Report of the Commission on Indigent Defense Services

Submitted to the North Carolina General Assembly
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EXECUTIVE SUMMARY

In August 2000, the General Assembly passed the Indigent Defense Services Act of 2000 ("IDS Act"), creating the Office of Indigent Defense Services ("IDS Office") and charging it with the responsibility of overseeing the provision of legal representation to indigent defendants and others entitled to counsel under North Carolina law. The IDS Office is housed in the Judicial Department and governed by a thirteen-member board, the Commission on Indigent Defense Services ("IDS Commission"). Effective July 1, 2001, the IDS Commission and IDS Office assumed responsibility for administering the State's indigent defense program.

As required by S.L. 2001-424, § 22.12, this report summarizes the work of the IDS Commission and IDS Office to date, with a particular emphasis on fiscal year 2003-04, as well as initiatives in progress. This report also presents last fiscal year's data on indigent caseloads and case costs across the State.

To improve the efficiency, cost-effectiveness, and quality of the State's indigent defense program in the long run, the IDS Commission and IDS Office have implemented a number of initiatives. Among other things, the Commission and Office have implemented measures to slow the rate of increase in spending without compromising the quality of representation; adopted and applied more uniform rates of compensation in capital and non-capital cases; improved the collection of revenues from recoupment; established higher qualification standards for attorneys seeking appointment to capital cases and appeals; expanded the Office of the Capital Defender and created several new regional capital defender offices; helped establish new public defender offices in Forsyth County, the First Judicial District, and Wake County; expanded a number of existing public defender offices; and worked with the public defender offices to develop plans for the appointment of counsel that provide for more significant oversight of the quality and efficiency of indigent representation in public defender districts. In addition, the IDS Commission and IDS Office have taken steps to improve data collection and analysis capabilities within the IDS Office and Administrative Office of the Courts; established a website and a number of specialized listservs to enhance communication and resource-sharing with public defenders and private defense attorneys; worked with the School of Government and other groups to develop and offer a number of new and innovative training programs; adopted performance guidelines for indigent representation in non-capital criminal cases at the trial level; and created a new statewide office of the Juvenile Defender as recommended by the American Bar Association Juvenile Justice Center in its 2003 report on access to and quality of legal representation in North Carolina delinquency proceedings.

The IDS Commission and IDS Office are also in the process of working on a number of other initiatives, including conducting analyses of budget trends and current indigent defense spending; developing additional specialized training programs for attorneys representing indigent persons; and developing an objective tool to measure the quality and efficiency of indigent defense systems at the county, regional, and statewide levels. Once that evaluation tool is developed, the IDS Commission plans to conduct a district-by-district review to assess the existing service-delivery systems and determine the most appropriate method of providing legal representation in each part of the State from both a cost and quality perspective.

In its first three years of operations, the IDS Commission has already taken significant steps to control increases in the cost of indigent representation. The increase in new demand (spending and current-year obligations) during fiscal year 2001-02 was 1.36% above fiscal year 2000-01; the increase in new demand during fiscal year 2002-03 was 4.63% above fiscal year 2001-02; and the increase in new demand during fiscal year 2003-04 was 7.6% above fiscal year 2002-03. By comparison, the average annual increase over the seven years prior to IDS' creation was more than 11%. Moreover, indigent defense expenditures per disposition have declined over the three years since IDS was established, which demonstrates that the overall increases in demand on the fund are due to an expanding indigent caseload, not a rise in per case costs. *See* Appendix A.

However, despite the comparatively lower increases in demand on the fund and the trend of declining per disposition expenditures, indigent defense remains under-funded. During fiscal year 2003-04, IDS' third year of operations, the amount available for new demand was almost $2 million less than the actual demand the year before IDS was created. In addition, the entire $9 million net increase in IDS' appropriation this fiscal year (2004-05), plus another $2.7 million, had to be spent paying off obligations from last fiscal year (2003-04) and there is no remaining funding to cover the currently projected 5% to 7.5% growth in new demand this fiscal year. *See* "Indigent Defense Fund Demand and Budget Needs: Historical and Future" below.

The IDS Commission is continuing to work on initiatives to control expenditures in the coming years, such as the creation of new public defender offices in some additional districts. Any projections for the future, however, will be affected by other changes in the criminal justice system. For example, significant changes in sentencing, criminal law or procedure, or in the conduct of district attorney offices, might increase or decrease the funds needed for indigent defense. Similarly, some changes that could control costs for indigent defense will necessarily be systemic and involve not just defense counsel, but prosecutors, judges, clerks, and other actors in the system. The IDS Commission is prepared to cooperate with other actors to identify and suggest systemic changes that would save money and/or improve the efficiency and quality of justice in our courts.

In short, the IDS Commission has accomplished a great deal since its formation, and is preparing to accomplish even more in the years to come.

REPORT

In 2000, the General Assembly passed the Indigent Defense Services Act of 2000 (S.L. 2000-144, S.B. 1323; G.S. 7A-498 *et seq.*) ("IDS Act"), creating a new statewide Office of Indigent Defense Services ("IDS Office"), housed in the Judicial Department and governed by the Commission on Indigent Defense Services ("IDS Commission"). The IDS Act charges the IDS Office with the responsibility of overseeing the provision of legal representation to indigent defendants and others entitled to counsel under North Carolina law. In accordance with that Act, the IDS Office assumed responsibility for overseeing indigent defense services on July 1, 2001.

As required by the IDS Act, the IDS Office must report to the General Assembly by March 1 of each year about the following matters:

(1) The volume and cost of cases handled in each district by assigned counsel or public defenders;
(2) Actions taken by the Office to improve the cost-effectiveness and quality of indigent defense, including the capital case program;
(3) Plans for changes in rules, standards, or regulations in the upcoming year; and
(4) Any recommended changes in law or funding procedures that would assist the Office in improving the management of funds expended for indigent defense services.

S.L. 2001-424, § 22.12; S.B. 1005, § 22.12. The first section of this report ("IDS Initiatives") addresses the second and third issues set forth above by describing the work of the IDS Commission and IDS Office, as well as new initiatives that are currently in progress. The second section of this report ("District Case Volume and Cost Statistics") addresses the first issue set forth above. The third section ("Legislative Recommendations") addresses the fourth issue set forth above.

I. IDS Initiatives

A. Initiatives Implemented to Date

This section describes the initiatives the IDS Commission and IDS Office have implemented since July 1, 2001, with a particular emphasis on fiscal year 2003-04.[1]

Division of Administrative Responsibilities

The IDS Act requires the Administrative Office of the Courts ("AOC") to provide general administrative support to the IDS Office. *See* G.S. 7A-498.2(c). IDS Office staff and AOC staff consult frequently to determine the most effective methods of performing the administrative functions necessary for the proper operation of the courts. In addition to assisting the IDS Office in preparing the budget each year, the AOC has continued to perform several other administrative functions related to processing fees for appointed counsel. AOC personnel continue to administer the automated fiscal systems for indigent defense, including keying in

[1] Lists of the current IDS Commission members and their appointing authorities and terms, as well as the current IDS Office staff, appear at the beginning of this report.

data from fee orders entered by the courts, issuing checks for legal services, and pursuing recoupment in cases in which recoupment is required by law. As it does for all other Judicial Branch components, the AOC also continues to perform purchasing and personnel functions for the IDS Office, and to provide technological and telecommunications support.

However, between September 2003 and December 2003, IDS paid for two full-time temporary positions to help AOC Financial Services catch up on a backlog of unpaid fee applications. Since January 2004, IDS has continued to pay for one of those full-time temporary positions to help keep data entry and payments current. In addition, IDS contributes $10,000 to the annual salary of an AOC staff attorney who supervises special counsel, *see* "Special Counsel Program" below, and acts as a liaison between AOC and IDS.

Rules for the Continued Delivery of Counsel Services in Non-Capital Cases, Capital Cases, and Non-Capital and Non-Criminal Appeals

To ensure that appropriate procedures were in place by July 1, 2001, the IDS Commission developed rules to govern the continued delivery of services in cases under its oversight. The rules deal with non-capital and non-criminal cases at the trial level; capital cases at all stages (trial, appellate, and post-conviction); and non-capital and non-criminal appeals. The IDS Rules were adopted on May 18, 2001 and became effective on July 1, 2001. Since the initial rules took effect, the IDS Commission has adopted revisions to several provisions in light of experience and to address new issues as they have arisen. The current rules are available on the IDS website (www.ncids.org), and are published in North Carolina Rules of Court, State (Thomson-West 2005) and the Annotated Rules of North Carolina (Lexis-Nexis 2005).

Internal Infrastructure for Data Collection and Reporting

One of the IDS Office's first tasks was to develop an infrastructure to accomplish the many responsibilities assigned to it by the IDS Act. With the assistance of an outside company specializing in computer programming and software development, Office staff designed a detailed internal database to document and track attorney appointments, expert authorizations, attorney and expert payments, and case information in all cases under its direct oversight—namely, potentially capital cases and appeals. The database has significantly improved the Office's ability to collect, analyze, and report data concerning the cases under IDS' direct oversight. For an example, see "Spending on Post-Conviction Mental Retardation Claims" below.

Spending on Post-Conviction Mental Retardation Claims

The IDS Office continues to collect data on expenditures associated with the legislation prohibiting executions of mentally retarded defendants. *See* G.S. 15A-2005 and 15A-2006; S.L. 2001-346. Petitions were filed under G.S. 15A-2006 to meet the January 31, 2002 statutory deadline on behalf of 50 defendants sentenced to death in North Carolina. As of February 2005, nine of those defendants have been resentenced to life without parole based on a judicial finding of mental retardation, one defendant has been resentenced to life without parole on other grounds, and two defendants have been awarded new trials by the Supreme Court of North

Carolina on other grounds. Also as of February 2005, 11 petitions have been denied in superior court; *certiorari* review has been denied by the State Supreme Court in five of those cases. One of the defendants who filed a mental retardation claim has been executed, and 27 cases are still pending in superior courts around the State.

Because attorney time spent preparing for and litigating those 50 mental retardation claims is so intertwined with time spent on regular post-conviction litigation, it has not been possible to calculate the attorney costs specifically associated with the mental retardation legislation. However, IDS Office staff have tracked and analyzed expert spending associated with those 50 mental retardation claims. In fiscal year 2001-02, IDS spent a total of $200,995 on such expert assistance—including psychologists, psychiatrists, investigators, mitigation specialists, and other experts—which represented 6.3% of all expert spending in indigent cases during that fiscal year. In fiscal year 2002-03, IDS spent $109,470 on expert assistance in those cases, which represented 2.9% of all expert spending in indigent cases during that fiscal year. In fiscal year 2003-04, IDS spent an additional $100,160 on expert assistance in those cases, which represented 2.1% of all expert spending in indigent cases last fiscal year. Once more of those cases are resolved, the IDS Office will be able to report additional findings about the financial costs associated with that legislation.

Expansion of Rosters of Qualified Attorneys

The IDS Rules discussed above contain detailed qualification standards for attorneys to be included on the Capital Trial (Lead and Associate), Capital Appeal, and Capital Post-Conviction Rosters. To implement those standards, the IDS Office developed comprehensive application forms for attorneys seeking placement on the various rosters. In conjunction with the Office of the Capital Defender and the Office of the Appellate Defender, the IDS Office evaluates all attorney applications and submissions to determine whether each applicant meets the qualifications set forth in the IDS Rules. Based on those evaluations, the IDS Office is continuing to expand the rosters of qualified attorneys across the State.

Development and Approval of Public Defender Plans

With the assistance of faculty from the School of Government, the IDS Office worked with each individual public defender office to develop a plan for the appointment of counsel in all non-capital cases in that district. *See* Rules of the Commission on Indigent Defense Services, Rule 1.5(b) (Adopted July 1, 2001 and Revised Nov. 16, 2001). The plans also contain qualification and performance standards for attorneys on the district indigent lists. By February 2002, the IDS Director had approved and certified appointment plans in all 11 public defender districts in existence at that time. In March 2003, the IDS Director approved and certified a public defender appointment plan in Forsyth County. *See* "Creation of New Forsyth County Public Defender Office" below. In December 2004, the IDS Director approved and certified a public defender appointment plan in the First Judicial District. *See* "Creation of New First District Public Defender Office" below. The IDS Director continues to review any proposed amendments to the public defender plans, and approve them if they are appropriate. Ultimately, these plans may be used as models for new appointment plans in non-public defender districts.

Electronic Communication and Resource-Sharing

The IDS Office has developed an independent website (www.ncids.org) that allows greater and more comprehensive communication with the bar, bench and public, and enhances the resources available to defense attorneys across the State. The website contains news and update links addressing the state of indigent defense funding, timing of attorney payments, IDS' main accomplishments since July 2001, and any other recent developments or matters of interest. The following materials, among others, are also posted on the website: contact information for the members of the IDS Commission, IDS staff, and all state defender offices; a list of IDS Commission committees and their participants; all approved minutes of IDS Commission meetings; IDS rules, policies, and procedures; performance guidelines for non-capital criminal cases at the trial level; reports and data generated by Office staff; fillable applications for the capital and appellate attorney rosters; attorney fee application forms; the public defender appointment plans; continuing legal education calendars and training materials from prior programs; the North Carolina Defender Manual; a North Carolina appellate brief bank; and links to related sites.

Moreover, the Office of the Appellate Defender has established a listserv for attorneys representing indigent persons on appeal; the Office of the Capital Defender has developed a listserv for attorneys representing indigent capital defendants at the trial level; and the IDS Office has established listservs for capital post-conviction attorneys, involuntary commitment attorneys, public defenders and assistant public defenders, attorneys representing parent-respondents in Chapter 7B cases, investigators and support staff in public defender offices, and mitigation specialists. In addition, the new Juvenile Defender recently developed a listserv for attorneys representing juveniles in delinquency proceedings. *See* "Improved Juvenile Delinquency Representation and New Office of the Juvenile Defender" below. Those listservs have been extremely effective tools for improving communication, sharing information, and providing resources and support to attorneys and others who work in these specialized areas across the State.

Appointment of Attorneys

On July 1, 2001, the IDS Office assumed direct responsibility for the appointment of counsel in all potentially capital cases at the trial level, all appeals, and all capital post-conviction proceedings. To ensure that appointments are made in an appropriate and timely fashion, the IDS Office utilized pre-existing resources in the Office of the Capital Defender and Office of the Appellate Defender. Thus, trial level appointments are the responsibility of the Capital Defender and appellate appointments are the responsibility of the Appellate Defender; the IDS Director makes appointments in capital post-conviction proceedings.

Between July 1, 2001 and February 15, 2005, the Capital Defender appointed 2,712 attorneys in 1,925 potentially capital cases at the trial level—including 708 attorneys in 521 cases during fiscal year 2001-02, 833 attorneys in 560 cases during fiscal year 2002-03, 741 attorneys in 528 cases during fiscal year 2003-04, and 430 attorneys in 316 cases so far this fiscal year. With few exceptions, an attorney is appointed the same day or day after the IDS Office's receipt of notification and determination of indigency by the court. If there is a delay in a defendant's first

appearance or the determination of indigency, the IDS Office has standby attorneys in every county in the State (called "provisional counsel") to ensure that a defendant's rights are protected in the interim.

Between July 1, 2001 and February 15, 2005, the Appellate Defender appointed 3,351 attorneys to handle capital and non-capital appeals—including 819 attorneys during fiscal year 2001-02, 829 attorneys during fiscal year 2002-03, 1,097 attorneys during fiscal year 2003-04, and 606 attorneys so far this fiscal year. Finally, between July 1, 2001 and February 15, 2005, the IDS Director appointed 175 attorneys in 84 different capital post-conviction proceedings—including 61 attorneys in 35 cases during fiscal year 2001-02, 60 attorneys in 34 cases during fiscal year 2002-03, 37 attorneys in 21 cases during fiscal year 2003-04, and 17 attorneys in 12 cases so far this fiscal year.

The IDS Commission and IDS Office believe the statewide roster system that IDS developed has significantly increased the quality of indigent representation in these areas of practice. *See* "Expansion of Rosters of Qualified Attorneys" above.

Expert Funding Authorizations

Between July 1, 2001 and February 15, 2005, the Capital Defender reviewed 4,681 requests for expert funding at the trial level—including 316 requests during fiscal year 2001-02, 1,306 requests during fiscal year 2002-03, 1,827 requests during fiscal year 2003-04, and 1,232 requests so far this fiscal year. During that same time period, the IDS Office reviewed 809 requests for expert funding in capital post-conviction proceedings—including 288 requests during fiscal year 2001-02, 243 requests during fiscal year 2002-03, 175 requests during fiscal year 2003-04, and 103 requests so far this fiscal year. The IDS Office has established procedures to approve or deny those requests, often with the assistance of a case consultant, and to assist attorneys in focusing on the experts that are necessary for an effective defense.

Compensation for Representation

On July 1, 2001, the IDS Office also assumed direct responsibility for compensating attorneys and experts in all potentially capital cases at the trial level, all appeals, and all capital post-conviction proceedings. The IDS Office is committed to reducing the rate of increase in expenditures in those cases without causing any decline in the quality of representation. To that end, the IDS Office adopted uniform rates of attorney compensation for all cases under its direct oversight, and developed detailed financial auditing procedures that it applies to every fee petition it receives. For instance, Office staff ensure that time sheets correctly support the total amount claimed; that receipts or detailed documentation support all major expenditures; and that attorneys properly obtained prior authorization for expert services from a court (before July 1, 2001) or the IDS Office (after July 1, 2001). Memoranda about those procedures were initially mailed to every attorney and expert in the Office's database; updated memoranda are posted on the IDS website.

Between July 1, 2001 and February 15, 2005, IDS Office staff set appropriate and uniform fee awards for 7,992 attorney fee applications across the State, including 1,864 attorney fee

applications during fiscal year 2001-02, 2,319 attorney fee applications during fiscal year 2002-03, 2,372 attorney fee applications during fiscal year 2003-04, and 1,437 attorney fee applications so far this fiscal year. Also between July 1, 2001 and February 15, 2005, the Office set fee awards for 5,767 expert bills—including private investigators, mitigation specialists, psychologists and psychiatrists, and ballistics and scientific experts. 970 of those awards were set during fiscal year 2001-02, 1,454 were set during fiscal year 2002-03, 2,005 were set during fiscal year 2003-04, and 1,338 have been set so far this fiscal year. The Office is currently setting about 80 attorney and expert fee awards per week, and forwarding those awards to the AOC for payment within two weeks of receiving each fee petition.

In addition to setting appropriate compensation awards in all capital cases and appeals, the IDS Office has taken some steps to control expenditures in the cases in which judges are still responsible for setting fees. For other steps the IDS Office is taking to manage the indigent defense fund, see, e.g., "Uniform Rates of Compensation" and "Improved Revenue Collection" below.

Uniform Rates of Compensation

When IDS assumed direct responsibility for compensating attorneys in capital cases on July 1, 2001, the IDS Commission continued the pre-existing standard rate of $85 per hour in those cases. After conducting a statewide survey, as well as studies of district and superior court fee awards during fiscal year 2001-02, the IDS Commission also adopted a standard statewide rate of $65 per hour for all non-capital cases, effective April 1, 2002. The IDS Commission and IDS Office believe that standard rates have the advantages of increasing the stability and predictability of payments to private assigned counsel, improving pay equity and fairness across the State, and enhancing the independence of defense counsel.

The standard rates have helped IDS control increases in indigent defense expenditures. However, while the IDS Commission intended the $65 non-capital rate to be essentially revenue neutral, it was slightly below the prevailing average in a number of North Carolina counties at the time it was enacted. In addition, the $85 per hour capital rate has been in place for more than ten years. Both of the standard rates are significantly below what attorneys can earn in the private sector, and will need to be examined and increased over time to keep pace with increases in the costs of living and operating a law practice. Moreover, the current standard rates are often cited as an impediment to attracting qualified attorneys to the appointed lists, and retaining them as they gain experience. For example, in the First Judicial District, the bar requested that a new public defender office be established because there was an insufficient number of attorneys willing to accept appointment. Private attorneys cited the $65 hourly rate as one of the principal reasons IDS could not attract enough qualified lawyers to continue the private appointed system. *See* "Creation of New First District Public Defender Office" below.

Creation of New Forsyth County Public Defender Office

Based on the IDS Commission's recommendation, the 2002 Appropriations Act established a new Public Defender Office in Forsyth County. In late 2002, the Senior Resident Superior Court Judge in District 21 appointed attorney George R. Clary to begin a four-year term as the Chief

Public Defender effective January 1, 2003. After his appointment, IDS Office staff members met with Clary on numerous occasions to assist him in establishing the new office. Among other things, Office staff worked with Clary to address issues of staffing, equipment, office space, and case management, and compiled a detailed orientation notebook. In addition, Office staff worked with Clary to develop a plan for the appointment of counsel in all non-capital cases in Forsyth County. That plan was approved and certified by the IDS Director in March 2003. *See* "Development and Approval of Public Defender Plans" above.

Forsyth County provided space for the new public defender office in a building across the street from the courthouse. Thirteen assistant public defenders had begun work by the first week in March 2003. By May 2003, the office was disposing of cases on a regular basis. Because the office was not fully operational until late in fiscal year 2002-03 and there was insufficient time to absorb start-up costs, the new office generated $228,000 in losses during its first partial fiscal year. However, a study conducted by IDS staff indicates that the Forsyth office saved the State $252,000 during fiscal year 2003-04 compared to what it would have cost to pay private attorneys to handle the same cases. In addition, the Chief Public Defender initiated a contract covering juvenile delinquency proceedings in Forsyth County that saved the State approximately $19,000 during fiscal year 2003-04. As the new office's caseload continues to increase to full capacity, IDS Office staff believe that savings during subsequent full years of operation will be even greater.

Creation of New First District Public Defender Office

Based on the IDS Commission's recommendation, the 2004 Appropriations Act established a new First District Public Defender Office, which is now responsible for providing representation in indigent cases in Camden, Chowan, Currituck, Dare, Gates, Pasquotank, and Perquimans counties. The Senior Resident Superior Court Judge in District 1 appointed attorney R. Andrew Womble to being a four-year term as the Chief Public Defender effective October 11, 2004. After his appointment, IDS Office staff worked with Womble to get the office operational and develop a plan for the appointment of counsel in non-capital cases. That plan was approved and certified by the IDS Director in December 2004. *See* "Development and Approval of Public Defender Plans" above. Pasquotank County provided space for the main public defender office in Elizabeth City, and Dare County provided space for a satellite office in Manteo. Four assistant public defenders have started work, and the office began accepting cases on December 1, 2004.

The IDS Commission believes that the new First District office will improve the quality of representation in that district. Previously, there were an insufficient number of attorneys who were willing to handle appointed indigent cases in the district, and the judiciary was forced to mandate service on the appointed lists. As a result, the bar and bench in the First District asked IDS and the General Assembly to create a new public defender office, and have been extremely helpful and cooperative in the process of establishing that office. However, during its first partial year of operations, IDS staff project the office will generate at least $600,000 in losses compared to what it would have cost to pay private attorneys to handle the same cases. In each subsequent full year of operations, IDS staff project that the office will generate more than $320,000 in losses. Moreover, initial staffing levels for the new office were minimized to

contain costs as much as possible. The IDS Office may determine that the current staff levels have to be increased because of travel time in the First District and the complexity of court schedules in the various counties within the district. *See* "Newly Created Positions in Existing Public Defender Offices" below.

Temporary Attorney Positions in the Durham County Public Defender Office

In September 2003, the IDS Director gave the Durham County Public Defender authorization to hire three new temporary attorneys and one new temporary paralegal, so the office could begin handling additional types of cases. In October 2003, the temporary attorneys began representing parent-respondents in abuse, neglect, or dependency and termination of parental rights proceedings, and handling child support and involuntary commitment cases. IDS Office staff expect those temporary positions to save money, and may ask the General Assembly to make them permanent if they prove to be cost-effective.

Newly Created Positions in Existing Public Defender Offices

In the 2004 Appropriations Act, the General Assembly gave the IDS Office authority to create up to 12 new attorney positions and six new support staff positions within existing IDS defender programs. The head of each defender office was then given the opportunity to submit a request and justification for additional staff to the IDS Director. IDS Office staff subsequently reviewed those requests and made decisions about whether adding new personnel would help expand the work each office is doing and/or relieve overburdened offices.

As of February 2005, IDS has allotted eight of the new attorney positions and 5.75 of the new support staff positions as follows:

1. One new attorney in the District 14 (Durham) Public Defender Office to help that office adequately represent juveniles in delinquency cases and parent-respondents in Chapter 7B proceedings;

2. Two new attorneys in the District 15B (Orange/Chatham) Public Defender Office to allow that office to handle additional cases that were previously assigned to private counsel, and to assist the office in becoming cost-effective due to its expanded size; and one new investigator to maintain the appropriate two-to-one attorney-support staff ratio;

3. One new attorney in the District 16A (Hoke/Scotland) Public Defender Office to allow the office to handle additional types of proceedings, including child support contempt and Chapter 7B proceedings, and to assist the office in becoming cost-effective due to its expanded size; and ¼ of a legal assistant position to make a ¾ assistant in the Hoke County office full-time;

4. One new attorney and one new legal assistant in the District 18 (High Point) Public Defender Office to relieve overburdened staff and assist the office in handling an expanding caseload;

5. One-half of a legal assistant in the District 21 (Forsyth) Public Defender Office to assist in conducting jail interviews prior to first appearances, thereby helping the office contain the local jail population;

6. One new attorney in the District 27 (Gaston) Public Defender Office to relieve overburdened staff and assist the office in handling an expanding caseload;

7. One new attorney for the statewide Office of the Appellate Defender to allow that office to handle additional appeals that are currently being assigned to private counsel; and one new legal assistant to help the office manage the statewide appellate roster;

8. One new attorney for the Durham Office of the Capital Defender to allow that office to handle additional capital cases that are currently being assigned to private counsel and paid at an hourly rate of $85; and

9. One new support staff for the central IDS Office to assist the Research Director in gathering and analyzing data, and identifying areas in which IDS can further improve efficiencies.

At this time, IDS Office staff are holding the remaining positions in reserve in case they are needed in the new First District Public Defender Office. *See* "Creation of New First District Public Defender Office" above. If that office does not require the additional remaining positions, they may be placed in other offices as needed.

Performance Guidelines for Indigent Defense Representation in Non-Capital Criminal Cases at the Trial Level

One of the IDS Commission's primary goals is to ensure that indigent defendants in North Carolina are afforded high quality legal representation. *See* G.S. 7A-498.1(2). To further that goal, the IDS Act directed the Commission to establish "[s]tandards for the performance of public defenders and appointed counsel." G.S. 7A-498.5(c)(4). With the assistance of IDS Office staff and faculty from the School of Government, a Committee of the IDS Commission developed a draft of proposed performance guidelines for attorneys representing indigent defendants in non-capital criminal cases at the trial level. The initial draft guidelines were based on the "Performance Guidelines for Criminal Defense Representation" that have been promulgated by the National Legal Aid and Defender Association, as well as a review of standards and guidelines in several other jurisdictions, including Connecticut, Kansas, Massachusetts, New Mexico, New York City, Oregon, and Washington. Between October 2003 and January 2004, the Committee met six times to review and refine the initial draft, and to tailor it to fit the nuances of North Carolina law and practice.

Initial proposed guidelines were then sent to 70 public and private defense attorneys representing every district around the State, with a request that they provide comments. Based on the responses, the Committee made a number of changes to the initial draft. In August 2004, the revised guidelines were mailed to all public defenders and assistant public defenders, more than 2,000 private defense attorneys, all active district and superior court judges, and all elected district attorneys for comments. In September 2004, the Commission also held four regional meetings around the State to discuss the proposed guidelines with interested persons. Based on the oral and written comments that were received, the Committee made a number of improvements to the proposed guidelines. (A report on all comments that were received is available at www.ncids.org under the "News & Updates" link.)

The full IDS Commission then reviewed and adopted final performance guidelines on November 12, 2004. The final guidelines are attached to this report as Appendix C. The IDS staff officially released the guidelines in February 2005. Lexis-Nexis has agreed to publish them as an appendix to the IDS Rules in the Annotated Rules of North Carolina; Thomson-West has similarly agreed to publish them in North Carolina Rules of Court, State. The guidelines will also be distributed by mail to the bar and bench in the near future.

The performance guidelines address areas such as the role and general duties of defense counsel, client contact and interviewing, case review and investigation, plea negotiations, trial preparation and representation, and sentencing. They are intended to serve as a guide for attorney performance in the covered cases, and contain a set of considerations and recommendations to assist counsel in providing quality representation for indigent criminal defendants. The Commission hopes the guidelines will be useful as a training tool and resource for new and experienced defense attorneys, as well as a tool for potential systemic reform in some areas. Because the goals embodied in the guidelines will not be attainable without sufficient funding and resources for indigent defense, the IDS Commission is relying on the General Assembly to continue its support of quality indigent defense services.

In the coming years, the IDS Commission hopes to develop performance guidelines for specialized areas of representation, such as capital, appellate, juvenile delinquency, and parent-respondent representation.

Sentencing Services Program

In the 2002 Appropriations Act, the General Assembly reduced the overall budget for the Office of Sentencing Services ("OSS") by almost 40%, and transferred that program to IDS with directions to reconfigure the program as necessary to implement the budget reduction. IDS assumed responsibility for OSS on September 20, 2002, and hired School of Government Professor John Rubin as Interim Administrator. In November 2003, the IDS Director hired Susan Brooks as the permanent half-time Administrator of OSS.

OSS has been substantially reorganized, and is continuing to provide quality and accountable services despite the funding reductions. During fiscal year 2001-02, OSS programs across the State contacted 14,539 offenders through referrals and targeting, opened 3,474 cases, and presented 2,228 plans to courts. During fiscal year 2002-03, after the substantial funding reduction discussed above, OSS programs contacted 9,692 offenders (a decrease of 33%), opened 2,120 cases (a decrease of 39%), and presented 1,732 plans to courts (a decrease of only 22%). During fiscal year 2003-04, OSS programs contacted 11,459 offenders (an increase of 18% from the prior fiscal year), opened 2,520 cases (an increase of 19% from the prior fiscal year), and presented 1,830 plans to courts (an increase of 6% from the prior fiscal year). Thus, the programs are continuing to adapt to the funding reduction and have substantially increased the number of clients contacted and cases opened. In addition, the programs continue to report that a greater percentage of cases are attributable to referrals from attorneys and judges.

Committees of the IDS Commission

The IDS Commission has formed a number of different committees responsible for addressing various aspects of its work. Based on work done by IDS Office staff, the Budget Committee has prepared fiscal notes for all major IDS initiatives, analyzed non-capital case costs in district and superior court and developed a standard hourly rate for those cases, analyzed budget trends, and prepared proposed budgets for the 2003-05 and 2005-07 biennia. The Capital Committee has addressed issues such as quality of capital representation, recruitment of qualified attorneys and experts, regional capital defender offices, compensation of capital defense attorneys and experts, and ways to provide cost-effective consulting services to capital attorneys.

The Public Defender Committee worked with the public defenders to develop plans to govern the appointment and qualifications of counsel in each public defender district, and was recently reformed to address ways to improve IDS' communication with the public defenders. The Review Committee developed procedures to govern review of the IDS Director's fee and roster decisions, and addresses all such requests for review. With the assistance of faculty from the School of Government, the Personnel Committee developed personnel policies for the IDS Office and tools to evaluate the performance of the Executive Director on an annual basis. An informal Training Committee has worked with staff and other groups to develop new and innovative training programs for attorneys representing indigent persons. *See* "Improved Training" below.

The Standards Committee developed the performance guidelines for indigent defense representation that are discussed above, which the full Commission subsequently refined and adopted. *See* "Performance Guidelines for Indigent Defense Representation in Non-Capital Criminal Cases at the Trial Level" above. The Systems Evaluation Committee is working with staff and outside participants to develop an objective tool to measure the quality and performance of indigent defense systems at the county, regional, and statewide levels. *See* "Measures to Evaluate Indigent Defense Systems" below. The Juvenile Committee worked with a group of outside juvenile experts to evaluate the findings and recommendations in the American Bar Association's 2003 report—"North Carolina: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings"—and to develop recommendations for reform initiatives. *See* "Improved Juvenile Delinquency Representation and New Office of the Juvenile Defender" below.

B. Initiatives in Progress

Study of Indigent Dispositions Compared to Total Court Dispositions

In September 2004, IDS Office staff conducted a study comparing the total number of indigent case dispositions compared to the total number of court dispositions in case types that IDS would be responsible for if the defendant or respondent were indigent, excluding traffic dispositions and dispositions from civil cases such as special proceedings and child support.[2]

[2] The study was based on total criminal non-traffic and indigent case disposition numbers provided by AOC, which count every closed CR or CRS file number as a disposition. IDS staff calculate dispositions differently, and count all file numbers disposed of on the same day before the same presiding judge as one disposition.

That study revealed that the number of total criminal non-traffic dispositions declined between fiscal year 2001-02 and fiscal year 2003-04. However, the number of public defender and private appointed counsel dispositions that are funded through IDS has risen over that same time period.

	FY02	FY03	FY04
Total Criminal Non-Traffic Dispositions	774,795	761,665	767,483
IDS Dispositions as a % of Total Criminal Non-Traffic Dispositions	34.9%	36.8%	38.3%

The greatest increase in indigent case dispositions has been in criminal district court, where IDS dispositions as a percentage of total dispositions increased 7.3% between fiscal year 2001-02 and fiscal year 2002-03, and another 5.2% between fiscal year 2002-03 and fiscal year 2003-04.

Based on this study, IDS staff believe the recent increases in demand on the indigent defense fund are largely attributable to more people being found indigent and entitled to court-appointed counsel. IDS staff will continue to monitor this trend in the years to come.

Indigent Defense Fund Demand and Budget Needs: Historical and Future

The IDS Commission has taken significant steps to control increases in the cost of indigent representation, and to analyze the factors driving growth in the fund. The increase in new demand (spending and current-year obligations) during fiscal year 2001-02 was only 1.36% above fiscal year 2000-01, which was the lowest increase in at least a decade. The increase in new demand during fiscal year 2002-03 was 4.63% above fiscal year 2001-02, and the increase in new demand during fiscal year 2003-04 was 7.6% above fiscal year 2002-03, both of which were still significantly below the average annual increase (more than 11%) during the seven years prior to IDS' creation. *See* Appendix A.

Moreover, indigent defense expenditures per disposition have declined over the three years since IDS was established, demonstrating that the overall increases in demand on the fund are attributable to an expanding indigent caseload rather than a rise in per case costs. As shown in the chart in Appendix A labeled "Indigent Defense Expenditure History per Disposition," there was a spike in total expenditures per disposition in fiscal year 2000-01, the year before IDS assumed responsibility for the fund. Total expenditures per disposition then declined significantly over the next two fiscal years, and increased again very slightly in fiscal year 2003-04. While expenditures per disposition on private counsel have been somewhat volatile, expenditures per disposition on public defenders have been much more stable. In addition, the significant decline in per disposition expenditures in public defender offices during fiscal year 2003-04 suggests that those offices are increasing efficiencies. IDS Office staff believe that the recent expansion of the public defender system has contributed to IDS' ability to stabilize overall per disposition expenditures.

Despite the comparatively lower increases in new demand during the past three fiscal years, as well as the overall trend of declining per disposition expenditures since IDS was established, indigent defense remains under-funded. Recent IDS staff analyses suggest that IDS' continuing

cycle of debt is a result of insufficient available funds to meet new demand. As shown below, IDS' had fewer funds available for new demand in fiscal years 2001-02, 2002-03, and 2003-04 than the actual new demand on the fund in fiscal year 2000-01, the year before IDS was established.

Fiscal Year 2000-01:

In fiscal year 2000-01, when the AOC was in charge of the indigent defense fund, there was about $69.95 million in new demand on the fund. Because AOC had insufficient funding to meet that demand, indigent defense ended the year with $1.7 million of debt.

Fiscal Year 2001-02:

In fiscal year 2001-02, which was IDS' first year of operations, the actual budget for indigent defense services was approximately $68.05 million, taking into account actual revenues as well as subsequent salary, benefit, and other adjustments that fiscal year. However, during that fiscal year, IDS had to pay off the $1.7 million of debt inherited from the AOC and revert an additional $2.8 million to the Office of State Budget. Thus, IDS had approximately $63.55 million available to spend on new demand during fiscal year 2001-02. Because there was about $70.9 million in new demand (a 1.36% increase from the prior year), IDS ended fiscal year 2001-02 with $7.4 million of debt.

Fiscal Year 2002-03:

With the assistance of AOC staff and IDS Office staff, *see* G.S. 7A-498.2(d), the IDS Commission prepared a proposed budget for fiscal year 2002-03. In that proposed budget, IDS asked for an increase of $6.4 million to cover the debt that was projected at that time, as well as some additional defender staff and equipment needs. The General Assembly ultimately appropriated an additional $4.95 million in non-recurring funds. Thus, in fiscal year 2002-03, the actual budget for indigent defense services was approximately $73 million, again taking into account actual revenues and other adjustments. However, because IDS had to pay off the $7.4 million of fiscal year 2001-02 debt and contribute $137,000 to the statewide negative reserve, the indigent defense fund was left with about $65.5 million available to spend on new demand during fiscal year 2002-03. Because there was about $74.2 million in new demand (a 4.63% increase from the prior year), IDS ended fiscal year 2002-03 with $8.7 million of debt.

Fiscal Year 2003-04:

Again with the assistance of AOC staff and IDS Office staff, the IDS Commission prepared a proposed budget for the 2003-2005 biennium. In that proposed budget, IDS asked for an increase of about $19 million in fiscal year 2003-04. That request was intended only to maintain, not expand, existing services, and predicted a modest 4.5% annual growth in demand on the fund. In addition, the request was intended to restore fiscal year 2002-03's non-recurring appropriation of $4.95 million and pay off fiscal year 2002-03's then-projected debt.

The General Assembly ultimately adopted a budget for fiscal year 2003-04 that included the prior year's $4.95 million non-recurring appropriation in IDS' base budget for the biennium, and appropriated an additional $3.5 million to indigent defense. Thus, in fiscal year 2003-04, the actual budget for indigent defense services was approximately $76.8 million, again taking into account actual revenues and other adjustments. However, because IDS had to pay off the $8.7

million of fiscal year 2002-03 debt, the indigent defense fund was left with about $68.1 million available to spend on new demand during fiscal year 2003-04. Because there was about $79.85 million in new demand (a 7.6% increase from the prior year), IDS ended fiscal year 2003-04 with $11.7 million of debt. That amount of debt represented more than a 10-week payment delay to private attorneys and defense experts.

Fiscal Year 2004-05:

The IDS Commission's original proposed budget for the 2003-2005 biennium also requested an increase of about $14 million in fiscal year 2004-05. Again, that request was intended only to maintain existing services, and predicted another 4.5% growth in demand on the fund during fiscal year 2004-05. The requested increase for 2004-05 was less than the requested increase for 2003-04 because of an assumption that all carry-over debt would be eliminated in light of the previous year's increase. However, IDS' original appropriation for fiscal year 2004-05 only included a net increase of $1.5 million over fiscal year 2002-03, because the General Assembly had to meet stricter targets for the second year of the biennial budget. In response to a subsequent request for a $13 million increase during the last legislative session, the General Assembly appropriated an additional $11 million to indigent defense for fiscal year 2004-05—$8.5 million in non-recurring funds plus $2.5 million in recurring funds—which represented a net increase of $9 million over fiscal year 2003-04. Thus, the authorized budget for indigent defense services this fiscal year is approximately $86.6 million; the actual budget will likely be somewhat lower after the anticipated revenue shortfalls and other adjustments are taken into account. However, because last fiscal year's $11.7 million of debt had to be paid out of this fiscal year's appropriation, IDS spent this year's entire net increase plus another $2.7 million on last year's obligations and there is no remaining funding to accommodate growth in new demand this year.

Current projections suggest there will be another increase in new demand during fiscal year 2004-05. In February 2005, IDS Office staff completed an analysis of the new demand on the private counsel fund between July 1, 2004 and January 31, 2005. Based on the first seven months of this fiscal year, the private counsel fund is expected to grow by 5.6% (or $3.36 million) compared to fiscal year 2003-04. The public defender fund is expected to grow at a similar rate because of recent expansions in the public defender system. Based on this new demand, the indigent defense fund is currently projected to end this fiscal year with approximately $9 million in unpaid fee awards that will have to be paid out of next fiscal year's appropriation. That amount of debt will again represent at least an eight-week delay in payments to attorneys and experts. Moreover, if the demand on the private counsel fund increases during the second half of fiscal year 2004-05, as it did in fiscal year 2003-04, the overall growth rate in the indigent defense fund this fiscal year may be 7.5% or higher. *See* Appendix A.

The IDS Commission is extremely grateful for the additional funding that indigent defense has received over the past several years. However, as shown above, the amount available to spend on new demand during IDS' third year of operations was $68.1 million, which was still almost $2 million less than the actual new demand on the fund the year before IDS was created ($69.95 million). Thus, it was not until the current fiscal year that IDS' annual appropriation included enough of an increase to even begin the process of combating indigent defense's historical cycle of debt.

Fiscal Years 2005-06 and 2006-07:

The IDS Commission has developed a proposed budget for the 2005-07 biennium, which asks the General Assembly to include last year's $8.5 million non-recurring appropriation in IDS' base budget for the upcoming biennium, and to appropriate net increases of $18 million and $13 million for fiscal years 2005-06 and 2006-07, respectively. The IDS Commission believes this additional funding will pay off the anticipated unpaid attorney and expert fees from fiscal year 2004-05, and accommodate an annual growth rate of 7.5%. In response to that request, the Governor has recommended net increases of $13.5 million and $8.5 million for fiscal years 2005-06 and 2006-07, respectively.

IDS' ongoing debt makes it difficult to recruit and retain qualified counsel to represent indigent defendants, and significantly impedes the IDS Commission's ability to manage the fund properly. Once sufficient funds are appropriated to meet the real demands on the fund and support timely payments to private counsel, the IDS Commission will be in a much better position to manage the indigent defense fund in an efficient or equitable manner.

Preparations for New Wake County Public Defender Office

The 2004 Appropriations Act established a new Wake County Public Defender Office effective July 1, 2005. IDS Office staff subsequently worked with the bar and bench in Wake County to develop procedures for selecting the Chief Public Defender. On October 1, 2004, the IDS Director issued regulations for the nomination of candidates for the public defender position. Based on requests from the bar and bench in Wake County, those regulations directed the Senior Resident Superior Court Judge to appoint a committee of attorneys to evaluate and rank the qualifications of all applicants. The Senior Resident Judge appointed 13 local attorneys to that committee on October 4, 2004. While the bar was originally supposed to meet and nominate three final candidates in December 2004, the committee needed more time to perform its evaluation of the applicants. At the request of the committee and the Senior Resident Judge, the IDS Director issued amended regulations on October 25, 2004. In accordance with those regulations, the bar met on February 24, 2005, and nominated three candidates. The Senior Resident Judge will be appointing a Chief Public Defender from those three nominees, with a term to begin effective July 2005. The IDS Office expects to enter into a contract with the successful candidate to begin some preliminary preparations for the office prior to the start of his or her term.

Updated Public Defender Cost-Effectiveness Studies

IDS Office staff conduct annual studies of the cost-effectiveness of all public defender offices in the State. In those studies, Office staff build caseload models for the public defender offices, and examine and quantify efficiencies of scale. The studies also quantify the system costs involved with using private counsel by including in the analysis the administrative time involved with making appointments, setting fee awards, and processing and issuing fee payments. The fiscal year 2003-04 study found that the 12 public defender offices in existence last fiscal year handled 31.6% of the cases assigned to public defenders and private counsel combined, but accounted for only 22.3% of the combined expenditures on appointed counsel.

The study concluded that all of the public defender offices together cost the State $2.66 million less than what it would have cost to pay private attorneys to handle the same cases. While the study did not compare the relative quality of representation in public defender and private counsel systems, IDS staff are working to develop a list of value-added activities that are performed by public defender offices and private counsel and hope to incorporate them into future analyses. *See also* "Measures to Evaluate Indigent Defense Systems" below.

In January 2005, IDS Office staff analyzed the costs expended on private assigned counsel in a number of non-public defender counties compared to the costs of potential new public defender offices in those counties. The results indicated that the State could save money by creating new public defender offices in a number of North Carolina counties and districts. In accordance with G.S. 7A-498.5(e), the IDS Office recently solicited comments from the bar and bench in the Fifth District (New Hanover and Pender counties), and may solicit comments in some other areas in the near future. Depending on the comments that are received and the projected fiscal impact of new offices, the IDS Commission may recommend that the General Assembly create some additional public defender offices.

Improved External Data Collection and Reporting

IDS Office staff have continued to work with AOC staff to develop better and more comprehensive data collection systems for the indigent defense program. During the Spring of 2002, the IDS Office asked AOC Financial Services to collect additional data from all non-capital fee applications that are signed by judges and submitted to AOC for payment. AOC previously collected the following data for each fee application: county, case number, defendant's name, attorney's name, judge's name, disposition date, and total fee. In addition to continuing to collect that data, the AOC began collecting the total hours claimed by counsel in each case on August 1, 2003, and had refined the accuracy of that data collection by December 1, 2003.

At IDS' request, the AOC and Office of State Controller ("OSC") subsequently agreed to reprogram the financial accounting system to allow the collection of much more detailed information about cases by account code and type of charge or proceeding. The OSC did that reprogramming at no charge to AOC or IDS, and the additional data will be collected without any expansion of existing personnel. For example, AOC staff previously only entered data on adult non-capital cases that was broken down into the following categories: felony, felony plus another charge, driving while impaired, misdemeanor, involuntary commitment, and other. Now that the system has been reprogrammed, AOC staff will be entering data broken down into adult superior court and adult district court. In turn, the adult superior and district court data will be broken down into the following case types: felony, felony probation violation, misdemeanor (non-traffic), misdemeanor probation violation, driving while impaired, other traffic, criminal contempt, child support contempt, and other. AOC Financial Services began data collection under the new scheme on July 1, 2004. Thus, during fiscal year 2004-05, IDS will have access to much better data about attorney time and cases than it has ever had in the past.

The IDS Office has also worked with the Appellate Defender to design case-reporting and time-keeping software in Microsoft Access. IDS staff built that database during the Spring of

2004, and the Office of the Appellate Defender plans to pilot-test it during fiscal year 2005-06. If the database meets that office's needs, IDS staff will then make it available to the Office of the Capital Defender and all public defender offices.

Improved Revenue Collection

IDS Office staff have worked with AOC staff to gather data on the amount each county collected in recoupment (through probationary collections and civil judgments) during each fiscal year since 2001-02. Staff then analyze that data annually to determine the amount recouped by each county as a percentage of that county's total expenditures on indigent defense. The results indicate that there is wide variability in recoupment among counties. During fiscal year 2002-03, recoupment rates ranged from a high of 35.8% to a low of 2.2%, with a statewide rate of 9% (or $6.536 million), including collections of the $50 attorney appointment fee. During fiscal year 2003-04, recoupment rates ranged from a high of 43.1% to a low of 1.8%, with a statewide rate of 9.2% (or $7.055 million), again including collections of the $50 attorney appointment fee.

The IDS Office has undertaken a number of initiatives to improve the recoupment process and increase revenues to the indigent defense fund. For instance, IDS Office staff continue to work with the public defender offices to ensure that they submit fee applications for entry of judgments in all recoupment-eligible cases, and have held meetings around the State with public defenders, judges, and clerks to discuss ways to increase revenues. In addition, IDS Office staff worked with the AOC Forms Committee to revise the fee applications and facilitate easier entry of judgments for attorney fees.

Effective December 1, 2002, the General Assembly enacted G.S. 7A-455.1, which established a $50 attorney appointment fee for indigent criminal defendants who are appointed counsel at State expense. Based on experience with similar fees in other states, the IDS Office originally predicted annual collection of approximately $1 million in appointment fees. However, implementing the attorney appointment fee proved to be more complicated and problematic than was expected. In addition, the fee was called into legal question by several lawsuits shortly after its enactment. Between December 2002 and January 2004, actual statewide revenues from the fee totaled $424,031.

On February 6, 2004, the Supreme Court of North Carolina filed an opinion in *State v. Webb*, 358 N.C. 92, 591 S.E.2d 505, which held that certain portions of the $50 attorney appointment fee statute violated the North Carolina Constitution. The Court held that the $50 fee may not be imposed prior to disposition, and may only be imposed upon defendants after they have been convicted or pled guilty or nolo contendere to one or more charges. The Court further held that any indigent defendant who paid the $50 fee prior to disposition between April 2, 2003 and February 6, 2004, and who was acquitted or whose case was dismissed, was entitled to a refund. Between the date of the Supreme Court's opinion and February 21, 2005, $15,615 has been refunded to defendants statewide. In addition, the revenues generated by the fee have decreased significantly since February 2004. Between February 2004 and June 2004, total statewide collections were $128,369. Between July 2004 and January 2005, total statewide collections were $167,350. As with regular attorney fee recoupment, there are great variations in the rate of

collection of the $50 fee from county to county, with some large counties reporting little or no collection of this fee.

Contracts with Attorneys

Since the Spring of 2003, the IDS Office has been exploring the use of contracts with attorneys as an alternative method of delivering legal services to indigent persons in various districts in North Carolina. Currently, the IDS Office has contracts with seven different attorneys in Forsyth and Guilford counties, as well as with the Children's Law Center in Charlotte and the Elder Law Clinic of the Wake Forest School of Law in Winston-Salem. The IDS contracts cover a variety of case types, including adult criminal, juvenile delinquency, civil commitment, and guardianship proceedings.

In November 2003, the IDS Director hired Susan Brooks as the half-time Contracts Administrator for the IDS Office, in addition to her responsibilities as the Administrator of OSS. As the IDS Contracts Administrator, Brooks is monitoring the existing contracts, evaluating reports regularly submitted by the contract attorneys, working with other IDS Office staff to improve data collection and better assess the cost-effectiveness of the contracts, conducting on-site evaluations of the services being delivered by contract counsel, and exploring other areas of the State in which new attorney contracts might save money and increase quality.

The IDS Office staff believe that carefully planned and tailored contracts can result in greater efficiencies and substantial savings, while improving the quality of services being delivered. Office staff will continue to evaluate the existing contracts from both a cost and quality perspective, and hope to expand IDS' use of contracts in the years to come.

Improved Training

The IDS Office continues to provide funding for public defender training, and has also sponsored new training programs in areas of representation that traditionally have not had adequate continuing legal education. The IDS Office worked with the Office of the Appellate Defender and faculty from the School of Government to develop a new hands-on training program for private appellate attorneys who accept appointments in indigent cases. That training was held during the month of July in 2002, 2003, and 2004; the programs were extremely successful and will continue to be offered on an annual basis.

With the assistance of AOC and School of Government staff, the IDS Office has planned new training programs for private counsel who work on involuntary commitment cases, and for full-time State employees who serve as Special Counsel for persons committed to mental health facilities. Those programs, which were held during February 2003 and January 2004, were the first of their kind in North Carolina. Also with the assistance of AOC, the School of Government, and the Guardian ad Litem program, the IDS Office planned a training program for attorneys who represent parent-respondents in Chapter 7B cases, including abuse, neglect, or dependency and termination of parental rights proceedings. That program was held in May 2003 and again in August 2003, and also was the first of its kind in North Carolina. In April 2004, IDS and the North Carolina Academy of Trial Lawyers co-sponsored another training for

attorneys who represent parent-respondents in these proceedings. In September of 2003 and 2004, the IDS Office and School of Government offered new five-day trial advocacy programs for public defenders, which were intensive hands-on training programs in which participants developed trial skills by working on their own cases. For the past several years, IDS has also sponsored an investigators conference for public defender staff investigators and private investigators who do a significant amount of appointed work.

Again with the assistance of the School of Government, IDS will be sponsoring a number of training programs during the 2005 calendar year. In addition to several regular programs and conferences, IDS will be sponsoring a management training program for the chief public defenders and their administrative assistants. With the assistance of the new Juvenile Defender and School of Government, IDS also intends to develop and offer new and innovative training programs for attorneys who represent juveniles in delinquency proceedings. *See* "Improved Juvenile Delinquency Representation and New Office of the Juvenile Defender" below.

The IDS Office has also provided funding for improvements to the School of Government's North Carolina Defender Manual, and has made that manual available to more attorneys by posting it on the IDS website. Attorneys around the State can now access or download the manual for free. Finally, the IDS Office posts on its website all materials that were used in IDS co-sponsored training programs, so that attorneys around the State can benefit from programs they were unable to attend in person.

The IDS Office is considering more ways in which additional improved training can be provided to public defenders and private attorneys, both to enhance the quality and efficiency of the services they provide, and to assist them in meeting the recently adopted performance guidelines. *See* "Performance Guidelines for Indigent Defense Representation in Non-Capital Criminal Cases at the Trial Level" above.

Improved Juvenile Delinquency Representation and New Office of the Juvenile Defender

In conjunction with the American Bar Association ("ABA") Juvenile Justice Center, the National Juvenile Defender Center, and the Southern Juvenile Defender Center, the IDS Office conducted a statewide assessment of juvenile delinquency representation in North Carolina. The goal of this project was to provide a thorough, objective assessment of the existing legal services available for North Carolina's youth, both in terms of the accessibility of defense counsel and the quality of representation, and to develop recommendations for improving those services where needed. As part of its mission to provide support to states working to improve their systems for delivering legal services to juveniles, the ABA had previously conducted similar assessments in a number of other states, including Arkansas, Georgia, Illinois, Kentucky, Louisiana, Maryland, Montana, Ohio, Texas, and Virginia.

During the Spring of 2003, surveys were mailed to all district court judges, all chief court counselors, and more than 200 private defense attorneys and assistant public defenders who represent juveniles around the State. In addition, 11 representative North Carolina counties were selected for site visits based on a variety of factors, including service delivery methods, the number and types of juvenile cases, and population and economic demographics. Teams of in-

state and national experts then visited the 11 selected counties, observed juvenile court, and interviewed judges, defense attorneys, prosecutors, juvenile clerks, court counselors, and other system actors.

On October 22, 2003, the ABA released its report on North Carolina's juvenile defense programs, along with reports in five other states (Maine, Maryland, Montana, Pennsylvania, and Washington). The North Carolina report contained a number of key findings about access to and quality of representation in delinquency proceedings in this State, such as: 1) the quality of juvenile defense is very uneven, partly due to a lack of statewide practice standards and insufficient training opportunities; 2) many juvenile defenders inadequately prepare their cases and have little or no access to support services; 3) many juvenile defenders have insufficient and/or untimely contact with their young clients; 4) juvenile defenders rarely file pre-adjudication motions, including competency motions; 5) North Carolina overuses and misuses pre-adjudicatory detention; 6) in some counties, as many as 90% of juvenile cases end in plea bargains; 7) minority children are over-represented in the juvenile justice system; 8) defenders rarely advocate for dispositional alternatives to detention, and are overly reliant on court counselor recommendations; 9) post-disposition representation is virtually non-existent, and juvenile appeals are rare; and 10) community-based treatment and mental health programs are inadequate.

The report also contained a number of ABA recommendations, such as: 1) ensure that juveniles have the assistance of counsel at the earliest possible stage; 2) consistently allocate sufficient resources to support the meaningful representation of juveniles; 3) designate a statewide Juvenile Defender to bring together resources and expertise, continue the evaluation process, and implement specific policies and programs; 4) work to stop the misuse and overuse of secure detention; 5) develop appropriate strategies to reduce disproportionate minority representation in the juvenile justice system; 6) develop specialized qualification standards and performance guidelines for juvenile defenders; 7) create and support programs to elevate the status of indigent juvenile defense practice; 8) conduct an examination of juvenile caseloads to ensure that they are consistent with quality expectations; 9) develop and offer comprehensive training programs for juvenile defenders; 10) support pilot projects in more counties to increase the availability of diversion opportunities and treatment alternatives; and 11) develop procedures for expediting appeals in juvenile delinquency cases.

After the ABA's report was released, the IDS Commission formed a Juvenile Committee to review the ABA's findings and prepare recommendations for reform initiatives. That Committee in turn sought the assistance of 13 outside juvenile experts, including delinquency attorneys, special education and mental health advocates, and academics and law school clinical faculty. The Juvenile Committee met four times between December 2003 and February 2004, and presented a reform proposal to the IDS Commission in March 2004. In May 2004, the Committee delivered a formal report of its findings and recommendations to the General Assembly.

The Committee's primary recommendations were to create a new statewide Juvenile Defender position so that someone is working full-time on needed reform initiatives, and to develop and offer comprehensive training programs for juvenile defense attorneys. The General

Assembly subsequently authorized the creation of a new statewide Juvenile Defender position, and the IDS Commission appointed attorney Eric J. Zogry to that position in November 2004. Zogry began work in January 2005 and has hired an Administrative Assistant.

Some of Zogry's duties will be serving as a central resource and contact person for individual juvenile defenders and juvenile associations statewide; fielding questions from practitioners and performing case consultations as needed; developing ways to connect and support juvenile defense attorneys across the State; evaluating the existing systems and practices, and the current quality of representation, in various areas of the State; identifying training needs and working with the School of Government and other groups to formulate a long-term training plan; and developing and maintaining a clearinghouse of materials on North Carolina juvenile law and practice. Zogry will also undertake a number of long-term responsibilities, such as developing uniform qualification standards, specialized performance guidelines, and caseload standards for juvenile defense attorneys. The IDS Commission and staff believe the creation of this new position is a significant step toward elevating the quality of legal services provided to North Carolina's children.

Measures to Evaluate Indigent Defense Systems

One of the IDS Office's key functions is to determine the most appropriate method of providing legal representation in each judicial district, from both a cost and quality perspective. The IDS Act authorizes the IDS Office to use appointed counsel on a case-by-case basis, enter into contracts with attorneys to handle a number of cases over a specified period of time, employ full-time or part-time public defenders to represent indigent defendants in a particular district or region with legislative approval, or use any combination of these or other methods.

This flexibility allows the IDS Office to tailor indigent defense services to the needs in different parts of the State and in different types of cases. Contracts with attorneys may be appropriate in some situations, but not in others. Caseload, population, and other factors may make a public defender office appropriate in some locations, but not in others. This flexibility also gives the IDS Office the ability to strike an appropriate balance in representation provided by private attorneys and public defenders. In its standards for administering indigent defense services, the ABA recommends that indigent defense programs utilize a mix of private counsel and public defender services, concluding that substantial private bar involvement is crucial to an effective program.

The IDS Office has developed ways to measure and compare the cost of various service delivery mechanisms in the State. *See, e.g.*, "Analysis of Spending and Obligations," "Updated Public Defender Cost-Effectiveness Studies," and "Contracts with Attorneys" above. In addition, in January 2004, the IDS Commission formed a Systems Evaluation Committee that is working with Office staff and others to develop an objective tool to evaluate the quality and performance of indigent defense systems at the county, district, and statewide levels. Such a tool could utilize data assessment, surveys, interviewing, on-site observations, and other methods of collecting information. It also should enable the IDS Commission and IDS Office to identify systemic barriers to the efficient administration of justice, and then work with other system actors to remedy those barriers. Because there are no existing models for this type of systemic

assessment of indigent defense or other legal systems, Office staff expect this project to be a long-term undertaking. Ultimately, any tool that is developed should serve as a model for other jurisdictions around the country.

The planned major phases of the Systems Evaluation project include: 1) clearly defining what successful indigent defense systems should accomplish; 2) developing an evaluation tool that will measure, in objective terms, how well North Carolina's indigent defense systems achieve that definition of success; 3) pilot-testing the evaluation tool in one or two counties; 4) testing the reliability and accuracy of the evaluation tool by conducting an independent on-site evaluation, and then comparing the results of the on-site evaluation to the results of the evaluation tool; and 5) identifying data infrastructure needs and developing an implementation plan.

The Systems Evaluation Committee and staff are currently working on the first major phase of this project. With the assistance of a professional facilitator from AOC Human Resources, the Committee and staff plan to take a number of steps to define the mission and goals of indigent defense in North Carolina, and to articulate what an evaluation tool should measure. First, Office staff will be conducting a series of focus groups around the State to interview representatives of groups or populations with different perspectives in the criminal justice system and community. Second, IDS will be hosting a one-day conference on March 18, 2005 for organizations that focus on criminal justice issues, innovative indigent defense programs around the country, and indigent defense service organizations from other states. IDS' out-of-pocket expenses for this conference will be reimbursed by the Z. Smith Reynolds Foundation. The conference will create, for the first time, a national forum where practitioners and criminal justice social scientists can gather to discuss approaches and strategies for evaluating indigent defense. Participants will examine the role indigent defense should play and consider strategies for how to best meet clients' short and long-term interests, overall court system obligations, and community interests. In addition, participants will begin to identify ways to measure and communicate about the benefits to the public from quality indigent defense services. Third, Office staff plan to assemble a Project Advisory Board of practitioners, criminal justice social scientists, and other stakeholders to work with IDS in developing a meaningful tool. Fourth, IDS staff plan to conduct periodic surveys to obtain critical input and feedback from the indigent defense community, the criminal justice system, and the public.

Once an evaluation tool is developed and tested, IDS Office staff intend to begin assessing the performance of existing systems in various North Carolina counties and districts, identifying best practices, and making recommendations for change where needed. However, before changing the method of delivering services in a particular district, the IDS Act requires the IDS Office to consult with the bar and bench in the district or districts under consideration. In addition, the IDS Office must obtain legislative approval before establishing or abolishing a public defender office. In accordance with the IDS Act, the IDS Commission and IDS Office plan to obtain input from all of the State's 39 judicial districts during the evaluation process. Based on the results of evaluations and the information the staff obtain from individual districts, the IDS Office ultimately hopes to identify the most appropriate method, from both a cost and quality perspective, for providing legal representation in each district. (Additional materials

about the Systems Evaluation Project are available at www.ncids.org under the "Systems Eval. Project" link.)

Parent-Respondent Representation

The IDS Office has taken some initial steps to assess and improve the representation of parents in abuse, neglect, or dependency and termination of parental rights cases. In August 2003, the Assistant Director of the IDS Office was appointed to serve on the Advisory Committee to the Court Improvement Project for Children and Families, which is an organization dedicated to improving the quality of North Carolina's family courts, as a parent attorney representative. During the Fall of 2003, IDS Office staff set up a listserv for attorneys representing parent-respondents in Chapter 7B cases across the State. The IDS Office has also authorized the Durham County Public Defender Office to represent parent-respondents in these cases, *see* "Temporary Positions in the Durham County Public Defender Office" above, and has added an assistant public defender position to the Hoke/Scotland Public Defender Office to handle these proceedings, *see* "Newly Created Positions in Existing Public Defender Offices" above. Finally, as shown in "Improved Training" above, the IDS Office has worked with other system actors to develop new training programs for attorneys representing parents. IDS Office staff intend to devote more attention to improving parent representation in the future.

Special Counsel Program

The IDS Office has worked with AOC attorney Dolly Whiteside to make the existing special counsel programs around the State more cost-effective. For example, previously, two salaried attorneys in the Special Counsel Office at Dorothea Dix handled a caseload of approximately 4,000 civil commitment cases in Wake County. A third private assigned attorney handled an additional 2,000 cases from private hospitals in Wake County. In conjunction with AOC staff, the IDS Office has taken steps to improve the efficiency of the two salaried special counsel positions. Those two attorneys are now handling all of the civil commitment cases from Wake County private hospitals, as well as those from Dorothea Dix, for a total annual caseload in excess of 6,000. As a result, the IDS Office is saving approximately $50,000 to $60,000 in private assigned counsel costs annually.

In 2007, pursuant to the State Mental Health Reform Plan, Dorothea Dix Hospital will close and a new hospital will open in Butner, North Carolina that will serve the combined Dix and Umstead catchment areas. As the implementation of that reform progresses, IDS and AOC staff will continue to monitor and adjust Special Counsel Office staffing to ensure cost-effective quality representation.

IDS and AOC staff also continue to monitor and evaluate caseloads in the Broughton Hospital region. While no changes have been implemented due to caseload fluctuations and plans for a new forensic program at Broughton, the IDS Office ultimately hopes to increase efficiencies there as well. After evaluation by IDS and AOC staff, and the Orange/Chatham County Public Defender, the method of payment to private appointed counsel handling civil commitment cases in Orange County was changed from per case fees to the standard $65 hourly rate, effective November 2003. The modified system generated savings of approximately

$16,000 during fiscal year 2003-04, and is projected to continue saving that amount annually. Finally, IDS and AOC staff are evaluating representation by appointed counsel in civil commitment cases in Cumberland County, and are developing a new arrangement to increase efficiencies and generate additional cost-savings in that county.

Electronic Case Reporting and Fee Filing

At some point in the future, IDS staff hope to develop a web-based system that would allow the Office to receive and process attorney fee applications electronically via the Internet. Such a system also would enable attorneys to review their case assignments and the status of their fee applications on-line. Initially, Office staff hope to pilot-test such a system in all capital and appellate cases statewide. If successful, IDS staff hope the system could then be expanded to allow receipt and processing of private attorney fee applications in all indigent cases throughout North Carolina—currently more than 150,000 cases annually. Such a system would ultimately result in significant savings by reducing the labor costs associated with the current paper-based system and automating routine tasks. In addition, it would greatly improve the ability of IDS staff to collect and analyze data that is currently inaccessible, thereby enhancing the IDS Commission's ability to make informed decisions about resource allocation.

II. District Case Volume and Cost Statistics

The existing data on the volume and cost of cases handled in each district by private assigned counsel and public defenders during fiscal year 2003-04 is attached to this report in Appendix B. While the available data is limited in scope, the IDS Office has worked with AOC to improve data collection procedures and data reporting capabilities. *See* "Improved External Data Collection and Reporting" above. After there is a full year of data collection under the revised system, the IDS Office will be in a position to include more detailed and helpful analyses in this annual report.

III. Legislative Recommendations

A. Additional Staff for Existing Public Defender Offices

The IDS Office may again request from the General Assembly the authority to add attorney and support staff positions to existing defender offices where IDS determines that the additions will be cost-effective and/or enhance the quality of representation in a district. *See* "Newly Created Positions in Existing Public Defender Offices" above.

B. New Public Defender Offices

In January 2005, the IDS Office conducted an updated study of the relative cost-effectiveness of new public defender offices compared to private assigned counsel in a number of counties and districts around the State. In addition, the Office recently completed a comment period with the bar and bench in New Hanover and Pender counties about a possible new public defender office there. If, based on its studies and the comments received, the IDS Commission determines there should be changes in the method of service delivery in some districts, IDS may request authority

to create new public defender offices. *See* "Updated Public Defender Cost-Effectiveness Studies" above.

In addition, the IDS Commission believes that quality improvements and projected cost-savings from any new public defender offices, as well as continuing efficiency and accountability in the existing public defender offices, can best be assured if the General Assembly enacts legislation giving the Commission authority to select and appoint the heads of all public defender offices.

C. Authorization to Pay Attorneys for *Certiorari* Petitions in Capital Cases

Because the filing of a *certiorari* petition in the Supreme Court of the United States is required to exhaust state court claims, the IDS Rules state that if a capitally sentenced defendant "does not receive sentencing relief in the Supreme Court of North Carolina, the appointed appellate lawyer shall prepare and file in the Supreme Court of the United States a timely petition for writ of *certiorari* to the Supreme Court of North Carolina, unless relieved of this responsibility by the IDS Director or Appellate Defender." Rules of the Commission on Indigent Defense Services, Rule 2B.4 (July 1, 2001). This rule is consistent with the State Supreme Court's opinion in *In re Hunnoval*, 294 N.C. 740 (1977). However, the IDS Commission and staff believe the current statutes do not authorize IDS to pay private attorneys for performing this valuable service. *See* G.S. 7A-451(b) and 7A-498.8(b). The federal courts also will not pay for this work because the *certiorari* petition is deemed to be part of litigating the state court claims. Thus, private attorneys are currently expected to provide this service without compensation. IDS will ask the General Assembly to revise the current statutes to authorize payment for this service. Office staff estimate that paying for this work would cost less than $15,000 annually.

D. Potential Systemic Reforms

The IDS Commission believes that a number of legislative systemic changes would save taxpayer money and enhance the efficiency of North Carolina's courts. For example, IDS spends a significant amount of money on defense attorney wait-time under the current calendaring system, and the Commission believes a modernized approach to calendaring cases would generate great savings in taxpayer money. Similarly, IDS spends a significant amount of money on appointed attorneys in lower-level traffic offenses in district court that carry the theoretical possibility of imprisonment, and the Commission believes that decriminalization of some of those offenses would also save money. *See also* Without Favor, Denial or Delay: A Court System for the 21st Century 53-54 (Commission for the Future of Justice and the Courts in North Carolina, Dec. 1996). In addition, the Commission believes that narrowing the definition of potentially capital cases and holding more meaningful Rule 24 hearings in capital cases would allow for better screening of those cases, thereby increasing efficiency in superior court and generating significant savings. In the near future, IDS staff hope to work with representatives of the Conference of District Attorneys and other system actors to discuss potential reforms in these areas, and to develop recommendations for the General Assembly.

E. Recoupment Statute Revisions

The IDS Commission may recommend that the General Assembly make some changes to the current recoupment statutes, particularly in the areas of recoupment for legal services provided on appeal and for legal services provided to parent-respondents in Chapter 7B cases.

F. Copies of Court Files

The IDS Commission may propose legislation clarifying the responsibility of clerks offices to provide copies of the trial file to appointed appellate counsel, and providing an exception to the statutory copy fees when copies are requested by an appointed attorney in connection with an indigent case. IDS staff plan to discuss any such proposals with AOC staff before presenting them to the General Assembly.

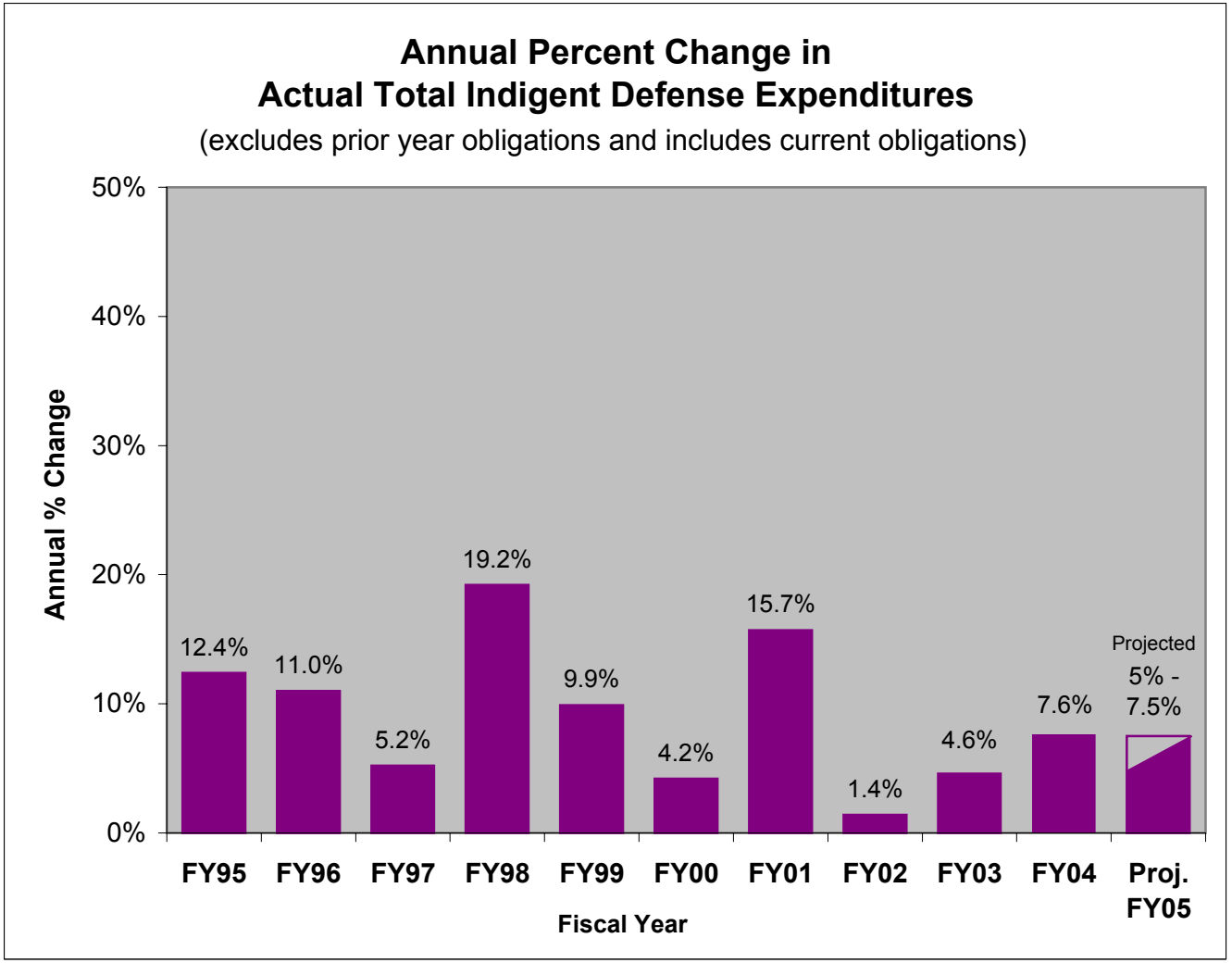
G. Technical Revisions

The IDS staff have identified several statutory provisions that appear to need technical revisions, either to conform with case law or other legislative acts, or for clarification purposes. The specific statutes are G.S. 7A-304(d)(1), 7A-451(a)(12) and (a)(15), 7A-455.1, 15A-1343(e), and 35A-1245(c). IDS staff plan to draft proposed revisions and present them to the General Assembly.

IV. Conclusion

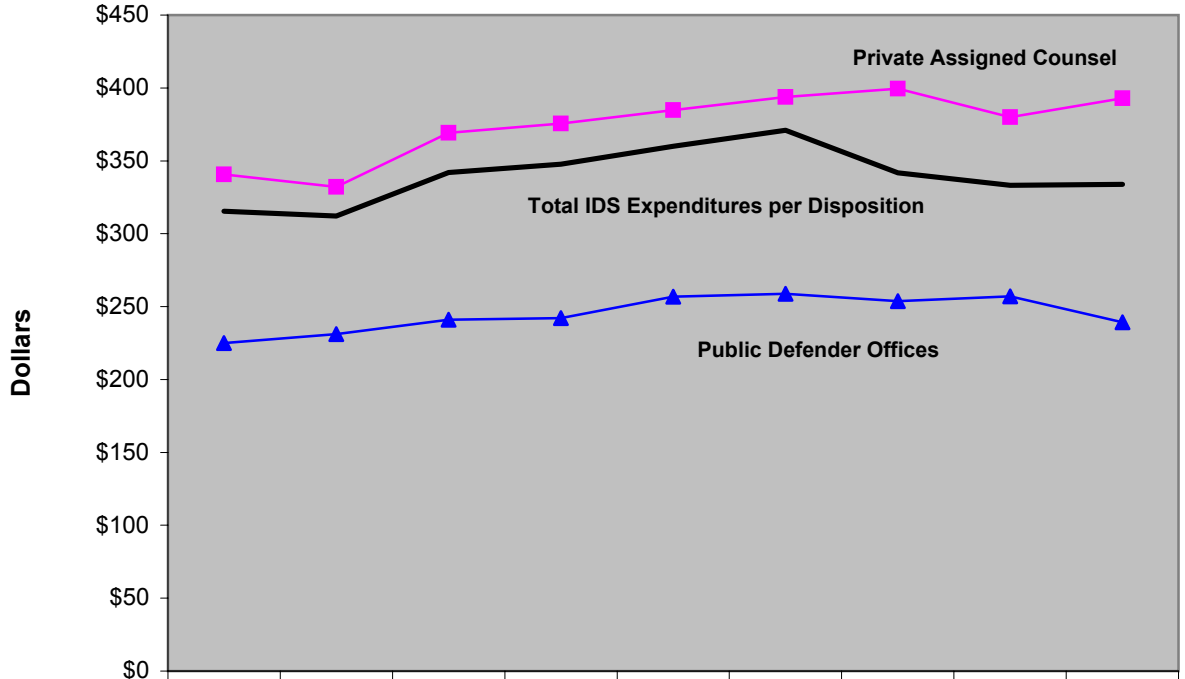
The General Assembly's creation of the IDS Commission and IDS Office makes North Carolina a national leader in the development of quality, cost-effective, and accountable indigent defense programs. Several states, including Alabama, Georgia, South Carolina, Virginia, and Texas, have looked to the IDS Act and IDS Office for guidance in improving their own indigent defense programs. In the coming years, the IDS Commission should continue to realize the goals of improving the quality of North Carolina's indigent defense program in a cost-effective manner.

APPENDIX A


Annual Percent Change in
Actual Total Indigent Defense Expenditures
(excludes prior year obligations and includes current obligations)
Annual % Change
50%
40%
30%
20%
10%
0%
12.4%
11.0%
5.2%
19.2%
9.9%
4.2%
15.7%
1.4%
4.6%
7.6%
Projected
5% -
7.5%
FY95
FY96
FY97
FY98
FY99
FY00
FY01
FY02
FY03
FY04
Proj.
FY05
Fiscal Year

Indigent Defense Expenditure History per Disposition

(Prior Year Obligations Removed FY94 to FY04)



	FY96	FY97	FY98	FY99	FY00	FY01	FY02	FY03	FY04
Total IDS Expenditures per Dispositions	$315.42	$312.25	$342.01	$347.66	$360.09	$370.94	$341.85	$333.19	$333.98
PAC Expenditures per Disposition	$340.71	$332.03	$369.28	$375.62	$384.90	$393.88	$399.46	$379.91	$393.02
PD Office Expenditures per Disposition	$225.03	$231.06	$241.12	$242.04	$256.88	$258.86	$253.79	$257.04	$239.17

Fiscal Year

Sources: Administrative Office of the Courts, Annual Reports 1988-99 through 2000-04 and IDS Office Chief Financial Officer. Based on caseload demand.

Indigent Defense Expenditure History
FY89 to FY04

Type of Expenditure	FY89	FY94	FY95	FY96	FY97	FY98	FY99	FY00	FY01	FY02	FY03	FY04
Private Assigned Counsel (PAC)												
Capital	2,095,675	5,189,722	4,605,960	6,950,613	6,453,782	9,589,186	9,176,899	10,079,534	11,272,810	10,876,856	10,005,808	10,714,595
Adult	11,724,097	16,309,410	18,597,507	19,932,141	22,322,081	25,540,251	27,428,944	29,283,471	35,536,744	32,226,789	37,847,981	37,879,960
Juvenile	1,045,401	1,712,647	2,268,305	2,314,826	2,560,702	2,787,998	2,966,086	3,138,127	3,828,369	2,932,196	3,195,779	2,927,609
GAL	102,770	71,827	71,630	77,089	115,313	123,838	159,776	208,031	298,241	278,687	180,819	188,468
Support Services	$ 629,266	$ 1,245,241	$ 1,565,817	$ 1,886,392	$ 2,431,457	$ 2,591,432	$ 2,970,751	$ 3,218,862	$ 3,475,239	$ 3,932,832	$ 4,566,156	$ 5,468,911
Obligated at Year-End	2,532,297	1,695,381	847,691	1,000,000	-	-	1,849,459	2,182,699	2,452,000	7,406,919	8,703,686	11,730,204
Total PAC	$ 17,500,240	$ 26,224,228	$ 27,956,909	$ 32,161,061	$ 33,883,335	$ 40,632,705	$ 44,551,915	$ 48,110,724	$ 56,863,403	$ 57,654,279	$ 64,500,229	$ 68,909,747
Total PAC with prior year obligations removed		$ 23,691,931	$ 26,261,528	$ 31,313,370	$ 32,883,335	$ 40,632,705	$ 44,551,915	$ 46,261,265	$ 54,680,704	$ 55,202,279	$ 57,093,310	$ 60,206,061
Annual % Change excluding prior year oblig. Including current oblig.			10.85%	19.24%	5.01%	23.57%	9.65%	3.84%	18.20%	0.95%	3.43%	5.45%
Public Defender Offices & Special Counsel												
IDS Office									$ 179,459	$ 472,471	$ 499,977	$ 580,360
Public Defender	$ 4,717,451	$ 8,877,852	$ 9,026,180	$ 9,364,670	$ 9,895,547	$ 10,708,729	$ 11,708,864	$ 12,260,820	$ 12,877,539	$ 13,024,014	$ 13,917,622	$ 15,987,985
Appellate Defender	$ 575,534	$ 811,277	$ 832,381	$ 930,474	$ 977,043	$ 919,279	$ 1,025,609	$ 1,068,893	$ 1,091,839	$ 972,713	$ 1,021,943	$ 1,048,528
Capital Defender							$ 183,896	$ 278,065	$ 352,240	$ 392,940	$ 777,491	$ 1,115,204
Set-Off Debt			$ 91,109	$ 91,109	$ 86,152	$ 83,085	$ 82,489	$ 84,414	$ 92,402	$ 65,519	$ 71,373	$ 68,900
Special Counsel	$ 264,601	$ 378,859	$ 397,427	$ 415,995	$ 455,201	$ 476,500	$ 502,067	$ 512,718	$ 674,721	$ 773,292	$ 802,022	$ 845,239
Total State Offices	$ 5,557,586	$ 10,067,988	$ 10,347,097	$ 10,802,248	$ 11,413,943	$ 12,187,593	$ 13,502,925	$ 14,204,910	$ 15,268,200	$ 15,700,949	$ 17,090,428	$ 19,646,216
Annual Percent Change			2.8%	4.4%	5.7%	6.8%	10.8%	5.2%	7.5%	2.8%	8.8%	15.0%
Total IDS Expenditures with prior year obligations removed		$ 33,759,919	$ 37,932,381	$ 42,115,618	$ 44,297,278	$ 52,820,298	$ 58,054,840	$ 60,466,175	$ 69,948,904	$ 70,903,228	$ 74,183,738	$ 79,852,277
Percent Change in Total Expenditures (exclude prior yr oblig.)			12.4%	11.0%	5.2%	19.2%	9.9%	4.2%	15.7%	1.36%	4.63%	7.64%

Sources: Administrative Office of the Courts, Annual Reports 1988-99 through 2000-04 and IDS Office Chief Financial Officer.
Following financial information not included for comparison reasons:
Programs no longer in operation - Death Penalty Resource Center, Indigency Screening Program
Programs not under Indigent Defense Services - Guardian ad Litem Program
Pass through grants - NC State Bar Grant, Center for Death Penalty Litigation Grant
Sentencing Services

APPENDIX B

COST AND CASE DATA ON REPRESENTATION OF INDIGENTS

July 1, 2003 – June 30, 2004

	Number of Cases*	Total Cost
Assigned Private Counsel		
Capital offense cases	1,221	$10,600,130
Adult cases (other than capital)	129,170	37,678,748
Juvenile cases	13,868	2,474,521
Guardian ad Litem	572	188,468
Totals	**144,831**	**50,941,867**
Private Counsel Contracts		**718,061**
Public Defender Offices		
District 3A	2,235	831,080
District 3B (Carteret County)	679	234,202
District 12	4,250	1,392,706
District 14	7,934	1,553,424
District 15B	2,727	775,624
District 16A	1,992	586,001
District 16B	3,223	955,679
District 18	8,133	2,065,124
District 21	5,460	1,277,667
District 26	17,964	4,076,685
District 27A	7,568	1,187,060
District 28	4,542	1,052,733
Totals	**66,707**	**15,987,985**
Office of the Appellate Defender		**1,048,528**
Special Counsel at State Mental Health Hospitals		**845,239**
Support Services		
Transcripts, records, and briefs		778,134
Professional examinations		548
Expert witness fees		3,009,273
Investigator fees		1,731,661
Total		**5,519,616**
Set-Off Debt Collection		**68,900**
Indigent Defense Services		**580,360**
Office of the Capital Defender		**1,115,204**
TOTAL INDIGENT DEFENSE SERVICES		**$76,825,760**
Sentencing Services Program		**$3,579,233**
GRAND TOTAL		**$80,404,993**

* The number of "cases" shown for private assigned counsel is the number of payments (checks) made by the Administrative Office of the Courts for appointed attorneys. For public defender offices, the number of "cases" is the number of indigent cases disposed of during the 2003-04 fiscal year.

NORTH CAROLINA JUDICIAL BRANCH OF GOVERNMENT
ASSIGNED PRIVATE COUNSEL
Cases and Expenditures *

* Expenditures exclude spending on expert witnesses, private investigators, and mitigation specialists

JULY 1, 2003 - JUNE 30, 2004

DISTRICT	TOTAL Number of Cases		TOTAL Expenditues
DISTRICT 1			
Camden	66	$	36,243
Chowan	163		49,319
Currituck	248		54,340
Dare	429		147,021
Gates	71		46,731
Pasquotank	512		169,881
Perquimans	94		33,396
District Total	**1,583**	**$**	**536,930**
DISTRICT 2			
Beaufort	1,018	$	307,075
Hyde	66		22,003
Martin	406		105,706
Tyrrell	115		30,959
Washington	167		43,836
District Total	**1,772**	**$**	**509,580**
DISTRICT 3A			
Pitt	2,181	$	902,992
District Total	**2,181**	**$**	**902,992**
DISTRICT 3B			
Carteret	1,054	$	335,581
Craven	590		279,117
Pamlico	107		41,888
District Total	**1,751**	**$**	**656,585**
DISTRICT 4A			
Duplin	837	$	293,883
Jones	151		45,893
Sampson	1,033		393,179
District Total	**2,021**	**$**	**732,954**
DISTRICT 4B			
Onslow	2,746	$	991,708
District Total	**2,746**	**$**	**991,708**
DISTRICT 5			
New Hanover	5,927	$	1,957,670
Pender	752		263,838
District Total	**6,679**	**$**	**2,221,508**

DISTRICT 6A			
Halifax	1,680	$	663,168
District Total	**1,680**	**$**	**663,168**
DISTRICT 6B			
Bertie	244	$	338,446
Hertford	602		294,290
Northampton	393		347,243
District Total	**1,239**	**$**	**979,980**
DISTRICT 7A			
Nash	1,231	$	677,818
District Total	**1,231**	**$**	**677,818**
DISTRICT 7B/C			
Edgecombe	972	$	397,306
Wilson	921		494,715
District Total	**1,893**	**$**	**892,022**
DISTRICT 8A			
Greene	369	$	116,487
Lenoir	1,570		395,209
District Total	**1,939**	**$**	**511,696**
DISTRICT 8B			
Wayne	2,190	$	702,500
District Total	**2,190**	**$**	**702,500**
DISTRICT 9			
Franklin	654	$	269,177
Granville	822		317,731
Vance	852		545,701
Warren	260		116,731
District Total	**2,588**	**$**	**1,249,340**
DISTRICT 9A			
Caswell	377	$	187,714
Person	1,204		481,282
District Total	**1,581**	**$**	**668,996**
DISTRICT 10			
Wake	13,549	$	4,069,235
District Total	**13,549**	**$**	**4,069,235**
DISTRICT 11A			
Harnett	2,086	$	812,106
Lee	1,058		273,928
District Total	**3,144**	**$**	**1,086,034**

DISTRICT 11B			
Johnston	2,468	$	731,362
District Total	**2,468**	**$**	**731,362**
DISTRICT 12			
Cumberland	2,431	$	2,072,712
District Total	**2,431**	**$**	**2,072,712**
DISTRICT 13			
Bladen	749	$	255,473
Brunswick	1,722		537,397
Columbus	1,079		490,435
District Total	**3,550**	**$**	**1,283,305**
DISTRICT 14			
Durham	1,788	$	940,123
District Total	**1,788**	**$**	**940,123**
DISTRICT 15A			
Alamance	2,566	$	892,697
District Total	**2,566**	**$**	**892,697**
DISTRICT 15B			
Chatham	413	$	156,757
Orange	2,380	$	306,542
District Total	**2,793**	**$**	**463,298**
DISTRICT 16A			
Hoke	154	$	100,685
Scotland	523	$	381,821
District Total	**677**	**$**	**482,507**
DISTRICT 16B			
Robeson	1,708	$	975,194
District Total	**1,708**	**$**	**975,194**
DISTRICT 17A			
Rockingham	2,035	$	543,904
District Total	**2,035**	**$**	**543,904**
DISTRICT 17B			
Stokes	701	$	435,537
Surry	1,480	$	598,225
District Total	**2,181**	**$**	**1,033,762**
DISTRICT 18			
Guilford	3,593	$	1,392,892
District Total	**3,593**	**$**	**1,392,892**

DISTRICT 19A			
Cabarrus	2,964	$	853,105
District Total	**2,964**	**$**	**853,105**
DISTRICT 19B			
Montgomery	503	$	215,267
Moore	1,990	$	567,680
Randolph	2,177	$	738,684
District Total	**4,670**	**$**	**1,521,631**
DISTRICT 19C			
Rowan	3,377	$	1,077,189
District Total	**3,377**	**$**	**1,077,189**
DISTRICT 20A			
Anson	937	$	365,088
Richmond	2,736	$	926,069
District Total	**3,673**	**$**	**1,291,156**
DISTRICT 20B			
Stanley	1,329	$	476,478
Union	2,615	$	1,031,496
District Total	**3,944**	**$**	**1,507,975**
DISTRICT 21			
Forsyth	4,351	$	1,182,850
District Total	**4,351**	**$**	**1,182,850**
DISTRICT 22			
Alexander	720	$	169,091
Davidson	3,830	$	997,357
Davie	661	$	316,363
Iredell	2,471	$	637,340
District Total	**7,682**	**$**	**2,120,151**
DISTRICT 23			
Alleghany	158	$	29,928
Ashe	410	$	94,256
Wilkes	1,640	$	449,405
Yadkin	587	$	111,202
District Total	**2,795**	**$**	**684,791**
DISTRICT 24			
Avery	303	$	131,743
Madison	210	$	69,815
Mitchell	267	$	82,844
Watauga	463	$	179,326
Yancey	289	$	112,003
District Total	**1,532**	**$**	**575,733**

DISTRICT 25A			
Burke	2,310	$	624,343
Caldwell	2,688	$	652,794
District Total	**4,998**	**$**	**1,277,136**
DISTRICT 25B			
Catawba	4,117	$	1,133,147
District Total	**4,117**	**$**	**1,133,147**
DISTRICT 26			
Mecklenburg	9,699	$	3,498,297
District Total	**9,699**	**$**	**3,498,297**
DISTRICT 27A			
Gaston	1,240	$	553,459
District Total	**1,240**	**$**	**553,459**
DISTRICT 27B			
Cleveland	2,482	$	647,907
Lincoln	689	$	193,067
District Total	**3,171**	**$**	**840,974**
DISTRICT 28			
Buncombe	0	$	-
District Total	**1,763**	**$**	**803,342**
DISTRICT 29			
Henderson	2,297	$	673,476
Mcdowell	901	$	420,814
Polk	421	$	121,979
Rutherford	1,943	$	531,928
Transylvania	586	$	241,199
District Total	**6,148**	**$**	**1,989,396**
DISTRICT 30A			
Cherokee	501	$	198,201
Clay	81	$	30,112
Graham	196	$	80,613
Macon	503	$	158,883
Swain	244	$	86,584
District Total	**1,525**	**$**	**554,393**
DISTRICT 30B			
Haywood	1,091	$	428,788
Jackson	534	$	183,553
District Total	**1,625**	**$**	**612,341**
STATE TOTAL	**144,831**	**$**	**50,941,867**

APPENDIX C

North Carolina Commission on Indigent Defense Services

Performance Guidelines for Indigent Defense Representation in Non-Capital Criminal Cases at the Trial Level

Adopted November 12, 2004

North Carolina Commission on Indigent Defense Services

Performance Guidelines for Indigent Defense Representation in Non-Capital Criminal Cases at the Trial Level

Preface

The primary goal of the Commission on Indigent Defense Services ("IDS Commission") is to ensure that indigent defendants in North Carolina are afforded high quality legal representation. *See* G.S. 7A-498.1(2). To further that goal, the Indigent Defense Services Act of 2000 directs the Commission to establish "[s]tandards for the performance of public defenders and appointed counsel." G.S. 7A-498.5(c)(4).

These performance guidelines are based largely on the "Performance Guidelines for Criminal Defense Representation" that have been promulgated by the National Legal Aid and Defender Association, as well as a review of standards and guidelines in several other jurisdictions, including Connecticut, Kansas, Massachusetts, New Mexico, New York City, Oregon, and Washington. Over a period of several months, a Committee of the IDS Commission reviewed a draft of these guidelines and revised them to fit the nuances of North Carolina law and practice. Initial proposed guidelines were then sent to 70 public and private defense attorneys around the state, with a request that they provide feedback. Based on the comments that were received, the Committee made a number of changes to that earlier draft. In August 2004, the revised guidelines were mailed to all public defenders and assistant public defenders, more than 2,000 private defense attorneys, all active district and superior court judges, and all elected district attorneys for comments. Again, based on the comments that were received, the Committee made a number of improvements to the guidelines. The full IDS Commission then adopted the attached performance guidelines on November 12, 2004.

These performance guidelines cover all indigent adult non-capital criminal cases in district and superior court. The guidelines are intended to identify issues that may arise at each stage of a criminal proceeding, and to recommend effective approaches to resolving those issues. Because all provisions will not be applicable in all cases, the guidelines direct counsel to use his or her best professional judgment in determining what steps to undertake in specific cases. The Commission hopes these guidelines will be useful as a training tool and resource for new and experienced defense attorneys, as well as a tool for potential systemic reform in some areas. The guidelines are not intended to serve as a benchmark for ineffective assistance of counsel claims or attorney disciplinary proceedings.

The IDS Commission believes that providing high quality criminal defense representation is a difficult and challenging endeavor, which requires great skill and dedication. That skill and dedication is demonstrated by defense counsel across North Carolina on a daily basis, and the Commission commends those counsel. The Commission recognizes that the goals embodied in these guidelines will not be attainable without sufficient funding and resources, and hopes the North Carolina General Assembly will continue its support of quality indigent defense services.

The IDS Commission thanks all of the defense attorneys who zealously represent indigent defendants across the state. In addition, the Commission thanks everyone who worked on the drafting of these performance guidelines and who offered comments. The Commission plans to review and revise the guidelines on a regular basis to ensure that they continue to comply with North Carolina law and reflect quality performance, and invites ongoing feedback from the defense bar and criminal justice community.

North Carolina Commission on Indigent Defense Services

Performance Guidelines for Indigent Defense Representation in Non-Capital Criminal Cases at the Trial Level

SECTION 1:

Guideline 1.1 Function of Performance Guidelines

(a) The Commission on Indigent Defense Services hereby adopts these performance guidelines to promote one of the purposes of the Indigent Defense Services Act of 2000—improving the quality of indigent defense representation in North Carolina—and pursuant to G.S. 7A-498.5(c)(4).

(b) These guidelines are intended to serve as a guide for attorney performance in non-capital criminal cases at the trial level, and contain a set of considerations and recommendations to assist counsel in providing quality representation for indigent criminal defendants. The guidelines also may be used as a training tool.

(c) These are performance guidelines, not standards. The steps covered in these guidelines are not to be undertaken automatically in every case. Instead, the steps actually taken should be tailored to the requirements of a particular case. In deciding what steps are appropriate, counsel should use his or her best professional judgment.

Guideline 1.2 Role of Defense Counsel

(a) The paramount obligations of criminal defense counsel are to provide zealous and quality representation to their clients at all stages of the criminal process, and to preserve, protect, and promote their clients' rights and interests throughout the criminal proceedings. Attorneys also have an obligation to conduct themselves professionally, abide by the Revised Rules of Professional Conduct of the North Carolina State Bar and other ethical norms, and act in accordance with all rules of court.

(b) Defense counsel are the professional representatives of their clients. Counsel should candidly advise clients regarding the probable success and consequences of adopting any posture in the proceedings, and provide clients with all information necessary to make informed decisions. Counsel does not have an obligation to execute any directive of a client that does not comport with law or standards of ethics or professional conduct.

Guideline 1.3 Education, Training and Experience of Defense Counsel

(a) To provide quality representation, counsel must be familiar with the substantive criminal law and the law of criminal procedure and its application in North Carolina. Counsel should also be informed of any applicable local rules, including those set forth in the district's case docketing plan, as well as the practices of the specific judge before whom a case is pending.

(b) Counsel has an ongoing obligation to stay abreast of changes and developments in criminal law and procedure, and to continue his or her legal education, skills training, and professional development.

(c) Prior to accepting appointment to an indigent criminal matter, counsel should have sufficient experience, skills, training, and supervision to provide quality representation. Where appropriate to provide competent representation, counsel should consult with more experienced attorneys to acquire

necessary knowledge and information, including information about the practices of judges, prosecutors, and other court personnel.

Guideline 1.4 General Duties of Defense Counsel

(a) Before accepting appointment to an indigent criminal case, an attorney has an obligation to ensure that he or she has available sufficient time, resources, knowledge, and experience to afford quality representation to a defendant in a particular matter. If it later appears that counsel is unable to afford quality representation in the case, counsel should move to withdraw. If counsel is allowed to withdraw, he or she should cooperate with new counsel to the extent that such cooperation is in the best interests of the client and in accord with the Revised Rules of Professional Conduct.

(b) Counsel must be alert to all actual and potential conflicts of interest that would impair their ability to represent a client. If counsel identifies an actual conflict of interest, counsel should immediately move to withdraw. If counsel identifies a potential conflict of interest, counsel should fully disclose the conflict to all affected clients and, if appropriate, obtain informed consent to proceed on behalf of those clients. Where appropriate, counsel may seek an advisory opinion on any potential conflicts from the North Carolina State Bar. Mere tactical disagreements between counsel and a client ordinarily do not justify withdrawal from a case. If it is necessary for counsel to withdraw, counsel should do so in a way that protects the client's rights and interests, and does not violate counsel's ethical duties to the client.

(c) Counsel has an obligation to maintain regular contact with the client and keep the client informed of the progress of the case. Counsel should promptly comply with a client's reasonable requests for information, and reply to client correspondence and telephone calls.

(d) Counsel should appear on time for all scheduled court hearings in a client's case. If scheduling conflicts arise, counsel should resolve them in accordance with Rule 3.1 of the General Rules of Practice.

(e) Counsel should never give preference to retained clients over appointed clients, or suggest that retained clients should or would receive preference.

SECTION 2:

Guideline 2.1 General Obligations of Counsel Regarding Pretrial Release

Where appropriate, counsel has an obligation to attempt to secure the prompt pretrial release of the client under the conditions most favorable to the client.

Guideline 2.2 Initial Interview

(a) Counsel shall arrange for an initial interview with the client as soon as practicable after being assigned to the client's case. Absent exceptional circumstances, if the client is in custody, the initial interview should take place within three business days after counsel receives notice of assignment to the client's case. If necessary, counsel may arrange for a designee to conduct the initial interview.

(b) *Preparation:*

Prior to conducting the initial interview, the attorney should, where possible:

(1) be familiar with the charges against the client, as well as the elements and potential punishment of each charged offense;

(2) obtain copies of any relevant documents that are available, including copies of any charging documents, recommendations and reports made by pretrial service or detention agencies concerning pretrial release, and law enforcement reports;

(3) be familiar with the legal criteria for determining pretrial release conditions and the procedures that will be followed in setting those conditions;

(4) be familiar with the different types of pretrial release conditions the court may set, as well as any written policies of the judicial district, and whether any pretrial service or other agencies are available to act as a custodian for the client's release; and

(5) be familiar with any procedures available for reviewing the trial judge's setting of bail.

(c) *The Interview:*

(1) The purpose of the initial interview is to acquire information from the client concerning pretrial release and, where appropriate, the facts of the case, and to provide the client with information concerning the case. Counsel should try to ensure at this and all successive interviews and proceedings that barriers to communication, such as differences in language or literacy, be overcome. If appropriate, counsel should file a motion to have a foreign language or sign language interpreter appointed by the court and present at the initial interview.

(2) Information that should be acquired during the initial interview includes, but is not limited to:

(A) the client's ties to the community, including the length of time he or she has lived at the current and former addresses, family relationships, employment record and history, and immigration status (if applicable);

(B) the client's physical and mental health, including any impairing conditions such as substance abuse or learning disabilities, and educational and armed services history;

(C) the client's immediate medical and/or mental health needs;

(D) the client's past criminal history, if any, including arrests and convictions for adult and juvenile offenses and prior history of court appearances or failure to appear in court;

(E) the existence of any other pending charges against the client and the identity of any other appointed or retained counsel;

(F) whether the client is on probation or parole, and the client's past or present performance under supervision;

(G) the ability of the client to meet any financial conditions of release; and

(H) the names of individuals or other sources that counsel can contact to verify the information provided by the client, and the permission of the client to contact those individuals.

(3) Information to be provided to the client during the initial interview includes, but is not limited to:

(A) an explanation of the procedures that will be followed in setting the conditions of pretrial release;

(B) an explanation of the type of information that will be requested in any interview that may be conducted by a pretrial release agency, and an explanation that the client is not required to and should not make statements concerning the offense;

(C) an explanation of the attorney-client privilege and instructions not to talk to anyone about the facts of the case without first consulting the attorney;

(D) the nature of the charges and potential penalties;

(E) a general procedural overview of the progression of the case, where possible;

(F) how counsel can be reached and when counsel plans to have contact with the client next;

(G) realistic answers, where possible, to the client's most urgent questions; and

(H) what arrangements will be made or attempted for the satisfaction of the client's most pressing needs, such as medical or mental health attention, and contact with family members.

(4) Where appropriate, counsel should be prepared at the initial interview to ask the client to sign a release authorizing counsel to access confidential information.

(d) *Additional Information*

Whenever possible, counsel should use the initial interview to gather additional information relevant to preparation of the defense. Such information may include, but is not limited to:

(1) the facts surrounding the charges against the client and the client's view of any potential defenses;

(2) any evidence of improper police investigative practices or prosecutorial conduct that may affect the client's rights;

(3) any possible witnesses who should be located;

(4) any evidence that should be preserved; and

(5) where appropriate, evidence of the client's competence to stand trial and/or mental state at the time of the offense.

Guideline 2.3 Pretrial Release Proceedings in Misdemeanor and Felony Cases

(a) As soon as possible after appointment, where the client has not been able to obtain pretrial release, counsel should consider filing a motion to reduce bond or otherwise modify any pretrial release conditions that were set by the magistrate or other judicial official at the client's initial appearance.

(b) Counsel should be prepared to present to the appropriate judicial official a statement of the factual circumstances and the legal criteria supporting release and, where appropriate, to make a proposal concerning conditions of release. Counsel should consider the potential consequences of allowing the client to make statements at any bond reduction hearing.

(c) In counties with a pretrial service program, counsel should consider utilizing the services of that program where it would be likely to benefit the client.

(d) Counsel should fully inform the client of his or her conditions of release after such conditions have been set by the court.

(e) If the court sets conditions of release that require the posting of a monetary bond or the posting of real property as collateral for release, counsel should be familiar with and explain to the client the available options and the procedures that must be followed in posting such assets. Where appropriate, counsel should advise the client and others acting in his or her behalf how properly to post such assets.

(f) Where the client is incarcerated and unable to obtain pretrial release, counsel should alert the jail, and if appropriate the court, to any special medical or psychiatric and security needs of the client that are known to counsel.

Guideline 2.4 Probable Cause Hearing in Felony Cases

(a) Counsel should discuss with the client the meaning of probable cause and the procedural aspects surrounding a probable cause determination, and should consider the tactical advantages and disadvantages of having a probable cause hearing. Counsel should consider any concessions the prosecution might make if the defendant waives, or does not oppose a continuance of, a probable cause hearing. Before waiving a probable cause hearing, counsel should consider the possible benefits of a hearing, including the potential for discovery and the development of impeachment evidence. Counsel also should be aware of all consequences if the client waives a probable cause hearing, including the effect of waiver on the statutory deadline for requesting voluntary discovery under G.S. 15A-902(d).

(b) In preparing for a probable cause hearing, counsel should consider:

(1) the elements of each of the offenses alleged;

(2) the law for establishing probable cause;

(3) factual information that is available concerning the existence or lack of probable cause;

(4) the tactics of full or partial cross-examination;

(5) additional factual information and impeachment evidence that could be discovered by counsel during the hearing; and

(6) any continuing need to pursue modification of the conditions of release if the client is in custody.

Counsel ordinarily should not call the client or defense witnesses to testify at the probable cause hearing unless there are sound tactical reasons for doing so.

Guideline 2.5 Charging Language in Criminal Pleadings

(a) Counsel should review the criminal pleadings in all cases and, unless there are sound tactical reasons for not doing so, move to dismiss the pleading if there are defects in the charging language, including but not limited to:

(1) the pleading does not list all of the essential elements of the charged offense; and

(2) the pleading contains more than one charge in a single count.

(b) Even if the pleading adequately charges a crime, counsel should be sufficiently familiar with the language of the pleading to recognize a fatal variance at trial and move to dismiss the charge if the evidence is insufficient to support the charge as pled.

(c) Counsel should be aware of all time limits applicable to challenges to defects in the charging language of a criminal pleading. Counsel also should be aware of the potential consequences of alerting the prosecution to defects in the charging language.

Guideline 2.6 Indictments and Bills of Information in Felony Cases

(a) Upon return of a bill of indictment, unless there are sound tactical reasons for not doing so, counsel should consider any potential grounds for quashing the indictment or challenges to the grand jury proceedings, including, but not limited to:

(1) improper composition of the grand jury as a whole, including any systematic exclusion of qualified persons either in the drawing of the list of potential grand jurors or the selecting of grand jurors from the list;

(2) the inclusion of a grand juror who does not meet the requirements of G.S. 9-3;

(3) the bill of indictment lacks the signatures and markings required by G.S. 15A-644;

(4) the bill of indictment was not found to be true by at least twelve grand jurors and/or was not returned in open court; and

(5) the bill of indictment was based entirely on the testimony of witnesses who were disqualified or evidence that is incompetent.

(b) Counsel should be aware of all time limits applicable to motions to quash the indictment or challenges to the grand jury proceedings.

(c) Where applicable, counsel should consider, and inform the client of, the advantages and disadvantages of waiving a bill of indictment and consenting to a bill of information pursuant to G.S. 15A-642 and G.S. 15A-923.

Guideline 2.7 Arraignment in Felony Cases

Counsel should consider whether to request arraignment under G.S. 15A-941(d). Counsel should be aware that some pretrial motions may be waived if they are not filed at or before arraignment (or within the time limit prescribed by G.S. 15A-952 if arraignment is waived), including a motion to continue, motion challenging venue or for change of venue, motion to join or sever offenses, motion challenging grand jury composition, motion for a bill of particulars, and motion challenging non-jurisdictional pleading defects. Counsel should also consult local calendaring rules to determine whether they establish different deadlines for pretrial motions.

SECTION 3:

Guideline 3.1 Search Warrants and Prosecution Requests for Non-Testimonial Evidence

(a) Counsel should be familiar with the law governing search warrants under G.S. 15A-241 *et seq.* and applicable case law, including, but not limited to, the requirements for a search warrant application, the basis for issuing a search warrant, the required form and content of a search warrant, the execution and service of a search warrant, and the permissible scope of the search.

(b) Counsel should be familiar with the law governing the prosecution's power to require a defendant to provide non-testimonial evidence (such as participation in an in-person lineup, handwriting exemplars, and physical specimens), the potential consequences if a defendant refuses to comply with a non-testimonial identification order issued pursuant to G.S. 15A-271 *et seq.*, and the extent to which counsel may participate in or observe the proceedings.

Guideline 3.2 Client's Competence and Capacity to Proceed

(a) When defense counsel has a good faith doubt as to the client's capacity to proceed in a criminal case, counsel may:

(1) file an *ex parte* motion to obtain the services of a mental health expert and thereby determine whether to raise the client's competency before the court; or

(2) file a motion questioning the client's competence to stand trial or enter a plea under G.S. 15A-1001(a) and applicable case law, in which case the court may order a mental health examination at a state mental health facility or by the appropriate local forensic examiner.

(b) While the client's wishes ordinarily control, counsel may question competency without the client's assent or over the client's objection if necessary.

(c) After counsel receives and reviews the report from any court-ordered competency examination, counsel should consider whether to file a motion requesting a formal hearing on the client's capacity to proceed.

(d) Whenever competency is at issue, counsel still has a continuing duty to prepare the case for all anticipated court proceedings.

(e) If the court enters an order finding the client incompetent and orders involuntary commitment proceedings to be initiated, defense counsel ordinarily will not represent the client at those proceedings, but should cooperate with the commitment attorney upon request.

SECTION 4:

Guideline 4.1 Case Review, Investigation, and Preparation

(a) Counsel has a duty to conduct an independent case review and investigation. The client's admissions or statements to counsel of facts constituting guilt do not necessarily obviate the need for such independent review and investigation. The review and investigation should be conducted as promptly as possible.

(b) Sources of review and investigative information may include the following:

(1) *Charging Documents, Statutes, and Case Law*

Copies of all charging documents in the case should be obtained and examined to determine the specific charges that have been brought against the client. The relevant statutes and precedents should be examined to identify:

(A) the elements of the offense(s) with which the client is charged;

(B) the defenses, ordinary and affirmative, that may be available, as well as the proper manner and timeline for asserting any available defenses; and

(C) any defects in the charging documents, constitutional or otherwise, such as statute of limitations, double jeopardy, or irregularities in the grand jury proceedings.

(2) *The Client*

An in-depth interview or interviews of the client should be used to:

(A) seek information concerning the incident or events giving rise to the charge(s);

(B) elicit information concerning possible improper police investigative practices or prosecutorial conduct that may affect the client's rights;

(C) explore the existence of other potential sources of information relating to the offense or client, including school, work, jail, probation, and prison records;

(D) collect information relevant to sentencing; and

(E) continue to assess the client's medical and/or mental health needs.

(3) *Potential Witnesses*

Counsel should consider whether to interview the potential witnesses, including any complaining witnesses and others adverse to the client. If the attorney conducts such interviews of potential witnesses, he or she should attempt to do so in the presence of a third person who will be

available, if necessary, to testify as a defense witness at trial. Alternatively, counsel should have an investigator conduct such interviews.

(4) *The Police and Prosecution*

Counsel should utilize available discovery procedures to secure information in the possession of the prosecution or law enforcement authorities, including police reports, unless a sound tactical reason exists for not doing so (*e.g.*, defense obligations under G.S. 15A-905).

(5) *The Courts*

If possible, counsel should request and review any tapes or transcripts from previous hearings in the case. Counsel should also review the client's prior court file(s) where appropriate.

(6) *Information in the Possession of Third Parties*

Where appropriate, counsel should seek a release or court order to obtain necessary confidential information about the client, co-defendant(s), witness(es), or victim(s) that is in the possession of third parties. Counsel should be aware of privacy laws and other requirements governing disclosure of the type of confidential information being sought.

(7) *Physical Evidence*

Where appropriate, counsel should make a prompt request to the police or investigative agency for any physical evidence or expert reports relevant to the offense or sentencing. Counsel should view the physical evidence consistent with case needs.

(8) *The Scene*

Where appropriate, counsel or an investigator should view the scene of the alleged offense. This should be done under circumstances as similar as possible to those existing at the time of the alleged incident (*e.g.*, weather, time of day, lighting conditions, and seasonal changes). Counsel should consider the taking of photographs and the creation of diagrams or charts of the actual scene of the alleged offense.

(9) *Assistance from Experts, Investigators, and Interpreters*

Counsel should consider whether expert or investigative assistance, including consultation and testimony, is necessary or appropriate to:

(A) prepare a defense;

(B) adequately understand the prosecution's case;

(C) rebut the prosecution's case; and/or

(D) investigate the client's competence to proceed, mental state at the time of the offense, and/or capacity to make a knowing and intelligent waiver of constitutional rights.

If counsel determines that expert or investigative assistance is necessary and appropriate, counsel should file an *ex parte* motion setting forth the particularized showing of necessity required by *Ake v. Oklahoma*, *State v. Ballard*, and their progeny. If appropriate, counsel should file a motion to have a foreign language or sign language interpreter appointed by the court. Counsel should take all necessary steps to preserve for appeal any denial of expert, investigative, or interpreter funding.

(c) During case preparation and throughout trial, counsel should identify potential legal issues and the corresponding objections. Counsel should consider the tactics of when and how to raise those objections. Counsel should also consider how best to respond to objections that could be raised by the prosecution.

Guideline 4.2 Discovery in Cases Within the Original Jurisdiction of the Superior Court

(a) Counsel has a duty to pursue discovery procedures provided by the applicable rules of criminal procedure within the time periods prescribed by G.S. 15A-902, and to pursue such informal discovery methods as may be available to supplement the factual investigation of the case.

(b) Prior to filing a formal motion with the court, counsel must first serve the prosecutor with a written request for voluntary discovery unless counsel and the prosecutor agree in writing to comply voluntarily with G.S. 15A-901 *et seq.* Counsel must file a motion to compel discovery if the prosecution's response is unsatisfactory or delayed. Regardless of the prosecution's response, counsel should file a motion to compel discovery if the case is proceeding to trial.

(c) In exceptional cases, counsel should consider not making a discovery request or signing a written agreement under G.S. 15A-902(a), on the ground that it will trigger a defense obligation to disclose evidence under G.S. 15A-905.

(d) Unless there is a sound tactical reason for not requesting discovery or signing a written agreement under G.S. 15A-902(a) (*e.g.*, defense obligations under G.S. 15A-905), counsel should seek discovery to the broadest extent permitted under federal and state law, including but not limited to, the following items:

(1) all information to which the defendant is entitled under G.S. 15A-903;

(2) all potential exculpatory information and evidence to which the defense is entitled under *Brady v. Maryland* and its progeny, including but not limited to:

(A) impeachment evidence, such as a witness' prior convictions or other misconduct; bias of a witness; a witness' capacity to observe, perceive, or recollect; and psychiatric evaluations of a witness;

(B) evidence discrediting police investigation and credibility;

(C) evidence undermining the identification of the client;

(D) evidence tending to show the guilt of another;

(E) the identity of favorable witnesses; and

(F) exculpatory physical evidence; and

(3) to the extent not provided under statutory discovery, any other information necessary to the defense of the case, including but not limited to:

(A) the names, addresses, and availability of state witnesses;

(B) the details of the circumstances under which any oral or written statements by the accused or a co-defendant were made;

(C) any evidence of prior bad acts that the prosecution may intend to use against the client;

(D) the data underlying any expert reports; and

(E) any evidence necessary to enable counsel to determine whether to file a motion to suppress evidence under G.S. 15A-971 *et seq*.

(e) Counsel should seek the timely production and preservation of discoverable evidence. If the prosecution fails to disclose or belatedly discloses discoverable evidence, counsel should consider requesting one or more of the sanctions provided by G.S. 15A-910.

(f) If counsel believes the state may destroy or consume in testing evidence that is significant to the case (*e.g.*, rough notes of law enforcement interviews, 911 tapes, drugs, or blood samples), counsel should also file a motion to preserve the evidence in the event that it is discoverable.

(g) Counsel should timely comply with all of the requirements in G.S. 15A-905 governing disclosure of evidence by the defendant and notice of defenses and expert witnesses. Counsel also should be aware of the possible sanctions for failure to comply with those requirements under G.S. 15A-910.

Guideline 4.3 Theory of the Case

During case review, investigation, and trial preparation, counsel should develop and continually reassess a theory of the case. A theory of the case is one central theory that organizes the facts, emotions, and legal basis for the client's acquittal or conviction of a lesser offense, while also telling the defense story of innocence, reduced culpability, or unfairness. The theory of the case furnishes the basic position from which counsel determines all actions in a case.

SECTION 5:

Guideline 5.1 The Decision to File Pretrial Motions

(a) Counsel should consider filing appropriate pretrial motions whenever there exists a good-faith reason to believe that the applicable law may entitle the client to relief which the court has authority to grant.

(b) The decision to file pretrial motions should be made after thorough investigation and after considering the applicable law in light of the circumstances of each case, as well as the need to preserve issues for appellate review. Among the issues that counsel should consider addressing in pretrial motions are:

(1) the pretrial custody of the client and a motion to review conditions of release;

(2) the constitutionality of the implicated statute or statutes;

(3) any potential defects in the grand jury composition or charging process;

(4) the sufficiency of the charging document under all applicable statutory and constitutional provisions;

(5) the dismissal of a charge on double jeopardy grounds;

(6) the need for a bill of particulars;

(7) the propriety and prejudice of any joinder or severance of charges or defendants;

(8) the statutory and constitutional discovery obligations of the prosecution;

(9) the suppression of evidence gathered as the result of violations of the North Carolina Constitution and the United States Constitution, including:

(A) the fruits of illegal searches or seizures;

(B) involuntary statements or confessions;

(C) statements or confessions obtained in violation of the client's right to counsel, or privilege against self-incrimination; and

(D) unreliable identification evidence that would give rise to a substantial likelihood of irreparable misidentification;

(10) the suppression of evidence gathered in violation of any right, duty, or privilege arising out of North Carolina law;

(11) access to necessary support or investigative resources or experts;

(12) the need for a change of venue;

(13) the defendant's speedy trial rights and/or calendaring rights under G.S. 7A-49.4;

(14) the defendant's right to a continuance in order adequately to prepare his or her case;

(15) matters of trial evidence that may be appropriately litigated by means of a pretrial motion in *limine*;

(16) the suppression of a prior conviction obtained in violation of the defendant's right to counsel;

(17) the recusal of the trial judge;

(18) the full recordation of all proceedings pursuant to G.S. 15A-1241;

(19) matters of trial or courtroom procedure; and

(20) notice of affirmative defenses if required by G.S. 15A-905(c) and G.S. 15A-959.

(c) Counsel should be aware of all time limits on the filing of pretrial motions, and should know whether a motion must or may be accompanied by a factual affidavit.

(d) Unless there are sound tactical reasons for not doing so, counsel should request that the court rule on all previously filed defense motions.

Guideline 5.2 Filing and Arguing Pretrial Motions

(a) Motions should be filed in a timely manner, should comport with the formal requirements of statute and court rules, and should succinctly inform the court of the authority relied upon.

(b) When a hearing on a motion requires the taking of evidence, counsel's preparation for the evidentiary hearing should include:

(1) investigation, discovery, and research relevant to the claim(s) advanced;

(2) the subpoenaing of all helpful evidence, and the subpoenaing and preparation of all helpful witnesses;

(3) full understanding of the burdens of proof, evidentiary principles and procedures applying to the hearing, including the benefits and costs of having the client and other defense witnesses testify;

(4) obtaining the assistance of an expert witness where appropriate and necessary; and

(5) preparation and submission of a memorandum of law where appropriate.

(c) If a hearing on a pretrial motion is held in advance of trial, counsel should attempt to obtain the transcript of the hearing for use at trial where appropriate.

Guideline 5.3 Subsequent Filing and Renewal of Pretrial Motions

Counsel should be prepared to raise during the subsequent proceedings any issue that is appropriately raised pretrial, but could not have been so raised because the facts supporting the motion were unknown or not reasonably available. Further, counsel should be prepared to renew pretrial motions or file additional motions at any subsequent stage of the proceedings if new supporting information is later disclosed or made available. Counsel should also renew pretrial motions and object to the admission of challenged evidence at trial as necessary to preserve the motions and objections for appellate review.

SECTION 6:

Guideline 6.1 The Plea Negotiation Process and the Duties of Counsel

(a) After appropriate investigation and case review, counsel should explore with the client the possibility and desirability of reaching a negotiated disposition of the charges rather than proceeding to trial. In doing so, counsel should fully explain to the client the rights that would be waived by a decision to enter a plea and not proceed to trial.

(b) Counsel should keep the client fully informed of any plea discussions and negotiations, and convey to the client any offers made by the prosecution for a negotiated settlement. Counsel may not accept any plea agreement without the client's express authorization.

(c) Counsel should explain to the client those decisions that ultimately must be made by the client, as well as the advantages and disadvantages inherent in those choices. The decisions that must be made by the client after full consultation with counsel include whether to plead guilty or not guilty, whether to accept a plea agreement, and whether to testify at the plea hearing. Counsel should also explain to the client the impact of the decision to enter a guilty plea on the client's right to appeal. Although the decision to enter a plea of guilty ultimately rests with the client, if counsel believes the client's decisions are not in his or her best interest, counsel should attempt to persuade the client to change his or her position.

(d) Notwithstanding the existence of ongoing tentative plea negotiations with the prosecution, counsel should continue to prepare and investigate the case to the extent necessary to protect the client's rights and interests in the event that plea negotiations fail.

(e) Counsel should not allow a client to plead guilty based on oral conditions that are not disclosed to the court. Counsel should ensure that all conditions and promises comprising a plea arrangement between the prosecution and defense are included in writing in the transcript of plea.

Guideline 6.2 The Contents of the Negotiations

(a) In conducting plea negotiations, counsel should attempt to become familiar with any practices and policies of the particular district, judge, and prosecuting attorney that may affect the content and likely results of a negotiated plea bargain.

(b) To develop an overall negotiation plan, counsel should be fully aware of, and fully advise the client of:

(1) the maximum term of imprisonment that may be ordered under the applicable sentencing laws, including any habitual offender statutes, sentencing enhancements, mandatory minimum sentence requirements, and mandatory consecutive sentence requirements;

(2) the possibility of forfeiture of assets seized in connection with the case;

(3) any registration requirements, including sex offender registration;

(4) the likelihood that a conviction could be used for sentence enhancement in the event of future criminal cases, such as sentencing in the aggravated range, habitual offender status, or felon in possession of a firearm;

(5) the possibility of earned-time credits;

(6) the availability of appropriate diversion or rehabilitation programs;

(7) the likelihood of the court imposing financial obligations on the client, including the payment of attorney fees, court costs, fines, and restitution; and

(8) the effect on the client's appellate rights.

Counsel should also discuss with the client that there may be other potential collateral consequences of entering a plea, such as deportation or other effects on immigration status; motor vehicle or other licensing; parental rights; possession of firearms; voting rights; employment, military, and government service considerations; and the potential exposure to or impact on any federal charges.

(c) In developing a negotiation strategy, counsel should be completely familiar with:

(1) concessions that the client might offer the prosecution as part of a negotiated settlement, including but not limited to:

(A) declining to assert the right to proceed to trial on the merits of the charges;

(B) refraining from asserting or litigating any particular pretrial motion(s);

(C) agreeing to fulfill specified restitution conditions and/or participation in community work or service programs, or in rehabilitation or other programs;

(D) providing the prosecution with assistance in prosecuting or investigating the present case or other alleged criminal activity;

(E) waiving challenges to validity or proof of prior convictions; and

(F) waiving the right to indictment and consenting to a bill of information on a related but unindicted offense;

(2) benefits the client might obtain from a negotiated settlement, including but not limited to, an agreement:

(A) that the prosecution will not oppose the client's release on bail pending sentencing or appeal;

(B) that the client may enter a conditional plea to preserve the right to litigate and contest the denial of a suppression motion;

(C) to dismiss or reduce one or more of the charged offenses either immediately, or upon completion of a deferred prosecution agreement;

(D) that the client will not be subject to further investigation or prosecution for uncharged alleged criminal conduct;

(E) that the client will receive, with the agreement of the court, a specified sentence or sanction or a sentence or sanction within a specified range;

(F) that at the time of sentencing and/or in communications with the preparer of a sentencing services plan or presentence report, the prosecution will take, or refrain from taking, a specified position with respect to the sanction to be imposed on the client by the court; and

(G) that at the time of sentencing and/or in communications with the preparer of a sentencing services plan or presentence report, the prosecution will not present certain information;

(3) information favorable to the client concerning such matters as the offense, mitigating factors and relative culpability, prior offenses, personal background, employment record and opportunities, educational background, and family and financial status;

(4) information that would support a sentencing disposition other than incarceration, such as the potential for rehabilitation or the nonviolent nature of the crime; and

(5) information concerning the availability of treatment programs, community treatment facilities, and community service work opportunities.

(d) In conducting plea negotiations, counsel should be familiar with:

(1) the various types of pleas that may be agreed to, including a plea of guilty, a plea of *nolo contendere*, a conditional plea of guilty in which the defendant retains the right to appeal the denial of a suppression motion, and a plea in which the defendant is not required to personally acknowledge his or her guilt (*Alford* plea);

(2) the advantages and disadvantages of each available plea according to the circumstances of the case; and

(3) whether the plea agreement is binding on the court and prison authorities.

Guideline 6.3 The Decision to Enter a Plea of Guilty

(a) Counsel shall inform the client of any tentative negotiated agreement reached with the prosecution, and explain to the client the full content of the agreement, including its advantages, disadvantages, and potential consequences.

(b) When counsel reasonably believes that acceptance of a plea offer is in the client's best interests, counsel should attempt to persuade the client to accept the plea offer. However, the decision to enter a plea of guilty ultimately rests with the client.

Guideline 6.4 Entry of the Plea before the Court

(a) Prior to the entry of a plea, counsel should:

(1) fully explain to the client the rights he or she will waive by entering the plea;

(2) fully explain to the client the conditions and limits of the plea agreement and the maximum punishment, sanctions, and other consequences the client will be exposed to by entering a plea; and

(3) fully explain to the client the nature of the plea hearing and prepare the client for the role he or she may play in the hearing, including answering questions of the judge and providing a statement concerning the offense.

(b) When entering the plea, counsel should ensure that the full content and conditions of the plea agreement between the prosecution and defense are made part of the transcript of plea.

(c) Subsequent to the acceptance of a plea, counsel should review and explain the plea proceedings to the client, and respond to any client questions and concerns.

SECTION 7:

Guideline 7.1 General Trial Preparation

(a) Throughout preparation and trial, counsel should consider the theory of the defense and ensure that counsel's decisions and actions are consistent with that theory.

(b) The decision to proceed to trial rests solely with the client. Counsel should discuss with the client the relevant strategic considerations of this decision. When appropriate, counsel should also explain to the client that decisions concerning trial strategy are ordinarily to be made by counsel, after consultation with the client and investigation of the applicable facts and law. However, counsel should be aware that, under North Carolina law, if counsel and a fully informed competent client reach an absolute impasse as to tactical decisions, the client's wishes may control.

(c) In advance of trial, counsel should take all steps necessary to complete thorough investigation, discovery, and research. Among the steps counsel should consider in preparation are:

(1) interviewing and subpoenaing all potentially helpful witnesses;

(2) examining and subpoenaing all potentially helpful physical or documentary evidence;

(3) obtaining funds for defense investigators and experts, and arranging for defense experts to consult and/or testify on issues that are potentially helpful;

(4) obtaining and reading transcripts of any prior proceedings in the case or related proceedings; and

(5) obtaining photographs or preparing charts, maps, diagrams, or other visual aids of all scenes, persons, objects, or information that may aid the fact finder in understanding the defense case.

(d) Where appropriate, counsel should have the following information and materials available at the time of trial:

(1) copies of all relevant documents filed in the case;

(2) relevant documents prepared by investigators;

(3) reports, test results, and other materials disclosed by the prosecution pursuant to G.S. 15A-901 *et seq.*;

(4) *voir dire* topics, plans, or questions;

(5) a plan, outline, or draft of opening statement;

(6) cross-examination plans for all possible prosecution witnesses;

(7) direct-examination plans for all prospective defense witnesses;

(8) copies of defense subpoenas;

(9) prior statements of all prosecution witnesses (*e.g.*, transcripts, police reports);

(10) prior statements of all defense witnesses;

(11) reports from defense experts;

(12) a list of all defense exhibits, and the witnesses through whom they will be introduced;

(13) originals and copies of all documentary exhibits;

(14) proposed jury instructions with supporting case citations;

(15) copies of critical statutes and cases; and

(16) a plan, outline, or draft of closing argument.

(e) Counsel should be fully informed as to the rules of evidence and the law relating to all stages of the trial process, and should be familiar with legal and evidentiary issues that reasonably can be anticipated to arise in the trial.

(f) Counsel should be familiar with case law concerning making admissions of guilt to the jury without the client's consent.

(g) Counsel should decide if it is beneficial to secure an advance ruling on issues likely to arise at trial (*e.g.*, use of prior convictions to impeach the defendant) and, where appropriate, should prepare motions and memoranda for such advance rulings.

(h) Where appropriate, counsel should advise the client as to suitable courtroom dress and demeanor. If the client is incarcerated, counsel should try to ensure that the client does not appear before the jury in jail or other inappropriate clothing, or in shackles or handcuffs. If an incarcerated client is brought before the jury in jail clothing, shackles, or handcuffs, counsel should object and seek appropriate relief from the court.

(i) Counsel should plan with the client, court personnel, and/or sheriff's office for the most convenient system for conferring throughout the trial.

(j) Throughout preparation and trial, counsel should consider the potential effects that particular actions may have upon sentencing if there is a finding of guilt.

Guideline 7.2 Preserving the Record on Appeal

Counsel should establish a proper record for appellate review throughout the trial process, including requesting recordation of all significant portions of the trial under G.S. 15A-1241(b). If something non-verbal transpires during trial that is relevant and important, counsel should ask to have the record reflect what happened.

Guideline 7.3 *Voir Dire* and Jury Selection

(a) *Preparation*

(1) Counsel should be familiar with the procedures by which a jury panel is selected, and should be alert to any potential legal challenges to the composition or selection of the panel.

(2) Counsel should be familiar with the local practices and the individual trial judge's procedures for selecting a jury from the panel, and should be alert to any potential legal challenges to those procedures.

(3) Prior to jury selection, counsel should seek to obtain a prospective juror list where feasible, and should develop a method for tracking juror selection and seating.

(4) Counsel should be familiar with any juror questionnaire that may be used by the court or prosecution and, where appropriate, should develop a defense questionnaire and file a pretrial motion to authorize its use.

(5) In advance of trial, counsel should develop *voir dire* topics, plans, or questions that are tailored to the specific case. Among the purposes *voir dire* questions should be designed to serve are:

(A) to elicit information about the attitudes of individual jurors, which will inform the use of peremptory strikes and challenges for cause;

(B) to determine the jurors' attitudes toward legal principles that are critical to the defense case, including, where appropriate, the client's decision not to testify; and

(C) to present the client, preview the defense case, and assess the impact of damaging information on the jurors' ability to fairly consider the case.

In conducting *voir dire*, counsel should be aware that jurors may develop impressions of counsel and the defendant, and should recognize the importance of establishing a relationship of credibility.

(6) Counsel should be familiar with the law concerning mandatory and discretionary *voir dire* inquiries so as to be able to defend any request to ask particular questions of prospective jurors.

(7) Counsel should be familiar with the law concerning challenges for cause and peremptory strikes. Counsel also should be aware of the statutory and case law directing that peremptory challenges need to be exhausted in order to preserve for appeal the denial of any challenges for cause.

(b) *Examining the Prospective Jurors*

(1) Counsel should personally conduct the *voir dire* examination of the panel.

(2) If the court denies counsel's request to ask questions during *voir dire* that are significant or necessary to the defense of the case, counsel should take all steps necessary to protect the *voir dire* record for appeal, including filing a written motion listing the proposed *voir dire* questions or otherwise making proposed questions part of the record.

(3) If the *voir dire* questions may elicit sensitive answers or where otherwise appropriate, counsel should request individual *voir dire*.

(c) *Challenges and Objections*

(1) Counsel should consider challenging for cause all persons who are subject to challenge under G.S. 15A-1212, including all persons about whom a legitimate argument can be made for actual prejudice or bias relevant to the case, when it is likely to benefit the client.

(2) When a challenge for cause is denied, counsel should consider exercising a peremptory challenge to remove the juror. Counsel should be aware of the requirements in G.S. 15A-1214(h) for preserving the denial of a challenge for cause for appellate review.

(3) In exercising challenges for cause and peremptory strikes, counsel should consider both the panelists who may replace a person who is removed and the total number of peremptory challenges available.

(4) Counsel should object to and preserve for appellate review all issues relating to the unconstitutional exclusion of jurors by the prosecution or court.

Guideline 7.4 Opening Statement

(a) Prior to delivering an opening statement, counsel should consider whether to ask for sequestration of witnesses.

(b) Counsel should be familiar with North Carolina law and the individual trial judge's practices regarding the permissible content of an opening statement. Counsel should consider the need to, and if appropriate, ask the court to instruct the prosecution not to mention in opening statement contested evidence for which the court has not determined admissibility.

(c) Counsel should consider the strategic advantages and disadvantages of disclosure of particular information during opening statement.

(d) Counsel's objectives in making an opening statement may include the following:

(1) to introduce the theory of the defense case;

(2) to provide an overview of the defense case;

(3) to identify the weaknesses of the prosecution's case;

(4) to emphasize the prosecution's burden of proof;

(5) to summarize the anticipated testimony of witnesses, and the role of each in relationship to the entire case;

(6) to describe the exhibits that will be introduced and the role of each in relationship to the entire case;

(7) to clarify the jurors' responsibilities;

(8) to state the ultimate inferences counsel wants the jury to draw;

(9) to personalize the client and counsel for the jury; and

(10) to prepare the jury for the client's testimony or decision not to testify.

(e) Counsel should consider incorporating the promises of proof the prosecutor makes to the jury during opening statement into the defense opening statement and summation.

(f) Whenever the prosecutor oversteps the bounds of a proper opening statement, counsel should consider objecting, requesting a mistrial, or seeking cautionary instructions, unless sound tactical considerations weigh against any such objections or requests. Such tactical considerations may include, but are not limited to:

(1) the significance of the prosecutor's error; and

(2) the possibility that an objection might enhance the significance of the information in the jurors' minds, or otherwise negatively affect the jury.

Guideline 7.5 Confronting the Prosecution's Case

(a) Counsel should anticipate weaknesses in the prosecution's proof, and research and prepare to argue corresponding motions for judgment of dismissal or nonsuit.

(b) Counsel should consider the advantages and disadvantages of entering into stipulations concerning the prosecution's case.

(c) Unless sound tactical reasons exist for not doing so, counsel should make timely objections and motions to strike improper state evidence, and assert all possible statutory and constitutional grounds for exclusion of the evidence. If evidence is admissible only for a limited purpose, counsel should consider requesting an appropriate limiting instruction.

(d) In preparing for cross-examination, counsel should be familiar with North Carolina law and procedures concerning cross-examination and impeachment of witnesses. Counsel should be prepared to question witnesses as to the existence and content of prior statements.

(e) In preparing for cross-examination, counsel should:

(1) consider the need to integrate cross-examination, the theory of the defense, and closing argument;

(2) consider whether cross-examination of each individual witness is likely to generate helpful information, and avoid asking questions that are unnecessary or might elicit responses harmful to the defense case;

(3) anticipate those witnesses the prosecution might call in its case-in-chief or in rebuttal, and consider a cross-examination plan for each of the anticipated witnesses;

(4) be alert to inconsistencies, variations, and contradictions within each witness' testimony;

(5) be alert to inconsistencies, variations, and contradictions between different witnesses' testimony;

(6) if applicable, review all prior statements of the witnesses and any prior relevant testimony of the prospective witnesses;

(7) where appropriate, review relevant statutes and local police regulations for possible use in cross-examining police witnesses;

(8) be alert to issues relating to witness credibility, including bias and motive for testifying; and

(9) be fully familiar with North Carolina statutory and case law on objections, motions to strike, offers of proof, and preserving the record on appeal.

(f) Counsel should consider conducting a *voir dire* examination of potential prosecution witnesses who may not be competent to give particular testimony, including expert witnesses whom the prosecutor may call. Counsel should be aware of the law concerning competency of witnesses in general, and admission of expert testimony in particular, to be able to raise appropriate objections.

(g) Before beginning cross-examination, counsel should ascertain whether the prosecutor provided copies of all prior statements of prosecution witnesses as required by G.S. 15A-903(a). If disclosure was not properly made, counsel should request relief as appropriate under G.S. 15A-910, including:

(1) a cautionary instruction;

(2) adequate time to review the documents or investigate and prepare further before commencing cross-examination, including a continuance or recess if necessary;

(3) exclusion of the witness' testimony and all evidence affected by that testimony;

(4) a mistrial;

(5) dismissal of the case; and/or

(6) any other sanctions counsel believes would remedy the violation.

(h) At the close of the prosecution's case and out of the presence of the jury, counsel should move for a judgment of dismissal or nonsuit on each count charged. Where appropriate, counsel should be prepared with supporting case law.

Guideline 7.6 Presenting the Defense Case

(a) Counsel should develop, in consultation with the client, an overall defense strategy. In deciding on defense strategy, counsel should consider whether the client's interests are best served by not presenting defense evidence, and instead relying on the evidence and inferences, or lack thereof, from the prosecution's case.

(b) Counsel should discuss with the client all of the considerations relevant to the client's decision to testify, including but not limited to, the likelihood of cross-examination and impeachment concerning prior convictions and prior bad acts that affect credibility.

(c) Counsel should be aware of the elements of any affirmative defense(s) and know whether the defense bears a burden of persuasion or production. Counsel should be familiar with the notice requirements for affirmative defenses and introduction of expert testimony that are imposed by G.S. 15A-905(c), G.S. 15A-959, and North Carolina case law.

(d) In preparing for presentation of a defense case, counsel should, where appropriate:

(1) develop a plan for direct examination of each potential defense witness;

(2) determine the implications that the order of witnesses may have on the defense case;

(3) consider the possible use of character witnesses and any negative consequences that may flow from such testimony;

(4) consider the need for expert witnesses;

(5) consider the use of demonstrative evidence and the order of exhibits; and

(6) be fully familiar with North Carolina statutory and case law on objections, motions to strike, offers of proof, and preserving the record on appeal.

(e) In developing and presenting the defense case, counsel should consider the implications it may have for rebuttal by the prosecution.

(f) Counsel should prepare all defense witnesses for direct examination and possible cross-examination. Where appropriate, counsel should also advise witnesses and the defendant of suitable courtroom dress and demeanor.

(g) If a prosecution objection is sustained or defense evidence is improperly excluded, counsel should make appropriate efforts to rephrase the question(s) and/or make an offer of proof.

(h) Counsel should conduct redirect examination as appropriate.

(i) At the close of all of the evidence, counsel should renew the motion for judgment of dismissal or nonsuit on each charged count.

Guideline 7.7 Closing Argument

(a) Counsel should be familiar with the substantive limits on both prosecution and defense summation, including the law governing closing arguments under G.S. 7A-97 and G.S. 15A-1230, Rule 10 of the General Rules of Practice for the Superior and District Courts, and North Carolina case law.

(b) In developing closing argument, counsel should review the proceedings to determine what aspects can be used in support of defense summation and, where appropriate, should consider:

(1) highlighting weaknesses in the prosecution's case;

(2) describing favorable inferences to be drawn from the evidence;

(3) incorporating into the argument:

(A) the theory of the defense case;

(B) helpful testimony from direct and cross-examinations;

(C) verbatim instructions drawn from the expected jury charge;

(D) responses to anticipated prosecution arguments; and

(E) visual aids and exhibits; and

(4) the effects of the defense argument on the prosecution's rebuttal argument.

(c) Whenever the prosecutor exceeds the scope of permissible argument, counsel should consider objecting, seeking cautionary instructions, or requesting a mistrial unless sound tactical considerations suggest otherwise. Such tactical considerations may include, but are not limited to:

(1) the possibility that an objection or cautionary instruction might enhance the significance of the information in the jurors' minds;

(2) whether, with respect to a motion for mistrial, counsel believes that the case will result in a favorable verdict for the client; and

(3) the need to preserve the objection for appellate review.

Guideline 7.8 Jury Instructions

(a) Counsel should be familiar with the law and the individual judge's practices concerning ruling on proposed instructions, charging the jury, use of pattern charges, and preserving objections to the instructions.

(b) Pursuant to G.S. 15A-1231, counsel should submit in writing proposed special instructions or modifications of the pattern jury instructions in light of the particular circumstances of the case, including the desirability of seeking a verdict on a lesser included offense. Where possible, counsel should provide case law in support of the proposed instructions. Counsel should try to ensure that all jury instruction discussions are on the record.

(c) Where appropriate, counsel should object to and argue against improper instructions proposed by the prosecution.

(d) If the court does not adopt instructions requested by counsel, or gives instructions over counsel's objection, counsel should take all steps necessary to preserve the record for appeal, including filing a copy of proposed instructions pursuant to G.S. 15A-1231.

(e) During delivery of the charge, counsel should be alert to any deviations from the judge's planned instructions, object to deviations unfavorable to the client, and, if necessary, request additional or curative instructions.

(f) If there are grounds for objecting to any jury instructions, counsel should object before the verdict form is submitted to the jury and the jury is allowed to begin deliberations.

(g) If the court proposes giving supplemental instructions to the jury, either upon request of the jurors or upon their failure to reach a verdict, counsel should ask the judge to state the proposed charge to counsel before it is delivered to the jury. Counsel should also try to ensure that any supplemental instructions are given to the entire jury in open court pursuant to G.S. 15A-1234(d).

SECTION 8:

Guideline 8.1 Obligations of Counsel in Sentencing

Counsel's obligations in the sentencing process include:

(a) where a defendant chooses not to proceed to trial, to attempt to negotiate a plea agreement with consideration of the sentencing, correctional, and financial implications;

(b) to try to ensure the client is not harmed by inaccurate information or information that is not properly before the court in determining the sentence to be imposed;

(c) to ensure that all reasonably available mitigating and favorable evidence, which is likely to benefit the client, is presented to the court;

(d) to develop a plan that seeks to achieve the sentencing alternative most favorable to the client, and that reasonably can be obtained based on the facts and circumstances of the offense, the defendant's background, the applicable sentencing provisions, and other information pertinent to the sentencing decision;

(e) to try to ensure that all information presented to the court which may harm the client, if inaccurate, untruthful, or otherwise improper, is stricken from the text of any sentencing services plan or presentence report;

(f) to consider the need for and availability of sentencing specialists, or mental health or mental retardation professionals; and

(g) to identify and preserve potential issues for appeal.

Guideline 8.2 Sentencing Options, Consequences, and Procedures

(a) Counsel should be familiar with and advise the client of the sentencing provisions and options applicable to the case, including:

(1) the applicable sentencing laws, including any habitual offender statutes, sentencing enhancements, mandatory minimum sentence requirements, mandatory consecutive sentence requirements, and constitutional limits on sentences;

(2) deferred prosecution, prayer for judgment continued, probation without a conviction, and diversionary programs;

(3) probation or suspension of sentence, and mandatory and permissible conditions of probation;

(4) confinement in a mental institution;

(5) forfeiture of assets seized in connection with the case;

(6) any mandatory registration requirements, including sex offender registration, or mandatory DNA testing; and

(7) the possibility of expungement and sealing of records.

(b) Counsel should be familiar with and advise the client of the direct and collateral consequences of the judgment and sentence, including:

(1) credit for pretrial detention;

(2) the likelihood that the conviction could be used for sentence enhancement in the event of future criminal cases, such as sentencing in the aggravated range, habitual offender status, or felon in possession of a firearm;

(3) the possibility of earned-time credits;

(4) the availability of correctional programs and work release;

(5) the availability of drug rehabilitation programs, psychiatric treatment, and health care; and

(6) the likelihood of the court imposing financial obligations on the client, including the payment of attorney fees, court costs, fines, and restitution.

Counsel should also discuss with the client that there may be other potential collateral consequences of the judgment and sentence, such as deportation or other effects on immigration status; motor vehicle

or other licensing; parental rights; possession of firearms; voting rights; employment, military, and government service considerations; and the potential exposure to or impact on any federal charges.

(c) Counsel should be familiar with the sentencing procedures, including:

(1) the effect that plea negotiations may have upon the sentencing discretion of the court;

(2) the procedural operation of the applicable sentencing system, including concurrent and consecutive sentencing;

(3) the practices of those who prepare the sentencing services plan or presentence report, and the defendant's rights in that process;

(4) access to the sentencing services plan or presentence report by counsel and the defendant;

(5) the defense sentencing presentation and/or sentencing memorandum;

(6) the opportunity to challenge information presented to the court for sentencing purposes;

(7) the availability of an evidentiary hearing to challenge information, and the applicable rules of evidence and burdens of proof at such a hearing; and

(8) the participation that victims and prosecution or defense witnesses may have in the sentencing proceedings.

Guideline 8.3 Preparation for Sentencing

In preparing for sentencing, counsel should consider the need to:

(a) inform the client of the applicable sentencing requirements, options, and alternatives, and the sentencing judge's practices and procedures if known;

(b) maintain regular contact with the client prior to the sentencing hearing, and inform the client of the steps being taken in preparation for sentencing;

(c) obtain from the client relevant information concerning such subjects as his or her background and personal history, prior criminal record, employment history and skills, education, medical and mental health history and condition, and financial status, and obtain from the client sources through which the information provided can be corroborated;

(d) inform the client of his or her right to speak at the sentencing proceeding and assist the client in preparing the statement, if any, to be made to the court, after considering the possible consequences that any admission of guilt may have on an appeal, subsequent retrial, or trial on other offenses;

(e) inform the client of the effects that admissions and other statements may have on an appeal, retrial, or other judicial proceedings, such as collateral or restitution proceedings;

(f) inform the client if counsel will ask the court to consider a particular sentence or range of sentences; and

(g) collect and present documents and affidavits to support the defense position and, where relevant, prepare and present witnesses to testify at the sentencing hearing**.**

Guideline 8.4 The Sentencing Services Plan or Presentence Report

(a) Counsel should be familiar with the procedures concerning the preparation and submission of a sentencing services plan or presentence report, and should consider the tactical implications of requesting that a plan be prepared.

(b) If a plan is prepared, counsel should:

(1) provide to the official preparing the plan relevant information favorable to the client, including, where appropriate, the client's version of the offense;

(2) prepare the client to be interviewed by the person preparing the plan;

(3) review the completed plan and discuss it with the client;

(4) try to ensure the client has adequate time to examine the completed plan; and

(5) take appropriate steps to ensure that erroneous or misleading information that may harm the client is challenged or deleted from the plan.

Guideline 8.5 The Prosecution's Sentencing Position

Unless there is a sound tactical reason for not doing so, counsel should attempt to determine whether the prosecution will advocate that a particular type or length of sentence be imposed, including the factual basis for any sentence in the aggravated range.

Guideline 8.6 The Defense Sentencing Theory

Counsel should prepare a defense sentencing presentation and, where appropriate, a defense sentencing memorandum. Among the topics counsel may wish to include in the sentencing presentation or memorandum are:

(a) information favorable to the defendant concerning such matters as the offense, mitigating factors and relative culpability, prior offenses, personal background, employment record and opportunities, educational background, and family and financial status;

(b) information that would support a sentencing disposition other than incarceration, such as the potential for rehabilitation or the nonviolent nature of the crime;

(c) information concerning the availability of treatment programs, community treatment facilities, and community service work opportunities;

(d) challenges to incorrect or incomplete information, and inappropriate inferences and characterizations that are before the court; and

(e) a defense sentencing proposal.

Guideline 8.7 The Sentencing Process

(a) Counsel should be prepared at the sentencing proceeding to take the steps necessary to advocate fully for the requested sentence and to protect the client's legal rights and interests.

(b) Where appropriate, counsel should be prepared to present supporting evidence, including testimony of witnesses, affidavits, letters, and public records, to establish the facts favorable to the defendant.

(c) Where the court has the authority to do so, counsel should request specific orders or recommendations from the court concerning the place of confinement and psychiatric treatment or drug rehabilitation, and against deportation or exclusion of the defendant.

(d) Where appropriate, counsel should prepare the client to personally address the court. In addition, counsel should prepare any expert and other witnesses to address the court.

(e) After the sentencing hearing is complete, counsel should fully explain to the client the terms of the sentence, including any conditions of probation.

SECTION 9:

Guideline 9.1 Appeal of Misdemeanor Conviction for Trial *de Novo* in Superior Court

(a) When a defendant has been convicted of a misdemeanor in district court, except where the defendant explicitly waives his or her right to appeal as part of a plea agreement, counsel should advise the client of the right to appeal for trial *de novo* with a jury in superior court. Counsel should also advise the client of the potential advantages and disadvantages of exercising that right.

(b) Counsel should be aware of, and advise the client of, the time limit for *de novo* appeal set forth in G.S. 15A-1431(c).

Guideline 9.2 Motion for Appropriate Relief in the Trial Division

(a) Counsel should be familiar with the procedures available under G.S. 15A-1411 *et seq.* to seek a new trial, dismissal of charges, or other relief. Counsel should be aware of the grounds for relief that must be asserted within 10 days after entry of judgment, and the grounds that may be asserted more than 10 days after entry of judgment.

(b) When a judgment has been entered against the defendant after trial, counsel should consider whether it is appropriate to file a motion for appropriate relief with the trial court pursuant to G.S. 15A-1414. In deciding whether to file such a motion, the factors counsel should consider include:

(1) the likelihood of success of the motion, given the nature of the error or errors that can be raised; and

(2) the effect that such a motion might have on the client's appellate rights, including whether the filing of such a motion will assist in preserving the defendant's right to raise on appeal the issues that might be raised in the motion for appropriate relief.

Guideline 9.3 Right to Appeal to the Appellate Division

(a) Counsel should inform the defendant of his or her right to appeal the judgment of the court to the appellate division and the action that must be taken to perfect an appeal.

(b) If the defendant has a right to appeal and wants to file an appeal, the attorney shall preserve the defendant's right to do so by entering notice of appeal in accordance with the procedures and timelines set forth in G.S. 15A-1448 and the Rules of Appellate Procedure. Pursuant to Rule 33(a) of the North Carolina Rules of Appellate Procedure and Rules 1.7(a) and 3.2(a) of the Rules of the Commission on Indigent Defense Services, the entry of notice of appeal does not constitute a general appearance as counsel of record in the appellate division.

(c) If the defendant does not have a right to appeal and counsel believes there is a meritorious issue in the case that might be raised in the appellate division by means of a petition for writ of *certiorari*, counsel should inform the defendant of his or her opinion and consult with the Office of the Appellate Defender about the appropriate procedure.

(d) If counsel believes the defendant has a right to appeal and continues to be indigent, but the trial court denies appointed appellate counsel or denies indigency status for purposes of appeal, trial counsel

should consult with the Office of the Appellate Defender about the defendant's options and inform the defendant of those options.

(e) Where the client takes an appeal, trial counsel should cooperate in providing information to appellate counsel concerning the proceedings in the trial court, and should timely respond to reasonable requests from appellate counsel for additional information about the case.

Guideline 9.4 Bail Pending Appeal

(a) Where a client indicates a desire to appeal the judgment and/or sentence of the court, counsel should inform the client of any right that may exist under G.S. 15A-536 to be released on bail pending the disposition of the appeal and, prior to the appointment of appellate counsel, make such a motion where appropriate.

(b) Where an appeal is taken and after appellate counsel is appointed, trial counsel should cooperate with appellate counsel in providing information if appellate counsel pursues a request for bail.

Guideline 9.5 Post-Disposition Obligations

Even after counsel's representation in a case is complete, counsel should comply with a client's reasonable requests for information and materials that are part of counsel's file. Counsel should also take reasonable steps to correct clerical or other errors in court documents, including jail credit calculations.

APPENDIX D

the statistics and evidence show is the single most frequent cause of wrongful convictions inadequate defense representation at trial.

Subtitle B was enacted against the backdrop of a shameful record of failure by many States to provide competent lawyers to indigent defendants facing the death penalty. Testimony in both the Senate and House Judiciary Committees revealed that of the 38 States that authorize capital punishment, very few have established effective statewide systems for identifying, appointing and compensating competent lawyers in capital cases.

Too often individuals facing the ultimate punishment are represented by lawyers who are drunk, sleeping, soon-to-be disbarred or just plain ineffective. Even the best lawyers in these systems are hampered by inadequate compensation and insufficient resources to investigate and develop a meaningful defense.

The Congress acted to remedy several major problems with the capital counsel appointment process. First, in many States the appointment of indigent counsel in criminal cases is a county-by-county responsibility. Unless a State legislature or court system adopts standards, each county is left to decide who is competent to represent criminal defendants and how much they should be paid. In smaller and less affluent counties where there is not a professional public defender system, the compensation rate for this service can be shockingly low and the quality of lawyers abysmal. This problem afflicts the indigent defense system in general, but is more acute in capital cases which are more complex and time consuming, and where the stakes are higher.

Second, in addition to the fiscal constraints on individual counties there are political pressures that make it difficult for well-meaning administrators to pay appointed lawyers a reasonable rate for their services. Criminal defendants are highly unpopular recipients of government largess, and accused murderers even less so. The Sixth Amendment to the U.S. Constitution requires that defendants be afforded effective representation at State expense, but efforts to invoke the Sixth Amendment to generate systemic change in State indigent defense systems have been largely unavailing.

A third major problem is that in almost all States, the appointment of capital defense lawyers is made by the trial judge rather than by an independent appointing authority. State trial judges, who are often elected officeholders, find themselves under political and administrative pressure to appoint lawyers unlikely to mount a vigorous, time-consuming or expensive defense.

Several States—including North Carolina and New York have—acted in recent years to establish statewide systems to deliver effective representation. North Carolina, for example, has established a centralized, independent appointing authority known as the Indigent Defense Services Commission. The Commission appoints a statewide Capital Defender who is accountable to the Commission but not accountable to the judiciary or to the political branches of government. The Capital Defender compiles and maintains a roster of private lawyers and public defenders who are qualified to try capital cases. The Capital Defender appoints two defense lawyers for each capital defendant. He may appoint himself and his staff, or he may appoint lawyers from the roster. The trial judge has no role whatsoever in the appointment of counsel. Congress viewed the North Carolina system as a national model for establishing an effective capital counsel system.

Section 421 of the new law authorizes a grant program, to be administered by the Attorney General, to improve the quality of legal representation provided to indigent defendants in State capital cases. Grants shall be used to establish, implement, or improve an effective system for providing competent legal representation in capital cases, but may not be used to fund representation in specific cases.

In earlier versions of the Innocence Protection Act, I had proposed to condition certain State defenses in habeas corpus actions on the State's establishment of an effective system for appointing capital counsel. In this manner, all capital States would have a strong incentive to improve their appointment systems, not merely those States that choose to apply for Federal funds. While this more ambitious proposal was not adopted, it is my intention that the grant program be administered in a manner that ensures meaningful improvements in this vital State function. Congress did not create this program to support existing death penalty systems in the States but rather to leverage needed improvements.

Under the new law, an effective system is one in which a public defender program or other entity establishes qualifications for attorneys who may be appointed to represent indigents in capital cases; establishes and maintains a roster of qualified attorneys and assigns attorneys from the roster; trains and monitors the performance of such attorneys; and ensures funding for the full cost of competent legal representation by the defense team and any outside experts.

The Act's definition of an effective system evolved from standards developed by the American Bar Association and adopted by other standard-setting bodies and commissions, such as the Constitution Project's blue-ribbon commission on capital punishment. Ideally, the entity that identifies and appoints defense lawyers will be independent of the political branches of State government, as are the authorities in North Carolina and New York. For example, the Act explicitly states that sitting prosecutors may not serve on the appointing entity. The underlying purpose of the scheme is to help insulate the appointment process from the political pressures that make it difficult for individual trial judges to appoint competent lawyers in individual cases.

In the course of negotiations to pass the bill in the House last year, I and other sponsors of the bill reluctantly agreed to accept an amendment, now section 421(e)(1)(C) of the Act, that has come to be described as ''the Texas carve-out.'' Under this provision, a State may qualify for a capital representation improvement grant if it has adopted and substantially complies with a State statutory procedure enacted before this Act under which the trial judge is required to appoint qualified attorneys from a roster maintained by a State or regional selection committee or similar entity.

In fact, the ''Texas carve-out'' is not a carve-out at all. It simply acknowledges that Texas is in the process of implementing a recent statewide reform law, the Fair Defense Act of 2001, and should be permitted to continue that process. If Texas is awarded a Federal grant it will still be required to improve its capital counsel appointment system, but Federal authorities will measure those improvements against standards in the 2001 Texas law.

Texas is not yet living up to the promise of the Fair Defense Act. A November 2003 report by the Equal Justice Center and the Texas Defender Service demonstrates that many Texas counties have failed to establish effective roster systems for identifying qualified lawyers and fail to provide reasonable compensation to capital counsel. If Texas accepts Federal funds under this new program, it will be required to live up to its own State standards, including the all-important requirement of reasonable compensation. The TDS report should be a guidepost for needed improvements.

It is conceivable that other States will qualify for consideration under section 421(e)(1)(C) but the provision should be strictly interpreted by grant administrators. The State law must have been enacted prior to enactment of the Innocence Protection Act, the trial judge must be required to make appointments from a roster of qualified lawyers, and the roster must be maintained by the State, a regional selection committee or a similar agency that is independent of the trial court. Congress was aware that the trial courts in many States maintain rosters from which lawyers may be chosen, but that is not the sort of rigorous quality control mechanism that section 421(e)(1)(C) requires.

States that establish an effective system under section 421(e)(1)(A) or (B) must compensate lawyers in accordance with section 421(e)(2)(F)(ii). That provision requires, among other things, that public defenders be compensated