12.5 Appointment of Counsel

A. Role of Court and IDS in Appointing Counsel

In 2000, the North Carolina General Assembly passed the Indigent Defense Services Act ("IDS Act"), which created the Office of Indigent Defense Services ("IDS") and granted it broad authority to manage the indigent defense program in North Carolina. (The governing board of the IDS Office is the IDS Commission, and both the Office and Commission are collectively referred to here as IDS.) With respect to the appointment of counsel, the IDS Act left some determinations with the court and transferred others to IDS. IDS has adopted comprehensive rules describing the appointment process and the responsibilities of the court and IDS.

The IDS Act recognizes a basic division in authority concerning the appointment of counsel. Whether a person is indigent and entitled to have counsel appointed at state expense is generally determined by the court, but once it is determined that a person has a right to counsel, counsel is assigned in accordance with IDS rules. *See* G.S. 7A-452(a). The court retains the power to remove an attorney if warranted, in which case new counsel would be appointed in accordance with IDS rules. *See Ivarsson v. Office of Indigent Defense Services*, 156 N.C. App. 628 (2003); *see also infra* § 12.5J, Removal and Withdrawal of Counsel.

The responsibilities that accompany the court's determination of entitlement to counsel are discussed in subsection B., below. The procedure for assigning counsel depends on the case and judicial district involved. For the majority of criminal cases—noncapital cases at the trial level in districts without a public defender office or a contract system—the IDS rules leave the assignment of counsel with the court in accordance with local bar plans. *See* Introduction to Part 1 of IDS rules (stating that because of sheer volume of noncapital cases at trial level, court will continue for foreseeable future to appoint counsel at trial level in districts without public defender office or contract counsel); *see also* IDS Rule 1.5 (detailing the appointment procedure for different types of districts). For other categories of criminal cases, such as capital cases, IDS has assumed a more direct role in selecting counsel. The procedures for selecting counsel in the various categories of cases are discussed *infra* in § 12.5G, Selection of Counsel by Appointing Authority.

B. Determination of Entitlement to Counsel

Determination by court. In most cases, a judge determines at the defendant's first court appearance whether the defendant is entitled to appointed counsel. As part of that process, the court must

- advise the defendant of his or her right to counsel (*see infra* § 12.5C, Advising Defendant of Right to Counsel),
- determine whether the defendant is indigent (*see infra* § 12.5D, Determining Indigency), and

- decide whether the defendant is entitled to counsel in the particular case (*see supra* § 12.3, Types of Cases in which Right to Counsel Applies).

Preliminary determination of entitlement. In some instances, IDS (through the Capital Defender, a chief Public Defender, or other designee) may preliminarily assign counsel to a defendant, pending a determination of indigency and entitlement to counsel by the court. Such preliminary assignments (discussed further *infra* in § 12.5G, Selection of Counsel by Appointing Authority) may occur as follows:

- In districts with a Public Defender office, the chief Public Defender may preliminarily assign an attorney from his or her office to represent the defendant.
- In capital cases, the Capital Defender may assign provisional counsel until the court determines that the defendant is entitled to counsel and the Capital Defender identifies and appoints qualified counsel.
- In cases in which a defendant is in custody and has no counsel, IDS's designee may preliminarily assign counsel to the defendant.

See also G.S. 122C-270(a) (in involuntary commitment cases for which they are responsible, special counsel determines indigency subject to redetermination by judge).

C. Advising Defendant of Right to Counsel

At several stages of the proceedings, the court must advise the defendant of the right to counsel. Failure to do so may affect the validity of any waiver of counsel (*see infra* § 12.6, Waiver of Counsel) and consequently the validity of the proceedings. (Law enforcement also must advise a criminal defendant of the right to counsel in certain instances—for example, at a custodial interrogation or certain nontestimonial identification procedures. *See supra* § 12.4C, Particular Proceedings.)

Initial appearance. On arrest the defendant must be taken before a judicial official, usually a magistrate, and the magistrate must advise the defendant of the right to communicate with counsel and friends. *See* G.S. 15A-511(b)(2). In some instances, the failure to advise the defendant of this right could result in dismissal of the charges. *See supra* § 1.11A, Impaired Driving Cases; *see also State v. Caudill*, ___ N.C. App. ___, 742 S.E.2d 268 (2013) (reviewing North Carolina cases and finding that delay in taking defendant to magistrate for initial appearance did not require suppression of defendant's statements to police where police advised defendant of his rights).

The chief district judge may delegate to magistrates who are licensed attorneys the authority to appoint counsel at initial appearance except in potentially capital cases. Magistrates are not authorized to accept a waiver of counsel. *See* G.S. 7A-146(11).

First appearance. At a defendant's first appearance before a judge, which is statutorily required in felony cases, the judge must: (i) determine whether the defendant has retained or been assigned counsel; (ii) if the defendant is unrepresented, inform the defendant of the right to counsel and right to appointed counsel if he or she is indigent; (iii) appoint

counsel if necessary; and (iv) if the defendant desires to proceed without counsel, obtain a written waiver. *See* G.S. 15A-603.

Probable cause hearing. If a defendant appears without counsel, the court must inquire whether the defendant has executed a written waiver of counsel. If not, the court must take "appropriate action," such as appointing counsel or providing the defendant an opportunity to retain counsel. *See* G.S. 15A-611(c).

Arraignment. If a defendant appears without counsel, the court must inform the defendant of the right to counsel and must "accord the defendant opportunity to exercise that right." If the defendant has waived arraignment, the court must take steps to verify that the defendant is aware of the right to counsel. *See* G.S. 15A-942.

Entry of plea. A defendant may not be called on to plead unless the court determines that his or her right to counsel has been honored. *See* G.S. 15A-1012; *see also* G.S. 15A-1022(a)(5) (in accepting guilty plea, court must determine that defendant, if represented by counsel, is satisfied with representation).

Trial. If a defendant expresses the desire to proceed pro se at trial, the court must inform the defendant of the right to counsel and, before permitting the defendant to proceed pro se, must be sure that he or she understands the consequences of that decision, the nature of the charges being prosecuted, and the range of permissible punishments. *See* G.S. 15A-1242.

The trial judge need not always be the judge who conducts this inquiry; the defendant may waive trial counsel at an earlier pretrial proceeding. *See State v. Kinlock*, 152 N.C. App. 84 (2002) (waiver of trial counsel at pretrial proceeding was valid, and trial judge did not need to repeat inquiry at trial; judge at pretrial proceeding had conducted appropriate inquiry, defendant had waived counsel, and at trial defendant never indicated desire for counsel), *aff'd per curiam*, 357 N.C. 48 (2003). For a further discussion of whether a prior waiver is adequate, see *infra* § 12.6D, Withdrawal of Waiver of Counsel

D. Determining Indigency

Definition. G.S. 7A-450(a) provides the basic definition of indigency: "An indigent person is a person who is financially unable to secure legal representation and to provide all other necessary expenses of representation . . . ." *See also* IDS Rule 1.4 (discussing standard and procedure for determining indigency).

For most cases, the defendant must be indigent to obtain counsel at state expense. *See* G.S. 7A-450. In limited instances, indigency is not required. *See* G.S. 7B-2000 (juvenile in delinquency case presumed indigent); G.S. 35A-1107 (attorney is appointed as guardian ad litem in incompetency proceeding unless respondent retains counsel); IDS Rule 4.2 (no requirement that court determine indigency for inmates in custody of Department of Adult Correction and entitled to legal representation to ensure access to courts).

The standard for indigency is necessarily a flexible one, depending not only on the defendant's resources but also on the anticipated expenses of litigation. There are only a few decisions addressing the standard, and the specific dollar amounts cited in older cases may not be particularly useful as a guide today. *See State v. Cradle*, 281 N.C. 198 (1972) (trial court erred in finding that defendant was not indigent when there was no record evidence contradicting her affidavit of indigency); *State v. Wright*, 281 N.C. 38 (1972) (defendant who earned $149 per month, had car payments of $56 per month, had debts of $4,000, and had savings of approximately $50, was indigent); *State v. Haire*, 19 N.C. App. 89 (1973) (evidence that defendant was a painter capable of earning $60 per week when he was able to obtain work, and that he had made little effort to secure counsel, did not support finding that defendant was not indigent); *see also* G.S. 7A-498.5(c)(8) (authorizing IDS to adopt standards for determining indigency).

Time of determination of indigency. Indigency may be determined or redetermined at any stage of the proceedings. *See* G.S. 7A-450(c); *see also State v. Sanders*, 294 N.C. 337 (1978) (although defendant may not have been indigent when first two indictments were returned, court was not excused from advising defendant of right to counsel and inquiring about indigency when defendant was arraigned on third indictment; that defendant was able to retain counsel on appeal after conviction did not show he was not indigent when tried); *State v. Hoffman*, 281 N.C. 727, 738 (1972) (an indigent person is "one who does not have available, *at the time they are required*, adequate funds to pay a necessary cost of his defense") (emphasis added).

When a defendant's personal resources are sufficiently depleted to demonstrate indigency, he or she may be eligible for state funding of the remaining necessary expenses of representation. *See infra* § 12.5F, Effect of Retaining Counsel on Right to Appointed Counsel.

Partial indigency. North Carolina has a statute on "partial indigency," which provides that the court may require an individual who is able to do so to pay part of his or her legal expenses. *See* G.S. 7A-455(a). The statute is actually a "recoupment" statute, however. It does not appear to authorize a court to require a person to pay a portion of the legal fees up front. It only permits the court to impose such an obligation at the conclusion of the proceedings if the defendant is convicted. *See infra* § 12.9, Repayment of Attorneys Fees.

E. $60 Appointment Fee in Criminal Cases

For criminal cases in which counsel is appointed, G.S. 7A-455.1 requires defendants to pay a mandatory appointment fee of $60, due only if the defendant is convicted (by trial or plea of guilty or no contest). If the defendant fails to pay, the court cannot deny counsel, hold the defendant in contempt, or impose other sanctions. *See* G.S. 7A-455.1(d); *see also* Amended Memorandum from Office of Indigent Defense Services, Updated Procedures to Implement Attorney Appointment Required by G.S. 7A-455.1 (Oct. 12, 2011), *available at* www.ncids.org/Rules%20&%20Procedures/Other%20Policies/$50_$60%20fee%20procedures.pdf.

The original version of G.S. 7A-455.1 required criminal defendants who were appointed counsel to make an up-front contribution to the expenses of their representation and to make this contribution regardless of whether they were convicted. In *State v. Webb*, 358 N.C. 92 (2004), the court struck down the portion of the statute requiring payment of the fee in advance and regardless of whether the defendant was convicted. The court found that these provisions violated article I, section 23, of the North Carolina Constitution, which prohibits the imposition of costs against a criminal defendant unless found guilty.

F. Effect of Retaining Counsel on Right to Appointed Counsel

Generally. The North Carolina courts have held that if a person retains counsel and counsel makes a general appearance, it is presumed that the person is no longer indigent for appointment-of-counsel purposes. Even if the defendant runs out of money and stops paying the attorney, the court may require the retained attorney to continue representing the defendant throughout the proceedings at the trial level. The State is not required to take over payments to the attorney. *See State v. Richardson*, 342 N.C. 772 (1996) (court not required to appoint and pay counsel who had been retained by indigent defendant's family when family stopped paying lawyer; unless court permits retained counsel to withdraw, there is no requirement to redetermine indigency); *see also infra* § 12.5I, Scope of Counsel's Obligations after Appointment.

The presumption that a person is not indigent would not apply if counsel makes a limited appearance. *See* G.S. 15A-143 (attorney who appears for limited purpose is deemed to have withdrawn without need for court's permission when purpose is fulfilled); *see also State v. Hoffman*, 281 N.C. 727, 738 (1972) (defendant could afford to pay for counsel at interrogation; ability to pay costs of subsequent proceedings would be determined at those subsequent proceedings).

Payment of other expenses. A defendant represented by retained counsel still may be considered indigent for purposes of obtaining funds for other expenses, including the cost of experts. *See State v. Boyd*, 332 N.C. 101, 109 (1992) ("That defendant had sufficient resources to hire counsel does not in itself foreclose defendant's access to state funds for other necessary expenses of representation—including expert witnesses—if, in fact, defendant does not have sufficient funds to defray these expenses when the need for them arises.").

In capital cases, a defendant who retains counsel remains entitled to a second, appointed counsel if indigent. *State v. Davis*, 168 N.C. App. 321 (2005). The *Davis* court distinguished *State v. McDowell*, 329 N.C. 363 (1991), in which a capital defendant retained counsel and waived the right to second, appointed counsel.

Withdrawal of waiver of appointed counsel. A different question arises if an indigent person waives the right to appointed counsel with the intention of hiring counsel but then is unable to do so. The defendant may be able to withdraw the waiver and obtain appointed counsel. *See infra* § 12.6D, Withdrawal of Waiver of Counsel.

G. Selection of Counsel by Appointing Authority

The process for selecting counsel varies with the type of case and district in which the case arises.

Noncapital cases in districts without public defender office. As of this writing, in most districts without a public defender office, the court ordinarily appoints attorneys on a case-by-case basis. Attorneys must qualify to be on the appointed list in accordance with the local bar plan. *See* IDS Rule 1.5(a).

Pursuant to the General Assembly's directive in 2011 (§ 15.16(c) in 2011 N.C. Sess. Laws. Ch. 145 (H 200), as amended by § 39 in 2011 N.C. Sess. Laws Ch. 391 (H 22)), IDS has begun entering into contracts for private attorneys to represent indigent defendants rather than have them assigned and paid on a case-by-case basis. *See also* IDS Rule 1.5(f) (recognizing IDS's authority to enter into contracts). The method of assigning attorneys to cases in districts with a contract system may vary from district to district.

Noncapital cases in districts with public defender office. Appointments are in accordance with the plan adopted by the Public Defender and approved by IDS. In some public defender districts, appointments are made by the Public Defender; in others, appointments are made by the court from a list of attorneys approved by the Public Defender in consultation with the local bar. IDS also may enter into contracts with attorneys to handle cases in the district. *See* IDS Rule 1.5(b), (f).

A Public Defender may preliminarily appoint his or her office to represent a person pending a determination by the court that the person is indigent and entitled to counsel. *See* G.S. 7A-452(a).

Capital cases. For appointment purposes, a "capital" case is defined as any case that includes a charge of first-degree murder or an undesignated degree of murder, except cases in which the defendant was under 18 years of age at the time of the alleged offense and therefore ineligible for the death penalty. *See* IDS Rule 2A.1. In those instances, whether the case arises in a district with a Public Defender's office or without one, the Capital Defender (as the IDS director's designee) appoints first and second counsel from a list of counsel maintained by the Capital Defender. *See* IDS Rule 2A.2. If the case is later declared noncapital, one of the two appointed attorneys must move to withdraw unless exceptional circumstances exist and the IDS Director or designee authorizes both attorneys to continue representation. *See* IDS Rule 2A.5(c).

Before appointing trial counsel, the Capital Defender may appoint provisional counsel for a capital defendant. The purpose of the provisional appointment is to provide a capital defendant with the benefit of counsel as soon as possible. *See* IDS Rule 2A.2(a).

Appeals. For all appeals in which a person is entitled to appointed counsel, the Appellate Defender is appointed, who either handles the case within that office or appoints counsel from a list of attorneys approved by the Appellate Defender. *See* IDS Rule 3.2

(noncapital criminal and non-criminal cases); IDS Rule 2B.2 (capital cases).

Ordinarily, to avoid potential conflicts, the Appellate Defender does not appoint trial counsel as counsel on appeal. The Appellate Defender may authorize appellate counsel to file a motion for appropriate relief in conjunction with an appeal. *See* IDS Rule 3.2(g1).

Standby counsel. In noncapital cases in which the defendant elects to proceed pro se, the court determines whether standby counsel should be appointed and then selects counsel. *See* G.S. 15A-1243; IDS Rule 1.6(b) & Commentary. In capital cases, the court notifies IDS, which may select standby counsel. *See* IDS Rule 2A.3(b).

In-custody defendants. G.S. 7A-453 and IDS Rule 1.3(b) contain special provisions for expedited appointment of counsel for incarcerated defendants who do not have a lawyer in noncapital cases. The extent to which these provisions are actually being followed is unclear.

The statute provides that in districts designated by IDS, the custodian of a person who has been in custody for more than 48 hours and who does not have counsel must notify IDS's designee. In Public Defender districts, the Public Defender is IDS's designee. The Public Defender may notify the court of the defendant's status or may preliminarily appoint his or her office to represent the defendant pending a determination by the court of entitlement of counsel.

In districts not designated by IDS, which as of this writing are all districts without a Public Defender office, the custodian of a person who has been in custody for more than 48 hours and who does not have counsel shall notify the clerk of superior court. The clerk has the responsibility of notifying the court of the person's status or preliminarily appointing counsel pending a determination by the court. The commentary to IDS Rule 1.3 emphasizes the importance of this procedure:

> If the clerk does not appoint counsel for an in-custody defendant, it is particularly important for the clerk to alert a district court judge, especially in cases involving probation violations, orders for arrest for failing to appear, surrenders by sureties, and misdemeanors in those judicial districts that do not routinely hold first appearances. In those cases, a defendant's first-scheduled court date may be several days or even weeks after he or she is taken into custody. If counsel is not appointed until that first court date, the case will likely have to be continued to a later date, resulting in inefficient use of court time, longer pretrial custody for defendants, and greater demands on limited jail resources.

The above obligations are reinforced by the U.S. Supreme Court's decision in *Rothgery v. Gillespie County*, 554 U.S. 191, 213 (2008), which held as a constitutional matter that counsel must be appointed within a reasonable time after the defendant's initial appearance, when the defendant's Sixth Amendment right to counsel attaches. *See supra*

"Sixth Amendment right to counsel after commencement of judicial proceedings" in § 12.4A, When Right to Counsel Attaches.

H. Choice of Counsel by Defendant

Appointed counsel. Generally, an indigent person does not have the right to counsel of his or her choosing. *See State v. Anderson*, 350 N.C. 152 (1999) (where defendant is appointed counsel, he or she may not demand counsel of choice); *accord State v. Montgomery*, 138 N.C. App. 521 (2000). In some circumstances, however, an indigent person may be entitled to have different counsel appointed. *See infra* § 12.5J, Removal and Withdrawal of Counsel.

Retained counsel. Generally, a defendant has the right to retained counsel of his or her choice. *See State v. Morris*, 275 N.C. 50 (1969); *State v. Montgomery*, 138 N.C. App. 521 (2000); *see also infra* § 12.5J, Removal and Withdrawal of Counsel. The court must allow a defendant reasonable time to hire counsel of choice. *Compare State v. McFadden*, 292 N.C. 609 (1977) (trial court erred in refusing to continue case to allow defendant to retain new counsel after previous counsel withdrew from case; there was nothing in record to indicate that defendant exercised right to select counsel in manner to disrupt or obstruct proceedings), *with State v. Poole*, 305 N.C. 308, 318 (1982) ("[a] defendant's right to select his own counsel cannot be insisted upon in a manner that will obstruct an orderly procedure in courts of justice"; trial court did not err in denying continuance to allow defendant, who wanted appointed counsel removed, to hire counsel); *see also* 3 LAFAVE, CRIMINAL PROCEDURE § 11.4(c), at 715–21 (discussing need to balance authority of trial court to manage trial schedule and right of defendant to hire counsel of choice).

I. Scope of Counsel's Obligations after Appointment

Unless removed or permitted to withdraw (*see infra* § 12.5J, Removal and Withdrawal of Counsel), counsel who is appointed to represent an indigent client, or who makes a general appearance on behalf of a retained client, is obligated to represent the client until entry of judgment at the trial level. *See* G.S. 15A-143 (attorney who makes general appearance undertakes to represent defendant until entry of final judgment at trial stage); *North Carolina State Bar v. Key*, 189 N.C. App. 80 (2008) (so holding); IDS Rule 1.7(a) (unless permitted by court to withdraw, counsel appointed to represent indigent defendant must represent client until final judgment at trial level); N.C. STATE BAR REV'D RULES OF PROF'L CONDUCT R. 1.16 cmt. 3 (court approval generally required before lawyer may withdraw from pending litigation). Thus, if counsel is appointed to handle a misdemeanor in district court and the client wishes to appeal for a trial de novo in superior court, counsel's obligations would continue through judgment in superior court unless removed or permitted to withdraw.

To a limited extent, appointed counsel's obligations may extend beyond entry of judgment at the trial level. Thus, counsel must advise the client of the right to appeal and must enter notice of appeal if the client requests it. *See* IDS Rule 1.7(a). Filing a notice of

appeal does not constitute an appearance, and does not make the attorney counsel of record, on appeal of a superior court judgment. *See* N. C. R. APP. P. 33(a) (attorney not recognized as appearing in case unless he or she signs record on appeal, motion, brief, or other document permitted by rules to be filed in appellate division), N.C. R. APP. P. 4(a)(2) (notice of appeal filed with clerk of superior court). Counsel also is authorized to file a "ten-day" motion for appropriate relief under G.S. 15A-1414, which permits motions up to ten days after entry of judgment on grounds such as the verdict was against the weight of the evidence. *See also* 3 LAFAVE, CRIMINAL PROCEDURE § 11.2(b), at 624 (certain post-verdict motions made immediately after conclusion of trial are extension of trial proceedings and should be treated as subject to Sixth Amendment).

For a further discussion of trial counsel's obligations regarding the client's right to appeal, see 2 NORTH CAROLINA DEFENDER MANUAL § 35.1 O (Trial Counsel's Obligations regarding Defendant's Right to Appeal after Superior Court Conviction) (UNC School of Government, 2d ed. 2012).

J. Removal and Withdrawal of Counsel

If counsel is removed or permitted to withdraw, new counsel is appointed in accordance with the assignment of counsel procedures for that case and district. *See supra* § 12.5G, Selection of Counsel by Appointing Authority.

Removal of Counsel. Although a defendant does not have the right to appointed counsel of his or her choice, the court must engage in an adequate inquiry into a defendant's request for the replacement of appointed counsel. The court must appoint different counsel if continued representation by original counsel would result in ineffective assistance of counsel, involve a conflict of interest, or otherwise violate the defendant's Sixth Amendment right to counsel. *See State v. Thacker*, 301 N.C. 348, 352 (1980) (substitute counsel required "whenever representation by counsel originally appointed would amount to denial of defendant's right to effective assistance of counsel, that is, when the initial appointment has not afforded defendant his constitutional right to counsel"); *see also State v. Williams*, 363 N.C. 689 (2009) (defendant only expressed uncertainty to trial judge about why attorney who had previously withdrawn from case had been reappointed and did not make request for substitute counsel; trial judge therefore was not required to hold hearing on removal); *State v. Hutchins*, 303 N.C. 321, 335 (1981) ("In the absence of any substantial reason for the appointment of replacement counsel, an indigent defendant must accept counsel appointed by the court, unless he wishes to present his own defense."); *State v. Sweezy*, 291 N.C. 366, 372 (1976) (substitute counsel warranted if good cause shown, such as conflict of interest, complete breakdown in communication, or irreconcilable conflict between counsel and client that would result in unjust verdict); *State v. Glenn*, ___ N.C. App. ___, 726 S.E.2d 185 (2012) (general dissatisfaction or disagreement over trial tactics insufficient basis to appoint new counsel).

Even if substitution of counsel is not required, a court has the discretion to grant a defendant's request for substitute counsel. *See State v. Kuplen*, 316 N.C. 387, 396 (1986)

(court has discretion to grant defendant's request to replace appointed counsel although replacement may not be constitutionally required); *State v. Rogers*, 194 N.C. App. 131 (2008) (not error for trial court to grant defendant's request for substitute counsel).

A motion to disqualify counsel may come from the prosecutor, but motions by an adversary should be scrutinized carefully by the court. *See State v. Yelton*, 87 N.C. App. 554, 556–57 (1987) (opposing counsel may raise objection but not as technique for harassment); *see also State v. Shores*, 102 N.C. App. 473, 476 (1991) (defendant's interest in retaining counsel of his choice outweighed State's interest in disqualifying attorney during pretrial proceedings based on "mere, though substantial, possibility" the State might call attorney as witness (citation omitted)). IDS may request that an appointed attorney be removed, but the ultimate decision remains with the court. *See, e.g.*, IDS Rule 2A.5(b) (capital trials).

In limited circumstances—for example, because of a significant conflict of interest—a court may remove retained or appointed counsel over the client's objection. *See Wheat v. United States*, 486 U.S. 153 (1988) (court may override waiver of conflict of interest and replace counsel preferred by defendant); *State v. Rogers*, ___ N.C. App. ___, 725 S.E.2d 342 (2012) (court could remove defendant's retained counsel based on serious potential for conflict of interest even if conflict never materialized); *State v. Ballard*, 180 N.C. App. 637 (2006) (new trial ordered where judge did not fully advise defendant about his attorney's potential conflict and defendant did not knowingly, intelligently, and voluntarily waive right to conflict-free representation); *State v. Taylor*, 155 N.C. App. 251 (2002) (court did not abuse discretion in finding that conflict existed requiring disqualification of retained counsel); *see also State v. Morgan*, 359 N.C. 131 (2004) (trial court could reasonably conclude that it was necessary to remove second chair counsel because her medical condition could affect her ability to provide effective assistance). *But see United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006) (Government conceded that trial judge erroneously barred retained counsel from representing defendant; error violated defendant's Sixth Amendment right to retain counsel of choice and was not subject to harmless error analysis); *State v. Yelton*, 87 N.C. App. 554 (1987) (court erred in disqualifying retained counsel over defendant's objection); *State v. Nelson*, 76 N.C. App. 371 (1985) (indigent defendant had right to continue to be represented by appointed counsel that he had confidence in and was satisfied with; court's removal of counsel was not for any judicially-approved reason), *aff'd on other grounds*, 316 N.C. 350 (1986).

Removal of counsel and substitution of new counsel may warrant a continuance to protect the defendant's Sixth Amendment right to counsel. *See generally Morris v. Slappy*, 461 U.S. 1 (1983) (court did not violate defendant's Sixth Amendment right to counsel by refusing to grant continuance; although denial of continuance necessitated that new public defender take place of public defender who had been handling case, new public defender was fully prepared to try case); *State v. Rogers*, 352 N.C. 119 (2000) (defendant entitled under circumstances of case to new trial where court removed counsel and did not grant continuance at request of new counsel).

Withdrawal of counsel. Possible grounds for an attorney's request to withdraw may vary

and are not reviewed here. *See, e.g.*, G.S. 15A-144 (counsel may move to withdraw for good cause); N.C. STATE BAR REV'D RULES OF PROF'L CONDUCT R. 1.16 (describing when counsel may and must move to withdraw). In moving to withdraw, counsel must be mindful of maintaining the confidentiality of client information. *See id.* at R. 1.16 cmt. 3 (lawyer may need to keep facts confidential that would constitute explanation of reasons for motion to withdraw). Ordinarily, it should be sufficient for counsel to indicate to the court the general basis for moving to withdraw. A trial court may hold an in camera hearing if necessary to inquire further but must remain wary of infringing on confidential attorney-client information. *See Holloway v. Arkansas*, 435 U.S. 475, 487 & n.11 (1978); *State v. Yelton*, 87 N.C. App. 554, 557 (1987).

Replacement of counsel without court order. Under some Public Defender appointment plans, if the Public Defender assigns a case to an attorney and the attorney has not appeared or otherwise accepted the case, the attorney may decline the assignment and return the case to the Public Defender for reassignment without making a motion to the court to withdraw. Attorneys should check their local plan for the requirements in their district.

Once an attorney is appointed, may another attorney in the office substitute for that attorney without the court's permission? If a specific attorney has been appointed, the answer is generally no. *See State v. Carter*, 66 N.C. App. 21, 23 (1984) ("In any criminal case where the defendant is found to be indigent and receives the services of court-appointed counsel it is only the specifically named counsel (and not the law firm or associates) that has the delegated right and duty to appear and participate in the case."); *cf.* North Carolina State Bar Ethics Opinion RPC 58 (1989) (another member of firm may substitute for appointed attorney if substitution does not prejudice client and court and client consent). The IDS rules recognize that another attorney may appear in place of appointed counsel in limited circumstances—for example, to seek a continuance or reduction in bail—if appointed counsel is unavailable because of an appearance in another court, illness, or family emergency. IDS Rule 1.5(d)(2) & Commentary.

The restrictions on substitution of counsel would not appear to apply to Public Defender offices since the office itself (or the chief Public Defender on behalf of the office) is typically appointed and then appears through assistant public defenders.