

INSTRUCTIONS FOR APPOINTMENT OF CONTRACT COUNSEL IN NON-CAPITAL CRIMINAL AND OTHER CASES IN LEE COUNTY UNDER THE INDIGENT DEFENSE SERVICES ACT

I. Applicability

A. Generally

These instructions are issued pursuant to Rules 1.5 and 1.8 of the *Rules for the Continued Delivery of Services in Non-Capital and Non-Criminal Cases at the Trial Level* (hereinafter “IDS Rules”) and Request for Proposals (“RFP”) #13-0001 and any subsequent RFP issued by the Office of Indigent Defense Services (hereinafter “IDS”) for the same case types in Lee County. They apply to all non-capital criminal cases at the trial level in which the provision of counsel is subject to the Indigent Defense Services Act of 2000 (G.S. 7A-498 through 7A-498.8) (hereinafter “IDS Act”).

B. Exclusions

1. In cases in which the defendant is charged with first-degree murder, an undesignated degree of murder, or an offense filed contemporaneously with or subsequently joined with such murder charges, and was 18 years of age or older at the time of the offense, the court shall appoint IDS, which shall appoint counsel in accordance with the *Rules for Providing Legal Representation in Capital Cases*.

2. In cases in which a person is entitled to appointed counsel in an appeal to the appellate division from an adverse ruling in the trial division, the court shall appoint the Office of Appellate Defender, which shall appoint counsel in accordance with the *Rules for Providing Legal Representation in Non-Capital Criminal Appeals and Non-Criminal Appeals*. The only exception to this procedure is in cases in which a death sentence has been returned, where the appellate entries made by the court shall reflect that appeal is taken by operation of law and that the IDS Director has appointed the Office of Appellate Defender. See Rule 2B.2(a) of *Rules for Providing Legal Representation in Capital Cases*.

C. Standard Terms and Conditions of Contract Incorporated

IDS’ Standard Terms and Conditions of Contract are incorporated into these appointment instructions by reference. Those Terms and Conditions are available at www.ncids.org on the “RFPs & Contracts” page.

II. IDS Contracts Administrator and Regional Defender

1. The IDS Contracts Administrator shall serve as Administrator of these instructions. The Administrator shall file and keep current these instructions for the appointment of contract counsel with the Clerk of Superior Court in the county, and shall ensure that current instructions are available at www.ncids.org on the “RFPs & Contracts” page.

2. The IDS Regional Defender for Judicial Divisions II and IV shall help ensure that all contractors provide quality representation by assisting, supporting, and overseeing the contract attorneys in his or her area, including conducting courtroom observations. The IDS Regional Defender shall also be responsible for addressing clients’ complaints about their assigned contractors and for assisting in the resolution of local issues and problems.

III. Determination of Entitlement to Counsel

1. In each case subject to these instructions, the court shall determine whether a person is entitled to have counsel appointed to represent him or her in the particular case. In cases in which the person must be indigent to receive counsel, the court shall determine indigency. When these instructions describe the functions that a court performs, the term “court” includes the Clerk of Superior Court.

2. Entitlement to the appointment of counsel begins as soon as practicable after the indigent is taken into custody or is served with the warrant, notice, or other initiating process. Whenever a person is entitled to the appointment of counsel but the appropriate court is not in session and will not be in session within the next 48 hours, the Clerk of Superior Court shall make a determination of indigency and shall appoint counsel as provided by G.S. 7A-452(c) and these instructions.

IV. Appointment of Contract Counsel

A. Master Lists and Appointment Records

1. The Clerk of Superior Court shall maintain in his or her office master lists of attorneys who are under contract with IDS to handle cases appointed by the court. The Administrator shall prepare such master lists and provide them to the clerk. These master lists shall be made reasonably available to the public upon request. Depending on the number of caseload units that a contract attorney has agreed to handle pursuant to his or her contract, the name of one or more contractors may appear multiple times on a master list.

2. When an appointment is to be made either by the District or Superior Court, the clerk shall provide the name of the next contractor on the appropriate master list to the court, which shall make the assignment as provided herein.

3. The court shall record the appointments it makes and the Clerk of Superior Court shall keep a permanent record of all appointments. These records shall be made available to the public upon request. If the court appoints a contractor who is not next in sequence on the appropriate master list, the court shall record the reasons for doing so.

B. Order of Appointments: Per Case

1. If the court determines that a person is entitled to counsel, the court shall assign an attorney from the appropriate master list of contractors. No appointment shall be made by the court of an attorney whose name does not appear on the appropriate master list of contractors on file with the Clerk of Superior Court. However, in exceptional circumstances and with the advance written approval of the IDS Director or his or her designee, the court may appoint a qualified attorney who is not on the appropriate contractor list with that attorney's consent. Exceptional circumstances that may warrant the appointment of a qualified attorney who is not on the appropriate contractor list include, but are not limited to, appointment of the same attorney who was previously assigned by the Office of Capital Defender to represent the defendant in a potentially capital case to other unrelated high-level felonies in the same county. If the court appoints an attorney who is not on the appropriate contractor list following approval by the IDS Director or his or her designee, the court shall record the reasons for doing so.

2. In the event that all contractors have a conflict of interest or that there are more codefendants than contractors, the court shall appoint a qualified attorney who is not on the appropriate contractor list with that attorney's consent. In that event, the court shall provide written notification to the IDS Director or his or her designee within five (5) business days of the appointment but is not required to obtain advance written approval. If the circumstances of a specific case require the appointment of counsel from another county or district, the court may contact IDS for assistance in identifying a qualified attorney who is available and willing to accept the appointment.

3. The court should assign contractors in a strict rotation in the sequence in which they appear on the list, except as permitted by these instructions.

a. The court has inherent authority to appoint a contractor who is not next in sequence on the list if the contractor who is next in sequence is unavailable or has a conflict, another contractor is already representing the particular client, or the interests of justice require that a specific contractor be appointed rather than the next available contractor. If the court passes over the name of a contractor for a reason other than the contractor's unavailability, the court should return to that contractor for the next appointment to the extent administratively feasible.

b. If the court appoints a contractor who is not next in sequence on the list because that

contractor is already representing the particular client, that appointment shall not count as a rotational appointment.

4. A contractor's appointment with respect to a particular charge or proceeding shall continue until final disposition of that charge or proceeding, including all critical stages thereof as set forth in G.S. 7A-451(b), unless the contractor is relieved of his or her appointment by the court. However, if a defendant is charged with committing a Class 3 misdemeanor offense on or after December 1, 2013 and the court has not found that the defendant has more than three prior convictions, but the defendant is in custody and the court appoints counsel for the limited purpose of ensuring that the defendant has meaningful access to the courts during the time period of the defendant's confinement on the Class 3 misdemeanor charge, pursuant to G.S. 15A-141(3) and G.S. 15A-143, the contractor's appointment shall end without the need for permission of the court at the time of the defendant's release from custody or at final disposition, whichever occurs first.

5. If local practice is to appoint counsel by some method other than a strict case-by-case rotation, such as assigning counsel to blocks of cases or to all new cases in a session, the court shall contact the IDS Regional Defender in the area to discuss appropriate modifications of these instructions.

C. Notice

Upon assigning a case to a contractor, the court or clerk shall furnish notice of the appointment to the contractor and shall furnish to the client instructions about contacting his or her attorney.

D. Multiple Counsel

1. In assigning cases to contractors, the court should seek to appoint the same contractor to all pending matters concerning the defendant if the attorney has a contract with IDS to handle all of the case types involved. The only exception is for Class 3 misdemeanor offenses allegedly committed on or after December 1, 2013 where the court has not found that the defendant has more than three prior convictions, but the defendant is in custody and the court appoints counsel for the limited purpose of ensuring that the defendant has meaningful access to the courts during the time period of the defendant's confinement on the Class 3 misdemeanor charge; such cases shall be assigned to contractors from Contractor List 1 regardless of the existence of other pending matters concerning the same defendant. Where a criminal defendant is discharged after a finding of no probable cause in District Court but is later indicted in Superior Court, the contractor appointed in District Court should be appointed to represent that defendant on the charge in Superior Court if he or she has a contract with IDS for the type of case involved. However, if new charges are brought against a former criminal defendant after disposition of unrelated, previous charges, there shall be no presumption that the contractor who represented

the defendant on the previous charges should be appointed to represent that defendant on the new charges.

2. If a contractor is appointed to represent a client on one matter, and the contractor learns that the client requires representation on another pending matter for which the attorney does not have a contract, the contractor shall notify the court. The court may remove the contractor from the case so that the court may assign all of the pending matters to another appropriate contractor. The only exception is for Class 3 misdemeanor offenses allegedly committed on or after December 1, 2013 where the court has not found that the defendant has more than three prior convictions, but the defendant is in custody and the court appoints counsel for the limited purpose of ensuring that the defendant has meaningful access to the courts during the time period of the defendant's confinement on the Class 3 misdemeanor charge.

3. If no single attorney has contracts to handle all of the case types involved, the contractors appointed to represent the client should consult with each other to assure that the client's interests are protected.

4. If new charges are brought against a client who was assigned an appointed attorney before the effective date of contracts and those charges are factually related to the previously assigned charges, the court shall assign the new charges to the previously assigned attorney, even if he or she does not have a contract with IDS. If the court assigns such charges to a contractor without determining that the new charges are factually related to charges that were assigned to an appointed attorney before the effective date of contracts, and the contractor so determines, the contractor and the previously assigned attorney shall consult with one another and determine which attorney shall move to withdraw.

E. Unavailability of Contractor

1. If an attorney has a contract for one or more caseload units and the attorney will be unavailable for new case assignments for a time period that will exceed four (4) business days, the contractor shall submit written notification as soon as practicable to the Clerk of Superior Court not to assign new contract cases to that contractor during the specified time period of unavailability. If a contractor will be unavailable for new case assignments for a time period that is likely to impair that contractor's ability to meet the minimum number of annual dispositions required by his or her contract, the contractor shall immediately notify IDS in writing.

2. If an attorney has a per session contract and the attorney will be unable to cover a session that is required by the contract, the contractor shall arrange for a suitable replacement attorney to cover the session and shall notify the court of the arrangement. If a contractor will be unable to cover more than one consecutive session that is required by the contract, the contractor shall immediately notify IDS to make arrangements for alternative coverage.

F. Periodic Review of Case/Session Assignments to Contractors

1. IDS shall periodically review the number and nature of cases assigned to each contractor in a contract category to ensure that each contractor is being assigned to the expected number of cases, and will notify the court and all contractors if assignment rates need to be adjusted.
2. In the event that IDS determines that any or all contractors appear to be reaching or have reached their maximum number of dispositions or expected number of sessions, and additional cases or sessions need to be assigned, IDS will notify the court, the Clerk of Superior Court, and all contractors how future assignments should be handled.

G. Contractor Caseloads

1. The agreed upon caseload for each contractor, measured by an annual range of dispositions or annual expected number of sessions, is set forth in each contractor's contract.
2. If, during the term of the contract, a contractor reaches the maximum number of annual cases (including disposed cases and pending assigned cases), the contractor may continue to accept new case assignments pursuant to the contract and be compensated pursuant to IDS' published overage schedule or, after advance notice to the clerk and IDS, decline to accept new case assignments pursuant to the contract.
3. If, during the term of a contract, a contractor reaches the expected number of annual sessions and the courts need additional per session coverage, the contractor shall continue to accept new session assignments pursuant to the contract to the extent possible, and the monthly compensation IDS owes to the contractor shall include payment for each session handled during the prior month. If a contractor is unable to accept additional session assignments, after advance notice to the clerk and IDS, the contractor may decline to accept additional session assignments pursuant to the contract.
4. If a contractor declines to accept new case or session assignments and the Clerk of Superior Court has not received notification from IDS pursuant to Section IV.F.2., above, the court should appoint the next available contractor on the master list and immediately notify the IDS Contracts Administrator.

V. Withdrawal of Contract Counsel

1. With the exception of the situation described in subsection V.2., below, a contractor may withdraw from an assigned contract case only with the court's approval. Contractors shall

promptly file motions to withdraw due to conflicts of interest or any other reason requiring withdrawal from a case. If the contract with IDS is with the individual attorney and the court grants the motion to withdraw, the case shall be reassigned to the next contractor on the applicable master list who is available and able to accept the case assignment. If the contract with IDS is with a law firm or non-profit organization, rather than with the individual attorney, the case should be reassigned to the replacement attorney designated by the law firm or nonprofit to the extent practicable.

2. If a defendant is charged with committing a Class 3 misdemeanor offense on or after December 1, 2013 and the court has not found that the defendant has more than three prior convictions, but the defendant is in custody and the court appoints counsel for the limited purpose of ensuring that the defendant has meaningful access to the courts during the time period of the defendant's confinement on the Class 3 misdemeanor charge, pursuant to G.S. 15A-141(3) and G.S. 15A-143, the contractor's appointment shall end without the need for permission of the court at the time of the defendant's release from custody or at final disposition, whichever occurs first.

3. If an attorney's contract requires an annual range of dispositions, the contractor is being paid on a monthly basis throughout the contract term for the expected number of dispositions, and the contract requires the attorney to complete all assigned cases at the expiration or termination of the contract. After contract expiration or termination, contractors should not be permitted to withdraw from pending contract cases unless the court is fully satisfied that a conflict of interest exists or that other compelling circumstances justify withdrawal.

VI. Contractor Lists

A. Provision of Lists

The Administrator shall provide to the court the master lists of contractors subject to appointment in the county, and shall update the lists whenever contracts are terminated or expire and whenever new contracts are executed. The current master lists are attached to these instructions as Appendix A and are available at www.ncids.org on the "RFPs & Contracts" page.

B. Non-Capital Criminal Lists

Contractor List 1. Adult Misdemeanor Cases

Contractors on this list will represent defendants at the trial level where the client is an indigent adult or a juvenile who was previously transferred to Superior Court for trial as an adult and the most serious original charge is a:

- Misdemeanor non-traffic;
- Misdemeanor traffic;
- Driving while impaired (“DWI”) or habitual DWI; • Habitual assault;
- Extradition;
- Probation violation in District Court; or
- Criminal or civil contempt in District Court (only if it arises in a criminal case or involves contempt of a parent in a juvenile delinquency case).

Adult misdemeanor cases include Class 3 misdemeanor offenses allegedly committed on or after December 1, 2013 where the court has not found that the defendant has more than three prior convictions, but the defendant is in custody and the court appoints counsel for the limited purpose of ensuring that the defendant has meaningful access to the courts during the time period of the defendant’s confinement on the Class 3 misdemeanor charge. Representation in an adult misdemeanor case may be in District or Superior Court.

Contractor List 2. Adult Low-Level Felony Cases

Contractors on this list will represent defendants at the trial level where the client is an indigent adult or a juvenile who was previously transferred to Superior Court for trial as an adult and the most serious original charge is a:

- Class E through Class I felony;
- Probation violation in Superior Court;
- Non-child support contempt case in Superior Court (including criminal and civil contempt cases);
- Post-release supervision and parole preliminary revocation hearing where the hearing officer has found an entitlement to counsel; or
- Habitual felon case where the most serious possible conviction would be a low-level felony. If a low-level felony contractor is assigned to an adult low-level felony client, the client is subsequently indicted as a habitual felon and the most serious possible conviction would be of a Class C or D felony, and the attorney does not also have a contract for high-level felony cases, the contractor shall consult with the area’s Regional Defender to determine whether to move to withdraw or to continue the representation.

Contractors on this list will also represent indigent clients at the trial level in other low-level felony or misdemeanor charges that are brought against a previously assigned contract client while the original low-level felony is still pending, with the exception of Class 3 misdemeanor offenses allegedly committed on or after December 1, 2013 where the court has not found that the defendant has more than three prior convictions, but the defendant is in custody and the court appoints counsel for the limited purpose of ensuring that the defendant has meaningful access to the courts during the time period of the defendant’s confinement on the Class 3 misdemeanor

charge. Other than contempt cases, representation in an adult low-level felony case may be in District or Superior Court.

Contractor List 3. Adult High-Level Felony Cases

Contractors on this list will represent defendants at the trial level where the client is an indigent adult or a juvenile who was previously transferred to Superior Court for trial as an adult and the most serious original charge is a:

- Class A felony that is not a “capital offense” (as defined by IDS Rule 2A.1(a)) through a Class D felony;
- Satellite-based monitoring “bring back” hearing; or
- Habitual felon case where the most serious possible conviction would be a high-level felony.

Contractors on this list will also represent indigent clients at the trial level in other criminal charges that are brought against a previously assigned contract client while the original highlevel felony is still pending, with the exception of Class 3 misdemeanor offenses committed on or after December 1, 2013 where the court has not found that the defendant has more than three prior convictions, but the defendant is in custody and the court appoints counsel for the limited purpose of ensuring that the defendant has meaningful access to the courts during the time period of the defendant’s confinement on the Class 3 misdemeanor charge. Representation in an adult high-level felony case may be in District or Superior Court.

VII. Performance Standards

1. Contractors are expected to provide quality representation for all clients, including maintaining regular contact with clients, keeping clients fully informed as to the status of their cases, and appearing on clients’ court dates absent justifiable excuse. In addition, absent exceptional circumstances, if a contract client is in custody and the contractor did not meet with the client at the time of assignment to the case, the contractor’s initial interview with the client should take place within three (3) business days after the contractor receives notice of assignment to the client’s case. If necessary, a contractor may arrange for a designee to conduct the initial interview. Additional minimum standards of representation are set forth in all contractors’ contracts.

2. Local court system actors who receive complaints about contractors’ services should direct those complaints to the IDS Regional Defender in the area.

VIII. Recoupment in Contract Cases

1. Because contractors are paid a monthly fee and are not paid on a case-by-case basis, contractors shall not submit fee applications in cases in which recoupment of attorney fees is not authorized.

2. In cases where recoupment of attorney fees is authorized, contractors shall submit recoupment applications to the court for a determination of the value of services and entry of any civil judgments that are authorized by law. In determining the value of services, the court shall apply the hourly rate that would be paid to private assigned counsel who are paid on an hourly basis.

3. On all applications that are submitted for recoupment purposes, contractors shall identify the applicant as “IDS contract counsel,” not “assigned counsel.” The Clerk of Superior Court shall ensure that any civil judgments that a court orders are docketed and that the recoupment applications are filed in the clerk’s office. The clerk shall not forward recoupment applications to IDS Financial Services.

IX. Miscellaneous

1. Nothing contained in these instructions shall be construed or applied inconsistently with the IDS Rules or with other provisions of law.

2. Nothing in these instructions shall preclude IDS from adopting and enforcing standards and rules that supplement or supersede these instructions or from implementing programs, plans, or additional contracts regarding the assignment of counsel to improve quality, efficiency, and economy. These instructions may be amended by the IDS Director.

3. These instructions shall become effective on the date in Section X., below, and shall supersede any existing regulation or plan concerning the appointment of counsel for the covered indigent cases. With the exception of any provision that is inconsistent with rules now or hereafter adopted by IDS, any existing regulation or plan concerning the appointment of counsel for indigent cases that are not covered by these instructions shall remain in full force and effect.

X. Adoption and Certification

These instructions are approved and certified by the IDS Director, Thomas K. Maher, as a plan for the appointment of contractors in the covered indigent cases in Lee County, North Carolina, effective June 1, 2014.

Originally adopted April 15, 2014. Last revised November 14, 2018

Appendix A
Master Lists of Contractors
Lee County
(as of December 11, 2018)

NOTE: Depending on the number of caseload units that a contract attorney has agreed to handle pursuant to his or her contract, the name of one or more contractors may appear multiple times on a master list.

Contractor List 1. Adult Misdemeanor Cases

Nicolle Phair
Amber D. Ellis
George Whitaker
Samantha Duncan
Kelly McLain-Miller
Nicolle Phair
Amber D. Ellis
George Whitaker
Amber Ellis
Kelly McLain-Miller
Amber Ellis
George Whitaker
Nicolle Phair
Amber Ellis

Contractor List 2. Adult Low-Level Felony Cases

Michael Yopp
Fred Webb
Nicolle Phair
George Whitaker
Michael Yopp
Fred Webb
Nicolle Phair
Michael Yopp
Fred Webb
Andrew Leliever
George Whitaker
Nicolle Phair

Contractor List 3. Adult High-Level Felony Cases

Fred D. Webb Jr.
Michael Yopp

Appendix B

Frequently Asked Questions About IDS Contractor Appointments

1. Are all of the case types covered by Contractor List 1 (Adult Misdemeanor Cases) actually misdemeanors?

No. The misdemeanor contract category covers a few case types that are actually low-level felonies, including habitual DWI and habitual assault. In addition, some other case types are covered as well, such as contempt cases in District Court. Those cases are included in this category because IDS' data on average time claims by private attorneys demonstrates that they require a similar level of time and effort.

2. Are all of the case types covered by Contractor List 2 (Adult Low-Level Felony Cases) actually low-level felonies?

No. The low-level felony contract category includes some other case types, such as misdemeanor charges that are brought against a previously assigned contract client while the original low-level felony is still pending. It also may include habitual felon charges where the most serious possible conviction is a high-level felony if the attorney does not move to withdraw after consultation with the IDS Regional Defender in the area. Finally, some other case types are covered as well, such as post-release supervision and parole revocation hearings.

3. Are all of the case types covered by Contractor List 3 (Adult High-Level Felony Cases) actually high-level felonies?

No. The high-level felony contract category includes some other case types, such as other criminal charges that are brought against a previously assigned contract client while the original high-level felony is still pending. It also includes satellite-based monitoring "bring back" hearings.

4. What happens if a contractor is assigned to an adult misdemeanor client, the client is subsequently charged with a low- or high-level felony, and the contractor does not have a low- or high-level felony contract?

In such a case, there is a presumption that the contractor will move to withdraw and that all pending charges against the client will be reassigned to an appropriate contractor. However, if both contractors agree after consultation with the client that dual representation would be in the client's best interest, dual representation is permitted.

5. What happens if a contractor is assigned to an adult low-level felony client, the client is subsequently charged with a high-level felony (excluding indictment as a habitual felon), and the contractor does not have a high-level felony contract?

In such a case, there is a presumption that the contractor will move to withdraw and that all pending charges against the client will be reassigned to an appropriate contractor. However, if

both contractors agree after consultation with the client that dual representation would be in the client's best interest, dual representation is permitted.

6. What happens if a contractor is assigned to an adult low-level felony client, the client is subsequently indicted as a habitual felon and the most serious possible conviction would be of a Class C or D felony, and the contractor does not have a high-level felony contract? The contractor should consult with the IDS Regional Defender in the area to determine whether to move to withdraw or to continue the representation.

7. What should the court do if cases arise that are not covered by the contractor lists in these instructions?

In case types that are not covered by the lists described in these instructions, the court should assign private counsel as described in the county's indigent appointment plan that was previously approved by IDS or, if no plan has been approved since July 2001, the State Bar. If local actors have questions about whether a specific case is covered by these appointment instructions, they should contact the IDS Contracts Administrator.