

## **Part 3**

# **Rules for Providing Legal Representation in Non-Capital Criminal Appeals and Non-Criminal Appeals**

This third part addresses the procedure to be followed when a person is entitled to appointed counsel on appeal to the Appellate Division from adverse decisions in the Trial Division in both non-capital criminal proceedings and non-criminal proceedings. The 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. Fee applications for appellate representation filed on or after that date will be governed by these rules.

The rules supercede the provisions on appellate representation in Section D. of the Rules and Regulations of the North Carolina State Bar (State Bar Rules) and any provisions on appellate representation in local bar plans issued pursuant to the State Bar Rules. As of July 1, 2001, those rules, which were authorized by former G.S. 7A-459, are no longer effective.

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.

### **3.1 Coverage of this Part**

This part applies to cases in which an indigent person is entitled to appointed appellate counsel pursuant to G.S. 7A-498.3 on appeal of right or other review to the Appellate Division from an adverse ruling in the Trial Division, including a petition for writ of certiorari or other extraordinary writ that is filed before or after entry of final judgment in the Trial Division, other than a judgment imposing a sentence of death or a non-capital judgment joined with a judgment imposing a sentence of death. This part also applies to cases in which an indigent person is a party and entitled to counsel pursuant to G.S. 7A-498.3, but a party other than the indigent person has appealed or sought review in the Appellate Division.

#### **3.1A Office of the Parent Defender**

- (a) Assignment of Cases. Appeals in which an indigent person is entitled to appointed appellate counsel arising from the following types of cases shall be assigned to the Office of the Parent Defender:
- Subchapter I of Chapter 7B of the General Statutes
  - Article 11 of Chapter 7B of the General Statutes
  - Article 2 of Chapter 5A of the General Statutes
  - Chapter 35A of the General Statutes

- (b) Whenever the term “Office of the Appellate Defender” is used in these rules in reference to cases set forth in paragraph 3.1A above, it means the Office of the Parent Defender.
- (c) Whenever the term “Appellate Defender” is used in these rules in reference to cases set forth in paragraph 3.1A above, it means the Parent Defender or his or her designee.

[Section amended effective November 15, 2002, February 27, 2009, and September 21, 2018]

*Authority:* 7A-452; 7A-498.1; 7A-498.3(a), (c); 7A-498.5(c), (d), (f)

*Commentary*

The bulk of the cases governed by this subsection will be indigent non-capital criminal appeals. However, G.S. 7A-451(a) identifies sixteen types of “actions and proceedings” in which persons are entitled to appointed counsel.

Where a right to appellate review of an adverse ruling is authorized by statute in any of these sixteen actions and proceedings, a person is entitled to appointed appellate counsel. Subsection (b) of G.S. 7A-451 reads in relevant part as follows:

(b) In each of the actions and proceedings enumerated in subsection (a) of this section, entitlement to the services of counsel begins as soon as feasible after the indigent is taken into custody or service is made upon him of the charge, petition, notice or other initiating process. Entitlement continues through any critical stage of the action or proceeding, including, if applicable: . . . (6) Review of any judgment or decree pursuant to G.S. 7A-27, 7A-30(1), 7A-30(2), and Subchapter XIV of Chapter 15A of the General Statutes.

Three of the four statutory references in subsection (6) are specific. G.S. 7A-30(1) and -30(2) extend a person’s right to counsel to appeals of right from decisions of the North Carolina Court of Appeals to the Supreme Court of North Carolina based either on a substantial constitutional question or on a dissent in the Court of Appeals. Subchapter XIV of Chapter 15A governs motions for appropriate relief and appeals of right from criminal convictions returned in the Trial Division, including appeals from superior court to the Appellate Division.

G.S. 7A-27, the fourth statutory reference in G.S. 7A-451(b), broadly concerns “appeals of right” from the Trial Division, and contains five subsections. Subsection (a) mandates that appeals in death cases go directly to the Supreme Court of North Carolina. Subsection (b) directs that appeals from “any final judgment of a superior court” other than those in death cases or those based on a guilty or no contest plea, go directly to the Court of Appeals. Subsection (c) directs that civil district court appeals go directly to the Court of Appeals. Subsection (d) concerns appeals from certain interlocutory orders in civil cases. Subsection (e) states that “[f]rom any other order or judgment of the superior court from which an appeal is authorized by statute, appeal lies of right directly to the Court of Appeals.”

This subsection was revised in September 2018 to make clear that an indigent person is entitled to appointment of appellate counsel in cases otherwise subject to this Part in which a party other than the indigent person, such as the State or a county, appeals or seeks review in the Appellate Division.

The Office of the Parent Defender was created by the IDS Commission on March 2, 2018. The Office of Indigent Defense Services, in consultation with the Appellate Defender, determined that appeals previously assigned to the Parent Representation Coordinator within the Office of the Appellate Defender would be assigned to the Office of the Parent Defender. Further, responsibilities regarding compensation of appellate counsel, standards for appellate representation, substitution of counsel and removal from roster in

those cases assigned to the Parent Defender would transfer from the Appellate Defender to the Parent Defender.

### **3.2 Appointment of Appellate Counsel**

#### **(a1) Provisional Appointment of the Office of the Appellate Defender to File a Petition for an Extraordinary Writ**

In extraordinary circumstances and in the absence of a court appointment pursuant to paragraph 3.2(b) below, the Appellate Defender may appoint the Office of the Appellate Defender, or an attorney on the roster of counsel who are qualified and willing to accept appointment to represent persons in the Appellate Division, on a provisional basis to make a preliminary determination of the person's entitlement to appointed counsel in the Appellate Division, and to file a petition for an appropriate extraordinary writ in the Appellate Division.

#### **(a2) Provisional Appointment of the Office of the Appellate Defender in Proceedings Under Subchapter I of Chapter 7B of the General Statutes**

In the absence of a court appointment pursuant to paragraph 3.2(b) below, when the Appellate Defender is notified of an appealable ruling adverse to the respondent in an action brought under Subchapter I of Chapter 7B of the General Statutes, the Appellate Defender may appoint the Office of the Appellate Defender, or an attorney on the roster of counsel who are qualified and willing to accept appointment to represent persons in the Appellate Division, to represent the respondent in contemplation of an appeal when the respondent has no attorney of record.

#### **(b) Determination of Indigent Status and Appointment of the Office of Appellate Defender by the Court**

When a person or party enters notice of appeal or other written indication of an intent to seek review in the Appellate Division in a case subject to this part the trial court shall make a determination of the person's indigent status.

(i) When a person or party files a written notice of appeal or other written indication of an intent to seek review in the Appellate Division in a case subject to this part, the Clerk of Superior Court shall expeditiously bring the notice of appeal or other written indication of an intent to seek review in the Appellate Division to the attention of the judge presiding in the matter appealed for a determination of the indigent status of the person seeking review or a person potentially opposing review and for consideration of appointment of the Office of the Appellate Defender. If the judge presiding in the matter appealed is no longer assigned to the district or is not readily available, then the Clerk of Superior Court shall expeditiously bring the notice of appeal or other written indication of an intent to seek review in the Appellate Division to the attention of a resident judge or other judge assigned to the district for a determination of the person's indigent status and consideration of appointment of the Office of Appellate Defender.

(ii) When an appellate court remands a case to the trial division for consideration of a person's indigent status and appointment of appellate counsel, upon receipt of the directive of the appellate court, the Clerk of Superior Court shall expeditiously bring the directive to the attention of a resident judge or judge assigned to the district and, in criminal cases, the district attorney, for compliance with the directive pursuant to G.S. § 15A-1452(c).

(iii) The trial court shall make a determination of the person's indigent status and appoint the Office of the Appellate Defender without regard for whether the notice of appeal or other written indication of an intent to seek review in the Appellate Division complies with the North Carolina Rules of Appellate Procedure.

(iv) In cases in which the court does not determine a person's indigent status immediately upon entry of notice of appeal in open court, including those cases which have been remanded by an appellate court for a determination of the person's indigent status and appointment of appellate counsel, the court may determine that the person is indigent and appoint the Office of Appellate Defender in or out of court and without requiring the presence of the person. In determining indigent status the court may rely on a prior affidavit of indigency, a prior determination of indigent status, a person's status of imprisonment, and any other factor reasonably related to determining whether the person is indigent and entitled to appointed counsel under N.C. Gen. Stat. § 7A-452.

If the court determines that the person is indigent, the court shall appoint the Office of Appellate Defender to represent the person in the Appellate Division. The court shall direct the Clerk of Superior Court to prepare an Appellate Entries and to immediately notify the Office of the Appellate Defender of the appointment. If the Office of Appellate Defender is appointed to file a petition for an extraordinary writ, the Office of Appellate Defender or counsel appointed by the Appellate Defender pursuant to paragraph 3.2(d), below, shall file the petition only if it will present a potentially meritorious issue for review.

**(b1) Conditions for Filing a Petition for an Extraordinary Writ**

If the Office of Appellate Defender is appointed to file a petition for an extraordinary writ, the Office of Appellate Defender or counsel appointed by the Appellate Defender pursuant to paragraph 3.2(d), below, shall file the petition only if it will present a potentially meritorious issue for review.

**(c) Transmittal of Judgment and Forms**

Following the appointment of the Office of Appellate Defender to represent a person in a case subject to this part, the clerk of superior court shall immediately send to the Office of Appellate Defender, by United States mail or by facsimile, a copy of the judgment or decree from which the appeal was taken, as well as any written appellate entries or rulings the court makes with respect to the appeal.

**(d) Assignment of Counsel by the Appellate Defender**

If the Appellate Defender determines that, to insure quality appellate representation, a person's appeal should not be assigned to the Office of Appellate Defender, the Appellate

Defender shall assign the person's case to private counsel or a public defender or assistant public defender listed on the roster of qualified appellate counsel maintained by the Appellate Defender pursuant to paragraph 3.4 below and rules approved by the IDS Director. Such counsel is thereafter appellate counsel of record, subject to the limitations and conditions of appointment in paragraph 3.2(i), below.

**(e) Conflicts**

If the Office of Appellate Defender is appointed to represent a person whose case would create a conflict of interest with a current or previous client of the Office of Appellate Defender, the Appellate Defender shall immediately notify the IDS Director, and the IDS Director shall appoint counsel in the new case pursuant to the rules under which the Appellate Defender would appoint counsel. If the Appellate Defender is appointed to represent co-appellants, the Appellate Defender may appoint the Office of the Appellate Defender to represent a co-appellant and may appoint counsel for the remaining co-appellants so long as the Appellate Defender previously has not undertaken representation of a co-appellant.

**(f) Notice of Assignment and Request for Record**

Following the Appellate Defender's decision to assign an appeal to other counsel, or following the IDS Director's assignment of counsel in case of a conflict, the assigning authority shall immediately notify assigned counsel of the appointment, and shall also notify the clerk of superior court, the court reporter(s) or other custodian(s) of the recorded proceedings, and the adverse parties of the name, address, and telephone number of assigned counsel. The Office of Appellate Defender shall transmit to assigned appellate counsel a copy of the documents forwarded to the Office of Appellate Defender by the clerk of superior court pursuant to paragraph 3.2(b) above, and shall request that the clerk transmit to assigned counsel the complete file maintained by the clerk in the case.

**(g1) Litigation of Non-Capital Motions for Appropriate Relief Pending Direct Appeal and Assignment of Counsel by the Appellate Defender**

Appellate counsel appointed pursuant to Part 3 of these rules who seeks to be compensated for preparing, filing, or litigating a non-capital Motion for Appropriate Relief ("MAR") pending direct appeal pursuant to G.S. 15A-1418 must obtain prior authorization from the Appellate Defender. If the Appellate Defender declines to authorize MAR litigation, appointed appellate counsel may seek authorization from the IDS Director. After consulting with appointed appellate counsel, the Appellate Defender or IDS Director may appoint one additional counsel to represent the appellant for purposes of preparing, filing, or litigating an MAR. If additional counsel is appointed to prepare, file, or litigate the MAR, that counsel must be on a roster of counsel in some North Carolina jurisdiction who are qualified to represent defendants at trial charged with the highest offense the appellant has appealed, or a higher offense. Compensation of counsel appointed under this subsection shall be governed by Rule 3.3. Appointment and compensation of experts and payment of other expenses related to MAR litigation authorized under this subsection shall be governed by Part 2D of these rules.

**(g2) Evidentiary Hearings on Remand from the Appellate Courts Pending Direct Appeal and Assignment of Counsel by the Appellate Defender**

After consulting with appointed appellate counsel, the Appellate Defender or IDS Director may appoint one additional lawyer to represent the appellant at an evidentiary hearing in the Trial Division on remand from the Appellate Division when the direct appeal is still pending. If additional counsel is appointed for that purpose in a criminal case, that counsel must be on a roster of counsel in some North Carolina jurisdiction who are qualified to represent indigent defendants in the Trial Division charged with the highest offense that is being remanded, or a higher offense. If additional counsel is appointed for that purpose in a case brought under Chapter 7B of the General Statutes, that counsel must be on a roster of counsel in some North Carolina jurisdiction who are qualified to represent indigent persons in the Trial Division in the applicable type of case. Compensation of counsel appointed under this subsection shall be governed by Rule 3.3. Appointment and compensation of experts and payment of other expenses related to litigation at the evidentiary hearing as authorized under this subsection shall be governed by Part 2D of these rules.

**(h) Litigation of Motions to Modify Dispositional Orders Pending Direct Appeal in Juvenile Delinquency Cases and Assignment of Counsel by the Appellate Defender**

Appellate counsel appointed to a juvenile delinquency case pursuant to Part 3 of these rules who seeks to be compensated for preparing, filing, or litigating a motion to modify a dispositional order pending direct appeal pursuant to G.S. 7B-2600 must obtain prior authorization from the Appellate Defender. If the Appellate Defender declines to authorize the litigation, appointed appellate counsel may seek authorization from the IDS Director. After consulting with appointed appellate counsel and the Juvenile Defender, the Appellate Defender or IDS Director may appoint one additional counsel to represent the appellant for purposes of preparing, filing, or litigating a motion to modify a dispositional order. If additional counsel is appointed to prepare, file, or litigate the motion, that counsel must be on a roster of counsel in some North Carolina jurisdiction who are qualified to represent juveniles in district court delinquency proceedings charged with the highest offense the appellant has appealed, or a higher offense. Compensation of counsel appointed under this subsection shall be governed by Rule 3.3. Appointment and compensation of experts and payment of other expenses related to the motion to modify the dispositional order authorized under this subsection shall be governed by Part 2D of these rules.

**(i) Petitions for Certiorari, Oppositions to Petitions for Certiorari, and Representation in the Supreme Court of the United States**

If appellate counsel appointed pursuant to Part 3 of these rules seeks to be compensated for any of the following, counsel must obtain prior written authorization from the Appellate Defender:

(i) preparing and filing a petition for certiorari seeking review of federal constitutional issues in the Supreme Court of the United States following an unfavorable final ruling in the North Carolina Appellate Division;

(ii) preparing and filing an opposition in response to a petition for certiorari review filed by the state in the Supreme Court of the United States following a favorable final ruling in the North Carolina Appellate Division; and

(iii) representation in the Supreme Court of the United States if certiorari is granted.

After consulting with appointed appellate counsel, as an alternative to authorizing appointed appellate counsel to undertake any of the above representation, the Appellate Defender may relieve appointed appellate counsel of this responsibility and undertake the representation directly or appoint another qualified appellate attorney from the list of lawyers eligible to represent non-capital defendants or respondents on appeal. The Appellate Defender also may appoint the Office of Appellate Defender or another qualified appellate attorney from the list of lawyers eligible to represent non-capital defendants or respondents on appeal as co-counsel with appointed appellate counsel. The appointed appellate counsel may seek review of the Appellate Defender's decision from the IDS Director. Compensation of counsel for work performed pursuant to this subsection shall be governed by Rule 3.3.

**(j) Litigation of Motions Challenging Adjudicatory, Dispositional, or Other Final Orders Pending Direct Appeal in Abuse, Neglect, Dependency, or Termination of Parental Rights Cases and Assignment of Counsel by the Appellate Defender**

Appellate counsel appointed to represent a respondent in an abuse, neglect, dependency, or termination of parental rights case pursuant to Part 3 of these rules who seeks to be compensated for preparing, filing, or litigating a motion in district court challenging an adjudicatory, dispositional, or other final order pending direct appeal must obtain prior authorization from the Appellate Defender. If the Appellate Defender declines to authorize the litigation, appointed appellate counsel may seek authorization from the IDS Director. After consulting with appointed appellate counsel, the Appellate Defender or IDS Director may appoint one additional counsel to represent the appellant for purposes of preparing, filing, or litigating such a motion. If additional counsel is appointed to prepare, file, or litigate the motion, that counsel must be on a roster of counsel in some North Carolina jurisdiction who are qualified to represent respondents in district court abuse, neglect, dependency, or termination of parental rights proceedings. Compensation of counsel appointed under this subsection shall be governed by Rule 3.3. Appointment and compensation of experts and payment of other expenses related to the motion authorized under this subsection shall be governed by Part 2D of these rules.

**(k) Litigation of Motions Challenging Civil Contempt or Other Final Orders Pending Direct Appeal in Child Support Contempt Cases and Assignment of Counsel by the Appellate Defender**

Appellate counsel appointed to represent a defendant in a child support contempt case pursuant to Part 3 of these rules who seeks to be compensated for preparing, filing, or

litigating a motion in district court challenging a finding of civil contempt or other final order pending direct appeal must obtain prior authorization from the Appellate Defender. If the Appellate Defender declines to authorize the litigation, appointed appellate counsel may seek authorization from the IDS Director. After consulting with appointed appellate counsel, the Appellate Defender or IDS Director may appoint one additional counsel to represent the appellant for purposes of preparing, filing, or litigating such a motion. If additional counsel is appointed to prepare, file, or litigate the motion, that counsel must be on a roster of counsel in some North Carolina jurisdiction who are qualified to represent defendants in child support contempt proceedings. Compensation of counsel appointed under this subsection shall be governed by Rule 3.3. Appointment and compensation of experts and payment of other expenses related to the motion authorized under this subsection shall be governed by Part 2D of these rules.

[New subsection (a1) adopted effective July 9, 2004]

[New subsection (a2) adopted effective February 10, 2006, and amended September 21, 2018]

[Subsection (b) amended effective September 15, 2006, December 8, 2006, February 27, 2009, and September 21, 2018]

[New subsection (b1) adopted effective September 21, 2018]

[Subsection (d) amended effective September 14, 2007]

[Subsection (e) amended effective January 18, 2002]

[New subsection (g1) adopted effective November 15, 2002]

[New subsection (g)(2) adopted effective November 4, 2005]

[New subsection (h) adopted effective July 8, 2005]

[New subsection (i) adopted effective September 14, 2007]

[New subsection (j) adopted effective September 19, 2008]

[New subsection (k) adopted effective December 7, 2012]

*Authority:* G.S. 7A-450(b); 7A-451(b)(6), (b)(8); 7A-452(a); 7A-498.3; 7A-498.5(d), (h); 7A-498.8(b)(1), (b)(6), (b)(6a)

#### *Commentary*

In all actions and proceedings in which courts previously appointed appellate counsel, the court shall appoint the Office of Appellate Defender.

**Subsection (a1):** This provision was added in July 2004 to authorize the Appellate Defender to provisionally appoint the Office of the Appellate Defender or a private appellate attorney in certain circumstances. The need for this authority has typically arisen in three types of cases: 1) cases in which the Appellate Defender believes that a trial court has erroneously denied indigency status after a person who the court previously determined was indigent entered notice of appeal, and that a petition for an extraordinary writ should be filed on the person's behalf; 2) cases in which a trial court has determined that a person is indigent but denied appointed appellate counsel, and the Appellate Defender believes that the person has a right to appointed appellate counsel and that a petition for an extraordinary writ should be filed on the person's behalf; and 3) cases in which the Appellate Defender is contacted by appointed trial counsel concerning the need for immediate review of a pre-trial ruling, and the Appellate Defender agrees that the ruling should be challenged in the appellate courts by means of a petition for an extraordinary writ.

**Subsection (a2):** This provision was added in February 2006 to authorize the Appellate Defender to provisionally appoint the Office of the Appellate Defender or a private appellate attorney on a provisional basis in proceedings brought under Subchapter I of Chapter 7B of the General Statutes. The need for this authority arose when the Supreme Court of North Carolina adopted Rule 3A of the North Carolina Rules of

Appellate Procedure, which is designed to expedite appeals in abuse, neglect, or dependency and termination of parental rights cases. Effective October 1, 2009, Rule 3A was renamed Rule 3.1. This subsection was revised in September, 2018 to eliminate language already present in (a1) and to reflect the creation of the Office of the Parent Defender and the responsibility of its attorneys to consult with trial counsel and the respondent on the decision of whether to enter notice of appeal.

**Subsection (b):** This subsection was revised in September 2006 to conform with amendments to G.S. 122C-270 and 122C-289 in the 2005 Technical Corrections Act. *See* S.L. 2006-264. Previously, G.S. 122C-270 and 122C-289 provided that the attorney appointed to represent the respondent in district court was also responsible for perfecting and concluding any 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, this subsection 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. Civil commitment appeals filed before October 1, 2006 continue to be the responsibility of the attorney assigned at the initial district court hearing. This subsection was further revised in December 2006 to clarify that the trial court is the proper body to determine an appellant's indigency and appoint the Office of the Appellate Defender. The subsection was further revised in February 2009 to clarify that it addresses appointments to file petitions for extraordinary writs, as well as direct appeals of right.

This subsection was revised in September 2018 to clarify that it applies to appeals by any party, such as the State in criminal appeals, or a county in appeals in cases under Subchapter I of Chapter 7B of the General Statutes. The requirement for an appellant to request appointment of appellate counsel was removed as it is not required by statute and could frustrate an appellant's desire for the appointment of appellate counsel where a request is unintentionally omitted from the contents of a notice of appeal. Additional revisions were intended to empower trial court judges to appoint appellate counsel when a notice is technically deficient, to determine indigent status by relying on a prior affidavit of indigence, a prior determination of indigence, or status of imprisonment, and to expedite appointment of appellate counsel by authorizing trial court judges to appoint appellate counsel in and out of court and without requiring the presence of the indigent person. To further expedite and facilitate appointment of appellate counsel, the Clerk of Superior Court is guided to notify a judge of competent jurisdiction expeditiously upon receipt of a written notice of appeal so that a judge may consider the person's indigent status and appoint appellate counsel. A final revision deleted outdated language concerning cases subject to G.S. 122C-270(e) and 122C-289 where the appeal was filed before October 1, 2006.

**Subsection (b1):** Although added as a new subsection as of September 21, 2018, the rule concerning the standard for filing a petition for an extraordinary writ is not new, but was moved verbatim from subsection (b) to new subsection (b1).

**Subsection (g1):** This provision was added in November 2002 to authorize the Appellate Defender or IDS Director to appoint counsel to litigate a non-capital motion for appropriate relief pending direct appeal.

**Subsection (g2):** This provision was added in November 2005 to authorize the Appellate Defender or IDS Director to appoint counsel to litigate an evidentiary hearing in the Trial Division on remand from the Appellate Division when the direct appeal is still pending.

**Subsection (h):** This provision was added in July 2005 to authorize the Appellate Defender or IDS Director to appoint counsel to litigate a motion to modify a juvenile dispositional order in district court pending appeal. G.S. 7B-2600(b) gives the district court authority to reduce the nature or duration of an illegally imposed disposition order in a juvenile delinquency case.

**Subsection (i):** This new subsection was adopted effective September 14, 2007 to address petitions for certiorari and oppositions in response to petitions for certiorari in the Supreme Court of the United States in cases involving important issues of federal law, as well as the responsibility for representation in the Supreme Court of the United States if that Court grants certiorari review. The amendments reflect statutory revisions that were enacted during the 2007 legislative session, which, subject to the IDS Rules, extended the entitlement to counsel to review of certain judgments or decrees rendered on direct appeal by a court of the North Carolina Appellate Division. S.L. 2007-323, § 14.19(a). Before requesting authorization to seek certiorari review by the Supreme Court of the United States from a ruling of the North Carolina Court of Appeals, appointed appellate counsel must seek review of the federal constitutional issues in question by

the Supreme Court of North Carolina in a petition for discretionary review or an appeal based on a dissent in the North Carolina Court of Appeals. The decision to authorize compensation will be in the Appellate Defender's discretion, subject to review by the IDS Director, based on the criteria set forth in G.S. 7A-451(b)(8).

**Subsection (j):** This provision was added in September 2008 to authorize the Appellate Defender or IDS Director to appoint counsel to litigate a motion in district court challenging an adjudicatory, dispositional, or other final order in an abuse, neglect, dependency, or termination of parental rights case pending appeal.

**Subsection (k):** This provision was added in December 2012 to authorize the Appellate Defender or IDS Director to appoint counsel to litigate a motion in district court challenging a finding of civil contempt or other final order in a child support contempt case pending appeal.

This subsection was revised in September 2018 to clarify that it applies to appeals by any party, such as the State in criminal appeals, or a county in appeals in cases under Subchapter I of Chapter 7B of the General Statutes. The requirement for an appellant to request appointment of appellate counsel was removed as it is not required by statute and could frustrate an appellant's desire for the appointment of appellate counsel where a request is unintentionally omitted from the contents of a notice of appeal. Additional revisions were intended to empower trial court judges to appoint appellate counsel when a notice is technically deficient, to determine indigent status by relying on a prior affidavit of indigence, a prior determination of indigence, or status of imprisonment, and to expedite appointment of appellate counsel by authorizing trial court judges to appoint appellate counsel in and out of court and without requiring the presence of the indigent person. To further expedite and facilitate appointment of appellate counsel, the Clerk of Superior Court is guided to notify a judge of competent jurisdiction expeditiously upon receipt of a written notice of appeal so that a judge may consider the person's indigent status and appoint appellate counsel. A final revision deleted outdated language concerning cases subject to G.S. 122C-270(e) and 122C-289 where the appeal was filed before October 1, 2006.

### **3.3 Compensation of Appellate Counsel**

#### **(a) Setting of Fee**

Assigned private appellate counsel of record shall be compensated in an amount determined by the Appellate Defender, except that the IDS Director shall determine the amount to compensate private appellate counsel assigned by the IDS Director pursuant to paragraph 3.2(e) above. If counsel is required pursuant to paragraph 3.4(f)(iii) below to meet with the Appellate Defender to review the representation, the fee shall include compensation for time spent in that review.

#### **(b) Fee Application**

After a person's appeal becomes final, assigned private counsel shall electronically submit, an itemized fee application to IDS on a form prescribed by the Appellate Defender, showing the time counsel spent in appellate representation of the person. If an attorney seeks compensation for time spent working on multiple cases simultaneously, the attorney's time shall be prorated among each of the cases involved. Following review of the fee application, the Appellate Defender shall fix the fee to be paid and forward the award to IDS for processing and payment. Final attorney fee applications must be signed by the appointed attorney and submitted to IDS within no more than one year after the date on which the appeal was finally disposed. 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. Assigned private appellate counsel may apply for interim payments.

**(c) Recoupment of Fees Generally**

To the extent required by law, persons 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 or appellate defender office, the value of services rendered by counsel. After the Appellate Defender sets the fee to be paid or the value of services rendered, IDS shall notify the person potentially responsible for paying the fees of the potential liability, and afford the person a reasonable opportunity to be heard on the issue. The trial judge or other appropriate judicial official shall then determine the amount to be recouped if recoupment is required by law.

**(d) Recoupment for Contract Services**

For legal representation rendered by attorneys working under contract with IDS , 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.

**(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 Appellate Defender. 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 Appellate Defender about the use of the funds.

[Subsection (a) amended May 6, 2005, August 13, 2007, May 62, 2010, and April 24, 2020]

[Subsection (b) amended April 24, 2020]

[Subsection (c) amended March 7, 2008 and April 24, 2020]

[Subsection (d) amended April 24, 2020]

[New subsection (e) adopted effective November 12, 2004. Subsection (e) amended September 15, 2006, and April 24, 2020]

*Authority:* G.S. 7A-450.1 through -450.4; 7A-452(b); 7A-455; 7A-458; 7A-498.1(4), (5); 7A-498.3(c), (d); 7A-498.5(c)(8), (f); 7A-498.8(b)

*Commentary*

**Subsection (a):** Effective April 24, 2020, the subsection was amended to transfer responsibility for the setting of compensation of appellate counsel to the Appellate Defender except in limited circumstances.

**Subsection (b):** The Appellate Defender will make available to counsel a form approved by the Appellate Defender (AOC-CR-426) to document fee and expense applications. Subsection (b) was amended effective May 6, 2005 to clarify that attorneys can not double-bill the state for time spent working on multiple cases simultaneously. For all cases finally disposed at the appellate level on or after July 1, 2005, the subsection was also amended to require attorneys to submit fee applications to the Appellate Defender or IDS Director 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. Effective April 24, 2020, the subsection was amended to require fee applications be sent to IDS for initial screening, to require that the fee applications be sent electronically and to transfer the responsibility for the setting of compensation of appellate counsel to the Appellate Defender. An additional revision deleted outdated language concerning cases finally disposed at the appellate level before July 1, 2005.

**Subsection (c):** In appellate cases, recoupment of the cost of court-appointed counsel 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 3.3(a) and (b) authorize the IDS Director to set fees for appellate counsel, this rule requires the IDS Director to notify the person potentially responsible for paying the fees of the potential liability and afford the person a reasonable opportunity to be heard on the issue, before the trial judge sets the amount of any judgment. The subsection was amended effective March 7, 2008 to clarify that judgments for attorney fees can be ordered by the trial judge or another appropriate judicial official. The Public Defender and Appellate Defender are obligated to inform the IDS Director of the value of legal services rendered to a defendant. The form judgment is a new form (AOC-CR-426) that is similar to the form previously used by the AOC. Effective April 24, 2020, the subsection was amended to transfer responsibility for the setting of compensation of appellate counsel to the Appellate Defender except in limited circumstances.

**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*. Effective April 24, 2020, the subsection was amended to reflect that if a third party contributes funds to non-counsel services, counsel shall place the funds in trust and account to the Appellate Defender, rather than the IDS Director, about the use of the funds.

### **3.4 Standards for Appellate Counsel**

#### **(a) Maintenance of Roster**

The Appellate Defender shall maintain a roster of attorneys who are qualified and willing to accept appointment by the Appellate Defender or IDS Director to represent persons in the Appellate Division pursuant to these rules.

#### **(b) Qualifications**

To be eligible for appointment to represent persons in the Appellate Division, an attorney must demonstrate that he or she is proficient in legal writing and oral advocacy, has the required legal knowledge and skill necessary for appellate representation, and will apply that knowledge and skill with appropriate thoroughness and preparation.

#### **(c) Submission of Application**

An attorney who desires to be on the roster of qualified appellate counsel shall submit to the Appellate Defender an application on a form prescribed by the Appellate Defender, accompanied by the following materials:

- (i) a complete resume of the applicant's educational and legal experience;

- (ii) four samples of the applicant's legal writing, which may include pleadings, memoranda of law, or appellate briefs;
- (iii) three letters of recommendation from attorneys licensed in North Carolina for five or more years, or from professors of law familiar with the applicant's legal writing and oral advocacy skills;
- (iv) unless the applicant is currently serving as the Appellate Defender or an Assistant Appellate Defender, a listing of three cases in which the applicant represented an appellant to judgment in the Appellate Division; and
- (v) any additional materials that may assist the Appellate Defender in evaluating the applicant's appellate qualifications and experience.

**(d) Waiver**

If an attorney cannot supply one or more of the submissions set forth in paragraph (c), the Appellate Defender, upon demonstration that the attorney has the required legal knowledge and skill necessary for representation as appellate counsel, and will apply that knowledge and skill with appropriate thoroughness and preparation, may either waive such submission(s) or defer such submission(s) for a reasonable time and in the interim place the attorney on the roster of qualified appellate counsel.

**(e) Review of Application and Creation of Appellate Roster**

Following receipt of the application to be on the roster of qualified appellate counsel, the Appellate Defender shall consider the submitted materials, conduct such investigation as is appropriate, and determine whether the attorney is qualified for appointment as appellate counsel in a non-capital criminal or non-criminal case. The Appellate Defender may require the applicant to attend an interview or training, or take additional action before a final decision is made on the application. The Appellate Defender shall notify the applicant in writing whether he or she will be placed on the roster of qualified appellate counsel. If the Appellate Defender determines that an attorney is not qualified for appointment as appellate counsel in a non-capital criminal or non-criminal case or otherwise declines to place the attorney's name on the appellate roster, the attorney may make a written request for a review of the Appellate Defender's decision from a committee of the IDS Commission designated by the IDS Commission to conduct such review.

**(f) Conditions of Appointment**

The Appellate Defender or IDS Director may set additional conditions of appointment, including requiring attorneys appointed under this subpart to:

- (i) consult with the Appellate Defender or his or her designee during the pendency of the representation in the Appellate Division or in the Supreme Court of the United States as provided by paragraph 3.2(i), above, participate in practice oral arguments, and submit briefs for pre-filing review, as required by the Appellate Defender;
- (ii) promptly notify the Appellate Defender by mail, facsimile, or email upon the filing of each brief or substantive motion or memorandum in the case, include in the notification a copy of the Questions Presented in each brief, and upon request by the Appellate Defender, transmit to the Appellate Defender a copy of the entire brief, motion, or memorandum, or portions thereof; and

(iii) meet with the Appellate Defender or his or her designee following an appellate decision and prior to final payment of counsel fees to review the course of the representation.

#### **(g) Retention of Eligibility**

To remain eligible for appointment as counsel in a non-capital criminal or non-criminal appeal, an attorney must attend and successfully complete any training sessions prescribed by the Appellate Defender.

[Subsection (e) amended February 10, 2006 and April 24, 2020.]

[Subsection (f) amended effective September 14, 2007]

*Authority:* G.S. 7A-450(b); 7A-451(b)(8); 7A-498.1(1), (2); 7A-498.5(c)(2), (c)(4), (h); 7A-498.6(b)(8); 7A-498.8(b)(3), (b)(4), (b)(6a)

#### *Commentary*

**Subsection (e)** was amended effective April 24, 2020 to allow the Appellate Defender to require applicants to comply with conditions prior to deciding whether or not to place the applicant on the roster.

**Subsection (f):** Based on statutory revisions that were enacted during the 2007 legislative session, which extended the entitlement to counsel to review of certain judgments or decrees rendered on direct appeal by a court of the North Carolina Appellate Division, see S.L. 2007-323, § 14.19(a), this subsection was amended effective September 14, 2007 to clarify that the Appellate Defender may set additional conditions of appointment for representation in the Supreme Court of the United States, including requiring consultations, reviews of draft petitions and briefs, and practice oral arguments.

### **3.5 Substitution of Counsel**

For good cause, the Appellate Defender or IDS Director may request *ex parte* that a judge of a court of competent jurisdiction replace appellate counsel previously appointed with new counsel selected by the Appellate Defender or IDS Director.

*Authority:* G.S. 7A-498.1(1), (2); 7A-498.5(c)(4), (h); 7A-498.6(b)(8); 7A-498.8(b)

#### *Commentary*

This rule permits the Appellate Defender or IDS Director to request *ex parte* that a judge remove an attorney previously appointed. It would be impossible to note all the circumstances that reasonably might cause the Appellate Defender or IDS Director to make such a request. Such circumstances might not in themselves constitute ineffective assistance of counsel. See *State v. Sweezy*, 291 N.C. 366, 371-72, 230 S.E.2d 524 (1976); see also *State v. Kuplin*, 316 N.C. 387, 396, 343 S.E.2d 793 (1986) (“Each case must be examined on an individual basis. In the absence of a constitutional violation, the decision about whether appointed counsel shall be replaced is a matter solely for the discretion of the trial court.”). Reasonable tactical disagreements between the Appellate Defender and appointed counsel, or between the IDS Director and appointed counsel, will not constitute grounds for the Appellate Defender or IDS Director to request substitution of counsel. If the judge determines that the attorney is rendering ineffective assistance of counsel or that the attorney has an impermissible conflict of interest, substitution is required as a matter of law. See *State v. Moorman*, 320 N.C. 387, 358 S.E.2d 502 (1987); *State v. James*, 111 N.C. App. 785, 433 S.E.2d 755 (1993).

### **3.6 Removal from Roster**

Following consultation with the IDS Director, the Appellate Defender may remove from the roster of attorneys qualified for appointment as appellate counsel any attorney who has ignored requirements for appointment as appellate counsel; has failed to continue to demonstrate that he or she has the required legal knowledge and skill necessary for representation as appellate counsel; or has failed to continue to demonstrate that he or she is willing to apply that knowledge and skill with appropriate thoroughness and preparation as appellate counsel. Following consultation with the IDS Director, the Appellate Defender may also remove an attorney from the roster if, as part of a periodic review of the roster, the Appellate Defender determines that a smaller roster of attorneys will better serve the goals of ensuring the best possible appellate representation of indigent persons and of delivering quality services in the most efficient and cost-effective manner. If the Appellate Defender removes an attorney from the appellate roster, the attorney may make a written request for a review of the Appellate Defender's decision from a subcommittee of the IDS Commission designated by the IDS Commission to conduct such review.

[Section amended effective February 10, 2006]

*Authority:* G.S. 7A-498.1(1), (2); 7A-498.5(c)(4), (h); 7A-498.8(b)

### **3.7 Authority to Implement other Programs, Plans, and Contracts**

Nothing in these rules shall prohibit assignment of otherwise qualified counsel to represent indigent defendants on appeal 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-498.1; 7A-498.3(a), (c); 7A-498.5(c), (d), (f)