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Memo

To: District and Superior Court Judges
Cc: Clerks, Assistant Clerks, and Deputy Clerks
From: Thomas K. Maher, IDS Director
Re: Recoupment of Attorney Fees in Cases Handled by Contract Attorneys
Date: July 8, 2014

As you all know, the General Assembly has directed IDS to shift away from paying private assigned counsel (“PAC”) on an hourly basis and toward a contract system. Under the new system, IDS pays contract attorneys a fixed monthly amount to cover one or more “caseload units,” which represent a range of annual dispositions within a certain case type.

As the new contract system has been established in a county or district, some judges and clerks have raised questions about the process of ordering recoupment of attorneys’ fees. The short answer is that the process is generally the same as when counsel was paid by the hour; when a case ends with a disposition that makes it eligible for recoupment, the contract attorney should report the amount of time that he or she has spent on the case and the Court should order recoupment of attorneys’ fees based on the number of hours approved and the applicable hourly rate that would have been paid if PAC had handled the case. In a recoupment-eligible case, contract counsel will provide the Court with a recoupment form, which looks similar to the AOC-CR-225 fee application form, but is used only for ordering recoupment. Because the recoupment form is not the vehicle through which a contract attorney is paid, clerks’ offices should not mail copies of those forms to IDS Financial Services. In addition, contract counsel should not provide a recoupment form to the Court if the General Statutes do not allow for recoupment due to the disposition of the case, such as an acquittal or dismissal. A contractor who is allowed to withdraw may submit a recoupment application to enable an attorney fee judgment for his or her time if the ultimate disposition makes the case recoupment eligible.

G.S. 7A-455 provides that “in all cases the court shall direct that a judgment be entered in the office of the clerk of superior court for the money value of services rendered by assigned counsel, the public defender, or the appellate defender.” G.S. 7A-455(c) exempts cases that do not result in a conviction from the requirement that a defendant be ordered to repay. The statute further provides that the “value of services” is to be determined in accordance with rules adopted by the IDS Office, and that the money value of services rendered by a public defender should be based on “the factors normally involved in fixing the fees of private attorneys, such as the nature of the case, the time, effort, and responsibility involved, and the fee usually charged in similar cases.”

IDS Rule 1.11 is consistent with this statutory language, directing that “in the case of representation by a public defender, the value of services rendered by counsel” is the benchmark for setting the recoupment amount.

Some judges have questioned whether it is appropriate to determine the “money value of services” based on the hours worked and the applicable PAC hourly rate when contract attorneys are not paid by the hour. Although contract attorneys are not paid by the hour, IDS policies still require judges to use the amount of time approved and the applicable hourly PAC rate to compute the recoupment amount. In this respect, contract attorneys are similar to assistant public defenders, who are paid a salary to represent the clients they are assigned. Although contract attorneys are not paid by the hour for each case, the amount of their contract payments are tied to an estimate of the time it will take them to provide representation for the defendants assigned to them under the contract. IDS believes that the “money value” of their services is best measured in the same way that the “money value” of work done by an assistant public defender is measured, which is to set recoupment based on the time involved and the PAC hourly rate for the type of case in which representation was provided. Practically speaking, setting the amount of recoupment based on the effective hourly rate of each individual contract attorney would not be feasible. First, judges would have to apply different hourly rates for every contract attorney who appears before them, which would not be a workable system. Second, contractors do not know their effective hourly rate until all of their contractual obligations have been completed. The only alternative to applying the current PAC hourly rates is to set flat per case recoupment amounts that vary by case type. That approach would have complications of its own, and would be even less fair to some defendants because the recoupment amount would not be tied to the actual amount of time the contractor spent on the case.

IDS appreciates the efforts of judges and clerks in ordering and collecting attorneys’ fees in eligible cases. Recoupment receipts make up a significant portion of IDS’ budget and, if those revenues decline under the new contract system, IDS’ ability to fund effective representation in the future will be compromised. As always, please feel free to contact IDS if you have any questions or concerns.