



Exit Interview with Danielle Carman

Assistant Director and General Counsel for the Office of Indigent Defense Services from its Inception until August of 2016

by Alyson A. Grine

In August of 2000, the North Carolina General Assembly passed the Indigent Defense Services Act (IDS Act), creating a new agency, the Office of Indigent Defense Services (IDS), and charging it with managing the indigent defense fund and overseeing the provision of legal representation to people entitled to counsel at state expense.¹ In the years that followed, both the population and the number of people living in poverty increased, resulting in a growth rate of more than 150 percent in the indigent defense caseload, from approximately 124,000 cases in Fiscal Year 2002 to more than 320,000 in Fiscal Year 2015.² During that time period, the cost of indigent defense grew by less than 70 percent.

In addition to managing the budget, IDS transformed the systems of representing indigent people. For example, IDS worked with the General Assembly to create five new district public defender offices, expanded the Office of the Appellate Defender and Office of the Capital Defender, created a new Office of the Juvenile Defender and Office of Parent Representation Coordinator and, at the General Assembly's direction, created a new contract system.

Two directors have assumed leadership of the agency during this transformative period. Danielle Carman, however, has been a constant, serving as Assistant Director and General Counsel since IDS opened its doors in July 2001. In this critical role, she has been on the front lines of North Carolina's efforts

to provide quality representation to indigent people. Recently, Danielle left the agency to pursue a new opportunity. In this exit interview, she reflects on the state of indigent defense over a decade and a half, key moments in IDS' history, and challenges and opportunities that lie ahead.

What was the impetus in the 1990s for creating a statewide agency charged with overseeing indigent defense?

At that time, judges were setting the rates for indigent work with minimal to no guidelines and there was a real lack of uniformity. Some judges were ordering payment of \$100 per hour for indigent work, while others sometimes imposed rates as low as \$10 per hour. This broad discretion created an incentive for defense attorneys to stay on judges' good sides. For example, there were times when the judge may have been focused on moving the docket along, and the attorney may have felt pressure not to litigate a pretrial motion. That wasn't consistent with the duty the attorneys owed their clients to provide a zealous defense. To have a healthy system, the defense function has to operate independently of the judiciary; the American Bar Association and other groups have published national standards to this effect.³

There was also tremendous inconsistency when it came to the quality of representation that was being provided in the state. While we had eleven public defender offices at that time,

the bulk of the work was being handled by private assigned counsel (PAC) who weren't getting much support or oversight. For example, a real estate lawyer might get on the local bar's appointment list and get assigned to handle a potentially capital case. As you might guess, this led to some bad outcomes for clients. You had attorneys who were truly excellent but others who were constitutionally deficient, and their colleagues in the local bar, oftentimes their friends, were unwilling or unable to take them off the list. There was no system in place to provide the attorneys with the support they needed to succeed—no performance guidelines and fewer training opportunities, for example.

Another concern at the time was that the growth rate in the cost of indigent defense was spiraling out of control. Before IDS was created, between Fiscal Year 1989 and 1999, there was a 168 percent growth in spending on indigent defense, while the caseload only increased by 89 percent.⁴ The rate of growth in spending on capital cases was even higher at 338 percent.⁵ No one was in charge of the big picture when it came to the budget.

The legislature created a study commission in 1998, which documented these concerns about an uneven quality of services and a lack of fiscal management. In 2000, the study commission issued a report recommending the formation of a centralized agency housed within the Judicial Department, but independent of judicial control.⁶ This led the way to passage of the IDS Act, creating the office, and charging it with managing the budget and providing cost-effective, quality representation for people entitled to counsel at state expense.⁷ There is sometimes tension between these duties of ensuring cost-effectiveness while also ensuring that the clients receive the services to which they are constitutionally entitled; it's been a fine line to walk.

You were there when IDS opened its doors. What was that like?

When the office opened in July of 2001 in Durham, I had no desk for the first week at least. I sat on the floor with my computer, and we taped cardboard boxes to the windows because we didn't have blinds yet. There were five staff positions: a Director, my position, a Research Analyst, a Fiscal Officer, and an Administrative Assistant. The IDS Act had also created the IDS Commission to oversee the office, made up of thirteen very dedicated commissioners appointed by the Chief Justice, Governor, leaders in the General Assembly, and certain bar associations.

So, we had this new structure and were ready to get to work, but right off the bat IDS was sued by thirteen private attorneys from Cumberland County.⁸ They argued that separation of powers was violated by the reallocation of some authority from judges to IDS, such as the authority to appoint and compensate attorneys.

The lawsuit was a terrible foot to start out on with the defense bar! We had to defend the IDS Act in the North Carolina Court of Appeals, which found that the Act was not unconstitutional and that appointment of counsel for indigent defendants was not within the inherent powers of the judiciary. The Supreme Court of North Carolina denied the plaintiffs' petition for review, so that was the end of it.⁹ I think the litigation largely reflected a fear of change. Some attorneys worried that a centralized agency would wrest control from local actors, which would hurt their livelihood. There was support for IDS around the state as well, but there were hot spots of dissension.

What was the first issue that IDS focused on after it was created?

Once we got beyond the lawsuit, we concentrated on improving the quality of representation in potentially capital cases. We focused on these cases because the consequences of poor advocacy are most dire, and because they are the most expensive cases and we needed to curb the growth in spending. In the late 1990s, there was little structure for capital defense; there were just a few state-employed capital litigators, housed within the Office of the Appellate Defender as a pilot project, who handled cases if assigned by the court.

One of the first things the IDS Commission did was appoint a capital defender and give that position the authority to assign counsel in any case potentially eligible for the death penalty. That comes to about 600 cases per year because North Carolina prosecutors typically charge intentional homicides as first-degree murder, even though many ultimately plead down to lesser offenses.¹⁰ We developed an active capital committee, which created policies about billing and standards of performance.

In 2002, the Commission adopted a standard hourly rate of \$85 for attorneys doing capital work and \$65 for attorneys handling non-capital and non-criminal cases. The IDS Director assumed responsibility for setting fees directly in potentially capital cases and appeals. While judges still had to determine the reasonableness of the claimed time in individual non-capital and non-criminal cases, the standardization of hourly rates led to more uniformity and meant that judges had less control over lawyers' income. This was a key accomplishment in the early years of the agency.

What changes did IDS make regarding provision of counsel in non-capital criminal cases?

We made some changes in who was handling the work. IDS recommended that the General Assembly create a number of additional public defender offices in urban areas that were not covered at the time, where it was cost-effective to do so compared to the hourly rates IDS was paying PAC at the time, such as in Forsyth, Wake, and New Hanover Counties. Public

defender offices were also created in a few other areas where it didn't realize savings, but local court actors had told us they needed an office to ensure quality representation, like in District 1 in the northeastern part of the state.

In public defender districts, we gave the chief public defenders more power to manage and oversee the PAC lists, which cover about two-thirds of the indigent caseload now. The chief public defenders are able to field complaints from clients, for example. Generally, we put more guidance and support in place. For example, in 2006 we created performance guidelines for non-capital criminal cases at the trial

\$70 for A-D felonies. So IDS is now paying attorneys less for district court work than we were in 2002; PAC in those cases received a 27 percent cut to their hourly pay. And of course, there has been inflation and it has become more expensive to live and run a practice. Most PAC are solo practitioners or in small practices and don't have much of a financial cushion. Some of them can't afford health insurance, and some struggle to pay rent or support staff.

Private attorneys began dropping off the appointment lists in droves with the rate cuts and we permanently lost many excellent lawyers. Other people were willing to take on the cases because North Carolina has so many lawyers who can't find full-time jobs, but in some cases we ended up with people who had less experience and who were providing lower quality services. We have seen a rash of exonerations in North Carolina over the past fifteen years and I believe it's a consequence in large part of not funding the defense function adequately. Ironically, the appeals and awards resulting from these wrongful convictions have been expensive for the state, not to mention the impact on the wrongfully convicted people and their families.

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level.¹¹ But figuring out how to have more of a direct impact on the vast majority of indigent cases in district and superior court has been a continuing struggle for the IDS Commission and staff.

What would you describe as the low point in IDS history? Was there a moment when you felt like throwing in the towel?

A real turning point was the economic downturn starting in late 2008. It was around the time Tom Maher took over from Tye Hunter as Director. All areas of state government were under financial pressure. In 2011, IDS was already carrying a deficit close to ten million dollars and we got a cut of about ten million more. It was a crisis for indigent defense.

The legislature directed us to minimize our shortfall by cutting the PAC rate.¹² I suppose the Commission could have imposed salary reductions on public defenders too but, unlike many other states, North Carolina has a history of parity between full-time public defenders and prosecutors that was important to maintain. Also, PAC can supplement their income by taking on retained cases while public defenders are prohibited from doing so by statute.

To give you a sense of how the PAC fees changed, back in 2002, the hourly rate was \$65 for a standard criminal case, and that was increased to \$75 in early 2008. Following the legislative cuts in 2011, the IDS Commission had to impose a new fee structure, broken down to \$55 per hour for most district court work, \$60 for most superior court work, and

North Carolina has a mixed system of representation that includes full-time, salaried public defenders; contract attorneys who receive a certain amount of money per month to handle a designated number of cases; and PAC who are paid an hourly rate or flat per case fees. There is something of a "sibling rivalry" between the groups; the public defenders feel that IDS shows favoritism to the PAC, while the PAC complain that IDS is taking better care of the public defenders, etc. Do you think one system of representation is superior to another?

I really believe that a mix is healthy for the state. Public defenders are specialized rather than trying to handle numerous practice areas, which benefits the clients. The office culture lends itself to mentorship, and makes it easier for the defense to have a voice when policy decisions are being made. Also, having a head of office make decisions about hiring and firing has a big impact on the quality of lawyers who handle the cases.

But we also need a vibrant private bar. If you remove PAC from the system, you might end up with crushing caseloads for public defenders. Also, indigent defense benefits from the relationships that many private attorneys have with legislators and other leaders. Some extremely talented private attorneys may be willing to handle the occasional indigent case but not to be full-time state employees. So, we don't want to lose the experience and influence of our best private lawyers, especially when it would not be cost-effective to create a public defender office in a given area. The PAC would benefit from more support, but IDS has a small, central staff of

fewer than 20 people, including accounts payable and support, while the PAC are more than 3,000 lawyers statewide, so it's a logistical challenge. I don't think indigent defense should be viewed as a way for inexperienced lawyers to "cut their teeth" without training or support—that learning takes place on the backs of clients.

In 2011, the General Assembly ordered IDS to implement contracts, and since then, IDS has added more than 200 contract attorneys.¹³ The contract system has its strengths and weaknesses like any other system. It's really a form of bundled flat fees, which creates a natural disincentive for people to invest time in the cases. IDS has tried to combat that by implementing a process for attorneys to request extraordinary pay for cases that require extra time. One strength of the system is that two regional defenders provide support for the contract attorneys within their regions. While the regional defenders' areas of coverage are too large, they provide a level of oversight that was missing before. Judges appreciate having a go-to person when they get client complaints or run into challenges with assigning counsel. Other strengths of the system are that IDS is able to provide more training and there is greater predictability of pay.

I'm not a fan of flat per case fees. Studies and data from within North Carolina and other states suggest that case outcomes are less favorable for the clients, probably because of the financial incentive to do the minimum amount of work.¹⁴ In any event, a flat fee system can only save money if the fees are less than the hourly rates, which are already terrible. Flat fees don't make the budget more predictable or easier to manage either, because IDS' overall spending is driven by the volume and types of cases, not average per case costs, which have been remarkably low and stable over the years. So, I think flat fees introduce problems and don't offer solutions.

While the various service providers are paid differently, they are representing the same clients for the same purpose, protecting their legal rights and making sure that they don't have a different experience in the justice system because they are poor. I'd like to see the defenders come together as a community to advocate for indigent defense in general.

Does IDS have any unlikely allies?

Tom Maher recently gave a presentation to the John Locke Foundation, and found a lot of support for IDS' work.¹⁵ Conservatives and libertarians don't like the government infringing on people's lives, which is what the criminal justice system does. Many conservatives are concerned with what they view as a misuse of government resources in our country. For example, we are seeing conservatives oppose mass incarceration, and some have come out against the death penalty recently, because of the extraordinary expense and concerns about entrusting the government with the power to take lives.

We have been lucky to have amazing people of both political parties serve on the IDS Commission, and it has been the greatest honor of my professional life to work with every one of them. It's been remarkable to see people from different aisles so united by their goal of creating a strong indigent defense system. This diversity on the Commission is key to building bridges with legislators and other system actors, which is critical if indigent defense is to be adequately funded.

Our Chief Justice has created a Commission on the Courts that has just published a draft report with recommendations for indigent defense.

What was your reaction to them?

I was pleased to see the emphasis on defense independence from the judiciary.¹⁶ This issue has come up recently in that IDS, which was created as an independent agency, has been moved into the Administrative Office of the Courts (AOC), and the legislature has given the Director of the AOC some authority over IDS's budget.¹⁷ This is inconsistent with the principles and national standards that led to the creation of IDS in 2001.¹⁸

I'm also happy that Chief Justice Martin and the Commission are supporting raising the age of juvenile court jurisdiction.¹⁹ North Carolina is one of only two states that treat 16- and 17-year-olds as adults.²⁰ The other state, New York, at least has a procedure that allows some of those juveniles to return to juvenile court.²¹ Scientific studies tell us that 16- and 17-year old brains are not fully developed, so it doesn't make sense to saddle juveniles with consequences of a criminal conviction that may affect their opportunities for the rest of their lives.²²

What are you most proud of when you reflect on what IDS has accomplished since its creation?

Imposing structure. We came into a giant vacuum, and instituted resources, support, and oversight for indigent defenders. I think we accomplished a tremendous amount in a relatively short time.

What do you see as the most pressing challenge for IDS going forward?

Increasing resources. IDS has to address the misconception that it has not been a good steward of resources. No facts support that. The growth rate in spending on indigent defense has been lowered tremendously under IDS oversight, especially in potentially capital cases. IDS underwent two performance audits by state auditors during my tenure, each of which resulted in very positive reports.²³ It is an incredibly lean agency, spending less than two percent of its budget on administration.²⁴ It's also very transparent. Everything we were doing is on the website for anyone to see.

What lesson have you taken away from your time as Assistant Director and General Counsel at IDS?

As an agency working under extreme stress, I learned the importance of laughter. Anyone who has spent much time with me can attest that I have a seriously big laugh. Taking time out to blow off steam with my colleagues kept me sane. I often felt like IDS got it from all sides and that I was the target of so much negativity. I loved my time there, but it could be a thankless job.

Well, let me take this opportunity to thank you for your service.

Cheers! ♦

1. Indigent Defense Services Act of 2000, 2000 N.C. Sess. Laws 144 (codified as amended at N.C. GEN. STAT. §§ 7A-498-199 (2015)).
2. NORTH CAROLINA COMMISSION ON INDIGENT DEFENSE SERVICES, REPORT OF THE COMMISSION ON INDIGENT DEFENSE SERVICES, App. C (Mar. 1, 2016), <http://www.ncids.org/Reports%20&%20Data/Prior%20GA%20Reports/LegislatureReport2016.pdf> [hereinafter COMMISSION REPORT 2016]; NORTH CAROLINA COMMISSION ON INDIGENT DEFENSE SERVICES, REPORT OF THE COMMISSION ON INDIGENT DEFENSE SERVICES, App. C (Mar. 1, 2003), <http://www.ncids.org/Reports%20&%20Data/Prior%20GA%20Reports/Leg%20Report%202003%20Web%20Version.pdf>.
3. The first of the ABA's Ten Principles of a Public Defender Delivery System states: "The public defense function, including the selection, funding, and payment of defense counsel, is independent." *ABA Ten Principles of a Public Defender Delivery System*, 2012 A.B.A. STANDING COMM. ON LEGAL AID AND INDIGENT DEF. 1, http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf; See also STANDARDS FOR CRIMINAL JUSTICE PROVIDING DEFENSE SERVICES 3RD Ed. Standard 5-1.3(a) at 13 (AM. BAR ASS'N 1992), <http://pretrialnola.org/wp-content/uploads/2015/09/ABA-Defense-Function.pdf> ("The plan and the lawyers serving under it should be free from political influence and should be subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice. . . . An effective means of securing professional independence for defender organizations is to place responsibility for governance in a board of trustees."). The first of the National Legal Aid and Defender Association's Ten Commandments of Public Defender Delivery Systems is consistent with the ABA's Ten Principles: "Thou shalt . . . [a]ssure that the public defense function, including the selection, funding, and payment of appointed counsel, is independent. The indigent defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel. To safeguard independence, and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems" James R. Neuhaud and Scott Wallace, *The Ten Commandments of Public Defense Delivery Systems*, NATIONAL LEGAL AID & DEFENDER ASSOCIATION, http://lobby.la.psu.edu/064_Legal_Services/Organizational_Statements/NLADA/NLADA_Standards_ten_commandments.htm (last visited Nov. 11, 2016); See also NORMAN LEFSTEIN AND ROBERT L. SPANGENBERG, NATIONAL RIGHT TO COUNSEL COMMITTEE, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 160 (APR. 2009), <http://www.constitutionproject.org/wp-content/uploads/2012/10/139.pdf>. ("Ideally, an indigent defense oversight body should be an independent agency of state government. This allows the [governing] commission to retain decision-making authority and advocate for adequate indigent defense funding. If a state's indigent defense system is financed primarily by the state, it is

especially important that its budget remain separate from those of other agencies, including the courts, so that resources directed towards indigent defense are not seen as having a negative impact on other worthwhile spending.").

4. See NORTH CAROLINA COMMISSION ON INDIGENT DEFENSE SERVICES, INDIGENT DEFENSE STUDY COMMISSION REPORT AND RECOMMENDATION, App. E (May 1, 2000), <http://www.ncids.org/home/ids%20study%20commission%20report.pdf>.
5. *Id.*
6. *Id.*
7. Indigent Defense Services Act of 2000, 2000 N.C. Sess. Laws 144 (codified as amended at N.C. GEN. STAT. §§ 7A-498-199 (2015)).
8. *Ivarsson v. Office of Indigent Def. Serv.*, 156 N.C. App. 628, *disc. review denied*, 357 N.C. 250 (2003).
9. *Id.*
10. NORTH CAROLINA OFFICE OF INDIGENT DEFENSE SERVICES, FY15 CAPITAL TRIAL CASE STUDY: POTENTIALLY CAPITAL CASE COSTS AT THE TRIAL LEVEL, 28-30 (Nov. 2015), <http://www.ncids.org/Reports%20&%20Data/Latest%20Releases/FY15CapitalCaseStudy.pdf>.
11. NORTH CAROLINA COMMISSION ON INDIGENT DEFENSE SERVICES, PERFORMANCE GUIDELINES FOR INDIGENT DEFENSE REPRESENTATION IN NON-CAPITAL CRIMINAL CASES AT THE TRIAL LEVEL (Nov. 2004), <http://www.ncids.org/Rules%20&%20Procedures/Performance%20Guidelines/Trial%20Level%20Final%20Performance%20Guidelines.pdf>.
12. SENATE APPROPRIATIONS COMMITTEE REPORT ON THE CONTINUATION EXPANSION AND CAPITAL BUDGETS: PROPOSED SENATE COMMITTEE SUBSTITUTE FOR HOUSE BILL 22, at 14 (N.C. June 16, 2011), http://www.ncleg.net/fiscalresearch/budget_legislation/budget_legislation_pdfs/2011_Money_Report.pdf.
13. Current Operations and Capital Improvements Appropriations Act of 2011, 2011 N.C. Sess. Laws 145, § 15.16(c) (2011), (amended by 2011 N.C. Sess. Laws 391, § 39 (2011)).
14. See, e.g., NORTH CAROLINA OFFICE OF INDIGENT DEFENSE SERVICES, DISTRICT COURT DWI AND MISDEMEANOR FLAT FEES AND CASE OUTCOMES, 4-6 (Sept. 2011), <http://www.ncids.org/systems%20evaluation%20project/caseoutcome/research/districtcourt.pdf>.
15. See Thomas Maher of N.C. Office of Indigent Services Discusses Criminal Justice Reform, CAROLINA JOURNAL (Jan. 11 2016), <https://www.carolinajournal.com/video/thomas-maher-of-n-c-office-of-indigent-defense-services-discusses-criminal-justice-reform>.
16. NORTH CAROLINA COMMISSION ON THE ADMINISTRATION OF LAW AND JUSTICE, COMMITTEE ON CRIMINAL INVESTIGATION & ADJUDICATION REPORT, 21-22 (Oct. 2016) [hereinafter ADMINISTRATION OF LAW AND JUSTICE REPORT].
17. Current Operations and Capital Improvements Appropriations Act of 2015, 2015 N.C. Sess. Laws 241, § 18A.17(d) (2015).
18. See *supra*, note iii.
19. NORTH CAROLINA COMMISSION ON THE ADMINISTRATION OF LAW AND JUSTICE, INTERIM REPORT OF COMMITTEE ON CRIMINAL INVESTIGATION & ADJUDICATION, App. A (July 2016), http://www.cfcrights.org/wp-content/uploads/2016/08/Criminal-Investigation-and-Adjudication_interim-report_NCCALJ.pdf.
20. Tamar R. Birkhead, *North Carolina, Juvenile Court Jurisdiction, and the Resistance to Reform*, 86 N. C. LAW REV. 1443, 102-103 (2008).
21. *Id.* at 103.
22. *Id.* at 119-121.
23. NORTH CAROLINA OFFICE OF THE STATE AUDITOR, PERFORMANCE AUDIT: OFFICE OF INDIGENT DEFENSE SERVICES ASSIGNMENT AND PAYMENT OF PRIVATE COUNSEL, 4-6 (Oct. 2014), <http://www.ncauditor.net/EPSWeb/Reports/Performance/PER-2013-2000.pdf>; N.C. OFFICE OF THE STATE AUDITOR, PERFORMANCE AUDIT: OFFICE OF INDIGENT DEFENSE SERVICES, 4-5 (Feb. 2007), <http://www.ncauditor.net/EPSWeb/Reports/Performance/PER-2007-7223.pdf>.
24. COMMISSION REPORT 2016, *supra* note ii, at 4-5.