Scenario 1

As you go through your stack of "jail mail" you read a letter from an inmate complaining that he has been in the county jail for almost a year now and that his court appointed attorney has only visited him twice to talk about his case. The defendant also states that he has tried to call his lawyer numerous times but that the attorney never is available to speak with him. The defendant tells you he wants to fire his lawyer and wants you to appoint someone else. This is the third complaint you have received in the past two months about this same lawyer not visiting clients and the complaints have been from different defendants. What do you do?

Comments from State Bar Perspective:
This scenario implicates the most common violations of the Rules of Professional Conduct found by the State Bar's Grievance Committee: Rule 1.3, which requires a lawyer to act with reasonable diligence and promptness on behalf of a client, and Rule 1.4, which requires a lawyer to communicate adequately with a client. The discipline imposed for violations of Rules 1.3 and 1.4 varies widely depending on the number of affected clients, whether the lawyer has prior discipline, the lawyer's level of experience, and the reasons (or lack thereof) for the misconduct.

You have inherent authority to regulate the legal profession and therefore can address attorney misconduct in a number of ways. In this scenario, possible responses include:

(1) Inform the lawyer that the court has received complaints from indigent clients about lack of communication and diligence, and notify the lawyer that a pattern of neglect and/or inadequate communication may be grounds for removal from the appointed list;
(2) Remove the lawyer from the appointed list;
(3) Initiate a judicial disciplinary proceeding;
(4) Refer the matter to the State Bar;
(5) Address the matter informally with the lawyer in an effort to determine why s/he may be failing to attend to clients.

When you have concerns about a lawyer's conduct, you are encouraged to inquire about his or her current status with the State Bar by calling the Office of Counsel at (919) 828-4620. It may be that the behavior is part of a pattern that has come to the Bar's attention.

Comments from Indigent Defense Services Perspective:
This situation appears to present two issues; (1) what can be done about the particular inmate's situation, and (2) what can be done about the apparent continuing problem of this attorney's failure to meet with their client. Failure to meet with clients before court is a recurring problem. As a small step toward addressing this issue IDS has changed the non-capital fee application so that counsel must now report the date of the first in person client interview; the hope is that recording this information will

emphasis the importance and also allow review of any pattern of failure to meet with clients. As far as the existing situation, a judge can have a hearing at which the lawyer and client can appear and the court can determine whether in fact counsel has been meeting with the client. I am aware of one case in which the court first obtained the visiting logs from the jail, which confirmed that the lawyer had not met with the client. If in fact that lawyer has not been keeping in contact with the client, and the relationship has been damaged, then a court could remove counsel, and appoint new counsel. When the removal is due to counsel's inattention to the case, it would be appropriate to refuse to pay counsel for any time in the case. As to the ongoing issue, a lawyer can be disciplined for failure to provide adequate representation in several ways. I am aware of at least one case in which a superior court judge entered an order suspending the lawyer's placement on the local indigent roster for 30 days based upon their failure to meet with a client. Also, if appropriate, the matter can be brought to the attention of the local indigent committee, which can review whether the attorney should remain on the roster of attorneys being appointed.

Scenario 2

You are presiding over a young defense attorney's first criminal trial. Her performance during jury selection was lackluster at best, she hasn't been very effective in her cross-examination of witnesses, and now, at the close of the State's evidence, she does not make a motion to dismiss. Do you take any action at this point? Does it make any difference to you whether she was appointed or privately retained?

Comments from State Bar Perspective:
This scenario may implicate Rule 1.1 of the Rules of Professional Conduct, which states that a lawyer shall not handle a legal matter s/he is not competent to handle. The Grievance Committee rarely finds that a lawyer has violated Rule 1.1.

This young lawyer may benefit from being paired with a mentor or from the experience of sitting second-chair to a more experienced lawyer. If the young lawyer is on the appointed list, you could condition her continued inclusion on the list on her fulfillment of reasonable requirements to enhance her competence.

Comments from Indigent Defense Services Perspective:
This also presents several issues: (1) Should the court do anything about the performance in this trial, and (2) should the court do anything about the possibility of similar sub-par performance in future trials. As a non-judge, I may not be the best source of advice on how active a judge should be in an on-going trial, but I think that it would be appropriate to question counsel about aspects of the trial that are not likely to be strategic decisions, such as the failure to move to dismiss. The issue is sufficiently important, and there is no obvious strategic reason not to make this motion, that the court might be well advised to ask counsel if they wish to make a motion to dismiss. Given that the poor performance appears to be due to inexperience, the court might also consider speaking with counsel after the trial and suggesting that they seek

additional training and experience – such as attending training offered by SOG, or volunteering to sit second chair on a trial with a more experienced attorney. I do not think that the retained/appointed status should weigh much on how to handle this situation.

Scenario 3

In your judicial district there is not a public defender's office. Instead, you have a list of attorneys that have been approved to handle court appointed cases. There are 15 lawyers on your appointment list. Of those 15, it has been your experience that 12 of them have impressed you as being diligent, hard-working, and at least reasonably well prepared in the matters the have brought before you. The remaining three, unfortunately, never seem to be as prepared and you have more requests for new attorneys from their clients than the 12 previously mentioned. Do you appoint these three lawyers to cases like the other twelve or do you treat them differently?

Comments from State Bar Perspective:
Since this scenario involves management of the district's appointed list and the inevitable distribution of appointed counsel on the bell curve of competence rather than ethics or lawyer misconduct, the State Bar can't be of much help.

Comments from Indigent Defense Services Perspective:
The model appointment plan developed by IDS, and which IDS strongly urges each district to adopt, requires random assignment of cases to lawyers to avoid any appearance of favoritism or judicial control over defense counsel. So, if counsel is not providing adequate representation the answer should not be to change how they are appointed from the list; rather, the issue should be brought to the attention of the indigent committee and a decision made as to whether they can remain on the list or lists.

Scenario 4

On Saturday night you get a phone call from one of your local attorneys letting you know that he has just driven another local attorney (who is a solo practitioner) to an inpatient drug rehab center. He informs you that he will be covering the other attorney's cases while he is in rehab, and that it will probably be 90 to 120 days before the other lawyer will be able to return to his law practice. He also informs you that the rehab center said that the other attorney cannot have contact with anyone outside the facility for the first two weeks of his treatment. What do you do?

Comments from State Bar Perspective:
There are many ways (involving varying levels of formality) to manage the situation when a lawyer is deceased, disabled, missing, or otherwise unable to manage his or her professional affairs. The decision about how to proceed is discretionary and informed

by myriad factors. You are always welcome to contact the Office of Counsel to discuss the options.

In some cases, the local bench and bar can cooperate to protect the interests of an incapacitated lawyer's clients during his or her temporary absence. In other cases, more formal action is warranted and the senior resident Superior Court judge can appoint a trustee pursuant to NCGS § 84-28(j) to protect the interests of the incapacitated lawyer's clients. The trustee should have access to the incapacitated lawyer's records, client files, and (where applicable) trust and/or operating accounts. Please be aware that a trustee is obligated to notify all of the lawyer's clients that the lawyer is unavailable and the clients must therefore seek other counsel. Accordingly, this approach is less flexible than informal arrangements where volunteers from the local bar protect the lawyer's clients. This approach may also leave a lawyer who is only temporarily out of commission without clients when he returns to his practice.

In the scenario described above, you could ask the local attorney who called to serve as the volunteer contact person for the court and other lawyers regarding the incapacitated lawyer's cases. If there are client matters that must be handled while the lawyer is in rehab, the helpful volunteer attorney should not merely "cover the cases" without the clients' informed consent. He should notify the affected clients that their lawyer will be unable to represent them for at least 3 to 4 months and offer to do whichever of the following each client chooses: (1) assume responsibility for the representation, (2) refer the client to another lawyer, or (3) provide the client with his file so that he can seek alternate counsel.

In the alternative, if you decide it is more appropriate under the circumstances, you could appoint the helpful attorney as a trustee under NCGS § 84-28(j). Judges usually call upon the Office of Counsel to file the petition and draft an order appointing the trustee.

Whether or not a trustee is appointed, please let the State Bar know whenever a lawyer is permanently or temporarily unable to protect his clients' interests. A lawyer entering rehab has typically been on a downward slide for some time and may not have made arrangements to protect his clients' interests. The lawyer's office is often in disarray. If a trustee was appointed, the trustee may have trouble compiling a complete client list. The Office of Counsel will likely receive complaints and requests for help from the impaired lawyer's clients. The State Bar can either assist the clients directly or, if a trustee was appointed, put them in contact with the trustee.

You may also initiate proceedings seeking to transfer the lawyer to disability inactive status, either by referring the issue of disability to the State Bar or by conducting a hearing on the issue. Upon request, the Office of Counsel can present evidence of disability at a hearing before the court. If a lawyer is transferred to disability inactive status, s/he must prove s/he is no longer suffering from a physical or mental condition that significantly impairs his or her professional judgment before s/he may return to the practice of law.

During the lawyer's hospitalization or upon his return to the community, you may also decide to contact the Lawyer's Assistance Program (LAP), which provides support for lawyers with substance abuse and mental health problems. Please be aware that a lawyer's referral to or participation in LAP is confidential and will not be made known to the Office of Counsel or result in any disciplinary action against the lawyer.

Comments from Indigent Defense Services Perspective:
Someone needs to act to ensure that client's interests are protected. It is probably important to figure out what cases are involved, the status of those cases, and make sure that clients are informed of situation.

Scenario 5

You are presiding over motion for summary judgment. The attorney for the plaintiff and the attorney for the defendant have never hid their obvious personal dislike of one another from anyone over the years. As the motion goes on, the tone of both lawyers becomes more agitated and their comments start becoming more personal. At what point, if any, do you take any action? If so, what kind of action do you take? Does it make any difference whether the courtroom is empty as opposed to being filled with spectators?

Comments from State Bar Perspective:
Rule 3.5 of the Rules of Professional Conduct prohibits lawyers from engaging in undignified or discourteous conduct that is degrading to the tribunal. Rule 4.4 states that in representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass or burden a third person. Additionally, Rule 12 of the General Rules of Practice ("Courtroom Decorum") provides: "All personalities between counsel should be avoided. The personal history or peculiarities of counsel on the opposing side should not be alluded to. Colloquies between counsel should be avoided." See also State v. Sanderson, 336 N.C. 1, 10, 442 S.E.2d 33, 39 (1994) (quoting State v. Miller, 271 N.C. 646, 659, 157 S.E.2d 335, 346 (1967)) ("[A] trial attorney may not make uncomplimentary comments about opposing counsel, and should 'refrain from abusive, vituperative, and opprobrious language, or from indulging in invectives.'").

You can and should intervene to correct unprofessional courtroom conduct by attorneys as soon you believe their behavior is inappropriate. The State Bar urges judges to address this type of behavior when it happens, whether or not there are spectators present. Various factors may influence whether you choose to address the unprofessional behavior in chambers or in open court (e.g. whether you want to maintain a verbatim record, the potential impact on spectators if the attorneys are admonished in open court, etc.).

When, as here, improper conduct occurs in the courtroom while you are on the bench, you may summarily discipline the lawyer or hold the lawyer in contempt pursuant to NCGS Chapter 5A. You may also impose monetary or other sanctions for violations of

the General Rules of Practice. See State v. Rivera, 350 N.C. 285, 291, 514 S.E.2d 720, 723 (1999)("We have viewed with concern the apparent decline in civility in our trial courts. This Court shall not tolerate, and our trial courts must not tolerate, comments in court by one lawyer tending to disparage the personality or performance of another. Such comments tend to reduce public trust and confidence in our courts and, in more extreme cases, directly interfere with the truth-finding function by distracting judges and juries from the serious business at hand. We admonish our trial courts to take seriously their duty to insure that the mandates of Rule 12 are strictly complied with in all cases and to impose appropriate sanctions if they are not.")

If you choose to intervene informally to correct the behavior, it may be helpful to maintain notes or some other record of the conduct and the warning from the bench, in case the lawyer's improper behavior turns out to be part of a pattern.

When a lawyer is habitually unprofessional, s/he may benefit from referral to the Chief Justice's Commission on Professionalism or a local bar professionalism committee. These organizations can attempt to address the unprofessional behavior through the Professionalism Support Initiative (PSI), wherein two members of the bar who have been trained in non-confrontational intervention will reach out to the lawyer in an effort to understand the causes of the unprofessional behavior and help the lawyer avoid future episodes.

Comments from Indigent Defense Services Perspective:
None as to this scenario.

Scenario 6

A lawyer presents a fee application to you for payment in a court appointed case. He lists that he had five hours in court in regards to the case. You know that the case pled out soon after being indicted and you are extremely doubtful as to the amount of time the attorney has claimed. What do you do?

Comments from State Bar Perspective:
If a lawyer falsely inflates his hours on a fee application, he is attempting to collect an excessive fee in violation of Rule 1.5(a) of the Rules of Professional Conduct. His submission of the padded fee application also constitutes a false statement of material fact to the tribunal in violation of Rule 3.3(a)(1) and conduct involving dishonesty, deceit and misrepresentation in violation of Rule 8.4(c).

You may investigate this matter on your own, refer it to the State Bar, or both. It is generally more expedient for a judge to make his or her own inquiry rather than going through the State Bar's grievance process.

In a recent case involving similar facts, a District Court judge conducted a hearing on his own motion to address the matter of a lawyer's apparently false fee application. After hearing, the judge entered a four-page sanctions order containing detailed

findings of fact. Sanctions included: admonition by the court; denial of any payment for the cases in which the lawyer inflated fees; a six month suspension from the district appointed list, and an indefinite prohibition against representing appointed clients before the judge who entered the order. After the court made its findings of fact, the matter was referred to the State Bar. The lawyer was reprimanded by the Grievance Committee for violating Rules 1.5 and 3.3.

Comments from Indigent Defense Services Perspective:
IDS relies on judges to make judgment about both whether the hours were in fact worked, and if so whether the amount of hours is reasonable. If a judge determines that the claimed hours were not worked or reasonable they should reduce the number of hours paid. A court may also want to meet with counsel to explain the cut, and try to ensure that this is not an ongoing problem.

Scenario 7

You are presiding over a first degree rape trial. During her closing argument, the assistant district attorney points at the defendant and in a loud voice tells the jury "This defendant is a monster who doesn't give a damn about anyone but himself!". The defense attorney sits there silently. What, if anything, do you do?

Comments from State Bar Perspective:
Whether and how to respond when a lawyer makes an unprofessional or potentially improper argument during a jury trial is a difficult decision within the sound discretion of the judge.

The conduct described in this scenario potentially violates Rule 12 of the General Rules of Practice, which provides: "Adverse witnesses and suitors should be treated with fairness and due consideration. Abusive language or offensive personal references are prohibited."

Rule 3.4 of the Rules of Professional Conduct also may be implicated. Rule 3.4(e) states that a lawyer shall not "allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, . . . or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused."

As noted in Scenario 5 above, Rule 3.5 of the Rules of Professional Conduct prohibits lawyers from engaging in undignified or discourteous conduct that is degrading to the tribunal. When lawyers in the courtroom point, raise their voices, and use profanity, it may degrade the dignity of the proceedings and the court.

Comments from Indigent Defense Services Perspective:
Case law suggests that some arguments are so improper and pose such a risk of prejudice that the trial court has a duty to act on its own to prevent the trial from being tainted by the argument. This argument appears to be an example of such a situation.