

Criminal Investigation & Adjudication Committee
Minutes, Nov. 23, 2015 Meeting

All Committee members attended the meeting.

After approval of the minutes from the October meeting, the remainder of the meeting focused on Indigent Defense (ID).

Committee Reporter Jessica Smith noted that ID is a fitting first topic for the Committee. First, it is a constitutional requirement for our criminal justice system and as such is part of the very foundational structure of that system. Second, one pressing issue regarding ID is funding. She noted that separately the Committee had expressed interest in looking at vehicles and procedures that divert defendants from the criminal justice system, such as alternate dispute resolution and alternative procedures for mentally ill and drug-addicted defendants. These mechanisms may reduce funding needs for ID and the criminal justice system overall. Other topics that the Committee will examine, such as improved case processing, also would reduce ID costs. By contrast, other ideas—such as a more robust right of review in post-conviction proceedings—would have the opposite effect. Finally the Committee identified race and poverty as overarching issues; research suggests that problems with ID disproportionately affect people of color and the poor. Finally, Smith noted that the recent survey circulated by Commission Executive Director Robinson showed that a majority of North Carolinians surveyed believed that poor people are treated less fairly in the NC court system.

Next the Honorable Rhoda Billings, spoke about the importance of providing effective assistance of counsel to indigent defendants. Justice Billings indicated that separate from the State's constitutional obligations to provide ID, justice and fairness are part of the very fabric of our court system. When we fail to provide indigent defendants the right to counsel we undermine those core values. Among other things, she noted that Americans strongly believe that the amount of money a person has should not affect the amount of justice he or she receives. She asserted that any perception of fairness vanishes if our citizens believe that a poor person is placed at a significant disadvantage in the justice system. Additionally, the possibility of wrongful conviction is enhanced if the defendant is required to face the government without an effective advocate. Justice Billings emphasized the importance of an "effective" advocate. In this respect, she noted that when an attorney is overburdened with cases and does not have adequate resources (e.g., for investigators), even the most competent attorney cannot be effective. She further noted the recurring problem of people charged with nonviolent offenses languishing in jail because they do not have an advocate who can argue for pretrial release or for a speedy trial. For this reason the right to counsel must begin with the initiation of criminal process. This is critical because if an accused is not allowed pretrial release, his or her ability to aid in the defense is greatly inhibited. Thus, the report of the National Right to Counsel Committee, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*, recommended that counsel be appointed as soon as feasible after arrest, detention, or the defendant's request for counsel. Justice Billings noted that the Committee filed a follow-up report in March 2015 noting that defendants who do not have counsel at bail hearings remain in jail, resulting in job loss and the need of the defendant's family to seek public assistance. Additionally, there is evidence that many pretrial detainees plead guilty to crimes that they did not commit so that they can get out of jail and back to their families, unaware that the consequences of that conviction can, among other things, cause them to lose employment. This can begin a cycle of unemployment and poverty that can last a lifetime. Pretrial incarceration of defendants who do not pose a risk to the community is costly not only for the defendant but also to the government (jail costs). Meanwhile wrongful convictions carry costs as well. Among the

most significant is that when the wrong person is convicted, the real perpetrator remains free to prey on citizens. Turning to the issue of funding, Justice Billings noted that we all know that the overall justice system suffers from a shortage of funds. ID costs money for lawyers, experts, paralegals, training, travel, among other things. But, she noted, wrongful convictions have costs too, and not just to the wrongfully convicted person but to the government as well in terms of appeals, pretrial incarceration, and legal settlements for wrongful convictions. And probably more important than any other cost is the loss of public confidence in the court system to administer justice in accordance with the federal and state constitutions.

The next speaker was Thomas Maher, Executive Director, NC Office of Indigent Defense Services (IDS). Maher's presentation covered six main topics: (1) what a healthy ID system looks like; (2) NC's progress towards achieving *Gideon's* promise of a fair trial; (3) an overview of NC's delivery of indigent representation; (4) an overview of IDS's finances; (5) the time needed to provide effective representation; and (6) the dangers of underfunding ID. The substance of his comments adhered closely to his PowerPoint presentation, attached to these minutes.

The meeting continued with a panel discussion providing the defense lawyer's perspective on ID services in NC. The panel was moderated by Commissioner Kemp. Panelists included: James E. Williams, Chief Public Defender (PD) (Dist. 15B), Jeff Cutler, Attorney (Contract Attorney, Wake), and Desmond McCallum (Private Appointed Counsel, Mecklenburg).

Kemp began by asking the panelists to assess IDS's success with respect improving quality and cost-effectiveness of ID in NC.

Cutler said that IDS has been very successful in providing good quality legal services. He noted that in Wake County there is a strong criminal defense bar that works together with the prosecutor's office and bench to make the system work. He noted that as fees have been reduced, lawyers who relied on ID work have struggled, but concluded that there are enough good attorneys in Wake County to do the work, along with the PD's office.

Williams commented that IDS has improved the quality of legal services and has done it relatively cost-effectively. To the extent it has been less than successful, that is attributable to lack of adequate resources. Williams noted that New Orleans PDs recently asked a judge to allow them to refuse additional cases because they were inundated, could not manage their caseloads, and were rendering ineffective assistance of counsel. He offered that as a cautionary note for NC. Williams also noted that IDS has made many new resources available to defense counsel, including training and support from forensic resource counsel.

McCallum commented that IDS has been effective in ensuring that poor people can get the same type of lawyer afforded to wealthy individuals.

Kemp echoed Williams' comments regarding resources and training noting that IDS' cooperation with the UNC School of Government to provide training and manuals to indigent defenders is incredible.

Commissioner Wagoner noted that none of the panelists were operating in counties without a PD office. She queried whether their views would change when assessing counties that have only private assigned counsel (PAC).

Chair Webb asked panelist Williams for his views on the appropriate salary range for employees of the PD office.

Williams responded that he has APDs with five years of experience earning less than \$50,000. His most senior lawyer is paid \$120,000. He noted however that keeping good quality lawyers is difficult when they have to take second jobs to make ends meet, which some do.

Commission Executive Director Will Robinson asked about the volume of applicants for open positions.

Williams indicated that in the last few years they have received 40-50 applications for each APD opening. He noted that has not always been the case and believed it is a reflection of the bad economy.

Kemp added that he can always fill positions because of the glut of lawyers. He noted that the critical point is the 3-5 year employee. At this point the employee is fully trained but because of non-competitive pay, he is unable to retain the employee. He noted that prosecutors have the same problem.

Commissioner Adams asked how long it would take an APD to move from a salary of \$40,000 to \$120,000.

Williams responded that it typically would be a couple of decades.

Kemp added that in the past APDs would receive raises of \$2,000-\$3,000/year and thus there was a time when an employee could get that six-figure salary. Now, with very small salary increases, they can't get there.

Kemp asked the panelists to assess the three different vehicles used provide ID services in NC: PD offices, contracts and PACs

Cutler indicated that the contract system makes sense in communities such as Wake County where there is a large number of cases and lawyers. He noted that in Wake, good lawyers have been willing to take on contract work. He noted however that in rural areas, it is very different. In those areas court may be held only 2 or 3 days per week, spread across multiple counties.

Lawyers in rural areas are not willing to take contracts because of the large amount of time it takes to go to a county to handle 1-2 misdemeanors in district court. While contracts work well in Wake County, he does not see them working well in rural communities.

Kemp asked whether contracts work better in some cases than others, such as low-level or high-level felonies.

Cutler noted that in Wake County, felony pleas are done in district court. By streamlining the process in this way, low-level felonies can be handled through contracts. With regard to serious felonies, the amount of time required is much greater and there is very little difference in the contract rate.

McCallum noted that there are no contracts in Mecklenburg. To get on the appointed list there is an application process and a mentoring requirement. Candidates must have experience before they are allowed to take on serious felonies. He indicated that this works well to ensure high quality counsel.

Kemp asked the panelists whether experienced lawyers left ID when the fees were decreased. McCallum said yes. Personally, at present rates, he is unable to afford to handle misdemeanors, even though he knows they can have serious consequences (e.g., for employment) for defendants. He has seen a number of lawyers in his jurisdiction leave because of low compensation.

Kemp asked Williams about his experience with contracts.

Williams indicated that as a result of contracts, two of their most experienced attorneys handling serious cases found that they had to discontinue that work because of low compensation. In his district, contracts have weakened the quality of counsel. He stated that while efficiency is an important value, we may need to recalibrate to ensure that clients receive quality representation. He worries that as we try to increase efficiency, we create high misdemeanor caseloads with the result that lawyers are not putting sufficient time into the cases.

Chair Webb asked whether any of the panelists would disagree that a mix of 3 delivery systems is the best way to proceed.

Williams stated that judgment was out on contracts. He agreed however that there has to be a combination of PD offices and PACs. In areas without a PD office, you need a regional PD who can supervise the PACs.

The other panelists agreed that some type of hybrid system is necessary, because of conflict and overload cases.

Commissioner Seigle asked whether NC could benefit from ADR in criminal court. Williams indicated that in his experience ADR only occurred after counsel had been appointed and that in an ideal world, defendants would have counsel before such a proceeding. Commissioner Murray noted that with respect to salary, each office gets a fixed amount per position which has to be allotted across the entire office. He also noted that most lawyers come out of school with over \$100,000 in debt. Kemp concluded by requesting that the subcommittee take up the issue of ADA and APD pay as well as the hourly PAC rate.

Next, Commissioner Murray moderated a panel on the prosecutor's perspective on ID. Panelists included: Lorrin Freeman, District Attorney (DA) (Prosecutorial District 10), Seth H. Edwards, DA (Prosecutorial District 2), Michael D. Waters, DA (Prosecutorial District 9).

Murray asked the panelists for their perspectives on the contract system.

Waters indicated that before the contract system, they used an appointment system that was vigorously guarded by the chief district court judge and superior court judge. Under the contract system they have lawyers from out of the district that routinely have court date conflicts with cases in other districts. Conflicts are common because the contract system has reduced the number of lawyers available to do the work. Court conflicts and secured leave can wreak havoc on the calendar. In Waters' view the appointed system worked well. He assesses the contract system as working "reasonably well," but noted that the existence of a regional PD adds considerable resources with respect to addressing scheduling and related issues.

Freeman commented that ID is "woefully underfunded." This makes a difference to defendants who deserve quality representation but it also matters to prosecutors. When lawyers are overloaded, prosecutors can't move forward. The same thing happens when they have multiple cases under contract and you end up with conflicts or ineffective assistance. She noted that ineffective assistance has system costs as well, including the cost of a retrial. She suggested that while the contract system may appear to be working now, it's not sustainable long-term. A number of people have dropped out of the contract system and she articulated grave concerns about the quality of people who will continue to do contract work.

Murray agreed that IDS was underfunded. He indicated that such underfunding impairs the prosecutor's ability to be efficient and effective. Murray specifically noted that he was speaking of non-capital cases.

Edwards stated that he lobbied for a PD office in his area. The PD office has come in and has done a great job. The PAC attorneys had not been providing adequate representation. For example, some came to court never having seen their clients before trial. By contrast, the PD office has a requirement that APDs meet with the client within a certain number of hours. The PD office has raised the quality of defense counsel. Although a committee of lawyers supervised the PAC list, there was little or no real oversight. Additionally, IDS does a good job training PD staff.

Murray asked the panelists about ID compensation and its impact.

Waters stated that at \$40-42/hour lawyers aren't making any money and that many lawyers no longer handle misdemeanor and high-level felony cases. This creates a system where the people left doing that work have bare-bones office support and end up seeing their clients only right before court. Additionally, new lawyers have no opportunity to get on the appointed list and obtain experience. This is not a good recruitment tool for talent into the criminal defense bar. Additionally, it impacts our ability to move cases through the system with a minimum of error.

Freeman indicated that there is no question that we started to see excellent lawyers drop away from doing ID work. She noted that in Wake County they file just under 10,000 felonies/year with about one half being disposed of by felony plea in district court. Contracts seem to work in this type of situation. However, for complex cases that require more time, it is not worth it for the lawyers to take the case given current compensation levels. She stated that we need to be

concerned about cultivating lawyers who can handle our most serious felony cases. Freeman expressed concerns about the contract system because she believes people will not stay with it over the long term.

Edwards noted that when the PDs oversee PACs handling conflict and overload cases, quality representation is ensured. He noted that IDS has been very receptive to dealing with problems with specific lawyers on the PAC list.

Murray noted that Mecklenburg has a rigorous PAC system with cases divided into 3 separate tiers depending on seriousness. In Mecklenburg a lot of lawyers have gotten off the appointed list and this has had a profound impact on the quality of representation. He noted that lawyers now lack the skills and ability to handle even misdemeanor matters. He emphasized misdemeanors, while low level offenses, have very serious consequences for defendants. He noted that a misdemeanor conviction can be a “life sentence” in terms of never being able to get above the poverty level.

Commissioner Huffman asked about new funding from the Governors Crime Commission for the prosecutor’s offices.

Murray responded that with a large office, he can use any additional support that he can get. But he noted the additional resources in question—victim witness assistants—do not do anything to relieve his ADAs. Thus, these new resources are not going to have a huge benefit when he has other pressing needs.

Robinson noted that in some rural counties there has been a net loss of lawyers. He asked if putting a PD in those areas would take away revenue stream from the local bar.

Edwards responded that implementation of a PD office in his district did impact the private bar. But, he emphasized, the quality of representation has gone the way up.

Murray asked the panelists whether every district should be allowed have its own model for ID. Freeman stated that if a contract system works, it should be required for all similarly situated districts. In her view, there should be uniformity of delivery methods.

Waters stated that what works in larger counties won’t work in his area.

Edwards reiterated that point, noting that the same thing won’t fit every district.

Murray asked for feedback from District Court Judge Hamby, who was present, about his flat fee method.

Judge Hamby stated that it works pretty well. There is a procedure for lawyers to argue for an increased amount. When they used an hourly rate, new lawyers were submitting 20 hours in misdemeanor cases and experienced lawyers were getting punished by resolving the case more quickly. He added that a flat rate may work in other places but that it won’t work everywhere.

The next panel offered the judges’ perspective on ID. Panelists included: Athena F. Brooks, Chief District Court Judge & President, NC Conference of District Court Judges (District 29B), Henry W. Hight, Jr., Superior Court Judge (Judicial District 9), and Judge Hamby.

Judge Hight indicated that his experience with ID began in 1974 when he served on the appointed list. This gave him experience and supplemented his law practice. His experience with PDs began in the 1980s. While he has no quarrel with PDs, he does not like the contracts. Contracts were implemented in his district and as a result, a small number of lawyers have a high percentage of the criminal docket. He stated that their unavailability for court can determine whether court is held at all. In his experience, lawyers are leaving the contract system because it’s not financially feasible to do that work. In the past, criminal lawyers served on the appointed list because of an obligation to the system. This in turn gave credibility to the system, something we are losing with the contracts. He stated that in his district there are 3 contract lawyers who do not live in the district or have an office there. He noted that many indigent defendants have transportation issues and in rural communities how and where they see their lawyers matters. He noted that the contract system also excludes new lawyers from obtaining valuable

experience. He worries that if we don't use them we will lose them, and this may have a significant impact in rural districts. He emphasized that lawyers are important in every community but especially so in rural communities. Judge Hight supports an appointed system, where local lawyers are used for local cases for several reasons, including: giving defendants ready access to their lawyers; ensuring that attorneys can have easy access to witnesses; promoting better communication with the DA's office; allowing greater flexibility in scheduling trials and pleas; ensuring a larger pool of counsel; reducing conflicts; ensuring that the most seasoned attorneys are doing ID work, giving credibility to the system; providing opportunities for young lawyers; and ensuring that attorneys have a stake in the system.

Judge Brooks noted that she used to work in Buncombe where there was a PD office but moved to a county served by the PAC system. In her experience, the smaller counties have more experienced PAC lawyers. In some counties with a larger bar the lawyers with the most experience are not on the list. She also noted that when a PD is monitoring the PAC list, quality is improved.

Judge Hamby stated that when both sides have good quality lawyers, you get a better result. He noted that in his area that they use a flat fee and a PAC system; they do not have a PD or contracts. He expressed concern about having a PD system that was managed out of a larger county, such as Mecklenburg. In closing he noted that we are a uniform court system. The level of service afforded to indigent defendants must be the same but the delivery methods can differ. Murray asked about the ability to manage a PAC list.

Commissioner Wagoner said it's harder for a superior court judge to do because the judge is moving around.

Hamby indicated it's easier for district court judges.

Hight added that in the old appointed system, he could look at the list and move past the name if he didn't think it was the appropriate lawyer for the case. Now he has no control, he must go strictly down the list.

Brooks stated that each district should be able to select what works best in the local community. Seigle asked Brooks if she would prefer a PAC system.

Brooks said that for criminal cases she would pick a PD office.

Prof. John Rubin, from the UNC School of Government spoke about models for providing ID. His PowerPoint presentation is attached to these minutes.

Rubin suggested that it might be helpful to focus on three essential components of an ID system: leadership, money, and people. Leadership refers to both the people in charge and the governance structure. Money refers to sufficient funding to implement the vision. People refers to the individuals who will do the work.

He suggested that a term that might be helpful to use to assess whether the system is working well is Reliability. We want a system that we can rely upon; unreliability is bad for the accused and as we heard earlier, bad for others including judges and prosecutors.

Turning to the essential component of leadership, Rubin noted that before IDS was created, we had a system where authority over ID was scattered among the AOC, the State Bar and some 36 local bar committees, over 300 judges acting in thousands of separate cases, and 11 independent PDs. The ID Study Commission recommended a central Commission structure, and that was how IDS was created. The approach of having an independent Commission model is the majority approach in the US. Independence refers to being able to exercise power independent of other actors in the court system. This is important to having effective leadership. He explained that the ID system needs to be one with coordinated planning, management and oversight independent of other court actors. This was the model initially adopted when IDS was created and once established, coordinated planning, management and oversight began. For example, IDS created performance guidelines and qualification standards; established new PD offices and uniform hourly rates; and developed a program of education for public defenders

and PAC lawyers. While many issues are left to be resolved, it's important to remember why IDS was created: we needed leadership and we didn't have it. Rubin noted that since its initial creation, the General Assembly has moved IDS into the AOC, and has given the AOC authority to modify the IDS budget. He noted that one concern the Committee may wish to consider is how to enable IDS leadership to direct the complicated enterprise of delivering ID services. Turning to money, Rubin noted that the ABA Principles state that the government has the responsibility to fully fund the cost of quality legal representation for all eligible persons. That means that ID should not be a pro bono, voluntary effort of lawyers. In fact, some lawyers have sued to enforce their belief that they been conscripted to work on ID matters. From a management perspective, if you want quality you need to pay for it. NC has managed funding issues, in part, by declining to pay for representation in certain matters, such as restoration of rights. These collateral matters, however, may have a significant impact on the ability of individuals to reintegrate into society. Rubin stated that another funding issue is who should provide the money: the state or county. He suggested it should be the state. If funding is purely local, poor counties will have low quality ID. Also local political pressures may negatively impact funding. Finally, he noted that it is hard to execute a vision for the state if the individual counties are responsible for funding. Rubin suggested that the biggest question regarding funding pertains to its adequacy. In this respect, there is no model formula. However, there is no way to have a reliable ID system without adequate funding. When PDs have less money and PACs are underfunded, representation suffers. When the rates were lowered in NC, lawyers spoke with their feet and they stopped taking cases. The experience of other states is that when funding is insufficient, defendants sit in jail, continuances are required because of unprepared lawyers, and ineffective assistance of counsel claims follow the trial. He noted that the NC system is currently under stress. Hourly rates are comparatively low, PD salaries are flat, and there is limited money for the kind of oversight and support that several earlier presenters have spoken about.

Turning to the issue of people—who should provide ID services—the ABA Principles state that where caseload is high, the delivery system should consist of a PD office and active participation of the bar. This recommendation makes sense for a number of reasons. First, a PD office can provide management capacity in terms of hiring decisions, mentoring and supervising lawyers, and taking corrective action when problems develop. Second, PD offices have other in-house support, such as investigators, social workers, and specialist attorneys in subjects like immigration and sexual assault. Third, training is easier with PD offices. And also, specialized offices can be set up, e.g., for appellate litigation and capital cases. This doesn't necessarily mean that PD offices should be established statewide. The ABA position is that they only should be established where populations warrant. Also, there are variations on this approach, such as multi-county organizations in rural areas, and use of part-time employees. But, even where PD offices exist there always will be cases where outside lawyers are needed because of conflicts and overload. The ABA Standards suggest that the PAC system should be used handle conflict and overload cases. The challenge with using a PAC system is how to build the type of management capacity that we have in PD offices. In this respect, ABA Standard 5-1.2(b) says this should be done through a coordinated PAC system, not an ad hoc one. There are places in the country with such systems and we have them in parts of NC. For example, we have jurisdictions where PDs serve on the local bar committee that maintains the PAC list. In districts without PDs, lawyers and judges do this but it's not clear how active they are, nor is it clear that they should be serving in this role. Other states have regional administrators, as IDS has with its contract supervisors. Still other states have part-time employees who serve as supervisors and mentors. Additionally the resources available to PD offices, such as investigators, can be made available to PACs in an actively managed system. The best direction may be to build in management capacity to supervise PACs.

Robinson asked how ID has maintained independence in other states where it has been moved under the court system.

Rubin offered the federal system as an example.

Robinson asked about metrics used assess ID delivery.

Rubin responded that Commission research assistant Emily Portner had found recent studies showing that PD offices provide superior services, but it's important to control for all variables.

Adams asked whether there were ways to improve the system other than funding.

Rubin responded that the focus has been on money because IDS was asked to create a contract system. Clearly funding is critically important, but having a systematic approach is just as important.

Maher commented that to improve the quality of ID services, the lawyers simply need more time; you need to reduce caseloads. You can do this without spending more taxpayer money by, for example, making minor misdemeanors infractions that do not require ID services. Also, allowing ID lawyers access to CJLeads would create efficiencies. Greater efficiency with respect to case calendaring also would help.

Kemp asked Maher why contracts had been established in some districts but not in others.

Maher responded that the General Assembly directed IDS to implement contracts statewide.

We couldn't do that overnight so we began in Durham where we are located and expanded from there. Then we were told to discontinue the expansion while the General Assembly studies the issue. Maher's assessment was that contracts work well in large districts with high volume caseloads. One concern about the contract system is that when lawyers aren't paid by the hour and contract pay is low, there is an incentive to spend less time on cases. When the lawyer is handling an especially difficult case, those pressures can be extreme. There is an outlet to allow for elevated payment, but it's not clear whether that is working.

Commission Chief Reporter Jon Williams suggested that the ABA and BJS have data on administration and funding of ID systems by state.

In response to another comment about underfunding of ID, Adams noted that ID was funded at \$12 million in 1987-88; now it is at \$120 million.

Reporter Smith asked Maher whether IDS has a plan for supervising PAC lawyers in non-PD districts.

Maher responded that IDS does not have such a plan. They have depended on volunteer lawyer committees, some of which have done a good job, some haven't. The primary reason why volunteer lawyer committees fail is that it's very hard for local lawyers to remove their colleagues from the PAC list. He noted that in theory you could have a regional system, but it is harder with appointed and contract lawyers.

The meeting concluded with a discussion of next steps, with the Committee deciding to form a subcommittee to make recommendations to the full Committee on this issue.