July 15, 2022 Quarterly Commission Meeting

Meeting Material

Commission on Indigent Defense Services

July 15, 2022
10:00 AM – 3:00 PM
Proposed Agenda

Call to Order — Dorothy Hairston Mitchell
Introductions
Adoption of Proposed Agenda
Minutes of April 8, 2022 Commission Meeting
State Government Ethics Act

Members of the commission/committee are hereby advised of their duty under the State Government Ethics Act to avoid conflicts of interest & the appearance of conflict & are instructed to refrain from participating in any matter coming before this commission/committee with respect to which there is a conflict of interest or appearance of conflict

Remarks from the Chair — Dorothy Hairston Mitchell
- Welcome Christopher Sadler, Research Director
- Welcome New Commissioner, Miriam Thompson

Director's Report on IDS Business — Mary Pollard
- MAC System Implementation
- Long Term Plan
- 2022 Legislative Session Update

Budget & Spending
- Review of FY2022/ Forecast for FY2023 — William Childs

Updates from the Field
- Report of the Capital Defender — Robert Sharpe, Jr.

Commission Business
- Committee Reports
  - Appointment Committee — Dorothy Hairston Mitchell
  - Diversity Committee
- IDS Rules & Policies
  - Providing Legal Representation in Juvenile Murder Cases – Presented for Discussion — Eric Zogry
  - Review of Director's Decision – Presented for Discussion — Whitney Fairbanks
- Quarterly Misconduct Report — Whitney Fairbanks

Executive Session — Dorothy Hairston Mitchell

Pursuant to G.S. 143-318.11(a) (3) and (6) the Commission will go into Executive Session to consult with an attorney employed or retained by the public body in order to preserve the attorney-client privilege between the attorney and the public body; and to consider the qualifications, competence, performance, character, fitness, conditions of appointment, or conditions of initial employment of an individual public officer or employee or prospective public officer or employee; or to hear or investigate a complaint, charge, or grievance by or against an individual public officer or employee.

Adjourn — Dorothy Hairston Mitchell
Next Meeting: October 28, 2022 (NCAOC)

Join Zoom Meeting

https://us02web.zoom.us/j/83112925121?pwd=VEl2YlMrV1E5RnB5WGRQYkVyWUoxQT09

Calling in?

Meeting ID: 831 1292 5121

Passcode: 328220

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VOLUNTARY WAIVER OF PER DIEM

Indigent Defense Services Commissioners who are not state employees may claim a $15 per diem for each day of official service. See G.S. 7A-498.4(j) and 138-5(a)(1). Beginning January 1, 2017, IDS is required to report Commissioner per diem fees to the Internal Revenue Service as income. (If you have any questions about the tax issues related to per diem payment as a Commissioner, consult a financial professional.)

WAIVER

I hereby waive payment of per diem fees as set forth in G.S. 7A-498.4(j) and 138-5(a)(1) for my services on the Indigent Defense Services Commission. I understand this waiver will continue in effect for all services related to IDS Commission business including Commission and Commission Committee meetings until such time as I submit a written revocation of this waiver to Indigent Defense Services.

_____ _____

Name of Commissioner Date

_____

Signature of Commissioner

OFFICE OF INDIGENT DEFENSE SERVICES
SAFEGUARDING JUSTICE
NCIDS.org

NORTH CAROLINA OFFICE OF INDIGENT DEFENSE SERVICES

MARY POLLARD
EXECUTIVE DIRECTOR
MARY.S.POLLARD@NCCOURTS.ORG

DOROTHY HAIRSTON MITCHELL
CHAIR

Memorandum

To: IDS Commissioners
Cc: IDS Director
From: Whitney Fairbanks, IDS Deputy Director/General Counsel & Designated Ethics Liaison
Re: State Government Ethics Act and Lobbying Laws[1]
Date: Updated October 2021

This memo is intended to summarize the main aspects of the Election and Ethics Enforcement Act that impact individuals who serve on the Commission on Indigent Defense Services.[1]

I. STATE GOVERNMENT ETHICS ACT

A. COVERAGE AND DEFINITIONS:

The State Ethics Act went into effect on October 1, 2006, and applies to all "covered persons" as of January 1, 2007[2]. "Covered persons" include the following:

- "Judicial officers": All Justices and Judges of the appellate and trial courts, District Attorneys, and Clerks of Superior Court, or any person elected or appointed to any of these positions prior to taking office. G.S. 138A-3(21).
- "Judicial employees": The Director and Assistant Director of the Administrative Office of the Courts, and any other Judicial Branch employees who earn at least $60,000 per year and are designated by the Chief Justice as a judicial employee. 138A-3(42).

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[1] This memo is a revision of one originally drafted by Danielle Carman in January of 2008, which was drawn in large part from a Memorandum titled "State Ethics Act—Effective January 1, 2007," which was authored by Pamela Weaver Best, AOC Deputy Legal Counsel, and distributed to judicial officials on December 15, 2006, as well as materials distributed at an October 11, 2006 North Carolina Academy of Trial Lawyers CLE titled "Ethics and Lobbying: The New Statute."

[2]Effective December 18, 2018, the North Carolina General Assembly recodified Chapter 163A, Elections and Ethics Enforcement Act, into Chapter 138A, State Government Ethics Act. See S.L. 2018-46.

- "Public servants": Judicial employees and voting members of public boards or commissions with more than advisory authority. G.S. 138A-3(3) & (70)i.

So, all members of the IDS Commission are "covered persons" under the Act's definition of "public servants."[3] To date the Chief Justice has not designated any IDS employees as "judicial employees." Chief Justice Martin also has not designated any IDS employees as "judicial employees." Thus, the IDS Director, Appellate Defender, Capital Defender, Juvenile Defender, Parent Defender, Special Counsel Supervising Attorney, and Chief Public Defenders are not subject to the Act.

B. SPECIAL DUTIES OF THE IDS DIRECTOR AND IDS COMMISSION CHAIR:

The head of each State agency, and Chair of each board or commission subject to the Act, have special obligations that are set forth in G.S. 138A-15, such as:

- At the beginning of each IDS Commission meeting, the IDS Commission Chair must remind the members of their duty to avoid conflicts of interest or the appearance of conflicts of interest, and must inquire of members whether there is a possible conflict with any issue coming before the Commission. G.S. 138A-15(e).
- The IDS Director and IDS Chair must notify the Ethics Commission of all new public servants or other officials who are covered by the Act, and provide those public servants or officials with copies of the Ethics Act and any necessary disclosure forms. 138A-15(h).
- The IDS Director and IDS Chair must consider the need for the development and implementation of in-house ethics educational programs, procedures, or policies. 138A15(g).

C. OBLIGATIONS OF PUBLIC SERVANTS:

1. Annual Statements of Economic Interest:

All members of the IDS Commission (and anyone who may be designated in the future as a "judicial employee" by the Chief Justice) must file an annual Statement of Economic Interest ("SEI") with the North Carolina Ethics Commission by April 15. Because all of the information in each year's SEI must be current as of the last day of December of the preceding year, a SEI cannot be filed prior to January 1 of the filing year. G.S. 138A-22(d). All SEIs are public records. G.S. 138A-23.

[3] This memo describes the obligations of an IDS Commissioner as a "public servant" under the Act. It does not describe any additional or different obligations of "judicial officers." IDS Commissioners who are also judges should receive information and training about their obligations as "judicial officers" directly from the AOC and North Carolina Ethics Commission.

The SEI form requires reporting of your ownership or interest in certain assets and businesses as of December 31 of the prior year, including:

- Real estate, including personal residence;
- Interests in public or private corporations or other businesses;
- Vested trusts created, established, or controlled by the filing person; and
- All liabilities, excluding indebtedness on a personal residence.

See G.S. G.S. 138A-24 and the SEI long form for the full contents of the required disclosure. The Ethics Commission has instructed filers not to leave any questions blank or the form will be returned and the filer may be subject to a fine or sanction; if the answer to any question is "none," the filer should write "none."

The Ethics Commission has a duty to evaluate SEIs on a biennial basis and issue written opinions about the existence or lack of conflicts of interest and potential conflicts of interest. G.S. 1385-24(e). If the Ethics Commission cites an actual or potential conflict of interest with regard to any member of the IDS Commission, the conflict must be recorded in the Commission minutes and brought to the attention of the Commission by the Commission Chair. G.S. 138A-15(c).

All new IDS Commission appointees must file a SEI and have it evaluated by the Ethics Commission before their initial appointment can be effective. G.S. 138A-22(a). The only exception is that a public servant who serves on more than one board may file one SEI and, if that public servant begins membership on another covered board during the biennial cycle, s/he is not required to file another SEI and the Commission is not required to evaluate the existing one again.

Any public servant who fails to file the required SEI will be notified by the Commission within 30 days of the due date, with a copy to the designated ethics liaison. If the public servant fails to file the SEI within 30 days of receipt of the late notice, he or she will be subject to a $250 fine. If the public servant fails to file the SEI within 60 days of receipt of the late notice, he or she will be subject to disciplinary action. G.S. 138A-25(b).

It is a Class 1 misdemeanor knowingly to conceal or fail to disclose required information on a SEI. G.S. 138A-26. It is a Class H felony knowingly to provide false information on a SEI. G.S. 138A-27.

2. Mandatory Ethics Education:

As public servants, all members of the IDS Commission are required to receive ethics education within six months of their appointment, and must receive refresher education every two years thereafter. The Act also requires the designated ethics liaison to receive that education. G.S. 138A-14(c) & (f). Unless the Chief Justice designates any IDS employees as "judicial employees" in the future, no other IDS staff members are subject to this requirement.

The Ethics Commission has developed an educational program that satisfies the ethics education and the lobbying education requirements. *See* Section II.B. below. The combined program is about 2 hours long. The Commission has also developed an on-line training program that satisfies

these requirements, which is available at http://www.ethicscommission.nc.gov/education/eduOnline.aspx.

3. Ethical Standards:

Public servants and other covered persons shall not knowingly use their public position in a manner that will result in a financial benefit to the person, a member of the person's extended family, or a business with which he or she is associated. G.S. 138A-31(a).

Public servants and other covered persons "shall not mention or permit another person to mention the covered person's public position in nongovernmental advertising that advances the private interest of the covered person or others. The prohibition . . . shall not apply to political advertising, news stories, news articles, the inclusion of a covered person's position in a directory or biographical listing, or the charitable solicitation for a nonprofit business entity . . ." G.S. 138A-31(b).

In addition, public servants must protect against conflicts of interest by continually monitoring their financial, personal, and professional interests. G.S. 138A-35(b). Public servants must also refrain from taking any official action, up to and including abstaining from voting, if the public servant or a person with whom the public servant is associated "may incur a reasonably foreseeable financial benefit from the matter under consideration" and that benefit "would impair the public servant's independence of judgment or from which it could reasonably be inferred that the financial benefit would influence the public servant's participation in the official action." G.S. 138A-36(a) & (b). If the public servant is unsure whether there is a conflict, the public servant should disclose the relationship to the person presiding over the proceeding and seek appropriate guidance. G.S. 138A-35(a) and 138A-36(d).

Recusal is the stated way of avoiding conflicts of interest. G.S. 138-36. However, otherwise disqualified covered persons are allowed to participate in official actions if the interest or reasonably foreseeable benefit accrues equally to all members of the particular profession, occupation, or general class. G.S. 138A-38(a)(1). It has been the IDS staff's belief that the exception in 138-38(a)(1) allows Commissioners who are also private appointed counsel to take part in official actions that impact payments to private attorneys in indigent cases, such as changes in the hourly rates. On May 22, 2008, the State Ethics Commission issued an advisory opinion, which provides that Commissioners who are also private appointed counsel may take part in official actions that impact payments to private attorneys in indigent cases, such as changes in the hourly rates private attorneys, under the "safe harbor" in 138-38(a)(1).

4. Gifts:

A covered person "shall not knowingly, directly or indirectly, ask, accept, demand, exact, solicit, seek, assign, receive, or agree to receive anything of value for the covered person . . . or for another person, in return for being influenced in the discharge of the covered person's . . . official responsibilities." G.S. 138-32.

Covered persons "may not solicit for a charitable purpose any gift from any subordinate State employee." This ban does not apply if the solicitation is a generic request to all employees, such as requests to contribute to the State Employees Combined Campaign. G.S. 138A-32(b).

In addition, public servants shall not "knowingly accept a gift, directly or indirectly, from a lobbyist or lobbyist principal registered under Article 8 of [Chapter 163A]. G.S. 138A-32(c). Nor may a public servant "knowingly accept a gift, directly or indirectly, from a person whom the public servant knows or has reason to know any of the following:

(1) Is doing or is seeking to do business of any kind with the public servant's employing entity.
(2) Is engaged in activities that are regulated or controlled by the public servant's employing entity.
(3) Has financial interests that may be substantially and materially affected, in a manner distinguishable from the public generally, by the performance or nonperformance of the public servant's official duties."

G.S. 138A-32(d). Prohibited gifts must be declined, returned, paid for, or donated to charity or the State. G.S. 138-32(g).

There are a number of exceptions to the gift ban that permit public servants to accept food and beverages for immediate consumption at public events (such as IDS Commission meetings), reasonable actual expenditures for educational programs or meetings, and plaques or non-monetary recognition mementos. G.S. 138A-32(f).

In addition, 138A-32(f)(10) provides that the gift bans in G.S. 138A-32(c) and (d) do not apply to "[g]ifts given or received as part of a business, civil, religious, fraternal, personal, or commercial relationship not related to the person's public service or position and made under circumstances that a reasonable person would conclude that the gift was not given for the purpose of lobbying."

5. <u>Honoraria:</u>

Covered persons shall not accept an honorarium for "conducting any activity where any of the following apply:

(1) The employing entity reimburses the covered person . . . for travel, subsistence, and registration expenses.
(2) The employing entity's work time or resources are used.
(3) The activity would be considered official duty or would bear a reasonably close relationship to the covered person's . . . official duties.

An outside source may reimburse the employing entity for actual expenses incurred by a covered person . . . in conducting an activity within the duties of the covered person . . . or may pay a fee to the employing entity, in lieu of an honorarium, for the services of the covered person . . . " G.S. 138A-32.

6. Other Compensation or Benefits:

Public servants and other covered persons "shall not solicit or receive personal financial gain" for acting in the public servant's official capacity or for advice or assistance given in the course of official duties. G.S. 138A-33.

In addition, covered persons shall not cause a member of the covered persons' extended family to be hired or appointed to a position over which the covered person has supervisory authority. G.S. 138A-40.

D. ADVISORY OPINIONS FROM THE ETHICS COMMISSION:

The Ethics Commission has authority to render advisory opinions if requested by a public servant or other covered person. G.S. 138A-13(a). A person who seeks an opinion is immunized from sanctions when he or she acts in accordance with an advisory opinion. G.S. 163A-157.

E. DESIGNATED ETHICS LIAISON:

Each agency is required to designate someone on staff as the ethics liaison to advise public servants of their duties under the law and maintain communication with the Ethics Commission. G.S. 138A-13(f). (IDS has designated the IDS Deputy Director/General Counsel to serve as our ethics liaison.

F. VIOLATIONS, INQUIRIES BY THE ETHICS COMMISSION, AND ACTION ON COMPLAINTS:

The Ethics Commission can accept complaints, investigate, and conduct hearings on alleged violations by public servants. If the Commission finds by clear and convincing evidence that a public servant has violated the Act, the Commission may issue a private admonishment or refer the matter for appropriate action to the entity that appointed or employed the public servant. The Commission can also refer criminal matters to the Attorney General and local district attorney. G.S. 138A-12(m)(1).

Willful violations of the Act by board members constitute malfeasance, misfeasance, and nonfeasance subjecting the person to removal from the board. Willful violations by State employees constitute a violation of a written work order that could lead to dismissal.

II. AMENDED LOBBYING LAWS:

A. COVERAGE AND DEFINITIONS:

In varying degrees, the lobbying laws apply to numerous individuals as defined by G.S. 120C-100:

- "Designated individuals": Those subject to being lobbied, including legislators, legislative employees, and public servants (as defined above).

- "Liaison personnel": Any state employee whose principal duties, in practice or as set forth in his or her job description, include lobbying legislators or legislative employees.
- "Lobbyist": Does not include designated individuals who are acting in their official capacity or individuals registered as liaison personnel.
- "Lobbying": Includes direct lobbying and goodwill lobbying.

Except for any person designated as a liaison personnel under G.S. 120C-500, the provisions of Article 8 of Chapter 163A do not apply to state employees when appearing solely in connection with matters pertaining to their office and public duties. G.S. 120C-700(3). Article 8 of Chapter 1163A also does not apply to any person appearing before a committee, commission, board, or council at the invitation or request of the committee or a member thereof. G.S. 120C-700(2)

B. OBLIGATIONS OF PUBLIC SERVANTS: LOBBYING EDUCATION:

As public servants, all members of the IDS Commission are required to receive lobbying education and awareness training within six months of their appointment, and must receive refresher education every two years thereafter. G.S. 120C-103(a). Any IDS employee who may be designated by the Chief Justice in the future as a "judicial employee" will also become subject to this requirement.

C. ADDITIONAL OBLIGATIONS OF LIAISON PERSONNEL:

Every State agency must designate at least one and no more than two liaison personnel to lobby for legislative action. G.S. 120C-500. Subsection (d) provides that the Chief Justice shall designate "at least one, but no more than four, liaison personnel to lobby for legislative action for all offices, conferences, commissions, and other agencies established under Chapter 7A of the General Statutes." In March 2009, the Chief Justice designated the IDS Director as one of the four liaison personnel for Chapter 7A agencies.

Liaison personnel are generally exempt from the lobbying laws, but are subject to the registration, reporting, and gift ban provisions of Article 8 of Chapter 163A. G.S. 120C-501.

Violations of the registration and reporting provisions are generally Class 1 misdemeanors and may subject the violator to civil fines. G.S. 120C-602.

1. Registration:

Annually, liaison personnel must file with the Secretary of State a Liaison Registration form and a State Agency Authorization Statement. No registration fee shall be required. G.S. 120C-200 and 120C-501(b).

2. Reporting:

Liaison personnel must file quarterly lobbyist reports with the Secretary of State under G.S. 120C-402. G.S. 120C-501. "The report shall include all of the following for the reporting period:

(1) All reportable expenditures made for the purpose of lobbying.

(2) Solicitation of others when such solicitation involves an aggregate cost of more than three thousand dollars ($3,000).

(3) Reportable expenditures reimbursed by the lobbyist's principal, or another person on the lobbyist's principal's behalf.

(4) All reportable expenditures for gifts given G.S. 138A-32(f)(1)-(9), 138A-32(f)(11), 138A-32(f)(12), and all gifts given under G.S. 138A-32 (f)(10) with a value of more than ten dollars ($10.00)."

In addition, if the liaison personnel incurs reportable expenditures in any month while the General Assembly is in session, the liaison personnel shall file a monthly reportable expenditure report.

3. Gifts:

The gift ban in G.S. 120C-501) applies to liaison personnel with respect to legislators and legislative employees. G.S. 163A-346(e). Subject to the gift exceptions in G.S. 138A-3(32), liaison personnel may not directly or indirectly give a gift to a legislator or legislative employee.

However, liaison personnel may make political contributions to legislators. G.S. 138A3(32) defines a "gift" for purposes of the State Government Ethics Act as anything of monetary value given or received without valuable consideration by or from a lobbyist, lobbyist principal, liaison personnel, or a person described under G.S. 138A-3(d)(1), (2), or (3). However, pursuant to G.S. 138A-3(3), campaign contributions that are properly received and reported as required under Article 23 of Chapter 163A are not gifts. In addition, while G.S. 163-278.13B provides that no lobbyist may make a campaign contribution as defined in G.S. 163-278.6 to a candidate who is a legislator, G.S. 120C-100 provides that the term "lobbyist" shall not include registered liaison personnel.

D. LIMITATION ON IDS COMMISSION APPOINTMENT OF LOBBYISTS:

There are limitations on the ability of the IDS Commission to appoint lobbyists or recent lobbyists as one of the Commission's three appointees to the IDS Commission. G.S. 120C-304 has been amended to provide: "A lobbyist shall not be eligible for appointment by a State official to, or service on, any body created under the laws of this State that has regulatory authority over the activities of a person that the lobbyist currently represents or has represented within 120 days after the expiration of the lobbyist's registration representing that person." Any appointment made in violation of this section is void. G.S. 120C-304

E. NO STATE AGENCY MAY CONTRACT WITH A LOBBYIST:

G.S. 120C-500 provides that "[n]o State agency or constitutional officer of the State may contract with individuals who are not employed by the State to lobby legislators and legislative employees. This subsection shall not apply to counsel employed by any agency, board, department, or division authorized to employ counsel under G.S. 147-17."

III. FORMS & QUESTIONS:

- The following link is to the North Carolina Ethics Commission website: http://www.ethicscommission.nc.gov. The annual Statement of Economic Interest forms, including the long form and no change form, can be accessed at that site.
- For general questions about your obligations under Subchapter II of the State Elections and Ethics Enforcement Act (formerly the State Ethics Act) as a member of the IDS Commission, please contact:
    - Whitney B. Fairbanks, IDS Deputy Director/General Counsel & Designated Ethics Liaison, at (919) 354-7205 or Whitney.B.Fairbanks@nccourts.org; or
    - Kathleen Edwards, Associate General Counsel, State Board of Elections and Ethics Enforcement at (919) 814-3600 or Ethics.Commissions@ncsbe.gov.
- For questions about the Statement of Economic Interest, please contact Lisa Johnson, Disclosure and Reporting Manager, State Board of Elections and Ethics Enforcement, at (919) 814-3600 or lisa.johnson@ncsbe.gov.

For questions about the mandatory ethics education, please contact Sue Lundberg, Associate General Counsel, State Board of Elections and Ethics Enforcement, at (919) 8143600 or sr.lundberg@ncsbe.gov

Draft Minutes

2022.04.08 MEETING MINUTES

Commission on Indigent Defense Services

Quarterly Meeting – April 8, 2022
Location: Whitted Building, Hillsborough

Commissioner Attendees: Dorothy Hairston Mitchell (Chair), William "Gus" Anthony, Art Beeler (Vice Chair), Brian Cromwell (virtual), Joseph Crosswhite, Caitlin Fenhagen, Staples Hughes (virtual), Brian Jones, Jan Pritchett (virtual), Stacey Rubain (virtual).

Staff Attendees: Chad Boykin (Financial Services Staff Attorney), Susan Brooks (Defender Administrator), D. Tucker Charns (Chief Regional Defender), Kristen DeSimone (Legal Assistant) (virtual), Whitney Fairbanks (Deputy Director), Aaron Gallagher (Financial Officer), Angela Henderson (Juvenile Contracts Administrator) (virtual), Susan Perry (Legal Assistant), Mary S. Pollard (Executive Director).

Local and State Public Defender Program Attendees: Woodrena Baker-Harrel (District 15B), Dawn Baxton (District 14), Glenn Gerding (Appellate Defender), John Neiman (District 18), Burcu Hensley (Assistant Juvenile Defender), Willia G. Mills (Assistant Special Counsel), Laura Powell (District 29A) (virtual), Wendy C. Sotolongo (Parent Defender), Deonte Thomas (District 10), `Dolly Whiteside (Chief Special Counsel), Eric Zogry (Juvenile Defender).

The meeting was called to order by Dorothy Hairston Mitchell, who then proceeded with the welcome and conducted a roll call of members participating in person and virtually.

Approval of January 28, 2022 Quarterly Commission Meeting Minutes

Hairston Mitchell opened the floor for members to discuss the minutes from the immediate last Quarterly Commission Meeting.

The minutes were approved by unanimous vote.

State Government Ethics Act Reminder

Hairston Mitchell reminded the Commissioners of their responsibilities under the State Government Ethics Act.

Remarks from the Chair

Hairston Mitchell welcomed Aaron Gallagher, IDS's new Chief Financial Officer.

Director's Report on IDS Business

Executive Director Mary Pollard took a few minutes to update the Commission on the various projects the staff was currently working on including the wind-down of the unit-based contract system and the planning for its replacement.

DRAFT

Updates from the Field

NC Parent Defender Wendy C. Sotolongo updated the Commission on the work of the Office of the Parent Defender, including appellate appointments to private assigned counsel and Assistant Parent Defenders. She highlighted the Staff and roster's ability to pivot to remote oral arguments and trainings during the height of the pandemic. Sotolongo also advised the Commission that IDS had received two reimbursements for federal funding through its Memorandum of Agreement with NC Department of Health and Human Services but cautioned that the reimbursement workflow was still a work in progress. Sotolongo finished by highlighting the improvement projects OPD would be able support through the reimbursements.

Public Business

James Williams, Chair, NC Commission on Racial and Ethnic Disparities ("NC CRED"), provided the commission with an informational update on its work to include mandatory diversity training in North Carolina's annual continuing legal education requirements and its Campaign to Remove Confederate Monuments.

Williams informed the Commission that after NC CRED's successful advocacy, the State Bar Council unanimously voted to approve for publication and comment a new mandatory CLE requirement regarding bias, inclusion, and diversity. The issue was now with the NC Supreme Court for consideration.

Regarding the Campaign to Remove Confederate Monuments, NC CRED was actively advocating for the removal of all Confederate monuments from courthouse grounds in the state of North Carolina. William asked the Commission to consider adopting a statement in support of campaign, noting that the NC Bar Association, NC Advocates for Justice, and NC Public Defender Association already had done so.

Commissioner Fenhagen thanked Williams and NC Cred for their work and asked that the Commission's Diversity Committee take up the request.

Commission Business

Financial Services Staff Attorney Chad Boykin provided the Commission with an update on the work of the Budget Committee. Specifically, Boykin advised the Commission that the Committee had recommended the IDS Executive Director continue to grant requests for relief from judgments for attorneys' fees subject to a memorialized policy. All Commissioners present voted in favor of the Committee's recommendation, which included relief when the underlying principal was met or when the requester made a showing of manifest hardship.

Boykin presented the request for waiver of fee application deadline submitted by attorney Shelby Chase for the Commission's consideration. All Commissioners present voted in favor of the Executive Director's recommendation to approve the deadline waiver.

DRAFT

Deputy Director Whitney Fairbanks reminded the Commission that the NC Association of Women Attorneys ("NCAWA") seat on the Commission needed to be filled. The Commissioners asked Staff to schedule a meeting for the Appointment Committee to consider possible recommendations for the seat and to relay any recommendations it had to the full Commission and the NCAWA before the July 15, 2022, meeting.

Executive Session

On motion of Commissioner Jones, the Commission went into Executive Session at 11:45AM to discuss personnel matters; litigation; and the nominees for the Professor John Rubin Excellence in Training Award.

The minutes of the Executive Session are being withheld from public inspection pursuant to to G.S. 143-318.11(a)(6); G.S. 143-318.11(a)(3); and G.S. 143-318.11(a)(2).

Commission Business

All Commissioners present voted to award the 2022 the Professor John Rubin Excellence in Training Award to former Chief Public Defender Susan Seahorn.

Vice-Chair Beeler made a motion to appoint J. Chadwick Perry to serve as Chief Special Counsel for a term to begin immediately and expire on June 30, 2026 and at the pleasure of the Commission. Commissioner Jones seconded. Commissioners Hairston Mitchell, Fenhagen, Crosswhite, Anthony, Pritchett, and Rubain voted in favor of the motion. Commissioners Hughes and Garren abstained from the vote.

Hairston Mitchell ended the meeting at 3:15PM.

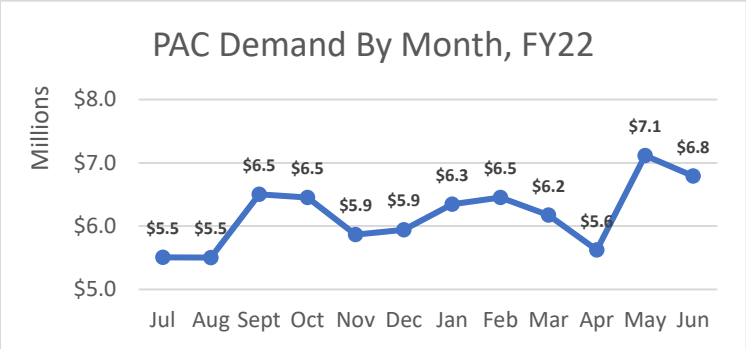
DRAFT

Fiscal Report

Office of Indigent Defense Services
Fiscal Year 2021-22 Budget Update
July 2022

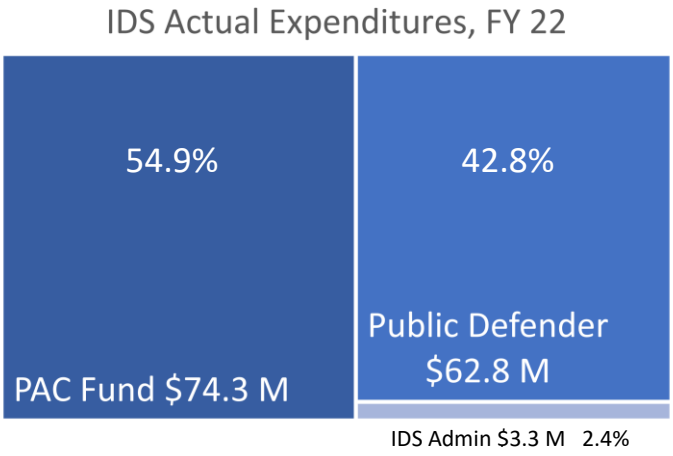
PAC Fund Spending

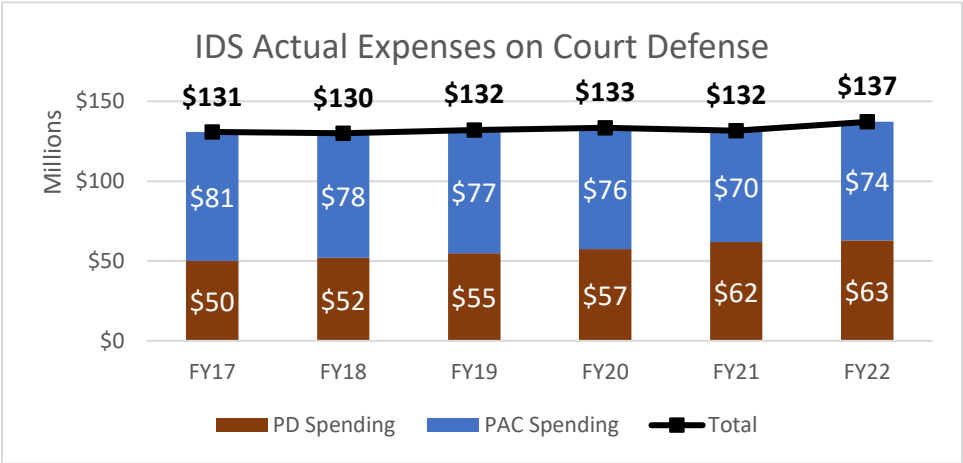
Although the PAC rate increases were effective on January 1, 2022, PAC spending did not reflect the expected increase until May. Because there can be some lag time before IDS receives fee applications, Staff expects that the true impact of the rate increases will be felt starting in FY 2023. The predicted average monthly amount of demand when the increased rates are fully implemented is $7.1 million.



Overall Spending

IDS spending in FY 22 was within anticipated levels. Staff is still working on the final numbers but expects to revert less than $3 million to General Fund. With OSBM expected to allow IDS to carryforward about $10 million in unspent funding from FY22, Staff is currently predicting that the PAC fund will remain solvent through FY 26, barring unexpected changes. Of course, this prediction will be affected by changes in demand, new Public Defender Offices and so forth. The chart below tracks actual expenses over the last few years, showing that while PAC demand has dropped a bit, PD spending has been steadily increasing. Some of this spending is related to new or expanded PD offices, but some of this is more likely related to the shifting nature of demand for defense services.





Other Reports

IDS
OFFICE OF INDIGENT DEFENSE SERVICES
SAFEGUARDING JUSTICE
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NORTH CAROLINA OFFICE OF INDIGENT DEFENSE SERVICES

MARY POLLARD
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DOROTHY HAIRSTON MITCHELL
CHAIR

Memorandum

To: IDS Commissioners
Cc: IDS Director
From: Whitney Fairbanks, IDS Deputy Director/General Counsel & Designated Ethics Liaison
Re: Governance for the IDS Commission
Date: July 15, 2022

The purpose of the memo is to provide an overview of generally accepted best practices for governance rules for commissions and boards (hereinafter "bylaws"). It includes essential components of bylaws. Where the IDS ACT is silent on a component, it provides some commonly used rules. Where the IDS Act addresses a component, it provides the section and language.

Bylaws often define board/ commission membership and responsibilities and formalize practices. Many bylaw clauses used by non-profit boards, however, are dictated by the IDS Act.

> **Membership.** G.S. 7A-498.4 established the Commission and defined the membership. The thirteen volunteer members are appointed by groups spanning all branches of government and the legal community. The section also provides rules for filling vacancies, limitations on voting, and term limits.
>
> **Responsibilities**. G.S. 7A-498.5 lists the responsibilities of the IDS Commission. Responsibilities include developing and improving public defense programs, appointing the Executive Director, developing standards, determining methods of delivery, and policies and procedures for the distribution of funds.

G.S. 7A-498.5(h) directs the Commission to "adopt such other rules and procedures as it deems necessary for the conduct of business by the Commission and the Office of Indigent." Other than the attached "Procedures for the Appointment of Members of the Commission on Indigent Defense Services Pursuant to G.S. 7A-498.4(b)(11)," which was adopted in 2002 and "Procedures for the Election of Officers of the Commission on Indigent Defense Services," which was also adopted in 2002 and amended in 2004 and 2011, the Commission has not exercised it authority under subsection (h) to enact formal governance rules.

Bylaw	Category	Statute No.	Provision/ Notes
Statute Silent/ consider rule			
Recruitment	Membership		While the Commission's ability to strategically recruit is limited by the appointing authorities, it does have the opportunity to be strategic when making recommendations to those authorities or making its own appointments. The Appointment Committee has generally taken on the task of identifying where gaps in representation on the Commission exist and directing recruitment efforts to fill those gaps. The Commission may want to consider directing the Appointment Committee to work with the Diversity Committee to develop a matrix.
Schedule	Meetings		In the absence of a legislative directive, the Commission may want to consider adopting a bylaw establishing a loose schedule—e.g., the Commission shall meet quarterly at such place and time as denoted in the notice.
Special Meetings	Meetings		To ensure flexible response to emergent situations, the bylaws should provide direction for how the Commission would convene a special meeting.
Attendance	Meetings		Many boards and commissions have attendance policies, with enforcement tied to a separate removal policy. The underlying philosophy is that Commissioners who regularly attend meetings are more informed about the pressures facing the agency and better able to provide oversight and guidance.
Remote Attendance	Meetings		IDS Commission and Committee meetings are subject to Chapter 143, The Open Meetings Act. It is relatively easy to comply with the Act when all voting members of the Commission are in physical attendance. One option is to allow only physically present members to vote; however, allowing remote participation allows busy volunteer Commissioners to participate more regularly. If the Commissions wants to continue to offer hybrid meetings, then the Commission should either adopt a standalone remote attendance policy or include one in a larger governance document.

Committees	Meetings		While the Commission does not have formal policies governing the assignment and scope of Committee work, it has a well-established practice. The Chair assigns Commissioners to Committees before the fourth quarter meeting, the Commissioners review the proposed assignment at that meeting, and assignments begin immediately after the Commission adopts the assignments. The Commission should consider memorializing the practice in bylaws and incorporating current assignments by reference in the document.
Reviewing/ amending bylaws	Other		Bylaws can formalize the commissions practices. Since the Commissions needs will evolve over time, it will be necessary to review them periodically to verify their continued appropriateness and to assess what might be missing. The Commission should consider forming a governance committee.
Provided by Statute			
Authority	Membership	7A-498.5	Responsibilities include developing and improving public defense programs, appointing the Executive Director, developing standards, determining methods of delivery, and policies and procedures for the distribution of funds.
Composition	Membership	7A-498.4(b)	Thirteen volunteer members appointed by representatives of all government branches, the legal community, and the IDS commission
Qualifications	Membership	7A-498.4(c)	Nine to ten attorneys, one to two judges, and two non-attorneys depending on appointment authority
		7A-498.4(d)	[S]ignificant experience in the defense of criminal or other cases or demonstrated commitment to quality representation
		7A-498.4(d)	No prosecutors or LEOs, no judges except as allowed above, no active PDs or APDs, no IDS employees
Terms	Membership	7A-498.4(c)	[A]ppointments shall be for four years and shall be made by the appointing authorities designated in subsection (b) of this section.

		7A-498.4(f)	Each member of the Commission shall serve until a successor in office has been appointed.
Term limits	Membership	7A-498.4(c)	No person shall serve more than two consecutive four-year terms plus any initial term of less than four years.
Election of Chair and Vice-chair	Membership	7A-498.4(h)	Commission shall elect a Commission chair from the members of the Commission for a term of two years. See also "Procedures for the Election of Officers of the Commission on Indigent Defense Services"
Removing members	Membership	7A-498.4(f)	Removal of Commission members shall be in accordance with policies and procedures adopted by the Commission.
Vacancy	Membership	7A-498.4(f)	Vacancies shall be filled by appointment by the appointing authority for the unexpired term.
Compensation	Membership	7A-498.4 (j)	Commission members shall not receive compensation but are entitled to be paid necessary subsistence and travel expenses in accordance with G.S. 138-5 and G.S. 138-6 as applicable.
Voting	Meetings	7A-498.4(e)	All members of the Commission are entitled to vote on any matters coming before the Commission unless otherwise provided by rules adopted by the Commission concerning voting on matters in which a member has, or appears to have, a financial or other personal interest.
Quorum	Meetings	7A-498.4(g)	A quorum for purposes of conducting Commission business shall be a majority of the members of the Commission.

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REPORT OF THE IDS DIVERSITY COMMITTEE

JULY 15, 2022

Attached are a series of reports that NCAOC Human Resources generated for IDS. The reports are rough and are attached here to guide a discussion on how to improve them so that they generate information that will help us assess the information.

Sarah's comment below is an example of the comments we think would be helpful in refining the information.

"I looked at the reports. I find the percentages hard to utilize on the headcount document. Like on this chart, I wonder if the % could be calculated as the percentage of all public defenders, so that it adds up to 100. I think the percent as is saying, the 56.3 per cent of the workforce is white public defenders. 16.8 per cent of the workforce is black public defenders. I think it would be more helpful for the percentages to say, 99/483 (20%) public defenders are black, 332/483 (69%) public defenders are white, etc. I'd recommend the same for administrative and special defenders.

All Public Defenders (Pub Def 1 – 29B)	Male	Female	Total	%
White (Non-Hispanic/Latino	147	185	332	56.3%
Black of African American (N-H/L)	41	58	99	16.8%
Asian (N-H/L)	1	3	4	.6%
American Indian or Alaska Native (N-H/L)	1	4	5	.8%
Two or More Races (N-H/L)	3	8	11	1.8%
Hispanic/Latino	15	17	32	5.4%
Total	**208**	**275**	**483**	

Other questions the reports raised for staff include:

- How do they assess whether an employee is disabled – is that self-reported at hiring? And how is it defined?
- For the quantitative analysis, it wasn't clear to me which positions fit into each SOC category. Do all PDs, APDs, and IDS central staff fit into professional specialty? What is protective services?"
- Would a salary study in addition to the headcount study be useful?

WORKFORCE AVAILABILITY AND ANALYSIS
As of 12/31/2021

To comply with our EEO Plan and Policy Statement, The North Carolina Administrative Office of the Courts conducts a workforce analysis annually and reports division findings to division leadership.

IDS workforce was analyzed according to statistics received from OSC HR Payroll System Report B0170 Population/Labor Force Compromise Census Compare by SOC as of 12/31/21. Report B0170 was also used to determine the job placement goals.

Report B0170 reflects the following 2021 SOC underrepresentation:

- Officials and Administrators: White females make up 100% of the officials and administrators. The two positions in this occupational category are appointed.

- Management Related: This occupational category has a total of three (3) employees for as of December 2021. All three employees are White females. Black females decreased by 2 from December 2020 and were not replaced. White females meet the expected availability in the labor workforce.

- Professionals: IDS employs fewer White females, Black females, Asian males, and Asian females compared to their availability based on expected NC labor force. White males, Black males, Hispanic males, and Hispanic females exceed their expected labor force availability. White males make up more than 39% of the professionals category.

- Technicians and Technologists: This occupational category has total of two (2) employees. White males and White females meet the expected availability in the labor workforce.

- Administrative Support: IDS employs fewer White males, Black males, and disabled employees compared to their availability based on expected NC labor force. Black females and Hispanic females exceed their expected labor force availability in the workforce.

- Protective Services: White males exceed their expected labor force availability in the workforce, representing 30.2%. Black males decreased in this occupational category and there was an increase of 1 White female and 1 Hispanic Male.

After reviewing the outcome of the utilization analysis, IDS demonstrates employment practices that are without bias and results in fairness to all races and ethnicities. The overall underutilization of employees with disabilities at 11.1% and this is an area we can focus on while complying with EO 92.

When calculating the under-utilization resulting from the occupation-specific working population comparison, the statewide working population and the statewide occupation-specific category compromise numbers were used for analyzing the officials and administrators,

management related and the professional occupational categories. When calculating the under-utilization resulting from the occupation-specific/working population comparison, the working population in the local geographical recruiting area and the occupational specific category compromise numbers in the local geographical recruiting area were used for analyzing the other occupational categories.

The analysis identified each occupational category in which groups were underutilized, as defined as having fewer employees in a demographic group in a particular occupational category than would be expected based on the compromise standard used for comparison.

Appendix A shows the full-time workforce of Indigent Defense Services as of December 31, 2021, broken down by occupational group, race, gender and disability. At that time, the department had 571 full-time permanent employees on the payroll.

IDS Headcount
Demographics as of 5/31/2022
Prepared by Human Resources Division

All IDS Employees	Male	Female	Total	%
White (Non-Hispanic/Latino	179	235	414	70.2%
Black of African American (N-H/L)	43	74	117	20%
Asian (N-H/L)	2	4	6	1%
American Indian or Alaska Native (N-H/L)	1	4	5	.8%
Two or More Races (N-H/L)	5	8	13	2.2%
Hispanic/Latino	15	19	34	5.7%
Total	**245**	**344**	**589**	**100**

Administrative (Asst Directors, Support Staff, Budget, Financial Services)	Male	Female	Total	%
White (Non-Hispanic/Latino	2	11	13	2.2%
Black of African American (N-H/L)		3	3	.5%
Asian (N-H/L)				
American Indian or Alaska Native (N-H/L)		1	1	.1%
Two or More Races (N-H/L)				
Hispanic/Latino	1		1	.1%
Total	**3**	**15**	**18**	

All Special Defenders (Appellate Defender, Capital Defender, Juvenile Defender, Regional Defender, Parent Rep, Special Counsel, JB IDS)	Male	Female	Total	%
White (Non-Hispanic/Latino	30	39	65	11%
Black of African American (N-H/L)	2	13	15	2.6%
Asian (N-H/L)	1			
American Indian or Alaska Native (N-H/L)				
Two or More Races (N-H/L)	1		1	.1%
Hispanic/Latino		2	2	.3%
Total	**34**	**54**	**83**	

All Public Defenders (Pub Def 1 – 29B)	Male	Female	Total	%
White (Non-Hispanic/Latino	147	185	332	56.3%
Black of African American (N-H/L)	41	58	99	16.8%
Asian (N-H/L)	1	3	4	.6%
American Indian or Alaska Native (N-H/L)	1	4	5	.8%
Two or More Races (N-H/L)	3	8	11	1.8%
Hispanic/Latino	15	17	32	5.4%
Total	**208**	**275**	**483**	

2022 EEO Quantitative Analysis Form												
AGENCY/UNIVERSITY: IDS												
SOC Category	White Males		White Females		Black Males		Black Females		Other Minority Males		Other Minority Females	
	2020	2021	2020	2021	2020	2021	2020	2021	2020	2021	2020	2021
Officials & Administrators	0	0	2	2	0	0	0	0	0	0	0	0
Management Related	0	0	3	3	0	0	2	0	0	0	0	0
Professional Specialty	159	160	149	155	27	27	46	40	12	11	16	17
Technicians & Technologists	1	1	1	1	0	0	0	0	0	0	0	0
Administrative Support	6	4	54	54	3	3	28	31	0	0	8	9
Protective Services	16	16	15	16	11	10	4	4	4	5	2	2
Skilled Crafts	0	0	0	0	0	0	0	0	0	0	0	0
Service	0	0	0	0	0	0	0	0	0	0	0	0
TOTAL EMPLOYEES	182	181	224	231	41	40	80	75	16	16	26	28

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TO: IDS Commission

FROM: Eric J. Zogry, Juvenile Defender

RE: First Degree Murder Project Update

DATE: July 15, 2022

This memo is intended to update the Commission on OJD's efforts to build a system of appointment and payment for juveniles aged 13 through 17 charged with first degree murder. Primarily we have been working on rules for appointment of counsel, authorization of expert services, and awards of fees with IDS Assistant Director Whitney Fairbanks and Staff Attorney Chad Boykin. A current draft of those rules is included in your materials for your consideration.

One issue that has come up is appointment of counsel and approval of expert fees in the public defender districts. In response to our presentations to, and subsequent discussions with, the Public Defenders and considering that the Public Defender districts are not high risk, we propose allowing these districts to opt- in or -out of the program.

- Opt-in: Appointment, attorney fee awards, expert authorizations, and expert fee awards would be handled by OJD pursuant to the new rule.
- Opt-out: Appointment, attorney fee awards, expert authorizations, and expert fee awards would not be handled by OJD. If the public defender opts-out, then the district would effectively maintain the status quo. Local Judges would continue to approve attorney fee awards, authorize expert expenses, and approve expert fee awards.

While we would certainly be willing to revisit a public defender's decision to opt-in or -out. We will not revisit it on a case-by-case basis. Rather, we will revisit it based on a periodic review of how well the system is working the relevant district. We also would be available to assist locating counsel in cases where the public defender has difficulty locating qualified counsel.

If the Commission does not approve a final set of rules during this meeting, our office respectfully asks that the Commission approve OJD's continued work on the following, under the assumption that formal rules will be adopted later:

- Work towards finalizing the rules and application documents;
- Begin to build a roster of attorneys interested in participation once the rules are approved;
- Prepare training programs and materials for interested attorneys; and
- Prepare a plan to communicate with involved and interested stakeholders in this new procedure.

Our hope is that be preparing in advance will ensure readiness at implementation date, which we estimate at this time to be February or March 2023. Thank you for your input, consideration, and support.

Part 5
Rules for Providing Legal Representation in Juvenile Cases

This part addresses the procedure to be followed when a juvenile is charged with first degree murder (youth ages 13-17). The rules are authorized by the Indigent Defense Services Act of 2000 (IDS Act), S.L. 2000-144, Senate Bill 1323 and apply to cases pending on or after (enter date that we enact this rule). Fee applications filed on or after that date will be governed by these rules.

These rules are intended to set forth a comprehensive system for providing legal representation in juvenile cases that may result in a sentence of life without parole or life with the possibility for parole. Unlike previous rules for assignment of counsel in juvenile delinquency cases, this departs significantly from previous practice and procedure. The approach taken below reflects the intent of the IDS Act, which places with the Office of Indigent Defense Services (IDS Office) the responsibility for appointing and compensating counsel in juvenile cases that may result in a sentence of life without parole or life with the possibility of parole.

This part is divided into three subparts, corresponding to the major areas requiring attention in this type of juvenile case:

5A Appointment and Compensation of Trial Counsel
5B Conditions of Appointment
5C Appointment and Compensation of Experts and Others Providing Services Related to Legal Representation

- ~~Appointment and Compensation of Trial Counsel~~
- ~~Conditions of Appointment~~
- ~~Appointment and Compensation of Experts and Others Providing Services Related to Legal Representation~~

This part also includes an appendix containing standards that attorneys must meet to be considered for appointment as trial counsel in these cases The rules are authorized by Chapters 7A and 7B of the North Carolina General Statutes. To the extent this part conflicts with any provision contained in IDS Rule Part 1, Rules for the Continued Delivery of Services in Non-Capital Criminal and Non-Criminal Cases at the Trial Level, this Part controls. N

Whenever the term "IDS Director" is used in these rules and appendix, it means the Director of the Office of Indigent Defense Services or her/his designee. Whenever the term "IDS Office" is used in these rules and appendix, it means the Office of Indigent Defense Services or its designee. Whenever the term "OJD" is used in these rules and appendix, it means the Office of the Juvenile Defender. Whenever the term "IDS Commission" is used in these rules and appendices, it means the Commission on Indigent Defense Services or its designee.

These rules may be changed by the IDS Commission pursuant to its authority.

Part 5A
Appointment and Compensation of Trial Counsel in Juvenile First Degree Murder Cases

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Part 5A.1 Coverage of this Subpart

(a) Applies to Juvenile First-Degree Murder Petitions (youth ages 13-17)

This subpart applies to all juveniles, aged 13-17 years old at the time of the offense, who have had a petition filed alleging first degree murder and other petitions brought contemporaneously with, or subsequently joined with the first-degree murder petition.

First-degree murder for these purposes is defined by N.C.G.S.§14-17(a)(a1).

For any juvenile case that is not first-degree murder see Part 1 Rules for the Continued Delivery of Services in Non-Capital Criminal and Non-Criminal Cases at the Trial Level.

For any first-degree murder case where the defendant is not aged 13-17 years old at the time of the offense see Part 2 Rules for Providing Legal Representation in Capital Cases.

(b) Authority to Implement Other Programs, Plans, and Contracts

Nothing in these rules shall prohibit assignment of otherwise qualified counsel to represent indigent juveniles in first degree murder cases pursuant to programs, plans, or contracts that may be implemented from time to time to improve quality, efficiency, and economy where such programs, plans, or contracts are approved by the IDS director.

(c) Districts Covered

This subpart applies to all superior and district court districts except that in any court districts with a public defender office, the Public Defender may continue to appoint qualified attorneys to represent youth charged with first degree murder pursuant to the "Regulation for Appointment of Counsel" for the Defender District.

5A.2 Appointment of Trial Counsel

(a) Assignment of Indigent Defense Services

Upon receipt by the Clerk of a petition alleging first degree murder, the clerk shall notify the IDS Director of the need to appoint counsel for the juvenile in accordance with these rules. The notification may be made by email to XXX@nccourts.org.

(b) Provisional Appointment of Counsel

Upon learning that a juvenile has been charged with first degree murder the Court may immediately appoint a lawyer on a provisional basis to attend the juveniles first appearance and initial secure custody hearing and take steps necessary to protect the juvenile's rights pending appointment of trial counsel by the IDS Director.

(~~b~~c) Appointment of Trial Counsel

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~~Existing~~ Pursuant to Section 1(c) above, in districts with a public defender office where the Public Defender has elected to follow the "Regulation for Appointment of Counsel" for the Defender District, the Public Defender ~~offices~~ will appoint qualified attorneys to represent youth charged with first degree murder as defined in these rules. If there are no qualified attorneys available, or there is a conflict, the public defender ~~will~~ may request that the IDS Director appoint a qualified attorney from the roster.

In jurisdictions without a public defender office, the IDS Director shall appoint an attorney for a juvenile in a murder case as early in the process as possible. The Office of the Juvenile Defender shall maintain a list of attorneys eligible for appointment. The list shall consist of attorneys who are eligible to represent juveniles pursuant to the procedures in Appendix A of these rules, and may include attorneys in private practice, and attorneys with whom the IDS Office contracts or employs to provide representation in juvenile first-degree murder cases. Appointment orders, signed by the IDS Director, shall be distributed to the clerk of district and superior court, the district attorney, the appointed attorney, and the juvenile.

(d~~c~~) Identification of Conflicts

Upon appointment to a case subject to this part, counsel shall make prompt and reasonable efforts to determine if the representation would cause any conflict of interest. If counsel identifies a non-waivable conflict of interest, counsel shall timely file a motion to withdraw and notify the Juvenile Defender of the conflict. If counsel identifies a waivable conflict of interest, counsel shall either obtain the informed written consent of the client in accordance with the Rules of Professional Conduct or file a timely motion to withdraw.

(~~d~~e) No Subsequent Appointment of Retained Counsel

If a retained attorney becomes unable to continue representing a juvenile charged with first degree murder because the juvenile's family or any third party cannot fulfill the terms of the financial agreement between the attorney and the juvenile's family or any third party, the retained attorney may file with the court a motion to withdraw. If the court permits the retained attorney to withdraw, that attorney is not eligible to be appointed to represent the juvenile.

(f~~e~~) Litigation of Extraordinary Writ in Appellate Division Outside Scope of Appointed Trial Counsel's Representation

Counsel appointed to represent a juvenile in the Trial Division, whether in the District or Superior Court, is not authorized to prepare, file, or litigate a petition for writ of certiorari or other extraordinary writ in the Appellate Division prior to the entry of final judgment in the Trial Division. If counsel appointed pursuant to paragraph 2A.2(c) or 2A.2(d), [CEB cross reference the highlighted references – before finalizing]~~[BCE1]~~above, determines that a petition for an extraordinary writ in the Appellate Division is warranted, counsel shall notify the Office of Appellate Defender. The Office of Appellate Defender or counsel appointed by the Appellate Defender pursuant to paragraph 2B.2(c), below, shall file the petition only if it will present a potentially meritorious issue for review.

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5A.3. Compensation and Recoupment

(a) Compensation

Appointed counsel who represented a juvenile charged with first degree murder shall submit to IDS an itemized fee application on a form prescribed by the Juvenile Defender showing the time counsel spent in representation of the juvenile. If an attorney seeks compensation for time spent working on multiple cases simultaneously, the attorney's time shall be prorated among each of the cases involved. Following review of the fee application, the Juvenile Defender shall determine the amount of compensation and forward the award to the IDS Director for approval. Upon approval by the IDS Director, the award will be forwarded to IDS Financial Services for payment. If counsel is required, pursuant to Part 2 (a)(iv) below, to meet with the Juvenile Defender or his/her designee to review the representation, the fee shall include compensation for time spent in that review. Private counsel appointed to represent a juvenile under these rules may apply for and receive interim payments in the discretion of the IDS Director. For all cases finally disposed at the trial level, final attorney fee applications must be signed by the appointed attorney and submitted to IDS within no more than one year after the date on which the case was finally disposed at the trial level. In accordance with policy and procedures approved by the IDS Commission, an attorney may apply to the IDS Director for one advance extension of the applicable deadline or for a waiver of the applicable deadline. Counsel may make a written request for a review of the amount of compensation approved by the IDS Director from a committee of the IDS Commission designated by the IDS Commission to conduct such review. A retained attorney is not eligible to receive state funds to supplement the amount of compensation he or she has received from the juvenile's family or any third party.

(b) Recoupment of Fees Generally

To the extent required by law, for legal representation rendered by private assigned counsel, the value of services rendered and the procedures for entry of any appropriate order or judgments, shall be determined by the presiding judge in accordance with N.C.G.S. 7A-450.1, 7A-455, and 7A-455.1. After the IDS Director sets the fee to be paid or the value of services rendered, the IDS Director shall notify the responsible party of the potential liability and afford them a reasonable opportunity to be heard on the issue. The trial judge or other appropriate judicial official shall then determine the amount to be recouped if recoupment is allowed by law.

(c) Recoupment for Contract Services

For legal representation rendered by contract attorneys working under contract with the IDS Office, the value of services, and the procedures for entry of any appropriate order or judgments, shall be determined in accordance with the terms of the contract if recoupment is required by law.

(d) Outside Compensation Prohibited

Once counsel has been appointed to represent a juvenile in a case subject to this part, counsel shall not accept any fees for the representation other than that awarded by the IDS

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Director. If a third party contributes funds to non-counsel services, counsel shall place the funds in trust and account to the third party and the IDS Director about the use of the funds.

Part 5B
Conditions of Appointment

(a) Requirements

The IDS Director may set additional conditions of appointment, including requiring attorneys appointed under this subpart to:

i. Consult with the IDS Director or his/her designee at regular intervals during the pendency of the representation, as required;
ii. Attend training and/or continuing legal education in the area of juvenile representation;
iii. Follow the procedures required in ~~Part 3~~ Part 5C of these rules concerning appointment and compensation of experts, and other expenses of representation; and
iv. Meet with the IDS Director or his/her designee following a verdict or plea in the case and prior to final payment of counsel fees to review the course of representation.

(b) Substitution of Counsel

For good cause, the IDS Director may request *ex parte* that a judge of a court of competent jurisdiction replace an attorney previously appointed with new counsel selected by the IDS Director.

(c) Provisional Appointment of Counsel

Upon learning that a defendant has been charged with a capital offense, the IDS Director may immediately appoint a lawyer on a provisional basis. If the defendant has not had a first appearance in court, the IDS Director may authorize provisional counsel to attend the defendant's first appearance. Provisional counsel is authorized to take steps to protect the defendant's rights pending appointment of trial counsel by the IDS Director, but the IDS Director may impose limitations on the scope of services to be provided by provisional counsel.

(d) Appointment of the Office of Appellate Defender by the Court for Litigation of Extraordinary Writ in Appellate Division Prior to Entry of Final Judgment in Trial Division

The trial court may appoint the Office of Appellate Defender to represent a juvenile charged with first degree murder for the purpose of preparing, filing, and litigating a petition for writ of certiorari or other extraordinary writ in the Appellate Division prior to final entry of judgment in the Trial Division. If appointed for this purpose, the Office of Appellate Defender or counsel appointed by the Appellate Defender pursuant to paragraph 2B.2(c), below, shall file the petition only if it will present a potentially meritorious issue for review.

Part 5C

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Appointment and Compensation of Experts and Payment of Other Expenses Related to Legal Representation in Juvenile First Degree Murder Cases

(a) Initial Application

Defense counsel shall make application to the IDS Director for authorization to retain experts or for other substantial expenses necessary to the defense of the juvenile before applying to a court for such authorization, and before incurring a financial obligation for which defense counsel will apply to the IDS Director for payment by the IDS Office. The application shall be in writing, unless exceptional or extraordinary circumstances necessitate an oral motion. Defense counsel will be required to make at least as specific an application to retain experts as would be required by a fair but exacting trial judge applying N.C.G.S. §7A-450(a) and *Ake v. Oklahoma* and its progeny. the IDS Director may require counsel to make a more particularized application before approving or disapproving the application.

Authority: N.C.G.S.§7A-450(b); 7A-454; 7A-498.1(1); 7A-498.3(a), (c), (d); 7A-489.5(c)(6), (f)

Commentary

Routine expenses, such as copies, are not substantial expenses within the meaning of this rule. Counsel can resolve any questions about whether an expense requires prior approval of the Juvenile Defender by communication with the Juvenile Defender by telephone or email.

Ordinarily, counsel should submit to the Juvenile Defender a written application for expert funding. However, in exceptional or extraordinary circumstances, counsel may apply for expert funding by telephone or email.

(b) Confidentiality of Application

the IDS Director will maintain the application in a confidential file open only to the IDS Director, the Office of the Juvenile Defender, and the defense team.

Authority: N.C.G.S.§7A-498.3(a), (c); 7A-489.5(c)(6), (f)

(c) Disapproval of Application

If the IDS Director the application, timely written notice of disapproval of the application will be delivered to counsel. The IDS Director or his/her designee will maintain the notice of disapproval in a confidential file open only to the IDS Director, the Office of the Juvenile Defender, and the defense team.

Authority: N.C.G.S.§7A-498.3(a), (c), (d); 7A-489.5(c)(6), (f)

(d) Application to Court

Defense counsel may apply to a court for appointment of experts or for other expenses following disapproval by the IDS Director, but before incurring a financial obligation for which defense counsel will apply for payment by the IDS Office. However, in no event may counsel apply to a court for a deviation from the standardized expert hourly rates following

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disapproval of a requested deviation by the IDS Director. If counsel applies to a court for appointment of experts or for other expenses, counsel may not ~~submit an application~~apply to a court that includes information not contained in the application made to the IDS Director unless exceptional or extraordinary circumstances necessitate submitting such new or additional information directly to a court. If counsel makes application to a court following the IDS Director disapproval, counsel shall notify the IDS Director in advance so that the IDS Director may take appropriate steps to ensure that all relevant information is before the court. Counsel shall also submit with its application to the court a complete copy of the written application made to the IDS Director. Counsel must immediately forward to the Juvenile Defender a complete copy of any court order approving funds previously disapproved by the IDS Director and a complete copy of the application made to the court. Such court order and application will be maintained in a confidential file open only to the IDS Director, the Office of the Juvenile Defender, and the defense team.

(e) Exclusions

Pursuant to Section 1(c) above, in districts with a public defender office where the Public Defender has elected to follow the "Regulation for Appointment of Counsel" for the Defender District, the court may approve fees for the service of expert witnesses, investigators, and others providing services related to legal representation in accordance with all applicable IDS rules and policies.

Authority: N.C.G.S.§7A--454; 7A-498.3(a), (c), (d); 7A-498.5(c)(6), (f)

Commentary

Subsection (d): If, after denial of an initial application to the IDS Director for appointment or compensation of experts or other supporting services, defense counsel discovers new or additional information that is relevant to such application, counsel ordinarily should submit a new application to the Juvenile Defender before applying to the court. Counsel may submit to the court an application that contains new or additional information only in exceptional or extraordinary circumstances.

Subsection (e): This subsection is to ensure conformity in process in public defender districts that elect to continue operations under "Regulation for Appointment of Counsel." Private Assigned Counsel appointed to represent a juvenile in a public defender district that has elected to continue operations should refer to "Part 1 Rules for the Continued Delivery of Services in Non-Capital Criminal and Non-Criminal Cases at the Trial Level" for guidance.

(e) Authority to Implement other Programs, Plans, and Contracts

Nothing in these rules shall prohibit appointment or compensation of otherwise qualified experts pursuant to programs, plans, or contracts that may be implemented from time to time to improve quality, efficiency, and economy where such programs, plans, or contracts are approved by the IDS Director.

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Authority: N.C.G.S.§7A-454; 7A-498.1(1), (3); 7A-498.3(a), (c); 7A-498.5(c)(6), (d), (f)

APPENDIX TO PART 2

(The following appendix sets eligibility standards for trial counsel in cases in which a juvenile, aged 13-17, has been charged with first degree murder.)

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