

## Appointed Counsel in Child Support Cases: How Far Do You Go?

An indigent parent in a child support case is entitled to appointed counsel only for contempt proceedings. But child support cases can be complex. Where should appointed counsel draw the line when representing these parents? Should they limit representation to the actual contempt proceeding or do they delve further? Is the underlying order valid? Is there a good cause to adjust the arrears or is there a change of circumstances justifying a modification of support? Judges must approve the fee applications for the time spent on cases, so counsel should take care to act within the scope of their representation.

### Ethical Considerations

Rule 0.1 of the [Rules of Professional Conduct](#) says attorneys are obligated to zealously protect and pursue a client's legitimate interests within the bounds of the law. Additionally, Rule 1.2 of the [Rules of Professional Conduct](#) allows an attorney to limit the scope of the representation if the limitation is reasonable under the circumstances. Zealous representation should include providing clients with information and tools that enable them to make good decisions about their cases beyond the scope of the underlying representation. It does not necessarily require specific actions, such as filing particular motions or arguing a position in court. The attorney decides what is reasonable by examining the facts of the client's case, the attorney's ethical responsibilities to the client, and the scope of representation.

### Should a motion be filed?

There are questions an attorney should ask when determining what actions to take in child support contempt cases.

- Will the motion cure the source of the nonpayment?
- Does the basis of the motion relate directly to the client's ability to pay? (*The court must find that the client has the present ability to pay (civil) or there was a willful disobedience of a court order (criminal) in order to find the person in contempt. G.S. 5A-11(a)(3); G.S. 5A-22.*)
- Will the motion help the client avoid being subject to future contempt proceedings?
- If the client had the information and knowledge, would she file the motion regardless of a pending action against her?

After reviewing the case and consulting with the client, the attorney may decide to file the motion.

### IDS policy

The IDS policy on [Scope of Representation](#) was revised in July 2014. Contempt cases are addressed in the last section. The policy states that it applies to contractors and public defenders, but it also provides guidance to private assigned counsel. Before the 2014 update, the policy stated: “If a contractor or public defender is assigned to a **pending child support contempt case** (emphasis in original), including cases assigned on a per session basis, and the contractor or public defender believes that it would be reasonable and appropriate to file a motion to challenge paternity, motion to adjust child support arrears, or motion to modify the child support obligation, the contractor or public defender has an obligation to file such motion(s) because the State has introduced ‘the potential curtailment of the indigent’s personal liberty.’ *McBride v. McBride*, 334 N.C. 124, 126, 431 S.E.2d 14, 16 (1993).” This policy gave the attorney great discretion when deciding whether to file motions in a contempt cases. However, this wide latitude caused confusion for attorneys trying to determine their obligations to clients and for judges in determining how much time spent by the attorney was appropriate.

The 2014 policy provides more guidance. It states: “If a contractor or public defender is assigned to a pending child support contempt or other contempt case, including cases assigned on a per session basis, and the contractor or public defender has identified a motion that, if successfully litigated, would constitute a defense in the contempt proceeding, such as a Rule 60 motion or a motion to challenge paternity, the contractor or public defender has an obligation to file such motion(s) because the State has introduced ‘the potential curtailment of the indigent’s personal liberty.’ *McBride v. McBride*, 334 N.C. 124, 126, 431 S.E.2d 14, 16 (1993).” The policy states further that the “contractor or public defender shall also give the client limited advice and guidance on how the client can address other related matters, including recommending other motions such as motions to modify a child support obligation.”

Now it is no longer in the attorney’s discretion to determine whether a motion is “reasonable and appropriate”. The policy both broadens and limits the scope of representation in contempt cases. Unlike the previous version of the policy, the new policy does not specifically mention a motion to modify support or a motion to adjust arrears. Rather, the attorney must file motions that specifically provide a defense to the contempt proceeding. If the attorney believes it would be appropriate to file motions in the case but not necessarily required as a defense to the contempt proceeding, the attorney should give the client advice and guidance on how to proceed. Private assigned attorneys may decide to file and litigate the motions pro bono, while public defenders do not have that option.

## Conclusion

Many attorneys believe it is their ethical responsibility to advise and assist the client with all aspects of a case, even if they may not be paid for their work because it is not within IDS’ scope of representation. How attorneys decide to handle these issues will depend on the goals of the client and the particular facts of the case.

I hope this generates discussion and helps attorneys sort through their options in order to ultimately

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do what is best for their clients.