

THE NORTH CAROLINA OFFICE OF INDIGENT DEFENSE SERVICES LONG TERM PLAN FOR FISCAL YEARS 2023-2030



IDS OFFICE OF INDIGENT
DEFENSE SERVICES
SAFEGUARDING JUSTICE

#SAFEGUARDINGJUSTICE

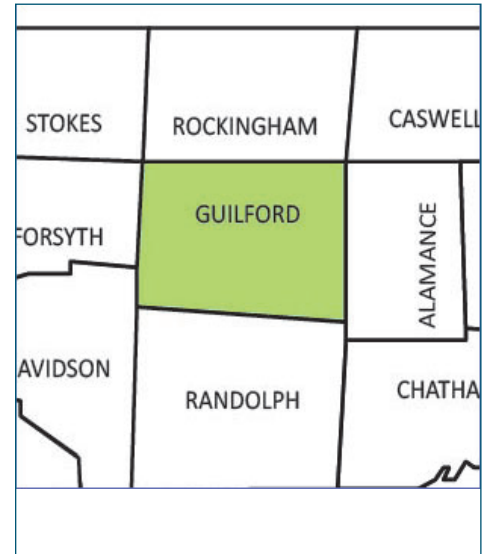
Introduction

The Future of Public Defense in North Carolina

Fifty years after North Carolina's first public defender office opened in Guilford County only 39 of our 100 counties have a public defenders' office. The remaining counties rely exclusively on court appointed attorneys from the local bar to represent people facing criminal charges or other deprivations of their fundamental liberties.

Shortages in qualified attorneys willing to accept court appointed cases are reaching crisis level in many judicial districts, especially rural districts. Overwhelming numbers of practicing

attorneys are reaching retirement age while, at the same time, the numbers of college graduates choosing law school/practice law as a profession is shrinking. Compounding the issue, depressed rates in court appointed cases have led many hardworking, experienced attorneys to remove their names from the rosters of court appointed counsel. North Carolina is at a tipping point where it soon may be unable to guarantee the constitutional right for people who have been charged with a crime to have access to counsel, regardless of ability to pay for services.



The solution is a statewide expansion of locally-run public defender offices supported by a network of fairly-paid local private assigned counsel (PAC) to handle conflict cases.



Supporting Evidence

Chief Justice Mark Martin convened an independent, multidisciplinary body in September 2015 to study and make recommendations for improving the administration of justice in North Carolina. The North Carolina Commission on the Administration of Law and Justice's (NCCALJ) members included leaders from all three branches of government, from business, from the legal profession, and from academia and the non-profit sector. As part of its work, staff spent hundreds of hours assessing the state of indigent defense and



made a comprehensive set of evidence-based recommendations to improve the system. In March 2017, after more than fifteen months of work, including a comprehensive review and multiple opportunities for public review, the Commission recommended expanding the public defender system statewide.

Citing empirical research, the Committee propounded that public defender offices have certain structural advantages that could lead to better outcomes for clients. Among the structural advantages the Committee cited:

- PD offices provide personnel and infrastructure to offer the oversight, supervision, and support of counsel both within the office and for private assigned counsel (PAC) that is required for an effective indigent defense delivery system;
- Efficiencies that can be obtained by using providers who devote all their efforts to indigent cases; and
- Public defender offices typically are in the best position to supply counsel to indigent persons in a timely manner.¹

In addition to these advantages, or perhaps because of them, PD offices often enjoy strong stakeholder support. In fact, judicial officials across the state have requested public defender offices; many are working actively with IDS to provide the legislature the information it needs to justify creating offices in the counties where they preside.

Alongside statewide expansion of public defender offices, a healthy indigent defense system will always require a strong and well-resourced network of private assigned counsel (PAC) to handle conflict cases. While public defender expansion will decrease PACs' crushing caseloads over time, IDS will continue to seek

more funding to maintain a robust roster of private assigned counsel. But for now, even if IDS were able to pay the current federal rate for indigent criminal defense—which starts at \$152 an hour for misdemeanors—money alone cannot fix the statewide lawyer shortage. Expansion of the public defender system is the most pragmatic, cost-effective way to approach the growing indigent defense crisis and to start replenishing attorney deserts.

Since the NCCALJ report's publication in 2017, the number of attorneys taking indigent cases has declined steadily. IDS staff regularly field calls from judges throughout the state struggling to find qualified attorneys willing to take appointed cases. Meanwhile, private assigned counsel who are still willing to serve on indigent rosters struggle under unmanageable caseloads. In 2020, at the request of then President Colon Willoughby, the North Carolina State Bar established a subcommittee to study the compensation of court-appointed counsel. Over 1,200 attorneys who either currently represent indigent defendants or who had in the past responded to a survey the committee designed to assess whether excessive caseloads and reduced compensation rates were preventing PAC attorneys from fulfilling their ethical obligations to provide competent and effective representation to their clients.

The committee found that an alarming number

¹ Appendix D, NCCALJ Final Report, pp. 31-33.



Why PD Offices are the way to go

In a July 2022 presentation to State Bar councilors, NC State Bar Deputy Counsel Brian Oten shared findings that 48 of North Carolina's 100 counties qualify as legal deserts. A legal desert is defined as an area where there is less than one lawyer for every 1,000 residents. Almost half of all active North Carolina lawyers are in two counties: Wake and Mecklenburg. North Carolina's five largest counties – Wake, Mecklenburg, Guilford, Durham, and Forsyth – account for 63% of active lawyers.² It is notable that these findings include all attorneys, not just those who take trial work. Finding private attorneys in legal deserts willing to take indigent defense cases at the current rates, which most attorneys consider well below market, is a critical challenge for the indigent defense system.

One approach to shrinking the 1 to 1,000 ratio is to create jobs that will attract and retain attorneys. Like a district attorney's office, a public defender office is an attractive workplace for lawyers who are drawn to public service or trial work. Attorneys who are state employed can work full-time on their cases without the added stress associated with operating a private business at the same time. Public defender offices also provide training, mentorship, and stable salaries with excellent benefits.

of attorney respondents reported that, due to the size of their caseloads, they were unable to perform critical tasks with reasonable effectiveness. Survey responses also indicated that:

- experienced attorneys were choosing to remove themselves from local court-appointed lists, contributing to the workloads of those attorneys remaining on the lists and leaving a less-experienced pool of attorneys to handle complex cases; and
- "low compensation rates" were a contributing factor to leave for a significant percentage of attorneys.

The report, which the State Bar Executive Committee adopted in October 2021, concluded that excessive caseloads might be "hindering the ability of PAC to effectively represent their indigent clients."

In the next section, our plan will describe efforts by the N.C. Office of Indigent Defense Services to supplement previous findings and justify the need for statewide expansion of public defender offices.

² Presentation to July 2022 Quarterly Meeting of the State Bar by Deputy Counsel Brian Oten

The Methodology

Step 1 — Assessing the Need

In indigent defense, a labor shortage exists wherever demand for PAC exceeds the number of qualified and willing PAC attorneys in each district. Anecdotal evidence of this labor shortage includes the increasing number of judicial officials and local bars that support public defender expansion and the increasingly frequent requests for help finding attorneys on a case-by-case basis. IDS and state bar data confirm the anecdotal evidence. To prepare this plan, IDS researchers conducted extensive research into attorney availability. Researchers examined labor supply, focusing specifically on PAC labor supply and labor shortages—e.g., the difference between the services needed and the services provided.

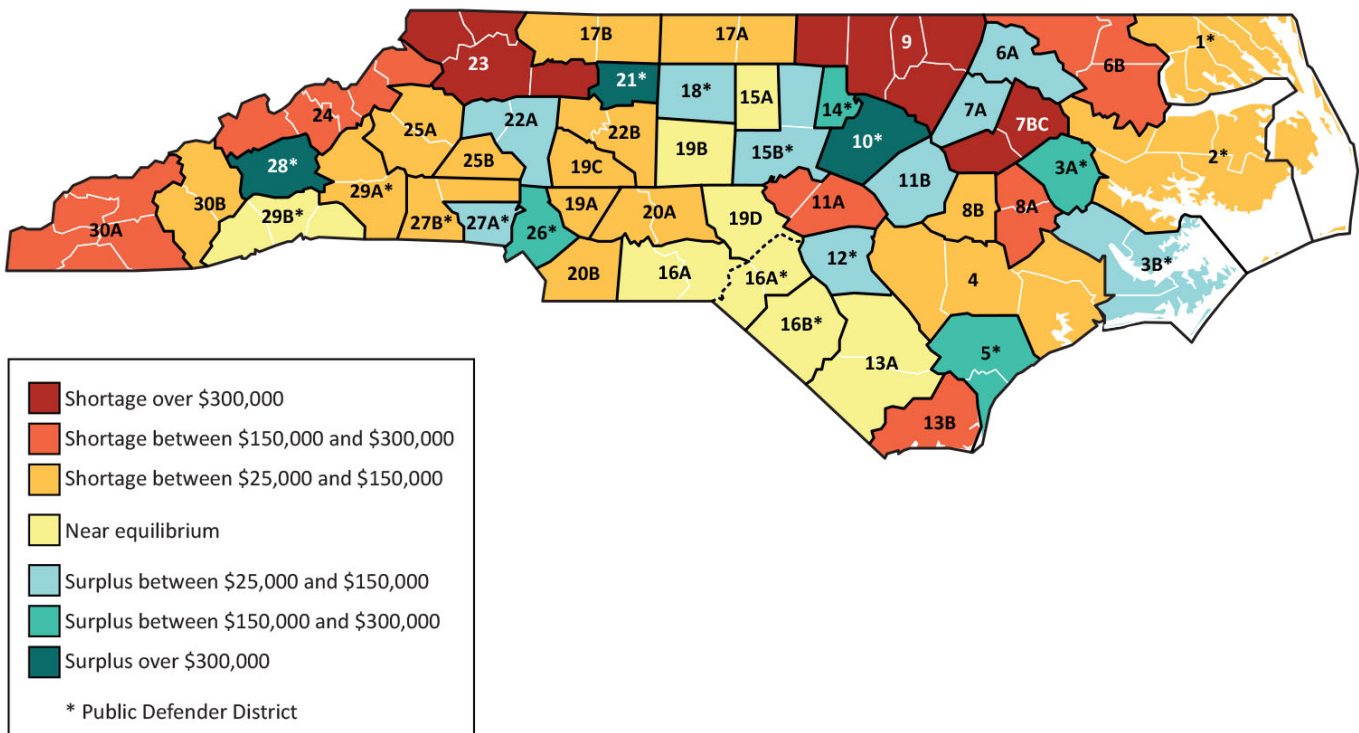
What the data have to say

IDS researchers used data from IDS Financial Services and the North Carolina State Bar to quantify labor shortages in North Carolina

attorney deserts. Researchers first looked at the cost of indigent defense representation using payments to PAC attorneys. Every payment to a PAC attorney tells IDS where it was (the county of the charge) and how much it took to get the work done (hours billed per case). Researchers then matched the billing records with State Bar records to determine the name and address of the attorney who billed for the work. Attorneys are considered as “based” in the county or district that includes the address the attorney has registered with the State Bar. Each district’s need was calculated using all payments for indigent defense services within the district. Then, each district’s output was calculated as the total of all payments to attorneys who are based within the district. The difference between these values—need minus output—is how IDS quantifies a district’s shortage or surplus of PAC labor.

To meet demand, IDS must pay to import labor from out of district, most often PAC from urban

SHORTAGES AND SURPLUSES OF PAC LABOR



SAMPLE PAC SHORATAGE

6B

***Superior Court Judicial District 6B
(Bertie, Hertford & Northampton Counties)
requires \$380,000 in
defense services annually.***

***Attorneys who are based within the district
provide \$120,000 of services each year.
Therefore, the district depends on outside
attorneys to fill the \$260,000 shortage. For
6B, many of these attorneys come from
Districts 6A (Haifax) and 14 (Durham).***

***This research does not support a
conclusion that any area of the state has
sufficient labor to fill public defense needs.***

***As outlined in the State Bar compensation
survey, even where districts can staff their
indigent rosters without significant outside
assistance, PAC attorneys are overworked
and sometimes overwhelmed. Counties
like Wake, Forsyth, and Buncombe may
export labor, but the chief public defenders
in those counties still struggle to find
sufficient PAC to handle conflict cases,
especially in felony cases.***

***This analysis is most useful as
a triage plan.***

districts with PD offices. The fact that attorneys must travel out of district to handle cases in neighboring counties creates additional costs to the system. IDS must pay mileage cost to overworked PAC, who must spend time traveling instead of doing substantive work on cases. Courts are inefficient and justice may be delayed when the court must continue a hearing just because the defense attorney is working in another county. Data shows further, counties that are "importing" high volumes of attorney labor are more likely to have situations that result in less than desirable outcomes for clients. Lawyers just don't have the capacity to give court-appointed clients the time and attention they deserve, since their bottom line depends on billable hours.

Per the map on the previous page, over half of the districts (25 of 48) have a shortage of more than \$25,000. The greatest attorney shortage is in District 9, which requires \$460,000 of outside labor annually. A third of the districts (16) have a surplus of more than \$25,000. The largest of these is District 10, which provides \$660,000 of labor to other districts. Only six districts break even. That is, they meet or come close to meeting their own needs.



Step 2 — Assessing Labor Requirements for Expansion

Staff are a critical component of a public defender office. Having Support staff, such as experts, investigators, legal assistants, social workers, etc. can decrease costs and increase efficiency by ensuring that everyone in the office is working only on matters for which they have the skill and training. For example, in a properly staffed PD office, certain categories of staff enable the defense attorneys to focus on their clients and cases—not administrative tasks/duties like requesting records, etc. IDS has identified three staff categories, which are typical of an efficient office: Attorney Staff, Investigator Staff, and Support Staff.



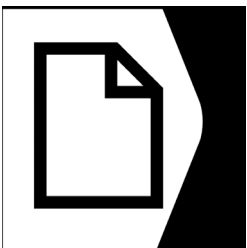
Attorney Staff:

Each office has a Chief Public Defender, responsible for staffing and supervising the office. The majority of current chiefs also do a significant amount of direct representation. Assistant Public Defenders (APDs) represent clients. IDS's expansion plan estimates the number of APDs hired by each office by dividing the number of hours needed to meet the district's need by 1,700 hours, which is the annual expectation of case-related work for one APD. The office may handle any type of work covered by the Indigent Defense Services Act. All offices handle adult criminal cases, but many also handle other types of cases such as parent defense and child support contempt.



Investigator Staff:

IDS allocates a minimum of one investigator per office. In addition, IDS uses historical case related data on investigator use in existing districts to determine whether an office needs additional investigators. These professionals/Investigators gather evidence, visit crime scenes, question witnesses, and perform other tasks vital trial preparation.



Support Staff:

Support staff include administrative assistants, legal assistants, and social workers. Following AOC promulgated guidelines, IDS calculates the total number of support staff by using a 2:1 ratio, or 2 attorneys to 1 support staff.

Step 3 — Proposing the Plan

IDS proposes expansion in three waves, with office openings staggered over the two-year budget terms. When assessing which districts go in which wave, IDS primarily relied on the needs identified in the labor shortage analysis. However, to equalize the cost and effort for each biennium, IDS also including some districts with less demonstrated need in each wave.



IDS also prioritized some districts where local support for a PD office is high or where we have identified a rapid growth in demand. Note that in some cases, IDS is recommending that the legislature create offices that follow district court rather than superior court boundaries. This is because following superior court boundaries in every case would lead to the creation of many

small offices, which often struggle to achieve the same efficiencies as larger offices.

Costs

The cost of expansion will be defrayed over time because of significant savings in the PAC fund as work is shifted to the PD office in a district.

The funds needed to create these new offices

Wave 1 | Biennium 2023-2025

District	Counties	Additional Staff	Annual PAC Savings	Additional Recurring Funds Needed
13B	Brunswick	Chief PD, 7 APDs, 5 Support	\$909,065	\$925,723
15A	Alamance	Chief PD, 7 APDs, 4 Support	\$767,146	\$702,953
19B	Randolph	Chief PD, 9 APDs, 6 Support	\$1,110,038	\$861,700
22A	Alexander and Iredell	Chief PD, 12 APDs, 7 Support	\$1,492,955	\$1,071,211
30A	Cherokee, Clay, Graham, Macon and Swain	Chief PD, 8 APDs, 5 Support	\$956,377	\$878,411
30B	Haywood and Jackson	Chief PD, 7 APDs, 5 Support	\$910,258	\$924,530
6	Halifax, Northampton, Bertie, Hertford	Chief PD, 11 APDs, 6 Support	\$1,316,325	\$1,020,102
7	Nash, Edgecombe, Wilson	Chief PD, 12 APDs, 7 Support	\$1,508,324	\$1,055,842
TOTAL		126 FTEs	\$8,970,488	\$7,440,471

Wave 2 | Biennium 2025-2027

District	Counties	Additional Staff	Annual PAC Savings	Additional Recurring Funds Needed
11A	Harnett and Lee	Chief PD, 8 APDs, 5 Support	\$1,018,422	\$816,366
11B	Johnston	Chief PD, 7 APDs, 4 Support	\$843,702	\$763,347
19C	Rowan	Chief PD, 9 APDs, 6 Support	\$1,169,252	\$802,486
20A	Montgomery and Stanly	Chief PD, 4 APDs, 3 Support	\$519,186	\$577,326
22B	Davidson and Davie	Chief PD, 11 APDs, 6 Support	\$1,339,533	\$996,894
24	Avery, Madison, Mitchell, Watauga, and Yancey	Chief PD, 7 APDs, 5 Support	\$910,296	\$696,752
4	Duplin, Jones, Onslow, and Sampson	Chief PD, 18 APDs, 9 Support	\$2,119,711	\$1,315,374
8	Wayne, Greene, Lenoir	Chief PD, 10 APDs, 6 Support	\$1,309,328	\$890,149
9	Franklin, Granville, Person, Vance and Warren	Chief PD, 9 APDs, 6 Support	\$1,018,422	\$816,366

Wave 3 | Biennium 2027-2029

District	Counties	Additional Staff	Annual PAC Savings	Additional Recurring Funds Needed
13A	Bladen and Columbus	Chief PD, 9 APDs, 5 Support	\$1,124,484	\$847,253
16A 19D	Anson, Richmond, and Scotland Hoke and Moore**	Chief PD, 16 APDs, 9 Support	\$1,847,551	\$1,000,170
17A	Caswell and Rockingham	Chief PD, 7 APDs, 5 Support	\$909,376	\$811,542
17B	Stokes and Surry	Chief PD, 7 APDs, 5 Support	\$884,462	\$836,457
19A	Cabarrus	Chief PD, 9 APDs, 5 Support	\$1,091,047	\$880,691
20B	Union	Chief PD, 11 APDs, 7 Support	\$1,345,400	\$1,104,896
23	Alleghany, Ashe, Wilkes, and Yadkin	Chief PD, 7 APDs, 5 Support	\$907,344	\$813,575
25A	Burke and Caldwell	Chief PD, 11 APDs, 7 Support	\$1,388,706	\$1,061,590
25B	Catawba	Chief PD, 9 APDs, 6 Support	\$1,126,214	\$959,393
TOTAL		145 FTEs	\$10,624,584	\$7,860,090

** 16A and 19D calculated together because of an existing office that operates partially in each district.

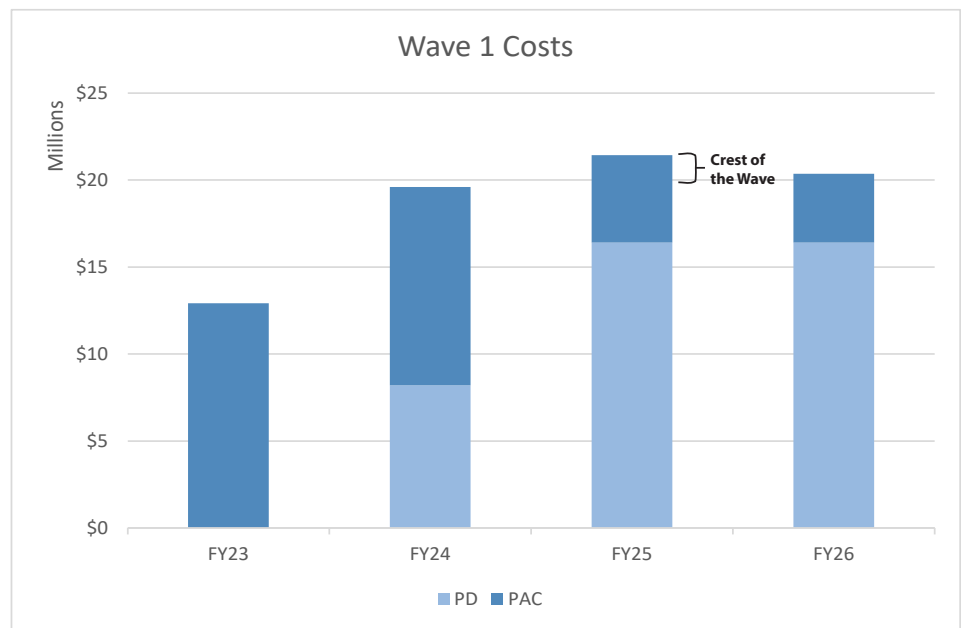
are between \$7.4 and \$7.9 million for each biennium; IDS requests \$10 million from the legislature in each biennium. The additional funds, between \$2.1 million and \$2.6 million in each two-year wave, will continue to shore up the PAC fund until the transfer of demand shifts from the PAC to the new PD offices. Thereafter, IDS will continue to use the funding to support PAC attorneys as essential partners in public defense.

It typically takes about a year for a new office to reach full staffing. It takes about the same amount of time for newly filed cases to begin offsetting cases that were assigned to PAC before the office opened. While PAC costs typically begin falling shortly after a new office opens as the bulk of the cases shift to the PD office there is a brief period during which IDS must pay the full PAC cost while also paying personnel and operating costs for new offices. The period where IDS continues to pay significant PAC costs while also bearing the cost of the new PD office looks somewhat like the crest of a wave, with the wave breaking and costs normalizing at about the one-year mark.

To keep the PAC fund solvent, IDS requests that the NCGA provided additional recurring funding in each biennium. IDS has managed to keep this fund solvent by managing shortfalls with nonrecurring funds that remained unspent largely due to depressed demand during the Covid-19 pandemic. This limited resource is not expected to last much longer, especially given both NCAOC and IDS data suggest

that demand is rebounding.

Shortfalls, which were frequent throughout the 2010s, are particularly damaging to the system because they not only require IDS withhold payment to PAC they also result in carry forward debt, which forces IDS to borrow the money from the new year's funding to pay for the last year's shortfall. By starting the new fiscal year by addressing



the last year's carryforward debt, the PAC fund was guaranteed to experience greater shortfalls earlier in the year. It took almost a decade for IDS to shrink the carryforward debt, and many highly skilled attorneys left the work during that time.

To keep the PAC fund steady and to avoid another protracted period of cascading carryforward debt, IDS's requests adequate recurring funds to address increased costs for both PAC and the PD offices during the implementation period and thereafter. Recurring funds will ensure the PAC fund solvency, thus allowing IDS to pay PAC for their work as they do it.

The Future for Private Assigned Counsel



Effective public defense systems include a healthy contingent of private assigned counsel. Public defender offices have had and will always have conflicts cases that need to be handled by attorneys beyond the PD offices.

A statewide network of offices can improve the public defender system's ability to provide conflict coverage for other offices, but it cannot eliminate the need for local PAC, especially in rural, hard-to-reach areas and in case types with high conflict rates, like parent defense cases.

While recommending the expansion of public defender offices statewide, the NCCALJ report also cautioned that the system would continue to need a large pool of strong, well-resourced, well-trained PAC attorneys. Because it has been difficult historically for the local bars to provide sufficient support and supervision to PAC, the report recommended the use of local PAC supervisors who would ensure implementation of IDS's workload, training, and performance

PAC Hourly Rates: Then and Now

PAC rates were generally static when IDS was created, and the IDS Commission was formed; they remained so for many years before a cut around 2012. An increase in appropriations from the legislature in 2022 enabled the IDS

standards and who could provide resources and support to PAC. To meet this recommendation, IDS plans to expand our Regional Defender program from two attorneys to four. Regional Defenders currently support 18 counties by providing case consultations, resources, assistance with complex discovery, taking court appointed work when there are conflicts of interest, and more.

In addition to providing enhanced oversight, IDS is working also to replace the archaic and decentralized model of fee application submissions with a modern system that will allow it to audit invoices and eliminate duplicate or erroneous payments.

Public defender offices seem more expensive on their face than PAC, but this is because we are comparing unsustainably low PAC rates—which we are being paid currently—with the price tag of expanding from 19 offices into a system of public defender offices that covers 100 counties instead of only 39.

Commission to raise PAC rates then. However, the current rate in district court still is \$10 less per hour than it was back in 2011. Accordingly, to recruit and retain sufficient private counsel, IDS will also seek sufficient appropriations/look for

ways to restore rates (at minimum) to the 2011 level.

As the NCCALJ report noted, “In assessing economic feasibility, reasonable PAC compensation rates should be used. Using the current unsustainably low rates in such an analysis is unlikely to ever make creation of a new single district public defender office appear cost

effective or cost neutral.”³ In order to provide the NCGA with accurate numbers to assess budgetary impact, the cost analyses used by the IDS Research Department in developing this proposal used the actual current rates. However, if IDS used the \$75 rate that was in place in 2011, then, even without adjusting for inflation, PD expansion would be more cost-efficient than relying upon PAC.

3 Appendix D, NCCALJ Final Report, p. 32.

Forecasts and Opportunities

Although IDS estimates that expanding public defender offices statewide will add a recurring \$30 million annually to our budget, the additional cost, while significant, will likely benefit taxpayers in other ways. The availability of public defenders for quick case assignments will greatly contribute to a more efficient court system. When cases move through the courts more quickly, people charged with crimes spend less time in county jails. This could generate additional savings for county governments. Costs for public defender offices are more predictable than costs for private assigned counsel. On the one hand operation costs (overhead, salaries, and benefits) for PD offices are more easily forecast, which makes planning and budgeting for offices simpler and more straightforward. PAC costs, on the other hand, are much more difficult to predict, due to the challenges that come with never being certain how many fee applications may need to be processed in any given week, month, and fiscal year.

IDS has made every effort to provide a thorough and comprehensive cost analysis for policymakers to consider. Some factors are unpredictable and outside of the control of IDS. For example, recent



trends could reverse and an increase in poverty or an increase in court filings could lead to an increase in demand on the IDS budget. Legislative or judicial action could require IDS to provide counsel in areas it does not currently fund such as first appearance representation. Alternatively, legislative action recodifying certain Class 3 misdemeanors such as non-impaired driving while license revoke as infraction would greatly reduce demand. It is also possible reductions in poverty, in court filings, or in the number of criminal offenses will reduce demand.

Oversight and Accountability

Public Defender expansion is an ambitious project that is designed to improve indigent defense services across the State and increase public defense efficiency. To ensure that it meets these goals, IDS researchers intend to evaluate the PD expansion annually at both the state and district levels. IDS will collect data on an ongoing basis to evaluate whether the offices are successful at improving case outcomes including client wait times, recidivism rates, and spending efficiency. It will also look at workloads and case disposition times. The benefit of this regular periodic evaluation of the PD expansion is that it allows IDS to adjust as necessary.

Accountability is critical to any system's ability to regulate itself, and IDS intends to ask for some Commission involvement in the Chief Public Defender retention process. IDS supports local control over the Chief PD selection decision; however, under current law the IDS Commission has no ability to remove an underperforming chief public defender.

As noted by the NCCALJ report, defender independence is a critical component of a constitutionally effective system, and "authority

4 Appendix D to NCCALJ report, p.16.



to remove or disqualify counsel from performing indigent defense services should not lie with the judge, except in cases where removal is required by law or pursuant to the court's inherent authority to discipline counsel." ⁴ This independence is especially important for the Chief Public Defender in a district. Retention decisions made by the IDS Commission as opposed to the judiciary, would ensure good chiefs are protected and ineffective chiefs could be justifiably removed and replaced.

IDS intends to seek a legislative change to give the Commission the authority to remove a chief public defender for cause and the authority to retain a chief public defender for re-appointment at the expiration of his or her initial four-year term.

Additional Considerations

Some costs would be borne by the Administrative Office of the Courts (AOC), which provides administrative support to IDS. Based on interviews with AOC IT and HR executives, AOC would only need six additional FTE to administer the increased IT needs, procurement needs, and human resources needs of a statewide system.

Still, other costs will be borne by the counties. Under North Carolina's unified court system, counties are responsible for housing and facilities

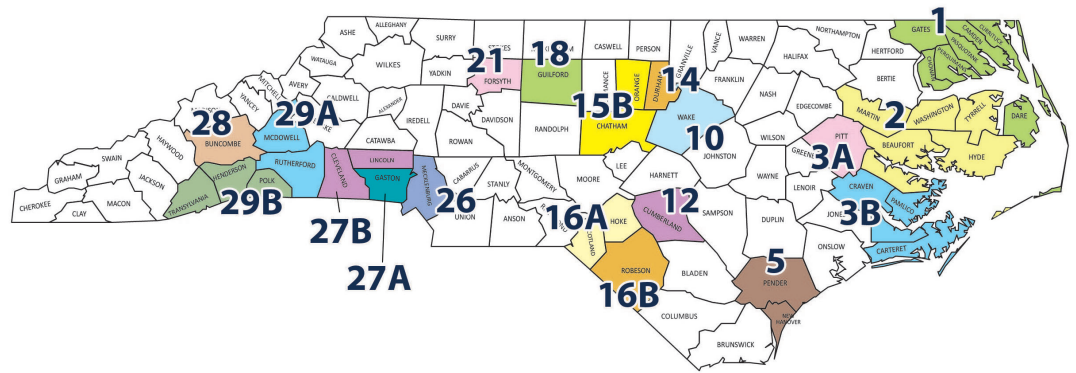
for public defender offices just as they house district attorney offices. An additional benefit of having a public defender office in a district include quicker release from jail for pretrial defendants, which would have a direct positive effect on county budgets.

Clients will also benefit from indirect results, including avoiding the collateral costs of wrongful convictions, improper sentences, and slower reentry into a society of taxpayers.

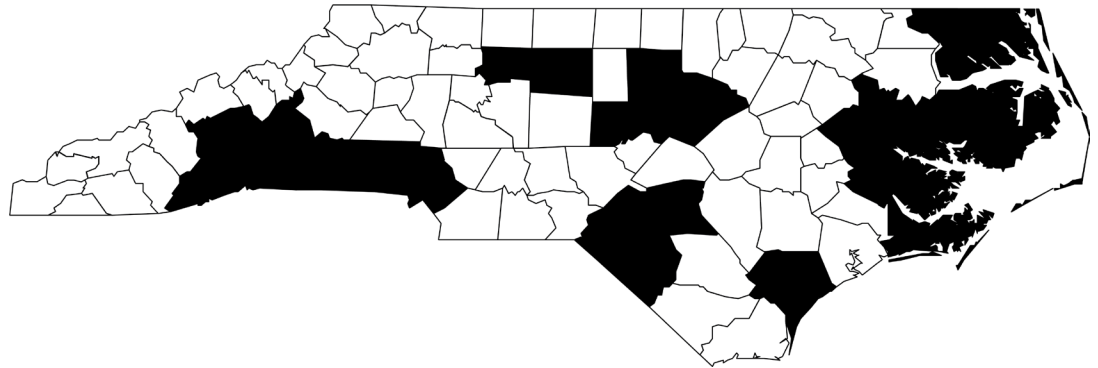
CONCLUSION

The future of public defense in North Carolina involves a statewide expansion of locally run public defender offices supported by a network of fairly paid, local private assigned counsel (PAC) to handle conflict cases. This, along with nudges toward legislators for some specific policy / proposed legislative changes will launch a new era for IDS and the IDS Commission. As we make a case for expansion, we still acknowledge that public defender districts will always require a healthy private bar to handle conflict cases. But plentiful and properly staffed PD offices will help alleviate the current crushing workloads on the private bar.⁵ And we can more fully and effectively ensure that people in North Carolina who are charged with a crime are guaranteed quality representation under the Sixth Amendment, regardless of ability to pay.

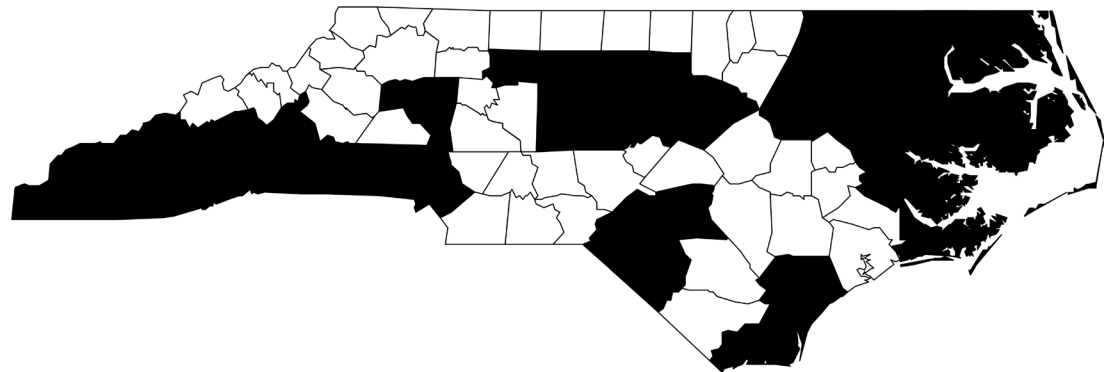
Current Defender Districts With Public Defender Offices in Place



 = Total Areas Currently Covered



 = Total Areas Covered after the Proposed Wave 1



⁵ A relative handful of districts might someday support a state-supported conflict defender office; IDS would propose that in the future should that become economically efficient. Final Report, p. 32. districts might someday support a state-supported conflict defender office; IDS would propose that in the future should that become economically efficient.

[Read the NCCALJ Final Report](#)



