

PUBLIC DEFENDER EXPANSION

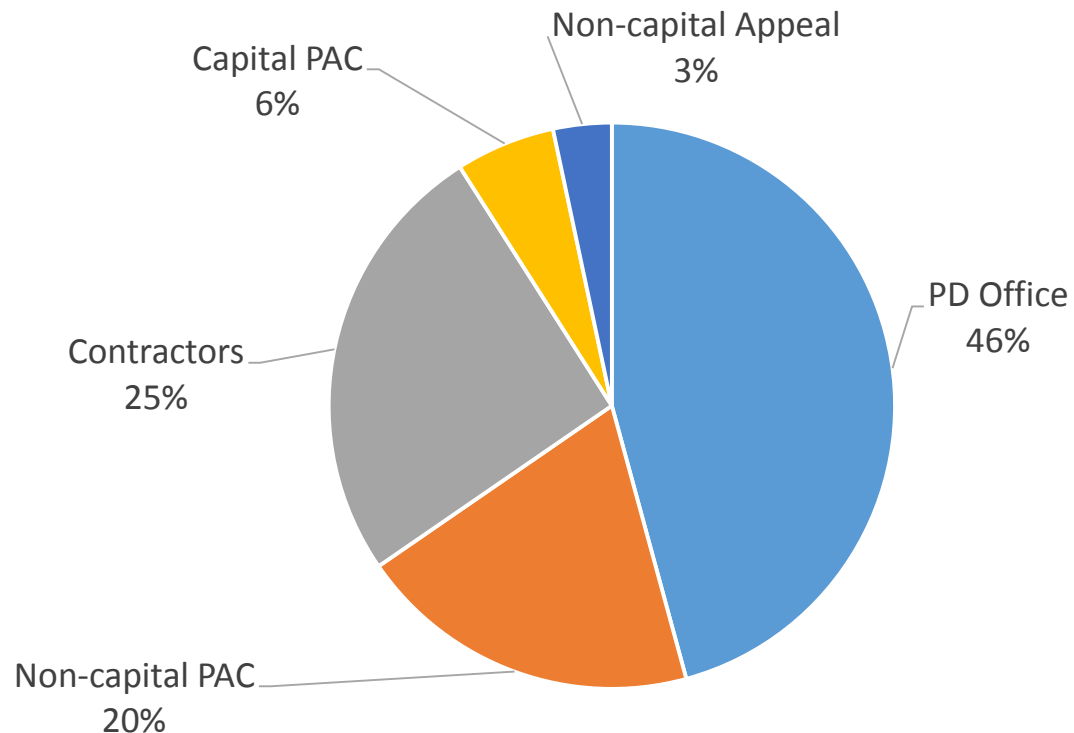
IDS PRESENTATION TO HOUSE COMMITTEE ON
JUDICIAL EFFICIENCY AND EFFECTIVE ADMINISTRATION OF JUSTICE

February 20, 2014

Healthy Systems Have a Mix of Indigent Service Delivery Options

- The American Bar Association recommends that indigent defense programs utilize a mix of service delivery systems
- A mix provides coverage for conflicts
 - PD offices can cover each others' conflicts when practical, pursuant to G.S. 7A-498.7(f1), but IDS can envision only a few situations where that will be truly practical—e.g., serious cases where offices are close in proximity
 - Private assigned counsel (PAC) or contractors can cover conflicts to the extent there are enough of them to go around
- A mix ensures against overload
 - PD offices can assign cases to PAC or contractors when they reach overload, and PAC/contractors can likewise avoid assignments when they reach their capacities
- Each delivery group has strengths that complement and fill in gaps of other groups
 - PD offices and PAC/contractors rely on each other as resources

Example: FY14 Year-to-Date Wake County Spending by Type of Delivery System*

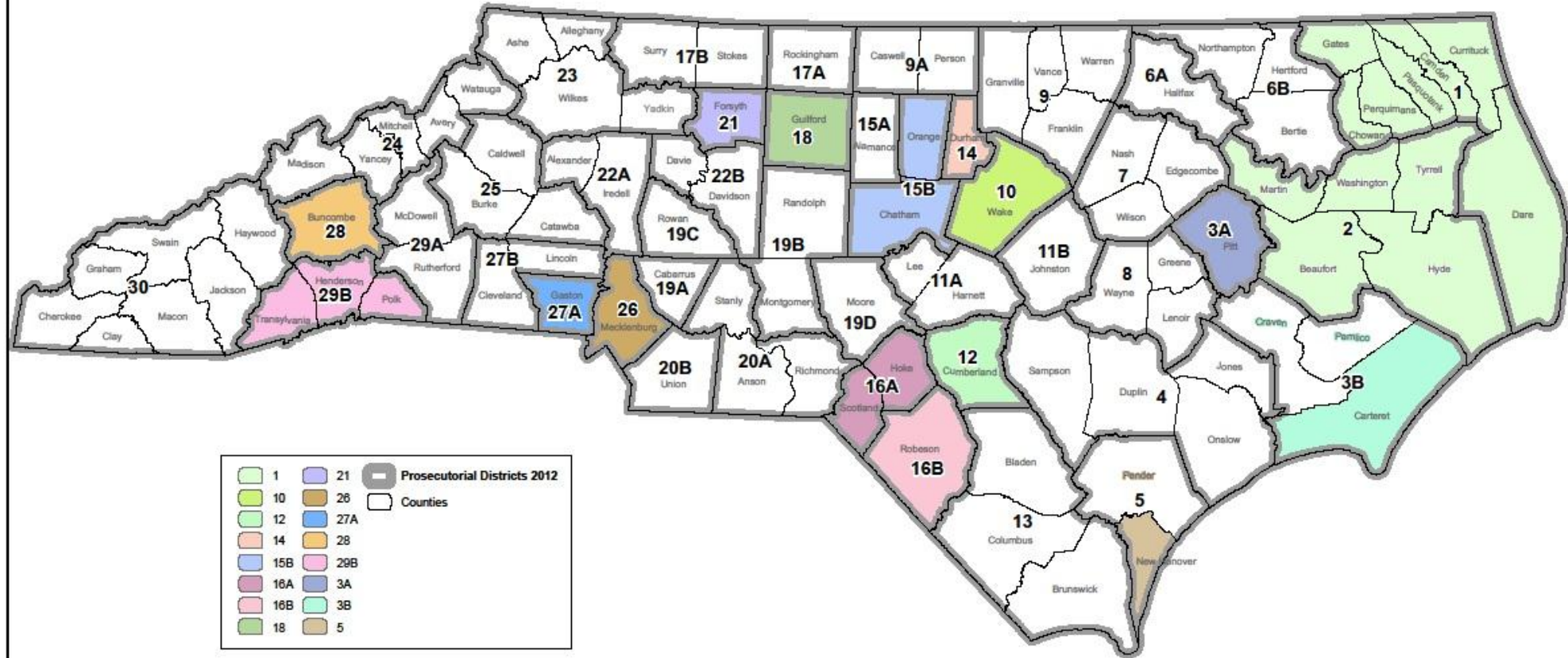


*Additional IDS work in Wake County FY14 YTD: Office of Capital Defender—1 pending capital case; Office of Special Counsel—3,861 civil commitment dispositions; Office of Appellate Defender—12 closed appeals

Authority and Reasons for PD Expansion

- G.S. 7A-498.7(a) provides, "After notice to, and consultation with, the affected district bar, senior resident superior court judge, and chief district court judge, the Commission on Indigent Defense Services may recommend to the General Assembly that a district or regional public defender office be established. A legislative act is required in order to establish a new office or to abolish an existing office."
- Additionally, S.L.2013-360, Section 18A.2, allows IDS to use up to \$1.25 million in the current biennium to expand existing offices, create new offices, or establish regional public defender offices notwithstanding G.S. 7A-498.7
- Offices have been established in some districts where it would be cost-effective compared to PAC to do so and in others where the local private bar has been unable to handle the caseload in a district

Prosecutorial Districts with Public Defender Offices



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Other Statutes that Affect Expansion

- Where district courts have been established, the counties are required by G.S. 7A-302 to provide office space for “related judicial facilities,” which is specified in G.S. 7A-304(a)(2) to include PD offices
 - However, the statutes are silent as to apportionment of costs in multi-county districts in which all counties do not provide facilities, and this has been the subject of dispute in Judicial Districts 1 and 2
- Appointment authority for chief public defenders was returned to senior resident superior court judges in a recent revision to G.S. 7A-498.7(b)
 - IDS appointment authority ensured the independence of the PD offices and increased accountability to IDS
 - Judicial appointment authority has the potential to cause problems in multi-district offices where two or more judges could be responsible for the appointment decision

Financial Considerations

- IDS must make an up-front outlay, including the cost of the salary of the Chief PD, when creating a new PD office
- This is a net new cost until the office builds up a full caseload and begins disposing of cases
- The cost of a new Chief PD and start-up equipment for an office is around \$200,000 in the first year before adding any other staff
- Travel and connectivity costs vary and depend on office locations and are generally higher in rural areas

Financial Considerations

- IDS has experienced significant budget shortfalls for the past 4 fiscal years and is projected to have shortfalls in FY14 and FY15
- Allocating funds to PD expansion means diverting them from paying PAC or contractors
- In response to budget cuts, PAC and contract rates have been set at extremely low levels since 2011, so current PAC costs are artificially below current PD costs

BUT...

PAC/Contractor Rates are Unsustainable

- IDS's current PAC hourly rates are:
 - \$55 for district court
 - \$60 for most superior court
 - \$70 for high-level felonies
 - \$75/\$85 for capital cases, depending on whether the case is declared capital
- Contract amounts are calculated so that contractors will be cost-effective versus PAC
- It is estimated that the hourly overhead to run many private law offices exceeds the district court rate and, depending on the office, may exceed the other rates
- IDS's previous rates of \$75 an hour for non-capital work and \$85/\$95 for potentially capital work are more likely to retain quality, experienced counsel on the PAC rosters and as contractors

Strengths and Challenges of PD Offices

Strengths:

- Institutional actor to work on system issues
- Efficiency in handling cases
 - Larger caseloads, increased expertise and specialization, and ready availability of counsel to meet court schedules result in less time spent per case
 - Cost savings for courts and for counties, which are better able to control their jail populations
- Supervision, training, and development of attorneys to improve quality of representation
- Laboratories for experimentation in ways to improve outcomes—e.g., job banks for clients; covering first appearance court
- Largely predictable costs
- Trained investigators and other legal assistance in-house

Challenges:

- Initial cost outlay for IDS and counties
- Retention of qualified, experienced attorneys and staff absent salary increases
- Decreased cost-effectiveness in areas with low volumes of work
- Overhead costs of Chief PD's salary, support staff, and resources
- Without IDS appointment authority, decreased independence from judiciary and accountability to IDS

Strengths and Challenges of Contractors

Strengths:

- Ability for IDS to set cost-effective contract amounts
- Largely predictable costs and some flexibility in dealing with changes in caseloads
- Quality control in selecting, monitoring, and training contractors
- Efficiency in handling cases due to larger caseloads
- Increased ability to address system issues
- Steady volume of cases and uniform monthly pay attract attorneys who may not be willing to handle a significant volume of cases as PAC
- Enhanced data collection

Challenges:

- Initial cost outlay
- Attracting and ascertaining best attorneys for contract types
- Retention of qualified, experienced attorneys given current contract rates
- Young attorneys may face difficulty in getting their feet in the door
- Risk to IDS in determining coverage needs where volume of work varies over time
- Large areas for regional defenders to oversee and additional administration for IDS
- Incentive for attorneys to short-cut cases when not paid by the hour

Strengths and Challenges of PAC

Strengths:

- Broad knowledge from a variety of other practice areas
- Flexibility
 - Crucial in areas with low volumes of work
 - Greater ability to deal with changes in law/procedure – e.g., Class 3 misdemeanor change
 - Good attorneys who do not want to work full time or to enter into contracts can contribute to the system
- Pay matches actual demand for types and complexity of cases
- Costs incurred at the end of cases
- Allows young attorneys to gain hands-on experience

Challenges:

- Little ability to ensure quality and to provide resources and training
- Inefficiency, particularly if local lists are too large for caseloads
- Unpredictability of costs
- Incentive for attorneys to overwork cases to increase hours
- Retention of qualified, experienced attorneys given current PAC rates and delays in payment caused by budget shortfalls
- Administrative burden on clerks and judges

Expansion of PD Offices – Judicial District 11 as an Example

- Based on an analysis of FY13 PAC data, IDS estimates that a new PD office in Judicial District 11 would require 14 attorneys, including the Chief PD, supported by seven support staff, including investigators
- One county would house the main office, and the other two counties would have smaller offices
- The office would handle adult criminal, capital, and juvenile delinquency cases
- At the more sustainable hourly rates prior to recent budget cuts, the office is projected to save around \$226,000
- At current PAC hourly rates, the office is projected to lose nearly \$230,000

Further PD Office Expansion

- Cost-effectiveness depends largely on factors such as the volume of cases in a district, its geography, and court schedules
- As in District 11, in some districts it would be cost-effective to create new PD offices at sustainable hourly PAC rates, while the same offices would lose money at the current rates

Alternative Option: Regional/Part-Time PD Offices

- Where there is not enough work in a single district to make a PD office cost-effective even compared with reasonable hourly rates, IDS could institute regional PD offices, as permitted by G.S. 7A-498.7(a) and S.L. 2013-360, Section 18A.2
- These offices could employ either full-time or part-time assistant PDs, who would be assigned PD cases in addition to their retained work
- Such part-time arrangements are used to good effect in other states, such as Minnesota
 - Part-time assistant PDs in Minnesota receive state benefits
 - Minnesota has a very loose conflict of interest rule, and part-time employees there are allowed to handle cases in which their co-workers' clients have conflicts of interest, such as those involving co-defendants

Challenges and Legislative Issues with Regional/Part-Time Model

- Supervision might be difficult where regional chief PDs would have to cover large areas, and oversight would be particularly necessary to ensure that part-time PDs devote sufficient time to their PD work
- The risk of client conflicts increases with a combination of retained and appointed practices
- G.S. 84-2, which prohibits chief and assistant public defenders, among other judicial officials, from engaging in the private practice of law or be subject to Class 3 misdemeanor charges, would complicate instituting any part-time arrangement and would need to be amended
- Limitations in state law and Judicial Branch policy might deter potential part-time employees
 - Part-time employees are not eligible for State Retirement under G.S. 135-1
 - While part-time employees working 30 or more hours per week are eligible for State Health Plan benefits, employees working 20-30 hours per week can participate in the State Health Plan but must pay the full cost
- Supplying equipment, staff, and infrastructure needed for office locations might prove cost-prohibitive

Challenges and Legislative Issues with Any PD Office Expansion

- County responsibilities for office facilities under G.S. 7A-302 would need to be clarified
- Returning appointment authority to IDS would ensure the offices' independence and accountability
- IDS would need additional funds to start up the offices