

## 12.1 Scope of Right to Counsel

### A. Right to Appointed Counsel

A person has a right to have counsel appointed at state expense in various proceedings. The principal sources of the right to counsel are as follows:

- In criminal prosecutions, from the initiation of formal proceedings through judgment at the trial level, a person has a Sixth Amendment right to counsel for all felonies and most misdemeanors. Other constitutional provisions give a criminal defendant the right to counsel in proceedings outside that time frame. For example, the Fifth Amendment protects a person from being interrogated by the police without counsel before the initiation of formal proceedings, while due process and equal protection give a person the right to counsel on a first appeal of right.
- In proceedings that are not characterized as criminal but may result in a deprivation of liberty or other important right, due process may give a person a right to counsel. *See generally Lassiter v. Dep't of Social Services*, 452 U.S. 18 (1981) (discussing application of due process to appointment of counsel in proceeding to terminate parental rights). A common situation in North Carolina in which a person has a due process right to counsel is in civil contempt proceedings, usually for failure to pay child support.
- In certain criminal and non-criminal proceedings in which the right to counsel is not constitutionally guaranteed, North Carolina statutory law guarantees a person the right to counsel. The following discussion deals primarily with criminal and quasi-criminal proceedings, such as juvenile delinquency proceedings. For a listing of civil proceedings in which a person has a right to counsel, such as involuntary commitment and termination of parental rights proceedings, see IDS Rule 1.1 Commentary.
- The Office of Indigent Defense Services (“IDS”) must provide legal representation in cases in which the State is obligated to provide legal assistance and access to the courts for inmates in the custody of the Division of Adult Correction in the Department of Public Safety. *See* G.S. 7A-498.3(a)(2a). Part 4 of the IDS Rules governs the provision of such representation. IDS has entered into an agreement with North Carolina Prisoner Legal Services to provide the legal assistance.
- The North Carolina Constitution also guarantees the right to counsel, but it is not clear whether those provisions extend beyond federal constitutional and state statutory rights. *See* N.C. CONST. art. I, sec. 19 (“No person shall be . . . deprived of his life, liberty, or property, but by the law of the land.”); art. I, sec. 23 (“In all criminal prosecutions, every person charged with crime has the right . . . to have counsel for defense . . .”).

In most of the above proceedings, a person is entitled to counsel at state expense only if he or she is indigent. In some instances—for example, a proceeding in which a juvenile is alleged to be delinquent—a person is entitled to have counsel appointed regardless of whether he or she is indigent. *See infra* § 12.5D, Determining Indigency.

## **B. Right to Retained Counsel**

The right to appear by retained counsel is at least as broad as the right to appear by appointed counsel. The right to retained counsel is based on both statutory and constitutional grounds. *See* Section 15-4 of the North Carolina General Statutes (hereinafter G.S.) (“[e]very person, accused of any crime whatsoever, shall be entitled to counsel in all matters which may be necessary for his defense”); *State v. Morris*, 275 N.C. 50 (1969) (defendant has constitutional right in every criminal case to retain and appear by counsel of his choice); *see also* 3 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 11.1(a), at 566–67 (3d ed. 2007) [hereinafter LAFAVE, CRIMINAL PROCEDURE]).

If a person is convicted without having waived the right to both appointed and retained counsel—for example, the person executes a waiver of appointed counsel but not of retained counsel—the conviction may be challenged as a violation of the person’s right to counsel. *See infra* § 12.6B, Mandatory Procedures for Waiving Counsel.

## **C. Right to Other Expenses of Representation**

An indigent person is entitled not only to the appointment of counsel but also to funds for “other necessary expenses of representation,” such as experts and investigators. G.S. 7A-450(b). This right is based on both statutory and constitutional grounds. For a discussion of applying for funds for experts and other assistance, *see supra* Ch. 5, Experts and Other Assistance.

A person who is able to retain counsel may still be considered indigent for purposes of paying for experts and other expenses of representation and may be entitled to obtain state funds for such services. *See infra* § 12.5F, Effect of Retaining Counsel on Right to Appointed Counsel.