

Commission on Legal Counsel for Indigents
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Responses to questions asked by the Administrative Rules Committee
in November 8, 2007 letter of John Walstad

1. The North Dakota Commission on Legal Counsel for Indigents requires exemption from both the rule making and the adjudicative proceeding provisions of NDCC Ch. 28-32.

The Commission's standards and policies are not the kind of rules for which the whole in-depth rule-making process of the AAPA would be necessary. Only a very limited number of people are effected by the Commission's standards and policies: the Commission's standards and policies generally deal with what an attorney is expected to do when providing services authorized by the Commission, or how to obtain authorization for additional services for the client. Indigent defense attorneys, judges, and any persons who indicate they are interested in the standards and policies are given notice of any proposed standards and policies and are given the opportunity to comment on them. The Commission carefully considers any comments prior to adopting its Standards and Policies.

Additionally, the Commission is a new agency, and new issues are constantly coming to the Commission's attention, and decision needs to be made on many of them in an expedient fashion. The Commission has a small budget; without the publication requirements of the AAPA, the adoption of standards and policies is done in an extremely cost effective manner.

Furthermore, the activities of the Commission are not such as would lend themselves to the appeal process under the AAPA. The Commission is basically a mechanism for providing a professional service by persons who are licensed by another entity. If a contractor or public defender is alleged to have provided ineffective assistance of counsel, for example, the matter should be resolved as a legal, constitutional issue, either by the defendant raising the matter in an appeal or post-conviction matter, or the defendant filing a disciplinary complaint against the attorney with the disciplinary board, not through an administrative appeal process.

2. The Commission likely does make rules which are of general statewide application and might affect the right or duties of persons outside the agency.

Under the broad AAPA definition of "rule," the Commission likely does make rules which are of general statewide application and might affect the right or duties of persons outside the agency, if persons outside the agency is defined to mean attorneys who are not employed by this agency, but contract with it, to provide services, and persons seeking indigent defense services from this agency. For example, the Commission has a Policy on Reimbursement of Extraordinary Expenses. Under this policy, a contractor is required to obtain agency approval before the contractor incurs expenses in excess of a certain amount, when representing an indigent person.

Many of the standards and policies of the Commission deal with internal management of the Commission, or are guidelines, statements of general policy, manuals, brochures, or pamphlets, which are explanatory and not intended to have the force and effect of law, and thus, not "rules" under the AAPA.

3. The only formal hearing held by the Commission to act on complaints, applications or appeals would be for denial of a questionable bill submitted to the Commission. The "rule" governing the conduct of the hearing and rights of the parties would be the Commission's "Policy on 'Billing'"

The Commission has a "Policy on 'Billing'" which requires that the bills reflect actual time, mileage, and expense. That policy provides that if a bill is received which is of questionable accuracy, the person who submitted the bill is contacted to provide a written explanation. If the explanation is unsatisfactory to the Commission staff, the questionable portion is denied. The person may appeal the denial to the Commission, and be heard at the next regularly scheduled Commission meeting.

The Commission does not otherwise hold formal hearings to act on complaints, applications or appeals. The Commission's decisions which would be subject to an administrative hearing are more properly subject to a judicial appeal or proceeding.

The Commission does have an attorney complaint procedure, whereby a defendant who is dissatisfied with his or her attorney can submit a written complaint to the Commission. After the Commission receives a complaint, the Commission contacts the assigned attorney and obtains a response to the complaint. If the substance of the complaint suggests a need for additional communication or explanation from the attorney, the attorney is asked to contact the defendant to attempt to work out the problems. If the substance of the complaint and response is such that it would be appropriate to assign a new attorney, a new attorney is assigned, subject to the court permitting the attorney to withdraw (assuming that the attorney has made an appearance in the matter).

4. The exemption for the Commission under subsection 2 of NDCC § 28-32-01 should continue unchanged.

Requiring the Commission to be subject to the administrative rule making and appeals procedures is unnecessary and would result in increased costs. The exemption for the Commission under § 28-32-01 (2) should continue unchanged.