Frequently Asked Questions and Recurring Issues in Criminal Cases

District Court Judges' Summer Conference

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PRETRIAL

1. **How does a trial judge determine whether a defendant is an indigent person entitled to appointed counsel?**

Relevant Legal Principles and Considerations: (Danielle Carman)

G.S. 7A-451(a) provides that "[a]n indigent person" is entitled to the services of counsel in a series of specified actions and proceedings, and G.S. 7A-450(b) states that it is the State's responsibility to provide counsel and other necessary expenses of representation to an indigent person who is entitled to counsel. Pursuant to G.S. 7A-450(c), the issue of indigency may be determined or redetermined at any stage of the proceedings.

G.S. 7A-450(a) defines an indigent person as "a person who is financially unable to secure legal representation and to provide all other necessary expenses of representation in an action or proceeding enumerated in [Subchapter IX of Chapter 7A of the General Statutes]." *See also, e.g.*, *State v. Hoffman*, 281 N.C. 727, 190 S.E.2d 842 (1972) ("An indigent is one who does not have available, at the time they are required, adequate funds to pay a necessary cost of his defense.").

IDS Rule 1.4(a) reiterates the standard in the statutes and case law: "An indigent person is a person who is financially unable to secure legal representation or provide other necessary expenses of representation at the time the expenses are required." IDS Rule 1.4(b)(1) directs courts to require defendants who are seeking appointed counsel to "complete and sign under oath an affidavit of indigency on a form approved by the IDS Director." For that purpose, IDS has continued to direct courts to use the same form affidavit of indigency that was previously used by AOC (AOC-CR-226). IDS Rule 1.4(b)(2) further provides that "[t]he court shall make reasonable inquiry of the defendant or respondent under oath to determine the truth of the statements made in the affidavit of indigency."

Several North Carolina cases direct that various factors, such as the person's employment, income, and assets, be weighed in determining whether a person is indigent. However, the cases do not establish a precise measure of indigency, and the specific dollar amounts discussed in older cases are not particularly useful guides in assessing a person's ability to hire a lawyer today.

G.S. 7A-498.5(c)(8) provides that the IDS Commission shall develop standards for determining indigency. The IDS Commission previously formed an Indigency Standards Committee and, in 2008, IDS staff conducted extensive research on indigency standards and how indigency determinations are made in all 50 states. The following trends existed as of 2008:

- While a majority of states directed the court to determine indigency, a statewide or local public defender initially determined indigency in 15 states and the District of Columbia. In most of the states where someone other than a judge determined indigency, the defendant could appeal to the court if his or her initial application for appointed counsel was denied.

- Most states employed a general definition of indigency, much like the one used in North Carolina. Several states directed that a person is eligible if retaining a private attorney would prove to be a "hardship" or "substantial hardship," but none of the states provided any specific criteria to define hardship. A number of states considered the severity and/or complexity of the case. Many states used certain indicators to presume indigency, such as if the defendant was incarcerated or received some form of public assistance. At least 16 states used some percentage of the federal poverty guidelines.

- Most state statutes and indigent defense rules appeared vague with respect to investigation and verification procedures, leaving such decisions to the discretion of judges, public defenders, or other actors. However, all but 15 states explicitly required the applicant to submit an affidavit of indigency or some other form of written application, and most states provided that a false statement made on such an affidavit constituted perjury. Nineteen states either required or allowed the courts or other actors to investigate or verify a defendant's claim of indigency, either randomly or when there was some question about the defendant's truthfulness.

After conducting this research, IDS staff had meetings with the chief public defenders and a group of seven district court judges to obtain feedback on current indigency screening practices and potential indigency standards. The chief public defenders appeared to believe that indigency screening and appointments are generally accurate and appropriate, although some defenders reported occasional appointments where the affidavits seemed incorrect or did not seem to support a finding of indigency. In such situations, IDS believes public defenders and appointed counsel should bring those concerns to the attention of the court pursuant to G.S. 7A-450(d): "If, at any stage in the action or proceeding, a person previously determined to be indigent becomes financially able to secure legal representation and provide other necessary expenses of representation, he must inform the counsel appointed by the court to represent him of that fact. In such a case, that information is not included in the attorney client privilege, and counsel must promptly inform the court of that information."

The group of district court judges expressed the following views:

- Judges have very limited time to make indigency determinations (generally less than 15 seconds per determination), and the group did not want IDS to adopt guidelines that would make the process more time-consuming or burdensome.

- The judges recognized that the current system is not perfect and that there probably is variability in judicial screening practices and decisions about indigency. However, they did not seem to think they could improve accuracy given their limited time and resources.

- The judges did not seem to think the existing form affidavit of indigency could be meaningfully improved.

- The judges expressed confidence in their familiarity with current local market rates for private representation, and said they consider the cost of retaining private counsel in the community when making indigency determinations. They did not seem to think that data on average retained costs by case type would be helpful to them.

- The judges seemed open to some rebuttable presumptions of indigency, such as for defendants who are incarcerated or receiving public assistance, but noted that there will always be specific instances where presumptions can and should be rebutted. They did not seem to view presumptions as an improvement that would save time or ensure more accurate decision making.

- The judges seemed to believe that the best way to increase the accuracy of indigency determinations would be to take the process out of the courtroom, at least by having the paperwork completed in advance.

- The judges indicated that their decisions are only as accurate as the information applicants provide on their affidavits of indigency. They were open to getting additional resources to verify the accuracy of information provided by defendants, such as personnel dedicated to indigency screening or verification, but recognized that would come at a cost.[1]

- The judges agreed that having defendants represented by counsel generates system savings by increasing the efficiency of the courts.

As a practical matter, IDS believes that some people are clearly indigent, some people are clearly not indigent, and some people fall somewhere on the spectrum of marginally indigent. While standards or guidelines may be useful for the marginally indigent group in the middle, in light of the complexity of the issue, the difficulty in generating standards that would provide both meaningful guidance and needed flexibility, and the fact that defendants who are convicted have to repay the value of services provided to them through the recoupment process, IDS has not made progress on providing a more useful and workable definition of indigency.

[1] The North Carolina court system employed indigency screening staff in the 1990s and found that they were not cost effective. In addition, a 2007 study of indigency verification in Nebraska found that the process detected inaccurate information in approximately 5% of applications for court appointed counsel. However, only 4% of the 5% that included misstatements (or only 1 in every 500 applications) led to the appointment of counsel in cases in which counsel otherwise would not have been provided. A more significant percentage of the inaccurate applications overstated the applicants' financial resources.

2. **The assistant district attorneys in this district typically do not check defendants' criminal records before their first court date. How does a trial judge in the district determine whether a defendant charged with a Class 3 misdemeanor is an indigent person entitled to appointed counsel?**

Relevant Legal Principles: (Danielle Carman)

Section 18B.13 of Session Law 2013-360 enacted a new punishment scheme for Class 3 misdemeanors committed on or after December 1, 2013. Unless otherwise provided for a specific offense, the section limits the punishment to a fine for defendants who are convicted of a Class 3 misdemeanor and have no more than three prior convictions. Thus, unless otherwise noted, an indigent defendant who is charged with committing a Class 3 misdemeanor on or after December 1, 2013 and who has no more than three prior convictions is not entitled to appointed counsel pursuant to G.S. 7A-451(a)(1), because an active or suspended term of imprisonment is not a possible consequence. As a result of those changes, the Joint Conference Committee Report on the Continuation, Expansion, and Capital Budgets that accompanied Session Law 2013-360 reduced IDS' budget by $2 million each year of the biennium.

To implement these changes, IDS adopted a policy titled "Appointment and Payment of Counsel in Class 3 Misdemeanor Cases," which is available here. School of Government Professor John Rubin has also prepared a very helpful document exploring the answers to many frequently asked questions about these changes, which is available here.

A defendant's prior convictions must be determined before counsel is appointed because, without evidence that the defendant has four or more prior convictions, the defendant is not entitled to counsel. A practice of appointing counsel in Class 3 misdemeanor cases pending a determination of prior convictions would undermine the General Assembly's intent, because it would effectively allow appointment for all Class 3 misdemeanors. In light of the line of cases addressing meaningful access to the courts, IDS believes there is a limited constitutional exception to the requirement that a defendant have four or more prior convictions to be entitled to counsel for defendants who are in custody at the time the court determines entitlement and are unable to represent themselves. *See, e.g., Bourdon v. Loughren*, 386 F.3d 88 (2d Cir. 2004) (pretrial detainees have a right to meaningful access to the courts to defend against the criminal charges resulting in their detention).

Form AOC-CR-224 has been revised to require the court to make one of two possible determinations to support appointment of counsel for a Class 3 misdemeanor that was committed on or after December 1, 2013: 1) that the court has found the defendant has more than three prior convictions; or 2) that the court has not found the defendant has more than three prior convictions, but the defendant is in custody, the court does not intend to modify the defendant's conditions of release to allow the defendant to be released pending trial without posting a secured bond, and the defendant has a constitutional right to meaningful access to the courts. If the court makes the second finding, the appointment is limited pursuant to G.S. 15A-141(3) and 15A-143 to the time period of the defendant's pretrial confinement on the Class 3 misdemeanor charge.

The new punishment scheme does not explicitly address the issue of who bears the burden of producing evidence of the defendant's prior convictions for purposes of appointment of counsel but, as a practical matter, the burden falls to the prosecution. Ultimately, the State has the burden of establishing the grounds for punishment. In this context, if the State wants the court to impose a sentence greater than a fine, it has to prove that the defendant has four or more prior convictions (except in the rare instance

when a statute authorizes a greater punishment without four or more priors). If the State wants the option of seeking a punishment greater than a fine, the court must have the defendant's record early enough in the case to support a finding that the defendant is eligible for such a sentence and thus eligible for counsel. Although the new statute does not preclude a court from obtaining prior record information from sources other than the State, if the court does not have the necessary information it may not appoint counsel and the State may not seek a higher punishment.

3. **Suppose that the trial judge in the previous example appoints an attorney, but later learns that the defendant has only two prior convictions. Will IDS pay the appointed attorney?**

Relevant Considerations: (Danielle Carman)

Yes. IDS' policy, "Appointment and Payment of Counsel in Class 3 Misdemeanor Cases," provides that, "[i]f the Court appoints an attorney to represent a defendant who is charged with a Class 3 misdemeanor, and the Court has found that the defendant has four or more prior convictions, the appointed attorney is not expected to go behind the Court's finding and make an independent determination of its validity." In addition, IDS understands that courts must make decisions based on the evidence before them and that evidence uncovered at a later date may have led a court to reach a different decision if it was timely presented. IDS will compensate counsel in this instance based on a presumption that the court's finding was valid at the time it was made.

4. **If a judge is presiding over a contested adoption case or a civil custody case and the judge believes one of the parties needs a GAL, will IDS pay for the GAL's services based on the judge's order?**

Relevant Legal Principles and Considerations: (Danielle Carman)

No. IDS does not have statutory authority to pay a GAL in many case types, including adoptions and custody cases. With respect to contested adoptions, while G.S. 48-2-201(b) provides that the court may appoint a GAL to represent the interests of the adoptee in a contested proceeding, there is no statute providing that the State bears the cost of that GAL. Any GAL who is appointed in a contested adoption or civil custody case is appointed pursuant to Rule 17(b)(2) of the Rules of Civil Procedure, which states that the GAL's fees should be fixed and taxed to the parties as part of the costs.

A chart showing the various types of GALs that are authorized by the General Statutes, and the agency or person responsible for paying the GALs' fees, is posted on the IDS website (click here) and the AOC Intranet. If judges have any questions about whether IDS will pay for a GAL in a specific case, IDS urges them to contact the IDS Assistant Director/General Counsel, Danielle Carman, in advance.

5. **If an appointed attorney has been working on a case for an extended time period and moves to withdraw based on a conflict of interest, should the judge allow the motion? If so, should the judge take the delay into account when setting the attorney's fee?**

Relevant Legal Principles and Considerations: (Danielle Carman)

IDS Rule 1.7(a1) provides: "Upon appointment to a case subject to this part, counsel shall make prompt and reasonable efforts to determine if the representation would cause any conflict of interest. If counsel identifies a nonwaivable conflict of interest, counsel shall file a timely motion to withdraw pursuant to subsection (b) of this rule. If counsel identifies a waivable conflict of interest, counsel shall either obtain the informed written consent of the client in accordance with the Rules of Professional Conduct or file a timely motion to withdraw pursuant to subsection (b) of this rule." IDS Rule 1.7(b) further provides: "At any time during or pending the trial or retrial of a case subject to this part, a judge of a court of competent jurisdiction may, upon application of the attorney appointed to the case and for good cause shown, permit the attorney to withdraw from the case."

Rule 1.7 of the Revised Rules of Professional Conduct governs conflicts of interest with current clients. Comment [3] provides that, if a conflict exists before representation is undertaken, the representation must be declined. Comment [4] provides that, "[i]f a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client" under certain conditions.

With respect to compensation, the commentary to IDS Rule 1.7 provides: "If appointed counsel moves to withdraw due to a conflict, in determining the appropriate amount of time to approve for compensation purposes . . . the trial judge shall consider the timeliness of counsel's efforts to identify the conflict and to file the motion to withdraw." However, as Comment [5] to Rule 1.7 of the Revised Rules of Professional Conduct recognizes, unforeseeable developments can create conflicts in the midst of representation. If an unforeseeable development caused a delay in withdrawing, IDS encourages judges not to financially penalize the withdrawing attorney.

6. **The family of a defendant charged with a traffic offense posts the bond. The defendant, who is subject to a detainer filed by ICE, is then taken from the jail to a federal facility in Georgia. The defendant does not appear in court as he still is in ICE custody on his scheduled court date. What action should the judge take when the defendant does not appear?**

Relevant Legal Principles: (Troy Page)

G.S. 15A-544.3(a) provides that, "If a defendant who was released under Part 1 of this Article upon execution of a bail bond fails on any occasion to appear before the court as required, the court shall enter a forfeiture for the amount of that bail bond in favor of the State against the defendant and against each surety on the bail bond" (emphasis added).

- Forfeiture under subsection (a) is mandatory, but as a practical matter, it appears to require first that the court treat the defendant's absence as a failure to appear (having the defendant "called and failed"). The AOC is unaware of any holding that subsection (a) requires forfeiture when the defendant's absence is completely beyond both his and the surety's control, *e.g.,* when the defendant is in court for a different proceeding in another county on the same court date, or

when he is in jail for other charges for which he couldn't make bond, but he mistakenly was left off of the jail's transport list for the day.

- If the court elects not to have the defendant called and failed as a result of his absence, presumably the court would continue the case until a later date, and the bond continues to secure his obligation to appear.

- If, however, the court treats the defendant's failure to appear as an FTA, G.S. 15A-544.3(a) mandates forfeiture.

If the court orders forfeiture, G.S. 15A-544.5(a) further provides that, "There shall be no relief from a forfeiture except as provided in this section. The reasons for relief are those specified in subsection (b) of this section. The procedures for obtaining relief are those specified in subsections (c) and (d) of this section."

- The appellate division has applied strictly the exclusivity of the set-aside mechanisms under G.S. 15A-544.5. *See, e.g., State v. Sanchez*, 175 N.C. App. 214, 623 S.E.2d 780 (2005).

- The court's only authority to set aside a forfeiture *ex mero motu* is in subsection (c), but it requires as a preliminary step that the court (i) strike the FTA, and (ii) recall any OFA issued for that OFA. Therefore if the FTA remains on the record and any OFA remains outstanding based on that FTA, subsection (c) does not apply.

    - As a practical matter, striking the FTA, recalling any OFA, and setting aside the forfeiture immediately after ordering the forfeiture would be no different than continuing the case without an FTA; with the forfeiture set aside, the bond continues to secure the defendant's future appearances in the case.

- Unless set aside by the court under subsection (c), the only mechanism for setting aside a forfeiture is a written motion to set aside under subsection (d) that then follows the chronology set out in that subsection. While the substantive grounds for setting aside a forfeiture under subsection (b) include that the defendant was in federal custody at the time of the FTA, G.S. 15A-544.5(b)(7), that ground still requires a written motion to set aside by the defendant or surety and additional procedural steps before any relief may be granted on that ground.

Arguably, G.S. 15A-534(h) might provide the court with a mechanism to grant the surety some relief from the obligation. Subsection (h) provides that a bond is "effective and binding upon the obligor throughout all stages of the proceeding in the trial division of the General Court of Justice until the entry of judgment in the district court from which no appeal is taken or the entry of judgment in the superior court. The obligation of an obligor, however, is terminated at an earlier time if: … (1) A judge authorized to do so releases the obligor from his bond." However, once the defendant is in FTA status, that option probably is foreclosed by G.S. 15A-544.3(a)'s directive that the court "shall" order forfeiture.

7. **Suppose the trial court issues an order for arrest for the defendant in the above case and forfeits the bond pursuant to G.S. 15A-544.3. The defendant's family later seeks to have the forfeiture set aside. What action should the judge take?**

Relevant Legal Principles: (Troy Page)

As noted above, the grounds for setting aside a forfeiture under G.S. 15A-544.5(b) are exclusive.

If the DA or school board attorney (SBA) does not object in writing to the motion, then the motion will be granted by operation of law 20 days after it was served on the DA and SBA. The motion will not come before the court unless an objection has been filed.

Assuming that the DA or SBA objects, the motion must have a hearing. If the basis for the surety's set-aside motion is G.S. 15A-544.5(b)(7) (defendant in federal custody at the time of the FTA), and assuming that the court finds that the surety has met all of the additional requirements for that basis (written notice to the DA while defendant still in that custody, and defendant still in custody for the requisite time after the notice), then the court must grant the motion and set aside the forfeiture. If the surety fails to establish that the facts meet the criteria of subdivision (b)(7) (or whichever of the 7 grounds was asserted in the motion), then the motion must be denied.

- While G.S. 15A-544.5(d)(6) and (d)(7) suggest that the court has discretion to grant or deny the motion - "If … court allows the motion" in (d)(6) and "If … the court does not enter an order setting aside the forfeiture" in (d)(7) (emphases added) - subsection (b) provides that a forfeiture "shall be set aside for any one of the following reasons" (emphasis added), suggesting that the relief is mandatory if the movant's evidence demonstrates that the criteria for the asserted ground have been satisfied. The conditional language of "if" in subdivisions (6) and (7) appears to reflect only that the court might find that the evidence presented does not satisfy the criteria for the set-aside ground alleged in the motion.

Note that if the forfeiture is set aside for either of the reasons discussed above (no objection by the DA or SBA, or upon the court's granting of a motion to set-aside), the surety is not yet "off the hook." The only relief granted is the setting aside of that particular forfeiture, which merely restores the case to *status quo ante*-FTA, so the surety remains obligated on the bond until the occurrence of one of the events listed in G.S. 15A-534(h).

8. **A sheriff's deputy calls a district court judge on a Saturday night to report that a person jailed for driving while impaired has been complaining of chest pains. The deputy explains that this person has a history of heart trouble and requests that the judge unsecure the defendant's bond, which is currently set at $2,000. What action should the judge take?**

Relevant Legal Principles: (Troy Page)

N.C. Const. art. IV, § 18: "The District Attorney shall … be responsible for the prosecution on behalf of the State of all criminal actions in the Superior Courts of his district…."

> "The clear mandate of that provision is that the responsibility and authority to prosecute all criminal actions in the superior courts is vested solely in the several District Attorneys of the State." *State v. Camacho*, 329 N.C. 589, 593, 406 S.E.2d 868, 871 (1991) (citations omitted).

G.S. 84-4: "Except as otherwise permitted by law, it shall be unlawful for any person or association of persons, except active members of the Bar of the State of North Carolina admitted and licensed to practice as attorneys-at-law, to appear as attorney or counselor at law in any action or proceeding before any judicial body …."

> G.S. 84-8(a): "Any person, corporation, or association of persons violating any of the provisions of G.S. 84-4 … shall be guilty of a Class 1 misdemeanor."

Canon 3.A.(4): "A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither knowingly initiate nor knowingly consider *ex parte* or other communications concerning a pending proceeding" (emphasis added).

G.S. 153A-224(b): "In a medical emergency, the custodial personnel shall secure emergency medical care from a licensed physician according to the unit's plan for medical care. If a physician designated in the plan is not available, the personnel shall secure medical services from any licensed physician who is available."

> G.S. 153A-224(c): "If a person violates any provision of this section, he is guilty of a Class 1 misdemeanor."

Finally, as a practical matter, even assuming none of the provisions above would bar the communication or a resulting order modifying the conditions of release, the defendant cannot be forced to execute an unsecured bond, if he wants to remain in the jail in order to have the county cover his medical expenses. An appearance bond is a contract between the State and defendant (and any surety). *State v. Corl*, 58 N.C. App. 107, 293 S.E.2d 264 (1982). Whether or not to bind himself to that contractual, financial obligation is the defendant's option, not the State's.

9. The sheriff has requested that magistrates in the county conduct initial appearances via videoconference due to the dangers and delays associated with transporting defendants to the magistrate's office. The AOC has approved the procedures and the equipment that the sheriff proposes. What other considerations are relevant to this decision?

Relevant Legal Principles: (Troy Page)

The threshold legal principle is satisfied by the facts presented in the question: "The AOC has approved the procedures and equipment that the sheriff proposes." Assuming those procedures addressed how the county would ensure (i) both audio and video connection between the judicial official and defendant, and (ii) how represented defendants will be able to consult confidentially with counsel, then the statutory requirement of G.S. 15A-511(a1) has been satisfied.

As a practical matter, a common procedural problem with audio-video hearings appears to be the transfer of paperwork. Local procedures should include provisions for the transfer and execution of documents. For example:

- For defendants arrested without a warrant and charged via a magistrate's order, G.S. 15A-511(c), local procedures should provide for delivery of a copy of the magistrate's order to the defendant.

- For implied-consent offenses, if the defendant is unable to make bond, G.S. 20-38.4(a)(4) requires that the magistrate inform the defendant in writing of procedures by which he can have others appear at the jail to observe him or obtain an independent chemical analysis.

    - Further, the defendant must be required to "list all persons he wishes to contact and telephone numbers on a form that sets forth the procedure for contacting the persons listed. A copy of this form shall be filed with the case file." G.S. 20-38.4(a)(4)b.

    - The form for this purpose is the AOC-CR-271, which contemplates content and signatures from both the defendant and magistrate, with the signed copy returning to the magistrate for delivery to the clerk's office.

- Execution of an appearance bond may require additional training for jailers on the administration of oaths under G.S. 15A-537(c).

    - If the defendant's release requires a monetary bond, an appearance bond form (AOC-CR-201) must be executed before the defendant can be released. This includes execution by any surety who will be obligated on the bond, who must sign the same bond as the defendant.

    - Because the question presumes a defendant physically separated from the magistrate, the magistrate may not be in a position to administer the necessary acknowledgments when all of the necessary parties are present to execute the bond.

    - For the limited purpose of execution of a bond necessary to the defendant's release, "any law-enforcement officer or custodial official may administer oaths to sureties and take other actions necessary in carrying out the duties imposed by [G.S. 15A-537]." G.S. 15A-537(c).

TRIAL

10. The assistant district attorney calls the case of State v. James Jennings. Jennings is present in the courtroom, but his attorney is not. Jennings' case was set for last, and you previously informed his counsel that you would grant no more continuances in the case. Jennings said that he has not seen his attorney today. Jennings says that he called the attorney's office, and the receptionist told him that the attorney was scheduled to appear in court on several matters today. The courtroom clerk advises you that he has not heard from the attorney today. How do you proceed?

Relevant Considerations:

North Carolina Code of Judicial Conduct

- Canon 3A.(3): "A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity . . . ."

- Canon 3A.(4): " A judge should accord to every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to the law . . . . "
- Canon 3A.(5): " A judge should dispose promptly of the business of the court."

While the State Bar is authorized by Chapter 84 of the General Statutes to discipline attorneys, trial courts have the inherent authority to discipline attorneys. *In re Key*, 182 N.C. App. 714, 720-21 (2007). G.S. 84–36 acknowledges this authority by providing that "[n]othing contained in this Article shall be construed as disabling or abridging the inherent powers of the court to deal with its attorneys." *Id.; see In re Key*, 182 N.C. App. 714, 720-21 (2007). Sanctions that the trial court may impose in disciplining an attorney include: "'citations for contempt, censure, informing the North Carolina State Bar of the misconduct, imposition of costs, suspension for a limited time of the right to practice before the court, suspension for a limited time of the right to practice law in the State, and disbarment.'" *Id. at* 457 (quoting *In re Robinson*, 37 N.C. App. 671 (1978)).

General Rules of Practice for the Superior and District Courts.
Rule 12. "Except for some unusual reason connected with the business of the court, attorneys will not be sent for when their cases are called in their regular order. . . ."

Rules of Professional Conduct of the North Carolina State Bar
Rule 1.3. "A lawyer shall act with reasonable diligence and promptness in representing a client."

G.S. § 5A-11. Criminal contempt.

(a) Except as provided in subsection (b), each of the following is criminal contempt:

(7) Willful or grossly negligent failure to comply with schedules and practices of the court resulting in substantial interference with the business of the court.

SENTENCING

11. You are concerned about enforcing the payment of costs and other monetary obligations imposed upon defendants in criminal cases. For cases in which you impose an active sentence, you have considered ordering that costs be docketed as a civil judgment. Do you have the authority to enter such an order at the initial sentencing hearing?

Relevant Legal Principles: (Troy Page)

The controlling statute is G.S. 15A-1365, which provides that a civil judgment may be ordered for a defendant who ***defaults*** on payments of costs and fines. There is some question as to whether the defendant can be said to have defaulted at the time the judgment in the criminal case is entered, thus justifying the immediate docketing of a civil judgment. Furthermore, it is unclear whether the clerk can order execution under G.S. 15A-1365 when the defendant received an active sentence.

The default mentioned in G.S. 15A-1365 may require the same finding as default under G.S. 15A-1364. Default in the latter context requires a show cause-style hearing and an opportunity for the defendant

to show "that his nonpayment was not attributable to a failure on his part to make a good faith effort to obtain the necessary funds for payment."

For a more detailed discussion of the docketing of costs and fines as civil judgments and what constitutes "default" when making that determination, see "Civil Judgments for Court Costs" by Jamie Markham, UNC School of Law Criminal Law Blog, at http://nccriminallaw.sog.unc.edu/?p=3961 (Nov. 8, 2012).

For other monetary obligations imposed in conjunction with an active sentence, any civil judgments authorized by statute will be docketed by operation of law:

For attorney fees and the appointment fee, G.S. 7A-455(c) requires docketing as a civil judgment upon conviction, if the defendant is not ordered to pay the attorney fees "as a condition of probation." This applies also to the appointment fee, which "shall be collected in the same manner as attorneys' fees are collected." G.S. 7A-455.1(b).

- The pre-printed content of the attorney fee application forms (primarily the AOC-CR-225) orders recoupment of attorney fees and appointment fees from the defendant, unless the court makes additional, specific findings to prevent that recoupment. *See*, AOC-CR-225, Side Two, section III., at http://www.nccourts.org/Forms/Documents/1196.pdf.

- If recoupment is ordered (again - that's built into the form unless the court makes additional findings to prevent it), the form then directs under section IV (Signature of Judge) that the judgments "shall become effective as provided by law," which allows the clerk to docket the judgments as provided in G.S. 7A-455(c).

If the offense is a Victims' Rights Act offense listed in G.S. 15A-830(a)(7), and restitution is awarded in an amount exceeding $250.00, then G.S. 15A-1340.38(b) requires docketing as a civil judgment at the time of conviction. Enforcement like any other civil judgment is permitted immediately for active sentences, because enforcement of a VRA restitution judgment is delayed under G.S. 15A-1340.38(c) only for defendants ordered to pay restitution as a condition of probation.

- The pre-printed form for ordering restitution at the time of conviction, the AOC-CR-611, orders the docketing of a civil judgment for awards set out in the VRA section of the form that exceed $250. *See*, Side Two, section V., No. 5, at http://www.nccourts.org/Forms/Documents/157.pdf. Therefore when entered as an order incorporated in the judgment of conviction, the AOC-CR-611 always directs the clerk to docket such awards (unless the court alters that directive by striking through it or otherwise amending the form).

There is no authority to order the docketing of a civil judgment for restitution when the offense is not a VRA offense listed in G.S. 15A-830(a)(7). *State v. Scott*, 723 S.E.2d 173 (N.C. Ct. App. Apr. 3, 2012) (unpublished).

12. In what circumstances is it appropriate to enter an order in a criminal case *nunc pro tunc*? Is the answer the same or different if the State and the defendant agree to entry of an order *nunc pro tunc*?

Relevant Legal Principles: (Shea Denning)

The court of appeals in Whitworth v. Whitworth, ___ N.C. App. ___, 731 S.E.2d 707 (2012), noted that the Latin phrase *nunc pro tunc*, translated as "now for then," signifies that "a thing is now done which should have been done on the specified date." The court explained that "before a court order or judgment may be ordered *nunc pro tunc* to take effect on a certain prior date, there must first be an order or judgment actually decreed or signed on that prior date." The court further noted that a decreed or signed order or judgment "not entered due to accident, mistake, or neglect of the clerk," may be appropriately entered at a later date *nunc pro tunc* to the date when it was decreed or signed—provided that no prejudice has arisen.

The *Whitworth* court concluded that the written order in that case "essentially created an order with findings of fact and conclusions of law that had not previously existed," in derogation of the well-established rule that a "nunc pro tunc entry may not be used to accomplish something which ought to have been done but was not done."

Many of the *nunc pro tunc* orders sought in criminal cases, like the civil order in *Whitworth*, are orders that inaccurately reflect a present action as having been taken in the past. Such orders are sought after in cases involving convictions for offenses such as impaired driving or driving while license revoked—offenses that result in the revocation of a person's license—in order to shorten or even eliminate altogether the ensuing revocation period. Those kinds of orders weren't on solid footing before *Whitworth*. The court's recent jurisprudence further emphasizes the shakiness of the grounds for this sort of relief.

POST-TRIAL

13. Donna Daniels, who was released from her initial appearance while subject to an unsecured bond of $1,000, is convicted of simple assault in district court. Daniels is a prior conviction Level II. The judge sentences her to 45 days imprisonment, suspended on condition that she complete 18 months of supervised probation. Daniels announces her intention to appeal the conviction to superior court. The judge tells Daniels that while she certainly may appeal, she intends to impose a secured bond of $2,000 in light of the evidence presented at trial and Daniels' flight risk. Is the judge authorized to double Daniels' bond?

Relevant Legal Principles: (Troy Page)

G.S. 15A-534(e) provides that, unless a superior court judge already has acted on the conditions of release pursuant to G.S. 15A-539, a district court judge "may modify a pretrial release order of the magistrate or clerk or any pretrial release order entered by him at any time prior to … [i]n a misdemeanor case tried in the district court, the noting of an appeal…." G.S. 15A-534 does not define what point in time constitutes the "noting" of an appeal.

G.S. 15A-1431(c) provides that "Within 10 days of entry of judgment, notice of appeal may be given orally in open court or in writing to the clerk" (emphasis added). Therefore the oral notice of appeal appears to remove the conditions of release from the district court's subject matter jurisdiction under most circumstances (but see below). Any modification from that point forward generally will be solely within the jurisdiction of the superior court. G.S. 15A-534(e) and 15A-539.

G.S. 15A-1431 contains three provisions for pretrial release upon appeal for trial *de novo*, the first of which appears to constitute an explicit exception to the limitation imposed in G.S. 15A-534(e). The second and third are less clear.

- G.S. 15A-1431(d) provides that a defendant may appeal from the judgment of a magistrate or district court judge, even if the defendant already has complied with the judgment (*e.g.*, paid his fine and costs). If so, the notice of appeal must be given in person (not via written filing with the clerk) to the magistrate or judge who imposed judgment or to another magistrate or judge in the same territorial jurisdiction, if the one who imposed judgment isn't available.

  For this post-compliance appeal, subsection (d) provides that the magistrate or judge to whom the notice is given "must review the case and fix conditions of release as appropriate." Therefore in the case of a post-compliance appeal, any limitation on subject matter jurisdiction under G.S. 15A-534(e) does not apply; in fact, the official to whom notice is given must address the conditions of release. Note that if conditions of release already were in effect for the initial proceeding, and those conditions are not modified upon review under subsection (d), then the existing conditions and any bond posted to satisfy them remain in effect and binding through the appeal. *See*, G.S. 15A-1431(e) (next bullet) and 15A-534(h).

- The second provision's reference to modification of the conditions of release is less clear. G.S. 15A-1431(e) provides that, "Any order of pretrial release remains in effect pending appeal by the defendant unless the judge modifies the order" (emphasis added). It is unclear whether the last clause of G.S. 15A-1431(e) was intended to confer unfettered discretion on the district court judge or magistrate to modify the conditions of release for an appeal from his or her judgment or merely is an acknowledgment of the potential for modification under subsection (d) and a corresponding provision to the rule of G.S. 15A-534(h) for any bond posted to satisfy those conditions (providing that any bond obligation remains in effect pending an appeal from district court).

  If subsection (e) means the former (unfettered discretion), then it is hard to reconcile with the plain language of G.S. 15A-534(e), and its omission of magistrates is hard to reconcile with their explicit authority conferred in subsection (d), given that G.S. 15A-1431 also applies to appeals from magistrates' judgments. If it means the latter, then the reference to potential modification may be simply an acknowledgment that the conditions of release might be modified under other provisions, *e.g.*:

  - modification by the official from which appeal is taken under subsection (d) for post-compliance appeals;
  - modification by a judge of the court to which the appeal is addressed under G.S. 15A-534(e); and

- the authority to revoke a pretrial release order for "good cause shown" under G.S. 15A-534(f) (discussed below).

- Third, G.S. 15A-1431(f1) provides that execution of the judgment appealed from (fines, costs, probation, and active punishment) is stayed pending the appeal for trial *de novo*. Subsection (f1) then provides that, "Pursuant to subsection (e) of this section, however, the judge may order any appropriate condition of pretrial release, including confinement in a local confinement facility, pending the trial de novo in superior court." As discussed above, it is not clear whether or not subsection (e) confers any authority to modify the conditions of release on the official from which the appeal is taken, but to the extent that subsection (f1)'s reference to modification of the conditions of release limits any such modification to those imposed "[p]ursuant to subsection (e)," subsection (f1) doesn't appear to confer any more or less authority that subsection (e) does.

  Further, the reference to "order[ing] … confinement … pending the trial de novo" appears to be a modification and restatement of the rule of the former G.S. 15A-1431(f), repealed in 2005 by the same act that enacted subsection (f1) (to clarify that probation is stayed pending appeal, along with fines, costs, and active punishment). S.L. 2005-339. The former subsection (f) provided, in relevant part, that:

  > Appeal stays portions of the judgment relating to confinement when the defendant has complied with conditions of pretrial release. If the defendant cannot comply with conditions of pretrial release, the judge may order confinement in a local confinement facility pending the trial de novo in superior court.
  >
  > (emphases added)

  Therefore subsection (f1)'s limitation to confinement imposed "[p]ursuant to subsection (e)" likely means only that confinement is appropriate when the defendant has not complied with the conditions in the release order, either as imposed originally (which, pursuant to subsection (e) "remains in effect pending appeal") or as modified under some other statutory authority.

With all of that said, G.S. 15A-534(f) provides that, "For good cause shown any judge may at any time revoke an order of pretrial release. Upon application of any defendant whose order of pretrial release has been revoked, the judge must set new conditions of pretrial release in accordance with this Article" (emphases added). Therefore in appropriate circumstances, the district court judge might have good cause not to modify the existing conditions of release but to revoke the current bond and enter an entirely new release order that supplants the original.

- The official commentary to G.S. 15A-534 explains subsection (f) as follows: "Because of the need on occasion to act swiftly to revoke conditions of release which may not be adequate to keep a defendant from fleeing prior to trial, subsection (f) allows revocation by any judge at any time. Presumably a district court judge would not revoke an order of release of a superior court judge without excellent cause."

- Given G.S. 15A-534(e), it is unlikely that mere conviction would constitute "good cause" to revoke the defendant's bond. Because she appeared at her trial on an unsecured bond, the likelihood of flight seems small. However, if the proceeding before the district court implicates

one of the factors listed in G.S. 15A-534(b) or (c) (*e.g.*, the defendant's own testimony suggests an intent to retaliate against the State's witness(es) - a "danger of injury to any person" contemplated in subsection (b)), then the court may have good cause to revoke the current bond and impose a new, secured bond as a condition of release.

14. What should I do if I have questions about the time an appointed attorney claims on a fee application, such as a large amount of time waiting in court?

Relevant Legal Principles and Considerations: (Danielle Carman)

G.S. 7A-458 provides: "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. Fees shall be based on the factors normally considered in fixing attorneys' fees, such as the nature of the case, and the time, effort and responsibility involved. Fees shall not be set or ordered at rates higher than those established by the rules adopted under this section without the approval of the Office of Indigent Defense Services." For non-capital criminal and non-criminal cases at the trial level, IDS Rule 1.9(a)(1b) tracks the statutory language: "[T]he trial judge shall, upon application, enter an order fixing the fee to which the attorney is entitled. In doing so, the judge shall review the amount of time claimed by the attorney, and shall approve an appropriate amount of time based on the factors normally considered in fixing attorneys' fees, such as the nature of the case, and the effort and responsibility involved."

In order to assist judges in evaluating attorneys' claimed time in cases, IDS has conducted studies of the average hours claimed by PAC in various case types in District and Superior Court. The original studies were based on data from fiscal year 2004-05. The District Court study reports average hours and frequency distributions by charge type. The Superior Court study reports average hours for non-trial cases, hours ranges for cases that went to trial, and frequency distributions by felony class and charge type. The full District Court study is posted here, and a summary chart is posted here. The full Superior Court study is posted here, and a summary chart is posted here. Based on data from fiscal year 2009-10 through 2011-12, IDS published an updated average hours study, which found that, for most case types, average hours had increased modestly over time. The study then examined a number of different factors that could be driving the growth in time claimed by PAC. That study can be found here. These studies were conducted to give judges guidance and context when evaluating fee applications. IDS encourages judges to consider the totality of charges covered by an individual fee application, as well as any other factors that could make a specific case more or less complicated, when evaluating the reasonableness of the amount of time claimed.

With respect to time spent waiting in court, IDS' billing policies define time waiting in court as "time during which the attorney must be present in court waiting for an appointed case to be called or heard, *and the attorney is unable to use that time to conduct work on other cases*." If the attorney can use that time to conduct work on other cases, the attorney should bill that time to those cases. IDS Rule 1.9(a)(1) and IDS' billing policies further provide that "[i]f an attorney seeks compensation for time spent waiting in court for multiple cases to be called or working on multiple cases simultaneously, the attorney's time shall be prorated among each of the cases involved." That being said, because defense counsel does not control the scheduling of court dockets, IDS does not believe that defense attorneys should be financially penalized for scheduling practices that result in a significant amount of time spent waiting in court.

If a judge has questions about the time claimed on a specific fee application, IDS encourages the judge to contact the attorney who submitted the fee application and ask about any unusual circumstances in the case that made it more complex or difficult. If judges continue to have questions or concerns, they should feel free to contact the IDS Director, Thomas Maher, or the IDS Assistant Director/General Counsel, Danielle Carman, to discuss the issue.

15. **Appointed counsel in this district work under the new contract system with IDS and are not paid by the hour. Can a judge order a defendant to repay the State for the value of services based on the hours claimed by the contract attorney?**

Relevant Legal Principles and Considerations: (Danielle Carman)

Yes. G.S. 7A-455(b) provides that "[i]n all cases the court shall direct that a judgment be entered in the office of the clerk of superior court for the money value of services rendered by assigned counsel, the public defender, or the appellate defender." The exception for cases that do not result in a conviction is set forth in G.S. 7A-455(c). G.S. 7A-498.5(c)(8) directs the IDS Commission to develop standards for "assessing and collecting the costs of legal representation."

While assigned counsel has traditionally been paid by the hour in North Carolina, public defenders and appellate defenders are paid a salary, and contractors are paid a set annual amount for handling a bundle of cases. The services provided by public defenders, appellate defenders, and contract attorneys have value and are funded by taxpayer dollars, even though they are not paid by the hour. Historically, recoupment of attorney fees has been ordered in cases in which representation is provided by salaried public defenders based on their reported time and the hourly rates paid to private assigned counsel ("PAC"), and not based on the actual salary paid to the individual attorney. This approach is consistent with the direction in G.S. 7A-455(b) that "[t]he money value of services rendered by the public defender and the appellate defender shall be based upon the factors normally involved in fixing the fees of private attorneys, such as the nature of the case, the time, effort, and responsibility involved, and the fee usually charged in similar cases." IDS Rule 1.1(a) (Recoupment of Fees) is consistent with this statutory language: "To the extent required by law, individuals who have been appointed counsel under this part shall continue to be responsible for repaying fees paid to such counsel or, in the case of representation by a public defender office, the value of services rendered by counsel. The judge setting the fee to be paid or the value of services rendered shall determine the amount to be recouped if recoupment is required by law." At least for the time being, IDS intends to continue the same approach with contract attorneys.

Practically speaking, setting the amount of recoupment based on the effective hourly rate of each individual contract attorney would not be feasible. First, judges would have to apply different hourly rates for every contract attorney who appears before them, which would not be a workable system. Second, contractors do not know their effective hourly rate until all of their contractual obligations have been completed. The only alternative to applying the current hourly rates that are paid to PAC is to set flat per case recoupment amounts that vary by case type. That approach would have complications of its own, and would be even less fair to some defendants because the recoupment amount would not be tied to the actual amount of time the contractor spent on the case.

16. **The State is offering a defendant who has admitted guilt a deferred prosecution and dismissal if the defendant complies with a substance abuse assessment and community service. Can the judge include as a condition of the deferral that the defendant pay the attorney's fee directly to the attorney or require the appointed attorney to waive his or her fee?**

Relevant Legal Principles and Considerations: (Danielle Carman)

No. G.S. 7A-455 provides that, in all adult criminal cases in which the defendant is "convicted," the court "shall" enter a judgment for attorney fees. While recoupment appears mandatory in these circumstances, the statute is subject to certain constitutional standards, including that the burden of repayment may not be imposed without notice and a meaningful opportunity to be heard and that the entity deciding whether to require repayment must take cognizance of the person's resources, the other demands on the person's and family's finances, and the hardships the person will endure if repayment is required. Thus, in criminal cases, recoupment can be ordered if the defendant is convicted or pleads guilty or nolo contendere, but recoupment cannot be ordered if the defendant is acquitted or the case is dismissed.

While recoupment of attorney fees generally is unlawful in criminal cases that end in a dismissal, deferrals are sometimes conditioned on a defendant's repayment of attorney fees. The theory is that repayment of attorney fees is a condition of the agreement, like victim restitution or community service, and so not an unlawful recoupment order for something short of a conviction. In those instances, the payment is spelled out in the agreement and made to the clerk of court before the charges are dismissed; the judge still sets a fee award and IDS still pays the appointed attorney.

There would be a number of significant problems with a judge requiring a defendant as part of a deferral to pay the attorney's fee directly to the attorney or requiring the appointed attorney to waive his or her fee:

- This practice would create an ethical dilemma for the attorneys. First, the practice would create a conflict between the attorney's financial interests and the client's interests, and may have a chilling effect on some appointed attorneys by causing them not to seek a deferral and dismissal to avoid being put in this situation. Second, this practice arguably creates an undisclosed and prohibited contingency fee for criminal defendants who receive a certain favorable result. *See* Rule 1.5(b) of the Rules of Professional Conduct ("When the lawyer has not regularly represented the client, the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, *before or within a reasonable time after* commencing the representation."); Rule 1.5(d) ("A lawyer shall not enter into an arrangement for, charge, or collect: (1) a contingent fee for representing a defendant in a criminal case . . . . "). Finally, RPC 52 (Jan. 13, 1989) provides that "an appointed counsel may not accept payment from his or her client for professional services."

- This practice arguably violates IDS Rule 1.9(e), which provides: "Once counsel has been appointed to represent a person in a case subject to this part, counsel shall not accept any fees for the representation other than that awarded by the court or the IDS Director." The commentary to that rule further provides that the subsection is intended "to clarify that, to avoid any potential for overreaching or the appearance of impropriety, an appointed attorney cannot subsequently accept fees as retained counsel from the client or the client's family."

Although the fee would still be "awarded by the court" in this situation, the IDS Rule is intended to prevent payments to appointed attorneys by indigent clients, at least when the purpose of the money is to compensate the attorney for the representation.

- An appointed attorney could accept money from the client in this situation and then also submit a fee application to a different district court judge, resulting in double payment for the same services. This has, in fact, happened recently. The appointed attorney realized the error, notified IDS, and repaid the fee, but there is nothing to prevent the same thing from happening again.

- In effect, this practice could skirt the priorities for disbursing paid funds that are set forth in G.S. 7A-304(d), which directs the clerk to disburse funds for attorney fees last. For instance, a defendant could also owe victim restitution, costs due to the county or city, etc., but have no remaining funds to pay those liabilities after paying attorney fees directly to appointed counsel.

17. **David Dean, 19, was sentenced to Level 1 punishment for impaired driving. Though this was his first criminal offense, he was subject to Level 1 punishment because he was driving with his 17 year-old-girlfriend in the car. Dean's sentence was suspended, and he was ordered to serve 30 days imprisonment as a condition of special probation. Dean was to serve the term of imprisonment during his summer break from college. The probation officer has moved to modify Dean's probation because he is suffering from acute panic attacks. Dean is under the care of a psychiatrist who is concerned that Dean's condition will significantly worsen if he is detained in jail. The motion to modify is before you. What action do you take?**

Relevant Legal Principles: (Shea Denning)

A judge may, after notice and hearing and for good cause shown, modify the conditions of probation. See G.S. 15A-1344(d). Thus, the judge could order the defendant to serve the term of special probation as an in-patient at a state-operated or licensed facility for the treatment of alcoholism or substance abuse. G.S. 20-179(k1). The judge also could credit against the term of special probation the time the defendant was an inpatient at a treatment facility, provided the treatment occurred after he committed the DWI. *Id.* The judge also could impose 120 days of alcohol abstinence and CAM and reduce the term of imprisonment as a condition of special probation to 10 days. G.S. 20-179(g).

Furthermore, G.S. 15A-1342(b) permits a judge to terminate probation at any time if warranted by the conduct of the defendant and the ends of justice.

In exercising this latter option, a judge should be mindful that there are several appellate court opinions in the judicial standards and mandamus context instructing that the provisions of G.S. 20-179 are mandatory, and directing judges to follow them. *See In re* Tucker, 348 N.C. 677, 501 S.E.2d 67 (1998) (noting in judicial disciplinary action district court judge's mistaken belief that mandatory sentencing provisions of G.S. 20-179 did not apply if he continued prayer for judgment to a date certain and then dismissed the case); *In re* Martin, 333 N.C. 242, 424 S.E.2d 118 (1993) (censuring district court judge for convicting defendants of reckless driving when they were charged with driving while impaired, acts that the judge knew to be improper and beyond the power of his office); *In re* Greene, 297 N.C. 305, 312, 255 S.E.2d 142, 147 (1979) (holding that North Carolina courts do not have an "'inherent power'" to continue prayer for judgment continued on conditions or to suspend sentence when the sentence (as it

is for impaired driving convictions) is mandated by the General Assembly; directing named district court judge in adjudicating convictions for offenses sentenced pursuant to G.S. 20-179 to pronounce judgment in accordance with statute); *see also* State v. Petty, 212 N.C. App. 368, 711 S.E.2d 509 (2011) (recognizing that district court judge had no authority to arrest judgment upon defendant's conviction of impaired driving—an action that amounted to the entry of an invalid judgment). These cases do not preclude a judge from terminating probation in a DWI case if the requirements of G.S. 15A-1342(b) are satisfied, but they do indicate that such terminations should not be entered as a matter of routine.