

Part 4

Rules for Providing Legal Assistance and Access to the Courts to Inmates in the Custody of the Department of Correction

The IDS Office is responsible for establishing, supervising, and maintaining a system for providing inmates in the custody of the Department of Correction with legal assistance and access to the courts. This fourth part addresses the procedure to be followed in such cases. The rules are authorized by § 14.9(a) of S.L. 2005-276, Senate Bill 622, and by Chapters 7A and 15A of the North Carolina General Statutes (G.S.), and apply to cases pending on or after March 15, 2010.

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.

4.1 Coverage and Definitions

(1) This part applies 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). This part does not apply to 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 on behalf of a defendant, regardless of whether the defendant is in the custody of the Department of Correction. Cases in which the court has appointed counsel to represent a defendant in non-capital post-conviction are governed by Part 1 of these rules.

(2) This part does not apply to capital post-conviction cases, as defined in Part 2 of these rules.

Authority: G.S. 7A-498.3; *Bounds v. Smith*, 430 U.S. 817 (1977); *Lewis v. Casey*, 518 U.S. 343 (1996)

4.2 Entitlement to Counsel

There is no requirement that the court determine indigency or entitlement to counsel or that counsel be appointed as provided in G.S. 7A-452 in cases subject to this part. If an inmate is released during the pendency of litigation subject to this part, which arose during confinement and is not mooted by release, representation shall continue in accordance with Rules 4.3 and 4.4 of these rules.

Authority: G.S. 7A-498.3(a)(2a), (b)

4.3 Case Screening, Investigation, and Appointment Procedures

(a) Principal Contract

The IDS Office is authorized to enter into contracts with North Carolina Prisoner Legal Services, Inc. (NCPLS) or other similar entity to provide legal assistance and access to the courts to inmates in the custody of the Department of Correction. Any contracts for legal assistance and access to the courts for inmates must be approved by the IDS Director. All requests for representation by inmates in the custody of the Department of Correction shall initially be made to NCPLS or other similar entity. If NCPLS or other similar entity accepts representation pursuant to the contract, NCPLS or other similar entity shall continue to represent the inmate in accordance with the terms of the contract, except as otherwise provided herein. With respect to non-capital post-conviction claims filed in state superior court, if the court grants an evidentiary hearing, NCPLS or other similar entity may continue the representation at the evidentiary hearing or ask the IDS Director to appoint qualified local counsel to continue the representation at the evidentiary hearing. Compensation for services rendered at the evidentiary hearing or pursuant to an appointment by the IDS Director shall be governed by Rule 4.5(b) of these rules.

(b) Conflicts of Interest

In cases in which NCPLS or other similar entity with which the IDS Office has entered into a contract pursuant to subsection (a) of this rule has a conflict of interest and cannot represent an inmate in state court post-conviction, the IDS Office is authorized to enter into additional contracts with organizations or individual attorneys or to appoint counsel to perform case screening and investigation, and, if appropriate, to prepare and file a motion for appropriate relief or other post-conviction motion in state court on behalf of the inmate. Any contracts or appointments in conflict cases must be approved by the IDS Director. If the court grants an evidentiary hearing, contract or appointed counsel may continue the representation at the evidentiary hearing or ask the IDS Director to appoint qualified local counsel to continue the representation at the evidentiary hearing. Compensation for services rendered at the evidentiary hearing or pursuant to an appointment by the IDS Director shall be governed by Rule 4.5(b) of these rules.

Authority: G.S. 7A-498.2(b); 7A-498.3(a)(2a), (c), (d); 7A-498.5(c), (d)

4.4 Scope of Services

(a) Scope of Obligation

(1) Unless otherwise provided by law, the scope of services to be provided by NCPLS or an organization or attorney under contract with the IDS Office or appointed by the IDS Director shall be governed by the terms of the contract or appointment. Counsel appointed by the IDS Director to represent an inmate at an evidentiary hearing shall continue with the representation until the action is resolved in state superior court, unless the inmate is released during the pendency of the post-conviction litigation and the issue is mooted by release or unless otherwise provided by law. If NCPLS or other similar entity that is representing an inmate pursuant to Rule 4.3(a) of these rules believes that a petition for writ of certiorari to the Appellate Division is

warranted, the filing of the petition shall be governed by the terms of the contract. If an attorney who has contracted with the IDS Office or been appointed by the IDS Director to represent an inmate pursuant to Rule 4.3(b) of these rules believes that a petition for writ of certiorari to the Appellate Division is warranted, the filing of the petition shall be governed by Part 3 of these rules.

(2) 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.

(b) Withdrawal

If an attorney is under contract with the IDS Office or has been appointed by the IDS Director to represent an inmate at an evidentiary hearing, a judge of a court of competent jurisdiction may, upon application of the attorney 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 4.3 of these rules.

Authority: G.S. 7A-498.3(a)(2a); 7A-498.5(c), (d); 15A-143; 15A-144

4.5 Compensation of Counsel

(a) Compensation of Contract Counsel

Compensation of counsel who represents an inmate pursuant to a contract authorized by Rule 4.3 of these rules shall be governed by the terms of the contract. If NCPLS or other similar entity under contract with IDS continues the representation of an inmate at an evidentiary hearing, in addition to the compensation provided pursuant to the contract, NCPLS or other similar entity may request attorney fees for work performed after the date of the court order granting the evidentiary hearing and during the pendency of the proceeding in state superior court, in the manner provided in subsection (b), below.

(b) Compensation of Appointed Counsel

(1) Upon completion of the representation, counsel who represented an inmate pursuant to an appointment authorized by Rule 4.3 of these rules shall submit to the IDS Director an itemized fee application on a form prescribed by the IDS Director, showing the time counsel spent in representation of the inmate. Counsel also may apply for and receive interim payments in the discretion of the IDS Director. Following review of the fee application, the IDS Director shall determine the amount of compensation based on the hourly rate established by Rule 1.9(a) of these rules. In doing so, the IDS Director 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) For all cases subject to this part that are finally disposed in superior court on or after March 15, 2010, final attorney fee applications must be signed by the appointed attorney and submitted to the IDS Director within no more than one year after the date on which the proceedings were finally disposed in superior court. 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.

(3) Counsel may make a written request for a review of the amount of compensation determined by the IDS Director from a subcommittee of the IDS Commission designated by the IDS Commission to conduct such review.

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

4.6 Experts and Supporting Services

(a) Initial Application to IDS Office

(1) Counsel providing representation in a case subject to this part must make application to the IDS Director for authorization to retain experts or for other substantial expenses necessary to the representation of an inmate before applying to a court for such authorization and before incurring a financial obligation for which defense counsel will apply to the IDS Director for payment by the IDS Office. The application shall be in writing, unless exceptional or extraordinary circumstances necessitate an oral motion. Defense counsel will be required to make at least as specific an application to retain experts as would be required by a fair but exacting trial judge applying G.S. 7A-450(a) and *Ake v. Oklahoma* and its progeny. The IDS Director may require counsel to make a more particularized application before approving or disapproving the application.

(2) The IDS Director shall maintain the application in a confidential file open only to the IDS Office and the defense team.

(3) If the IDS Director disapproves the application, timely written notice of disapproval of the application will be delivered to counsel. The IDS Director shall maintain the notice of disapproval in a confidential file open only to the IDS Office and the defense team.

(b) Application to Court

Counsel providing representation in a case subject to this part may apply to a court for appointment of experts or for other expenses following disapproval by the IDS Director, but counsel may not submit an application to a court that includes information not contained in the application made to the IDS Director unless exceptional or extraordinary circumstances necessitate submitting such new or additional information directly to a court. If counsel makes application to a court following the IDS Director's disapproval, counsel shall submit with its application to the court a complete copy of the IDS Director's written notice of disapproval and a complete copy of the written application made to the IDS Director. Counsel must immediately forward to the IDS Director a complete copy of any court order approving funds previously disapproved by the IDS Director and a complete copy of the application made to the court. Such court order and application shall be maintained in a confidential file open only to the IDS Office and the defense team.

Authority: G.S. 7A-450(b); 7A-454; 7A-498.1(1); 7A-498.3(a), (c), (d); 7A-498.5(c)(6), (f)

Commentary

Subsection (a): Routine expenses, such as typical long-distance telephone calls, are not substantial expenses within the meaning of this rule. Counsel can resolve any question about whether an expense requires prior approval of the IDS Director by communication with the IDS Director by telephone or email.

Subsection (b): If, after denial of an initial application to the IDS Director for appointment or compensation of experts or other supporting services, counsel discovers new or additional information that is relevant to such application, counsel ordinarily should submit a new application to the IDS Director before submitting an application to a court. Counsel may submit to a court an application that contains new or additional information only in exceptional or extraordinary circumstances.

4.7 Authority to Implement Other Programs, Plans, and Contracts

Nothing in these rules shall prohibit assignment of otherwise qualified counsel to provide legal assistance and access to the courts to inmates in the custody of the Department of Correction 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.

Authority: G.S. 7A-454; 7A-498.1; 7A-498.3; 7A-498.5(c), (d), (f)