged to be abused, neglected, or dependent.

(c) Districts with a Special Counsel Office

In judicial districts with a special counsel program, the court shall continue to appoint special counsel, pursuant to G.S. 122C-270, to represent all indigent respondents at all hearings, rehearings, and supplement hearings held at the state facility. For cases assigned to a special counsel office that the office is unable to handle, the special counsel office shall adopt a plan for assigning such cases to qualified members of the private bar. The special counsel office shall submit any plan for approval and certification by the IDS Director.

(d) Appointments Pursuant to Plans

(1) Except as otherwise provided by the IDS Director, all appointments of counsel in cases subject to this part shall be made in conformity with the plans described in this rule, unless the judge in cases subject to subsection (a), above, or the authority authorized to make appointments in cases subject to subsections (b) and (c), above, deems it proper in the furtherance of justice to appoint as counsel for a person a lawyer who is not on the certified plan or list or who is not next in sequence on the list.

(2) No attorney shall be appointed as counsel for a person in a non-capital criminal or non-criminal case in a court of any district unless the attorney has consented to placement of his or her name on the list of attorneys subject to appointment or, if the attorney has not agreed to do so, has otherwise consented to be appointed. The attorney named in the appointment order shall not delegate to another attorney any material responsibilities to the client, including representation at critical stages of the case, unless the court finds in open court that the substitute attorney practices in the same law firm as the appointed attorney and is on the list of attorneys who are eligible for appointment to the particular case, that the client and the substitute attorney both consent to the delegation, and that the delegation is in the best interests of the client.

(3) No person for whom counsel is appointed shall be entitled to select or specify the attorney assigned to defend him or her.

(d1) Right of Review from Denial of Attorney Application for Placement on Appointment List or Removal of Attorney from Appointment List

If an attorney is denied placement on or removed from one or more lists of attorneys subject to appointment in a judicial district or county pursuant to a plan authorized by subsection (a), (b), or (c), above, the attorney may seek review of that decision by the IDS Director or his or her designee in accordance with policies and procedures adopted by the IDS Office.

(e) Record Keeping

(1) In districts without a public defender office, the clerk of superior court of each county, under the direction of the Administrative Office of the Courts pursuant to G.S. 7A-343(3) and (10), shall continue to file in his or her office, maintain, and keep current the plan for assignment of counsel in non-capital criminal and non-criminal cases, and a record of all counsel eligible for appointment under the plan, applicable to said county as certified by the Secretary of the North Carolina State Bar or IDS Director, as the case may be.

(2) No later than November 1, 2001, in districts with a public defender office, the Public Defender shall file in his or her office, maintain, and keep current the plan for assignment of counsel in non-capital criminal and non-criminal cases pursuant to subsection (b), above, and a record of all counsel eligible for appointment under the plan, applicable to said district as certified by the IDS Director.

(3) In districts with a special counsel program, the special counsel shall file in his or her office, maintain, and keep current the plan for assignment of counsel pursuant to

subsection (c), above, and a record of all counsel eligible for appointment under the plan, applicable to said district as certified by the IDS Director.

(4) Orders for the appointment of counsel shall be entered by the court on a form approved by the IDS Director.

(f) Authority to Implement Other Programs, Plans, and Contracts

Nothing in these rules shall prohibit assignment of otherwise qualified counsel to represent indigent defendants pursuant to programs, plans, or contracts that may be implemented from time to time to improve quality, efficiency, and economy where such programs, plans, or contracts are approved by the IDS Director. Nothing in these rules shall preclude the IDS Commission from adopting and enforcing rules that supercede a plan for appointment of counsel in any district.

[Subsection (a) amended effective February 10, 2005 and December 10, 2010]

[Subsections (b) amended effective November 16, 2001 and July 1, 2009]

[Subsection (c) amended effective December 10, 2010]

[Subsection (d) amended effective July 8, 2005 and February 16, 2007]

[New subsection (d1) adopted effective February 1, 2010]

[Subsection (f) amended effective November 16, 2001]

Authority: G.S. 7A-452(a); 7A-498.3(a), (c); 7A-498.5(c), (d), (e); 122C-270

Commentary

G.S. 7A-498.3 and 7A-498.5 grant the IDS Office broad authority to adopt rules, procedures, and standards for the appointment of counsel. *See also* G.S. 7A-452(a) (counsel shall be appointed by the court in non-capital criminal cases in accordance with rules adopted by the IDS Office). Because of the sheer number of non-capital criminal and non-criminal cases handled by appointed counsel each year, the IDS Office is not presently able to consider or adopt improvements in the method for appointing counsel in such cases across the state. Accordingly, this rule continues much of the current practice and procedure. The text of this rule is based in large part on former Rule D.0404 of the State Bar Rules.

Subsection (a): The IDS Commission recognizes the continuing importance of district and county bar plans to the operation of the system, and in most respects this rule keeps the current plans in effect until the IDS Commission and IDS Office consider and implement changes. If a district bar or county bar association wishes to make changes to a plan after July 1, 2001, the changes must be approved by the IDS Commission rather than the North Carolina State Bar, which reflects the changes in authority implemented by the IDS Act. Many district and county bar plans that were in effect on June 30, 2001 do not specifically address non-criminal cases. If a plan does not address such cases, the court should appoint counsel on a systematic and impartial basis.

Subsection (b): Currently, in some districts with a public defender office, the judge assigns most indigent cases to the Public Defender, who then assigns to private counsel those cases that the office is unable to handle (either because of workload or conflict-of-interest reasons). All public defender offices are currently drafting plans that will expand this procedure to all districts with such an office. However, because all public defender offices are not in a position to begin performing this duty as of July 1, 2001, subsection (1) leaves current practices undisturbed until the Public Defender in the district submits a plan, which the IDS Director approves and certifies. The rule requires all Public Defenders to ensure that such a plan has been submitted, approved, and certified no later than November 1, 2001. Any plan adopted pursuant to this provision should address, among other things, the procedure to be followed when the public defender office has a conflict of interest. Subsection (b)(5) was amended effective July 1, 2009 to remove a reference to the appointment of guardians ad litem for juveniles in cases in which the

Administrative Office of the Courts' guardian ad litem program is unable to represent the juvenile due to a conflict. The Administrative Office of the Courts is responsible for the appointment and compensation of guardians ad litem in those cases.

Subsection (c): This subsection establishes a procedure similar to subsection (b), requiring special counsel offices (in districts where located) to develop plans for assigning to private counsel cases that the office is unable to handle. This subsection was amended effective December 10, 2010 to delete a prior reference to special counsel continuing to represent indigent respondents on direct appeal. For all civil commitment appeals filed on or after October 1, 2006, S.L. 2006-264 directs that appellate counsel for the indigent respondent shall be appointed in accordance with rules adopted by the IDS Office. As with all other indigent appeals, Rule 3.2(b) was subsequently revised to provide that, for civil commitment appeals filed on or after October 1, 2006, the court shall appoint the Office of the Appellate Defender to represent the respondent.

Subsection (d): As in the past, appointments should be made in accordance with the plans for each district. The subsection makes some changes, however. First, subsection (1) clarifies that in the interest of justice an attorney may be appointed who is not on the list regardless of whether the attorney regularly practices in the district. Second, subsection (2) prohibits appointment of an attorney unless the attorney consents to appointment, either by agreeing to be on the list or, if not on the list, by consenting to being appointed. Subsection (d)(2) was amended effective July 8, 2005 and again February 16, 2007 to clarify that an attorney appointed to a case may not delegate material responsibility for that case to another attorney who is not named in the appointment order. *See State v. Carter*, 66 N.C. App. 21, 23, 311 S.E.2d 5, 7 (1984); RPC 58 (1989). If an appointed attorney is unable to appear at a scheduled court appearance due to a conflict in another court, secured leave, illness, or a family emergency, subsection (d) does not prohibit the attorney from asking another lawyer to appear on his or her behalf and seek a continuance or argue a bond reduction motion for an incarcerated client. Subsection (d) also does not prohibit an appointed attorney who is unavailable from sending another lawyer to interview an incarcerated client. In exceptional cases where the appointed attorney is unavailable, the court may allow the appointed attorney to delegate client responsibilities at critical stages of a case if the court makes the specified findings.

Subsection (d1): This subsection was adopted effective February 1, 2010 to provide that an attorney who has been denied placement on a local indigent list or removed from a local indigent list by a local indigent committee has the right to seek review of that decision by the IDS Director. This subsection does not create a right to seek review by the IDS Director of an order imposed by a court pursuant to its concurrent jurisdiction over the conduct of the lawyers who appear before it.

Subsection (e): The clerk of superior court continues to keep a record of current district or county bar plans and eligibility lists in districts without a public defender office. Public defender and special counsel offices will keep their plans on file in their offices. The court (judge or clerk) continues to make a record of appointments by entering the order of appointment on a revised version of the form that has been used by the AOC (AOC-CR-224).

Subsection (f): This subsection recognizes the authority of the IDS Office to modify appointment procedures and to adopt different methods for delivering services (such as contracting with attorneys rather than appointing them on a case-by-case basis). *See G.S. 7A-498.3; G.S. 7A-498.5.*

1.6 Waiver of Counsel

(a) Standard

An indigent person who has been informed of his or her right to be represented by counsel at any in-court-proceeding may, in writing, waive the right to in-court representation by counsel. Any such waiver of counsel shall be effective only if the court finds of record that at the time of waiver the indigent person acted with full awareness of his or her rights and of the consequences of the waiver. In making such a finding, the court shall follow the requirements of G.S. 15A-1242 and shall consider, among other

things, such matters as the person's age, education, familiarity with the English language, mental condition, and the complexity of the matter.

(b) Standby Counsel in Criminal Cases

In a criminal case, if the defendant has elected to proceed without the assistance of counsel, the trial judge in his or her discretion may determine that standby counsel should be appointed to assist the defendant when called upon, and to bring to the judge's attention matters favorable to the defendant upon which the judge should rule on his or her own motion.

Authority: G.S. 7A-457; 15A-1243

Commentary

Subsection (a): Revised G.S. 7A-457(a) provides that waivers of in-court representation shall be in accordance with rules adopted by the IDS Office. The above rule restates the requirements for a valid waiver in G.S. 7A-457(a) and is intended to continue current practice and procedure on taking waivers until the IDS Office develops any additional rules or procedures. Until the IDS Office develops any such additional rules or procedures, courts can continue to use the same waiver of counsel form that has been used by the AOC (AOC-CR-227). This rule does not affect the standard in G.S. 7A-457(c) with respect to waiver of counsel at out-of-court proceedings, such as during interrogation, which the IDS Act did not revise. This rule also does not deal with waiver of retained counsel by a non-indigent person. If a person has no counsel, the court should determine whether the person wishes to waive the right to both appointed and retained counsel. In criminal cases, if the person wishes to represent himself or herself, the court must conduct the inquiry required by G.S. 15A-1242 on self-representation.

The IDS Act also did not affect the statutes that recognize that in some circumstances a person may lack the capacity to waive counsel. For example, G.S. 122C-268(d) provides that in cases in which a person is alleged to be mentally ill and subject to in-patient commitment, counsel shall be appointed if the person is indigent or refuses to retain counsel although financially able to do so. *See also* G.S. 35A-1107 (appointment of guardian ad litem for person alleged to be incompetent); G.S. 108A-105(b) (appointment of guardian ad litem for disabled adult). Similar provisions apply to minors who have a right to counsel. *See* G.S. 7B-600 and -601 (juvenile abuse and neglect proceedings); G.S. 7B-1101 (termination of parental rights where parent is a minor); G.S. 7B-2000 (juvenile delinquency proceedings).

Subsection (b): G.S. 15A-1243 provides that, in cases in which a defendant has elected to represent himself or herself, appointment of standby counsel shall be in accordance with rules adopted by the IDS Office. For non-capital criminal cases, the above rule restates the provisions on appointment of standby counsel in G.S. 15A-1243 and is intended to continue the current practice and procedure.

1.7 Withdrawal of Appointed Counsel

(a) Scope of Obligation

Unless otherwise provided by law, counsel appointed in a case subject to this part is required to continue with the representation through judgment at the trial level, discussion with the client about his or her right to appeal, and entry of notice of appeal or expiration of the time for giving notice of appeal. Nothing in these rules shall be construed as permitting or requiring an attorney of record to deviate from applicable laws of this State, the Rules of Professional Conduct administered by the North Carolina State Bar, or other legal or ethical obligations of an attorney as an officer of the court.

(a1) Identification of Conflicts

Upon appointment to a case subject to this part, counsel shall make prompt and reasonable efforts to determine if the representation would cause any conflict of interest. If counsel identifies a nonwaivable conflict of interest, counsel shall file a timely motion to withdraw pursuant to subsection (b) of this rule. If counsel identifies a waivable conflict of interest, counsel shall either obtain the informed written consent of the client in accordance with the Rules of Professional Conduct or file a timely motion to withdraw pursuant to subsection (b) of this rule.

(b) Withdrawal

At any time during or pending the trial or retrial of a case subject to this part, a judge of a court of competent jurisdiction may, upon application of the attorney appointed to the case and for good cause shown, permit the attorney to withdraw from the case. If the judge allows the attorney to withdraw, appointment of new counsel shall be in accordance with Rule 1.5 of these rules.

(c) Contract Counsel

Withdrawal from a case by an attorney performing work under contract with the IDS Office shall be in accordance with the terms of the contract. If the contract does not specify a method of withdrawal, an attorney may withdraw in accordance with subsections (a) and (b) of this rule.

[New subsection (a1) adopted effective September 24, 2010]

Authority: G.S. 7A-498.2(b); 7A-498.3(a), (c); 7A-498.5(c), (d); 15A-143; 15A-144

Commentary

Subsection (a): G.S. 15A-143 states that an attorney making a general appearance in a criminal case is obligated to represent the defendant “until entry of final judgment.” Subsection (a) is intended to emphasize the attorney’s further responsibility to advise the client concerning appeal and to enter notice of appeal if requested. This rule applies that requirement to all cases subject to this part unless otherwise provided by law.

Subsection (a1): This subsection was added effective September 24, 2010. If appointed counsel moves to withdraw due to a conflict, in determining the appropriate amount of time to approve for compensation purposes pursuant to Rule 1.9(a)(1b), below, the trial judge shall consider the timeliness of counsel’s efforts to identify the conflict and to file the motion to withdraw.

Subsection (b): This subsection restates the provisions in former Rule D.0405 of the State Bar Rules on withdrawal from a case at the trial level. If a person other than appointed counsel (such as the client, prosecutor, or IDS Director) requests that a judge of a court of competent jurisdiction remove counsel for good cause, the judge shall follow established law. *See, e.g., State v. Poole*, 305 N.C. 308, 289 S.E.2d 335 (1982); *State v. Hutchins*, 303 N.C. 321, 279 S.E.2d 788 (1981); *see also State v. Robinson*, 330 N.C. 1, 409 S.E.2d 288 (1991).

Subsection (c): This subsection is new. Although contracts entered into by the IDS Office may require that attorneys obtain a judge’s approval to withdraw from a case, they potentially may provide for a different method of reassigning cases.

1.8 Contracts

The IDS Office is authorized to enter into contracts for legal representation and related services in cases in which the IDS Office is responsible for the provision and oversight of legal representation of a person. Contracts may provide for, among other things, appointment of particular counsel to handle certain cases and compensation at a specified rate. Any contracts for legal representation or related services in cases under the oversight of the IDS Office must be approved by the IDS Director.

Authority: G.S. 7A-498.2(b); 7A-498.3(a), (c), (d); 7A-498.5(c), (d), (f)

Commentary

This rule reflects the authority granted the IDS Office to contract for services in cases in which the IDS Office is responsible for the provision of legal services, and to control the expenditure of funds for quality legal representation and related services in such cases.

1.9 Payment of Appointed Counsel

(a) Compensation at Trial

(1a) If an attorney seeks compensation for time spent waiting in court for multiple cases to be called or working on multiple cases simultaneously, the attorney's time shall be prorated among each of the cases involved. For all cases finally disposed at the trial level on or after July 1, 2005, final attorney fee applications must be signed by the appointed attorney and submitted to the trial judge within no more than one year after the date on which the case was finally disposed at the trial level. For all cases finally disposed at the trial level before July 1, 2005, final attorney fee applications must be signed by the appointed attorney and submitted to the trial judge by January 1, 2006. In accordance with policies and procedures approved by the IDS Commission, an attorney may apply to the IDS Director for one advance extension of the applicable deadline or for a waiver of the applicable deadline.

(1b) Upon completion of the representation of a person by appointed counsel in the trial court in a non-capital criminal or non-criminal case, the trial judge shall, upon application, enter an order fixing the fee to which the attorney is entitled. In doing so, the judge shall review the amount of time claimed by the attorney, and shall approve an appropriate amount of time based on the factors normally considered in fixing attorneys' fees, such as the nature of the case, and the effort and responsibility involved.

(2) Absent extraordinary circumstances and advance written approval of the IDS Director, once the judge approves an appropriate amount of time pursuant to subsection (1b), above, the hourly rate for attorney compensation in such cases in both district and superior court, for both in-court and out-of-court time, shall be an amount approved by the IDS Commission and specified in the applicable IDS policy. In the event of changes in the availability of funding, the IDS Commission shall determine the effective date of any adjustment to the hourly rates for attorney compensation in cases in district and superior court.

(3) Even if the trial, hearing, or other proceeding is never held, preparation therefore is nevertheless compensable and, in extraordinary cases pending in superior court, the presiding judge may allow a fee for services rendered and payment for expenses incurred pending final determination of the case. In such cases, the time approved and hourly rate paid shall be set pursuant to subsections (1b) and (2), above.

(4) Fees shall be fixed by the district court judge who hears the case for actions or proceedings finally determined in the district court, and by the superior court judge who hears the case for actions or proceedings originating in superior court. In cases that are heard on appeal from district to superior court, fees may be fixed by the presiding district or superior court judge, provided that the defendant is given notice and an opportunity to be heard.

(5) This section does not preclude districts from compensating attorneys in the above cases based on methods other than hours per case, such as per case fee schedules or per session rates, or based on an hourly rate that differs from that set forth in subsection (2), above, provided that the alternative compensation method or rate is approved by the IDS Director. Any district using or proposing an alternative compensation method shall notify the IDS Director, and the IDS Director may approve the method used or proposed provided it is consistent with the purposes of the IDS Act.

(b) Orders for Payment

Orders for the payment of compensation to appointed counsel for representation shall be entered by the judge on a form approved by the IDS Director. A copy of the order for the payment of fees shall be forwarded by the clerk of superior court to IDS Financial Services Division, Courier Box 56-10-50, Raleigh, N.C. If no courier is available, a copy of the order shall be mailed to P.O. Box 2448, Raleigh, N.C. 27602.

(c) Fee Schedules

The IDS Director may authorize or require the use of fee schedules for the compensation of attorneys and the payment for services related to legal representation in non-capital criminal and non-criminal cases.

(d) Compensation of Contract Counsel

Compensation of attorneys performing work under contract with the IDS Office shall be paid in accordance with the terms of the contract.

(e) Outside Compensation Prohibited

Once counsel has been appointed to represent a person in a case subject to this part, counsel shall not accept any fees for the representation other than that awarded by the court or the IDS Director. If a third party contributes funds to non-counsel services, counsel shall place the funds in trust and account to the third party and the IDS Director about the use of the funds.

[Subsection (a) amended effective February 15, 2002, May 6, 2005, August 13, 2007, February 1, 2008, February 27, 2009, June 5, 2009, and June 1, 2011]

[Subsection (b) amended effective May 6, 2005]
[Subsection (e) amended effective September 15, 2006]

Authority: G.S. 7A-458; 7A-498.5(f)

Commentary

This rule effectively continues the current practice on compensating appointed counsel in non-capital criminal and non-criminal cases. It incorporates substantial portions of former Rule D.0406 of the State Bar Rules and of G.S. 7A-458 before it was revised by the IDS Act. Representation is complete within the meaning of this rule when counsel has fulfilled the obligations set forth in Rule 1.7(a), above. Courts using fee schedules in effect before the effective date of the IDS Act should notify the IDS Office of any such schedules. Because of the sheer number of non-capital criminal and non-criminal cases handled by appointed attorneys, the IDS Office is not presently in a position to assume responsibility for determining compensation throughout the state. However, the IDS Commission and IDS Office are developing plans for assuming that responsibility as soon as feasible.

Subsection (a): Effective April 1, 2002, subsection (a) established a standard hourly rate of \$65 in all non-capital and non-criminal cases at the trial level. The subsection was amended effective February 1, 2008 to increase that rate to \$75 per hour for all fee applications signed by judges on or after February 1, 2008. Due to significant funding reductions by the 2011 General Assembly and the Commission's decision to implement a reduced and variable rate structure for different types of cases, the subsection was amended effective June 1, 2011 to provide that the hourly rates for non-capital and non-criminal cases shall be as approved by the Commission and specified in the applicable IDS policy. The subsection was also amended effective May 6, 2005 to clarify that attorneys can not double-bill the state for time spent waiting in court or working on multiple cases simultaneously. For all cases finally disposed at the trial level on or after July 1, 2005, the subsection was amended to require attorneys to submit fee applications to the presiding judge within one year of the date of final disposition. Effective August 13, 2007, the subsection was amended to allow attorneys to apply for an advance extension or waiver of the deadline in accordance with policies and procedures approved by the IDS Commission. Attorney fee applications submitted more than one year after the date of final disposition without an approved extension or waiver will not be paid from state funds. Subsection (a)(4) was amended effective February 27, 2009 to clarify that, in cases that are appealed de novo to superior court, fees may be set by the presiding district or superior court judge, depending on local practice. Subsection (a)(2) was amended effective June 5, 2009 to remove a provision that set a minimum fee equivalent to one hour of work for cases in which an attorney claims and the court approves less than one hour.

Subsection (b): In entering orders for payment, courts should continue to use a revised version of the fee application form that has been used by the AOC (AOC-CR-225). Effective May 6, 2005, the clerk is no longer required to certify every individual fee application. However, fee applications must be sent to IDS Financial Services in a secure packet directly from the clerk's office.

Subsection (e): Subsection (e) was amended effective September 15, 2006 to clarify that, to avoid any potential for overreaching or the appearance of impropriety, an appointed attorney cannot subsequently accept fees as retained counsel from the client or the client's family. If family or friends of an indigent client want to contribute to non-counsel services, such as expert or support services, nothing in this subsection precludes them from doing so. However, the appointed attorney must place any such funds in his or her trust account and provide an accounting to the contributing family member and the IDS Director. If, during the course of representation as appointed counsel, an attorney learns that a client who was previously determined to be indigent has become financially able to pay for the representation, G.S. 7A-450(d) directs the attorney to inform the court. *But cf.* RPC 52 (Jan. 13, 1989) (directing counsel to "call upon his client to reveal that circumstance to the tribunal" and, if the client refuses to permit disclosure, to move to withdraw). If the court finds that the client is no longer indigent, the appointed attorney may move to withdraw or continue the representation *pro bono*.

1.10 Supporting Services

In non-capital criminal and non-criminal cases, the court may approve fees for the service of expert witnesses, investigators, and others providing services related to legal representation in accordance with all applicable IDS rules and policies.

[Section amended December 9, 2011]

Authority: G.S. 7A-454; 7A-498.3(c); 7A-498.5(c)(6)

Commentary

The above statutes, as revised, provide that appointment and compensation of experts, investigators, and others providing services related to legal representation shall be in accordance with IDS rules. For non-capital criminal and non-criminal cases, this rule is intended to restate in general terms the current statutory and case law on such services. This section was amended December 9, 2011 to clarify that court orders approving fees for experts and investigators shall comply with all applicable IDS rules and policies, including the standardized expert rates set by the IDS Commission pursuant to G.S. 7A-498.5(f). For capital cases, *see* Part 2, Rules 2D.1 through 2D.5.

1.11 Recoupment of Fees

(a) Generally

To the extent required by law, individuals who have been appointed counsel under this part shall continue to be responsible for repaying the fees paid to such counsel or, in the case of representation by a public defender office, the value of services rendered by counsel. The judge setting the fee to be paid or the value of services rendered shall determine the amount to be recouped if recoupment is required by law. The court shall ensure that the person potentially responsible for paying the fees is notified of the potential liability, and that the person has a reasonable opportunity to be heard on the issue.

(b) Recoupment for Contract Services

For legal representation rendered by attorneys working under contract with the IDS Office, the value of services, and the procedures for entry of any appropriate orders or judgments, shall be determined in accordance with the terms of the contract if recoupment is required by law.

Authority: G.S. 7A-450.1 through -450.4; 7A-455; 7A-498.5(c)(8)

Commentary

For the most part, this rule is intended to continue current practice in non-capital criminal and non-criminal cases with respect to recoupment of the cost of appointed counsel. In criminal cases, recoupment is governed by G.S. 7A-455. The IDS Act made only one change to that statute. It required that the value of services reflected in a judgment against a defendant be set in accordance with rules adopted by the IDS Office. Since Rules 1.9 and 1.10 continue to leave with the judge the responsibility of setting fees for counsel and supporting services, this rule continues to leave with the judge the responsibility of setting the amount of any judgment. The Public Defender remains obligated to inform the judge of the value of legal

services rendered to the defendant. The form judgment is a revised version of the same fee application form that has been used by the AOC (AOC-CR-225).

In some non-criminal cases, recoupment of fees is also required, although the procedure for recoupment differs somewhat from the procedure in criminal cases. *See* G.S. 7A-450.1 through -450.4. The IDS Act did not alter those procedures.

This rule also provides that a person potentially liable for fees should be given reasonable notice and an opportunity to be heard. In most cases covered by this part, the person will be present at the time judgment is entered, and the court can give the person an opportunity to be heard on the amount proposed to be entered.