

COMMISSION ON INDIGENT DEFENSE SERVICES
REPORT ON PUBLIC DEFENDER CONFLICTS
FOR FISCAL YEAR 2022-2023

SUBMITTED TO THE NORTH CAROLINA GENERAL ASSEMBLY
PURSUANT TO S.L. 2013-360, SECTION 18A.6.(B)
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The Office of Indigent Defense Services shall report to the Chairs of the Joint Legislative Oversight Committee on Justice and Public Safety by October 1, 2013, and by October 1 of each year thereafter, on (i) the number of conflicts of interest that arose in public defender offices during the prior fiscal year and the cost to the State in private assigned counsel funds to resolve them and (ii) beginning with the October 1, 2014, report, the number of conflicts of interest resolved through the authorization in G.S. 7A-498.7(f1) during the prior fiscal year and the savings to the State in private assigned counsel funds as a result.

I. Relevant Legislative Provisions

This report is prepared pursuant to S.L. 360, § 18A.6.(b), which requires the North Carolina Office of Indigent Defense services to report annually on the following:

1. the number of conflicts of interest that arose in public defender offices during the prior fiscal year and the cost to the State in private assigned counsel funds to resolve them; and
2. the number of conflicts of interest resolved through the authorization in G.S. 7A-498.7(f1) during the prior fiscal year and the savings to the State in private assigned counsel funds as a result.

G.S. 498.7(f1), as amended by S.L. 360, § 18A.6.(a), directs that:

In cases in which a public defender determines that a conflict of interest exists in the office, whenever practical, rather than obtaining private assigned counsel to resolve the conflict, the public defender may request the appointment of an assistant public defender from another office of public defender in the region to resolve the conflict.

II. Ethical Obligations and Assignment Practices

A. Ethical Obligations

Public defender attorneys, like their private counterparts, are bound by the North Carolina State Bar's Rules of Professional Conduct (RPC) to avoid representing clients who have conflicts of interest with other current or former clients. Specifically, RPC 1.16(a)(1) requires an attorney to decline or to withdraw from representation if the representation will result in a violation of law or the Rules.

- RPC 1.7, Conflict of Interest: Current Clients, prohibits representation of a client if it will be directly adverse to another client, with certain limited exceptions.
- RPC 1.9, Duties to Former Clients, disallows representation of another person in the same or a substantially related matter in which the person's interests are materially adverse to the interests of a former client unless the former client provides a written waiver. Matters are substantially related if the lawyer learned of confidential information from the former client that can be used against the former client in the present matter or if facts relevant to the prior matter are relevant and material to present matter.
- RPC 1.10, Imputation of Conflicts of Interest, attributes to the attorney knowledge of any confidential information obtained through the office's prior representation and

thus disqualification. If the office gained confidential information from both clients, the office will likely have to forgo representing each of them.

- RPC 1.1, Competence, requires, among other things, thoroughness and preparation for representation.
- RPC 1.3, Diligence states in Comment 2 that “a lawyer’s workload must be controlled so that each matter can be handled competently.”

Conflicts and reassignments can also occur for other reasons, such as a breakdown in the attorney-client relationship. Another form of conflict of interest can occur when offices receive influxes of cases or have vacant positions, creating situations where the attorneys’ caseloads may exceed their capacity to adequately represent each client according to ethical standards.

B. Assignment Practices

All public defender offices in the state handle adult criminal cases in their respective districts, including misdemeanors, felonies, and probation violations and some offices also handle other cases in which indigent persons are entitled to counsel, such as abuse, neglect, dependency, and termination of parental rights.

Some offices are not staffed to handle and, therefore not expected to take all the non-conflict cases that arise in their jurisdictions. For example, Judicial District 10 was originally and is currently staffed to accommodate around half of the adult criminal cases in the district.

Depending on local preferences, some jurisdictions assign all cases the offices have agreed and are staffed to handle to public defender offices who may then reassign conflict cases to private counsel. In other districts, judges or clerks who spot evident conflicts will assign other counsel as the cases arise and will reassign cases upon request of the offices if conflicts become apparent after initial appointments have been made.

Offices also may reassign cases they might otherwise handle to private assigned counsel (PAC) because it is more efficient to do so. For example, if a defendant or respondent is represented by private counsel on other charges related or unrelated to the present matter, the office may assign the new matter to the same attorney to ensure that all matters are considered and resolved concurrently to the extent possible. An office may also do this if the defendant or respondent was represented by PAC in the past, taking advantage of an existing attorney client relationship and possible time saving in investigation. Additionally, sometimes offices will assign cases to PAC whose specialized knowledge or skills afford heightened ability to address certain complex matters.

Public defender offices did not typically cover each other's conflict cases until G.S. 498.7(f1) was amended to allow it when practicable. Instead, public defenders relied on local private counsel to fill in the gaps. This practice made sense because PAC already practicing in the district were readily available and did not incur further costs of travel. It also avoided inefficiencies created by handling a small number of cases in a county or district.

In contrast, district attorney offices have occasionally handled conflict cases from their peer offices; however, such instances are rare because district attorneys do not represent individual clients and thus do not face the same number of ethical conflicts. Furthermore, unlike public defender offices, district attorney offices do not maintain rosters of private prosecutors to whom they can easily transfer responsibilities for representation.

One exception to the general rule that North Carolina public defender offices have not historically covered each other's conflicts: the Gaston County and Mecklenburg County offices have a longstanding arrangement wherein the Gaston office employs an assistant public defender who is housed in the Mecklenburg office to handle some of the latter's felony conflict cases. This arrangement requires strict partition between the work product of that attorney and the rest of the Mecklenburg office, including dedicated support staff and firewalls for electronic data. This type of arrangement could be replicated in other offices, but it would work best in offices in proximity to each other, where the caseloads are sufficient to provide for full-time conflict work, and where resources allow for adequate sequestration.

C. Conflict Tracking

In October 2013, IDS revised its online disposition database to give public defender offices the ability to track conflicts and cases they assign out of their offices. Offices now enter by case type the number of cases they:

- reassign to PAC because of case-specific or workload conflicts, or other practical reasons; or
- transfer to other public defender offices.

It should be noted, however, that the offices often do not know when conflict assignments are made from the courtroom.

III. **FY 2022-23 Conflict of Interest and Assignments to Private Counsel**

A. Assignments to Private Counsel

In FY 2022-23, public defender offices reported a total of 40,155 cases reassigned to private counsel due to case conflicts, workload conflicts, and other non-conflict reasons. Specifically, offices reported:

- 15,123 case-specific conflict cases,
- 14,430 workload conflict cases, and
- 10,601 non-conflict cases.

Tables showing breakdowns of the numbers of cases assigned by type of case, court of jurisdiction at the time of assignment, and reason for reassignment can be found in Appendix A.

B. Assignments to Other Public Defender Offices

In past years, interoffice transfers were used to get coverage when local counsel was not available and not to provide cost efficiencies. Other than conflict units attached to offices, it is not clear that public defender offices covering other offices' conflicts would be cost efficient. While there may be value in having public defender offices meet the needs of adjacent districts, having a public defender attorney travel to another district to handle one case might cost more than assigning local PAC.

C. Conflict Tracking

Public defender offices use an online database to track conflicts and cases they assign out of their offices. Offices track cases which are:

- reassigned to PAC/MAC because of conflicts or other practical reasons;
- transferred to other public defender offices.

It should be noted that the information entered in the online database may differ from the official court record since offices often do not know when conflict assignments are made from the courtroom. Additionally, conflict tracking is a manual process and is subject to error.

Every effort is made to minimize reporting errors, but the numbers provided in this report may differ from the official court record.

III. FY 2022-23 Conflict of Interest and Assignments to Private Counsel

A. Assignments to Private Counsel

In FY 2022-23, public defender offices reported a total of 38,402 cases reassigned to private counsel. This is a reduction of 1,753 cases from the previous fiscal year. A table showing the breakdown of the numbers of conflict cases assigned to private counsel grouped by PD district can be found in Appendix A.

Appendix A

Cases reassigned to private counsel FY2022-23.

PD District	Total Farmouts
1	364
2	1,045
3A	2,570
3B	1,624
5	843
10	7,196
12	534
14	1,271
15B	459
16A	329
16B	3,430
18	3,714
21	1,753
26	10,039
27A	396
27B	161
28	1,201
29A	14
29B	1,458
Total	38,402

