

# IMPROVING INDIGENT DEFENSE IN NORTH CAROLINA

## NCCALJ COMMITTEE ON CRIMINAL INVESTIGATION & ADJUDICATION REPORT

OCTOBER 2016

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## Executive Summary

As the United States Supreme Court recently declared: “No one doubts the fundamental character of a criminal defendant’s Sixth Amendment right to the ‘Assistance of Counsel.’”<sup>1</sup> This right is so critical that the high Court has deemed its wrongful deprivation to constitute “structural” error, affecting the very “framework within which the trial proceeds.”<sup>2</sup> For indigent defendants, this fundamental right to effective assistance of counsel must be provided at state expense.<sup>3</sup> When the system fails to provide this right, it denies indigent defendants justice. That denial has very real consequences for defendants, including excessive pretrial detention, increased pressure on innocent persons to plead guilty, wrongful convictions, and excessive sentences.<sup>4</sup>

There are, however, other costs associated with the State’s failure to provide effective assistance, including costs to victims, families, communities, taxpayers and the criminal justice system as a whole.<sup>5</sup> Costs to the criminal justice system include trial delays and an increased number of appeals and post-conviction challenges, all of which must be funded by North Carolina taxpayers, as are costly retrials when those challenges are successful.<sup>6</sup> As has been noted: “Justice works best when all players within the system are competent and have access to adequate resources. When the system includes well-trained public defenders, cases move faster (helping the court manage growing caseloads), and the system tends to generate and implement innovative programs.”<sup>7</sup>

Trial delay is not merely a theoretical danger; it is an actual one. District Attorneys forcefully asserted to the Committee that an erosion of the quality of North Carolina’s indigent defense bar was impairing their ability to deliver justice in the state’s criminal courts.<sup>8</sup>

In comments to the Committee, Justice Rhoda Billings emphasized that wrongful convictions deny justice to victims and put North Carolina’s citizens in danger by allowing the real criminal to remain

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<sup>1</sup> *Luis v. United States*, 578 U.S. \_\_\_, 136 S. Ct. 1083, 1088 (2016). The Sixth Amendment provides, in relevant part: “In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense.” U.S. CONST. amend. VI.

<sup>2</sup> *Luis*, 578 U.S. at \_\_\_, 136 S. Ct. at 1089 (quotation omitted).

<sup>3</sup> *Id.*

<sup>4</sup> Comments of the Honorable Rhoda Billings, Committee Meeting Nov. 23, 2015 [hereinafter Billings Comments]; *see also* THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 6 (2009) [hereinafter JUSTICE DENIED] (noting that wrongful convictions have occurred as a result of inadequate representation by defense counsel), <http://www.constitutionproject.org/wp-content/uploads/2012/10/139.pdf>.

<sup>5</sup> JUSTICE POLICY INSTITUTE, SYSTEM OVERLOAD: THE COSTS OF UNDER-RESOURCING PUBLIC DEFENSE 2 (2011) [hereinafter SYSTEM OVERLOAD], [http://www.justicepolicy.org/uploads/justicepolicy/documents/system\\_overload\\_final.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/system_overload_final.pdf).

<sup>6</sup> JUSTICE DENIED, *supra* note 4, at 2 (noting the cost of retrials); Comments of District Attorney Lorrin Freeman, Committee Meeting Nov. 23, 2015 (ineffective assistance leads to costly retrials); Comments of Former Attorney General Eric Holder, Brennan Legacy Awards Dinner, Nov. 16, 2009 [hereinafter Holder] (“Even assuming these defendants were guilty of the crimes for which they were originally convicted, the public still must bear the cost of appeals and retrials because the system didn’t get it right the first time.”), <https://www.brennancenter.org/analysis/attorney-general-eric-holder-indigent-defense-reform>.

<sup>7</sup> Tony Fabelo, *What Policymakers Need to Know to Improve Public Defense Systems*, US BUREAU OF JUSTICE ASSISTANCE EXECUTIVE SESSION ON PUBLIC DEFENSE, Dec., 2001, at 2 [hereinafter *What Policymakers Need to Know*] (a strong public defense system “facilitates a smoother operating justice system”), <https://www.ncjrs.gov/pdffiles1/bja/190725.pdf>.

<sup>8</sup> Comments of District Attorney Andrew Murray, Committee Meeting Nov. 23, 2015 (underfunding of IDS impairs the prosecutors’ ability to be efficient and effective); Comments of District Attorney Lorrin Freeman, Committee Meeting Nov. 23, 2015 (when lawyers are overloaded, prosecutors cannot move forward with their cases); Comments of District Attorney Michael Waters, Committee Meeting Nov. 23, 2015.

at large, free to perpetrate crime on others.<sup>9</sup> Additionally, families of wrongfully convicted defendants suffer, not just from the loss of a family member who may be incarcerated, but from the dramatic collateral consequences that follow as a result of any criminal conviction, including barriers to obtaining employment, joining the military, or receiving financial aid to pursue higher education.<sup>10</sup> These collateral consequences impair the person's ability to support both himself and his family, often necessitating public assistance and thus additional taxpayer support.

In addition to paying for the cost of an inefficient justice system, taxpayers pick up the tab for ineffective assistance in other ways. When inadequate lawyering results in excessive pretrial detentions and sentences and in incarceration for convictions that are later reversed, the costs of such detentions are paid by North Carolina's citizens.<sup>11</sup>

Finally — and perhaps most importantly — another cost of failing to provide an effective indigent defense system is a loss of public confidence in the court system's ability to administer justice.<sup>12</sup> Inadequate indigent defense services compromise the integrity of the justice system,<sup>13</sup> by calling its fairness into question.<sup>14</sup> Because people in the lowest income groups are most likely to require indigent defense services, failures in the indigent defense system are felt most acutely by these individuals.<sup>15</sup> As Justice Billings noted to the Committee: Americans strongly believe that the amount of money a person has should not affect the amount of justice he or she receives; any perception of fairness vanishes if our citizens believe that a poor person is placed at a significant disadvantage in the justice system.<sup>16</sup> In fact, evidence indicates that a majority of citizens *already* believe that poor people are at such a disadvantage: A recent survey of North Carolinians shows that 64% of respondents believe that low-income people fare worse than others in our state court system.<sup>17</sup>

Sixteen years ago the North Carolina General Assembly created the state's existing indigent defense system. While stakeholders agree that North Carolina has benefited greatly from the creation of the Office of Indigent Defense Services (IDS) and the Commission on Indigent Defense Services (IDS Commission),<sup>18</sup> the potential that IDS and the IDS Commission hold for providing uniform quality,

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<sup>9</sup> Billings Comments, *supra* note 4; *see also* JUSTICE DENIED, *supra* note 4, at 6; Holder, *supra* note 6 (“And for those cases in which the defendants were not guilty, then obviously the price tag is much higher -- both in the ultimate nightmare scenario of sending an innocent person to jail, and in terms of letting the person who actually committed the crime remain free.”).

<sup>10</sup> *See generally* Collateral Consequences Assessment Tool (UNC School of Government), <http://ccat.sog.unc.edu/> (centralized database of collateral consequences).

<sup>11</sup> Billings Comments, *supra* note 4 (so noting with respect to pretrial incarceration of low-risk defendants); *see also* JUSTICE DENIED, *supra* note 4, at 2 (noting that increased jail expenses result from a failure to provide effective assistance); Holder, *supra* note 6 (“An analysis conducted by the State Appellate Defender Office in Michigan found that the state's failure to invest resources at the trial court level has contributed to the costly imprisonment of defendants whose convictions were later reversed.”).

<sup>12</sup> JUSTICE DENIED, *supra* note 4, at 2; Billings Comments, *supra* note 4; SYSTEM OVERLOAD *supra* note 5, at 23.

<sup>13</sup> SYSTEM OVERLOAD, *supra* note 5, at 23; *What Policymakers Need to Know*, *supra* note 7, at 2 (“A strong public defense system promotes the legitimacy of the justice system—legitimacy necessary to maintain public support.”).

<sup>14</sup> *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (“The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.”).

<sup>15</sup> *What Policymakers Need to Know*, *supra* note 7, at 2.

<sup>16</sup> Billings Comments, *supra* note 4.

<sup>17</sup> Elon University Poll, conducted at the request of the NC Commission on the Administration of Law & Justice, at 26 (2015) (on file with Commission staff).

<sup>18</sup> DAVID BROWN & MONICA YELVERTON, TRIAL JUDGES' PERCEPTIONS OF NORTH CAROLINA'S OFFICE OF INDIGENT DEFENSE SERVICES: A REPORT ON SURVEY RESULTS (UNC School of Government 2016) [hereinafter TRIAL JUDGES']

cost-effective representation statewide has yet to be fully achieved. North Carolina is not alone in this respect. Just last year, Tim Lynch, Director of the CATO Institute Project on Criminal Justice, noted that “indigent defense in America today is in a state of crisis” and that “[f]or the indigent, the right to counsel too often has been illusory.”<sup>19</sup> Similarly, a recent Heritage Foundation program noted that fulfilling the promise of providing indigent defense services remains a “continuing challenge.”<sup>20</sup> Nor is North Carolina alone in its desire to improve indigent defense. In a statement accompanying a major grant to the National Association of Criminal Defense Lawyers (NACDL), Charles G. Koch, chairman and CEO of Koch Industries, expressed support for “NACDL’s efforts to make the Sixth Amendment’s guarantee of an individual’s right to counsel a reality for all Americans, especially those who are the most disadvantaged in our society.”<sup>21</sup> Support for these efforts crosses traditional ideological lines.<sup>22</sup> As noted in a 2012 report on indigent defense reform by the American Bar Association and the NACDL, conservatives and liberals “share the belief that people should be protected by counsel when liberty is taken away.”<sup>23</sup>

This report aims to help North Carolina strengthen the protections it offers to indigent people when their liberty is at stake. It begins with a brief background. It then defines the critical characteristics of an effective indigent defense system and makes recommendations regarding how to best achieve those characteristics in North Carolina. Key recommendations include:

- Establishing single district and regional public defender offices throughout the state.
- Providing oversight, supervision and support to all counsel providing indigent defense services.
- Implementing uniform indigency standards.

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PERCEPTIONS OF IDS] (based on responses of 135 judges surveyed, judges had a generally positive view of IDS’s performance), [https://www.sog.unc.edu/sites/www.sog.unc.edu/files/reports/20160060\\_Judges\\_Perceptions\\_Brown.pdf](https://www.sog.unc.edu/sites/www.sog.unc.edu/files/reports/20160060_Judges_Perceptions_Brown.pdf); Comments of Jeff Cutler, Attorney, Committee Meeting Nov. 23, 2015 (IDS has been very successful in providing good quality legal services); Comments of Chief Public Defender James Williams, Committee Meeting Nov. 23, 2015 (IDS has improved the quality of legal services and has done it relatively cost-effectively); Comments of Desmond McCallum, Attorney, Committee Meeting Nov. 23, 2015 (IDS has been effective in ensuring that poor people can get the same type of lawyer afforded to wealthy individuals); Comments of District Attorney Seth Edwards, Committee Meeting Nov. 23, 2015 (noting success of a new public defender office and IDS’s strength in training staff).

With respect to improvements in cost-effectiveness in the delivery of indigent defense services, the Commission reports that “overall IDS demand (spending and current-year obligations) since IDS was created has averaged 4.3%, which is significantly below the average annual increase (more than 11%) during the seven years prior to IDS’ creation.” REPORT OF THE COMMISSION ON INDIGENT DEFENSE SERVICES 1 (Submitted to the N.C. General Assembly Mar. 1, 2016) [hereinafter IDS REPORT], <http://www.ncids.org/Reports%20&%20Data/Prior%20GA%20Reports/LegislatureReport2016.pdf>. The Commission reports that although indigent defense per disposition expenditures fluctuate from year to year, “overall per disposition costs during fiscal year 2014-15 were only \$9.67 more than per disposition costs the year before IDS was established (fiscal year 2000-01).” *Id.* It further reports that while there have been modest increases in average per case costs for some case types over the past 15 years, the overall increases in demand on the fund are primarily due to an expanding indigent caseload. *Id.*

<sup>19</sup> Tim Lynch, *2015 Can be the Year of Criminal Justice Reform*, CATO INSTITUTE, <http://www.cato.org/publications/commentary/2015-can-be-year-criminal-justice-reform> (last visited May 24, 2016).

<sup>20</sup> The Heritage Foundation, *Gideon at 50: Fundamental Right, Ongoing Challenge* (Mar 12, 2013), <http://www.heritage.org/events/2013/03/gideon> (this Heritage Foundation panel discussion was co-hosted with the National Association of Criminal Defense Lawyers).

<sup>21</sup> Jacob Gershman, *Koch Industries Funds Legal Defense for the Poor*, THE WALL STREET JOURNAL LAW BLOG (Oct. 22, 2014), <http://blogs.wsj.com/law/2014/10/22/koch-industries-funds-legal-defense-for-the-poor/>.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

- Implementing uniform training, qualification, and performance standards and workload formulas for all counsel providing indigent services.
- Providing reasonable compensation for all counsel providing indigent defense services.
- Developing a long-term plan for the delivery of indigent defense services in the state.
- Ensuring that the indigent defense function is directly accountable to the legislature but independent of the conflicts created by judicial control.
- Reducing the cost of indigent defense services to make resources available for needed reforms.

The NCCALJ<sup>24</sup> Criminal Investigation and Adjudication Committee (Committee)<sup>25</sup> recognizes that these recommendations cannot be implemented all at once. It hopes however that they will serve as a long-term blueprint for changes to the state's indigent defense system. In the short term, the Committee hopes that these recommendations will serve as important touchstones for evaluating the merits of new legislative proposals, and that legislation advancing the blueprint, as drawn here, will be adopted and that legislation at odds with it will be averted. It is important to note that many of the Committee's recommendations are interdependent. For example, this report recommends both establishing single district and regional public defender offices statewide and that IDS provide oversight, supervision and support to all counsel providing indigent defense services. The vehicle for implementing the latter recommendation is the offices created by the former.

The Committee's work was limited by both time and resources. As a result, while civil proceedings for which indigent defense services are required are mentioned in this report, its focus is on criminal cases. The Committee suggests that further study be done to make recommendations for improving indigent defense representation in non-criminal cases.

This report begins with background information regarding IDS and the IDS Commission. It then defines the characteristics of an effective indigent defense system. Finally, it makes recommendations to bring North Carolina's indigent defense system in line with those characteristics so that it can best achieve its mission: ensuring fair proceedings by providing effective representation in a cost-effective manner.

## **Background**

### **Creation of IDS & IDS Commission**

In August 2000, the North Carolina General Assembly passed the Indigent Defense Services Act,<sup>26</sup> creating the Office of Indigent Defense Services (IDS) and the IDS Commission and charging them with overseeing the provision of legal representation to indigent persons entitled to counsel at state expense. On July 1, 2001, IDS formally assumed its responsibilities under the Act.<sup>27</sup>

The impetus for the Indigent Defense Services Act included findings from a 1998 legislative study commission that indigent defense in North Carolina suffered – with regards to both cost-effectiveness and quality – from a lack of a centralized agency to provide coordinated planning, oversight, and management. Among other things, the study commission found that the indigent

<sup>24</sup> For information about the North Carolina Commission on the Administration of Law & Justice (NCCALJ), visit the Commission's website: <http://nccalj.org/>.

<sup>25</sup> See *infra* pp. 50-51 (listing all Committee members).

<sup>26</sup> S.L. 2000-144. The stated purpose of the Act was to enhance the oversight, quality, independence, and cost-effectiveness of indigent defense services; establish uniform policies and procedures for the delivery of those services; and generate reliable statistical information about services provided and funds expended. *Id.*

<sup>27</sup> IDS REPORT, *supra* note 18, at 1.

defense function should be independent of judicial control; that an independent centralized agency would be more accountable to the legislature and taxpayers; and that the quality of indigent defense services was unequal across the state, and was at times poor.<sup>28</sup>

### **IDS Commission**

The IDS Commission oversees IDS as well as the Offices of the Juvenile Defender, Appellate Defender, and Capital Defender. The Commission's 13 members are appointed by the Chief Justice, Governor, Senate, House, State Bar, Bar Association, Public Defenders Association, Advocates for Justice, Association of Black Lawyers, Association of Women Lawyers, and the Commission itself.<sup>29</sup>

The IDS Commission has substantial authority, including the power to appoint the IDS Executive Director, Appellate Defender, Capital Defender, and Juvenile Defender and to set standards of representation and rates of compensation.<sup>30</sup> In 2011, authority to appoint Chief Public Defenders was transferred from local senior resident superior court judges to the IDS Commission;<sup>31</sup> in 2013, that appointing authority was returned to the local senior resident superior court judges.<sup>32</sup>

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<sup>28</sup> INDIGENT DEFENSE STUDY COMMISSION, REPORT AND RECOMMENDATIONS (Submitted to the N.C. General Assembly May 1, 2000) [hereinafter LEGISLATIVE STUDY COMMISSION REPORT], [http://www.ncids.org/home/ids\\_study\\_commission\\_report.pdf](http://www.ncids.org/home/ids_study_commission_report.pdf).

<sup>29</sup> G.S. 7A-498.4. Commissioners serve a 4-year term, with an optional one-time reappointment. *Id.* Commissioners must have significant experience in the defense of cases subject to the IDS Act, or have a demonstrated commitment to quality representation in indigent cases. G.S. 7A-498.4(d).

<sup>30</sup> G.S. 7A-498.5.

<sup>31</sup> S.L. 2011-145, sec. 15.16(b) (amending G.S. 7A-498.7(b); requires the local bar to nominate two to three candidates, from which the IDS Commission will make its selection).

<sup>32</sup> S.L. 2013-360, sec. 18A.5(a).

The authority to appoint the Public Defender has been vested in different persons and in a combination of persons over time. When the State's first two Public Defender offices were created in 1970, the Governor was given authority to appoint the Public Defender. S.L. 1969-1013. In 1973, a third office was created in District 28 (Buncombe County); while the Governor retained appointment authority with respect to the first two offices, the senior resident superior court judge was given appointment authority for the new office. S.L. 1973-799, sec. 2. From 1975 to 1981, additional offices were created, with the Governor designated as appointing authority. S.L. 1975-956, sec. 14; S.L. 1979-1284, sec. 2; S.L. 1981-1282, sec. 73. Then, in 1985, appointment authority was transferred to the senior resident superior court judge for all offices. S.L. 1985-698, sec. 22.1. In 1987, two new offices were created in Districts 16A (Scotland and Hoke Counties) and 16B (Robeson County). S.L. 1987-1056, sec. 8. The senior resident superior court judge was given appointment authority in District 16A; however, appointment authority for District 16B was vested with "the resident superior court judge of superior court district 16B other than the senior resident superior court judge." *Id.* at sec. 10. This arrangement continued until the Senior Resident Superior Court Judge in District 16B, Joe Freeman Britt, left the bench in 1997, at which time appointment authority in the district was given to the senior resident superior court judge. S.L. 1997-175. Meanwhile, when a new office was created in District 14 (Durham County), appointment authority went to the senior resident superior court judge. S.L. 1989-1066, sec. 127(b). Thus, by the time IDS and the IDS Commission were created, appointment authority for all Chief Public Defenders resided with the senior resident superior court judge. Although the report of the legislative study commission that led to the Indigent Services Act recommended that the IDS Commission be vested with authority to appoint Chief Public Defenders, LEGISLATIVE STUDY COMMISSION REPORT, *supra* note 28, at 2, when the IDS Commission was created, appointing authority was left with the senior resident judges. The IDS Commission was first vested with that authority in 2011; specifically, the IDS Commission was authorized to select the Chief Public Defender from a list of two or three attorneys nominated by the local bar. S.L. 2011-145, sec. 15.16(b). Then, effective August 1, 2013, responsibility for appointing Chief Public Defenders was transferred back to the local senior resident superior court judges. S.L. 2013-360, sec. 18A.5(a).

## IDS

As initially created in 2001, IDS was an independent agency within the Judicial Department. However, the 2015 Appropriations Act provides that IDS is a sub-agency of the North Carolina Administrative Office of the Courts (NCAOC).<sup>33</sup> That Act also provides that the IDS budget is part of the NCAOC budget, that the NCAOC shall conduct an annual audit of the IDS budget, and that the NCAOC director has the authority to modify the IDS budget without approval of the IDS Commission.<sup>34</sup>

The IDS office includes the executive director and administrative staff.<sup>35</sup> It is responsible for administration and implementation of policy as directed by the Commission. The executive director has direct oversight of the Office of the Special Counsel, and fiscal authority over the 16 public defender offices.<sup>36</sup> The IDS office also has statutory reporting requirements.<sup>37</sup>

The NCAOC provides general administrative support to IDS,<sup>38</sup> in the form of purchasing and personnel functions and technology and telecommunications support.<sup>39</sup>

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<sup>33</sup> S.L. 2015-241, sec. 18A.17(b).

<sup>34</sup> *Id.*

<sup>35</sup> IDS REPORT, *supra* note 18. IDS' administrative offices accounted for less than 2% of IDS' overall budget in fiscal year 2014-15. *Id.* at 4.

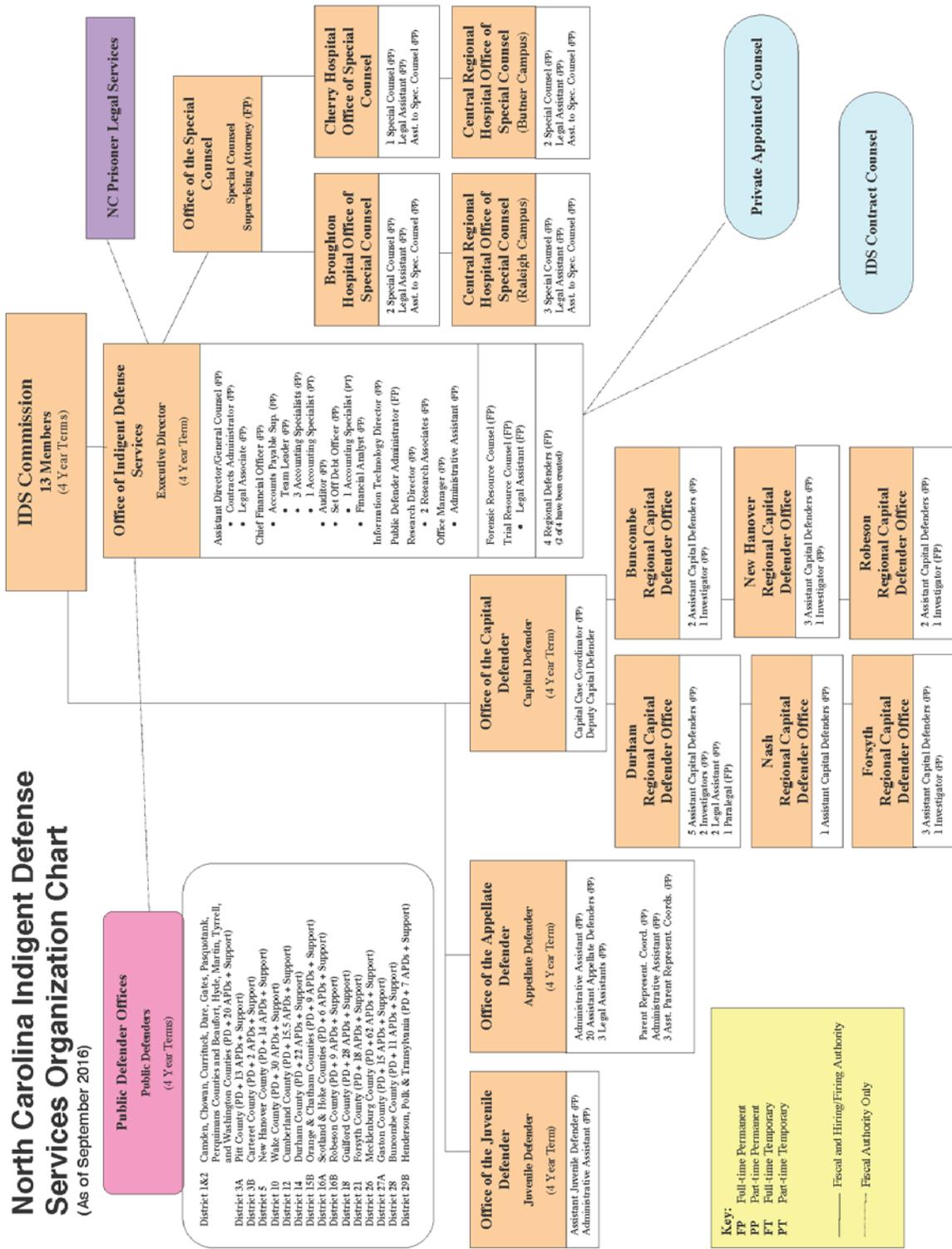
<sup>36</sup> Public defender offices are located in the following areas: District 1& 2: Camden, Chowan, Currituck, Dare, Gates, Pasquotank, Perquimans Counties and Beaufort, Hyde, Martin, Tyrrell, and Washington Counties; District 3A: Pitt County; District 3B: Carteret County; District 5: New Hanover County; District 10: Wake County; District 12: Cumberland County; District 14: Durham County; District 15B: Orange & Chatham Counties; District 16A: Scotland & Hoke Counties; District 16B: Robeson County; District 18: Guilford County; District 21: Forsyth County; District 26: Mecklenburg County; District 27A: Gaston County; District 28: Buncombe County; District 29B: Henderson, Polk & Transylvania. IDS REPORT, *supra* note 18.

<sup>37</sup> IDS must report annually to the Chairs of the Joint Legislative Oversight Committee on Justice and Public Safety and to the Chairs of the House of Representatives Subcommittee on Justice and Public Safety and the Senate Appropriations Committee on Justice and Public Safety on: the volume and cost of cases handled in each district by assigned counsel or public defenders; actions taken to improve the cost-effectiveness and quality of indigent defense services, including the capital case program; plans for changes in rules, standards, or regulations in the upcoming year; and any recommended changes in law or funding procedures that would assist IDS in improving the management of indigent defense services funds, including recommendations concerning the feasibility and desirability of establishing regional public defender offices. G.S. 7A-498.9. Also, IDS must report annually on contracts with local governments for additional assistant public defender positions. G.S. 7A-346.2(a).

<sup>38</sup> G.S. 7A-498.2(c).

<sup>39</sup> IDS REPORT, *supra* note 18, at 11.

Fig. 1. Organizational Chart



Source: Email from Whitney B. Fairbanks, Assistant Director/General Counsel, NC IDS to Committee Reporter (Sept. 31, 2016) (on file with Reporter)

## Case Types & Caseloads

IDS provides counsel in the categories of cases shown in Fig. 2 below.

**Fig. 2. IDS Case Types**

- Capital cases at the trial level
- Non-capital at the trial level, misdemeanors and felonies
- Juvenile delinquency
- Civil commitments
- Competency/Guardianship
- Adult protective services
- Juvenile abortion waivers
- Minors petitioning to marry
- Abuse, neglect, dependency cases
- Termination of parental rights cases
- Civil and criminal contempt
- Treatment courts
- Direct appeals
- Post-conviction proceedings, capital, and non-capital

*Source: Email from Danielle Carman, former Assistant Director/General Counsel, NC IDS to Committee Reporter (Mar. 31, 2016) (on file with Reporter).*

In fiscal year 2014-15, IDS handled 320,489 cases.<sup>40</sup> Based on NCAOC data, IDS handled 53.7% of all non-traffic criminal filings in North Carolina in that year.<sup>41</sup> However, IDS handled a greater percentage of non-traffic superior court criminal dispositions (71%) than non-traffic district court criminal dispositions (49.4%).<sup>42</sup>

IDS has responsibility for a wider range of cases than do North Carolina’s prosecutors. In North Carolina, prosecutors handle only trial level criminal cases and some post-conviction matters. Unlike IDS, the prosecution is not responsible for criminal appeals; advocacy for the State in criminal appeals is handled by the Attorney General’s office. And unlike IDS, the prosecution is not involved in any civil cases.

## Funding & Budget

Indigent defense services primarily are funded through State appropriations from the General Fund and budgeted recoupment revenues.<sup>43</sup> Budget appropriations for the fiscal biennium ending June 30, 2017 are shown in Figure 3 below. Recoupment revenue is shown in Figure 4 below. In addition to state funds, IDS pursues grant funding to support special projects.<sup>44</sup> Also, two counties —

<sup>40</sup> IDS REPORT, *supra* note 18, at Appendix C.

<sup>41</sup> *Id.* at 33.

<sup>42</sup> Email from Danielle Carman, former Assistant Director/General Counsel NC IDS to Committee Reporter (Mar. 31, 2016) (on file with Reporter).

<sup>43</sup> If an indigent defendant is convicted, attorney fees and the \$60 appointment fee are due back to the state, either through probation or collection of a civil judgment. *See* NC OFFICE OF INDIGENT DEFENSE SERVICES, INDIGENCY SCREENING AND RECOUPMENT (Mar. 2016), [http://www.ncids.org/News%20&%20Updates/Screening\\_Recoupment.pdf](http://www.ncids.org/News%20&%20Updates/Screening_Recoupment.pdf). “Recoupment” refers to the collection of these funds.

<sup>44</sup> IDS REPORT, *supra* note 18, at 28-29 (listing grants received).

Mecklenburg and Durham — provide additional support for indigent defense under an agreement with IDS.<sup>45</sup>

**Fig. 3. IDS Budget Appropriations**

Fiscal Year	Base Budget	Recurring Adjustments <sup>46</sup>	Nonrecurring Adjustments	Total Appropriation
FY 2015-2016	\$112,087,174	\$3,485,302	\$430,421	<b>\$116,002,897</b>
FY 2016-2017	\$112,097,118	\$6,717,688	\$4,256,503	<b>\$123,071,309</b>

*Source: S.L. 2015-241; Email from Thomas K. Maher, Executive Director, NC IDS to Committee Reporter, Sept. 30, 2016 (explaining adjustments made in the short session) (on file with Reporter).*

**Fig. 4. IDS Recoupment Revenue**

Fiscal Year	Recoupment Revenue (millions)
FY 2012	\$13.2
FY 2013	\$13
FY 2014	12.9
FY 2015	\$10.02

*Sources: REPORT OF THE COMMISSION ON INDIGENT DEFENSE SERVICES 24 (Submitted to the N.C. General Assembly Mar. 1, 2013); REPORT OF THE COMMISSION ON INDIGENT DEFENSE SERVICES 26 (Submitted to the N.C. General Assembly Mar. 10, 2014); REPORT OF THE COMMISSION ON INDIGENT DEFENSE SERVICES 28 (Submitted to the N.C. General Assembly Feb. 1, 2015); REPORT OF THE COMMISSION ON INDIGENT DEFENSE SERVICES 33 (Submitted to the N.C. General Assembly Mar. 1, 2016).*

### Characteristics of an Effective Indigent Defense System

Agreement as to the characteristics of an effective indigent defense system is a necessary prerequisite to any recommendations regarding North Carolina's indigent defense system. Without agreement as to what the system *should provide*, there is no baseline against which to assess its components. The characteristics presented here derive from this overall goal for North Carolina's indigent defense system:

*The goal of North Carolina's indigent defense system is to ensure fair proceedings by providing effective representation in a cost-effective manner.*

<sup>45</sup> *Id.* at 42; Email from Thomas K. Maher, Executive Director, NC IDS to Committee Reporter, Oct. 3, 2016 (on file with Reporter).

<sup>46</sup> A significant portion of the recurring adjustments to the IDS budget were allocated to address a dramatic reduction in recoupment revenue due to changes in the NC tax code. *See* Figure 4 (showing reduction in recoupment revenue); Email from Danielle Carman, former Assistant Director/General Counsel NC IDS to Committee Reporter, June 10, 2016 (on file with Reporter) (explaining the need for recurring adjustments). As IDS has explained:

[T]he 2013 state tax reforms were accompanied by changes in the withholding tables that are resulting in 40% to 50% fewer people receiving state income tax refunds. One-third of IDS' previous recoupment revenues came from intercepted state tax refunds, and revenues have declined significantly as a result of the tax changes.

*Id.*

## Meaningful Access to Counsel

### Types of Cases

The United States and North Carolina Constitutions require the State to provide indigent defense services for felony cases and misdemeanor cases if an active or suspended sentence is imposed and in specified other proceedings.<sup>47</sup> North Carolina’s lawmakers, however, have long recognized that there are good reasons to provide indigent defense services in additional case types above the constitutional floor,<sup>48</sup> such as promoting efficient case management and ensuring fairness and confidence in the court system. In addition to constitutionally required services, an effective indigent defense program provides services in proceedings arising from or connected with a criminal action in which the defendant may be deprived of liberty or otherwise subjected to serious deprivations<sup>49</sup> or resulting in significant collateral consequences.<sup>50</sup>

### Determination of Indigency

The system must promptly and meaningfully screen clients for eligibility<sup>51</sup> and decision makers must have clear and easily implemented written uniform standards for assessing indigency.<sup>52</sup> For example, one guideline might state that a defendant who is incarcerated or receiving food stamps is presumed to be indigent.<sup>53</sup> Use of presumptions streamlines the process and reduces the cost of indigency screening.<sup>54</sup> For those not presumed to be indigent, indigency should be determined based on standards that compare “the individual’s available income and resources to the actual price of retaining a private attorney.”<sup>55</sup> “Non-liquid assets, income needed for living expenses, and

<sup>47</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963) (felony defendants); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (all criminal charges resulting in imprisonment); *Alabama v. Shelton*, 535 U.S. 654 (2002) (suspended sentences); *In Re Gault*, 387 U.S. 1 (1967) (juvenile delinquency proceedings); *Douglas v. California*, 372 U.S. 353 (1963) (first appeal granted as a matter of right).

<sup>48</sup> *See, e.g.*, G.S. 7A-451(a)(3) (defendant has a right to counsel on a post-conviction motion for appropriate relief).

<sup>49</sup> AMERICAN BAR ASSOCIATION, ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES, Standard 5-5.2 & Commentary (3d ed. 1992) [hereinafter ABA STANDARDS].

<sup>50</sup> *See* John D. King, *Beyond “Life and Liberty”: The Evolving Right to Counsel*, 48 HARV. CIV. RIGHTS-CIV. LIBERTIES L. REV. 1 (2013) (arguing that defendants facing severe collateral consequences require the assistance of counsel).

<sup>51</sup> AMERICAN BAR ASSOCIATION, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 3 (2002) [hereinafter ABA TEN PRINCIPLES] (Principle 3 provides: “Clients are screened for eligibility . . .”); JUSTICE DENIED, *supra* note 4, at 197-98 (noting that it is “highly desirable that screening be undertaken pursuant to uniform written standards used throughout the jurisdiction” and that the statewide Commission “is in a position to adopt uniform eligibility standards for the state”); BRENNAN CENTER FOR JUSTICE, ELIGIBLE FOR JUSTICE: GUIDELINES FOR APPOINTING DEFENSE COUNSEL 6 (2008) [hereinafter ELIGIBLE FOR JUSTICE] (“Screening is a good idea in almost every jurisdiction.”), <https://www.brennancenter.org/sites/default/files/legacy/publications/Eligibility.Report.pdf>.

<sup>52</sup> ELIGIBLE FOR JUSTICE, *supra* note 51, at 2, 5-6 (standards should be uniform and in writing); ABA STANDARDS, *supra* note 49, Commentary to Standard 5-7.1 (“to assure fair eligibility determination and equal treatment for defendants . . ., it is essential that there be detailed written guidelines” for determining indigency). Several states currently have uniform, statewide screening criteria, including Massachusetts, New Hampshire and Oregon. ELIGIBLE FOR JUSTICE, *supra* note 51, at 7.

<sup>53</sup> ELIGIBLE FOR JUSTICE, *supra* note 51, at 21-22. The ability of the defendant to post bond should not be used as a basis for determining indigency because it requires the accused to choose between receiving legal representation and the opportunity to be at liberty pending trial. *Id.* at 5, 17-18; ABA STANDARDS, *supra* note 49, Commentary to Standard 5-7.1.

<sup>54</sup> ELIGIBLE FOR JUSTICE, *supra* note 51, at 21-22 (listing standards that can be used to create such a presumption).

<sup>55</sup> *Id.* at 2.

income and assets of family and friends should not be considered available for purposes of this determination.”<sup>56</sup> The standard should not determine individuals ineligible based on strict income or asset cut-offs.<sup>57</sup>

Although uniform standards are the goal, geographic variations in the cost of living and the price of obtaining a lawyer may require local adjustments.<sup>58</sup>

Uniform eligibility standards provide several benefits. First, they help the state predict future costs of indigent defense services.<sup>59</sup> Second, they help ensure that state funds are used only for persons who are in fact indigent.<sup>60</sup> Third, they “raise the quality of defense services by concentrating communities’ limited resources where they are truly needed.”<sup>61</sup> Fourth, uniform standards promote fairness by ensuring that similarly situated persons are treated similarly.<sup>62</sup> And finally, uniform standards promote due process by guarding against arbitrary eligibility determinations.<sup>63</sup>

Eligibility determinations should not be done by individuals affiliated with the indigent defense services program or any entity that has a conflict of interest in the indigency determination.<sup>64</sup> Consistent with this principle, a number of people can serve as screeners, such as the magistrate, court personnel, or a judge other than the presiding judge.<sup>65</sup>

Eligibility standards should be regularly updated to account for, among other factors, inflation and increases in the cost of living.<sup>66</sup> To ensure appropriate use of taxpayer funds, the system must regularly verify, through auditing or other techniques, that the screening tool ensures that services are being provided only to indigent persons.

### Timely Appointment of Counsel

Timely appointment of counsel is a key component of an effective indigent defense delivery system.<sup>67</sup> Timely appointment is necessary for several reasons, one of which is to advocate on the client’s behalf with respect to pretrial release.<sup>68</sup> Relatedly, early appointment of counsel may

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<sup>56</sup> *Id.* at 2, 5, 14-17.

<sup>57</sup> *Id.* at 12.

<sup>58</sup> *Id.* at 7 (“Although statewide uniformity of screening criteria and procedures is desirable, local variations in the cost of retaining private counsel and in the cost of living may require that particular jurisdictions depart from statewide standards . . .”).

<sup>59</sup> JUSTICE DENIED, *supra* note 4, at 198 (so stating); ELIGIBLE FOR JUSTICE, *supra* note 51, at 7.

<sup>60</sup> ELIGIBLE FOR JUSTICE, *supra* note 51, at 2.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 6.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 2, 5, 8 (“[C]ommunities should protect screening from conflicts of interest. Prosecutors, defense attorneys, and presiding judges all have interests—for example, in controlling their workloads by resolving cases—which conflict with their need to be objective when deciding who should receive free counsel. Decisions about eligibility should be made by those who are not involved with the merits of individuals’ cases.”); JUSTICE DENIED, *supra* note 4, at 198 (asserting that screening should be done by court or other personnel; citing concerns regarding conflict of interest, confidentiality rules, and harm to the attorney-client relationship).

<sup>65</sup> ELIGIBLE FOR JUSTICE, *supra* note 51, at 8 (listing other appropriate screeners).

<sup>66</sup> *Id.* at 7.

<sup>67</sup> ABA TEN PRINCIPLES, *supra* note 51, Principle 3 (“defense counsel is assigned and notified of appointment, as soon as feasible after clients’ arrest, detention, or request for counsel”).

<sup>68</sup> ABA STANDARDS, *supra* note 49, Commentary to Standard 5-6.1 (“Where the accused is incarcerated, defense counsel must begin immediately to marshal facts in support of the defendant’s pretrial release from

reduce the number of instances where defendants plead guilty simply to obtain release from pretrial detention.<sup>69</sup> Early appointment of counsel also is necessary so the defense can obtain and preserve critical evidence that may otherwise dissipate;<sup>70</sup> advocate for charges to be dismissed, reduced, or diverted;<sup>71</sup> and allow the defendant to more effectively aid in his or her defense.<sup>72</sup> Thus, counsel should be provided as soon as possible after arrest, charge, detention, or a request for counsel by the client.<sup>73</sup>

### Access to Counsel

Whether in custody or released, indigent defendants must have meaningful access to counsel. Among other things, counsel must be available to interview the defendant prior to court appearances, discuss plea options, identify relevant evidence and key witnesses, and prepare the defendant for hearings and trial. Access also requires that counsel have an office in or near the jurisdiction<sup>74</sup> or be able to demonstrate that counsel will be available to the court and to the defendant.

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custody.”); JUSTICE DENIED, *supra* note 4, at 8 (lack of a timely appointment causes defendants to remain in custody far longer than they would otherwise); *id.* at 86; Billings Comments, *supra* note 4 (noting the recurring problem of people charged with nonviolent offenses languishing in jail because they do not have an advocate who can argue for pretrial release or for a speedy trial); Holder, *supra* note 6 (“In . . . parts of the country, . . . defendants may sit in jail cells for weeks, even months, waiting for a lawyer.”); *see generally* Nadine Frederique et al., *What is the State of Empirical Research on Indigent Defense Nationwide? A Brief Overview and Suggestions for Future Research*, 78 ALBANY L. REV. 1317, 1322 (2015) [hereinafter *Empirical Research on Indigent Defense*] (discussing studies showing that involvement of counsel has positive impacts on pretrial release determinations). The importance of securing early pretrial release cannot be overstated. For example, one recent study found that, controlling for all other factors, “when held 2-3 days, low-risk defendants were almost 40 percent more likely to commit new crimes before trial than equivalent defendants held no more than 24 hours.” Laura and John Arnold Foundation, *Pretrial Criminal Justice Research* (LJAF Research Summary) Nov. 2013, at 4, [http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-Pretrial-CJ-Research-brief\\_FNL.pdf](http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-Pretrial-CJ-Research-brief_FNL.pdf).

<sup>69</sup> JUSTICE DENIED, *supra* note 4, at 86.

<sup>70</sup> ABA STANDARDS, *supra* note 49, Commentary to Standard 5-6.1 (“Often there are witnesses who must be interviewed promptly by the defense lest their memories of critical events fade or the witnesses become difficult to locate.”); JUSTICE DENIED, *supra* note 4, at 86 (late appointment of counsel affects the ability to prepare a defense: “Unless counsel represents the accused soon after arrest, witnesses may be lost, memories of witnesses may fade, and physical evidence useful to the defense may disappear.”).

<sup>71</sup> ABA STANDARDS, *supra* note 49, Commentary to Standard 5-6.1 (“Counsel’s early presence in the case can also sometimes serve to convince the prosecutor to dismiss unfounded charges, to charge the accused with less serious offenses, or to divert the case entirely from the criminal courts.”). The Committee notes that early resolution of cases reduces system costs overall.

<sup>72</sup> Billings Comments, *supra* note 4 (noting that if a defendant is not allowed pretrial release, his or her ability to aid in the defense is greatly inhibited).

<sup>73</sup> ABA STANDARDS, *supra* note 49, Standard 5-6.1 (“as soon as feasible”); *see also* JUSTICE DENIED, *supra* note 4, at 13 (expressly recommending that “defense lawyers should be provided as soon as feasible after accused persons are arrested, detained, or request counsel”); Billings Comments, *supra* note 4 (right to counsel must begin with the initiation of criminal process and noting that the report of the National Right to Counsel Committee so recommended). Some standards suggest that counsel typically should be provided within 24 hours of such events. ABA TEN PRINCIPLES, *supra* note 51, Commentary to Principle 3.

<sup>74</sup> Exceptions to the general rule may be appropriate in some proceedings, such as appellate litigation and capital and other serious cases requiring specialized expertise that may not be available locally.

## Counsel is Qualified

The system must provide qualified counsel uniformly throughout the state.<sup>75</sup> In order to meet this obligation, the system must provide appropriate supervision, oversight and support to counsel, as detailed below.

### Supervision & Oversight

National standards recognize that supervision and oversight of counsel is essential to ensure that the system is providing effective representation.<sup>76</sup> Such supervision and oversight should be done by system-employed supervisors.<sup>77</sup>

#### *Initial Selection of Counsel*

In an effective indigent defense system, counsel’s “ability, training, and experience match the complexity of the case.”<sup>78</sup> To provide this guarantee, the system must have uniform statewide standards specifying the prerequisite skills and experience counsel must possess to handle each type of case for which indigent services are provided.<sup>79</sup> These standards should specify, at a minimum, training requirements (what topics; how much; acceptable providers; how recent, etc.) and required litigation experience (types of cases; how many; how recent, etc.). “A meaningful assessment of attorney qualifications, however, should go beyond objective quantitative measures.”<sup>80</sup> Appointment standards should be regularly reviewed and modified, as needed, based on developments in the law, science, technology and other disciplines relevant to criminal defense practice.

If there is an insufficient number of qualified counsel to handle caseloads in any geographic area or for any particular type of case, the system should devote resources and develop programs for counsel to gain the necessary skills and experience.

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<sup>75</sup> As has been noted:

No system of public defense representation for indigent persons can be successful unless the lawyers who provide the representation are capable of rendering quality representation. Regardless of whether assigned counsel, contract attorneys, or public defenders provide the defense services, states should require that the attorneys be well-qualified to do so.

JUSTICE DENIED, *supra* note 4, at 191.

<sup>76</sup> ABA TEN PRINCIPLES, *supra* note 51, Principle 10 (“[d]efense counsel is supervised and systematically reviewed for quality and efficiency”); *see also* JUSTICE DENIED, *supra* note 4, at 12 (expressly recommending that the statewide board or commission “should ensure that all attorneys who provide defense representation are effectively supervised and remove those defense attorneys who fail to provide quality services”); *id.* at 91 (it is “essential” that counsel “be appropriately . . . supervised”); SYSTEM OVERLOAD, *supra* note 5, at 10; ROBERT C. BORUCHOWITZ ET AL., MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA’S BROKEN MISDEMEANOR COURTS 40-41 (2009) [hereinafter MINOR CRIMES, MASSIVE WASTE] (“Supervision of misdemeanor defenders is sorely lacking and, often, performance reviews are non-existent”; recommending that such lawyers be actively supervised).

<sup>77</sup> JUSTICE DENIED, *supra* note 4, at 192.

<sup>78</sup> ABA TEN PRINCIPLES, *supra* note 51, Principle 6.

<sup>79</sup> JUSTICE DENIED, *supra* note 4, at 191 (recommending that the Commission establish and enforce qualification standards and specifying: “A tiered system of qualifications for appointment to different levels of cases, depending on the training and experience of the lawyers, will help to ensure that the defender has the requisite knowledge and skills to deliver high quality legal services, whether the charge is juvenile delinquency, a simple misdemeanor, or a complex felony.”).

<sup>80</sup> *Id.* (so stating and noting that “States should also implement other more substantive screening tools, including audits of prior performance, in-court observations, inspection of motions and other written work, and peer assessments”).

To ensure that counsel's ability, training, and experience match the complexity of the case assigned, supervision is required with respect to selection of counsel for each case. Supervision also is required to avoid conflicts, both at initial appointment and as the case develops.<sup>81</sup> And it is required to ensure that counsel has appropriate resources to handle the case, such as office space, office support, access to research tools, etc.<sup>82</sup>

### ***Ongoing Evaluation of Counsel***

The fact that counsel is determined at the outset to have the necessary ability, skills, and experience to handle the case is insufficient to ensure that he or she is delivering effective representation.<sup>83</sup> The system should have uniform performance standards for all types of cases.<sup>84</sup> Evaluation against those standards should involve observations of counsel's in-court performance and client and witness interviews; reviewing counsel's legal filings; and soliciting input from judges, prosecutors, clients and peers.<sup>85</sup> Evaluation should involve an opportunity for the supervisor to give counsel feedback and develop a remediation plan for any deficiencies.

### ***Ability to Reward & Sanction***

In order to incentivize excellence, supervisors must be able to reward good performance. Additionally, system-employed supervisors must have authority to remove or disqualify counsel who provide deficient performance, pursuant to established criteria.<sup>86</sup> Because peers may be reluctant to remove or disqualify a colleague, this authority should not reside with volunteer local bar committees. To preserve counsel's independence,<sup>87</sup> authority to remove or disqualify counsel from performing indigent defense services should not lie with the judge, except in cases where removal is required by law or pursuant to the court's inherent authority to discipline counsel.

### ***Monitoring Workload***

To ensure that counsel has sufficient time to spend on each case, system supervisors should monitor and adjust workloads for all counsel providing indigent defense services. Monitoring and adjustment should be made pursuant to uniform, statewide workload formulas, as discussed below.<sup>88</sup>

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<sup>81</sup> For a discussion of the types of conflicts to be avoided, see OFFICE OF INDIGENT DEFENSE SERVICES, REPORT ON PUBLIC DEFENDER CONFLICTS FOR FISCAL YEAR 2014-15 (2015).

<sup>82</sup> See *infra* pp. 17-19 (discussing necessary resources).

<sup>83</sup> JUSTICE DENIED, *supra* note 4, at 192 ("It is not sufficient, however, just to make sure that attorneys who provide defense services are qualified when they begin to provide representation.").

<sup>84</sup> *Id.* at 12 (expressly recommending that board or commission "should establish and enforce qualification and performance standards"); *id.* at 91 ("it is essential that . . . lawyers adhere to performance standards"); see also *Empirical Research on Indigent Defense*, *supra* note 68, at 1323-24 (2004 study concluded that indigent defense standards improved quality).

<sup>85</sup> ABA TEN PRINCIPLES, *supra* note 51, Principle 10 ("Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards."); *id.* Commentary to Principle 10 ("The defender office (both professional and support staff), assigned counsel, or contract defenders should be supervised and periodically evaluated for competence and efficiency").

<sup>86</sup> ABA STANDARDS, *supra* note 49, Standard 5-2.3 ("[t]he roster of lawyers should periodically be revised to remove those who have not provided quality legal representation"; "Specific criteria for removal should be adopted in conjunction with qualification standards."); JUSTICE DENIED, *supra* note 4, at 12 (expressly recommending that the statewide commission "should ensure that all attorneys who provide defense representation are effectively supervised and remove those defense attorneys who fail to provide quality services"); *id.* at 191-92.

<sup>87</sup> See *infra* p. 21.

<sup>88</sup> See *infra* p. 18.

## Resources

Even the most qualified and dedicated counsel cannot provide effective assistance if counsel lacks necessary resources,<sup>89</sup> as outlined below.

### ***Time***

Having appropriate time to handle a case is essential to providing a quality defense.<sup>90</sup> Counsel cannot provide effective representation when caseloads are excessive and counsel lacks time to perform critical tasks, including interviewing clients and witnesses; conducting legal research; writing and responding to motions; accessing and preparing experts, and preparing to advocate on the client's behalf at hearings, trial and sentencing.<sup>91</sup> The costs of ineffective assistance to defendants, victims, the court system and the citizens of North Carolina are detailed above.<sup>92</sup> Additionally, problems with excessive caseloads can compound: "Eventually, working under such conditions on a daily basis undermines attorney morale and leads to turnover, which in turn, contributes to excessive caseloads for the remaining defenders and increases the likelihood that a new, inexperienced attorney will be assigned to handle at least part of the caseload."<sup>93</sup> Thus, national standards emphasize the need for defense counsel to have manageable case and workloads.<sup>94</sup>

### ***Workload Formulas***

To ensure that counsel has sufficient time to handle indigent cases and is prepared when the case is called for hearing or trial, the system should have workload formulas in place for all indigent defense providers.<sup>95</sup> The workload formulas should be more sophisticated than simple caseload limits,<sup>96</sup> taking into consideration factors such as case complexity, administrative responsibilities<sup>97</sup> and counsel's skill and experience. Workload formulas should balance quality and efficiency.<sup>98</sup>

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<sup>89</sup> Billings Comments, *supra* note 4 (when an attorney is overburdened with cases and does not have adequate resources (e.g., for investigators), even the most competent attorney cannot be effective).

<sup>90</sup> *Id.*; ABA TEN PRINCIPLES, *supra* note 51, Principle 5 ("Defense counsel's workload is controlled to permit the rendering of quality representation."); SYSTEM OVERLOAD, *supra* note 5, at 10, 13.

<sup>91</sup> ABA STANDARDS, *supra* note 49, Commentary to Standard 5-5.3 ("One of the most significant impediments to the furnishing of quality defense services for the poor is the presence of excessive workloads."); JUSTICE DENIED, *supra* note 4, at 65; *see also id.* at 7; Billings Comments, *supra* note 4 (when an attorney is overburdened with cases even the most competent attorney cannot be effective).

<sup>92</sup> *See supra* pp. 3-5.

<sup>93</sup> JUSTICE DENIED, *supra* note 4, at 65; *see also id.* at 69 (citing a survey finding a statistically significant correlation between excessive caseloads and use of less experienced lawyers to handle serious felony cases).

<sup>94</sup> ABA TEN PRINCIPLES, *supra* note 51, Principle 5.

<sup>95</sup> JUSTICE DENIED, *supra* note 4, at 12 (expressly recommending that the board or commission "should establish and enforce workload limits for defense attorneys"); *id.* at 68 ("High caseloads often force attorneys to continue cases."); *id.* at 194 ("The issue of workload is important not only to public defenders but also to assigned counsel and to private attorneys who provide services pursuant to contracts. In the case of private attorneys, this should include oversight of the extent of their practice in order to ensure that they have adequate time to devote to their indigent cases.").

<sup>96</sup> There is, however, some evidence that even caseload caps improve the quality of representation. Geoff Burkhart, *How to Improve Your Public Defense Office*, CRIMINAL JUSTICE, Spring 2016, at 56, 57 (noting that a study by the Center for Court Innovation found that New York City's caseload caps resulted in "highly positive" results).

<sup>97</sup> ABA STANDARDS, *supra* note 49, Commentary to Standard 5-5.3 (simple caseload limits are insufficient); JUSTICE DENIED, *supra* note 4, at 12 (expressly recommending that workload limits should take into account other responsibilities in addition to client representation); *id.* at 192-93.

<sup>98</sup> *See* ABA TEN PRINCIPLES, *supra* note 51, Principle 5 ("Defense counsel's workload is controlled to permit the rendering of quality representation.").

Additionally, procedures must be in place to ensure that defense counsel has adequate time to provide quality representation at the time of appointment and throughout representation.<sup>99</sup>

### ***Access to Investigators, Experts & Other Support***

Counsel must have access to necessary experts, such as mental health and forensic experts<sup>100</sup> and investigators and interpreters.<sup>101</sup> Access must be timely so that counsel can prepare for pretrial hearings, such as bail and competency hearings. Counsel must have access to specialized legal resources, such as forensic resources and immigration counsel. Counsel must have necessary office support, such as a suitable location to work, a private location for client and witness meetings, computer and internet access, telephone services, and access to pattern jury instructions and online legal research tools.<sup>102</sup> While the system should endeavor to provide such access when possible, counsel without such resources should not be allowed to provide indigent defense services.

### ***Compensation***

Reasonable compensation is required to ensure that the State can sustainably provide effective indigent defense services.<sup>103</sup> When compensation falls below reasonable levels, lawyers who can be reasonably compensated elsewhere flee the system. An insufficient number of competent lawyers threatens the system's ability to guarantee effective assistance of counsel, both because of the quality of counsel available and because of higher caseloads for quality counsel still performing indigent work.<sup>104</sup> All of the other costs of failing to provide effective assistance also attach, such as wrongful convictions and case delays.<sup>105</sup>

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<sup>99</sup> JUSTICE DENIED, *supra* note 4, at 65 (noting that NLADA guidelines so require and that withdrawal should be sought when counsel has insufficient time to provide quality representation).

<sup>100</sup> Experts often are necessary to present an effective defense, test physical evidence, or provide an opinion independent of the prosecution's state-supplied expert. JUSTICE DENIED, *supra* note 4, at 93-94. For an indigent defendant's legal right to such assistance, see *Ake v. Oklahoma*, 470 U.S. 68 (1985) (right to mental health expert) and JUSTICE DENIED, *supra* note 4, at 25 & n.36.

<sup>101</sup> ABA STANDARDS, *supra* note 49, Standard 5.14 ("The legal representation plan should provide for investigatory, expert, and other services necessary to quality legal representation."); JUSTICE DENIED, *supra* note 4, at 13, 93-95 ("The outcome of a criminal case can hinge on retaining an appropriate expert or conducting a thorough fact investigation. In the case of non-English speaking clients, qualified interpreters are critical for attorney-client communication."); SYSTEM OVERLOAD, *supra* note 5, at 10, 13; Billings Comments, *supra* note 4.

Investigators are needed to interview witnesses and collect physical evidence. JUSTICE DENIED, *supra* note 4, at 93. The Committee notes that access to investigators may reduce the cost of indigent defense services. ABA STANDARDS, *supra* note 49, Commentary to Standard 5-1.4 ("If the defense attorney must personally conduct factual investigations, the financial cost to the justice system is likely to be greater because the defender's time is generally more valuable than the investigator's.").

<sup>102</sup> ABA STANDARDS, *supra* note 49, Commentary to Standard 5-1.4 (importance of, among other things, secretarial support, computers, telephones, and copying and mailing facilities); *id.*, Commentary to Standard 5-4.3 (it is "essential" that facilities be provided in which clients can be interviewed in privacy and that counsel have necessary office equipment and legal research tools); *see also* JUSTICE DENIED, *supra* note 4, at 8 (lawyers must have access to technology and data).

<sup>103</sup> JUSTICE DENIED, *supra* note 4, at 12 (expressly recommending that fair compensation should be provided); *id.* at 195 (noting that the ABA urges "reasonable" compensation).

<sup>104</sup> IDS REPORT, *supra* note 18, at 15.

<sup>105</sup> *See supra* pp. 3-5 (discussing these costs).

**Training**

Having access to training is essential to providing a quality defense.<sup>106</sup> Training is necessary not just for new lawyers, but for experienced lawyers,<sup>107</sup> so that they can keep abreast of changes in the law, science, technology, and other related disciplines.<sup>108</sup> It is also essential for support staff, such as investigators.<sup>109</sup>

**Feedback on Performance & Remediation Services**

As noted above, evaluation of counsel's performance should involve an opportunity for the evaluator to give counsel feedback and to support counsel by developing a remediation plan to address any deficiencies.<sup>110</sup>

**System Is Actively Managed  
Collect & Use Data in Decision-Making**

Lack of data is an obstacle to improving public defense systems.<sup>111</sup> Good data informs decision making and leads to better results. In an effective public defense system, data is gathered, maintained consistently over time, and plays a key role in decision making. Data needs in indigent defense are wide and varied and include, among other things:

- Measuring the quality of representation provided through various delivery methods
- Measuring the cost and cost effectiveness of various delivery mechanisms
- Assessing implications on performance of changes in procedures or standards
- Measuring cost implications of procedural or system changes
- Measuring workloads
- Measuring the effectiveness of training and other support systems
- Predicting future funding needs

**Long-Term Planning**

The system should have a long-term plan for providing indigent defense services that articulates discrete, measurable objectives. The plan should be evidence-based, in that it accounts for among other things: anticipated demographic changes, including geographic in- and out-migration;

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<sup>106</sup> ABA STANDARDS, *supra* note 49, Standard 5-1.5 (“The legal representation plan should provide for the effective training, professional development and continuing education of all counsel and staff involved in providing defense services.”); *id.* Commentary to Standard 5-1.5 (“Adequate and frequent training programs are a key component in the provision of quality representation by defense attorneys.”); ABA TEN PRINCIPLES, *supra* note 51, Principle 9 (“Defense counsel is provided with and required to attend continuing legal education.”); JUSTICE DENIED, *supra* note 4, at 91 (it is “essential” that counsel “be appropriately trained”); SYSTEM OVERLOAD, *supra* note 5, at 10, 15; MINOR CRIMES, MASSIVE WASTE, *supra* note 76, at 39-40 (“Appropriate training is critical to practice, regardless of level”; recommending that defense counsel be required to attend training on trial skills, substantive and procedural laws and collateral consequences before being allowed to represent misdemeanor defendants).

<sup>107</sup> ABA STANDARDS, *supra* note 49, Standard 5-1.5 (“The legal representation plan should provide for . . . continuing education of all counsel and staff”); *id.* Commentary to Standard 5-1.5 (“programs should be established for both beginning and advanced practitioners”).

<sup>108</sup> ABA TEN PRINCIPLES, *supra* note 51, Commentary to Principle 9 (training should be “comprehensive”).

<sup>109</sup> ABA STANDARDS, *supra* note 49, Standard 5-1.5 (“The legal representation plan should provide for the effective training . . . of all counsel and staff”).

<sup>110</sup> See *supra* p. 16.

<sup>111</sup> *What Policymakers Need to Know*, *supra* note 7, at 1.

predicted changes in crime rates; expectations regarding availability of counsel in geographic areas; and expected technology changes.

This type of long-term planning allows the system and the State to better predict resources needed for indigent defense services. It also allows for an evaluation of the overall system. Additionally, long-term planning permits the system to undertake systemic reform that requires longer lead and implementation time. And finally, when the system's long-term plan is endorsed by lawmakers, it allows the system to focus on accepted long-term objectives, rather than devoting resources to respond to short-term changes in sentiment.

### **Managed for Efficiency**

As noted, the goal of North Carolina's indigent defense system is to ensure fair proceedings by providing effective representation in a cost-effective manner.<sup>112</sup> The system must be gathering and using data to make evidence-based decisions about cost-effective ways of delivering services. This should involve evaluation of existing and alternative systems. The system should stay abreast of developments in other jurisdictions and new ideas that may yield efficiencies. When appropriate, pilot studies should be used to test new systems.

### **Reporting & Accountability**

To ensure transparency and confidence, the system should report regularly to the funding authority, courts, the bar, and the public, providing evidence-based assessments of system performance against discrete, measurable objectives.<sup>113</sup> The system should be audited regularly to ensure appropriate use of funds. The system should be directly accountable to the funding authority.

### **System Affords Appropriate Independence from the Judiciary**

Independence is a key component of an effective indigent defense system.<sup>114</sup> At the micro level independence refers to the ability of counsel to zealously advocate for the client, unimpeded by conflicts of interest, or control by the prosecutor or judge, except with respect to legal rulings and the trial court's inherent authority to discipline lawyers. To preserve independence at the micro level, direct supervisory authority over counsel should lie with system-employed supervisors. Although it is sometimes asserted that judges can provide the necessary supervision, allowing judges to supervise lawyers providing indigent defense services creates "[s]everal serious problems," including putting "constraints on zealous representation which do not exist for prosecutors or lawyers representing non-indigent clients."<sup>115</sup> Additionally, "[i]n general, judges lack

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<sup>112</sup> See *supra* p. 12.

<sup>113</sup> ABA STANDARDS, *supra* note 49, Commentary to Standard 5-1.2 ("[T]hose responsible for the administration of defense services programs . . . should render periodic reports on operations, and these reports should be made available to the funding source, to the courts, to the bar, and to the public. Regular reports help to maintain public confidence in the integrity of the services provided . . .").

<sup>114</sup> JUSTICE DENIED, *supra* note 4, at 7 (lack of independence is an impediment to a successful indigent defense program); *id.* at 80-84.

<sup>115</sup> LEGISLATIVE STUDY COMMISSION REPORT, *supra* note 28, at 7; see also ABA STANDARDS, *supra* note 49, Standard 5-1.3 (lawyers providing indigent services "should be subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice"); JUSTICE DENIED, *supra* note 4, at 7 (when there is a lack of independence from the judiciary, "[l]awyers deemed to be too aggressive may be excluded from appointments, or favoritism may be shown to certain lawyers, who are appointed to a disproportionate share of the cases"); Holder, *supra* note 6 (a statewide survey of Nebraska judges raised concerns about judges who refused to reappoint lawyers who requested too many trials).

the time and information to exercise uniform or coordinated management, or monitor or control the quality of representation.”<sup>116</sup> This sentiment was echoed by stakeholders who spoke to the Committee,<sup>117</sup> and is consistent with national guidelines.<sup>118</sup>

At the macro level, independence refers to the independence of the statewide indigent defense system. Assuring an appropriate level of system independence has long been understood to be a critical component of an effective indigent defense system.<sup>119</sup> Independence allows the system to set priorities statewide based on its overall goal of ensuring fair proceedings by providing effective representation in a cost-effective manner, as opposed to other court system goals that may undermine that objective, such as increasing case clearance rates. Additionally, an independent system serves as an important counterweight to pressures by individual actors in the court system, such as a district attorney who pressures a lawyer to resolve cases in a certain manner or a judge who unreasonably reduces a lawyer’s fees. Thus, the Report of the National Right to Counsel Committee “urge[d] that the state’s commission be an independent agency of state government and that its placement within any branch of government be for administrative purposes only.”<sup>120</sup>

### System Involved in Policy Discussions

As a critical stakeholder in the system with valuable information and experience, the indigent system and indigent defense providers should be involved in policy decisions that affect the delivery of indigent defense services.<sup>121</sup>

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<sup>116</sup> LEGISLATIVE STUDY COMMISSION REPORT, *supra* note 28, at 7.

<sup>117</sup> Comments of Superior Court Judge Anna Mills Wagoner, Committee Meeting Nov. 23, 2015 (noting difficulties because of Superior Court Judge rotation).

<sup>118</sup> See ABA TEN PRINCIPLES, *supra* note 51, Principle 1 (“The public defense function, including the selection, funding, and payment of defense counsel, is independent.”); see *id.* Commentary to Principle 1 (“The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel.”).

Issues of independence also can arise with respect to selection of Chief Public Defenders. The report of the study commission that led to the creation of IDS noted that “serious problems arise by placing authorities over appointment of public defenders . . . with judges;” it thus recommended that appointment authority be vested with the IDS Commission. LEGISLATIVE STUDY COMMISSION REPORT, *supra* note 28, at 7. Additionally, a 2007 performance audit of IDS by the North Carolina State Auditor noted that because chief public defenders were appointed by the senior resident Superior Court judge of the district those lawyers suffered from a lack of independence from the judiciary. OFFICE OF THE STATE AUDITOR OF NORTH CAROLINA, PERFORMANCE AUDIT-OFFICE OF INDIGENT DEFENSE SERVICES 6-7 (2007). That report stated: “Since it is reasonable to assume that each public defender has an interest in being reappointed to the next four-year term and would like to remain in the judge’s favor during the interim, neither the public defender, his or her staff, nor the private counsel they appoint can be considered free from judicial influence.” *Id.* at 7. Likewise, national standards emphasize the need for the indigent defense function to be independent of the judiciary and recommend that “[s]election of the chief defender . . . by judges should be prohibited.” ABA STANDARDS, *supra* note 49, Standard 5-4.1; *id.* Commentary to Standard 5-4.1 (“What is not deemed satisfactory is for the chief defender to be chosen by judges, because that method fails to guarantee that the program will remain free of judicial supervision. Even with the best of motives by both judges and defenders, the appearance of justice is tarnished when the judiciary selects the chief defender . . .” (quotation omitted)). North Carolina’s shifting approach on this issue is detailed in footnote 32 above.

<sup>119</sup> ABA TEN PRINCIPLES, *supra* note 51, Principle 1 (“The public defense function, including the selection, funding, and payment of defense counsel, is independent”); LEGISLATIVE STUDY COMMISSION REPORT, *supra* note 28, at 1 (recommending such independence for North Carolina’s system: “defense function must be independent of judicial or other control over policy and budgetary decisions”).

<sup>120</sup> JUSTICE DENIED, *supra* note 4, at 10.

<sup>121</sup> ABA TEN PRINCIPLES, *supra* note 51, Commentary to Principle 8 (“Public defense should participate as an equal partner in improving the justice system.”); SYSTEM OVERLOAD, *supra* note 5, at 33.

## Recommendations

The Committee offers these recommendations for improving North Carolina’s indigent defense system, all of which flow from the characteristics set forth above and are designed to achieve the system’s overall goal: ensuring fair proceedings by providing effective representation in a cost-effective manner.

### Organizational Structure & Management

#### Ensure Accountability to General Assembly & Independence from Judiciary

##### *Retain Existing Commission Structure*

The report of the legislative study commission that led to the Indigent Services Act recommended the establishment of an independent commission to oversee IDS.<sup>122</sup> That recommendation was accepted and the IDS Commission was created. A Commission structure is the majority approach in the country,<sup>123</sup> is recognized as the preferred structure for an indigent defense system,<sup>124</sup> ensures critical independence and accountability,<sup>125</sup> and should be maintained.<sup>126</sup>

Members of the Commission should be appointed by a diverse group of officials and organizations, with no single person or organization authorized to appoint a majority of Commissioners.<sup>127</sup> All members of the Commission should be committed to the delivery of quality indigent defense services, and a majority should have prior experience in providing indigent defense representation.<sup>128</sup> Under current law, a private defense lawyer may serve on the Commission but a full-time Public Defender or employee of the public defender’s officer may not so serve.<sup>129</sup> Because Public Defenders and their employees can add important perspectives and experience, this restriction should be removed.

The Commission should have a responsibility to hire the Executive Director of IDS and remove him or her for cause.<sup>130</sup>

<sup>122</sup> LEGISLATIVE STUDY COMMISSION REPORT, *supra* note 28, at 8.

<sup>123</sup> Comments of Professor John Rubin, Committee Meeting, Nov. 23, 2015; JUSTICE DENIED, *supra* note 4, at 10 (noting that of the 27 states that have organized their defense services either entirely or substantially on a statewide basis, 19 have a state commission with supervisory authority over the state’s defense program; in the remaining 23 states, there is either a state commission with partial authority over indigent defense (9 states), a state appellate commission or agency (6 states), or no state commission of any kind (8 states)).

<sup>124</sup> JUSTICE DENIED, *supra* note 4, at 185-86 (“The system most frequently recommended . . . [is] an independent Board or Commission vested with responsibility for indigent defense.”).

<sup>125</sup> See *supra* pp. 21-22 (defining these as characteristics of an effective indigent defense delivery system).

<sup>126</sup> Geoff Burkhardt, *How to Improve Your Public Defense Office*, CRIMINAL JUSTICE, Spring 2016, at 56, 57 (advocating for a strong well-structured commission to “safeguard independence, increase funding, and decrease caseloads, helping to ensure ethical and constitutional defense provision”).

<sup>127</sup> JUSTICE DENIED, *supra* note 4, at 186-87.

<sup>128</sup> *Id.* at 185, 187.

<sup>129</sup> G.S. 7A-498.4(d) (“No active public defenders, active employees of public defenders, or other active employees of the Office of Indigent Defense Services may be appointed to or serve on the Commission, except that notwithstanding this subsection, G.S. 14-234, or any other provision of law, Commission members may include part-time public defenders employed by the Office of Indigent Defense Services and may include persons, or employees of persons or organizations, who provide legal services subject to this Article as contractors or appointed attorneys.”).

<sup>130</sup> JUSTICE DENIED, *supra* note 4, at 189. Currently, the statute provides that the Commission may remove the Director by a vote of two-thirds of all of the Commission members, G.S. 7A-498.6(a), without specifying that cause is required.

## ***Financial Matters***

### **Budget**

The report of the study commission that led to the creation of IDS found that the indigent defense function must be “free of the influences and priorities the NCAOC must set for core court functions, prosecutorial operations, and other programs under the NCAOC” and recommended that the NCAOC should “not have control over policy or budgetary decisions.”<sup>131</sup> National commissions have come out similarly on this issue. The Report of the National Right to Counsel Committee concluded, in part:

If a state’s indigent defense system is financed primarily by the state, it is especially important that its budget remain separate from those of other agencies, including the courts, so that resources directed towards indigent defense are not seen as having a negative impact on other worthwhile spending. For example, if the agency is housed in the judicial branch and is part of the judiciary’s budget, the judiciary may be less likely to advocate for increased indigent defense funding if it means less money will be available for judges, court personnel, and facilities.<sup>132</sup>

IDS was created as an independent agency within the Judicial Department. As noted above, however, in 2015 the General Assembly made IDS a sub-agency of the judicial branch and gave the NCAOC authority to modify the IDS budget without approval of the IDS Commission.<sup>133</sup>

Although current NCAOC leadership has indicated that it does not intend to exercise this new budgetary authority, leadership and policies can change. Thus, to preserve appropriate independence from the judiciary, the Committee believes that the pre-2015 standard is preferable with respect to IDS’s status and budgetary authority.

### **Compensation Methods for Private Assigned Counsel (PAC)**

Consistent with the recommendations below regarding PAC compensation methods,<sup>134</sup> IDS should have flexibility to determine the most appropriate methods of compensating PAC to achieve the overall system goal of ensuring fairness by providing effective indigent defense services in the most cost-effective manner.<sup>135</sup>

### **Resource Flexibility**

The report of the study commission that led to the creation of IDS noted that one deficiency of the then-existing system was that “[c]rucial decisions that could be made flexibly for the most effective ways to provide services are instead fixed in legislation.”<sup>136</sup> To some extent this deficiency still exists. For example, in 2011, the General Assembly mandated that IDS implement a contract payment system for PAC statewide. The Committee recommends that IDS be afforded flexibility in managing its resources, subject to required reporting and accountability directly to the General Assembly.

That same report recommended that IDS have authority to “determine and implement the best approaches to provide representation in each area of the state among public defender offices, private counsel systems, and/or contracts.”<sup>137</sup> The Committee concurs and recommends that IDS

<sup>131</sup> LEGISLATIVE STUDY COMMISSION REPORT, *supra* note 28, at 1-2.

<sup>132</sup> JUSTICE DENIED, *supra* note 4, at 160.

<sup>133</sup> *See supra* p. 8.

<sup>134</sup> *See infra* pp. 39-46.

<sup>135</sup> *See supra* p. 12 (setting out this goal); *supra* pp. 21-22 (discussing the need for independence).

<sup>136</sup> LEGISLATIVE STUDY COMMISSION REPORT, *supra* note 28, at 1.

<sup>137</sup> *Id.* at 2.

have broad authority to implement the best approaches to providing representation, including the creation of new Public Defender offices. It further notes that historically the General Assembly has given IDS authority to create a certain number of new attorney and support staff positions within existing defender programs,<sup>138</sup> and supports continuation of this flexibility.

### ***Direct Accountability to the General Assembly***

Consistent with the recommendations of the legislative study commission that led to the creation of IDS, the Committee believes that IDS should be directly accountable to the General Assembly.<sup>139</sup>

## **System Is Actively Managed**

### ***Development of Indigency Standards***

The legislative study commission report that led to the creation of IDS noted that “[n]o statewide uniform standards exist for determination of indigency.”<sup>140</sup> Thus, G.S. 7A-498.5(c)(8) was enacted, directing the IDS Commission to develop standards governing the provision of services under the IDS Act, including “[s]tandards for determining indigency.” Notwithstanding this provision, no such standards currently exist. Instead, defendants submit affidavits of indigency<sup>141</sup> and each judge makes his or her own determination as to whether or not individuals qualify as indigent. Although IDS has suggested that “it will be very challenging to develop indigency standards that would be both meaningful and flexible enough to take into account the wide variety of financial situations facing defendants and respondents,”<sup>142</sup> the Committee believes that in spite of this difficulty developing such standards will benefit the system. It thus recommends that the Commission develop easily implemented uniform standards for indigency. To promote efficiency, it further recommends that those standards employ presumptions of indigency to avoid a full screening in every case.<sup>143</sup>

Based on evidence suggesting that indigency verification may not be cost-effective,<sup>144</sup> the Committee declines to recommend such a procedure for all cases. The Committee notes that it is a Class I felony to make a false material statement about one’s indigency<sup>145</sup> and that attorneys have a statutory obligation to inform the court if they believe an assigned client has the resources to hire

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<sup>138</sup> IDS REPORT, *supra* note 18, at 14.

<sup>139</sup> LEGISLATIVE STUDY COMMISSION REPORT, *supra* note 28, at 8.

<sup>140</sup> *Id.* at 1. G.S. 7A-450(a) defines an indigent person as one “who is financially unable to secure legal representation and to provide all other necessary expenses of representation.”

<sup>141</sup> The affidavit of indigency is NCAOC-CR-226, available here <http://www.nccourts.org/Forms/Documents/687.pdf>.

<sup>142</sup> IDS REPORT, *supra* note 18, at 7.

<sup>143</sup> *See supra* p. 13 (discussing the value of presumptions of indigency). At a minimum, the guidelines should specify that a juvenile is presumed indigent.

<sup>144</sup> As reported by IDS,

[T]he North Carolina court system employed indigency screening staff in the 1990s and found that they were not cost effective. In addition, a 2007 study of indigency verification in Nebraska found that the process detected inaccurate information in approximately 5% of applications for court appointed counsel. However, only 4% of the 5% that included misstatements (or only 1 in every 500 applications) led to the appointment of counsel in cases in which counsel otherwise would not have been provided. A more significant percentage of the inaccurate applications overstated the applicants’ financial resources. If the same holds true in North Carolina, it is highly unlikely that additional screening or verification of financial information in affidavits of indigency would pay for itself.

IDS REPORT, *supra* note 18, at 7.

<sup>145</sup> G.S. 7A-456.

an attorney.<sup>146</sup> However, to ensure appropriate use of taxpayer funds, IDS should regularly verify, through auditing or other techniques, that the screening tool ensures that indigent defense services are being provided only to persons who are in fact indigent.

### ***Development of Workload Formulas***

As noted above, an effective indigent defense system employs workload formulas to ensure that counsel has sufficient time to spend on indigent cases and that cases are tried on time.<sup>147</sup> Additionally, workload formulas can help assess system capacity and future needs.

Except for caseload limits for private counsel handling potentially capital cases,<sup>148</sup> and some case limitations that apply to attorneys handling contracts,<sup>149</sup> IDS does not have workload formulas for counsel providing indigent defense services.<sup>150</sup> The Committee recommends that IDS develop and use workload formulas for public defenders and PAC. The workload formulas should balance quality and efficiency. Consistent with national standards, IDS should contractually limit PAC's participation in private cases that would exceed the workload formulas given existing indigent assignments.<sup>151</sup> Workload formulas should be regularly updated based on changes in case processing, technology, and other developments.

Although the Committee defers to IDS on the creation of the appropriate workload formulas, within these broad requirements, it notes that a number of systems have set caseload limits to help maintain quality representation.<sup>152</sup> Reference to these standards may facilitate creation of standards for North Carolina. In no event, however, should national caseload standards be exceeded.<sup>153</sup> North Carolina's workload formulas should adjust caseloads by complexity,

<sup>146</sup> G.S. 7A-450(d).

<sup>147</sup> See *supra* p. 18.

<sup>148</sup> Cap on the Number of Potentially Capital Cases Per Private Appointed Counsel, IDS Policy, [http://www.ncids.org/Rules & Procedures/Policies By Case Type/CapCases/Cap\\_OpenCases.pdf](http://www.ncids.org/Rules%20&%20Procedures/Policies%20By%20Case%20Type/CapCases/Cap_OpenCases.pdf).

<sup>149</sup> Lawyers doing full-time contract work are prohibited from engaging in the private practice of law without the advance approval of the IDS Director. See Standard Contract Terms and Conditions § 8 (NC IDS), <http://bit.ly/23utrgP>.

<sup>150</sup> "Workload" as used here is distinguishable from the more narrow term "caseload." See generally ABA STANDARDS, *supra* note 49, Commentary to Standard 5-5.3. Caseload refers to the number of cases assigned to an attorney at a given time. *Id.* Workload by contrast is the total of all work performed by counsel; it includes the number of cases assigned but also includes other administrative or supervisory work, and adjusts caseload for complexity. *Id.*

<sup>151</sup> ABA TEN PRINCIPLES, *supra* note 51, Commentary to Principle 5 ("Counsel's workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels." (emphasis added)).

<sup>152</sup> SYSTEM OVERLOAD, *supra* note 5, at 11-12 (discussing caseload limits in place in Seattle, Washington DC, among others).

<sup>153</sup> ABA TEN PRINCIPLES, *supra* note 51, Commentary to Principle 5 ("National caseload standards should in no event be exceeded . . ."). Like others, the Committee expresses caution with respect to the national maximum caseload numbers suggested by the National Advisory Commission on Criminal Justice Standards and Goals in 1973. As has been noted, those standards are decades old and were never empirically based. JUSTICE DENIED, *supra* note 4, at 66 (asserting that those standards "should be viewed with considerable caution" because of their age, lack of empirical support, and the fact that since they were developed the practice of criminal and juvenile law has become "far more complicated and time-consuming"; those 1973 standards set caseload limits at: 150 felonies; 400 misdemeanors; 200 juvenile cases; 200 mental health cases; or 25 appeals). For one set of more recent standards, see DOTTIE CARMICHAEL ET AL., GUIDELINES FOR INDIGENT DEFENSE CASELOADS: A REPORT TO THE TEXAS INDIGENT DEFENSE COMMISSION (2015) ("for the delivery of reasonably competent and effective representation attorneys should carry an annual full-time equivalent caseload of no more than" 236 Class B Misdemeanors; 216 Class A Misdemeanors; 175 State Jail Felonies; 144 Third Degree Felonies; 105

incorporate counsel's administrative responsibilities to the system,<sup>154</sup> and account for variations in local practice that may affect efficiency.<sup>155</sup>

### ***Robust Local Supervision***

As noted above, an effective indigent defense system requires rigorous supervision and oversight of its indigent defense service providers.<sup>156</sup> To ensure appropriate independence, counsel should be supervised by local system-employed supervisors.<sup>157</sup> In public defender offices, the structure and personnel exist to provide such supervision and oversight to assistant public defenders and staff. However, such supervision and oversight is not carried out uniformly in all public defender offices. To address that, IDS should develop uniform standards regarding supervision and oversight, consistent with the characteristics of an effective indigent defense delivery system as stated above.<sup>158</sup>

The appropriate structure and personnel do not exist to provide the necessary supervision and oversight of PAC. Currently, these attorneys are supervised, if at all, by volunteer local bar committees, or for those doing contract work, by IDS's regional defenders. Volunteer bar committees are unable to provide the requisite level of supervision. First, they lack the infrastructure and capacity to do so. Second, perhaps because bar committee members may find it difficult to sanction a peer in the local community, such sanctions rarely occur, indicating a lack of rigor in this peer review system. While IDS's regional defenders provide important oversight for contract attorneys,<sup>159</sup> only two such positions exist, responsible for oversight of 218 contract lawyers.<sup>160</sup> This workload precludes the type of rigorous review required for an effective indigent defense system.

In light of this and consistent with national standards,<sup>161</sup> the Committee recommends the use of local PAC supervisors housed within single district, regional or conflict public defender offices<sup>162</sup> and afforded the required time and resources to provide the necessary oversight and supervision pursuant to uniform policies adopted by IDS. Consistent with national standards, the local

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Second Degree Felonies; 77 First Degree Felonies), [http://www.americanbar.org/content/dam/aba/events/legal\\_aid\\_indigent\\_defendants/2015/lisclaidsummit04texasstudyfullreport.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2015/lisclaidsummit04texasstudyfullreport.authcheckdam.pdf).

<sup>154</sup> See *supra* p. 18 (discussing factors that should be incorporated into a workload formula).

<sup>155</sup> For example, a lawyer who works in an urban area on only one type of case (e.g., adult felony) in one courthouse where court meets daily can be more efficient than a lawyer in a rural area responsible for a more varied caseload in multiple courthouses that do not hold court daily.

<sup>156</sup> See *supra* pp. 15-17.

<sup>157</sup> See *supra* p. 15.

<sup>158</sup> See *supra* pp. 15-17 (setting out the required oversight and supervision needed for an effective system).

<sup>159</sup> Comments of Michael Waters, Committee Meeting Nov. 23, 2015 (noting the support offered by IDS's current regional defenders).

<sup>160</sup> REPORT OF THE COMMISSION ON INDIGENT DEFENSE SERVICES TO THE CHAIRS OF THE HOUSE APPROPRIATIONS COMMITTEE ON JUSTICE AND PUBLIC SAFETY, THE SENATE APPROPRIATIONS COMMITTEE ON JUSTICE AND PUBLIC SAFETY, AND THE JOINT LEGISLATIVE OVERSIGHT COMMITTEE ON JUSTICE AND PUBLIC SAFETY: REQUESTS FOR PROPOSALS AND CONTRACTS FOR LEGAL SERVICES 2 (2015), [http://www.ncids.org/RFP/RepData/GA\\_Report\\_2015.pdf](http://www.ncids.org/RFP/RepData/GA_Report_2015.pdf) [hereinafter REPORT ON REQUESTS FOR PROPOSALS AND CONTRACTS FOR LEGAL SERVICES].

<sup>161</sup> ABA TEN PRINCIPLES, *supra* note 51, Commentary to Principle 2 ("The appointment process should never be ad hoc, but should be according to a coordinated plan directed by a full-time administrator who is also an attorney familiar with the varied requirements of practice in the jurisdiction. Since the responsibility to provide defense services rests with the state, there should be state funding and a statewide structure responsible for ensuring uniform quality statewide." (footnote omitted)).

<sup>162</sup> See *infra* pp. 34-35 (recommending the creation of such offices).

supervisors should be lawyers with experience in North Carolina criminal law.<sup>163</sup> The local supervisors would replace the current supervisory role of volunteer local bar committees and would ensure implementation of uniform workload, training, and performance standards as well as provide required support to PAC.<sup>164</sup>

### ***Uniform Training Standards***

As noted above, training is a key component of an effective indigent defense system.<sup>165</sup> Currently, IDS has no uniform training requirements for new defense counsel or continuing education requirements for experienced lawyers. To the extent training requirements exist,<sup>166</sup> they vary by jurisdiction, as set forth in the jurisdiction's appointment plan.<sup>167</sup> Some local plans were waived in when IDS was created and have not been updated since; given the age of these plans it is not possible to believe that their training requirements are currently appropriate, given changes in law, science, and technology. In jurisdictions without a public defender office it is not clear how or if training requirements are enforced by the local bar committee. Public defenders receive more regular training through an IDS/UNC School of Government partnership,<sup>168</sup> but training opportunities still vary, with some offices offering robust in-house training and others offering none.

To ensure that counsel has the necessary ability and skills to handle indigent cases, IDS should develop uniform training requirements for all defense counsel, setting out training prerequisites for particular cases (type of training, hours, how recent), continuing education requirements, and acceptable training providers. The Committee further recommends that these standards be enforced by local supervisors.

If at any time the system lacks qualified lawyers in a particular jurisdiction or for any particular type of case, IDS should develop programs for counsel to gain the necessary skills and experience, such as a second chair program or collaboration with law school clinical programs.

### ***Uniform Qualification Standards***

As noted above, in an effective indigent defense system, counsel's ability, training, and experience match the complexity of the case; to provide this guarantee, the system must have uniform standards specifying the prerequisite skills and experience counsel must possess to handle each type of case for which indigent services are provided.<sup>169</sup> North Carolina has no such uniform

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<sup>163</sup> ABA TEN PRINCIPLES, *supra* note 51, Commentary to Principle 2.

<sup>164</sup> See *infra* pp. 28-30 (uniform standards).

<sup>165</sup> See *supra* p. 19 (so noting); see generally MINOR CRIMES, MASSIVE WASTE, *supra* note 76 at 40-41 ("Supervision of misdemeanor defenders is sorely lacking and, often, performance reviews are non-existent."; recommending that such lawyers be actively supervised).

<sup>166</sup> Some appointment plans fail to state any training requirements for handling serious cases. See, e.g., Vance County Appointment Plan (specifying no training requirements to serve on the list to handle Class F through I felonies), [http://www.ncids.org/IndigentApptPlans/Non-PD Appt Plans/Vance County.pdf](http://www.ncids.org/IndigentApptPlans/Non-PD%20Appt%20Plans/Vance%20County.pdf); District 1 Appointment Plan (specifying no training requirements to serve on the list for Class A through E felonies), [http://www.ncids.org/IndigentApptPlans/PD Appointment Plans/1st judicial district.pdf](http://www.ncids.org/IndigentApptPlans/PD%20Appointment%20Plans/1st%20judicial%20district.pdf).

<sup>167</sup> For example, compare the Vance County Appointment Plan cited above in footnote 166 (specifying no training requirements to serve on the list to handle Class F through I felonies) with the District 1 Appointment Plan cited above in the same footnote (specifying that trial experience requirement for the same category of cases may be satisfied by showing that counsel has "attended at least six (6) hours of continuing legal education in the area of criminal jury trials").

<sup>168</sup> For information about the training offerings pursuant to that partnership, see UNC School of Government, *Indigent Defense Education*, SOG.UNC.EDU, <https://www.sog.unc.edu/resources/microsites/indigent-defense-education> (last visited May 27, 2016).

<sup>169</sup> See *supra* pp. 15-16.

standards in place.<sup>170</sup> The Committee recommends that, in addition to establishing and enforcing through local supervisors uniform training requirements as discussed immediately above, IDS develop and enforce in the same manner standards specifying required litigation experience (types of cases; how many; how recent, etc.) for each IDS case type.<sup>171</sup> The Committee further recommends that these standards be regularly reviewed and modified, as needed, based on developments in the law, science, technology and other disciplines relevant to criminal defense practice.

### ***Uniform Performance Standards***

The IDS Commission is required by law to establish “[s]tandards for the performance of public defenders and appointed counsel.”<sup>172</sup> To date, the IDS Commission has developed and published performance guidelines for attorneys representing:

- indigent defendants in non-capital criminal cases at the trial level<sup>173</sup>
- juveniles in delinquency proceedings,<sup>174</sup>
- indigent parent respondents in abuse, neglect, and dependency cases,<sup>175</sup> and
- indigent parents in termination of parental rights cases.<sup>176</sup>

The policy pertaining to non-capital criminal cases was adopted twelve years ago; the others were adopted nine years ago.<sup>177</sup>

IDS reports that because of the close supervision afforded in the offices of the Capital Defender, Appellate Defender and the Center for Death Penalty Litigation and because it screens the qualifications of lawyers who handle capital and appellate cases, it has not devoted resources to developing performance standards for potentially capital, appellate, or post-conviction capital cases.<sup>178</sup> IDS reports that it has not devoted resources to developing best practices in post-conviction non-capital cases because of the small number of such cases that the system handles outside of North Carolina Prisoner Legal Services.

Notwithstanding this, to ensure consistent quality throughout the state, IDS should establish uniform standards for performance of counsel for all cases in which it provides services.<sup>179</sup> These standards are necessary both to support counsel (e.g., in training and as resources for new counsel)

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<sup>170</sup> See, e.g., *supra* pp. 28-29 (discussing the lack of uniform training standards).

<sup>171</sup> See *supra* p. 10 (listing IDS case types).

<sup>172</sup> G.S. 7A-498.5(c)(4).

<sup>173</sup> NORTH CAROLINA COMMISSION ON INDIGENT DEFENSE SERVICES, PERFORMANCE GUIDELINES FOR INDIGENT DEFENSE REPRESENTATION IN NON-CAPITAL CRIMINAL CASES AT THE TRIAL LEVEL (Adopted Nov. 12, 2004), <http://www.ncids.org/Rules & Procedures/Performance Guidelines/Trial Level Final Performance Guidelines.pdf>.

<sup>174</sup> NORTH CAROLINA COMMISSION ON INDIGENT DEFENSE SERVICES, PERFORMANCE GUIDELINES FOR APPOINTED COUNSEL IN JUVENILE DELINQUENCY PROCEEDINGS AT THE TRIAL LEVEL (Adopted Dec. 14, 2007), <http://www.ncids.org/Rules & Procedures/Performance Guidelines/Juv Del perf guides 1-08.pdf>.

<sup>175</sup> NORTH CAROLINA COMMISSION ON INDIGENT DEFENSE SERVICES, PERFORMANCE GUIDELINES FOR ATTORNEYS REPRESENTING INDIGENT PARENT RESPONDENTS IN ABUSE, NEGLIGENCE, DEPENDENCY AND TERMINATION OF PARENTAL RIGHTS PROCEEDINGS AT THE TRIAL LEVEL (Adopted Dec. 14, 2007), <http://www.ncids.org/Rules & Procedures/Performance Guidelines/Parent Atty guides 1-08.pdf>.

<sup>176</sup> *Id.*

<sup>177</sup> See *supra* notes 173-76.

<sup>178</sup> IDS has however adopted Best Practice Guidelines in Potentially Capital Cases at the Trial Level in a Time of Severe Budgetary Constraints (Adopted June 27, 2011), <http://www.ncids.org/Rules & Procedures/Performance Guidelines/BestPracticeGuidelines.pdf>.

<sup>179</sup> See *supra* p. 10 (listing case types); see MINOR CRIMES, MASSIVE WASTE, *supra* note 76 at 41-42 (“Jurisdictions should adopt practice standards applicable to all attorneys representing indigent defendants.”).

and so that local supervisors can adequately assess their work. Additionally, IDS should develop a regular schedule for review of its performance standards; at a minimum, standards should be reviewed every seven years.

### ***Data Collected & Maintained; Evidence-Based Decisions***

As recommended throughout this report, IDS should move towards uniform measures and standards. IDS's long-term planning and short-term decisions should be based on objective data as evaluated against these measures and standards.<sup>180</sup>

### ***Long Term Plan for Indigent Defense Services***

North Carolina currently does not have a long-term plan for the delivery of indigent defense services. The Commission heard evidence about expected changes in North Carolina's demographics.<sup>181</sup> North Carolina needs a long-term plan for providing indigent defense services that accounts for these demographic and other changes.<sup>182</sup> Such a plan may forecast shifting resources from areas where population is expected to decrease to those expected to increase. Having such a plan will aid not only IDS and the IDS Commission but also legislators as they plan for needed resources. Additionally, because such a plan will include discrete, measurable objectives,<sup>183</sup> it will allow for evaluation of the system.

## **Access to Counsel Types of Cases**

As noted above, an effective indigent defense program provides services in criminal cases and in proceedings arising from or connected with a criminal action against the defendant and in which the defendant may be deprived of liberty or subjected to serious deprivations or collateral consequences.<sup>184</sup> In light of this, indigent defense services should be expanded to defendants filing petitions for removal from the sex offender registry,<sup>185</sup> based on the severity of the consequences that attach when such a petition is denied.<sup>186</sup>

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<sup>180</sup> The Committee notes that IDS currently has a Systems Evaluation Project underway. Details of that project are provided in the IDS Commission's 2016 Report to the General Assembly. See IDS REPORT, *supra* note 18, at 40-42.

<sup>181</sup> Jon Williams, North Carolina Court Operations: An Overview, Part Two (presentation at Commission meeting Sept. 30, 2015), [http://nccalj.org/wp-content/uploads/2015/09/NCCALJ\\_Court\\_Operations\\_Presentation-Part-Two.pdf](http://nccalj.org/wp-content/uploads/2015/09/NCCALJ_Court_Operations_Presentation-Part-Two.pdf) [hereinafter Williams].

<sup>182</sup> See *supra* p. 20 (sketching out the broad parameters of a long-term plan for indigent defense services).

<sup>183</sup> *Id.*

<sup>184</sup> See *supra* p. 12.

<sup>185</sup> See generally, James M. Markham, *Petitions to Terminate Sex Offender Registration*, in NC SUPERIOR COURT JUDGES' BENCHBOOK (Jessica Smith, Editor), <http://benchbook.sog.unc.edu/criminal/petitions-terminate-sex-offender-registration>.

<sup>186</sup> The Indigent Defense Subcommittee also raised the issue of extending indigent defense services to all misdemeanor prosecutions against 16- and 17-year-olds because of the severe collateral consequences that attach to young persons upon conviction. However, because of the Committee's separate recommendation to raise the juvenile age, see JUVENILE REINVESTMENT, NCCALJ CRIMINAL INVESTIGATION & ADJUDICATION COMMITTEE REPORT, this issue is not addressed here. If the Committee's raise the age recommendation is not implemented, counsel should be provided in all misdemeanor prosecutions against juveniles.

## Time for Appointment

As noted above, timely appointment of counsel is a key component of an effective indigent defense system.<sup>187</sup> Many public defender offices assign staff to regularly review jail populations to ensure that appointments are timely made for in-custody defendants. In areas without a public defender office, no system or infrastructure exists to conduct such a review. As explained below, the Committee recommends that all areas of the state be served by either a single-district or regional public defender office.<sup>188</sup> Creation of such offices will provide the infrastructure for such reviews. IDS should, by policy or rule, require frequent review of jail populations by assigned staff in single-district and regional public defender offices to ensure timely appointment of counsel.<sup>189</sup> Additionally, to ensure that all in-custody indigent defendants receive counsel as soon as possible after detention, the Committee further recommends that the first appearance statute be amended to require a first appearance for all in-custody defendants within 48 hours or the next day that district court is open.<sup>190</sup>

## Waiver of Counsel

Current law allows certain magistrates to accept waivers of counsel.<sup>191</sup> Although the Committee believes that magistrates can make initial indigency determinations using a uniform indigency screening tool,<sup>192</sup> it believes that only a judge should be authorized to take a waiver of constitutional rights<sup>193</sup> and that current law should be amended accordingly.

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<sup>187</sup> See *supra* p. 14.

<sup>188</sup> See *infra* pp. 33-34.

<sup>189</sup> Under G.S. 7A-453, a custodian must inform authorities when that person has custody of someone who is without counsel for more than 48 hours. In public defender districts, notification is made to the public defender office. *Id.*; Rules of the Commission on Indigent Defense Services, Rule 1.3(b). In areas without such an office, notification is made to the clerk of superior court. G.S. 7A-453. In the latter situation, it is not clear whether such notifications are uniformly occurring or what happens after such notification is made.

State law requires a first appearance to be held within 96 hours after a felony defendant is taken into custody. G.S. 15A-601. A counsel determination is made at that proceeding. G.S. 15A-603. A first appearance is not, however, required for in-custody misdemeanor defendants.

Recent research shows that controlling for other factors, even a short pretrial detention can have negative consequences for a defendant. See *supra* note 68.

For all of these reasons, the Committee recommends frequent review of jail rosters as explained in the text above.

<sup>190</sup> Under existing law, a first appearance need only be held for in-custody felony defendants; it must be held within 96 hours after the defendant is taken into custody or at the first regular session of district court, whichever is earlier. G.S. 15A-601. Because the statute does not afford a first appearance for in-custody misdemeanor defendants, these individuals sometimes remain in pretrial detention, without any court hearing, until their first court date, which then must be continued because they do not have counsel. In some instances, a misdemeanor defendant will spend more time in pretrial detention than could be imposed as a sentence if he or she is found guilty. Additionally, as noted above, recent research shows that controlling for other factors, even short pretrial detentions can have negative consequences for a defendant. See *supra* note 68.

<sup>191</sup> G.S. 7A-146(11) (chief district court judge may designate certain magistrates to accept waivers of counsel in all cases except potentially capital cases).

<sup>192</sup> ELIGIBLE FOR JUSTICE, *supra* note 51, at 8 (noting that a magistrate is one of several court personnel who appropriately can serve as an indigency screener); see *supra* pp. 25-26 (recommending uniform indigency standards).

<sup>193</sup> The procedure of taking a constitutionally valid waiver of counsel is exacting, see Jessica Smith, *Counsel Issues*, in NC SUPERIOR COURT JUDGES' BENCHBOOK (Jessica Smith, Editor), <http://benchbook.sog.unc.edu/criminal/counsel-issues>, and failure to take a proper waiver of counsel results in reversal. See JESSICA SMITH, CRIMINAL CASE COMPENDIUM, <https://www.sog.unc.edu/resources/legal->

## Ability to Meet and Communicate with Counsel

As noted above, indigent defendants must have timely access to counsel.<sup>194</sup> This is a particular problem with in-custody defendants. IDS reported to the Committee that some jail rules and policies create barriers to counsel's confidential access to in-custody defendants, including strict visitation hours, guards who will not afford privacy for client meetings, and long wait times for visitation. IDS should document these difficulties and advocate for rule and policy changes to facilitate counsel's access to in-custody defendants.

Because geographic distances can make it difficult for lawyers and clients to meet face to face,<sup>195</sup> the Committee recommends that PAC assignments take into account, whenever possible, this access issue.

### Delivery Systems Preference for Public Defender Offices

For the following reasons, the Committee believes that the best delivery system for indigent defense services in North Carolina is a public defender office:

- A public defender office provides personnel and infrastructure to offer the oversight, supervision, and support of counsel (both within the office and PAC) required for an effective indigent defense delivery system.<sup>196</sup>
- Strong stakeholder support for services delivered by public defender offices.<sup>197</sup>
- Empirical research showing that, on average, public defenders provide better services than PAC.<sup>198</sup>

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[summaries/criminal-case-compendium](#) (listing published North Carolina cases since 2008 that have held waivers to be invalid).

<sup>194</sup> See *supra* p. 14.

<sup>195</sup> See Comments of Superior Court Judge Henry W. Hight, Jr., Committee Meeting Nov. 23, 2015 (noting that when lawyers do not have offices nearby, many indigent defendants, because of transportation issues, have difficulty seeing their lawyers).

<sup>196</sup> See *supra* pp. 15-19 (discussing that oversight, supervision, and support are key characteristics of an effective system).

<sup>197</sup> See, e.g., Comments of District Court Judge Athena F. Brooks, Committee Meeting Nov. 23, 2015 (when a public defender office is monitoring the appointed list, quality is improved); Comments of District Attorney Seth Edwards, Committee Meeting Nov. 23, 2015 (comparing the quality of representation provided by public defenders versus PAC and noting that the public defender office enforces a requirement that counsel meet with the defendant within a specific number of hours whereas PAC sometimes come to court never having met with their clients; noting that the new public defender office in the district has raised the quality of counsel and "has done a great job").

<sup>198</sup> See Radha Iyengar, *An Analysis of the Performance of Federal Indigent Defense Counsel*, (National Bureau of Economic Research, Working Paper No. 13187, 2007) (compares federal public defenders and appointed counsel and finds that defendants represented by appointed counsel are more likely to be found guilty and to receive longer prison sentences than those represented by a public defender), <http://www.nber.org/papers/w13187.pdf>; JAMES M. ANDERSON & PAUL HEATON, MEASURING THE EFFECT OF DEFENSE COUNSEL ON HOMICIDE CASE OUTCOMES (2012) (compares outcomes in Philadelphia murder cases and finds that assigning cases to the public defender over private counsel reduced the conviction rate by 19%, the probability that the defendant received a life sentence by 62%, and the overall expected sentence length by 24%); TONY FABELO ET AL., COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER, IMPROVING INDIGENT DEFENSE: EVALUATION OF THE HARRIS COUNTY PUBLIC DEFENDER (2013) (finds significant advantages to full-time public defenders, including overwhelming statistical evidence of better outcomes), <http://tidc.texas.gov/media/23579/jchcpdfinalreport.pdf>.

- National standards, which express a preference for public defender offices.<sup>199</sup>
- Efficiencies that can be obtained by using providers who devote all of their efforts to indigent cases.<sup>200</sup>
- The fact that a public defender office is typically in the best position to supply counsel to indigent persons in a timely manner.<sup>201</sup>

Recognizing that resources are not unlimited, the Committee recommends that where caseload is sufficiently high or where quality indigent defense services are unavailable, a single district public defender office, where economically feasible, is the preferred delivery system for indigent defense services. In assessing economic feasibility, reasonable PAC compensation rates should be used. Using the current unsustainably low rates<sup>202</sup> in such an analysis is unlikely to ever make creation of a new single district public defender office appear cost effective or cost neutral.

### ***Regional Public Defender Offices When Single District Office Is Not Feasible***

To ensure a level playing field, a public defender office should exist in every jurisdiction that has a prosecutor's office. Having such parity should be the long-term goal of the system. Until that long-term goal can be achieved and to effectuate the Committee's preference for public defender offices while doing so in a cost-effective manner, the Committee recommends, consistent with national standards,<sup>203</sup> that where an individual district's caseload does not warrant creation of a public defender office or it is not cost effective to do so, a regional public defender office should be created to serve a multi-district or multi-county area. The Committee notes that IDS already has successfully implemented one such regional defender office in Districts 1 and 2.<sup>204</sup> The personnel

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Early data from IDS's outcomes research confirms these national results, showing that for key performance indicators (KPIs), North Carolina public defenders outperform PAC. For example, with respect to KPI I (Non-conviction), public defenders achieved 3-year client favorable outcomes 48.9% of the time in high exposure cases; the comparable figure for PAC was 41.6%; for low exposure cases those percentages were 72.4% and 64.0% respectively. See Margaret Gressens, *Indigent Defense Milestone: A Comparison of Delivery Systems in North Carolina* (May 2016) (PowerPoint presentation on file with Committee Reporter). For KPI V (convicted of highest charge), public defenders had lower client unfavorable outcomes than did PAC, as measured by 3-year averages for both high exposure and low exposure cases, again suggesting better performance. *Id.* Public defenders also had lower client unfavorable results with respect to KPI VI (Alternative to incarceration convictions ended in supervised probation) than PAC with respect to high exposure cases; with respect to low exposure cases the two groups had comparable results. *Id.* For KPI III (Felony cases ending in a conviction that end in misdemeanor conviction) public defenders outperformed PAC in client favorable results. *Id.* Although PAC outperformed public defenders with respect to KPI VIII (failure to appear) (client unfavorable outcome), *id.*, further research is needed to validate these results; for example, research should test whether public defender clients experience higher failure to appear rates as compared to PAC because public defenders are more effective in securing pretrial release for their clients). A similar question must be resolved with respect to KPI VIIa (Percentage of convictions that were time served) where PAC outperformed public defenders. *Id.*

<sup>199</sup> ABA TEN PRINCIPLES, *supra* note 51, Principle 2; ABA STANDARDS, *supra* note 49, Standard 5-1.2; *id.*, Commentary to Standard 5-1.2 ("The primary component in every jurisdiction should be a public defender office, where conditions permit.").

<sup>200</sup> ABA STANDARDS, *supra* note 49, Commentary to Standard 5.1-2 (noting that by devoting all of their expertise to criminal cases, public defenders develop "unusual expertise in handling various kinds of criminal cases").

<sup>201</sup> *Id.*

<sup>202</sup> See *infra* pp. 39-41 (discussing the need for reasonable compensation of PAC).

<sup>203</sup> ABA STANDARDS, *supra* note 49, Standard 5-1.2(a) ("Multi-jurisdictional organizations may be appropriate in rural areas.").

<sup>204</sup> See *supra* note 36 (listing counties in Districts 1 and 2).

and infrastructure that such an office would provide would allow for the oversight, supervision, and support necessary to an effective indigent defense delivery system.<sup>205</sup>

### ***Conflict Defender Offices Where Caseloads Warrant***

For the same reasons that the Committee favors single district and regional public defender offices as the primary vehicles for delivery of indigent defense services, the Committee recommends the creation of conflict defender offices where sufficient volume exists to sustain such an office. Currently only a small number of districts have sufficient volume to support such an office. However, given expected demographic changes, additional offices may be justified over time.<sup>206</sup>

The Committee notes that G.S. 7A-498.7(f1) provides that, whenever practical, public defender offices should seek to assign conflict cases to another office in the region, rather than to PAC. However, as IDS has explained, “with the possible exception of very serious felony cases and excluding the Gaston County conflict attorney who is housed in the Mecklenburg County office, it is rare for an assignment to a neighboring office to be practical because of the additional time it would take assistant public defenders to travel to a neighboring county and because of the disruption to their regular in-county caseloads.”<sup>207</sup> Establishing conflict defender offices within the jurisdiction would eliminate this logistical problem.

### ***Pilot Use of Part-Time Public Defenders***

State law currently prohibits practicing lawyers to serve as part-time public defenders.<sup>208</sup> Allowing part-time defenders to serve in regular, regional, or conflict public defender offices offers benefits to the system, including:

- Administrative flexibility and cost effectiveness in offices where caseloads warrant additional staff less than a full-time employee.
- Administrative flexibility in terms of being able to split one full-time position into two part-time positions and thus cover a larger geographic territory.

Although the Committee notes that part-time defenders will pose challenges, these challenges can be managed with oversight and supervision, including strict adherence to workload formulas.<sup>209</sup> It further notes that although some national standards advise against the use of part-time defenders, others endorse their use.<sup>210</sup> Thus, the Committee recommends that state law be amended to allow for the use of part-time defenders, when and where IDS determines them to be appropriate. In no instance however should a lawyer be hired as a part-time defender if he or she maintains a significant private practice in areas outside of those assigned by the indigent defense system.<sup>211</sup> IDS

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<sup>205</sup> See *supra* pp. 15-19 (discussing that oversight, supervision, and support are key characteristics of an effective system).

<sup>206</sup> Williams, *supra* note 181.

<sup>207</sup> IDS REPORT, *supra* note 18, at 12.

<sup>208</sup> G.S. 84-2 (public defender prohibited from engaging in the private practice of law; criminalizing the practice).

<sup>209</sup> See *supra* pp. 26-27 (recommending the creation of such formulas).

<sup>210</sup> Compare ABA TEN PRINCIPLES, *supra* note 51, Commentary to Principle 2 (stating, in principles adopted in 2002, that “private bar participation may include part-time defenders”), with ABA STANDARDS, *supra* note 49, Commentary to & Standard 5-4.2 (explaining, in these 1992 standards, that “[w]here part-time law practice is permitted, defenders are tempted to increase their total income by devoting their energies to private practice at the expense of their nonpaying clients”). See also JUSTICE DENIED, *supra* note 4, at 12 (“Public defenders should be employed full-time whenever practicable”).

<sup>211</sup> ABA STANDARDS, *supra* note 49, Commentary to Standard 5-4.2 (with respect to the use of part-time defenders, explaining that “the expertise required of defense counsel is less likely to be developed if an

should develop rules and/or policies providing clear, and uniform standards for the scope and performance of duties of part-time defenders, limits on private practice, and the avoidance of conflicts of interest.<sup>212</sup>

### Formal Assigned Counsel System for PAC

Even if North Carolina had single district and regional public defender offices covering the entire state, conflict and overload cases will require continued active participation by the private bar.<sup>213</sup> Currently, almost 2,600 PAC handle indigent defense cases.<sup>214</sup> In part because of the large number of PAC doing indigent work, the system is unable to adequately supervise and support these lawyers.<sup>215</sup> This problem is not new. In fact, the lack of “statewide uniform standards . . . for . . . appointment, qualifications . . . or performance of counsel” was cited as a reason supporting the creation of IDS.<sup>216</sup> These deficiencies continue to exist. In districts with a public defender office, IDS and the Commission have “worked with the chief public defenders to develop plans for the appointment of counsel in non-capital criminal and non-criminal cases . . . , which provide for more significant oversight by the public defenders over the quality and efficiency of local indigent representation and contain qualification and performance standards for attorneys on the district indigent lists.”<sup>217</sup> In districts without a public defender office, IDS and the Commission have developed a model indigent appointment plan that includes qualification standards for the various indigent lists, provides for oversight by a local indigent committee, and includes some basic reporting requirements to the IDS Office.<sup>218</sup> Although districts are required to adopt appointment plans, they have some discretion regarding the content of their plans.<sup>219</sup> IDS reports that as it implements contracts pursuant to legislative mandates, local appointment plans are being supplemented or superseded by contractor appointment instructions that IDS issues in consultation with local court system actors.<sup>220</sup>

The Committee finds that the existing method of supervising PAC is deficient in the following respects:

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attorney maintains a private practice involving civil cases”). *See generally supra* p. 10 (listing the civil cases for which indigent defense services are provided). Although the authority cited here focuses on lawyers who maintain a civil practice beyond that served by the indigent defense system, similar concerns arise where the lawyer’s private criminal practice is outside of the area handled in his or her indigent cases.

<sup>212</sup> ABA STANDARDS, *supra* note 49, Commentary to Standard 5-4.2.

<sup>213</sup> JUSTICE DENIED, *supra* note 4, at 53. In fiscal year 2014-15, public defender offices assigned out 13,379 case-specific conflict cases and 7,684 workload conflict cases. OFFICE OF INDIGENT DEFENSE SERVICES, REPORT ON PUBLIC DEFENDER CONFLICTS FOR FISCAL YEAR 2014-15, at 4 (2015).

<sup>214</sup> IDS REPORT, *supra* note 18, at 16.

<sup>215</sup> *See* TRIAL JUDGES’ PERCEPTIONS OF IDS, *supra* note 18 (survey responses showed that judges had concerns about the appointment process for PAC counsel and about the management, and supervision of PAC); *id.* at 16 (noting that some judges suggested that there was a need for more IDS monitoring of PAC); Comments of Chief Public Defender James Williams, Committee Meeting Nov. 23, 2015 (regional public defenders are required to supervise PAC); Comments of District Attorney Seth Edwards, Committee Meeting Nov. 23, 2015 (local committee provided little or no real oversight of PAC).

<sup>216</sup> LEGISLATIVE STUDY COMMISSION REPORT, *supra* note 28, at 1.

<sup>217</sup> IDS REPORT, *supra* note 18, at 5.

<sup>218</sup> *Id.*

<sup>219</sup> Memorandum from Malcolm Ray Hunter, Jr., IDS Director to Bar Presidents, Appointed Attorneys, Superior Court Judges, District Court Judges, Clerks of Court, Regarding Model Indigent Appointment Plan for Non-Public Defender Districts (April 2008), [http://www.ncids.org/IndigentApptPlans/Non-PD%20Appt%20Plans/Memo\\_ModelAppointmentPlan.pdf](http://www.ncids.org/IndigentApptPlans/Non-PD%20Appt%20Plans/Memo_ModelAppointmentPlan.pdf).

<sup>220</sup> IDS REPORT, *supra* note 18, at 5.

- Because appointment plans vary by jurisdiction, there is no uniform statewide standard with respect to the ability, training, and experience required for indigent cases.<sup>221</sup>
- Some appointment plans fail to state minimum training requirements<sup>222</sup> or litigation experience or fail to state those requirements with the necessary specificity.<sup>223</sup>
- No uniform requirement is in place for the regular review and updating of appointment plans.<sup>224</sup> According to IDS, some appointment plans have not been updated since the 1980s.
- No infrastructure or systems exist to address a shortage of qualified PAC to handle caseloads in particular areas or for particular types of cases.<sup>225</sup>
- No infrastructure or systems exist to verify that PAC meets the minimum standards required to handle the particular case (e.g., training and experience).<sup>226</sup>
- No infrastructure or systems exist to help PAC identify and report conflicts when a case is initially assigned and as it progresses.<sup>227</sup>
- The plans do not require and no infrastructure or systems exist to ensure that counsel has appropriate resources to handle the case, such as office space, office support, access to research tools, etc.<sup>228</sup>
- The plans do not require and no infrastructure or systems exist for ongoing evaluation of PAC's performance, including observations of PAC's in-court performance and client and witness interviews; reviewing PAC's legal filings; and soliciting input from judges, prosecutors, clients and peers.<sup>229</sup>
- The plans do not require and no infrastructure or systems exist for the evaluator to give PAC feedback and develop a remediation plan for any deficiencies.<sup>230</sup>
- Vesting supervisory authority over PAC with volunteer local bar committees does not provide the required rigor of review.<sup>231</sup>

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<sup>221</sup> See *supra* pp. 15-16 (noting that in an effective indigent defense system, counsel's ability, training, and experience matches the complexity of the case and that to provide this guarantee, the system must have uniform statewide standards identifying the prerequisite skills and experience counsel must possess to handle each type of case for which indigent defense services are provided).

<sup>222</sup> See *e.g.*, District 1 Appointment Plan, *supra* note 166, at 11 (stating no training requirements for counsel to handle Class A through E felony cases).

<sup>223</sup> See *supra* pp. 15-16 (noting that standards should specify, at a minimum, training requirements and required litigation experience); see, *e.g.*, District 1 Appointment Plan, *supra* note 166, at 11 (stating that to handle Class A through E felonies, counsel "must have tried as lead counsel or individually at least three jury trials to verdict" but not specifying what type of trial experience is necessary (case type) or how recent such experience must be).

<sup>224</sup> See *supra* p. 16 (noting that in an effective system, appointment standards should be reviewed on a regular basis and modified, as needed, based on developments in the law, science, technology, and other disciplines relevant to criminal defense practice).

<sup>225</sup> See *supra* p. 16 (noting that when this occurs, the system should devote resources and develop programs for counsel to gain the necessary skills and experience).

<sup>226</sup> See *supra* p. 16 (noting that to ensure that counsel's ability, training, and experience match the complexity of the case assigned, supervision is required with respect to selection of counsel).

<sup>227</sup> See *supra* p. 16 (noting that supervision is required to avoid conflicts, both at initial appointment and as the case develops).

<sup>228</sup> See *supra* pp. 18-19 (noting that in an effective indigent defense system such resources are required).

<sup>229</sup> See *supra* p. 16 (noting that in an effective indigent defense system such an evaluation is provided).

<sup>230</sup> See *supra* p. 16 (noting that in an effective indigent defense system such activities would occur).

<sup>231</sup> See *supra* p. 17 (noting that volunteer attorneys may be reluctant to sanction a colleague and suggesting that sanctioning authority should be vested with local supervisors); LEGISLATIVE STUDY COMMISSION REPORT, *supra* note 28, at 7 ("Some local district bar committees do a poor job managing the local lists of attorneys that can be appointed to provide representation, particularly with regard to monitoring and when necessary sanctioning the performance of local attorneys.").

- The plans do not provide for and no infrastructure or systems exist to develop, monitor and enforce workload requirements.<sup>232</sup>
- With the exception of services provided by IDS’s Forensic Resource Counsel,<sup>233</sup> few if any resources are provided to help PAC access necessary expertise and support, such as investigators and experts or access to individuals with specialized expertise in certain subject areas.<sup>234</sup>
- No infrastructure or systems exist to provide timely, high quality, relevant, skills based training to *all* PAC.<sup>235</sup>

In light of this and consistent with national standards,<sup>236</sup> PAC should be employed through a formal assigned counsel system where a local supervisor housed within the single district, regional or conflict public defender office provides the requisite supervision, oversight and support pursuant to uniform performance and workload standards developed by IDS.

### **Budget & Funding Issues**

Consistent with other states’ experiences,<sup>237</sup> stakeholders across North Carolina acknowledge that the State’s indigent defense system is woefully underfunded.<sup>238</sup> In this section, the Committee makes recommendations regarding budget and funding issues.

#### **Continue State Funding of Indigent Defense**

North Carolina should retain its current state-funded indigent defense program. State funding is the majority approach in the country.<sup>239</sup> Additionally, and as numerous studies have shown, a state funded model avoids the inevitable inequities that develop with locally-funded programs<sup>240</sup> and thus promotes uniformity in the delivery of justice in the state’s criminal courts. Funding should come from the General Fund or other stable revenue source; to ensure that the State honors its constitutional obligation to provide counsel to indigent persons, funding from unpredictable revenue sources should be avoided.<sup>241</sup>

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<sup>232</sup> See *supra* p. 18 (noting the importance of such requirements for an effective indigent defense delivery system).

<sup>233</sup> IDS REPORT, *supra* note 18, at 31 (describing the role of Forensic Resource Counsel).

<sup>234</sup> See *supra* pp. 18-19 (noting the importance of this support function).

<sup>235</sup> See *supra* p. 19 (noting that training is a key feature of an effective indigent defense system).

<sup>236</sup> ABA TEN PRINCIPLES, *supra* note 51, Commentary to Principle 2 (“private bar participation may include . . . a controlled assigned counsel plan”); ABA STANDARDS, *supra* note 49, Standard 5-1.2(b) (participation of the private bar “should be through a coordinated assigned-counsel system”).

<sup>237</sup> See, e.g., Sarah Breitenbach, *Right to an Attorney? Not Always in Some States*, THE PEW CHARITABLE TRUSTS, (April 11, 2016), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/04/11/right-to-an-attorney-not-always-in-some-states> (“There is a lack of funding for public defense in every state . . .”); JUSTICE DENIED, *supra* note 4, at 59-60 (citing states experiencing funding emergencies in indigent defense); *id.* at 64 (noting that throughout the country, “compensation of assigned counsel is often far from adequate”).

<sup>238</sup> Comments of District Attorney Andrew Murray, Committee Meeting Nov. 23, 2015; Comments of District Attorney Lorrin Freeman, Committee Meeting Nov. 23, 2015 (IDS is “woefully underfunded”); TRIAL JUDGES’ PERCEPTIONS OF IDS, *supra* note 18, at 16 (survey respondent stated that “court appointed attorneys are woefully underpaid”).

<sup>239</sup> JUSTICE DENIED, *supra* note 4, at 53.

<sup>240</sup> *Id.* at 54-55.

<sup>241</sup> *Id.* at 57 (noting that “[s]pecial funds and other revenue sources are unpredictable and more apt to fall short of indigent defense needs”).

## Funding to Meet Obligations on Annual Basis

As shown in Figure 5 below, IDS repeatedly has been unable to pay its obligations on an annual basis. IDS has accurately predicted its funding needs; end-of-year deficits have resulted from appropriations at levels lower than predicted demand.<sup>242</sup>

**Figure 5. IDS Debt at Fiscal Year End**

Fiscal Year	Year End Debt
2009-10	\$664,752
2010-11	\$9.9 million
2011-12	\$9.9 million
2012-13	\$7.9 million
2013-14	\$3.1 million
2014-15	\$6.1 million

*Source: IDS REPORT, supra note 19, at 30; Email from Danielle Carman to Committee Reporter (Mar. 31, 2016) (on file with Reporter).*

Recurring budget shortfalls result in payment delays and hardship for PAC, most of whom are solo practitioners in small law firms.<sup>243</sup> The Committee concurs with IDS' assertion that regularly allowing it to run short of funds and stop payments to PAC leads to a deterioration in the quality of lawyers willing to do assigned work.<sup>244</sup> Consistent with national standards,<sup>245</sup> the Committee recommends that IDS be funded adequately so that it can consistently meet its obligations on an annual basis.<sup>246</sup>

## Compensation of Providers

### **Compensation Should Be Reasonable**

Counsel providing indigent defense services should receive reasonable compensation.<sup>247</sup> Doing so ensures that the State can sustainably provide effective indigent defense services.<sup>248</sup> Stakeholders agree that compensation for assistant public defenders, like that of assistant district attorneys and other judicial branch employees, is insufficient.<sup>249</sup> With respect to compensation for PAC,

<sup>242</sup> Thomas Maher, *Indigent Defense in North Carolina*, (Nov. 23, 2016) (PowerPoint presentation on file with the Committee Reporter).

<sup>243</sup> IDS REPORT, *supra* note 18, at 18.

<sup>244</sup> *Id.*

<sup>245</sup> ABA STANDARDS, *supra* note 49, Standard 5-2.4 ("Assigned counsel should receive prompt compensation . . .").

<sup>246</sup> JUSTICE DENIED, *supra* note 4, at 183 ("For this Constitutional requirement to be implemented effectively, adequate funding of defense services is indispensable.").

<sup>247</sup> ABA STANDARDS, *supra* note 49, Standard 5-2.4 (compensation should be "reasonable"); ABA TEN PRINCIPLES, *supra* note 51, Commentary to Principle 8 ("[a]ssigned counsel should be paid a reasonable fee").

<sup>248</sup> ABA STANDARDS, *supra* note 49, Commentary to Standard 5-2.4 (noting a variety of reasons why reasonable compensation is appropriate); JUSTICE DENIED, *supra* note 4, at 63 ("Across the country, because of inadequate compensation, public defense programs find it difficult to attract and retain experienced attorneys."); SYSTEM OVERLOAD, *supra* note 5, at 11 ("Low rates of compensation for public defenders can make it difficult to attract and keep attorneys, resulting in higher turnover and less experienced defenders. Low pay can also decrease the participation of private attorneys as assigned or contracted counsel." (footnotes omitted)).

<sup>249</sup> See, e.g., Comments of District Attorney Lorrin Freeman, Committee Meeting Nov. 23, 20015; Comments of District Attorney Andrew Murray, Committee Meeting Nov. 23, 2015; Comments of District Attorney Mike Waters, Committee Meeting Nov. 23, 2015.

prosecutors, defense counsel, and judicial stakeholders agree that all current compensation systems (hourly, flat fee, and contract) are unsustainable in terms of ensuring that competent lawyers are available to do indigent defense work<sup>250</sup> and as a result, qualified lawyers are declining such work.<sup>251</sup>

In fact, evidence indicates that private lawyers plan to decline or already have declined to do indigent work because of low pay.<sup>252</sup> An insufficient number of competent lawyers threatens the system in several ways:

<sup>250</sup> TRIAL JUDGES’ PERCEPTIONS OF IDS, *supra* note 18, at 18-19 (by a two-to-one margin, judges responded that they had seen impacts on the quality of representation due to reduction in PAC hourly rates, with the vast majority of judges indicating that the quality of representation had suffered).

<sup>251</sup> See, e.g., IDS REPORT, *supra* note 18, at 2; Comments of Superior Court Judge Henry W. Hight, Jr., Committee Meeting Nov. 23, 2015 (noting that lawyers are leaving indigent work because it no longer is financially feasible); Comments of District Attorney Michael Waters, Committee Meeting Nov. 23, 2015 (because of low payment rates, many PAC no longer handle misdemeanor or high level felony cases; this has eroded quality); Comments of District Attorney Lorrin Freeman, Committee Meeting Nov. 23, 2015 (at current rates the contract system is not sustainable; a number of people have dropped out of the contract system because of low pay; expressing grave concerns about the quality of lawyers who will continue to do contract work); TRIAL JUDGES’ PERCEPTIONS OF IDS, *supra* note 18 (noting that in a follow-up question, 59 of 66 survey respondents indicated that the quality of representation had suffered primarily due to fewer experienced attorneys being willing to take indigent cases, as a result of a reduction in PAC hourly rates); *id.* at 16-17 (survey respondent indicated that “fees are such that more experienced attorneys will not accept the cases”; several judges urged IDS to lobby the legislature to approve rate increases).

Original PAC rates, original PAC rates adjusted for inflation and current PAC rates are as follows:

Case Type	Original PAC Rates (set in 2002)	Original PAC Rates Adjusted for Inflation to 2015 *	Current PAC Rates (set in May 2011)	Current PAC Rate as % of CPI Adjusted
Potentially Capital Cases	\$85	\$111.99	\$85 (\$75 after a non-capital declaration)	75.9% (67.0%)
High-Level Felonies (Class A-D)	\$65	\$85.64	\$70	81.7%
All Other Superior Court Cases	\$65	\$85.64	\$60	70.0%
All Other District Court Cases	\$65	\$85.64	\$55	64.2%

\* Based on CPI Inflation Calculator.

IDS REPORT, *supra* note 18, at 17.

The history of changes in PAC rates is as follows:

Case Type	Original IDS Rates (2002)	Aug. 2006 Rates	Feb. 2008 Rates	Jan. 2011 Rates	May 2011 Rates
Potentially Capital Cases	\$85	\$95	\$95	\$95 (\$85 after a non-capital declaration)	\$85 (\$75 after a non-capital declaration)
High-Level Felonies (Class A-D)	\$65	\$65	\$75	\$75	\$70
All Other Superior Court Cases	\$65	\$65	\$75	\$75	\$60
All Other District Court Cases	\$65	\$65	\$75	\$75	\$55

REPORT OF THE COMMISSION ON INDIGENT DEFENSE SERVICES 13 (Submitted to the N.C. General Assembly Feb. 1, 2015), <http://www.ncids.org/Reports%20&%20Data/Prior%20GA%20Reports/LegislatureReport2015.pdf>.

<sup>252</sup> In a January 2015 survey, 41.8% of PAC said that rate cuts were the primary cause of changes in their state court practice since May 2011. IDS REPORT, *supra* note 18, at 17. When asked if they will stop accepting indigent cases in the next two years if the rates remain at current levels, 41.7% said they either definitely will or there is a strong possibility that they will, and 39.5% said they are considering that change. *Id.*; see also Comments of Desmond McCallum, Attorney, Committee Meeting Nov. 23, 2015 (noting that he can no longer afford to handle misdemeanors at current rates and that he has seen a number of lawyers in his jurisdiction leave because of low compensation); Comments of Chief Public Defender James Williams, Committee Meeting

- The State may be unable to fulfill its constitutional obligation to provide defendants with effective assistance of counsel.
- The State may experience higher caseloads as a result of ineffective assistance of counsel claims asserted on appeal and in post-conviction motions.
- The State may experience trial delays as a result of overburdened or unprepared lawyers.
- The State may wrongfully convict defendants, with negative consequences for those persons, their families, victims, taxpayers, and the justice system.<sup>253</sup>

In light of this, the Committee recommends that IDS develop a clear, objective method for determining reasonable compensation of PAC and a long-term plan for obtaining and implementing reasonable compensation statewide.

### ***Compensation Should Ensure Parity with Prosecution Function***

The importance of parity in funding with the prosecution has been articulated in national standards, by the Department of Justice, the United States Supreme Court and other experts.<sup>254</sup> The Committee recommends that compensation for indigent defense providers should be commensurate with that provided to prosecutors.<sup>255</sup>

### ***Compensation Methods Should Not Create Negative Incentives or Disincentives***

#### **Contracts**

Since 2003 IDS has been exploring the use of contracts to pay for indigent defense services provided by PAC.<sup>256</sup> In fiscal year 2014-15, IDS had individually negotiated contracts with 44 different attorneys in a range of counties and covering a variety of case types, including adult criminal; juvenile delinquency; abuse, neglect and dependency; termination of parental rights; civil commitment; guardianship; Industrial Commission contempt; and treatment court proceedings.<sup>257</sup> Additionally, IDS contracts with over 200 attorneys through its separate Request for Proposal contract system.<sup>258</sup> IDS supports the use of contracts, noting that “carefully planned and tailored contracts can result in greater efficiencies and savings while improving the quality of services being delivered.”<sup>259</sup>

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Nov. 23, 2015 (noting that two of the most experienced lawyers in his district ceased handling serious cases because of low contract rates); *supra* note 251.

<sup>253</sup> See *supra* pp. 3-5 (discussing the costs to defendants, victims, taxpayers and the court system when the State is unable to provide effective assistance of counsel for indigent persons).

<sup>254</sup> ABA TEN PRINCIPLES, *supra* note 51, Principle 8; ABA STANDARDS, *supra* note 49, Standard 5-4.1; JUSTICE DENIED, *supra* note 4, at 12; SYSTEM OVERLOAD, *supra* note 5, at 8; *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

<sup>255</sup> Unlike the experience in other states, see JUSTICE DENIED, *supra* note 4, at 63 (noting that “throughout the country, public defender salaries are often significantly below those of prosecutors”), current data suggest that rough parity—at least in terms of assistant public defender and assistant district attorney pay—currently exists. See Summary of average APD and ADA Pay, Provided to Committee Reporter by Susan Brooks, IDS Public Defender Administrator, April 4, 2016 (on file with Committee Reporter).

A full analysis of parity would go beyond a comparison of salary and would examine all resources (e.g., support staff such as investigators and outside funding) supporting the defense and prosecution functions and compared to workload. See *supra* p. 10 (discussing the differences between indigent defense and prosecution case types).

<sup>256</sup> IDS REPORT, *supra* note 18, at 19.

<sup>257</sup> *Id.*

<sup>258</sup> REPORT ON REQUESTS FOR PROPOSALS AND CONTRACTS FOR LEGAL SERVICES, *supra* note 160, at 2.

<sup>259</sup> IDS REPORT, *supra* note 18, at 19. IDS notes that excluding certain contracts that were reported under a different system, all of the individually negotiated contracts combined saved 8% during fiscal year 2014-15 compared to fees paid to PAC under an hourly individual appointment method. *Id.*

In light of this and consistent with national standards,<sup>260</sup> the Committee supports IDS’s strategic use of contracts when<sup>261</sup> and where appropriate.<sup>262</sup> However, to ensure effective representation contracts should:

- Not be awarded primarily on the basis of cost; quality must be a consideration<sup>263</sup>
- Set minimum attorney qualifications, including training requirements<sup>264</sup>
- Separately fund expert, investigative and other litigation support services<sup>265</sup>
- Specify performance standards<sup>266</sup>
- Provide independent oversight and monitoring<sup>267</sup>
- Provide workload caps<sup>268</sup>
- Provide limitations on the practice of law outside of the contract<sup>269</sup>
- Provide an overflow or funding mechanism for excess, unusual or complex cases<sup>270</sup>
- Contain management and tracking requirements<sup>271</sup>

<sup>260</sup> ABA TEN PRINCIPLES, *supra* note 51, Commentary to Principle 2 (“private bar participation may include . . . contracts for services”); ABA STANDARDS, *supra* note 49, Standard 5-1.2(b) (participation of the private bar may include contracts for services); *id.*, Standard 5-3.1 (“Contracts for services of defense counsel may be a component of the legal representation plan.”).

<sup>261</sup> Stakeholders say that contracts work well for some cases but not others. Comments of Jeff Cutler, Committee Meeting Nov. 23, 2015 (contracts work well for misdemeanors and felony pleas in district court but not for serious felony trials where more time is required to handle the case); Comments of District Attorney Lorrin Freeman (contracts work well for misdemeanors felony pleas in district court but not for complex cases requiring more time).

<sup>262</sup> Stakeholders report that contracts work best in areas with high case volume; they emphasized difficulties contracts pose in low volume areas, including exacerbating court date conflicts because a small number of lawyers are handling a bulk of the indigent docket. Comments of Superior Court Judge Henry W. Hight, Jr., Committee Meeting Nov. 23, 2015 (because a small number of lawyers are handling a large portion of the docket, court conflicts result); Comments of Jeff Cutler, Committee Meeting Nov. 23, 2015 (contracts work well in Wake County but not in rural areas); Comments of District Attorney Michael Waters, Committee Meeting Nov. 23, 2015 (court conflicts are common because the contract system has reduced the number of lawyers available to do the work).

<sup>263</sup> ABA STANDARDS, *supra* note 49, Standard 5-3.1; *id.* Commentary to Standard 5-3.1 (“The key with all components of an effective defense services program is not merely cost but also the provision of quality legal representation. While it should be obvious that no contract for defense services should be awarded on the basis of cost alone, the apparent economies in the use of contracts make the admonition necessary . . .”).

<sup>264</sup> UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, CONTRACTING FOR INDIGENT DEFENSE SERVICES 16 (April 2000) [hereinafter CONTRACTING FOR INDIGENT SERVICES], <https://www.ncjrs.gov/pdffiles1/bja/181160.pdf>; *see also* ABA STANDARDS, *supra* note 49, Standard 5-3.3(a) (“Contracts should include provisions which ensure quality of legal representation . . .”).

<sup>265</sup> ABA TEN PRINCIPLES, *supra* note 51, Commentary to Principle 8; ABA STANDARDS, *supra* note 49, Standard 5-3.3(b)(x); CONTRACTING FOR INDIGENT SERVICES, *supra* note 264, at 16.

<sup>266</sup> ABA TEN PRINCIPLES, *supra* note 51, Commentary to Principle 8; CONTRACTING FOR INDIGENT SERVICES, *supra* note 264, at 16; *see also* ABA STANDARDS, *supra* note 49, Standard 5-3.3(a) (“Contracts should include provisions which ensure quality legal representation . . .”).

<sup>267</sup> CONTRACTING FOR INDIGENT SERVICES, *supra* note 264, at 16; ABA STANDARDS, *supra* note 49, Standard 5-3.3(b)(xi).

<sup>268</sup> ABA TEN PRINCIPLES, *supra* note 51, Commentary to Principle 8; ABA STANDARDS, *supra* note 49, Standard 5-3.3(b)(v); CONTRACTING FOR INDIGENT SERVICES, *supra* note 264, at 16.

<sup>269</sup> CONTRACTING FOR INDIGENT SERVICES, *supra* note 264, at 16; ABA STANDARDS, *supra* note 49, Standard 5-3.3(b)(viii).

<sup>270</sup> ABA TEN PRINCIPLES, *supra* note 51, Commentary to Principle 8.

<sup>271</sup> CONTRACTING FOR INDIGENT SERVICES, *supra* note 264, at 16; ABA STANDARDS, *supra* note 49, Standard 5-3.3(b)(xiv).

- Provide a mechanism for oversight and evaluation<sup>272</sup>
- Specify grounds for terminating the contract<sup>273</sup>
- Provide for the completion of cases if the contract is terminated, breached, or not renewed<sup>274</sup>

IDS should avoid the following characteristics, associated with a deficient contract system:

- Rewarding low rather than realistic bids<sup>275</sup>
- Placing cost containment before quality<sup>276</sup>
- Creating incentives to plead cases out early rather than go to trial,<sup>277</sup> when a plea is not in the client’s best interest
- Resulting in lawyers with fewer qualifications and less training doing a greater percentage of the work<sup>278</sup>
- Offering limited training, supervision, or continuing education to counsel<sup>279</sup>
- Providing unrealistic caseload limits or no limits at all<sup>280</sup>
- Failing to provide resources for investigative or expert services<sup>281</sup>
- Resulting in case dumping that shifts cost burdens back to the institutional defender<sup>282</sup>
- Failing to provide for independent monitoring or evaluation of performance outside of costs per case<sup>283</sup>
- Failing to include a case tracking or case management system and failing to incorporate a strategy for case weighting<sup>284</sup>

Importantly, contracts should never be a separate, “stand-alone” delivery system; contracts always must be administered under a formal assigned counsel system that allows for appropriate oversight, supervision, and support.<sup>285</sup>

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<sup>272</sup> CONTRACTING FOR INDIGENT SERVICES, *supra* note 264, at 16.

<sup>273</sup> ABA STANDARDS, *supra* note 49, Standard 5-3.3(b)(xv).

<sup>274</sup> CONTRACTING FOR INDIGENT SERVICES, *supra* note 264, at 16. IDS reports that it considered all of these characteristics in creating its existing contract system. Telephone conversation between Danielle Carman, former Assistant Director/General Counsel, NC IDS, Thomas Maher, Executive Director, NC IDS and Committee Reporter, June 9, 2016. *See generally* REPORT OF THE COMMISSION ON INDIGENT DEFENSE SERVICES TO THE JOINT LEGISLATIVE COMMISSION ON GOVERNMENTAL OPERATIONS: REQUESTS FOR PROPOSALS AND CONTRACTS FOR LEGAL SERVICES (2011) (noting considerations), [http://www.ncids.org/RFP/RepData/GA\\_Report.pdf](http://www.ncids.org/RFP/RepData/GA_Report.pdf).

<sup>275</sup> CONTRACTING FOR INDIGENT SERVICES, *supra* note 264, at 13; SYSTEM OVERLOAD, *supra* note 5, at 9.

<sup>276</sup> CONTRACTING FOR INDIGENT SERVICES, *supra* note 264, at 13; ABA TEN PRINCIPLES, *supra* note 51, Commentary to Principle 8 (“[c]ontracts with private attorneys for public defense services should never be let primarily on the basis of cost”).

<sup>277</sup> CONTRACTING FOR INDIGENT SERVICES, *supra* note 264, at 13.

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> ABA STANDARDS, *supra* note 49, Commentary to Standard 5-1.2 (noting that the ABA does not endorse the use of contracts as a stand-alone system; use of contracts must be part of a larger, coordinated assigned counsel system and “[t]he structure should guarantee adequate independence, oversight and quality control for the use of contracts”). *See generally supra* pp. 35-38 (recommending a formal assigned counsel system).

## Flat Fee

A flat fee system offers payment per case or per session. North Carolina has experience with flat fee compensation. Specifically, when IDS was created, it approved two preexisting flat per case fee systems for district court cases in Cabarrus and Rowan counties.<sup>286</sup> Additionally, in 2016, the General Assembly directed the NCAOC and IDS to implement a flat fee pilot project in one or more counties in at least six judicial districts.<sup>287</sup>

As compared to contracts, flat fee arrangements involve lower administrative costs, allow for greater participation by the private bar, give greater flexibility for private lawyers who may not want to take a large number of indigent cases as part of a contract and provide certainty to the client regarding the potential amount of attorney fees that he or she may be ordered to pay. However, national standards discourage the use of flat fees,<sup>288</sup> explaining: “The possible effect of such rates is to discourage lawyers from doing more than what is minimally necessary to qualify for the flat payment.”<sup>289</sup> This disincentive to providing an effective defense is particularly acute when the flat fee arrangement does not allow for additional payment in exceptional cases.<sup>290</sup> More importantly, a 2011 study by IDS found that “case outcomes, both in terms of determination of guilt and disposition or sentence, for PAC DWI and misdemeanor cases under the hourly rate system were significantly more favorable than outcomes under the flat fee systems in Cabarrus and Rowan [Counties].”<sup>291</sup> A more recent IDS study confirmed those results.<sup>292</sup>

In light of concerns about flat fee arrangements and existing evidence showing that outcomes for North Carolina cases compensated under a flat fee method are less favorable than for those compensated on an hourly basis, the Committee recommends that any decisions about continued use or expansion of flat fee payment systems should be evidence-based, relying on fiscal and outcomes data generated from the new flat fee pilot program.

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<sup>286</sup> NORTH CAROLINA OFFICE OF INDIGENT DEFENSE SERVICES, DISTRICT COURT DWI AND MISDEMEANOR FLAT FEES AND CASE OUTCOMES 1 (2011) [hereinafter FLAT FEES & CASE OUTCOMES], [http://www.ncids.org/systems\\_evaluation\\_project/caseoutcome/research/districtcourt.pdf](http://www.ncids.org/systems_evaluation_project/caseoutcome/research/districtcourt.pdf).

<sup>287</sup> S.L. 2016-94, sec. 19A.4.

<sup>288</sup> ABA STANDARDS, *supra* note 49, Commentary to Standard 5-2.4 (“Since a primary objective of the payment system should be to encourage vigorous defense representation, flat payment rates should be discouraged.”).

<sup>289</sup> *Id.* (going on to note that decisions striking down statutory fee maximums “constitute a strong trend away from the payment of flat fees”); *see also* SYSTEM OVERLOAD, *supra* note 5, at 9 (noting that if the purpose of a flat fee arrangement is solely to reduce costs, the arrangement will negatively impact indigent defense services by creating a disincentive to devote the necessary time to the case); MINOR CRIMES, MASSIVE WASTE, *supra* note 76, at 30 (noting that with a flat fee arrangement, the lawyer is motivated to dispose of the case as quickly as possible to maximize profit, creating a conflict of interest between attorney and client; recommending that jurisdictions discontinue the use of flat fee systems); Stephen J. Schulhofer, *Client Choice for Indigent Criminal Defendants: Theory and Implementation*, 12 OHIO STATE J. OF CRIM. LAW 505, 511 (2015) (“If attorney compensation is low, defense counsel may forego useful investigations and may avoid trial even when there are good chances for acquittal.”).

<sup>290</sup> ABA STANDARDS, *supra* note 49, Commentary to Standard 5-2.4 (noting the importance of providing extra payments to counsel when representation is provided in unusually protracted or complicated cases).

<sup>291</sup> FLAT FEES & CASE OUTCOMES, *supra* note 286, at 3-6.

<sup>292</sup> Margaret Gressens, *Indigent Defense Milestone: A Comparison of Delivery Systems in North Carolina* (May 2016) (PowerPoint Presentation on file with Committee Reporter). Just one of the findings of that study was that for high exposure cases, public defender offices achieved a 48.9% 3-year average of client favorable outcomes; for the same group of cases over the same period, flat fee arrangements yielded 21.8% client favorable outcomes. *See supra* note 198 (discussing IDS’s outcomes research and data for key performance indicators).

### Hourly Fees

A benefit to an hourly fee compensation method<sup>293</sup> is that payment is directly tied to case complexity. Thus, this compensation method does not create a disincentive for counsel to spend an appropriate amount of time on the case.

One potential problem with an hourly fee compensation method is that it creates an incentive to “overwork” a case to increase hours and thus compensation.<sup>294</sup> In North Carolina, however, there seems to be no evidence of widespread overbilling under the hourly fee method. In fact, the average hours claimed by PAC for adult criminal cases in fiscal year 2012 was only 4.56 hours.<sup>295</sup> Average hours claimed by PAC ranged from a low of 3.31 hours for district court misdemeanor non-traffic cases to a high of 7.59 hours for superior court Class I felony cases.<sup>296</sup> Nevertheless, to ensure appropriate use of taxpayer funds and confidence in the indigent defense program, IDS should develop a system to flag high fee submissions by PAC in individual cases and a system for appropriate auditing.

Numerous stakeholders expressed concern that current depressed compensation rates are negatively impacting the criminal justice system and are unsustainable long term.<sup>297</sup> As noted above, the Committee recommends that IDS develop a clear, objective method for determining reasonable compensation of PAC and a long term plan to obtain and implement reasonable compensation statewide.

### Voucher & Client Choice Systems

Under a voucher system, the indigent defendant is given a voucher for a specified sum and is instructed to hire his or her own counsel. This payment method is not currently in place in North Carolina. Nor did research reveal any other state or jurisdiction that has employed such a system. Although a pilot program in Comal County Texas (population 116,524) sometimes is cited as an example of a voucher system, the Comal pilot is not a true voucher program. Rather, clients chose lawyers from an approved list of lawyers and in felony cases the judge sets the compensation rate within a specified range; as such, the Comal pilot may be better described as a client choice model.<sup>298</sup> Some suggest that by providing client choice, voucher systems will improve outcomes for defendants and the system.<sup>299</sup> The Committee, however, identified difficulties presented by a voucher system including:

- what to do with a case when the client-selected lawyer later is dismissed or removed;
- how to provide resources to pretrial detainees so that they can make informed choices regarding counsel and can contact counsel to discuss representation;

<sup>293</sup> For current hourly PAC compensation rates, see note 251.

<sup>294</sup> See Schulhofer, *supra* note 289, at 511 (“if compensation is very generous, defense counsel may pursue unproductive investigations or hold out hopes for acquittal at trial when a guilty plea would better serve the client’s interest”).

<sup>295</sup> See NORTH CAROLINA OFFICE OF INDIGENT DEFENSE SERVICES, FY12 PRIVATE APPOINTED COUNSEL AVERAGE HOURS STUDY 1 (2013) (breaking down hours claimed by case type), [http://www.ncids.org/Reports & Data/Latest Releases/FY12\\_PACHoursStudy.pdf](http://www.ncids.org/Reports & Data/Latest Releases/FY12_PACHoursStudy.pdf).

<sup>296</sup> *Id.*

<sup>297</sup> See *supra* pp. 39-40.

<sup>298</sup> See Schulhofer, *supra* note 289, at 545-46 (judges must approve assigned counsel vouchers; in felony cases judges have wide discretion to select the compensation rate they consider appropriate within an authorized range; separately describing misdemeanor vouchers).

<sup>299</sup> See *id.* (arguing for client choice); Stephen J. Schulhofer & David D. Friedman, *Reforming Indigent Defense: How Free Market Principles Can Help to Fix a Broken System* (CATO Institute Policy Analysis, Sept. 1, 2010), <http://object.cato.org/sites/cato.org/files/pubs/pdf/pa666.pdf>.

- what to do when the client is unable to find a lawyer who will accept the voucher;<sup>300</sup>
- how to address the negative incentives that are inherent in any flat fee arrangement, such as a voucher system;<sup>301</sup> and
- what to do when voucher recipients flock to a popular lawyer, resulting in case conflicts and delays.

Perhaps most importantly, however, the Committee has identified a lack of supervision and support of PAC to be a key deficiency with the state’s existing indigent program and has recommended system changes to address this deficiency, such as uniform qualification standards for PAC.<sup>302</sup> By placing no limits on who can serve as counsel, a voucher system undercuts core recommendations in this Report.

For these reasons, the Committee recommends against implementing a true voucher system in North Carolina. However, it recognizes that client choice—allowing defendants the option of choosing counsel from an approved list—may promote the lawyer-client relationship. It thus recommends that IDS evaluate the outcome of the Texas pilot program to determine whether to pilot the use of a client choice model in North Carolina.

#### Debt Forgiveness

Programs that allow for forgiveness of law school student loan debt in exchange for working for a specified period of time in a public defender office may be a valuable tool to attract qualified new law school graduates to indigent defense practice.<sup>303</sup> The Committee recommends that IDS and the NCAOC pursue such programs with North Carolina’s law schools and through the North Carolina Legal Education Assistance Foundation,<sup>304</sup> to attract candidates to public defense positions, positions in the prosecutor’s office, and to other public service positions within the judicial branch.

### Strategies to Reduce Indigent Defense Expenses

A number of the Committee’s recommendations will require additional resources. To reduce the taxpayer funds required to implement these recommendations, the Committee recommends the following strategies to reduce indigent defense expenses to create capacity to implement recommended reforms.

#### **Reclassify Minor Crimes**

Unlike prosecutors, who can exercise discretion with respect to which cases and defendants they wish to prosecute, IDS does not have discretion to refuse to provide indigent defense services once charges have been initiated. IDS must provide qualified counsel for every indigent person who has a right to representation. As noted, both the United States and North Carolina Constitutions require the State to provide indigent defense services for misdemeanor cases whenever an active or

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<sup>300</sup> A defendant cannot be required to proceed pro se unless the defendant (1) knowingly, voluntarily and intelligently waives the right to counsel, *Iowa v. Tovar*, 541 U.S. 77, 88 (2004); or (2) forfeits the right to counsel. See Jessica Smith, *Counsel Issues*, in NC SUPERIOR COURT JUDGES’ BENCHMARK (Jessica Smith, Editor), <http://benchbook.sog.unc.edu/criminal/counsel-issues>. North Carolina applies a presumption against forfeiture, *id.*, and a finding of forfeiture must rest on a factual record of the defendant’s intent to disrupt the criminal justice process. *Id.*

<sup>301</sup> See *supra* pp. 44-45.

<sup>302</sup> See *supra* pp. 27-31 (recommendations regarding oversight and support).

<sup>303</sup> JUSTICE DENIED, *supra* note 4, at 12 (expressly recommending that “[l]aw student loan forgiveness programs should be established for both prosecutors and public defenders”); *id.* at 195-96 (same).

<sup>304</sup> The Foundation website is here: <http://ncleaf.org/>.

suspended sentence is imposed.<sup>305</sup> Thus, one way to reduce indigent defense caseloads—and indigent defense costs—is to repeal minor, non-violent misdemeanors or reclassify them as civil infractions for which defendants are subjected only to fines.<sup>306</sup> If the potential for incarceration is eliminated with reclassification, counsel is not required under the constitution.<sup>307</sup> Reclassification of minor offenses is recommended in the Report of the National Right to Counsel Committee as a tool to reduce pressures on indigent defense systems<sup>308</sup> and has been implemented in some jurisdictions.<sup>309</sup> Although commonly associated with liberals, supporters of reclassification come from across the political spectrum and include former Texas Governor and 2012 Republican presidential candidate Rick Perry, evangelical minister Pat Robertson, and the Cato Institute.<sup>310</sup>

In March 2011, IDS released a study designed to identify misdemeanor offenses that could be reclassified as infractions without negatively impacting public safety and to estimate potential cost savings to the state’s indigent defense system if these offenses were reclassified as infractions.<sup>311</sup> That study found, in part, that the state’s court system has a high volume of minor misdemeanor cases, especially misdemeanor traffic cases.<sup>312</sup> Specifically, in 2009, 55.2% of the 1.498 million cases disposed of by the state’s court system were cases where the highest charge was either a Class 2 or 3 misdemeanor.<sup>313</sup> Focusing on thirty-one specific misdemeanor offenses, the study found that:

- 12 of the offenses resulted in dismissal without leave at least 75% of the time;
- 21 resulted in dismissal without leave at least 50% of the time; and
- for all but 2 offenses, active time was imposed in less than 1% of cases.<sup>314</sup>

After reviewing cost savings associated with reclassifying the identified offenses, the study concludes: “The data shows that the North Carolina court system is handling a high volume of low level misdemeanor cases and suggests that the North Carolina court system could save significant money and relieve over-burdened courts by reclassifying many minor misdemeanor offenses as infractions.”<sup>315</sup> Specifically, it concluded that the state could save approximately \$2.25 million just

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<sup>305</sup> See *supra* p. 12 (discussing the scope of the right to counsel).

<sup>306</sup> THE SPANGENBERG PROJECT, THE CENTER FOR JUSTICE, LAW AND SOCIETY AT GEORGE MASON UNIVERSITY, AN UPDATE ON STATE EFFORTS IN MISDEMEANOR RECLASSIFICATION, PENALTY REDUCTION AND ALTERNATIVE SENTENCING, at i (2010) [hereinafter THE SPANGENBERG PROJECT REPORT] (so noting); see also Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1073 (2015) [hereinafter *Misdemeanor Decriminalization*] (“[a]larmed by the crisis in indigent defense,” commentators have “zeroed in” on the cost saving that decriminalization provides).

<sup>307</sup> JUSTICE DENIED, *supra* note 4, at 198.

<sup>308</sup> *Id.* at 13, 72-73 (discussing how indigent defense providers in several states are burdened with excessive caseloads of minor, petty offenses).

<sup>309</sup> THE SPANGENBERG PROJECT REPORT, *supra* note 306, at 4-6 (noting that as of 2010 both Alaska and Massachusetts had done so; noting other then-pending legislation); *Misdemeanor Decriminalization*, *supra* note 306 at 1070-71 (noting more recent legislation, including marijuana decriminalization).

<sup>310</sup> *Misdemeanor Decriminalization*, *supra* note 306, at 1069.

<sup>311</sup> See NORTH CAROLINA OFFICE OF INDIGENT DEFENSE SERVICES, FY11 RECLASSIFICATION IMPACT STUDY 3 (2011), <http://www.ncids.org/Reports%20&%20Data/Latest%20Releases/FY11ReclassificationImpactStudy.pdf> [hereinafter RECLASSIFICATION IMPACT STUDY].

<sup>312</sup> *Id.* at 5.

<sup>313</sup> *Id.* North Carolina’s high percentage of the criminal docket attributed to misdemeanors is in line with other states. *Misdemeanor Decriminalization*, *supra* note 306, at 1057.

<sup>314</sup> RECLASSIFICATION IMPACT STUDY, *supra* note 311, at 6.

<sup>315</sup> *Id.* at 8.

in counsel fees if all thirty-one studied offenses were reclassified as infractions.<sup>316</sup> Of course, overall savings to the court system would be much greater.

In light of this, repeal and/or reclassification are promising tools to reduce indigent defense costs without sacrificing public safety.<sup>317</sup> The Committee thus recommends that the North Carolina Sentencing and Policy Advisory Commission<sup>318</sup> be charged with the responsibility of identifying—on a regular basis—criminal offenses that should be considered for repeal or reclassification as fine-only infractions, because, for example, charges are routinely dismissed or rarely result in an active sentence.<sup>319</sup>

### **Capital Cases**

Spending on potentially capital cases constitutes approximately 12.75% of IDS's budget.<sup>320</sup> Capital cases<sup>321</sup> are expensive for a number of reasons, including that proceeded capital cases require two

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<sup>316</sup> *Id.*

<sup>317</sup> THE SPANGENBERG PROJECT REPORT, *supra* note 306, at i.

<sup>318</sup> The North Carolina Sentencing and Policy Advisory Commission was created by the General Assembly to make recommendations to the General Assembly for the modification of sentencing laws and policies, and for the addition, deletion, or expansion of sentencing options as necessary to achieve policy goals. *See* The North Carolina Court System, *Sentencing and Policy Advisory Commission*, NCCOURTS.ORG, <http://www.nccourts.org/courts/crs/councils/spac/> (last visited June 2, 2016).

<sup>319</sup> The Sentencing and Policy Advisory Commission already provides a detailed annual analysis of convictions and sentences imposed by class of crime. *See, e.g.*, NORTH CAROLINA SENTENCING AND POLICY ADVISORY COMMISSION, STRUCTURED SENTENCING STATISTICAL REPORT FOR FELONIES AND MISDEMEANORS: FISCAL YEAR 2014/15 (2016), [http://www.nccourts.org/Courts/CRS/Councils/spac/Documents/statisticalrpt\\_fy14-15.pdf](http://www.nccourts.org/Courts/CRS/Councils/spac/Documents/statisticalrpt_fy14-15.pdf).

The Committee notes that in 2013, the General Assembly reclassified certain misdemeanors as infractions. *See* Robert L. Farb, *2013 Legislation Affecting Criminal Law and Procedure* 25-26 (rev. Nov. 2013), <https://www.sog.unc.edu/sites/www.sog.unc.edu/files/reports/2013CriminalLegislation%20Revised%20Nov%202013.pdf> (discussing these changes). Thus, the General Assembly has recent experience with the type of reclassification discussed here. That same 2013 legislation also reclassified certain Class 1 and 2 misdemeanors as Class 3 misdemeanor offenses. *Id.* The Committee notes that when low-level crimes are reclassified as fine-only Class 3 misdemeanors, the crimes remain criminal offenses but because the possibility of incarceration is removed, so too is the right to counsel. Such an approach is sometimes thought of as a “win-win,” in that it relieves the defendant of the threat of incarceration while saving the state millions of dollar in defense and other justice system costs. *Misdemeanor Decriminalization*, *supra* note 306, at 1058-59 (noting that some so characterize such reforms but asserting that collateral and other consequences that attach to fine-only misdemeanors suggest otherwise). However, fine-only misdemeanors are still crimes and as such still trigger a panoply of burdens, including arrest, fines, criminal records and, importantly, all of the collateral consequences that attach to any criminal conviction, *id.*, including barriers to obtaining employment, joining the military, or receiving financial aid to pursue higher education. *See supra* note 10 (North Carolina's Collateral Consequences Assessment Tool). As noted above, an effective indigent defense program provides services in proceedings arising from or connected with a criminal action resulting in significant collateral consequences. *See supra* p. 12. Because significant collateral consequences attach to *any* criminal conviction, including fine-only misdemeanors, an approach that reclassifies minor misdemeanors as fine-only crimes violates a core characteristic of an effective indigent defense program and thus is not preferred. *Misdemeanor Decriminalization*, *supra* note 306, at 1058-59 (noting the collateral consequences that attach to fine-only misdemeanors and observing: “These burdens, moreover, can be imposed on offenders quickly, informally, and without counsel, so that the standard procedural safeguards against wrongful conviction and overpunishment are lessened, if not eliminated altogether.”); THE SPANGENBERG PROJECT REPORT, *supra* note 306, at 11-12 (discussing the dangers of uncounseled misdemeanor convictions); MINOR CRIMES, MASSIVE WASTE, *supra* note 76.

<sup>320</sup> Email from Danielle M. Carman, Assistant Director/General Counsel NC IDS to Committee Reporter (May 16, 2016) (on file with Reporter) (the figure excludes the local public defender offices' share of potentially capital cases at the trial level and the Office of the Appellate Defender's share of capital appeals).

<sup>321</sup> The term “potentially capital cases” includes cases charged as first-degree murder or undesignated degree of murder. NORTH CAROLINA OFFICE OF INDIGENT DEFENSE SERVICES, FY15 CAPITAL TRIAL CASE STUDY: POTENTIALLY

lawyers to be appointed to assist with the defense; the hourly rate for potentially capital cases is higher than the rate for non-capital cases; potentially capital cases require more hours to both prepare and litigate; and most potentially capital cases require additional support services, such as private investigators, mitigation specialists, experts and attorney support services (e.g., paralegals).

Figure 6 below shows the results of a recent IDS study that examined the average indigent defense costs associated with different types of homicide cases between 2007 and 2015.

**Fig. 6. Average PAC & Expert Costs for Homicide Prosecutions**

	<b>Proceeded Capital Murder<sup>322</sup></b>	<b>Potentially Capital Murder<sup>323</sup></b>	<b>Proceeded Non-Capital Murder<sup>324</sup></b>	<b>Second-Degree Murder</b>	<b>Voluntary Manslaughter</b>
<b>Average Cost</b>	\$93,231	\$34,666	\$21,022	\$2,338	\$1,023

*Source:* NORTH CAROLINA OFFICE OF INDIGENT DEFENSE SERVICES, FY15 CAPITAL TRIAL CASE STUDY: POTENTIALLY CAPITAL CASE COSTS AT THE TRIAL LEVEL (2015)

That same study also found that although most alleged intentional homicides are charged as first-degree or undesignated murder, more than 83% of these cases are eventually disposed as second-degree murder or less.<sup>325</sup> Specifically, of all potentially capital cases disposed between 2007 and 2015:

- 83.6% ended in a conviction of second degree-murder or less.
- 11.7% ended in a voluntary dismissal, no true bill, or no probable cause finding.
- 45.7% ended in a conviction of less than second-degree murder.<sup>326</sup>

For proceeded capital cases:

- 58.1% ended in a conviction of second-degree murder or less.
- 20.1% ended in a conviction of less than second-degree murder.
- 2.2% ended in a death verdict.<sup>327</sup>

That report posits that “North Carolina is spending unnecessary taxpayer dollars by charging cases as first-degree or undesignated murder and prosecuting them as potentially capital cases when most are disposed at a much lower level.”<sup>328</sup> The Committee finds this data compelling and recommends, consistent with a study required by the 2016 Appropriations Act,<sup>329</sup> that IDS work

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CAPITAL CASE COSTS AT THE TRIAL LEVEL 7 (2015), <http://www.aoc.state.nc.us/www/ids/Reports & Data/Latest Releases/FY15CapitalCaseStudy.pdf> [hereinafter CAPITAL CASE COSTS] “Proceeded capital” refers to a subset of potentially capital cases at the trial level in which two appointed attorneys worked on the case simultaneously at any given point in time. *Id.*

<sup>322</sup> See *supra* note 321 (defining this term).

<sup>323</sup> See *id.* (defining this term).

<sup>324</sup> “Proceeded non-capital” refers to a subset of potentially capital cases at the trial level in which no more than one appointed attorney worked on the case at any given point in time. See CAPITAL CASE COSTS, *supra* note 321, at 7.

<sup>325</sup> *Id.* at 2.

<sup>326</sup> *Id.* at 4.

<sup>327</sup> *Id.*

<sup>328</sup> *Id.*

<sup>329</sup> S.L. 2016-94, Sec. 19A.3.

with the NC Conference of District Attorneys to identify ways for earlier identification of charges that truly warrant prosecution as capital cases.

### ***Maintain Open File Discovery***

North Carolina was a leader in adopting open file discovery.<sup>330</sup> Open file discovery should be maintained for a number of reasons, one being that it reduces indigent defense costs.<sup>331</sup>

### **Committee & Subcommittee Members**

To facilitate its work, the Committee formed an Indigent Defense Subcommittee to prepare draft recommendations for Committee review. Members of the Indigent Defense Subcommittee included:

Athena Brooks, District Court Judge and President N.C. Conference of District Court Judges  
James Coleman, Jr., Professor, Duke University School of Law and Committee member  
Darrin D. Jordan, Lawyer, IDS Commissioner and Committee member  
Thomas K. Maher, Executive Director, IDS  
LeAnn Melton, Public Defender  
John Rubin, Albert Coates Professor of Public Law and Government, School of Government, UNC Chapel Hill  
Anna Mills Wagoner, Senior Resident Superior Court Judge and Committee member  
Michael Waters, District Attorney

Members of the Committee included:

William A. Webb, U.S. Magistrate Judge (ret.) and Committee Chair  
Augustus A. Adams, N.C. Crime Victims Compensation Committee member  
Asa Buck III, Sheriff and Chairman, N.C. Sheriffs' Association  
Randy Byrd, President N.C. Police Benevolent Association  
James E. Coleman, Jr., Professor, Duke University School of Law  
Kearns Davis, Lawyer and President, N.C. Bar Association  
Paul A. Holcombe III, District Court Judge  
Darrin D. Jordan, Lawyer and IDS Commissioner  
Robert C. Kemp III, Public Defender and Immediate Past-President, N.C. Defenders Association  
Sharon S. McLaurin, Magistrate  
R. Andrew Murray Jr., District Attorney and Immediate Past-President, N.C. District Attorneys Conference  
Diann Seigle, Executive Director, Carolina Dispute Settlement Services  
Anna Mills Wagoner, Senior Resident Superior Court Judge

This report was prepared for the Committee by Committee Reporter Jessica Smith, W.R. Kenan, Jr. Distinguished Professor, School of Government, UNC Chapel Hill.

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<sup>330</sup> Hon. Alex Kozinski, *Preface to Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC., iii, xxvi-xxvii (2015) (advocating for open file discovery and noting that NC adopted its open file discovery rule by statute in 2004).

<sup>331</sup> JUSTICE DENIED, *supra* note 4, at 77 ("Open-file discovery not only promotes the prompt disposition of cases; it can also significantly reduce indigent defense workloads and costs."); *id.* at 207 (same).