

# **Private Assigned Counsel Survey Results: Impact of May 2011 Rate Reductions**

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**North Carolina Office of Indigent Defense Services  
123 West Main Street, Suite 400  
Durham, NC 27701  
[www.ncids.org](http://www.ncids.org)**

## PAC Survey Results: Impact of May 2011 Rate Reductions

*"Many of my clients are facing financial distress, including homelessness, lack of resources for necessities, and institutional under/unemployment, together with the attendant dysfunctions arising from these conditions. Only through effective representations can these issues begin to be addressed."*

-- District 19C attorney with 20+ years of experience

### Introduction

Indigent defense in much of the United States has been in a state of crisis since the Supreme Court's decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963), which held that indigent defendants have a fundamental right to the assistance of counsel in a criminal prosecution. In "Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel," the report's authors, including North Carolina's former Chief Justice Rhoda Billings, observe:

[T]here is uncontroverted evidence that funding [for indigent defense] still remains woefully inadequate and is deteriorating in the current economic difficulties that confront the nation. Because of insufficient funding, in much of the country, training, salaries, supervision, and staffing of public defender programs are unacceptable for a country that values the rule of law. Every day, the caseloads that defenders are asked to carry force lawyers to violate their oaths as members of the bar and their duties to clients as set forth in rules of professional conduct. In addition, private contract lawyers and attorneys assigned to cases for fees receive compensation that is usually not even sufficient to cover their overhead and that discourages their participation in defense systems.

Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel, at xi (The Constitution Project, Apr. 2009).

Until recently, North Carolina had a relatively healthy indigent defense system. While there were delays in paying private assigned counsel ("PAC") due to budget shortfalls, and assistant public defenders were often carrying large caseloads, the base rate of pay for private attorneys was sufficient to ensure that qualified lawyers were willing to handle appointed cases. In May 2011, however, the IDS Commission was forced to reduce the rates paid to PAC due to funding constraints. The rate in non-capital cases was cut from a uniform \$75 per hour to \$55 per hour (a 27% reduction) for most cases in District Court, to \$60 per hour (a 20% reduction) for most cases in Superior Court, and to \$70 per hour (a 7% reduction) for serious felonies (non-capital Class A through D). Rates for potentially capital cases and appeals were also reduced. With the exception of the serious felony rate, the current standard rates are below the original rates that IDS established more than a decade ago; all of the current rates are significantly below what attorneys can earn in retained cases and in appointed cases in federal court.

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 non-capital declaration)	\$85 (\$75 after non-capital declaration)
High-Level Felonies (non-capital Class A-D)	\$65**	\$65	\$75	\$75	\$70

Case Type	Original IDS Rates (2002)	Aug. 2006 Rates	Feb. 2008 Rates	Jan. 2011 Rates	May 2011 Rates
All Other Superior Court Cases	\$65**	\$65	\$75	\$75	\$60
All Other District Court Cases	\$65**	\$65	\$75	\$75	\$55

\* \$85 in 2002 has the same buying power as \$111.58 today, but IDS only pays \$85/\$75.

\*\* \$65 in 2002 has the same buying power as \$85.32 today, but IDS only pays \$70/\$60/\$55 depending on type of case.

As a result of the reductions, PAC had to either reduce their overhead, by sacrificing support staff or other important resources, or accept drastically reduced compensation for the work they do. In addition, during the 2012 legislative session, IDS was directed to develop and implement a contract system, which is intended to be cost effective compared to the already low PAC hourly rates.

The reduced hourly rates have now been in effect for almost four years, and the first two-year contracts pursuant to a Request for Proposals ("RFP") recently ended. During January 2015, IDS conducted a survey of PAC and contract attorneys to determine the impact of the reductions on the private lawyers who represent indigent defendants and respondents and on the clients themselves.

This report summarizes the responses that IDS received, which reveal that North Carolina is in danger of joining those jurisdictions in which the right to effective assistance of counsel is honored in word but not in deed. While the reductions in compensation have strongly impacted the lawyers, the survey results make it clear that they are also impacting the clients who depend on those lawyers to receive quality representation. As multiple cases from around the country have recognized, failing to offer adequate compensation to the attorneys who provide the services inevitably undermines the constitutional right to effective representation. See, e.g., *Simmons v. State Public Defender*, 791 N.W.2d 69 (Iowa 2010); *Jewell v. Maynard*, 383 S.E.2d 536 (W. Va. 1989); *Makemson v. Martin County*, 491 So.2d 1109 (Fla. 1986); *Okeechobee County v. Jennings*, 473 So.2d 1314 (Fla. 1985).

Traditionally, in North Carolina and around the country, many attorneys have used their earnings in retained cases to subsidize their ability to handle indigent cases because representing indigent people is seen as an obligation of the legal profession. However, the survey results show that many North Carolina attorneys are now devoting more of their time to their retained practices at the same time that more people are being found indigent and qualifying for appointed counsel as a result of the economy.

	FY02	FY04	FY06	FY08	FY10	FY12	FY14
Criminal Non-Traffic Court Files	850,541	842,488	876,555	872,486	823,737	810,894	769,822
IDS Criminal Non-Traffic Files	291,954	318,460	366,294	392,011	412,970	414,594	422,411
IDS Disps. as % of Criminal Non-Traffic Court Files	34.3%	37.8%	41.8%	44.9%	50.1%	51.1%	54.9%

The net result is that there are more indigent cases and less available qualified attorney hours to devote to them. These forces are creating a train wreck that will be more expensive for the State to fix later on the back end than it would be to pay for competent professional services now on the front end.

*"When you stand in a court room and you are representing a 15 year old child with a limited I.Q. and a number of psychiatric disorders, and he has no idea what is happening, and because he is in DSS custody and doesn't trust his social worker and he has no family to support him, he looks at you to help him--well, that lawyer deserves to be paid more than a plumber."*

-- District 6B attorney with 20+ years of experience

*“My indigent clients are overwhelmingly addicted to drugs or alcohol or both. They have nothing--no money, no proper clothes, no food, no home, no transportation, no education, no pride, no self respect, no honor, no credibility, and no hope. Too many of them came up in homes just like they now have, and for those that were brought up in better homes, once they became addicted all was lost. Many then become stealers and dealers to support their habits. And even more tragic, I now see their children in even worse shape . . . and they are themselves doomed to repeat these horrors on their own children someday. Most of these clients don't want to live their lives this way, but once addicted, they are trapped. They need help, not only negotiating their legal problems, and their problems with social services, but with help steering them to rehabilitation. We do all those with them. The addictions are hard to end, and sometimes it takes many tries, but for every one whose addictions are defeated, there are always two, three, or more children whose lives are changed in wonderful ways. Most lawyers do care very much, but the most experienced ones are the ones who make the most difference; and it has been this group that has left appointed work. The young ones don't know how to deal with these clients as well, and many don't know where the good programs are. . . . We truly need better pay to attract better lawyers, to achieve better results for more clients, to show the need for better treatment, and to better the lives of our young people and their children and grandchildren.”*

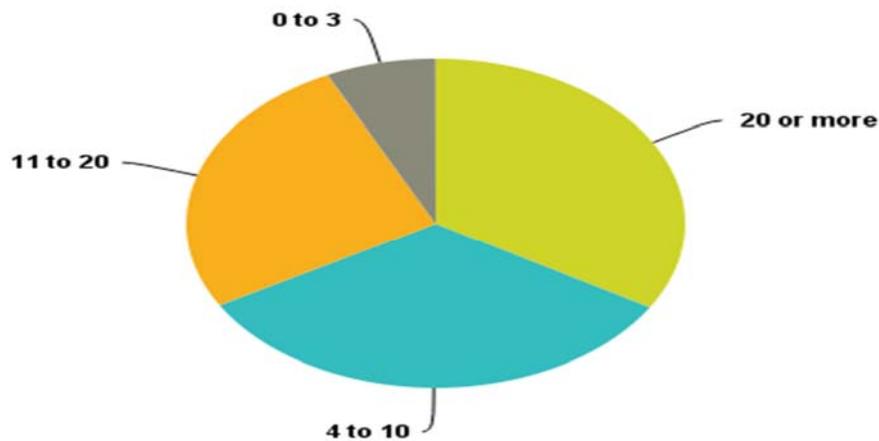
*-- District 30B attorney with 20+ years of experience*

## Survey Results: Demographic Information

423 PAC and contract attorneys from all over North Carolina responded to some or all of the survey questions. At least one attorney responded from 49 of the State's 50 judicial districts. One third of respondents had 20 or more years of experience practicing law in North Carolina. The overwhelming majority (almost 93%) had four or more years of experience. Only 11% of respondents had less than four years of experience representing indigent clients. The majority of respondents were solo practitioners, and a significant percentage do not have access to any support staff. The vast majority of respondents (82.5%) handle appointed criminal cases in state court, and a majority (56.7%) handle appointed non-criminal cases in state court as well.

### Years in Practice in North Carolina:

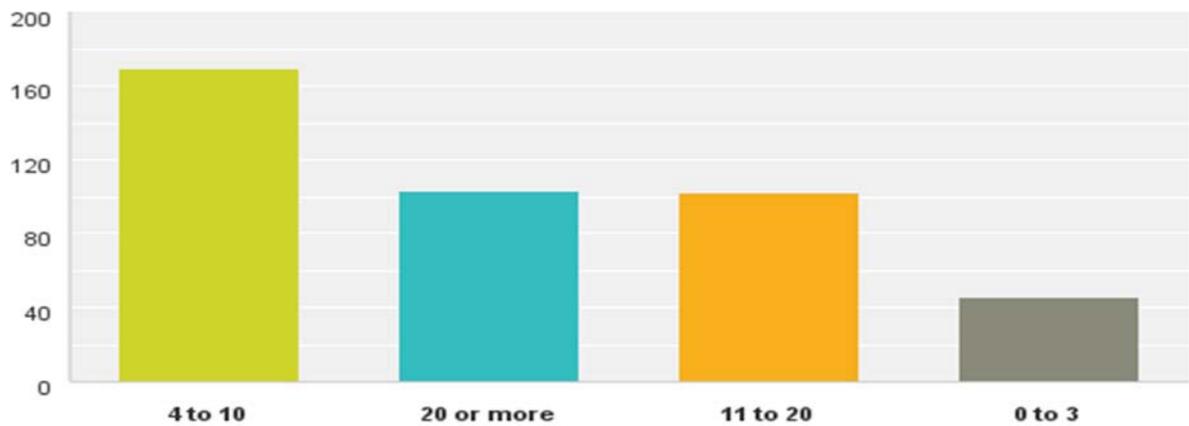
Almost 93% of respondents (or 390 attorneys) had four or more years of experience practicing law in North Carolina.



Answer Choices	Responses	Count
20 or more	33.57%	141
4 to 10	33.10%	139
11 to 20	26.19%	110
0 to 3	7.14%	30
<b>Total</b>		<b>420</b>

### Years Representing Indigent Clients in North Carolina State Court:

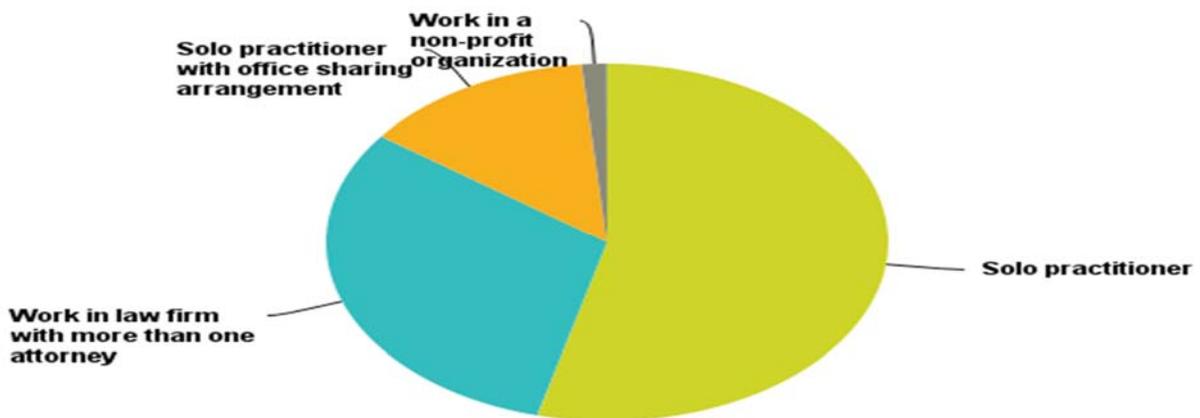
The largest percentage of respondents (40.2% or 169 attorneys) had four to 10 years of experience representing indigent clients in North Carolina state court. Only 11% of respondents (or 46 attorneys) had less than four years of experience representing indigent clients.



Answer Choices	Responses	
4 to 10	40.24%	169
20 or more	24.52%	103
11 to 20	24.29%	102
0 to 3	10.95%	46
<b>Total</b>		<b>420</b>

**Structure of Law Practice:**

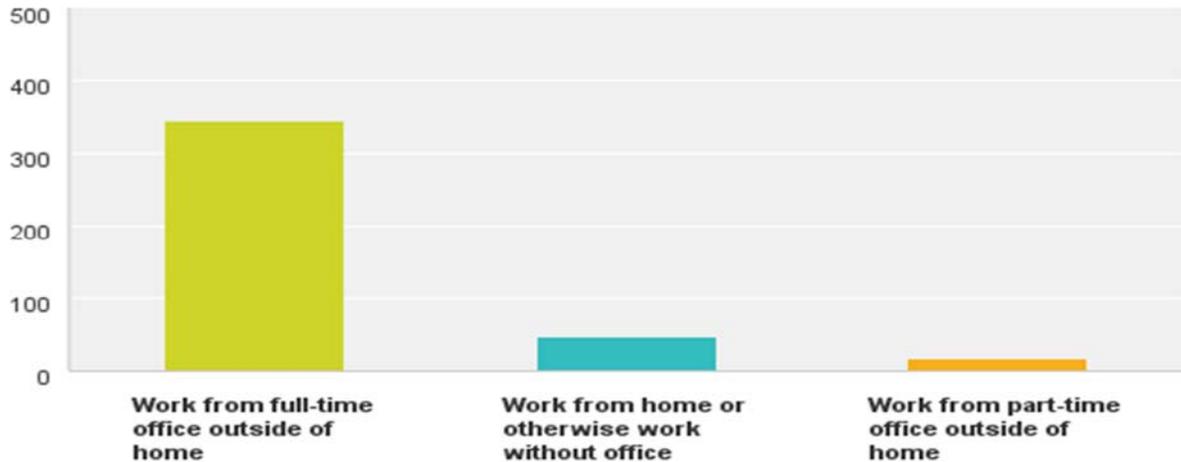
A majority of respondents (67.4% or 277 attorneys) were solo practitioners, including 13.4% (55 attorneys) who have an office sharing arrangement.



Answer Choices	Responses	
Solo practitioner	54.01%	222
Work in law firm with more than one attorney	31.14%	128
Solo practitioner with office sharing arrangement	13.38%	55
Work in a non-profit organization	1.46%	6
<b>Total</b>		<b>411</b>

**Location of Primary Work:**

While the vast majority of respondents (84.4% or 346 attorneys) work from a full-time office, 11.5% (or 47 attorneys) work from home or otherwise work without an office.



Answer Choices	Responses
Work from full-time office outside of home	84.39% 346
Work from home or otherwise work without office	11.46% 47
Work from part-time office outside of home	4.15% 17
<b>Total</b>	<b>410</b>

**Access to Support Staff:**

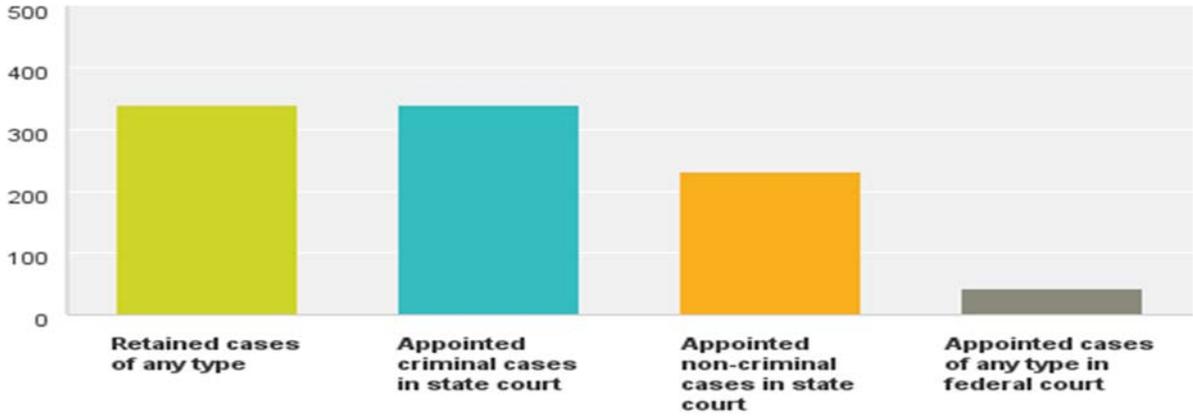
A significant percentage of respondents (30.2% or 124 attorneys) do not have access to any support staff.



Answer Choices	Responses
Full-time support staff (at least one full-time equivalent)	51.22% 210
No support staff	30.24% 124
Part-time support staff (less than one full-time equivalent)	18.54% 76
<b>Total</b>	<b>410</b>

**Types of Cases Handled:**

82.5% of respondents (or 339 attorneys) handle appointed criminal cases in state court, and 56.7% (or 233 attorneys) handle appointed non-criminal cases in state court.



Answer Choices	Responses	
Retained cases of any type	<b>82.73%</b>	340
Appointed criminal cases in state court	<b>82.48%</b>	339
Appointed non-criminal cases in state court	<b>56.69%</b>	233
Appointed cases of any type in federal court	<b>10.46%</b>	43
<b>Total Respondents: 411</b>		

### Survey Results: Impact of Rate Reductions on Law Practices

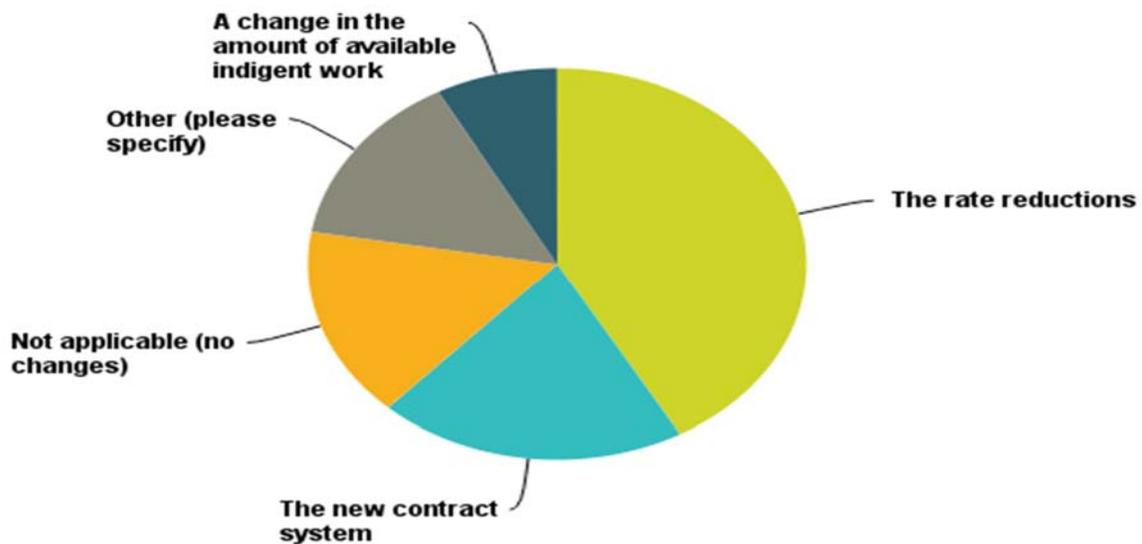
The low PAC rates, and the comparably low pay in the new RFP-based contract system, have had a significant impact on respondents' law practices, including reductions in available resources to use in representing clients, reductions in compensation packages for attorneys and staff, reductions in support staff, and changes in office facilities and firm structure.

*"I've reduced my personal spending as much as I can. My business has been severely impacted because I had contractual obligations that I still had to pay, such as rentals on office equipment, when the rates were suddenly reduced. The General Assembly members may see the situation differently if they put themselves in our shoes: being a professional who is reduced to barely scraping by. So far as I know, no others in the court system had a reduction in wages."*

-- District 3A attorney with 20+ years of experience

### Primary Cause of Changes in State Court Practice Since May 2011:

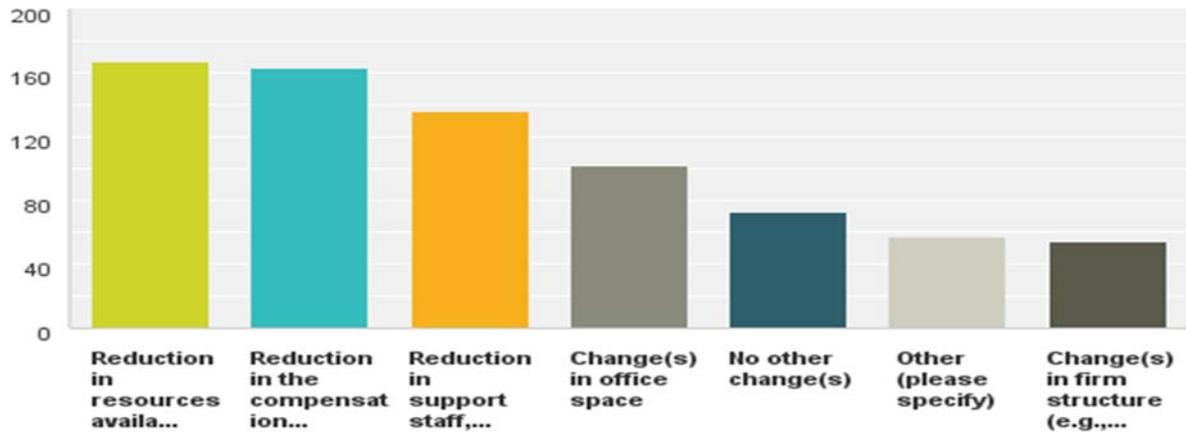
The rate reductions and the new RFP-based contract system combined were the primary cause of changes in 61.9% of respondents' law practices since May 2011.



Answer Choices	Responses
The rate reductions	41.81% 148
The new contract system	20.06% 71
Not applicable (no changes)	15.82% 56
Other (please specify)	14.41% 51
A change in the amount of available indigent work	7.91% 28
<b>Total</b>	<b>354</b>

**Other Practice Changes:**

Other changes to respondents’ law practices included reductions in available resources to use in representing clients (48.6%), reductions in compensation packages for attorneys and staff (47.4%), reductions in support staff (39.5%), and changes in office space and firm structure (45.4%).



Answer Choices	Responses
Reduction in resources available to use in client representation, such as legal research tools, pattern jury instructions, or ability to attend specialized training	48.55% 167
Reduction in the compensation package for you or your staff, including salary, health insurance, retirement benefits, etc.	47.38% 163
Reduction in support staff, including reduction from full-time to part-time	39.53% 136
Change(s) in office space	29.65% 102
No other change(s)	21.22% 73
Other (please specify)	16.57% 57
Change(s) in firm structure (e.g., fewer attorneys or moved to solo practice)	15.70% 54
<b>Total Respondents: 344</b>	

*“My law partner and myself currently make so little each month that if we were to need representation we would qualify as indigent and qualify for court appointed counsel.”*

-- District 23 attorney with 4-10 years of experience

The survey results revealed a significant overall trend of more attorneys with four or more years of experience handling fewer or no indigent cases and shifting their time to retained cases. In addition, the number of attorneys with 11 or more years of experience who reported that they do not handle any appointed misdemeanors or felonies has more than doubled since the rate reductions.

A number of recurring themes emerged from respondents' answers to open-ended questions about the impact of the rate reductions on their law practices and the practices of their colleagues:

1. A lot of attorneys, especially the most experienced and skilled ones, have stopped handling indigent cases as a result of the reduction in compensation.

*"In my district several lawyers have stopped taking indigent cases. At least four lawyers have left the practice of law altogether during the past two years. This increases the burden on the rest of us to provide indigent representation. A substantial part of my practice is indigent representation. After overhead I get about \$15 per hour before taxes for indigent representation. My mechanic charges \$68 per hour to work on my car -- and he is at the low end of the scale. I, and every other attorney I know doing indigent work, have to consider whether it is financially feasible to continue to do so."*

-- District 7A attorney with 20+ years of experience

2. Attorneys are working longer hours, taking more cases (both retained and appointed), and sometimes securing secondary employment to try to make up the lost compensation.

*"There is a good possibility that I will have to seek supplemental employment to continue to be able to support myself and my family."*

-- District 15B attorney with 11-20 years of experience

*"I am working more hours at home after work to try and make up for the revenue shortfall."*

-- Attorney with 20+ years of experience

3. There is a growing mismatch between the caseloads in many districts and the number of attorneys available to accept indigent appointments. In most districts, there are too few qualified attorneys on the indigent lists, leaving the ones who remain overwhelmed with higher caseloads for less compensation. Having an increased number of clients also results in less time available to spend per client, so the clients are not getting proper representation. In some other districts, the flood of new inexperienced attorneys in a saturated market has caused inefficiencies and resulted in attorneys traveling to neighboring counties for additional work. In both situations, there has been a significant decline in the level of experience of the attorneys who remain on the indigent lists.

*"We now have fewer experienced attorneys to handle felony cases. The few attorneys handling felony indigent cases are overwhelmed. This has also caused our criminal court system to fall behind in dispositions which hurts victims and witnesses. This is a real mess that I do not think is going to end well."*

-- District 9A attorney with 11-20 years of experience

4. Attorneys have had to cut back significantly on basic operating expenditures, including but not limited to office space, support staff, compensation and benefits, legal research tools and other resources, and training.

*"99% of my practice is indigent defense. Since the rate reductions I have had to let my full time staff person go, move from an office suite to renting one office from another attorney. I now work from a cell phone without benefit of an office phone or FAX. . . . I have had to cut expenses in every way possible, including not paying dues to professional organizations. I have not been able to make a student loan payment since the cut in rates. I have struggled to keep a roof over my head and have fallen significantly behind in mortgage payments from time to time."*

-- District 7A attorney with 11-20 years of experience

5. As a result of the continuing poor economy, fewer clients can afford to retain attorneys, so many of the respondents' retained practices have declined at the same time the PAC rates were reduced, making it even more difficult to maintain small businesses. As a result, many PAC have closed their practices, left the practice of criminal defense, retired earlier than planned, moved to other states, or made other life changes.

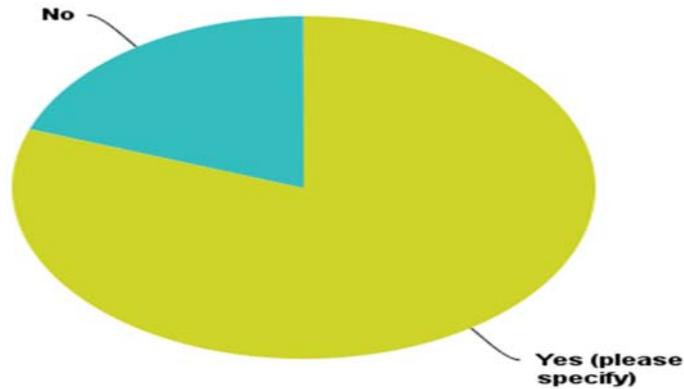
*"The impact on my own financial situation is so dire that I decided to either take a second job on the weekends or leave indigent defense in North Carolina. I decided on the second option and will shortly begin practicing in another state that funds indigent defense more adequately."*

-- District 14 attorney with 4-10 years of experience

## Survey Results: Impact of Rate Reductions on Quality

### Whether Rate Reductions have Reduced Quality of Representation:

80.6% of respondents indicated that the rate reductions have caused a decline in the quality of representation provided to indigent defendants and respondents.



Answer Choices	Responses	
Yes (please specify)	80.58%	278
No	19.42%	67
<b>Total</b>		<b>345</b>

A number of common themes about the impact on the quality of representation emerged in the respondents' answers to this question and other open-ended questions.

1. As a result of the decreased compensation, there has been a significant decline in the level of experience among the attorneys who remain on the indigent lists at the same time that the practice of criminal defense has become more difficult and complex.
2. The emphasis is now on quantity and handling a high volume of cases, rather than on providing quality services.

*"My colleagues and I cannot afford to put the hours into a case as we previously did. We often have to put quantity over quality to make ends meet."*

-- District 30A attorney with 4-10 years of experience

*"The low rates place attorneys into a difficult balancing act between fulfilling their ethical obligations to be zealous advocates for clients, and the economic realities of running a business. I have no doubt that the quality of representation has suffered, especially in light of so many experienced attorneys no longer handling appointed cases. Instead, these cases are all too frequently being handled by new inexperienced attorneys who are frequently ill-equipped to adequately represent their [clients]."*

-- District 26 attorney with 4-10 years of experience

3. The low hourly rates push PAC not to spend the necessary time on cases, and the contract system has compounded that problem because it is based on dispositions and not hourly pay.

*"[E]conomics plays a huge role in our ability to provide excellent service when you too are struggling to make ends meet. The private defense bar has taken a big hit financially. It should not affect the service we provide, but when you have attorneys who have to go without vehicles because of their inability to pay repair costs, or attorneys not being able to address medical needs because of lack of resources, economics factor into our ability to provide service."*

-- District 14 attorney with 4-10 years of experience

*"Most [court appointed] work pays \$55 an hour. My overhead is \$45. At \$75 it was reasonably profitable... now making a profit of \$10 an hour, it just isn't rewarding. I like helping people with law as a profession, but it is also a business. I can make more an hour doing manual labor and at least get some exercise, than with court appointed work with a law degree. Something is wrong with this picture."*

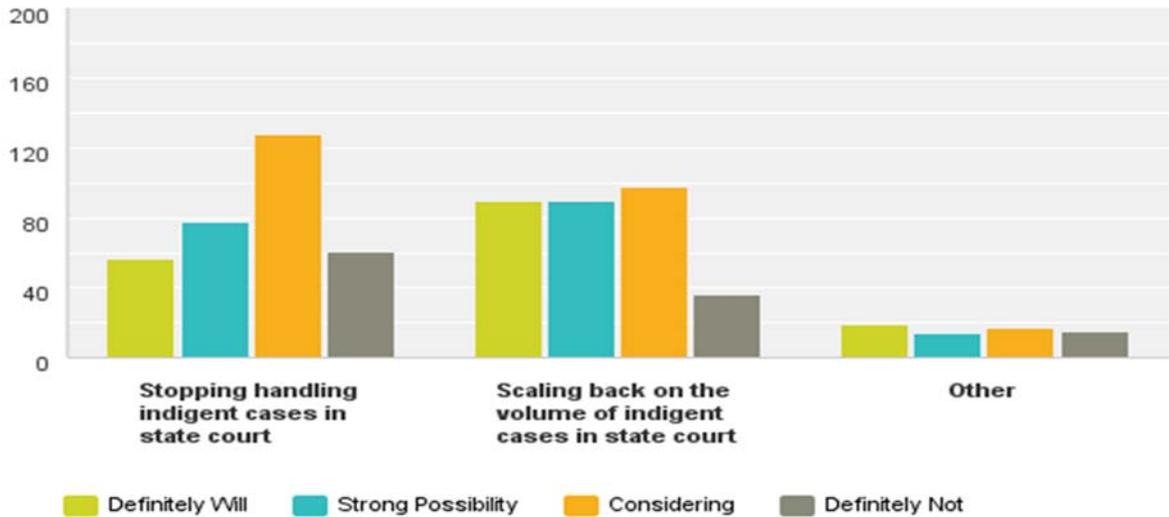
-- District 13A attorney with 11-20 years of experience

*"Most citizens who come into contact with our Criminal Justice System appear in the District Court either for minor criminal matters or serious traffic cases. The outcome of those cases will have an impact on their lives. Many will lose licenses, some will lose jobs and some will go to jail. All of them deserve to have a competent professional assist them to minimize the impact that case will have on their lives. Since the rate reductions took effect, I have noted that some of the attorneys who handle appointed cases have lost the desire to look and act like competent professionals. I see lawyers who wear the same torn and dirty suits to court day after day, and resolve their clients cases without much thought about the direct and collateral consequences. Unless we are willing to adequately compensate appointed attorneys, I believe competent and motivated attorneys will move to other aspects of the practice of law."*

-- District 17A attorney with 20+ years of experience

### Survey Results: The Future of Indigent Defense

When asked whether they anticipate making any changes to their practice in the next two years if the hourly rates remain at the current levels, 41.7% of respondents said they either definitely will or there is a strong possibility that they will stop handling indigent cases in state court. An additional 39.5% said they are considering making that change. 57.3% of respondents said they either definitely will or there is a strong possibility that they will scale back on the volume of indigent cases that they handle. An additional 31.2% said they are considering making that change.



	Definitely Will	Strong Possibility	Considering	Definitely Not	Total
Stopping handling indigent cases in state court	17.59% 57	24.07% 78	39.51% 128	18.83% 61	324
Scaling back on the volume of indigent cases in state court	28.66% 90	28.66% 90	31.21% 98	11.46% 36	314
Other	29.23% 19	21.54% 14	26.15% 17	23.08% 15	65

Attorneys with 11 to 20 years of experience were the most likely to respond that they definitely will or that there is a strong possibility that they will stop handling indigent cases. Interestingly, attorneys with 20 or more years of experience were the least likely to respond that they definitely will or that there is a strong possibility that they will stop handling indigent cases. It may be that many of the most experienced attorneys are nearing retirement and are not planning to make large-scale changes to the nature of their practices at this point in their careers.

Years Representing Indigent Clients in NC	Definitely Will or Strong Possibility of Stopping Handling Indigent Cases
20+	33.3%
11-20	47.1%
4-10	41.6%
0-3	45.2%

More than half of the respondents in every experience group indicated that they definitely will or that there is a strong possibility that they will scale back on the volume of indigent cases they handle. Again, attorneys with 11 to 20 years of experience were the most likely to respond that they definitely will or that there is a strong possibility that they will scale back on the volume of indigent cases:

Years Representing Indigent Clients in NC	Definitely Will or Strong Possibility of Scaling Back Volume of Indigent Cases
20+	55.9%
11-20	59.5%
4-10	58.1%
0-3	53.1%

Attorneys who work in a law firm with more than one attorney were the most likely to indicate that they definitely will or that there is a strong possibility that they will either stop taking indigent cases or scale back on the volume of indigent cases they handle. This is probably due to the fact that attorneys in law firms reported higher overhead than solo practitioners; 52% of attorneys in law firms reported overhead costs of \$51 or more per hour.

Structure of Law Practice	Definitely Will or Strong Possibility of Stopping Handling Indigent Cases	Definitely Will or Strong Possibility of Scaling Back Volume of Indigent Cases
Law firm with more than one attorney	53.7%	75%
Solo practitioner	39.1%	50.6%
Solo practitioner with office sharing arrangement	27.3%	48.9%

Throughout the responses, three common themes emerged about the future of indigent defense in North Carolina:

1. The appointed defense bar is demoralized and sees no realistic future in this work.

*"When it becomes clear that you're Nobody, and Nothing, you just don't work it like you used to."*

-- District 30A attorney with 11-20 years of experience

*"The reduction in fees have demoralized the indigent bar. We spend more of our quality time just trying to make the payroll for our employees and to pay the ever increasing health insurance costs than ever before. We should be using that time to mentally develop theories and strategies for our cases. The cuts in rates have caused us to have to take on more cases just to make ends meet. We are all working harder and longer hours just to get paid less. It is hard on us. We need help."*

-- District 7B/C attorney with 20+ years of experience

*"Appointed work remains my primary source of income as a younger sole practitioner, and I struggle to meet all of my bills. I am on debt-based repayment of student loans . . . and am becoming buried under those payments, as compounding interest is causing my balance to increase monthly instead of decrease. I love this work, but it comes with a huge price.*

-- District 18 attorney with 4-10 years of experience

2. Many attorneys who formerly handled indigent cases are leaving the lists and refocusing their legal practices on other areas of the law or attempting to increase their retained caseload.

*"Many of the quality lawyers have removed themselves from the representation altogether and have pursued other areas of practice like domestic, corporate or other work areas. Indigent defense is becoming more and more like the 'flip and plead' system feared by one of our colleagues in an article in the NCAJ publication approximately 12-15 years ago. The rate reductions have produced just that."*

-- District 20B attorney with 20+ years of experience

3. North Carolina's failure to provide adequate compensation in indigent cases may generate short-term savings, but it will lead to increases in spending over the long-term by causing unnecessary jail/prison costs and by requiring errors, ineffective assistance of counsel, and wrongful convictions to be addressed through more costly appellate and post-conviction litigation.

*"This is ground zero for wrongful convictions."*

-- District 20B attorney with 20+ years of experience

*"The more qualified attorneys have left the lists. MARs have started to become a problem since less competent attorneys are making mistakes."*

-- District 26 attorney with 4-10 years of experience

*"The rate reductions have had a devastating impact on indigent representation. Compensation is wholly inadequate to cover overhead. The state ends up spending more money for jail and prison sentences for defendants because inexperienced attorneys are handling cases they are not properly qualified to take on. . . . Pay attorneys a fair hourly rate and the state will actually save money in the long run due to better quality representation."*

-- District 26 attorney with 20+ years of experience

*"The savings earned by cutting trial attorney rates will be offset by all the appellate and post-conviction work created by poor representation at trial."*

-- District 10 attorney with 4-10 years of experience

*"NC can pay upfront for a decent system, or it can pay truckloads more money on the back end through post-conviction litigation and in settlements/civil verdicts for wrongful convictions, etc."*

-- District 10 attorney with 11-20 years of experience

## Conclusion

North Carolina is fortunate that many attorneys have been willing to continue to shoulder the responsibility of providing effective representation to North Carolina citizens who cannot afford to hire counsel, despite the reductions in compensation in 2011. However, as the years have gone by with no restoration of the rates, more attorneys have become unable or unwilling to continue to subsidize the State's obligation to provide counsel by working for unreasonably low pay. In addition to their impact on the defense bar, the unsustainable rates are already adversely affecting the quality of representation and the damage will only get worse over time. To ensure the long-term health of North Carolina's indigent defense system, the General Assembly must appropriate adequate funds for the IDS Commission to begin restoring the rates of compensation for the attorneys who do this difficult and important work.