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

I. Applicability

A. Generally

These instructions are issued pursuant to Rules 1.5 and 1.8 of the Rules for the Continued Delivery of Services in Non-Capital and Non-Criminal Cases at the Trial Level (hereinafter "IDS Rules") in Johnston County. They apply to all non-capital criminal cases at the trial level, as well as per session probation violation and domestic violence probation violation cases in District Court, in which the provision of counsel is subject to the Indigent Defense Services Act of 2000 (G.S. 7A-498 through 7A-498.8) (hereinafter "IDS Act").

B. Exclusions

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

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

3. In case types that are not covered by these contractor appointment instructions, the appointment of counsel shall be governed by the Regulations for Appointment of Counsel in Judicial District 11 in Cases Under the Indigent Defense Services Act, available here.

C. Standard Terms and Conditions of Contract Incorporated

IDS' Standard Terms and Conditions of Contract, and any relevant appendices, are incorporated into these appointment instructions by reference. Those Terms and Conditions are available at www.ncids.org on the "MAC Contracts and Attachment" page.

II. Administration of Instructions and Lists

A. Administration of Instructions

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

2. The Clerk of Superior Court in each county shall keep a record of all counsel in the county eligible for appointment under these regulations as provided in Section IV. A. below, and a permanent record of all appointments made in the county.

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

B. Administration of Lists

1. Application

    a. Any attorney who wishes to have his or her name added to any list shall file an application with IDS using a form approved by IDS.

    b. By applying for placement on any list, an attorney consents to a confidential inquiry by IDS of any references listed in the request and others familiar with attorney's competence, for the purpose of determining whether the attorney fulfills the requirements for placement on the list(s). The attorney agrees the information obtained by IDS in conjunction with the application, including reference information, is confidential and will not be disclosed except as required by law.

2. Addition/ Removal of Attorneys on Lists in Each County

   a. IDS shall determine whether the attorney meets all of the applicable standards for placement on an applied for list. IDS shall act on each application in a timely manner and shall notify the applicant attorney in writing of the action taken with respect to his or her application with 60 days of its decision.

   b. IDS shall periodically review the number and nature of cases assigned to each contractor in a contract category to ensure that each contractor is being assigned an appropriate number of cases and will notify the Clerk of Superior Court and all contractors if assignment rates need to be adjusted.

   c. Voluntary Temporary Removal ("Pause"). An attorney who wishes to have his or her name temporarily removed from a roster, shall notify the Clerk or Public Defender and the Clerk or Public Defender shall remove the attorney's name from the roster. A temporary removal is not a termination of the contract. The Clerk shall add the attorney's name to the roster when requested to do so by the attorney. For purposes of this section, a temporary pause in assignments is one where the attorney expects to be off the list for seven (7) or fewer days.

   d. Voluntary Extended Removal. An attorney who wishes to have his or her name removed from a roster for more than seven (7) days, must notify the IDS Contracts Administrator and their Regional Defender.

   e. Voluntary Permanent Removal. An attorney who wishes to have his or her name permanently removed from a roster shall file a written request with IDS, and IDS shall remove the attorney's name from the roster and notify the court and any other interested parties. A permanent removal is a termination of the contract and an attorney who asks to be permanently removed from a roster must reapply for a new contract if he or she wishes to resume assignments. Voluntary permanent removal will not result in the attorney being automatically removed from cases to which he or she already has been appointed.

   f. Involuntary Removal/ Suspension. The Director may remove or suspend an attorney from a roster as allowed by Policy # 04.01.07, "Adverse Decision of Executive Director and Procedures for Review." Adverse Decision of Executive Director and Procedures for Review - Indigent Defense Services (ncids.org)

III. Determination of Entitlement to Counsel

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

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

IV. Appointment of Contract Counsel

A. Master Lists and Appointment Records

1. The Clerk of Superior Court shall maintain in his or her office master lists of attorneys who are under contract with IDS to handle cases appointed by the court. The Administrator shall prepare such master lists and provide them to the clerk. These master lists shall be made reasonably available to the public upon request. A contract attorney's name may appear multiple times in an Appointment List to balance caseloads, minimize the risk of excessive caseloads, and accommodate requests for leave.

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

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

4. If a contractor declines to accept new case or session assignments the Clerk of Superior Court should appoint the next available contractor on the master list and immediately notify the IDS Contracts Administrator.

B. Order of Appointments

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

   If no attorney on the appropriate list is available to take an appointment, and no qualified attorney consents to appointment, the judge should consult with the IDS director or her designee and, if IDS fails to arrange for counsel from any district within a reasonable time after such consultation, the judge may appoint any qualified attorney who is a member of the district bar. Counsel so appointed is entitled to compensation at the IDS-approved rate.

2. If the circumstances of a specific case require the appointment of counsel who does not appear on the appropriate master list of contractors on file with the Clerk of Superior Court, then the court may appoint alternate counsel from another county or district. The court should first attempt to appoint counsel from within the county or district who, after notice of possible appointment, consent to the appointment. The court may contact IDS for assistance in identifying a qualified attorney who is available and willing to accept the appointment.

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

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

b. If the court appoints a contractor who is not next in sequence on the list because that contractor is already representing the client, that appointment shall not count as a rotational appointment.

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

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

C. Notice

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

D. Multiple Counsel

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

brought against a former criminal defendant after disposition of unrelated, previous charges, there shall be no presumption that the contractor who represented the defendant on the previous charges should be appointed to represent that defendant on the new charges.

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

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

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

E. Unavailability of Contractor

1. If an attorney will be unavailable for new case assignments for a time period greater than seven (7) business days, the contractor shall submit written notification as soon as practicable to the Clerk of Superior Court not to assign new contract cases to that contractor during the specified time period of unavailability and immediately notify the Contracts Administrator in writing. For purposes of notifying the Contracts Administrator, email shall suffice.

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

session that is required by the contract, the contractor shall immediately notify IDS to arrange for alternative coverage.

V. Withdrawal of Contract Counsel

1. Except for the situation described in subsection V.2., below, a contractor may withdraw from an assigned contract case only with the court's approval. Contractors shall promptly file motions to withdraw due to conflicts of interest or any other reason requiring withdrawal from a case. If the contract with IDS is with the individual attorney and the court grants the motion to withdraw, the case shall be reassigned to the next contractor on the applicable master list who is available and able to accept the case assignment. If the contract with IDS is with a law firm or non-profit organization, rather than with the individual attorney, the case should be reassigned to the replacement attorney designated by the law firm or non-profit to the extent practicable.

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

3. After contract expiration or termination, contractors should not be permitted to withdraw from pending contract cases unless the court is fully satisfied that a conflict of interest exists or that other compelling circumstances justify withdrawal.

VI. Contractor Lists

A. Provision of Lists

The Administrator shall provide to the Clerk of Superior Court the master lists of contractors subject to appointment in the county and shall update the lists whenever contracts are terminated or expire and whenever new contracts are executed. The current master lists are attached to these instructions as Appendix A and are available at www.ncids.org on the "Manage Assigned Counsel" page.

B. Non-Capital Criminal Lists

Contractor List 1. Adult Misdemeanor Cases

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

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

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

Contractor List 2. Adult Low-Level Felony Cases

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

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

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

Contractor List 3. Post-Release Supervision and Parole Commission Cases

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

- Contempt case before the Post-Release Supervision and Parole Commission.
- Post-release supervision and parole preliminary revocation hearing where the hearing officer has found an entitlement to counsel; or
- Post-release supervision and parole revocation hearings where the Post-Release Supervision and Parole Commission has found an entitlement to counsel.

Contractor List 4. Adult High-Level Felony Cases

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

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

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

on the Class 3 misdemeanor charge. Representation in an adult high-level felony case may be in District or Superior Court.

C. Per Session Lists

Contractor List 5A. Per Session Probation Violation Court

Contractors on this list will represent defendants charged with probation violations in District Court when those case types are handled on a per session basis.

Contractor List 5B. Per Session Domestic Violence Probation Violation Court

Contractors on this list will represent defendants charged with domestic violence probation violations in District Court when those case types are handled on a per session basis.

VII. Performance Standards

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

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

VIII. Recoupment in Contract Cases

1. Because contractors are paid a monthly, contractors shall not submit fee applications in cases in which recoupment of attorney fees is not authorized.

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

3. On all applications that are submitted for recoupment purposes, contractors shall identify the applicant as "IDS contract counsel," not "assigned counsel." The Clerk of Superior

Court shall ensure that any civil judgments that a court orders are docketed and that the recoupment applications are filed in the clerk's office. The clerk shall not forward recoupment applications to IDS Financial Services.

IX. Miscellaneous

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

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

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

X. Adoption and Certification

These instructions are approved and certified by the IDS Director, Mary S. Pollard, as a plan for the appointment of contractors in the covered indigent cases in Johnston County, North Carolina, effective February 16, 2023.

Appendix A
Frequently Asked Questions About IDS Contractor Appointments

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

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

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

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

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

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

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

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

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

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

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

7. What should the court do if cases arise that are not covered by the contractor lists in these instructions?
In case types that are not covered by the lists described in these instructions, the Public Defender or court should assign an assistant public defender or private counsel as described in the county's indigent appointment plan that was approved by IDS. If local actors have questions about whether a specific case is covered by these appointment instructions, they should contact the IDS Contracts Administrator.

Attachment A – Policy History

Policy Name:	INSTRUCTIONS FOR APPOINTMENT OF CONTRACT COUNSEL IN NON-CAPITAL CRIMINAL CASES IN JOHNSTON COUNTY UNDER THE INDIGENT DEFENSE SERVICES ACT
Policy Number:	05.02I.02
Custodian:	Contracts Administrator
Effective Date:	2023.02.17
Next Review Date:	2028.01.01, unless reviewed earlier
Location:	Instructions for Appointment of Contract Counsel by County or District - Indigent Defense Services (ncids.org)
Revision History	Instructions certified December 1, 2023; amended February 16, 2023.