



STATE OF NORTH CAROLINA

PERFORMANCE AUDIT

OFFICE OF INDIGENT DEFENSE SERVICES

ASSIGNMENT AND PAYMENT OF PRIVATE COUNSEL

OCTOBER 2014

OFFICE OF THE STATE AUDITOR

BETH A. WOOD, CPA

STATE AUDITOR

EXECUTIVE SUMMARY

PURPOSE

This audit determines if the Office of Indigent Defense Services (IDS) correctly assigns the number of attorneys and pays assigned counsel the correct rates for capital and non-capital murder cases. A capital case is a murder case in which the defendant can potentially be punished by execution.

BACKGROUND

IDS assigns counsel for individuals charged with a crime who cannot afford their own attorneys. When public defenders are not available, IDS appoints an attorney from an approved list of available attorneys and pays them based on published rate schedules.

For cases with a charge of first- or undesignated degree murder that could lead to the death penalty, IDS pays the capital rate (currently \$85 an hour) until the case is declared to be non-capital by a judge or the district attorney indicates the case will not proceed capitally.

KEY FINDINGS

- Based on its policy, IDS assigned the correct number of attorneys and paid the correct rates for capital and non-capital murder cases.
- Based on IDS policy, the assignment of a second attorney was justified in 100% of the cases reviewed.
- Based on its policy, IDS paid attorneys the correct rate 99.6% of the time.

KEY RECOMMENDATIONS

IDS and the IDS Commission should consider adding criteria to more clearly define potentially capital cases and should consider reducing the period an attorney can receive payment at the capital rate without a judge's preliminary ruling.

AUDITOR'S TRANSMITTAL

October 16, 2014

The Honorable Pat McCrory, Governor
The General Assembly of North Carolina
Mr. Thomas Maher, Executive Director, Office of Indigent Defense Services

Ladies and Gentlemen:

We are pleased to submit this performance audit titled "*Office of Indigent Defense Services – Assignment and Payment of Private Counsel.*" The audit objective was to determine if IDS correctly assigns the number of attorneys and pays assigned counsel the correct rates for capital and non-capital murder cases.

Indigent Defense Services Executive Director Mr. Thomas Maher reviewed a draft copy of this report. His written comments are included after each finding and in Appendix A.

The Office of the State Auditor initiated this audit based on concerns identified by district attorneys.

We wish to express our appreciation to the staff of the Office of Indigent Defense Services and district attorneys for the courtesy, cooperation, and assistance provided us during the audit.

Sincerely,



Beth A. Wood, CPA
State Auditor

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BACKGROUND

The Office of Indigent Services (IDS) assigns counsel for individuals charged with a crime who cannot afford their own attorneys. When public defenders are not available, IDS appoints an attorney from an approved list of available attorneys.

Per IDS policy, one attorney is assigned to every case unless the IDS Director determines that aggravating factors exist in a murder case and reasons that the case will likely proceed capitally.

Otherwise, IDS policy requires assignment of a second attorney only when one of the following occurs:

- A hearing before a judge (Rule 24 Hearing) determines that the case can proceed capitally;
- The district attorney provides notice of its intent to prosecute capitally; or
- A judge orders an additional attorney.

The hourly rate paid to an IDS-assigned attorney depends on the charges filed by the district attorney. IDS pays assigned counsel based on a published felony rate schedule (currently \$70 an hour for Class A-D felonies). Cases with first- or undesignated degree murder charges may result in the death penalty. IDS has a separate rate schedule for these “potentially capital” cases (currently \$85 an hour).

For these potentially capital cases, IDS-assigned counsel will receive the capital rate for hours worked, as IDS pays the capital rate for cases that are identified as potentially capital until the case is declared non-capital based on one of three actions:

- The district attorney notifies the IDS-assigned attorney that the State will not seek the death penalty;
- A Rule 24 Hearing determines the State cannot seek the death penalty based on the evidence presented; or
- Twelve (12) months have passed since the arrest date, and a Rule 24 Hearing has not been held.

If one of the above actions occurs during the case, the hourly rate drops to \$75 an hour to indicate a non-capital case rate.

To receive payment for services, the attorneys file fee applications based on the hours worked and the status of the case. IDS staff process the fee applications and update its case information database.

OBJECTIVES, SCOPE, AND METHODOLOGY

The audit objective was to determine whether the Office of Indigent Defense Services (IDS) correctly assigns the number of attorneys and pays IDS-assigned counsel the correct rates for capital and non-capital murder cases.

The Office of the State Auditor initiated this audit based on concerns identified by district attorneys.

The audit scope included cases that were opened between January 1, 2006, and June 30, 2013. To narrow down the cases that were concerning to the district attorneys, auditors requested information from all 44 district attorneys for cases that met all of the following criteria:

- Defendant was charged with first-degree or undesignated degree murder.
- Defendant was declared indigent and was assigned an attorney through IDS.
- At some point, the case was determined to be capital or non-capital.
- After the case was declared non-capital, there is evidence that the attorney was paid at the capital rate, there is no evidence regarding how the attorney was paid, or there is evidence that two attorneys were still assigned to the case.

To achieve the audit objective, auditors interviewed personnel with Office of Indigent Services, the Office of the Capital Defender, and district attorneys' offices. Auditors reviewed IDS business rules, North Carolina General Statute, and the American Bar Association guidelines. Auditors tested a random sample of case files provided by 35 of the 44 district attorneys¹ and the associated fee applications for those case files. The conclusions apply to the population of cases provided by the district attorneys.

Auditors conducted fieldwork from November 2013 to May 2014.

Because of the test nature and other inherent limitations of an audit, together with limitations of any system of internal and management controls, this audit would not necessarily disclose all performance weaknesses or lack of compliance.

As a basis for evaluating internal control, auditors applied the internal control guidance contained in professional auditing standards. As discussed in the standards, internal control consists of five interrelated components: (1) control environment; (2) risk assessment; (3) control activities; (4) information and communication; and (5) monitoring.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

¹ Auditors requested cases from all 44 district attorneys. Two district attorneys did not comply with the Office of the State Auditor's repeated requests. Seven district attorneys indicated they did not have any cases meeting all of the criteria in the request.

FINDINGS, RECOMMENDATIONS AND RESPONSES

ATTORNEYS WERE ASSIGNED AND PAID PER IDS POLICY

Based on the Office of Indigent Defense Services (IDS) policy, IDS assigned the correct number of attorneys and paid the correct rates for representing indigents in capital² and non-capital murder cases.

These conclusions are based on a review of cases where district attorneys expressed concern about the number of defense attorneys assigned to the case or the rate they were paid.

Auditors examined a random sample of these cases and compared the number of attorneys assigned and attorney payment rates to IDS' policies.

IDS said that it developed its policies as authorized by state law³ and in a manner that is consistent with guidance from the American Bar Association.

Number of Attorneys Correctly Assigned per IDS Policy

Based on IDS policy, the assignment of a second attorney was justified in 100% of the cases reviewed.

A review of case files found that IDS properly supported the assignment of a second attorney. Auditors sampled 217 of the 521 District Attorney submitted cases (42%) to identify cases with two attorneys. Fifty-one of the 217 cases (23.5%) had two concurrent attorneys assigned to the case. All 51 cases reviewed had sufficient documentation to support assigning more than one attorney.

Assignment of a second attorney depends on the specifics of the case. Per its policy, IDS assigns a second attorney when either:

- A Rule 24 Hearing determines that the case may proceed capitally;
- The District Attorney office provides notice of its intent to prosecute capitally;
- A judge orders an additional attorney; or
- The IDS Director (in consultation with the assigned capital defender) determines that aggravating factors exist and assesses that the case will likely proceed capitally.

Attorneys Paid Correctly per IDS Policy

Based on its policy, IDS paid attorneys the correct rate 99.6% of the time.

Auditors reviewed 940 of 2,878 fee applications identified by the district attorneys as possible overpayments. Auditors found four of the 940 fee applications (0.4%) were paid at a rate

² A capital case is a murder case in which the defendant can potentially be punished by execution.

³ *North Carolina General Statutes 7A-498.3(c) and 7A-458.*

FINDINGS, RECOMMENDATIONS AND RESPONSES

higher than allowed by the rate schedule. In all four instances, IDS paid the attorneys using the previous rate schedule (prior to IDS reducing the rate by \$10/hour). All four of these overpayments occurred near the date when the IDS Commission reduced the hourly rate.

The four overpayments totaled \$2,460 of about \$4.3 million of the fees reviewed.

Some District Attorneys Have a Different Perspective

Some district attorneys say IDS is not in compliance with state law.

The district attorneys state that a more accurate interpretation of state law requires IDS to assign only one attorney and pay the assigned counsel according to the felony rate schedule unless the district attorney specifically states that he/she plans to seek the death penalty.

From their perspective, a case is non-capital until they provide notice of intent to proceed capitally. Specifically, the district attorneys cite *North Carolina General Statute* § 15A-2004, which addresses prosecutorial discretion:

“A sentence of death may not be imposed upon a defendant convicted of a capital felony unless the State has given notice of its intent to seek the death penalty...If the State has not given notice of its intent to seek the death penalty prior to trial, the trial shall be conducted as a noncapital proceeding....”

Therefore, in their opinion, a case cannot be considered a capital case unless the district attorney provides notice of intent to proceed capitally or a Rule 24 hearing determines the case may proceed capitally. Until one of these actions has occurred, the district attorneys assert that these cases should be paid at the lower, felony rate.

If IDS were to assign attorneys and pay for cases in the manner consistent with the district attorneys’ perspective, the potential savings to the state would be approximately \$400,000-\$800,000 annually.

State Statute Gives IDS Authority to Set Policy

IDS has the authority to assign and pay attorneys representing indigents. The Indigent Defense Act of 2000⁴ states that IDS is responsible for

“...appointment of counsel, determination of compensation, appointment of experts, and use of funds for experts and other services related to legal representation shall be in accordance with rules and procedures adopted by the Office of Indigent Defense Services.”

⁴ *NC General Statute Chapter 7A Article 39B*

FINDINGS, RECOMMENDATIONS AND RESPONSES

IDS is also responsible for setting rates for attorneys defending indigents. State law⁵ states that “The fee to which an attorney who represents an indigent person is entitled shall be fixed in accordance with rules adopted by the Office of Indigent Defense Services....”

Per its policy, IDS initially identifies all first-degree or undesignated degree murder cases as “potentially capital” and pays assigned counsel at the capital rate, as the charges of first- or undesignated degree murder could result in the death penalty.

IDS policy requires that the rate drop to the lower, non-capital rate after:

- A Rule 24 Hearing outcome concludes the case cannot be prosecuted capitally;
- A year passes without a Rule 24 Hearing being held; or
- The district attorney indicates they will not seek the death penalty.

Defense attorneys are responsible for notifying IDS of any changes in the case through a form that must be included with every request for compensation. The form reflects the current status of the case (proceeding potentially capitally, capitally, or non-capitally). The form also reflects the date of a Rule 24 Hearing and the date the prosecutor notified the defense attorney that the death penalty will not be sought. Each attorney signs and certifies the form, indicating the information is accurate. IDS policy requires this form for every fee request and denies payment without the completed case status form.

IDS Policy Is Supported by the American Bar Association Guidelines

IDS states that it pays a higher rate for potentially capital cases because attorneys who handle potentially capital cases need to be skilled and must have training and experience specific to death penalty cases.

This position is supported by the American Bar Association (ABA) guidelines.⁶ The ABA states that the guidelines “apply from the moment the client is taken into custody and extend to all stages of every case in which the jurisdiction **may be entitled to seek the death penalty**, including initial and ongoing investigation, pretrial proceedings, trial, etc.” (Emphasis added)

⁵ *NC General Statute 7A-458*

⁶ Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases

FINDINGS, RECOMMENDATIONS AND RESPONSES

The ABA guidelines state:

“The period between an arrest or detention and the prosecutor’s declaration of intent to seek the death penalty is often critically important. In addition to enabling counsel to counsel his or her client and to obtain information regarding guilt that may later become unavailable, **effective advocacy by defense counsel during this period may persuade the prosecution not to seek the death penalty.** Thus, **it is imperative that counsel begin investigating mitigating evidence and assembling the defense team as early as possible—well before the prosecution has actually determined that the death penalty will be sought...**The case remains subject to these Guidelines until the imposition of the death penalty is no longer a legal possibility.” (Emphasis added)

The ABA guidelines state:

“Counsel in death penalty cases should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the extraordinary responsibilities inherent in death penalty representation.”

Recommendations:

IDS and the IDS Commission should continue to develop ways to reduce potentially capital payments such as adding criteria to limit the number of potentially capital cases and shortening the length of time for IDS-assigned counsel to receive the capital payment rate if a Rule 24 hearing has not occurred.

Agency response:⁷

IDS agrees with the audit’s key findings. However, we want to stress that IDS strongly disagrees with any assertion by the District Attorneys that IDS is “not in compliance with state law.” The IDS Act clearly gives the IDS Commission and Office the authority to set PAC [private assigned counsel] payment rates, including the rates for potentially capital cases and the rates for other felonies.

The IDS Commission and Office continually strive to control the costs of potentially capital cases without sacrificing the quality of representation in those cases. Indeed, the need to control costs and improve representation in potentially capital cases were driving factors behind the creation of IDS.

⁷ The complete response can be found in Appendix A.

MATTERS FOR FURTHER CONSIDERATION

In addition to the differing perspective as to when a case can be paid at the capital rate, there were other issues and observations made by some of the district attorneys that contributed to their concern about how IDS paid attorneys and reported financial information.

These issues include (1) IDS funding, (2) the IDS annual report to the General Assembly, and (3) the IDS case database.

1. For the fiscal year ending June 30, 2014, the General Assembly budgeted about \$72.8 million⁸ for IDS to pay attorneys representing indigents. IDS paid fee applications until the budget was depleted. That left IDS with about \$3.2 million still owed to attorneys going into fiscal year 2015. By carrying forward unfunded liabilities owed beyond the fiscal year it was accrued, IDS is potentially violating the State Budget Act. Specifically, *North Carolina General Statute* 143C-6-8 states that state agencies may incur financial obligations only if authorized by the Director of the Budget and subject to the availability of appropriated funds. By incurring the financial obligation to pay the attorneys without the availability of appropriated funds, IDS is unable to satisfy the State Budget Act.

Since 2009, IDS has been carrying unfunded liabilities⁹ into the next year. These amounts ranged from \$665,000 to \$9.97 million. Even though IDS requested this debt to be funded through the budget process, IDS has not received adequate funding to pay attorney fees in the fiscal year the attorney submitted the request for payment.

To address the budget shortfalls, IDS lowered the rates it pays attorneys in May 2011. The rate reduction saved approximately \$12 million in fiscal year 2012 and \$18 million in fiscal year 2013.

The General Assembly should consider fully funding the cost of assigned counsel. Going forward, IDS should consider using a rolling average of the last three years in its budget requests.

2. The IDS annual report to the General Assembly contains information about capital cases that may be misleading to the reader. There are opportunities for IDS to clarify the capital case information to the General Assembly.

For example, the 2014 report contains an appendix (C), entitled “Cost and Case Data on Representation of Indigent.” In the appendix, the line item for the number of capital cases assigned to private counsel is 1,474; and North Carolina paid \$10,003,597 in total costs for these capital cases.

⁸ \$72.8 million includes all private assigned counsel fees. About \$10 million (about 14%) of these fees are for capital and non-capital murder case defense costs.

⁹ For the purposes of this report, auditors reviewed shortfalls beginning in fiscal year 2010, as the IDS budget was underfunded by only about \$600,000 at the end of fiscal year 2009.

MATTERS FOR FURTHER CONSIDERATION

Lacking definitions for the terms in the table and background about the IDS payment process, this table could be interpreted to read that 1,474 cases were tried capitally in 2013 that cost more than \$10 million. However, that is not the situation. In 2013, only five cases proceeded capitally to trial, and 41 cases were pending cases that were proceeding capitally.

The “*number of cases*” heading in the report reflects the number of “*fee applications*” for potentially capital cases and capital cases combined. While IDS does include footnotes in the report to help explain the numbers, the manner in which the cost and case data is presented could be misleading to readers.

To reduce the risk of misleading the readers, IDS should include definitions for potentially capital cases, non-capital cases, and capital cases and include case statistics for each type of case status. Similarly, IDS should identify the specific amount paid for each case status.

3. While researching the overpayment issue, the district attorneys noted and reported what appeared to be an inconsistency between case classification and payment rates.

It was noted that the capital and non-capital murder case information in the IDS database does not match the corresponding case payment information. Specifically, cases receiving the capital pay rate were identified as non-capital in the database.

The status field of capital and non-capital cases can be misleading to someone outside of IDS. However, the capital status field in the database does not drive the payment rates.

Payment rates are supported by documentation and manual review. The capital status field is not used by the administrative staff to assist with attorney rate verification. As discussed previously, the review of payment rates found the payment rate process is effective in 99.6% of payments reviewed.

The capital status field (capital or non-capital) in the database designates the case outcome and is used only for research purposes. With this in mind, IDS will need to consider how best to identify cases as potentially capital, non-capital, and capital when they create the online, searchable fee application database, which is directed in the Section 18A.1 of the fiscal year 2015 budget provision - Indigent Defense Services Fee Transparency.

IDS should clearly identify the status of the case at the time of the fee application and should include case status definitions to avoid any possible confusion.

Agency Response:

With respect to the first matter for further consideration in the audit report, IDS agrees that indigent defense should be fully funded by the General Assembly. In addition to achieving compliance with the State Budget Act, an annual appropriation that meets the anticipated demand on the indigent defense fund is the best way to ensure that

MATTERS FOR FURTHER CONSIDERATION

North Carolina meets its constitutional and statutory obligations to provide effective representation to indigent persons who are entitled to counsel at state expense.

With respect to the second matter for further consideration in the audit report, IDS did not intend to mislead readers with the data in Appendix C to its annual reports and included explanatory notes for all data reported. However, in light of the auditors' concerns, we intend to clarify that appendix in our next annual report, which is due by February 1, 2015.

With respect to the third matter for further consideration in the audit report, we want to reiterate what the audit report states, which is that the "case status" field in IDS' in-house Access database is a short-hand internal field that is used solely for research purposes and should not be used beyond that purpose. To the extent that any short-hand labels in our database can be misleading or misapplied, we will do our best to clarify their meaning in any future responses to public records requests.

APPENDIX A: AGENCY RESPONSE

THOMAS K. MAHER
EXECUTIVE DIRECTOR
THOMAS.K.MAHER@NCCOURTS.ORG

TELEPHONE:
(919) 354-7200
FACSIMILE:
(919) 354-7201

OFFICE OF
INDIGENT DEFENSE SERVICES
STATE OF NORTH CAROLINA

www.ncids.org
123 WEST MAIN STREET
SUITE 400
DURHAM, N.C. 27701

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KATHERINE LEWIS PARKER

September 29, 2014

Beth A. Wood, CPA
State Auditor
2 South Salisbury Street
20601 Mail Service Center
Raleigh, NC 27699-7580

Re: Performance Audit: Office of Indigent Defense Services'
Assignment and Payment of Private Counsel

Dear Ms. Wood:

Thank you for the opportunity to respond to the draft audit report that your office recently released about the Office of Indigent Defense Services' (IDS) appointments of and payments to private assigned counsel (PAC) in potentially capital cases at the trial level. Initially, on behalf of the IDS Commission and staff, I want to express our appreciation to you and your staff for the time and attention that you devoted to our office during this performance audit.

IDS' Response to Key Audit Findings:

IDS agrees with the audit's key findings. However, we want to stress that IDS strongly disagrees with any assertion by the District Attorneys that IDS is "not in compliance with state law." The IDS Act clearly gives the IDS Commission and Office the authority to set PAC payment rates, including the rates for potentially capital cases and the rates for other felonies. *See* G.S. 7A-458 ("The fee to which an attorney who represented an indigent person is entitled shall be fixed in accordance with rules adopted by the Office of Indigent Defense Services."); G.S. 7A-498.3(c) ("In all cases subject to this Article, appointment of counsel, [and] determination of compensation . . . shall be in accordance with rules and procedures adopted by the Office of Indigent Defense Services."); G.S. 7A-498.3(d) ("The Office of Indigent Defense Services shall allocate and disburse funds appropriated for legal representation and related services in cases subject to this Article pursuant to rules and procedures established by the Office."); G.S. 7A-498.5(f) ("The Commission shall establish policies and procedures with respect to the distribution of funds appropriated under this Article, including rates of compensation for appointed counsel, schedules of allowable expenses, . . . and procedures for applying for and receiving compensation.").

The IDS Commission and Office continually strive to control the costs of potentially capital cases without sacrificing the quality of representation in those cases. Indeed, the need to control

costs and improve representation in potentially capital cases were driving factors behind the creation of IDS. The Indigent Defense Study Commission Report and Recommendations was submitted to the General Assembly on May 1, 2000. That report stated: “A pervasive factor affecting indigent defense is the high cost and increasing demands of death penalty cases. Costs for private assigned counsel in capital cases increased by 338% since 1988-89, from \$2.1 million to \$9.2 million in 1998-99. The state faces the ongoing challenge of ensuring the availability of able lawyers to provide representation in capital cases.” *Id.* at 5. IDS does not know how the Administrative Office of the Courts defined “death penalty cases” before IDS was created and we suspect there was no uniform definition. However, in light of the spending figure for fiscal year 1998-99, we are confident that it included far more cases than those that were actually proceeding capitally.

The IDS Act also distinguishes between non-capital cases and capital cases. G.S. 7A-452(a) provides that “[i]n noncapital cases, the court shall assign counsel pursuant to rules adopted by the Office of Indigent Defense Services. In capital cases, the Office of Indigent Defense Services or [its] designee . . . shall assign counsel.” The Act does not define the terms “noncapital cases” and “capital cases,” but instead leaves the task of defining those terms to the IDS Rules. There are numerous compelling policy reasons to define potentially capital cases broadly as they are defined by the IDS Rules—*i.e.*, as any case in which there is the potential for a death verdict. The primary reason is that the defense has no way of knowing at the time a case opens whether the prosecutor will proceed capitally or non-capitally. Because these cases span multiple years, at any given time, there are more than 1,000 potentially capital cases pending around the state, and IDS has no way of knowing how the prosecutors in those cases intend to proceed unless they tell defense counsel. *See State v. Hunt*, 357 N.C. 257, 582 S.E.2d 593 (2003) (upholding North Carolina’s short form murder indictment and finding that the state does not have to allege aggravating circumstances in a murder indictment to sustain a capital prosecution). Without that information, the appointed defense attorneys have to prepare to defend their clients against an effort by the state to take their lives or send them to prison for the rest of their lives. *See American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, Guideline 1.1 (2003).

Rule 24 of the General Rules of Practice provides that “[t]here shall be a pretrial conference in every case in which the defendant stands charged with a crime punishable by death.” The rule directs the prosecutor to apply to the court within 10 days of the superior court obtaining jurisdiction and the court to schedule the hearing within 45 days thereafter. However, those time limits are not enforced, and many potentially capital cases never have Rule 24 hearings or have very delayed Rule 24 hearings. *See State v. Defoe*, 364 N.C. 29, 691 S.E.2d 1 (2010) (holding that a Rule 24 hearing more than 31 months after indictment was not grounds for striking a capital declaration by the state when the defendant failed to show sufficient prejudice).

In North Carolina, the vast majority of intentional homicides (86% to 88%) are charged as first-degree or undesignated degree of murder, even though more than 83% of those cases are disposed as second-degree murder or less. FY07 Capital Trial Case Study: PAC and Expert Spending in Potentially Capital Cases at the Trial Level, 9 (IDS Dec. 2008). Second-degree murder and voluntary manslaughter tend to be pleas, not charges. The prosecutors control those decisions, and they charge defendants as they do so they can use the threat of death as leverage to

induce pleas. If they would charge differently, or if they would make binding non-capital declarations at the beginning of cases, IDS may have a different system for appointing and compensating defense counsel. However, IDS' system and defense costs are driven by the prosecutors' charging decisions and the fact that they often do not timely inform defense counsel of how they intend to proceed. IDS is certainly open to discussing smarter and less costly ways of providing effective representation to the clients in these very serious cases, but the district attorneys would need to be part of any solutions because their conduct drives our system and our costs.

With respect to the suggestion that IDS consider shortening the length of time for PAC to receive the capital payment rate if a Rule 24 hearing has not occurred, IDS originally set the time period at 12 months for two reasons. First, the data we analyzed at the time indicated that, in 94.5% of the cases that ultimately had a second attorney appointed, that appointment happened within 12 months of appointment of the first attorney. In 88.9% of the cases that ultimately had a second attorney appointed, that appointment happened within nine months. And, in 77.9% of the cases that ultimately got a second attorney appointed, that appointment happened within six months. Thus, the 12-month time period captured more of the cases that would ultimately proceed capitally. Second, implementation based on one year is much easier than it would be for some other time period because the calculation of one year is simpler and more routine. That factor is especially important in light of the large number of fee applications that IDS staff process on a weekly basis.

In light of this audit recommendation, IDS staff updated those frequency distributions based on the "capital status date" in the IDS database, which is either the date of the Rule 24 hearing or the date that the second attorney was appointed. IDS staff looked at all cases in our database with a warrant served date of 2001 or later and that were ever declared capital. Because the Office of the Capital Defender ("OCD") has applied a more stringent standard to the appointment of second counsel since the applicable IDS rule was revised in June 2008, we also looked at all cases with a warrant served date in FY09 or later and that were ever declared capital to see if there were any recent changes or trends. Based on the updated data that included all cases with a warrant date of 2001 or later, in 89.3% of the cases that ultimately had a second attorney appointed, that appointment happened within 12 months. In 81.6% of the cases that ultimately had a second attorney appointed, that appointment happened within nine months. And in 69.7% of the cases that ultimately had a second attorney appointed, that appointment happened within six months. The smaller sample of cases with warrant dates in FY09 or later did not suggest there have been any recent significant changes in those percentages.

Based on this analysis, the IDS Commission and Office continue to believe that the 12-month period IDS currently utilizes is much more "accurate" in terms of capturing the most cases that will ultimately have a Rule 24 hearing and get declared capital. If we decrease that time period, we will receive more individual requests from counsel to treat individual cases as potentially capital for compensation purposes, which IDS policies allow them to do. We will also have more cases with the applicable payment rate going up and down throughout the course of the case, which will certainly lead to more mistakes with very little associated savings. Moreover, the issue of 12 months passing without a Rule 24 hearing only arises if the district attorney refuses to declare whether a case will be prosecuted capitally or non-capitally within that time period; if the

district attorney believes defense counsel should be paid the lower non-capital rate for a shorter time period, it is within his or her sole control to declare the case non-capital and effectuate that rate change. In the absence of such a declaration, IDS errs on the side of ensuring that the defendants receive effective assistance of counsel until the 12-month period expires and 95% (based on our original data set) to 90% (based on our more recent analysis) of the cases that ultimately will be declared capital have been. Finally, unless IDS made any policy change retroactive, IDS staff would have to keep track of yet another complicated variation in the IDS billing policies depending on the warrant date or some other bright line indicator.

As stated above, the IDS Commission and Office continually strive to control the costs of potentially capital cases without sacrificing the quality of representation in those cases. Over the years, IDS has implemented a number of policies that are designed to meet those goals, such as: 1) decreasing the hourly rate after a potentially capital case becomes non-capital through one of several means; 2) requiring consultations in cases that are proceeding capitally; 3) placing limits on pre-trial compensation and funding for investigators and mitigation specialists unless a case has been declared “exceptional” based on certain enumerated criteria; and 4) requiring attorneys in the most costly cases to prepare budgets for IDS approval. The Commission and Office will continue to look for new ways to improve quality and control costs. However, we do not believe there would be any policy benefits from shortening the length of time for PAC to receive the capital payment rate if a Rule 24 hearing has not occurred, and the cost savings would be minimal. In addition, absent a change in the law or prosecutorial charging practices, IDS has no way of “adding criteria to limit the number of potentially capital cases” as recommended in the audit. Instead, IDS has to work with a broad statutory scheme that includes a significant number of expansive and ill-defined aggravating factors, such as the crime was “especially heinous, atrocious, or cruel.” See G.S. 15A-2000(e). In order to truly address the number of potentially capital cases and the associated costs, the General Assembly would need to reduce the number or scope of the existing statutory aggravating factors.

IDS does not know how much money would be saved by paying cases in a manner consistent with the district attorneys’ perspective, and believes that the auditors’ estimate is very rough. Regardless, IDS is barely paying PAC enough under the current hourly rate structure to ensure constitutionally effective representation. If IDS were to expect the most experienced PAC to handle the most difficult criminal cases for less pay than they currently receive, we do not believe we would be able to maintain a healthy capital defense bar. As it is now, the \$85/\$75 hourly rate structure is significantly less than the \$95 hourly rate that IDS paid for all potentially capital cases before May 2011. Indeed, the same attorneys who previously billed \$95 per hour now bill \$85 or \$75 per hour (depending on how the case is proceeding) for the exact same work, despite increases in the costs of living and operating a law practice. Moreover, more than 20 years ago in June 1993, when the costs of living and running a law practice were significantly lower than they are today, a subcommittee of the North Carolina Bar Association’s All-Bar Death Penalty Representation Conference recommended that the General Assembly establish a \$95 hourly rate in capital cases.

IDS’ Response to Matters for Further Consideration:

With respect to the first matter for further consideration in the audit report, IDS agrees that indigent defense should be fully funded by the General Assembly. In addition to achieving

compliance with the State Budget Act, an annual appropriation that meets the anticipated demand on the indigent defense fund is the best way to ensure that North Carolina meets its constitutional and statutory obligations to provide effective representation to indigent persons who are entitled to counsel at state expense.

With respect to the second matter for further consideration in the audit report, IDS did not intend to mislead readers with the data in Appendix C to its annual reports and included explanatory notes for all data reported. However, in light of the auditors' concerns, we intend to clarify that appendix in our next annual report, which is due by February 1, 2015.

With respect to the third matter for further consideration in the audit report, we want to reiterate what the audit report states, which is that the "case status" field in IDS' in-house Access database is a short-hand internal field that is used solely for research purposes and should not be used beyond that purpose. To the extent that any short-hand labels in our database can be misleading or misapplied, we will do our best to clarify their meaning in any future responses to public records requests.

The IDS Commission and Office will continue to apply our best efforts to ensure that indigent defendants, particularly in these most serious cases where their lives are literally at stake, receive the quality legal services to which they are constitutionally entitled and to remain responsible with the taxpayers' money. We would like to recognize and thank all of the attorneys around the state, both public and private, who competently and zealously represent indigent defendants in potentially capital cases. Without their talent and commitment, none of our work would be possible.

Thank you again for the time and attention that you devoted to this audit.

Sincerely,



Thomas K. Maher
Executive Director

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