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The assistance of counsel is so vital to the proper functioning of the criminal justice system that it has been "deemed necessary to insure fundamental human rights of life and liberty." *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963) (citation omitted). This chapter addresses the scope of the right to the assistance of counsel. Section 12.1 identifies the constitutional and statutory sources of the right. Section 12.2 discusses the consequences of a violation. Section 12.3 reviews the types of cases in which a person has a right to counsel. Section 12.4 discusses the stages of a criminal case in which a person has the right to have counsel present. Section 12.5 discusses the procedures for appointing counsel. Section 12.6 addresses a defendant's right to waive counsel and proceed pro se (that is, represent himself or herself without counsel). Section 12.7 describes the law on ineffective assistance of counsel. Section 12.8 addresses the attorney-client relationship and the lawyer's role and responsibilities within that relationship. Section 12.9 discusses the rules on repayment of attorneys fees, known as recoupment in North Carolina. Last, Appendix 12-1 provides guidance on dealing with conflicts in criminal defense representation.

This chapter refers in several places to the Rules of the N.C. Commission on Indigent Defense Services [hereinafter "IDS Rules"]. A complete set of IDS Rules may be found at www.ncids.org/Attorney/IDSRules.html?c=Information%20for%20Counsel,%20IDS%20Rule

s. This chapter also refers to the North Carolina State Bar Rules of Professional Conduct and Ethics Opinions. For those materials, go to www.ncbar.com/menu/ethics.asp and follow the appropriate link.

## 12.1 Scope of Right to Counsel

### A. Right to Appointed Counsel

A person has a right to have counsel appointed at state expense in various proceedings. The principal sources of the right to counsel are as follows:

- In criminal prosecutions, from the initiation of formal proceedings through judgment at the trial level, a person has a Sixth Amendment right to counsel for all felonies and most misdemeanors. Other constitutional provisions give a criminal defendant the right to counsel in proceedings outside that time frame. For example, the Fifth Amendment protects a person from being interrogated by the police without counsel before the initiation of formal proceedings, while due process and equal protection give a person the right to counsel on a first appeal of right.
- In proceedings that are not characterized as criminal but may result in a deprivation of liberty or other important right, due process may give a person a right to counsel. *See generally Lassiter v. Dep't of Social Services*, 452 U.S. 18 (1981) (discussing application of due process to appointment of counsel in proceeding to terminate parental rights). A common situation in North Carolina in which a person has a due process right to counsel is in civil contempt proceedings, usually for failure to pay child support.
- In certain criminal and non-criminal proceedings in which the right to counsel is not constitutionally guaranteed, North Carolina statutory law guarantees a person the right to counsel. The following discussion deals primarily with criminal and quasi-criminal proceedings, such as juvenile delinquency proceedings. For a listing of civil proceedings in which a person has a right to counsel, such as involuntary commitment and termination of parental rights proceedings, see IDS Rule 1.1 Commentary.
- The Office of Indigent Defense Services ("IDS") must provide legal representation in cases in which the State is obligated to provide legal assistance and access to the courts for inmates in the custody of the Division of Adult Correction in the Department of Public Safety. *See* G.S. 7A-498.3(a)(2a). Part 4 of the IDS Rules governs the provision of such representation. IDS has entered into an agreement with North Carolina Prisoner Legal Services to provide the legal assistance.
- The North Carolina Constitution also guarantees the right to counsel, but it is not clear whether those provisions extend beyond federal constitutional and state statutory rights. *See* N.C. CONST. art. I, sec. 19 ("No person shall be . . . deprived of his life, liberty, or property, but by the law of the land."); art. I, sec. 23 ("In all criminal prosecutions, every person charged with crime has the right . . . to have counsel for defense . . . .").

In most of the above proceedings, a person is entitled to counsel at state expense only if he or she is indigent. In some instances—for example, a proceeding in which a juvenile is alleged to be delinquent—a person is entitled to have counsel appointed regardless of whether he or she is indigent. *See infra* § 12.5D, Determining Indigency.

### B. Right to Retained Counsel

The right to appear by retained counsel is at least as broad as the right to appear by appointed counsel. The right to retained counsel is based on both statutory and constitutional grounds. *See* Section 15-4 of the North Carolina General Statutes (hereinafter G.S.) ("[e]very person, accused of any crime whatsoever, shall be entitled to counsel in all matters which may be necessary for his defense"); *State v. Morris*, 275 N.C. 50 (1969) (defendant has constitutional right in every criminal case to retain and appear by counsel of his choice); *see also* 3 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 11.1(a), at 566–67 (3d ed. 2007) [hereinafter LAFAVE, CRIMINAL PROCEDURE]).

If a person is convicted without having waived the right to both appointed and retained counsel—for example, the person executes a waiver of appointed counsel but not of retained counsel—the conviction may be challenged as a violation of the person's right to counsel. *See infra* § 12.6B, Mandatory Procedures for Waiving Counsel.

### C. Right to Other Expenses of Representation

An indigent person is entitled not only to the appointment of counsel but also to funds for "other necessary expenses of representation," such as experts and investigators. G.S. 7A-450(b). This right is based on both statutory and constitutional grounds. For a discussion of applying for funds for experts and other assistance, see *supra* Ch. 5, Experts and Other Assistance.

A person who is able to retain counsel may still be considered indigent for purposes of paying for experts and other expenses of representation and may be entitled to obtain state funds for such services. *See infra* § 12.5F, Effect of Retaining Counsel on Right to Appointed Counsel.

## 12.2 Consequences of Denial of Counsel

### A. Suppressing Prior Uncounseled Conviction

**Convictions obtained without counsel.** The State may not rely on a prior, uncounseled conviction in a later proceeding—to impeach the defendant, raise the level of an offense, or enhance a sentence—if the defendant was entitled to counsel, had no counsel, and did not waive counsel. *See* G.S. 15A-980; *Custis v. United States*, 511 U.S. 485 (1994); *see also* G.S. 20-179(o) (in sentencing for impaired driving, court may not consider prior impaired driving conviction obtained in violation of right to counsel).

The onus of raising the invalidity of a conviction is on the defendant. If the defendant fails to raise the issue, he or she waives the right to contest the conviction's use in that proceeding. *See State v. Thompson*, 309 N.C. 421, 426 (1983) ("Where a defendant stands silent and, without objection or motion, allows the introduction of evidence of a prior conviction, he deprives the trial division of the opportunity to pass on the constitutional question and is properly precluded from raising the issue on appeal."); G.S. 15A-980(b) (defendant waives right to suppress use of prior conviction based on denial of counsel if he or she does not move to suppress).

**Raising violation in current proceeding.** The defendant is entitled to challenge the use of a prior uncounseled conviction in the case in which the State proposes to use it—that is, the defendant may "collaterally" attack the conviction. The courts permit this procedure because the failure to provide counsel to an indigent defendant is considered a unique defect. *See Custis v. United States*, 511 U.S. 485 (1994) (so holding; also noting that earlier cases considered such a violation to be jurisdictional defect that rendered conviction void); *State v. Blocker*, ___ N.C. App. ___, 727 S.E.2d 290, 291 (2012) ("[A] motion to suppress a prior conviction that challenges the voluntary nature of a waiver of counsel for that prior conviction may properly be made before the sentencing judge for a subsequent conviction."). Other types of violations—for example, a guilty plea that is not knowing or voluntary (known as a *Boykin* violation) or deficient performance of counsel—ordinarily cannot be raised in the proceeding in which the conviction is proposed to be used. The defendant must seek to vacate the conviction by filing a motion for appropriate relief in the case in which the conviction was entered. *See Custis*, 511 U.S. 485; *State v. Hensley*, 156 N.C. App. 634 (2003) (defendant could not collaterally attack, based on deficient performance of counsel, conviction used by State as predicate felony for habitual felon status); *State v. Stafford*, 114 N.C. App. 101 (1994) (defendant could not collaterally attack, based on *Boykin* violation, conviction used by State as predicate felony for habitual impaired driving).

*Custis* did not specifically address whether a defendant could collaterally attack in the current proceeding a prior conviction obtained in violation of the right to retained counsel. However, the waiver of appointed and retained counsel are closely related, and most questions may be resolved by reference to the record of the previous proceedings without the taking of extensive additional evidence, a point of importance to the *Custis* court. Thus, a defendant should be able to raise all denial-of-counsel challenges collaterally.

**Timing of motion.** There appear to be two methods for challenging in the current proceeding the use of a prior conviction. Under one or the other method, a defendant tried in superior court may be able to challenge the use of a prior conviction at the time offered by the State. Unless there are strategic reasons for waiting, however, the safer course is to challenge the conviction's use before trial in superior court. (In misdemeanor cases in district court, a challenge to the use of a prior uncounseled conviction may always be made at trial. *See infra* § 14.6A, Timing of Motion.)

One method for challenging a prior uncounseled conviction is to move to suppress under G.S. 15A-980. That statute authorizes motions to suppress for a denial of counsel in accordance with the requirements for motions to suppress generally. The suppression statutes provide generally that a defendant must move to suppress evidence before trial except in specified circumstances. *See* G.S. 15A-975. It is not clear, however, that the legislature intended to require the defendant to move to suppress an uncounseled conviction before the phase of the proceedings in which the conviction is offered. Thus, if the State intends to offer a prior conviction at sentencing, it may be permissible under G.S. 15A-980 for the defendant to move to suppress at the outset of the sentencing proceeding, after the defendant has been found guilty of the current offense. *See State v. Blocker*, ___ N.C. App. ___, 727 S.E.2d 290 (2012) (after guilty plea and before sentencing, defendant made motion to suppress prior uncounseled conviction; trial judge erred in summarily denying motion as impermissible collateral attack and case remanded for proper determination of motion); *see also* G.S. 15A-1340.14(f) (if motion to suppress prior conviction pursuant to G.S. 15A-980 is made during sentencing stage in felony case, court may grant continuance of sentencing hearing); G.S. 15A-1340.21(c) (stating same for misdemeanor sentencing); G.S. 20-179(o) (in deciding on sentence for impaired driving, court must allow defendant opportunity to present evidence that prior impaired driving conviction was obtained in violation of right to counsel). An even stronger argument can be made that a defendant charged with being a habitual felon may move to suppress an uncounseled conviction at the outset of the habitual felon phase, which is based on a separate indictment from the trial of the underlying felony. *See generally State v. Hensley*, 156 N.C. App. 634, 637–38 (2003) (suggesting that defendant may challenge prior conviction at habitual felon sentencing); *see also* G.S. 14-72(b) (prior conviction may not be used as predicate for habitual misdemeanor larceny unless defendant was represented by counsel or waived counsel).

Alternatively, the defendant may be able to object to the use of a prior conviction at the time the State seeks to offer it in evidence. *See State v. Thompson*, 309 N.C. 421, 427 (1983) ("The defendant may challenge the evidence of prior convictions prior to trial by motion to suppress or he may challenge the evidence in the first instance at the time of the offer of proof by the State"; decision discusses G.S. 15A-980, which had been enacted but had not yet become effective).

In entering a guilty plea, if the defendant wants to reserve the right to appeal the denial of a motion to suppress a prior uncounseled conviction, the defendant must expressly reserve that right. *See infra* § 14.7B, Appeal after Guilty Plea.

**Proof of violation.** To establish that an uncounseled conviction was obtained in violation of the right to counsel, the defendant must show that he or she (i) was entitled to counsel, (ii) had no counsel, and (iii) did not waive counsel. *See* G.S. 15A-980; *see also State v. Jordan*, 174 N.C. App. 479 (2005) (relying on *Parke v. Raley*, 506 U.S. 20 (1992), which addressed a challenge to the validity of a guilty plea, court states that a conviction enjoys a similar "presumption of regularity" against a later challenge based on an alleged violation of the right to counsel; court finds that defendant has burden of proof to show violation and failed to meet that burden where 20-year-old records in case had been

routinely destroyed and defendant's right to counsel had long been recognized at time of case); *accord State v. Hadden*, 175 N.C. App. 492 (2006) (burden on defendant to overcome presumption of regularity).

G.S. 15A-980(c) and cases interpreting it state that the defendant must also show that he or she was indigent. *See State v. Rogers*, 153 N.C. App. 203 (2002) (mere assertion by defendant that he could not afford attorney at time of prior conviction was insufficient to prove indigency); *State v. Brown*, 87 N.C. App. 13 (1987) (State permitted to impeach defendant with prior conviction; defendant failed to prove he was indigent at time of conviction). This requirement is unobjectionable when the defendant claims that he or she was improperly denied the right to appointed counsel. But, the defendant also has a right to be represented by retained counsel, and the courts have found violations when the trial court has required the defendant to proceed pro se without a proper waiver of assistance of all counsel. *See infra* § 12.6D, Withdrawal of Waiver of Counsel.

### B. Suppressing Illegally Obtained Evidence

For evidence taken in violation of a defendant's right to counsel—for example, a statement taken by police in violation of the Fifth Amendment right to counsel or an identification at a police lineup in violation of the Sixth Amendment right to counsel—the defendant may move to suppress the evidence and prevent its use in the current proceeding. *See infra* § 12.4C, Particular Proceedings (discussing stages of case in which defendant has right to counsel and in which violation may require suppression); *see also infra* § 14.3, Illegal Confessions or Admissions; § 14.4F, Right to Counsel at Lineups.

### C. Precluding Sentence of Imprisonment

A defendant has a right to counsel in misdemeanor prosecutions if the court imposes an active or suspended sentence of imprisonment. *See Alabama v. Shelton*, 535 U.S. 654 (2002). Accordingly, if the defendant is improperly denied counsel, the court is precluded from imposing either an active or suspended sentence of imprisonment. Further, if the court imposes a suspended sentence of imprisonment in violation of the defendant's right to counsel, the court may not activate the defendant's sentence at a probation revocation proceeding regardless of whether the defendant is represented at the revocation proceeding. *See infra* § 12.3B, Misdemeanors.

### D. Vacating Uncounseled Conviction

Generally, an uncounseled conviction in violation of the right to counsel is automatically subject to reversal. *See Satterwhite v. Texas*, 486 U.S. 249 (1988) (discussing impact of various types of right-to-counsel violations). Where the evil caused by a denial of counsel is limited to the erroneous admission of evidence—for example, the admission of identification testimony obtained in violation of a defendant's right to counsel at a post-indictment lineup—a reviewing court may engage in harmless error analysis. *See id.*; *see also Coleman v. Alabama*, 399 U.S. 1 (1970) (remanding case to lower court to determine whether denial of counsel at preliminary hearing was harmless beyond reasonable doubt).

## 12.3. Types of Cases in which Right to Counsel Applies

### A. Felonies

**Generally.** The Sixth Amendment guarantees the right to counsel to any indigent person accused of a felony. *See Gideon v. Wainwright*, 372 U.S. 335 (1963); *State v. Mays*, 14 N.C. App. 90 (1972); *see also* 3 LAFAVE, CRIMINAL PROCEDURE § 11.2(a), at 611 n.12. This right attaches regardless of the punishment that is authorized or imposed for the offense.

**Capital felonies.** An indigent defendant charged with a capital crime is statutorily entitled to the appointment of two attorneys to represent him or her at trial and in postconviction proceedings. *See* G.S. 7A-450(b1) (trial); G.S. 7A-451(c), (c1) (postconviction).

### B. Misdemeanors

**Sentence of actual or suspended imprisonment.** An indigent person has a Sixth Amendment right to counsel in all misdemeanor cases in which actual imprisonment or a suspended sentence of imprisonment is imposed. The formulation of this right has developed over a series of U.S. Supreme Court decisions. *See Argersinger v. Hamlin*, 407 U.S. 25 (1972) (recognizing basic right in misdemeanor cases); *Scott v. Illinois*, 440 U.S. 367, 373–74 (1979) (in misdemeanor cases, "the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel"); *Alabama v. Shelton*, 535 U.S. 654 (2002) (indigent defendant has right to appointed counsel in misdemeanor case if court imposes suspended sentence of imprisonment); *see also North v. Russell*, 427 U.S. 328 (1976) (recognizing that in two-tiered court system, such as North Carolina's district and superior court system, judge at each level must inform indigent defendant of right to counsel if sentence of confinement is to be imposed).

This rule has three effects. First, if the court has not appointed counsel for an indigent defendant and the indigent defendant has not waived counsel, the court is prohibited from imposing an active or suspended sentence of imprisonment. For example, suppose a district court judge refuses to appoint counsel in a misdemeanor case and continues the case to another date, when it will be heard by a second district court judge. If the second judge does not revisit the earlier refusal to appoint counsel and the defendant does not waive counsel, the second judge may not sentence the defendant to an active or suspended term of imprisonment regardless of the evidence presented at trial or sentencing.

Second, if the court imposes a suspended sentence of imprisonment in violation of the defendant's right to counsel, the court in a later proceeding may not revoke the defendant's probation and activate the sentence. This prohibition applies even if the defendant is represented by counsel at the probation revocation hearing. *See Shelton*, 535 U.S. 654; *State v. Neeley*, 307 N.C. 247 (1982) (trial judge may not activate suspended

sentence if, in original proceeding in which suspended sentence was imposed, defendant did not have counsel and had not waived counsel); *accord State v. Barnes*, 65 N.C. App. 426 (1983) (applying *Neeley* to district court case); *State v. Black*, 51 N.C. App. 687 (1981) (to same effect as *Neeley*).

Third, if the court imposed an active or suspended term of imprisonment for a misdemeanor despite the failure to appoint counsel, the conviction should not be available in a subsequent proceeding to impeach, enhance a sentence, or increase the level of an offense. The reason is that when a sentence of imprisonment—actual or suspended—is imposed for a misdemeanor, the case is considered serious enough to require the protection of counsel. As in a felony case, if a conviction is obtained without counsel having been afforded to the defendant, the conviction should be subject to suppression. In this respect, the U.S. Supreme Court's decision in *Shelton*, which held that an indigent defendant has a right to counsel if a suspended sentence of imprisonment is imposed, appears to modify or at least clarify *Nichols v. United States*, 511 U.S. 738 (1994). *Nichols* held that a prior uncounseled misdemeanor conviction could be used to enhance a defendant's sentence in a subsequent proceeding if the defendant did not have a right to counsel at the prior proceeding. After *Shelton*, a prior misdemeanor conviction should not be useable in a subsequent proceeding if the prior conviction resulted in an active or suspended sentence of imprisonment, the defendant did not have counsel, and the defendant did not waive counsel.

**Sentence not involving imprisonment.** An indigent defendant does not have a Sixth Amendment right to appointed counsel for a misdemeanor if an active or suspended sentence of imprisonment is not imposed. *See Shelton*, 535 U.S. 654; *Scott*, 440 U.S. 367. Thus, under the Sixth Amendment, a court may impose a fine or restitution without affording counsel to an indigent defendant if the court does not include an active or suspended term of imprisonment. For a discussion of the procedures after a failure to pay, including the right to have counsel appointed, see *infra* § 12.3E, Nonpayment of Fine.

G.S. 7A-451(a)(1) provides indigent criminal defendants with a broader right to counsel. It provides for appointed counsel in "[a]ny case in which imprisonment, or a fine of five hundred dollars . . . or more, is likely to be adjudged." While it is unclear whether there is a meaningful difference between the statutory language and the constitutional requirements in cases involving imprisonment, the statute appears broader in fine-only cases, providing for counsel when the court imposes a fine of $500 or more.

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***Legislative note:*** Effective for offenses committed on or after December 1, 2013, section 18B.13 of the 2013 Appropriations Act (S.L. 2013-360 (S 402), as amended by S.L. 2013-363 (H 112), S.L. 2013-380 (H 936), and S.L. 2013-385 (S 182)), revises the punishment for Class 3 misdemeanors. Among other things, it adds G.S. 15A-1340.23(d) to provide that unless otherwise provided for a specific offense, the punishment for a person convicted of a Class 3 misdemeanor who has no more than three prior convictions may consist of a fine only. The potential impact of this change on appointment practices is not yet clear.

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### C. Juvenile Proceedings

**Delinquency.** A juvenile who is alleged to be delinquent is entitled to counsel at all proceedings before the juvenile court, including transfer proceedings, adjudications, and disposition hearings. This right is based on both due process and state statute. *See* G.S. 7B-2000(a) (juvenile within jurisdiction of juvenile court has right to appointed counsel in all proceedings); G.S. 7A-451(a)(8) (juvenile has right to counsel at hearing in which commitment to institution or transfer to superior court for felony trial is possible); *In re Gault*, 387 U.S. 1 (1967) (recognizing due process right to counsel in juvenile delinquency proceedings). Juveniles are "conclusively presumed to be indigent," and if they have not retained counsel, counsel must be appointed for them. G.S. 7B-2000(b).

**Undisciplined behavior.** A juvenile generally has no right to appointed counsel in cases in which he or she is alleged to be undisciplined. *See In re Walker*, 282 N.C. 28 (1972) (counsel not required at hearing on an undisciplined child petition). *But see generally Lassiter v. Dep't of Social Services*, 452 U.S. 18 (1981) (due process may require appointment of counsel in cases where person's liberty is not at stake but where fundamental fairness requires it); N.C. R. CIV. P. 17(b) (appointment of guardian ad litem authorized for children [rule rarely invoked for child alleged to be undisciplined]).

G.S. 7B-2000(a)(ii) gives juveniles the right to appointed counsel in an undisciplined case if alleged to be in contempt of court. However, effective October 1, 2012, the General Assembly rewrote G.S. 7B-2505 and deleted the provision that authorized a court to hold a juvenile in contempt for failing to comply with a court order after being adjudicated undisciplined. 2012 N.C. Sess. Laws Ch. 172 (H 853).

**Interrogation of juveniles.** Special rules apply to the interrogation of juveniles. *See infra* "Custodial interrogation of juvenile" in § 12.4C, Particular Proceedings.

### D. Contempt

**Differences between criminal and civil contempt.** Criminal contempt is intended to punish a person for a past act in violation of a court order. There are three different types of criminal contempt proceedings:

- summary proceedings for direct criminal contempt;
- plenary proceedings for direct criminal contempt; and
- plenary proceedings for indirect criminal contempt.

In the latter two types of proceedings, an indigent person has a constitutional right to have counsel appointed if imprisonment is imposed.

Civil contempt is intended to coerce a person to comply with a court's order, not to punish for a previous violation. The characterization of contempt as civil or criminal has various procedural consequences. For example, appeal of criminal contempt is to superior court for a trial de novo, and appeal of civil contempt is to the court of appeals. *See* John

L. Saxon, *Using Contempt to Enforce Child Support Orders*, SPECIAL SERIES NO. 17 (UNC School of Government, 2004)**.**

For purposes of appointment of counsel, the differences between civil contempt and plenary proceedings for criminal contempt (whether direct or indirect) are minimal. In all of those proceedings, an indigent person is entitled to have counsel appointed if imprisonment is imposed.

**Summary proceedings for direct criminal contempt.** The court is not required to appoint counsel when imposing summary measures for direct contempt. *See In re Williams*, 269 N.C. 68 (1967) (summary punishment for direct contempt does not contemplate trial at which person charged with contempt must have counsel).

There are a number of restrictions applicable to these proceedings. First, the contempt must be "direct." *See* G.S. 5A-13 (act must be committed within sight or hearing of presiding official, committed in or in immediate proximity to room where proceedings are being held before court, and likely to interrupt or interfere with matters then before court). For example, a defendant who shouts obscenities at a judge during court proceedings has engaged in direct contempt.

Second, the court must act "summarily"—that is, the court must impose any necessary measures "substantially contemporaneously" with the contempt. G.S. 5A-14(a). If the court delays imposing measures, it must initiate plenary proceedings, discussed below.

Third, before imposing summary punishment, the court must give the defendant summary notice and opportunity to respond and must find facts beyond a reasonable doubt supporting summary measures. *See* G.S. 5A-14(b).

Last, if a person is held in summary criminal contempt by a "judicial official inferior to a superior court judge," such as a district court judge, the person has the right to a de novo review in superior court. G.S. 5A-17. A de novo hearing is a plenary proceeding. *State v. Ford*, 164 N.C. App. 566 (2004). Therefore, the person is entitled to counsel as in plenary proceedings, discussed below.

**Plenary proceedings for direct criminal contempt.** An indigent person has a right to appointed counsel in plenary proceedings for direct criminal contempt if imprisonment is likely to be imposed. *See* G.S. 7A-451(a)(1); *Hammock v. Bencini*, 98 N.C. App. 510 (1990). A defendant also would appear to be entitled to counsel if the court imposes a suspended sentence of imprisonment. *See supra* § 12.3B, Misdemeanors (defendant entitled to counsel in misdemeanor case if suspended sentence of imprisonment imposed).

Plenary proceedings for direct criminal contempt are required when the judicial official chooses not to proceed summarily (that is, the judge does not proceed immediately) or is not authorized to proceed summarily. *See* G.S. 5A-15; *O'Briant v. O'Briant*, 313 N.C. 432 (1985) (when court does not act immediately to punish act constituting direct

contempt, notice and hearing required); *see also Groppi v. Leslie*, 404 U.S. 496 (1972) (in case alleging contempt of legislative body, due process violated by failure of legislature to give defendant notice and opportunity to respond to contempt charge that was brought two days after alleged contempt).

**Plenary proceedings for indirect criminal contempt, including child support and probation violations.** An indigent person has the same right to appointed counsel in proceedings for indirect criminal contempt as in plenary proceedings for direct criminal contempt.

Any criminal contempt that is not a direct criminal contempt constitutes an indirect criminal contempt. For example, a contempt committed outside the courtroom, such as a failure to pay child support or a probation violation under G.S. 5A-11(a)(9a), constitutes an indirect criminal contempt, and plenary proceedings are required pursuant to G.S. 5A-15.

**Civil contempt.** In *McBride v. McBride*, 334 N.C. 124 (1993), the N.C. Supreme Court held that an indigent defendant charged with civil contempt for failing to pay child support may not be incarcerated unless he or she has been appointed counsel or has waived counsel. The court rejected the argument that the right to counsel depends on whether the case is considered civil or criminal, stating that "jail is just as bleak no matter which label is used." 334 N.C. at 130 (citation omitted). Although *McBride* concerned a child support contempt case, its reasoning applies equally to any contempt proceeding in which the defendant is incarcerated. *See* John L. Saxon, McBride v. McBride*: Implementing the Supreme Court's Decision Requiring Appointment of Counsel in Civil Contempt Proceedings*, ADMINISTRATION OF JUSTICE MEMORANDUM No. 94/05 at 1 n.3 (Institute of Government, May 1994).

In *Turner v. Rogers*, ___ U.S. ___, 131 S. Ct. 2507 (2011), the U.S. Supreme Court took a somewhat more limited view of the right to appointed counsel in civil contempt proceedings. It held that "the Due Process Clause does not *automatically* require the provision of counsel at civil contempt proceedings to an indigent individual who is subject to a child support order, even if that individual faces incarceration (for up to a year)." *Id.*, 131 S. Ct. at 2520 (emphasis in original). The Court limited its holding, however, to cases in which the opposing party is not represented by counsel and the State provides adequate alternative procedural safeguards for the respondent. The Court found in *Turner* that the State had not satisfied these requirements and the respondent's incarceration without the benefit of counsel violated the Due Process Clause.

North Carolina law does not depend on the above analysis in determining the right to appointed counsel in civil contempt proceedings. Until revisited by the North Carolina appellate courts, *McBride* requires the provision of counsel to an indigent person in a civil contempt proceeding resulting in incarceration unless counsel is waived.

**Underlying paternity proceedings.** In *Wake County, ex rel. Carrington v. Townes*, 306 N.C. 333 (1982), the court held that an indigent defendant did not have an automatic right

to counsel in a civil paternity action. Rather, the trial court should determine whether the defendant requires counsel in light of all the circumstances. The supreme court suggested that in most instances appointment of counsel is unnecessary.

The court also stated that "an indigent person cannot be sent to jail, in any later proceeding to enforce the support order, unless he had the benefit of legal assistance and advocacy at the proceeding in which paternity was determined." *Id.*, 306 N.C. at 336. It does not appear that any reported decisions have actually enforced such a requirement and, in light of *McBride* (discussed above), the courts may be unreceptive to such an argument. At the time of *Townes*, an indigent defendant charged with civil contempt for failing to pay child support did not have an automatic right to counsel even if sent to jail. *See Jolly v. Wright*, 300 N.C. 83 (1980), *overruled by McBride v. McBride*, 334 N.C. 124 (1993). Now that *McBride* has extended the right to counsel to defendants in civil contempt proceedings resulting in imprisonment, the courts could well conclude that the additional protection suggested by *Townes* is unnecessary. At most, *Townes* may mean that if the defendant in a civil proceeding should have been appointed counsel under the circumstances of the case, the defendant cannot be given a sentence of imprisonment for a later violation of orders from those proceedings.

**Post-release supervision contempt.** G.S. 143B-720(a) gives the Post-Release Supervision and Parole Commission authority to conduct contempt proceedings, in accordance with the requirements for plenary contempt proceedings under G.S. 5A-15, for a post-release supervision violation by a person on post-release supervision for an offense subject to sex offender registration requirements. In such cases, therefore, a person would appear to have an automatic right to appointed counsel if imprisonment is imposed or likely to be imposed. *See infra* "Parole and post-release supervision revocation and contempt hearings" in § 12.4C, Particular Proceedings.

**Industrial Commission contempt proceedings.** The North Carolina Industrial Commission has limited civil and criminal contempt powers under G.S. 97-80. IDS has released a memorandum outlining the relevant procedures for appointment of counsel for indigent people appearing in response to a show cause order issued by the Commission. *See* Memorandum from Danielle Carman, IDS Assistant Dir./Gen. Counsel, Appointment and Comp. of Counsel in Indus. Comm'n Contempt Proceedings (Aug. 22, 2012), *available at* www.ncids.org/Rules%20&%20Procedures/Other%20Policies/IndustCommissionContemptProceedings.pdf.

### E. Nonpayment of Fine

G.S. 15A-1361 through G.S. 15A-1365 establish a procedure for collecting fines in cases in which the court imposes a fine only. Although structured sentencing allows a court to impose fine-only sentences in any case in which community punishment is authorized, including felonies, such sentences are typically imposed in misdemeanor cases only. A defendant's right to counsel depends on the amount of the fine, stage of the proceedings, and procedure followed.

**Fine-only sentence.** G.S. 15A-1364(a) and (b) provide that a court may impose a fine without an active or suspended term of imprisonment and, if the defendant fails to pay, may issue an order requiring the defendant to show cause why he or she should not be imprisoned. Unless the defendant was unable to comply, the court may impose a term of imprisonment of up to 30 days for nonpayment. This procedure is similar to contempt.

It is unclear whether imprisonment is constitutionally permissible for nonpayment if the defendant was not afforded counsel at the time the fine was imposed. *See generally United States v. Pollard*, 389 F.3d 101, 105–06 (4th Cir. 2004); *United States v. Perez-Macias*, 335 F.3d 421, 428 (5th Cir. 2003). (Under G.S. 7A-451(a)(1), the defendant would be statutorily entitled to counsel at the initial proceeding if the fine is $500 or more. *See supra* "Sentence not involving imprisonment" in § 12.3B, Misdemeanors.) The defendant is entitled to counsel at a show cause hearing for the nonpayment of any fine if a sentence of imprisonment is or is likely to be imposed. *See supra* § 12.3D, Contempt.

**Fine and suspended sentence.** G.S. 15A-1362(c) permits a court to impose a fine and a specific sentence to be served in the event the fine is not paid. At the time of imposing the sentence, the court also may issue an order requiring the defendant to appear and show cause if he or she fails to pay.

If the court follows this procedure, the court would appear to be required to afford counsel to the defendant at the initial proceeding in which the fine and sentence of imprisonment are imposed. *See supra* "Sentence of actual or suspended imprisonment" in § 12.3B, Misdemeanors. Also, to activate a sentence of imprisonment at a show cause proceeding, the court would need to afford counsel to the defendant.

## 12.4 Stages of Criminal Case in which Right to Counsel Applies

The right to counsel in a criminal case encompasses various proceedings. The Sixth Amendment right to counsel attaches once adversarial judicial proceedings have commenced and applies to any critical stage thereafter. Other constitutional provisions and state statutes afford the defendant the right to counsel at additional proceedings, both before and after the initiation of judicial proceedings.

### A. When Right to Counsel Attaches

**Sixth Amendment right to counsel after commencement of judicial proceedings.** The Sixth Amendment right to counsel attaches on commencement of adversarial judicial proceedings against the defendant, "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Kirby v. Illinois*, 406 U.S. 682, 689 (1972); *accord State v. Tucker*, 331 N.C. 12, 33 (1992). The question of when judicial proceedings commence affects both the procedures for appointment of counsel (the subject of this chapter) and the lawfulness of police procedures—for example, whether the defendant has a Sixth Amendment right to counsel during interrogation or at a lineup. *See infra* Chapter 14, Suppression Motions.

Generally, when a defendant is arrested for a felony or misdemeanor (with or without a warrant), the Sixth Amendment right to counsel attaches at the defendant's initial appearance before a judicial official—in North Carolina, usually before a magistrate under G.S. 15A-511. *See Rothgery v. Gillespie County*, 554 U.S. 191, 213 (2008) (so holding because "a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings"). The initial appearance itself is not a critical stage of the proceedings at which a defendant must have counsel. *Id.*, 554 U.S. at 212; *see also State v. Detter*, 298 N.C. 604 (1979) (first appearance before judge [at which courts formerly held that right to counsel attached] is not critical stage). The State, however, must afford counsel to the defendant within a reasonable time after the initial appearance to allow for adequate representation at any critical stage thereafter. *Rothgery*, 554 U.S. at 212. *Rothgery* effectively overruled earlier cases holding that the Sixth Amendment right to counsel attached at the defendant's first appearance before a judge. *See, e.g., State v. Franklin*, 308 N.C. 682 (1983) (taking of statement after arrest and before first appearance did not violate Sixth Amendment). In felony cases in which the defendant is in custody, first appearances occur fairly quickly—under G.S. 15A-601, no later than 96 hours after arrest and in practice usually sooner. In misdemeanor cases in which the defendant is in custody, first appearances are not statutorily required. Some districts have a practice of holding first appearances in misdemeanor cases; but, in those districts that do not do so, a defendant's first appearance in court may be on the arresting officer's next court date, which could be weeks after arrest. By holding that adversary judicial proceedings commence on initial appearance, *Rothgery* may advance the attachment of the Sixth Amendment right to counsel in misdemeanor prosecutions in North Carolina.

If the defendant is indicted before being arrested, the Sixth Amendment right to counsel attaches on return of the indictment. *See Kirby*, 406 U.S. 682. *Rothgery* did not alter this principle.

**Statutory right to counsel before commencement of proceedings.** G.S. 7A-451(b) provides that the right to counsel attaches immediately after arrest, and it lists certain proceedings at which counsel must be provided. The North Carolina courts have interpreted the statute with respect to some of the listed proceedings, such as lineups, as not affording a defendant a greater right to counsel than provided by the Sixth Amendment. *See State v. Henderson*, 285 N.C. 1 (1974), *vacated on other grounds*, 428 U.S. 902 (1976). However, other statutes specifically provide a defendant with a statutory right to counsel at certain proceedings before attachment of the Sixth Amendment right to counsel. *See infra* § 12.4C, Particular Proceedings.

**Fifth Amendment right to counsel before commencement of proceedings.** Criminal defendants have a right under the Fifth and Fourteenth Amendments to the U.S. Constitution to have counsel present during a custodial interrogation. *See Miranda v. Arizona*, 384 U.S. 436 (1966). Once judicial proceedings have begun and the defendant invokes his or her right to counsel, the Sixth Amendment also protects the defendant from interrogation without counsel present. *See infra* § 12.4C, Particular Proceedings.

### B. Critical Stages after Commencement of Proceedings

**Sixth Amendment right at critical stages at trial level.** After commencement of judicial proceedings, a defendant has a Sixth Amendment right to counsel at all critical stages. A "critical stage" includes any proceeding where potential substantial prejudice to the defendant's rights inheres in the particular proceeding and the assistance of counsel would help avoid that prejudice. *See Coleman v. Alabama*, 399 U.S. 1 (1970); *State v. Robinson*, 290 N.C. 56 (1976). Critical stages include both pretrial and trial proceedings but generally end on judgment and sentence at the trial level. *But cf. Mempa v. Rhay*, 389 U.S. 128 (1967) (trial judge placed defendant on probation without fixing term of imprisonment; subsequent probation revocation proceeding at which judge determined and imposed sentence was form of deferred sentencing, and defendant had Sixth Amendment right to counsel); 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).

**Other constitutional and statutory rights.** Constitutional provisions other than the Sixth Amendment afford defendants additional rights to counsel after judgment and sentence at trial. For example, a person has a due process right to counsel for a first appeal of right. A defendant has statutory rights to counsel after judgment and sentence at the trial level, including the right to counsel for probation revocation proceedings, postconviction motions, and additional appeals. *See infra* § 12.4C, Particular Proceedings.

### C. Particular Proceedings

Listed below are various criminal proceedings where, as a matter of constitutional law or state statute, a defendant in North Carolina is entitled to counsel.

**Lineup after judicial proceedings have commenced.** This is a critical stage, and the defendant has a Sixth Amendment right to counsel. *See United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967); *see also State v. Henderson*, 285 N.C. 1 (1974) (recognizing that defendant does not have Sixth Amendment right to counsel where lineup occurs before adversarial judicial proceedings have commenced; also stating that G.S. 7A-451(b)(2), which gives defendant right to counsel at pretrial identification procedures, was apparently intended to be consistent with U.S. Supreme Court's interpretation of Sixth Amendment), *vacated on other grounds*, 428 U.S. 902 (1976); ROBERT L. FARB, ARREST, SEARCH, & INVESTIGATION IN NORTH CAROLINA at 559 (UNC School of Government, 4th ed. 2011) (defendant has Sixth Amendment right to counsel when appearing in lineup or showup at or after adversary judicial proceedings have begun); *cf. United States v. Ash*, 413 U.S. 300 (1973) (no Sixth Amendment right to counsel at photographic identification procedure). In *Rothgery v. Gillespie County*, 554 U.S. 191 (2008), the Court held that the Sixth Amendment right to counsel attaches at initial appearance; therefore, defendants have a right to have counsel present at any live lineup following initial appearance.

If a violation occurs, the identification must be suppressed. Further, an in-court identification by a witness who took part in an unconstitutional pretrial lineup must be excluded unless the State demonstrates by clear and convincing evidence that the in-court identification is of independent origin and not tainted by the illegal pretrial procedure. *See State v. Hunt*, 339 N.C. 622, 646–47 (1994).

A pretrial identification procedure conducted before the commencement of judicial proceedings may violate Due Process and be subject to suppression if it was unduly suggestive and created a risk of misidentification. The procedure also may violate statutory requirements. *See infra* § 14.4A, Pretrial Identification Procedures: Constitutional and Statutory Requirements; § 14.4B, Statutory Requirements for Lineups; and §14.4C, Constitutional Requirements.

**Deliberate elicitation of information by police after judicial proceedings have commenced.** This is a critical stage, and the defendant has a Sixth Amendment right to counsel. *See Fellers v. United States*, 540 U.S. 519 (2004); *Massiah v. United States*, 377 U.S. 201 (1964); *State v. Tucker*, 331 N.C. 12 (1992) (taking of statement by police after first appearance [now, initial appearance] violated Sixth Amendment right to counsel); *see also* FARB at 550 (officers' deliberate efforts, by themselves or through informant, to elicit information, by interrogation or simple conversation, from defendant about pending charge after adversarial judicial proceedings have begun "is always a critical stage"). A defendant may waive the Sixth Amendment right to counsel during questioning by the police after judicial proceedings have begun, provided the waiver is knowing, intelligent, and voluntary. In *Montejo v. Louisiana*, 556 U.S. 778 (2009), the U.S. Supreme Court overruled *Michigan v. Jackson*, 475 U.S. 625 (1986), which held invalid any waiver of a defendant's right to counsel after the Sixth Amendment right to counsel attaches and the defendant requests counsel (typically, during his or her first appearance in court). *Montejo* continued to recognize that the Sixth Amendment protects against police interrogation once judicial proceedings have been initiated, whether the defendant is in custody or out of custody. But, the Court held that officers may initiate contact with and question a defendant, even one who has been appointed counsel, if the officers advise the defendant of the right to have counsel present (through *Miranda*-style warnings) and the defendant knowingly and voluntarily waives the right to have counsel present. If a violation of the right to counsel occurs, the defendant's statements must be suppressed. *See also* 3 LAFAVE, CRIMINAL PROCEDURE § 9.5(b) at 476 (taking position that fruit-of-poisonous tree doctrine may bar evidence discovered as result of statements taken in violation of Sixth Amendment right to counsel).

For a further discussion of suppressing statements taken in violation of the Sixth Amendment right to counsel, see *infra* § 14.3C, Confessions in Violation of Sixth Amendment Right to Counsel.

**Custodial interrogation by police at any time.** The defendant has a right to counsel during custodial interrogation based on the Fifth Amendment. *See Miranda v. Arizona*, 384 U.S. 436 (1966); *State v. Buchanan*, 353 N.C. 332 (2001); G.S. 7A-451(b)(1). If a *Miranda* violation occurs, the defendant's statements must be suppressed. *See infra* §

14.3B, *Miranda* Violations. Derivative evidence obtained as the result of an unwarned but otherwise voluntary confession is generally admissible, however. *See infra* § 14.3E, Evidence Derived from Illegal Confession.

**Custodial interrogation of juvenile.** In addition to Fifth and Sixth Amendment protections, juvenile interrogation rights apply to any person under 18. *See* G.S. 7B-2101; *State v. Fincher*, 309 N.C. 1 (1983) (juvenile is defined as person under 18 years of age under former G.S. 7A-517(20) [now codified as G.S. 7B-101(14)]; juvenile interrogation rights therefore apply to a suspect 16 or 17 years of age even though the suspect is old enough to be prosecuted as adult in superior court); *see also infra* "Juvenile warnings" in § 14.3B, *Miranda* Violations. A juvenile's statements taken in violation of these statutory rights are subject to suppression. *See Fincher*, 309 N.C. at 11.

**Nontestimonial identification procedures.** The defendant has a statutory right to counsel at nontestimonial identification procedures conducted under G.S. 15A-271 through G.S. 15A-282, such as the taking of fingerprints or blood, and must be advised of this right before the procedure takes place. *See* G.S. 15A-279(d); *State v. Satterfield*, 300 N.C. 621 (1980) (recognizing right but finding no violation); *cf. Gilbert v. California*, 388 U.S. 263 (1967) (taking of handwriting exemplar not critical stage under Sixth Amendment); *Schmerber v. California*, 384 U.S. 757 (1966) (no Fifth Amendment right to counsel at taking of blood sample, which did not compel communications or testimony); *State v. Wright*, 274 N.C. 84 (1968) (nontestimonial identification procedures involving physical characteristics are generally not subject to Sixth Amendment; however, when accused is required to perform act, such as repeating of words, for purpose of identification by victim, procedure may be critical stage under Sixth Amendment). The statutory right does not apply to nontestimonial procedures lawfully conducted by law enforcement without a nontestimonial identification order. *See State v. Coplen*, 138 N.C. App. 48 (2000) (upholding denial of motion to suppress results of gunshot residue test that was based on probable cause and exigent circumstances and was conducted without a nontestimonial identification order).

If the defendant's statutory right to counsel is violated, any statements made by the defendant during the proceeding must be suppressed; however, suppression of the results of the identification procedure is not required. *See* G.S. 15A-279(d); *Coplen*, 138 N.C. App. 48.

**Chemical analysis in impaired driving cases.** *See* G.S. 20-16.2(a)(6) (statutory right to confer with counsel if testing would not be delayed more than 30 minutes); *State v. Rasmussen*, 158 N.C. App. 544 (2003) (recognizing statutory right to counsel but finding no violation); *cf. State v. Howren*, 312 N.C. 454 (1984) (chemical test for impairment not critical stage under Sixth Amendment).

**Capacity evaluation.** The N.C. Supreme Court has held that the defendant does not have a Sixth Amendment right to have counsel present at a capacity evaluation (although the mental health facility or trial court may permit counsel to attend). *See State v. Davis*, 349 N.C. 1 (1998). Statements made by the defendant may still be subject to suppression

under the Fifth and Sixth Amendments. *See supra* § 2.9, Admissibility at Trial of Results of Capacity Evaluation.

**Extradition proceedings.** A defendant has a statutory right to counsel at extradition proceedings. *See* G.S. 7A-451(a)(5) (appointed counsel must be provided to indigent person whose extradition to another state is sought); *cf. State v. Taylor*, 354 N.C. 28 (2001) (Sixth Amendment right to counsel did not attach to out-of-state extradition proceedings; adversary criminal judicial proceedings had not yet commenced).

**Interstate compact for adult offender supervision.** North Carolina is a party to this compact, which governs the supervision of probationers and parolees from other states who are residing in North Carolina. *See* G.S. 148-65.4 through G.S. 148-65.9. A probationer or parolee subject to the compact does not go through extradition proceedings; the compact has its own procedures, primarily in G.S. 148-65.8, for returning a person to the originating state, called the "sending state" in the compact. G.S. 148-65.8 does not explicitly provide for counsel for a probationer or parolee whom North Carolina, called the "receiving state" in the compact, wants to return to the sending state for an alleged violation. Nor has North Carolina's Interstate Compact Office adopted rules addressing the issue. *See* N.C. Department of Public Safety: Interstate Compact, www.ncdps.gov/index2.cfm?a=000003,002223,002224. However, a probationer or parolee may have a due process right to counsel at a hearing in North Carolina for an alleged violation that may result in the person's return to the sending state. *See Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (defendant has right to counsel if necessary to ensure effectiveness of his or her hearing rights); *see also* Interstate Commission for Adult Offender Supervision, ICAOS BENCHBOOK FOR JUDGES AND COURT PERSONNEL § 4.4.3.2, at 91–92 (Version 7.0, 2012) (recognizing possible right to counsel), *available at* www.interstatecompact.org/.

**Bail hearing.** An indigent person is statutorily entitled to appointed counsel at a hearing to reduce bail or fix bail if bail was earlier denied. *See* G.S. 7A-451(b)(3). If the bail hearing is conducted by audio-visual transmission, the defendant must be allowed to communicate fully and confidentially with his or her attorney. *See* G.S. 15A-532(b) (defendant who has counsel must be permitted to consult with counsel); *see also* Douglas L. Colbert, *Thirty-Five Years after* Gideon: *The Illusory Right to Counsel at Bail Proceedings*, 1998 U. ILL. L. REV. 1 (1998) (arguing that defendants should have right to counsel when bail is initially set).

**Probable cause hearing.** An indigent person has a Sixth Amendment right to appointed counsel at a probable cause hearing at which the court determines whether the State has sufficient evidence to proceed. *See Coleman v. Alabama*, 399 U.S. 1 (1970) (probable cause hearing is critical stage; although hearing is not constitutionally required, defendant has constitutional right to counsel if one is held); *State v. Cobb*, 295 N.C. 1 (1978) (probable cause hearing is critical stage); G.S. 7A-451(b)(4); G.S. 15A-611(c); *see also Moore v. Illinois*, 434 U.S. 220 (1977) (Sixth Amendment violated by identification of defendant at preliminary hearing in absence of counsel). A hearing before a magistrate to determine whether there was probable cause for an arrest (called an initial appearance in

North Carolina) is not a critical stage. *See Gerstein v. Pugh*, 420 U.S. 103 (1975); G.S. 15A-511 (describing function of initial appearance). However, the right to counsel attaches at the defendant's initial appearance before a magistrate, and counsel must be appointed within a reasonable time after attachment to allow for adequate representation at any critical stage thereafter. *Rothgery v. Gillespie County*, 554 U.S. 191, 212 (2008); *see supra* § 12.4A, When Right to Counsel Attaches.

**Arraignment/entry of plea.** *See Hamilton v. Alabama*, 368 U.S. 52 (1961) (arraignment is critical stage); *White v. Maryland*, 373 U.S. 59 (1963) (per curiam) (plea of guilty made without counsel and then later revoked inadmissible at trial); *see also* G.S. 15A-942 (person who appears at arraignment must be informed of right to counsel); G.S. 15A-1012 (defendant may not be called on to plead until he or she has had opportunity to retain counsel, has been assigned counsel, or has waived counsel).

**Pretrial evidentiary hearing.** *See Pointer v. Texas*, 380 U.S. 400 (1965) (pretrial hearing where evidence is presented is critical stage).

**Suppression hearing.** *See State v. Frederick*, ___ N.C. App. ___, 730 S.E.2d 275 (2012) (suppression hearing is critical stage at which defendant has right to counsel; waiver of counsel not adequate).

**Trial and sentencing.** *See Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel for felonies); *Scott v. Illinois*, 440 U.S. 367 (1979) (right to counsel for trial of misdemeanor where actual imprisonment imposed); *Alabama v. Shelton*, 535 U.S. 654 (2002) (right to counsel for trial of misdemeanor where suspended sentence of imprisonment imposed); *see also* G.S. 7A-451(a)(1), (b)(5). Sentencing is a critical stage of these proceedings. *State v. Boyd*, 205 N.C. App. 450 (2010). For a further discussion of the right to counsel for felonies and misdemeanors, see *supra* § 12.3A, Felonies, and § 12.3B, Misdemeanors.

In *State v. Lambert*, 146 N.C. App. 360 (2001), the court of appeals held that a defendant did not have the right to counsel at a resentencing hearing at which the only issue was the modification of a condition of probation. This ruling is questionable, particularly in light of the holding in *Shelton* that a defendant has the right to counsel when a suspended sentence of imprisonment is imposed.

**Capital trial.** A defendant is statutorily entitled to two attorneys in a capital case. *See* G.S. 7A-450(b1); IDS Rule 2A.2(b)-(d) (describing when second lawyer is appointed). Failure to appoint a second attorney is reversible error. *See State v. Hucks*, 323 N.C. 574 (1988).

**Probation revocation hearing.** A defendant has a statutory right to counsel at a probation revocation hearing. *See* G.S. 7A-451(a)(4); G.S. 15A-1345(e); *State v. Coltrane*, 307 N.C. 511 (1983) (court finds that G.S. 15A-1345(e) was intended to go beyond federal constitutional right to counsel); *State v. Ramirez*, ___ N.C. App. ___, 724 S.E.2d 172 (2012) (recognizing right to counsel at probation revocation hearing and finding waiver of counsel inadequate); *see also State v. Neeley*, 307 N.C. 247 (1982) (judge may not

activate suspended sentence if defendant was not represented by counsel and did not waive counsel when suspended sentence and probation were imposed). The failure to provide counsel for an indigent defendant may also violate due process. *See Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (defendant has right to counsel if necessary to ensure effectiveness of his or her hearing rights).

**Direct appeal.** A defendant has a constitutional right, based on due process, to appointed counsel on a first appeal as of right. *See Evitts v. Lucey*, 469 U.S. 387 (1985); *see also Douglas v. California*, 372 U.S. 353 (1963) (denial of Equal Protection to fail to afford counsel to indigent defendant for first appeal of right). A defendant has broader statutory rights to counsel. *See* G.S. 7A-451(b)(6); IDS Rule 3.1 & Commentary.

**Certiorari petition.** The N.C. Supreme Court has held that appellate counsel has a duty to file a certiorari petition to the U.S. Supreme Court, at least in a capital case in which the defendant has been sentenced to death and has not received sentencing relief on appeal. *See In re Hunoval*, 294 N.C. 740 (1977) (court disciplines attorney for refusing to file cert. petition for client sentenced to death; court rejects attorney's argument that he was not an eleemosynary institution—that is, a charitable institution—and that he could not be required to file cert. petition without pay); IDS Rule 2B.4(a) (directing appointed counsel to file cert. petition in capital case unless relieved of responsibility by IDS).

Legislation enacted in 2007 extends the statutory right to counsel to cert. petitions in capital cases (G.S. 7A-451(b)(7)) and in some circumstances noncapital cases. G.S. 7A-451(b)(8). For a discussion of these changes, see IDS Rules 2B.4(a) and 3.2(i) and accompanying commentary.

**MAR in noncapital case.** In postconviction proceedings in noncapital cases, an indigent person has a statutory right to counsel if he or she has been convicted of a felony, fined $500 or more, or been sentenced to a term of imprisonment. *See* G.S. 7A-451(a)(3) (setting forth general right); G.S. 15A-1420(b2)(2) (assigned judge shall review motion for appropriate relief (MAR) in noncapital case and issue initial review order indicating whether counsel should be appointed unless the motion is dismissed); *cf. Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) ("We have never held that prisoners [in noncapital cases] have a constitutional right to counsel when mounting collateral attacks upon their convictions, . . . and we decline to so hold today."). Generally, counsel is not appointed to assist an indigent person in filing the initial MAR in a noncapital case, although judges sometimes appoint counsel to investigate and prepare the initial motion when they believe there are compelling circumstances. Nor will a judge typically appoint counsel if he or she summarily denies a pro se MAR. *See* Jessica Smith, *Motions for Appropriate Relief*, ADMINISTRATION OF JUSTICE BULLETIN No. 2010/03, at 21 (UNC School of Government, June 2010) (observing that "many judges do not appoint counsel unless the MAR passes a frivolity review"), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb1003.pdf. At a minimum, appointment of counsel would appear to be required for any hearing on a motion for appropriate relief, including hearings involving issues of law alone and evidentiary hearings. *See generally* G.S. 7A-451(a)(3) (right to counsel at "proceedings" in indicated cases); G.S. 15A-1420(c)(1) (party entitled to hearing on questions of law or fact arising from motion;

judge may direct counsel for parties to appear for conference on any prehearing matter); G.S. 15A-1420(c)(4) (defendant entitled to counsel for evidentiary hearing).

If a defendant has postconviction counsel (appointed or otherwise) and the case is in superior court, a defendant has a right to open-file discovery from the State. *See supra* "Noncapital cases" in § 4.1G, Postconviction Cases.

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***Legislative note:*** G.S. 15A-1420(b2), enacted in 2012, established deadlines for review of a noncapital MAR, including a determination whether to appoint counsel. Effective for motions filed on or after December 1, 2013, S.L. 2013-385 (S 182) repeals this statute.

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On direct appeal in a noncapital case, appellate counsel who has been appointed to represent an indigent defendant may apply to the N.C. Office of the Appellate Defender for authorization to litigate a MAR related to the appeal or for appointment of other counsel to file a MAR. *See* IDS Rule 3.2(g1).

IDS also provides legal representation in cases in which the State is obligated to provide legal assistance and access to the courts for inmates in the custody of the Division of Adult Correction in the Department of Public Safety. *See* G.S. 7A-498.3(a)(2a). IDS provides this representation through an agreement with North Carolina Prisoners Legal Services (PLS). PLS may handle cases pursuant to this agreement without a court determination of indigency or entitlement to counsel. *See* IDS Rule 4.2.

**MAR in capital case.** An indigent person convicted of a capital offense and sentenced to death is statutorily entitled to the appointment of two postconviction attorneys to prepare, file, and litigate a motion for appropriate relief. *See* G.S. 7A-451(c); s*ee also* IDS Rule 2C.2 (setting out the procedure for appointment of postconviction counsel in capital case and detailing the scope of representation); *cf. Murray v. Giarratano*, 492 U.S. 1 (1989) (four members of Court find no constitutional right to counsel to seek state postconviction relief in capital case; fifth member of Court concurs in judgment because no prisoner had actually been denied counsel in such proceedings).

**State writ of habeas corpus.** An indigent person is entitled to have counsel for a hearing on a state writ of habeas corpus. *See* G.S. 7A-451(a)(2).

**Innocence Inquiry Commission.** A convicted person has the right to advice of appointed counsel before signing a waiver of rights related to the claim of innocence and, if a formal inquiry is granted, throughout the formal inquiry. *See* G.S. 15A-1467(b). The convicted person also has a right to be represented by counsel at the evidentiary hearing before the three-judge panel reviewing a Commission finding of innocence. G.S. 15A-1469(d). For further information about Commission proceedings, see 2 NORTH CAROLINA DEFENDER MANUAL § 35.8 (Innocence Inquiry Commission) (2d ed. 2012).

**Clemency proceedings.** In *Harbison v. Bell*, 556 U.S. 180 (2009), the U.S. Supreme Court held that federal law authorizes federally appointed counsel in capital cases to represent their clients in state clemency proceedings.

**DNA testing and biological evidence.** An indigent convicted defendant who brings a motion for DNA testing is entitled to appointed counsel if the testing may be material to a claim of wrongful conviction. *See* G.S. 15A-269(c); *State v. Gardner*, ___ N.C. App. ___, 742 S.E.2d 352 (2013) (requiring showing of materiality for appointment of counsel and finding that defendant's conclusory statement of materiality insufficient). An indigent convicted defendant appealing an order denying a motion for DNA testing is entitled to appointed counsel. *See* G.S. 15A-270.1.

G.S. 15A-268 requires agencies with custody of biological evidence to retain the evidence in the manner and according to the schedule in that statute. If the State wants to destroy evidence earlier, the prosecutor must notify the defendant, counsel of record in the case in which the defendant was convicted, and the Office of Indigent Defense Services. G.S. 15A-268(b)(2). The statute does not explicitly give the defendant the right to have counsel appointed to oppose the request, but the notice requirement suggests that the defendant may have a right to counsel.

**Parole and post-release supervision revocation and contempt hearings.** The Post-Release Supervision and Parole Commission determines whether a parolee or post-release supervisee is entitled to appointed counsel at a revocation hearing. *See* G.S. 148-62.1; *see also* Memorandum from Danielle M. Carman, IDS Assistant Director, Appointment of Counsel in Post-Release Supervision and Parole Preliminary Revocation Hearings Before a Hearing Officer, and Post-Release Supervision and Parole Revocation Hearings and Criminal Contempt Proceedings Before the Post-Release Supervision and Parole Commission (Nov. 19, 2012), *available at* www.ncids.org/Rules%20&%20Procedures/Other%20Policies/ParoleRevocationHearings.pdf. Although the applicable statutes indicate that the determination of entitlement to counsel is in the Commission's discretion, due process may require appointment. *See Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (defendant has right to counsel if necessary to ensure effectiveness of his or her hearing rights).

G.S. 143B-720(a), amended in 2011, gives the Post-Release Supervision and Parole Commission authority to conduct contempt proceedings, in accordance with the requirements for plenary contempt proceedings under G.S. 5A-15, for a violation of post-release supervision by a person on post-release supervision for an offense subject to sex offender registration requirements. In plenary contempt proceedings, an indigent respondent is entitled to appointed counsel if imprisonment is imposed or likely to be imposed. *See* G.S. 7A-451(a)(1) (providing for the right to appointed counsel if imprisonment is likely to be imposed); *Hammock v. Bencini*, 98 N.C. App. 510 (1990) (recognizing the right to appointed counsel for criminal contempt if imprisonment is likely to be imposed); *McBride v. McBride*, 334 N.C. 124 (1993) (recognizing similar right for civil contempt); *see also generally supra* § 12.3D, Contempt.

**Satellite-based monitoring.** Ordinarily, the sentencing judge determines whether a person has been convicted of an offense requiring registration as a sex offender and warranting satellite-based monitoring (SBM). If a defendant is represented by an appointed attorney for the trial or plea, he or she will continue to be represented by that

attorney at the SBM determination at sentencing. If the judge makes no determination at sentencing about the appropriateness of SBM, the Division of Adult Correction may request the prosecution to schedule another hearing for the court to make that determination, commonly called a "bring-back" hearing. Under G.S. 14-208.40B(b), an indigent defendant is entitled to have counsel appointed for a bring-back hearing. (The statutes do not provide for counsel to be appointed on a petition to terminate sex offender registration requirements and associated SBM obligations. G.S. 14-208.12A.) For a discussion of ineffective assistance of counsel for SBM determinations, see *infra* "Statutory right to effective assistance" in § 12.7A, Cases in which Right Arises.

## 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.

## 12.6 Waiver of Counsel

### A. *Faretta* Right to Self-Representation

**Generally.** Implicit in the Sixth Amendment right to counsel is the right to reject counsel and represent oneself. *See Faretta v. California*, 422 U.S. 806 (1975) (criminal defendant has Sixth Amendment right to refuse counsel and conduct his or her own defense); *State v. Thacker*, 301 N.C. 348 (1980). *But cf. Martinez v. Court of Appeal of California*, 528 U.S. 152 (2000) (declining to recognize constitutional right of self-representation on direct appeal of criminal conviction but also recognizing that appellate courts may allow defendant to represent self).

Any waiver of counsel must be voluntarily and understandingly made. "[T]he waiver of counsel, like the waiver of all constitutional rights, must be knowing and voluntary, and the record must show that the defendant was literate and competent, that he understood the consequences of his waiver, and that, in waiving his right, he was voluntarily exercising his own free will." *Thacker*, 301 N.C. at 354; *see also* 3 LAFAVE, CRIMINAL PROCEDURE § 11.5(d), at 752–59 (discussing circumstances in which court need not honor defendant's request to proceed pro se).

In some instances, a defendant may waive the right to self-representation by delay in asserting it. *Compare State v. Wheeler*, 202 N.C. App. 61 (2010) (not error for trial court to deny defendant's motion to discharge counsel after defendant waived counsel, then requested appointed counsel for jury selection; court expressly told defendant he would not be permitted to discharge counsel again, and defendant tried to discharge counsel after trial began), *with State v. Walters*, 182 N.C. App. 285 (2007) (no waiver of right to self-representation).

In certain non-criminal cases involving allegations of mental infirmity, North Carolina's statutes appear to require representation by counsel. *See, e.g.*, G.S. 122C-268(d) (in cases in which person is alleged to be mentally ill and subject to in-patient commitment, counsel shall be appointed if person is indigent or refuses to retain counsel although financially able to do so); G.S. 35A-1107 (guardian ad litem for person alleged to be incompetent unless person retains own counsel). *But cf. In re Watson*, 209 N.C. App. 507 (2011) (holding that evidence was insufficient to show that respondent in involuntary commitment proceeding knowingly and voluntarily waived right to counsel; court does not resolve respondent's alternative argument that commitment statutes do not permit self-representation in involuntary commitment proceeding). There are similar provisions concerning juveniles. *See* G.S. 7B-602(b) (in abuse and neglect proceedings, guardian ad litem required under Rule 17 of N.C. Rules of Civil Procedure for parent who is under 18 years of age and not married or otherwise emancipated); G.S. 7B-1101.1(b) (to same effect for termination of parental rights proceedings); G.S. 7B-2000 (appointment of counsel for juvenile in delinquency proceedings); G.S. 7B-2405(6) (no right to self-representation by juvenile in delinquency proceeding at adjudicatory hearing).

For more information on the right to self-representation and related counsel issues, see Jessica Smith, *Selected Counsel Issues in North Carolina Criminal Cases*, ADMINISTRATION OF JUSTICE BULLETIN No. 2007/04 (UNC School of Government, July 2007), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb0704.pdf.

**No ineffective assistance of self-representation.** A defendant who waives his or her right to counsel and appears pro se has no right to claim ineffective assistance of counsel as to his or her own performance. *See State v. Thomas*, 331 N.C. 671 (1992); *State v. Brunson*, ___ N.C. App. ___, 727 S.E.2d 916 (2012); *cf. State v. Rogers*, 194 N.C. App. 131 (2008) (pro se defendant did not have right to access to legal materials). However, a defendant may have a claim for ineffectiveness based on the performance of counsel before the defendant elected to proceed pro se. *See also infra* "Standby counsel" in § 12.7A, Cases in which Right Arises.

**No right to notice of right to self-representation.** The trial court has no constitutional obligation to inform a defendant of the right to proceed without counsel. The defendant must affirmatively express a desire to proceed pro se. *See State v. Hutchins*, 303 N.C. 321 (1981) (expression of dissatisfaction with one's attorney is not expression of desire to proceed pro se and does not trigger any duty on part of trial court to determine whether defendant wants to proceed without counsel).

**No right to hybrid representation.** A defendant must choose between representation by counsel or self-representation. There is no right to appear pro se and by counsel. *See State v. Thomas*, 331 N.C. 671(1992) (defendant has only two choices—to appear pro se or by counsel); *accord State v Porter*, 303 N.C. 680 (1981). A court does not violate an indigent defendant's right to counsel by requiring the defendant to choose between continuing to be represented by his or her current appointed counsel or proceeding pro se; an indigent defendant does not have the right to different appointed counsel unless grounds warrant substitution of counsel. *See State v. Kuplen*, 316 N.C. 387 (1986); *see also supra* § 12.5J, Removal and Withdrawal of Counsel.

A court may refuse to consider a motion filed by a defendant personally when the defendant is represented by counsel. *Compare State v. Williams*, 363 N.C. 689, 700 (2009) (defendant cannot file motions on his or her own behalf while represented by counsel; defense counsel did not adopt motions by stating, "The defendant filed some *pro se* motions. We need rulings on those."), *with State v. Williamson*, 212 N.C. App. 393 (2011) (because counsel adopted defendant's motion by submitting evidence to support it, trial court was not prohibited from ruling on defendant's request to dismiss assault charge), *and State v. Howell*, 211 N.C. App. 613 (2011) (trial court could rule on defendant's motion to dismiss where counsel argued the issue; in addition, trial court and State consented to addressing issue). *See also State v. Glenn*, ___ N.C. App. ___, 726 S.E.2d 185, 193 n.1 (2012) (dismissing defendant's pro se motion for appropriate relief from sentence while represented by counsel on appeal).

These principles do not appear to bar a pro se defendant from obtaining the advice of an attorney outside the proceedings. A N.C. State Bar ethics opinion takes the position that

an attorney may give advice to a pro se litigant without making an appearance in the proceeding and without disclosing or ensuring that the litigant discloses the assistance to the court unless disclosure is required by law or court order. *See* North Carolina State Bar, 2008 Formal Ethics Opinion 3 (2009).

**Standby counsel.** A defendant who waives the right to counsel may be appointed standby counsel. *See* G.S. 15A-1243. The duties of standby counsel are to: (i) assist the defendant when called on to do so by the defendant; and (ii) bring to the judge's attention matters favorable to the defendant that the judge should rule upon on his or her own motion.

A recently enacted statute may be at odds with the limited role of standby counsel in a narrow situation. Under G.S. 15A-1225.1(e), if the court allows a child to testify remotely, the court must ensure that defense counsel is physically present where the child is testifying and has the opportunity to cross-examine the child witness and communicate privately with the defendant. If the defendant is appearing pro se, however, the statute does not require that the defendant be present. Rather, under G.S. 15A-1225.1(g), if the court has appointed standby counsel to assist the defendant, only standby counsel is permitted to be present where the child testifies. This procedure may violate the prohibition on hybrid representation because it appears to permit standby counsel to conduct the cross-examination of the child and thus act as counsel for a pro se defendant.

For a further discussion of standby counsel, see *infra* "Standby counsel" in § 12.7A, Cases in which Right Arises.

**No right to be represented by layperson.** *See State v. Sullivan*, 201 N.C. App. 540 (2009).

### B. Mandatory Procedures for Waiving Counsel

**Constitutional requirements.** Before allowing a defendant to proceed pro se, the trial judge must establish two things: (i) that the defendant "clearly and unequivocally" expressed a desire to proceed without counsel, and (ii) that the defendant "knowingly, intelligently, and voluntarily" waived the right to counsel. *See State v. LeGrande*, 346 N.C. 718, 723 (1997); *State v. Thomas*, 331 N.C. 671 (1992) (defendant who equivocated and asked for lawyer as assistant did not waive right to counsel); *State v. Worrell*, 190 N.C. App. 387 (2008) (trial court did not pressure or coerce defendant into accepting appointed counsel and conducted thorough inquiry before defendant voluntarily revoked waiver of counsel); *see also infra* § 12.6C, Capacity to Waive Counsel.

**Statutorily-required inquiry.** When a defendant indicates a desire to represent himself or herself, the trial judge has a statutory obligation under G.S. 15A-1242 to conduct an inquiry as to whether the defendant knowingly, intelligently, and voluntarily wishes to waive the right to counsel. This statutory inquiry is necessary to safeguard the defendant's constitutional right to counsel. *See State v. Pruitt*, 322 N.C. 600 (1988) (inquiry to be made by trial court under G.S. 15A-1242 is mandatory; failure to make inquiry is reversible error); G.S. 15A-1101 (requirements in G.S. 15A-1242 apply to

district court). *But cf. In re P.D.R.*, 365 N.C.533 (2012) (finding that G.S. 15A-1242 does not apply to waiver of counsel in termination of parental rights proceedings; court does not address whether inquiry is required as matter of due process when respondent seeks to waive right to counsel). [*Legislative note:* Effective for actions pending on or after Oct. 1, 2013, S.L. 2013-129 (H 350) amends G.S. 7B-602 and G.S. 7B-1101.1 to require that waivers of appointed counsel be knowing and voluntary in abuse, neglect, dependency, and termination of parental rights proceedings.]

Before permitting a defendant to proceed pro se, the trial judge must satisfy himself or herself that the defendant:

- has clearly been advised of the right to counsel;
- understands the consequences of his or her decision; and
- comprehends the nature of the charges and the range of possible punishments.

*See* G.S. 15A-1242; *State v. Rich*, 346 N.C. 50 (1997) (recognizing these requirements); *see also State v. Moore*, 362 N.C. 319 (2008) (trial court failed to make thorough inquiry into defendant's waiver of right to counsel; court sets out checklist of sample questions that trial courts could ask). For a list of the questions cited in *Moore*, see Jessica Smith, *Counsel Issues*, *in* THE SURVIVAL GUIDE: SUPERIOR COURT JUDGES' BENCHBOOK, (UNC School of Government, Jan. 2010), *available at* http://benchbook.sog.unc.edu/criminal/counsel-issues.

In evaluating a waiver, the court must consider the defendant's age, education, familiarity with English, mental condition, the complexity of the crime charged, and other factors bearing on whether the waiver is knowing and intelligent. *See* G.S. 7A-457(a).

**Requirement of written waiver.** In addition to the procedure in G.S. 15A-1242 for the taking of waivers, G.S. 7A-457(a) provides that an indigent person's waiver of counsel for in-court proceedings (that is, trial and other court proceedings) must be in writing. (G.S. 7A-457(c) states that waivers of counsel for out-of-court proceedings may be oral or in writing.) *See also* IDS Rule 1.6(a) (waiver in noncapital case must be in writing); IDS Rule 2A.3(a) (waiver of counsel in capital case must be in writing).

The North Carolina Supreme Court has held that in no case may a waiver of counsel be presumed from a silent record. *See State v. Neeley*, 307 N.C. 247 (1982); *State v. Blackmon*, 284 N.C. 1 (1973) (failure to request attorney does not constitute waiver). The Court has also held, however, that a waiver is not necessarily invalid because of the absence of a written waiver. *See State v. Fulp*, 355 N.C. 171 (2002). Together, these principles mean that if there is no written waiver, the State must produce other record evidence affirmatively showing that the defendant validly waived counsel. Even if a written waiver exists, the waiver may be invalid if the court failed to conduct the necessary inquiry or the waiver was otherwise not knowing and voluntary. *See, e.g.*, *State v. Sorrow*, ___ N.C. App. ___, 713 S.E.2d 180 (2011) (although defendant executed two waiver of counsel forms, trial court failed to conduct statutory inquiry; waivers not

presumed knowing, intelligent, and voluntary where rest of record indicates otherwise); *State v. Cox*, 164 N.C. App. 399 (2004) (error where judge failed to proceed with required statutory inquiry and only directed defendant to execute a written waiver); *State v. Wells*, 78 N.C. App. 769 (1986) (record demonstrated that, contrary to certified written waiver of counsel, trial court did not properly advise defendant before taking waiver); *see also State v. Kinlock*, 152 N.C. App. 84 (2002) (when defendant executes written waiver, which is certified by trial court, waiver of counsel will be presumed to have been knowing, intelligent, and voluntary unless rest of record indicates otherwise), *aff'd per curiam*, 357 N.C. 48 (2003).

**Requirement of waiver of appointed and retained counsel.** For an indigent defendant to proceed without counsel, he or she must waive both appointed and retained counsel. The AOC waiver of counsel form, AOC-CR-227 (www.nccourts.org/forms/Documents/686.pdf), reflects this requirement by including boxes for waiver of appointed counsel and the assistance of all counsel. A waiver of assigned counsel does not constitute a waiver of the right to the assistance of all counsel, and it is the trial court's responsibility to clarify the scope of any waiver. *See infra* "Improperly requiring defendant to proceed pro se" in § 12.6D, Withdrawal of Waiver of Counsel.

**Illustrative cases.** The North Carolina courts have frequently addressed the issue of whether a waiver of counsel was knowing, intelligent, and voluntary. In the following recent cases, the courts found a valid waiver:

*State v. Jones*, ___ N.C. App. ___, 725 S.E.2d 415 (2012) (trial judge explained that defendant could continue with appointed counsel or represent himself and strongly suggested that defendant not proceed pro se; court reviews entire colloquy and finds that trial judge complied with statutory requirements)

*State v. Paterson*, 208 N.C. App. 654 (2010) (defendant's failure to check appropriate box on waiver form and trial court's failure to inform defendant of charges and potential punishments before defendant executed form did not render waiver invalid; judge later informed defendant of the charges and punishments)

In the following cases, the courts found the purported waiver invalid:

*State v. Frederick*, ___ N.C. App. ___, 730 S.E.2d 275 (2012) (trial court failed at suppression hearing to adequately advise defendant of the possible maximum punishment before accepting defendant's election to proceed without counsel; statute requires thorough inquiry and specificity for valid waiver)

*State v. Ramirez*, ___ N.C. App. ___, 724 S.E.2d 172 (2012) (defendant waived only his right to appointed counsel and trial court mistakenly believed defendant had waived right to all counsel)

*State v. Watlington*, ___ N.C. App. ___, 716 S.E.2d 671 (2011) (trial court allowed defendant to represent himself without completing the required inquiry; defendant's

expressions of dissatisfaction with prior counsel and desire to proceed pro se insufficient to show waiver)

### C. Capacity to Waive Counsel

**Generally.** The U.S. Supreme Court has held that there is only one standard of capacity and that a defendant who is capable of standing trial is capable of waiving the right to counsel. *See Godinez v. Moran*, 509 U.S. 389 (1993). However, evidence relevant to the issue of capacity may bear on the issue of whether the defendant's waiver of counsel is knowing, voluntary, and intelligent. Thus, a defendant who is marginally capable of standing trial, although capable of waiving the right to counsel, may still be incapable of knowingly and intelligently doing so. *See State v. Thomas*, 331 N.C. 671 (1992) (mentally ill defendant who made inconsistent request "to proceed pro se with assistance of counsel" did not knowingly and intelligently waive right to counsel); *State v. Gerald*, 304 N.C. 511 (1981) (mentally ill defendant with IQ of 65, who told judge that courtroom made him dizzy and that he wanted to get proceeding over with, did not intelligently waive right to representation).

**Capacity to represent self.** The U.S. Supreme Court has held further that states may *require* representation by counsel of defendants who are capable of standing trial but who lack the mental capacity to represent themselves. *See Indiana v. Edwards*, 554 U.S. 164 (2008) (characterizing such defendants as in the "gray-area" between capacity to stand trial and mental fitness to represent themselves). After the issuance of *Edwards*, the North Carolina Supreme Court initially appeared to indicate that a "gray-area" defendant may not proceed without counsel in North Carolina. *State v. Lane* [*Lane I*], 362 N.C. 667 (2008) (remanding to trial court to determine whether defendant was within category of "gray-area" defendants described in *Edwards* and should have been permitted to represent himself); *accord State v. Wray*, 206 N.C. App. 354 (2010) (so construing *Lane I*); *see also In re P.D.R.*, 212 N.C. App. 326 (2011) (finding in reliance on *Lane I* that trial court erred in failing to conduct *Edwards* inquiry before accepting respondent's waiver of counsel in termination of parental rights proceeding), *rev'd on other grounds*, 365 N.C. 533 (2012). Under this approach, in deciding whether to allow a defendant to proceed pro se, the trial judge must determine (1) whether the defendant is capable of proceeding, (2) whether the defendant has the mental capacity to represent himself or herself, and (3) whether the defendant's waiver is knowing and voluntary.

Subsequently, however, the N.C. Supreme Court appears to have made the second inquiry discretionary with the trial judge. Once a trial judge determines that a defendant is capable of proceeding, the judge either may allow the defendant to proceed pro se if the defendant knowingly and voluntarily waives the right to counsel, or may refuse to allow the defendant to proceed pro se if the defendant is not mentally capable of doing so. *State v. Lane* [*Lane II*], 365 N.C. 7 (2011) (setting out these options and finding that the trial court upheld the defendant's rights by allowing him to proceed pro se after determining that his waiver of counsel was knowing and voluntary); *accord State v. Nackab*, ___ N.C. App. ___, 714 S.E.2d 209 (2011) (unpublished) (construing *Lane II* as holding that the U.S. Supreme Court's decision in *Edwards* applies only if the trial court

refuses to allow the defendant to proceed pro se; since trial court allowed the defendant to proceed pro se, *Edwards* was not applicable and the only question was whether the defendant knowingly and voluntarily waived the right to counsel).

A "gray-area" defendant may forfeit the right to counsel if he or she engages in conduct amounting to a forfeiture. *State v. Cureton*, ___ N.C. App. ___, 734 S.E.2d 572 (2012) (trial court did not err in finding defendant forfeited right to counsel where defendant engaged in serious misconduct, e.g., shouted at and insulted his attorneys and spat on and threatened to kill one of them); *cf. State v. Wray*, 206 N.C. App. 354, 362 (2010) (defendant's misbehavior was the same evidence that cast doubt on his capacity to proceed and represent himself and did not amount to serious misconduct associated with forfeiture). For a further discussion of forfeiture issues, see *infra* § 12.6E, Forfeiture of Right to Counsel.

Although the N.C. Supreme Court in *Lane II* declined to adopt a statewide approach to waivers of counsel by "gray-area" defendants and authorized trial judges to decide whether to conduct an *Edwards* inquiry in each case, as a practical matter trial judges may be inclined to conduct a full inquiry to ensure that a defendant is capable of representing himself or herself and receives a fair trial. *See Cureton*, ___ N.C. App. ___, 734 S.E.2d 572, 583–86 (2012) (observing that although not explicitly forbidden, the cases "indicate that North Carolina courts strongly disfavor self-representation by 'gray-area' defendants"; also observing that "it is debatable whether a "gray-area" defendant is truly competent to represent himself at trial").

### D. Withdrawal of Waiver of Counsel

**Generally.** The courts have stated that "[o]nce given, a waiver of counsel is good and sufficient until the proceedings are terminated or until the defendant makes known to the court that he desires to withdraw the waiver and have counsel assigned to him." *State v. Hyatt*, 132 N.C. App. 697, 700 (1999).

Despite the seeming restrictiveness of this statement, an indigent defendant who has waived counsel has several opportunities to obtain appointed counsel, discussed below, and the burden on the defendant is ordinarily minimal. Even if the defendant does not explicitly request counsel, the failure of the court on its own initiative to inquire about the defendant's wishes may violate the right to counsel.

**Limitations of waiver.** For certain proceedings, a waiver of counsel is limited to that proceeding, and the defendant need not affirmatively rescind the waiver for other proceedings. For example, a waiver of counsel for out-of-court proceedings, such as a waiver of the right to counsel at interrogation or at a nontestimonial identification procedure, should have no effect on a defendant's right to counsel at trial and other in-court proceedings. If the defendant waives counsel for all trial-level proceedings, the waiver remains in effect only until conclusion of the trial; it should not apply to subsequent proceedings at which the defendant has a right to counsel, such as probation revocation proceedings or appeal. A waiver of counsel in district court for trial on a

misdemeanor also should not be sufficient itself to constitute a waiver of counsel in subsequent superior court proceedings. *See generally State v. Wall*, 184 N.C. App. 280 (2007) (defendant waived counsel and was tried and convicted in district court; where defendant executed another waiver of counsel at pretrial proceeding in superior court following appeal for trial de novo, trial judge did not need to redo full inquiry before allowing defendant to proceed pro se at trial).

**Improperly requiring defendant to proceed pro se.** Courts have erred in the following ways in requiring a defendant to proceed without counsel despite a previous waiver of counsel.

First, at several stages of the proceedings, the trial court has a statutory duty to re-inform an unrepresented defendant of his or her right to counsel and determine whether the defendant wishes to proceed without counsel. *See supra* § 12.5C, Advising Defendant of Right to Counsel. The onus is on the court to inquire about counsel at these stages. *See State v. Sanders*, 294 N.C. 337 (1978) (although court had twice denied counsel to defendant on two previous indictments on ground that defendant was not indigent, rulings did not excuse court from inquiring whether defendant was entitled to appointed counsel when he was arraigned on third indictment joined for trial with other indictments); *State v. Anderson*, ___ N.C. App. ___, 721 S.E.2d 233 (2011) (waiver insufficient where defendant executed written waiver at first appearance in district court, for which there was no record of colloquy, and defendant stated he wanted to proceed pro se at subsequent appearance in superior court, where judge did not engage in required statutory colloquy and did not inform defendant he could request appointed counsel; State also indicted defendant as habitual felon between district and superior court appearances), *aff'd per curiam*, 365 N.C. 466 (2012); *State v. Williams*, 65 N.C. App. 498 (1983) (even though defendant had signed waiver of counsel in district court at first appearance, superior court had duty at arraignment to inform defendant of right to counsel as required by G.S. 15A-942).

The judge presiding at trial need not always be the one who conducts this inquiry, however. *See State v. Kinlock*, 152 N.C. App. 84 (2002) (trial judge need not always conduct inquiry regarding waiver of counsel for trial; another judge may do so at pretrial proceeding), *aff'd per curiam*, 357 N.C. 48 (2003); *see also State v. Dorton*, 182 N.C. App. 34 (2007) (no error where trial court failed to inquire at second resentencing hearing whether defendant wished to withdraw a waiver of counsel he executed eight days earlier before the first resentencing hearing; defendant didn't ask to withdraw waiver).

Second, even after a fully informed defendant has waived counsel, the defendant may change his or her mind and request that counsel be appointed. This situation arises most often with defendants who have waived appointed counsel with the intention of retaining counsel and then have been unable to do so. Generally, the court must give the defendant a reasonable opportunity to hire counsel and, if he or she is unable to do so, must honor the defendant's request for appointed counsel. *See State v. Sexton*, 141 N.C. App. 344 (2000) (reversing revocation of probation where trial court failed to honor defendant's

request to withdraw initial waiver). *Sexton* suggests that the burden on the defendant is merely to show a change of desire, but other cases (and certain language in *Sexton*) indicate that the defendant may have to show some level of good cause to withdraw a previous waiver. *See, e.g., State v. Scott*, 187 N.C. App. 775 (2007) (trial court erred in denying defendant's request for appointed counsel where defendant had good cause to withdraw waiver, telling the court he didn't know hiring counsel would cost "that much"); *State v. Hoover*, 174 N.C. App. 596 (2005) (no error for court to deny defendant's motion to withdraw his waiver of counsel where defendant had four counsel appointments, requested change of counsel four times in 18 months, and complained about his standby counsel two weeks before trial; defendant failed to state a clear request to withdraw his waiver and did not provide a reason for the delayed withdrawal request that constituted good cause); *State v. Atkinson*, 51 N.C. App. 683 (1981) (no duty to continue case or appoint counsel where defendant had signed two waivers of counsel, informed court he had financial resources to retain counsel, and only asked for appointed counsel on day of trial; defendant did not show sufficient facts entitling him to withdraw waiver); *State v. Clark*, 33 N.C. App. 628 (1977) (defendant may not delay until trial request for appointed counsel and thereby sidetrack proceedings); *see also State v. Hyatt*, 132 N.C. App. 697 (1999) (finding it unnecessary to articulate any particular standard for request to withdraw waiver of appointed counsel because defendant made no request). These cases appear comparable to those in which the defendant was alleged to have "forfeited" the right to counsel and may be more appropriately analyzed under that standard. *See infra* § 12.6E, Forfeiture of Right to Counsel. However categorized, a denial of a defendant's request for counsel would seem justified only by excessive dilatoriness by the defendant.

Third, except in circumstances amounting to a forfeiture of the right to counsel, a court may not require a defendant to proceed without the assistance of all counsel based on a waiver of appointed counsel only. This principle again comes into play most often when a defendant waives appointed counsel with the intention of retaining counsel and then is unable to do so. In that instance, even if the defendant does not explicitly request that counsel be appointed, the court may not require the defendant to proceed pro se without clarifying that the defendant wishes to waive the assistance of all counsel. Numerous cases have so held. *See, e.g., State v. McCrowre*, 312 N.C. 478 (1984) (error to require defendant to proceed pro se where defendant waived appointed counsel expecting to employ counsel but found himself financially unable to do so); *State v. Seymore*, ___ N.C. App. ___, 714 S.E.2d 499 (2011) (court could not presume that defendant intended to proceed pro se based on waiver of appointed counsel only); *Hyatt*, 132 N.C. App. 697 (although defendant did not ask that counsel be appointed and did not seek to withdraw waiver of appointed counsel, court erred in requiring defendant to proceed pro se; record did not establish that defendant wished to proceed without assistance of all counsel); *State v. Gordon*, 79 N.C. App. 623 (1986) (without clear indication that defendant desired to proceed pro se, trial court erred in requiring defendant to proceed pro se at suppression hearing after defendant dismissed appointed counsel); *State v. White*, 78 N.C. App. 741 (1986) (following *McCrowre*).

### E. Forfeiture of Right to Counsel

In limited circumstances, a defendant may be found to have forfeited the right to counsel and may be required to proceed without counsel even though he or she has not met the standard for waiving counsel.

In *State v. Montgomery*, 138 N.C. App. 521 (2000), an indigent defendant was twice appointed counsel, and he twice dismissed his appointed attorneys and retained private counsel. He then expressed dissatisfaction with his retained attorney, stated in court that he would not cooperate with his retained attorney, and assaulted the attorney by throwing water at him. The trial judge permitted the retained attorney to withdraw but declined to appoint replacement counsel for the defendant. After a continuance for the purpose of permitting the defendant to seek different private counsel, the defendant represented himself at trial. The court of appeals held in this situation that the defendant had "forfeited," not "waived," his right to counsel, and the trial judge was not required to ensure that the defendant had acted "knowingly, intelligently, and voluntarily" before requiring him to proceed pro se. *See also State v. Cureton*, ___ N.C. App. ___, 734 S.E.2d 572 (2012) (trial court did not err in finding defendant forfeited right to counsel where defendant engaged in serious misconduct, e.g., shouted at and insulted his attorneys and spat on and threatened to kill one of them); *State v. Leyshon*, 211 N.C. App. 511 (2011) (defendant forfeited right to counsel where he obstructed and delayed trial proceedings, refusing to recognize court's jurisdiction and refusing to respond to court's inquiries about whether he wanted counsel, among other things); *State v. Quick*, 179 N.C. App. 647 (2006) (after waiving appointed counsel, defendant forfeited right to retained counsel by failing to retain private counsel during eight months before probation revocation hearing); *Sampley v. Attorney General of North Carolina*, 786 F.2d 610, 613 (4th Cir. 1986) (court did not violate defendant's right to counsel by refusing to grant continuance to allow defendant additional time to secure counsel; court should consider whether continuance request results from "the lack of a fair opportunity to secure counsel or rather from the defendant's unjustifiable failure to avail himself of an opportunity fairly given"); *cf. supra* § 12.6D, Withdrawal of Waiver of Counsel (discussing cases in which court refused to allow defendant to withdraw waiver of counsel because of defendant's dilatory tactics).

Forfeiture is not appropriate unless the defendant engages in serious misconduct. *See State v. Wray*, 206 N.C. App. 354, 362 (2010) (defendant did not engage "in the kind of serious misconduct associated with forfeiture of the right to counsel"; defendant's misbehavior was the same evidence that cast doubt on his capacity to proceed and capacity to represent himself); *see also generally* 3 LAFAVE, CRIMINAL PROCEDURE § 11.3(c), at 691–95 (discussing doctrine).

A break in a forfeiture of counsel may occur, restoring the defendant's right to be represented to counsel. *See State v. Boyd*, 205 N.C. App. 450 (2010) (break in forfeiture occurred where, following initial trial at which defendant forfeited right to counsel, defendant appealed and accepted appointed counsel; defendant's forfeiture did not continue through his resentencing hearing following his appeal, and judge erred in failing

to conduct a new inquiry under G.S. 15A-1242 to determine whether defendant wanted to proceed pro se at resentencing).

## 12.7 Right to Effective Assistance of Counsel

### A. Cases in which Right Arises

**Generally.** "A defendant's right to counsel includes the right to the effective assistance of counsel." *State v. Braswell*, 312 N.C. 553, 561 (1985). If the defendant has a constitutional right to counsel, then he or she has a constitutional right to effective assistance of counsel based on the constitutional provision establishing the defendant's right to counsel. *See Strickland v. Washington*, 466 U.S. 668 (1984) (Sixth Amendment right to counsel includes right to effective assistance of counsel); *Evitts v. Lucey*, 469 U.S. 387 (1985) (right to counsel on appeal includes right to effective assistance of that counsel); *see generally* 3 LAFAVE, CRIMINAL PROCEDURE § 11.7(a), at 808–14. If the defendant has a statutory right to counsel, he or she has a comparable statutory right to effective assistance of counsel (discussed further below in "Statutory right to effective assistance" in this subsection A.).

IDS has developed performance guidelines for attorneys for various proceedings, at www.ncids.org/Attorney/Standards_Guidelines.html?c=Information%20for%20Counsel,%20Standards%20And%20Performance%20Guidelines. The preface to the noncapital criminal trial level guidelines states that the guidelines are not intended to serve as a benchmark for ineffective assistance of counsel claims, but they provide a useful review of the responsibilities of counsel during different parts of the proceedings. *Cf. Bobby v. Van Hook*, 558 U.S. 4, 7 (2009) (restatements of professional conduct, such as ABA Guidelines, can be useful guides to whether an attorney's conduct was reasonable).

**Appointed and retained counsel.** If a defendant has a right to counsel, the same standards of effectiveness apply whether the defendant is represented by appointed or retained counsel. *See Cuyler v. Sullivan*, 446 U.S. 335 (1980); 3 LAFAVE, CRIMINAL PROCEDURE § 11.7(b), at 815–16.

**Capital trials.** In capital trials, North Carolina law gives an indigent defendant the right to a second attorney. *See* G.S. 7A-450(b1). Since a defendant's right to second counsel in a capital case is statutory, the denial of second counsel would not violate a defendant's Sixth Amendment right to counsel. (A defendant would still be able to obtain relief because the denial of a defendant's statutory right to second counsel, or limitations on second counsel's participation that amount to a denial of the statutory right to counsel, would be reversible error. *See State v. Hucks*, 323 N.C. 574 (1988).)

The constitutional analysis of second counsel's role must be different, however, for claims of ineffective assistance, such as attorney incompetence, admissions of guilt without client consent (*Harbison* error, discussed below in subsection C.), and conflicts of interest. A capital defendant has a constitutional right to counsel and therefore a

constitutional right to be represented effectively. Since the two lawyers appointed to represent a capital defendant share responsibilities, the actions or inactions of both determine the effectiveness of the representation received by the defendant. To take an extreme example, suppose one attorney handles the guilt-innocence phase and the second the sentencing phase, but the second attorney does nothing to prepare for sentencing and the defendant is sentenced to death. The overall representation received by the defendant is constitutionally deficient regardless of which attorney is constitutionally required and which attorney is only required by statute. *See also State v. Matthews*, 358 N.C. 102 (2004) (reversible error for one of capital defendant's attorneys to admit defendant's guilt to lesser offense without defendant's consent); *Frye v. Lee*, 89 F. Supp. 2d 693 (W.D.N.C. 2000), *aff'd*, 235 F.3d 897 (4th Cir. 2000) (defendant alleged *Strickland* ineffectiveness by his two attorneys, and neither the district court nor the Fourth Circuit questioned the viability of such an argument regarding second counsel).

**Standby counsel.** Many courts are unreceptive to the possibility of a claim of ineffective assistance of standby counsel. *See* 3 LAFAVE, CRIMINAL PROCEDURE § 11.5(f), at 764–65 & n.106 (noting conflicting authority). Such a claim may arise in limited circumstances, however. In *State v. Thomas*, 331 N.C. 671, 677 (1992), the N.C. Supreme Court indicated that a defendant may claim ineffectiveness of standby counsel regarding "the limited scope of the duties assigned to such counsel by the statute or the defendant or voluntarily assumed by such counsel."

In addition to the N.C. Supreme Court's statement in *Thomas*, a number of decisions have recognized the possibility of a claim of ineffective standby counsel in limited circumstances, although courts may differ regarding the circumstances they would accept. *See United States v. Schmidt*, 105 F.3d 82, 90–91 (2d Cir. 1997) (stating that it might consider a claim of ineffectiveness by standby counsel if counsel assumed expanded role as defendant's trial counsel; also finding in alternative that standby counsel's performance was reasonable); *United States v. VanHoesen*, 636 F. Supp. 2d 155 (N.D.N.Y. 2009) (to same effect as *Schmidt*); *Jelinek v. Costello*, 247 F. Supp. 2d 212, 265–67 (E.D.N.Y. 2003) (court reviews several federal and state decisions and finds that "[i]n an appropriate case, a defendant who proceeds pro se may make out a claim that he received ineffective assistance of standby counsel"; court also observes that "[e]ven those circuits most hostile to the idea of a claim of ineffective assistance of standby counsel refuse categorically to reject the possibility of such a claim succeeding"); *State v. Surber*, 723 S.E.2d 851, 863 (W. Va. 2012) ("To prevail on a claim that counsel acting in an advisory or other limited capacity has rendered ineffective assistance, a self-represented defendant must show that counsel failed to perform competently *within the limited scope of the duties assigned to or assumed by counsel*." (citation omitted)) (emphasis in original); *State v. Pugh*, 222 P.3d 821, 826 (Wash. Ct. App. 2009) ("In general, a criminal defendant who exercises his constitutional right to self-representation cannot later claim ineffective assistance of counsel, because the defendant assumed complete responsibility for his own representation. But our Supreme Court has suggested that a criminal defendant may claim ineffective assistance of standby counsel if standby counsel violated a limited duty or obligation owed to the pro se defendant." (citation

omitted)); *People v. Michaels*, 49 P.3d 1032, 1055–56 (Cal. 2002) (court finds that federal decisions have "left open the possibility that on different facts the federal court might allow a pro se defendant to challenge the performance of standby counsel"; using language similar to North Carolina Supreme Court's opinion in *Thomas*, court holds that defendant may raise ineffectiveness claim based on breach of limited authority and responsibility that standby counsel has assumed); *see also State v. McDonald*, 22 P.3d 791 (Wash. 2001) (recognizing right to conflict-free standby counsel).

If counsel is ineffective before the defendant elects to proceed pro se, there is no question that the defendant may claim ineffectiveness for that counsel's performance. *See Downey v. People*, 25 P.3d 1200 (Colo. 2001) (in addition to finding that defendant may assert claim of ineffective assistance of standby counsel in limited circumstances, court notes that defendant may maintain claim for ineffective assistance of counsel for any acts or omissions that might have occurred before defendant elected to proceed pro se). And, in cases in which standby counsel assumes a greater role than appropriate, a defendant may have a claim that standby counsel interfered with the defendant's right to self-representation. *See McKaskle v. Wiggins*, 465 U.S. 168 (1984).

**Statutory right to effective assistance.** If a defendant has a statutory right to counsel, he or she generally has a statutory right to effective assistance of counsel. *See In re Bishop*, 92 N.C. App. 662, 664–65 (1989) (court holds that statutory right to counsel in proceeding to terminate parental rights includes right to effective assistance of counsel; otherwise, statutory right to counsel would be "empty formality"); *Jackson v. Weber*, 637 N.W.2d 19, 23 (S.D. 2001) ("We will not presume that our legislature has mandated some 'useless formality' requiring the mere physical presence of counsel as opposed to effective and competent counsel." (citation omitted)); *Lozada v. Warden, State Prison*, 613 A.2d 818, 821 (Conn. 1992) (court discusses statutory right to counsel and finds that "[i]t would be absurd to have the right to appointed counsel who is not required to be competent"); *see also* 3 LAFAVE, CRIMINAL PROCEDURE § 11.7(a), at 814 (where state has constitutional obligation to conduct proceedings, ineffectiveness of counsel may deprive defendant of right to contest proceedings and thus violate due process even if defendant has no constitutional right to counsel). *But cf.* G.S. 15A-1419(c) (stating that ineffective assistance of postconviction counsel, afforded by North Carolina statute, does not constitute good cause to excuse grounds listed in G.S. 15A-1419(a) for denial of motion for appropriate relief).

Under G.S. 7A-451(a)(18), an indigent defendant has the right to appointed counsel in a proceeding involving placement into satellite monitoring. The court of appeals has stated, however, that a defendant cannot raise an ineffective assistance of counsel claim in such cases because ineffective assistance of counsel claims may be raised in criminal cases only and satellite-based monitoring is not a criminal punishment. *See State v. Wagoner*, 199 N.C. App. 321 (2009), *aff'd per curiam*, 364 N.C. 422 (2010); *accord State v. Miller*, 209 N.C. App. 466 (2011) (so stating for appeals from SBM determinations). These decisions are inconsistent with the above-cited decisions in other civil contexts recognizing a right to effective assistance of counsel.

### B. Deficient Performance

It is impossible to review in depth here the various situations in which a claim of ineffectiveness may arise. For purposes of this discussion, cases involving ineffectiveness claims are divided into two basic categories—cases in which the defendant ordinarily must show prejudice to prevail (discussed in this subsection) and cases in which prejudice is presumed or at least is not part of the standard for judging ineffectiveness (discussed *infra* in § 12.7C, Presumptive Prejudice, and § 12.7D, Conflicts of Interest).

***Strickland* standard.** The most common ineffectiveness claims involve allegations of attorney incompetence or error. Generally, the defendant must show: (i) that the attorney's performance was deficient in that it lay outside the range of professionally competent assistance, and (ii) that the deficient performance prejudiced the defendant. *See Strickland v. Washington*, 466 U.S. 668 (1984). To establish prejudice, the defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. *Compare, e.g., State v. Hunt*, ___ N.C. App. ___, 728 S.E.2d 409 (2012) (counsel's performance was deficient but not prejudicial when he opened the door to other crimes evidence), *review granted*, ___ N.C. ___, 738 S.E.2d 360 (2013), *with State v. Surratt*, ___ N.C. App. ___, 717 S.E.2d 47 (2011) (attorney's failure to object to inadmissible testimony by social worker about alleged sexual abuse was deficient and prejudicial and required new trial), *vacated* ___ N.C. ___, 732 S.E.2d 348 (2011) (vacating court of appeals opinion without prejudice to filing of motion for appropriate relief alleging ineffective assistance of counsel).

In some instances, counsel's errors or omissions may be so egregious as to warrant a presumption of prejudice without any further showing. *See infra* § 12.7C, Presumptive Prejudice.

**Failure to investigate or prepare.** Attorneys are probably most likely to be found ineffective when they fail to investigate or prepare a case. Courts reviewing ineffective assistance of counsel claims usually give considerable deference to *informed* strategic or tactical choices by lawyers. *See Strickland*, 466 U.S. 668, 690 ("strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable"). Ineffectiveness is more likely to be found where an attorney failed to obtain the necessary background information to make an informed choice. *See, e.g., Porter v. McCollum*, 558 U.S. 30 (2009) (per curiam) (counsel's conduct fell below standard of reasonableness when he failed to investigate and present mitigating evidence of defendant's mental health, background, and military service); *Rompilla v. Beard*, 545 U.S. 374 (2005) (counsel ineffective for failing to examine readily-available prosecution file containing mitigating evidence); *Wiggins v. Smith*, 539 U.S. 510 (2003) (counsel ineffective for failing to investigate mitigating evidence); *Foster v. Lockhart*, 9 F.3d 722, 726 (8th Cir. 1993) ("Although we generally give great deference to an attorney's informed strategic choices, we closely scrutinize an attorney's preparatory activities."); *Deluca v. Lord*, 77 F.3d 578 (2d Cir. 1996) (counsel ineffective for failing to investigate mental disturbance defense); *see also* ABA STANDARDS FOR CRIMINAL JUSTICE:

PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 4-4.1 (3d ed. 1993) (defense counsel has duty to investigate).

Preparation and investigation do not render strategic or tactical decisions completely immune from review, however. If, for example, after investigating the case an attorney settles on an outlandish or implausible strategy when other options are superior, an ineffectiveness claim may succeed. *See* 3 LAFAVE, CRIMINAL PROCEDURE § 11.10(c), at 964–65; *cf. Knowles v. Mirzayance*, 556 U.S. 111 (2009) (defense counsel not ineffective for recommending, in sentencing phase of first degree murder trial, that defendant withdraw insanity defense where the same jury had rejected similar testimony in guilt phase and strongest testimony was no longer available; counsel is not required to raise a defense that is "almost certain to lose").

**Failure to make suppression motion.** *See State v. Gerald*, ___ N.C. App. ___, 742 S.E.2d 280 (2013) (finding on direct review of conviction that counsel was ineffective for failing to make suppression motion); *State v. Canty*, ___ N.C. App. ___, 736 S.E.2d 532 (2012) (to same effect).

**Failure to inform client of plea offer and consequences.** Lawyers have sometimes been found ineffective when they have misinformed the client of the consequences of accepting a plea offer and entering a guilty plea. *See Hill v. Lockhart*, 474 U.S. 52, 56, 59 (1985) (guilty plea not knowing and voluntary where defendant enters plea on advice of counsel and advice is not "within the range of competence demanded of attorneys in criminal cases"; defendant still must show prejudice—that is, "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial"); *Ostrander v. Green*, 46 F.3d 347, 354–56 (4th Cir. 1995) (prejudice found based on erroneous advice of counsel regarding plea), *overruled in part on other grounds by O'Dell v. Netherland*, 95 F.3d 1214 (4th Cir. 1996), *aff'd*, 521 U.S. 151 (1997).

Similarly, an attorney may be found ineffective if his or her advice led to the improvident *rejection* of a plea offer by a defendant. *See Lafler v. Cooper*, ___ U.S. ___, 132 S. Ct. 1376, 1385 (2012) (prejudice inquiry focuses on whether "there is a reasonable probability that the plea offer would have been presented to the court . . ., that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed").

Lawyers also may be found ineffective if they fail altogether to inform the client of a plea offer. Counsel must communicate to the defendant formal plea offers from the prosecution. *See Missouri v. Frye*, ___ U.S. ___, 132 S. Ct. 1399 (2012) (counsel rendered ineffective assistance by allowing a plea offer to expire without informing the defendant or allowing him to consider the offer); *State v. Simmons*, 65 N.C. App. 294, 300 (1983) (holding that "a failure to inform a client of a plea bargain offer constitutes ineffective assistance of counsel absent extenuating circumstances"); *compare State v. Martin*, 318 N.C. 648 (1986) (no relief warranted; defendant offered insufficient evidence

that prosecutor had made definite plea offer); *State v. Johnson*, 126 N.C. App. 271 (1997) (finding under circumstances of case that counsel's failure to timely inform prosecutor of defendant's acceptance of plea offer did not warrant relief).

In light of the U.S. Supreme Court's decisions in *Lafler* and *Frye*, the remedy of a new trial (ordered by the North Carolina Court of Appeals in *Simmons* for counsel's failure to inform the defendant of the State's plea offer) may be insufficient to cure the prejudice to the defendant; a defendant may be entitled to the terms of the earlier plea offer. *See Lafler* (describing potential remedies for ineffective assistance of counsel causing defendant to reject earlier plea offer); *Frye* (describing remedies when counsel fails to communicate plea offer to defendant). For a further discussion of counsel's obligations in advising clients about entering a guilty plea, see 2 NORTH CAROLINA DEFENDER MANUAL Ch. 23 (Guilty Pleas) (UNC School of Government, 2d ed. 2012).

**Advice about immigration and other significant "collateral" consequences.** The courts have sometimes distinguished between direct and collateral consequences in assessing counsel's obligation to advise clients about the impact of a criminal conviction. *See, e.g., State v. Goforth*, 130 N.C. App. 603, 605 (1998) (noting that, "[g]enerally, an attorney is not required to advise his [or her] client of the myriad 'collateral consequences' of pleading guilty"). In *Padilla v. Kentucky*, 559 U.S. 356 (2010), the U.S. Supreme Court refused to apply this distinction to advice about immigration consequences. Because of the importance of immigration consequences and their close connection to the criminal process, the Court concluded that defense counsel has an obligation to advise noncitizen clients about immigration consequences, whether characterized as direct or collateral.

The *Padilla* court described a two-step approach. One, if the immigration consequences are clear—as they were in *Padilla*, where the defendant was facing virtually mandatory deportation if convicted—counsel must advise a noncitizen client of the consequences of conviction. In that instance, the failure to advise, as well as the giving of incorrect advice, falls below expected professional norms. Two, if the immigration consequences of a guilty plea are unclear, counsel at least must advise a noncitizen client that a conviction may carry adverse immigration consequences. *Cf. Chaidez v. United States*, 568 U.S. ___, 133 S. Ct. 1103 (2013) (*Padilla* not retroactive); *State v. Alshaif*, ___ N.C. App. ___, 724 S.E.2d 597 (2012) (to same effect).

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***Practice note:*** As a practical matter, the two-step approach adopted in *Padilla* requires that counsel investigate a noncitizen's circumstances to determine whether potential immigration consequences are clear or unclear. Only then will counsel have sufficient information to satisfy the obligation of appropriately advising a noncitizen client. For a detailed discussion of the immigration consequences of a conviction, see SEJAL ZOTA & JOHN RUBIN, IMMIGRATION CONSEQUENCES OF A CRIMINAL CONVICTION IN NORTH CAROLINA (UNC School of Government, 2008), *available at* www.ncids.org (select "Training & Resources," then "Reference Manuals"). The immigration consequences manual is not a substitute, however, for independent research and consultation with an immigration expert as needed.

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The approach taken in *Padilla* may apply to other significant consequences of a conviction, whether characterized as direct or collateral. Thus, effective assistance of counsel may require the giving of advice about sex offender registration and monitoring requirements as a result of a criminal conviction. *See Bauder v. Dep't of Corr.*, 619 F.3d 1272 (11th Cir. 2010) (relying on *Padilla* and finding counsel's performance deficient based on counsel's incorrect advice about the potential for civil commitment as a result of the defendant's guilty plea to stalking of a minor). The North Carolina courts have held that sex offender registration and monitoring requirements are collateral matters for purposes of evaluating the taking of a guilty plea by a judge (*see State v. Bare*, 197 N.C. App. 461 (2009)), and that a defendant does not have a right to effective assistance of counsel for a satellite monitoring determination (*see supra* "Statutory Right to Effective Assistance" in § 12.7A, Cases in which Right Arises); but, the courts have not specifically addressed counsel's obligation to advise clients about sex offender registration and monitoring requirements.

Attorneys also may be found ineffective for misadvice to a client about collateral consequences. *See State v. Goforth*, 130 N.C. App. 603 (1998) (advice of attorney who failed to accurately answer defendant's question about collateral consequence of plea was deficient).

Counsel may obtain more information about collateral consequences by consulting the Collateral Consequences Assessment Tool (C-CAT), an online tool available at http://ccat.sog.unc.edu/.

### C. Presumptive Prejudice

For certain ineffective assistance of counsel claims, outcome-determinative prejudice need not be shown. Prejudice is presumed. *See United States v. Cronic*, 466 U.S. 648, 658–59 (1984); *Bell v. Cone*, 535 U.S. 685 (2002); 3 LAFAVE, CRIMINAL PROCEDURE § 11.8 (referring to these claims as involving state interference and other extrinsic factors); JESSICA SMITH, INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS IN NORTH CAROLINA CRIMINAL CASES § 1.04 (UNC School of Government, 2003) (referring to these cases as involving actual or constructive denials of counsel); *see also infra* § 12.7D, Conflicts of Interest. Some of the violations discussed here may be considered as involving ineffective assistance of counsel or the denial of other rights, such as due process, the right to confront one's accusers and present a defense, and the right to counsel itself.

**Absence of counsel and restrictions on assistance.** Prejudice need not be shown when counsel either was totally absent, or was prevented from assisting the accused, during a critical stage. *See Cronic*, 466 U.S. 648, 659 & n.25; *see also Geders v. United States*, 425 U.S. 80 (1976) (constitutional denial of counsel where lawyer was not permitted to consult with defendant during overnight recess); *Herring v. New York*, 422 U.S. 853 (1975) (constitutional denial of counsel to deny defense counsel opportunity to make closing argument in either jury or nonjury case); *State v. Colbert*, 311 N.C. 283 (1984) (reversal of conviction required where defense lawyer was late to court and judge started jury selection without him).

**Failure to subject State's case to meaningful adversarial testing.** Prejudice is presumed "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." *Cronic*, 466 U.S. 648, 659; *accord Bell*, 535 U.S. 685 (reaffirming *Cronic*, but finding on facts presented that attorney performance did not amount to failure to subject case to meaningful adversarial testing and should be analyzed under *Strickland* standard).

***Harbison* error.** North Carolina presumes prejudice where defense counsel concedes the defendant's guilt on any element of an offense without the defendant's consent. *See State v. Harbison*, 315 N.C. 175 (1985) (trial counsel conceded defendant's guilt to a lesser included offense without defendant's consent; reversible error per se). This type of error can be viewed as one type of failure to subject the State's case to meaningful adversarial testing. For a further discussion of *Harbison* error, see 2 NORTH CAROLINA DEFENDER MANUAL § 23.7C (Concessions of Guilt during Trial), § 28.6 (Admissions of Guilt During Opening Statement), and § 33.6 (Admissions of Guilt During Closing Argument) (UNC School of Government, 2d ed. 2012).

**Inability of fully competent lawyer to provide effective assistance.** On some occasions, "although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *Cronic*, 466 U.S. 648, 659–60. For example, prejudice may be presumed where the trial court improperly denies a defense motion for a continuance and counsel does not have adequate time or opportunity to prepare. *See Powell v. Alabama*, 287 U.S. 45 (1932) (defendant must not be stripped of right to have sufficient time to consult with counsel and prepare defense); *State v. Rogers*, 352 N.C. 119 (2000) (defense counsel had insufficient time to prepare defense and was presumptively ineffective). *Compare, e.g.*, *State v. Tunstall*, 334 N.C. 320 (1993) (refusal to grant continuance did not interfere with defendant's ability to consult with counsel).

**Forfeiture of legal proceeding.** *See Roe v. Flores-Ortega*, 528 U.S. 470 (2000) (attorney failed to file notice of appeal despite defendant's request; where attorney error results in forfeiture of legal proceeding, prejudice presumed).

### D. Conflicts of Interest

**Generally.** The right to effective assistance of counsel includes the right to conflict-free counsel. *See Wood v. Georgia*, 450 U.S. 261 (1981); *State v. Bruton*, 344 N.C. 381 (1996). There are two basic standards for conflict-of-interest cases, discussed below. The cases interpreting these standards may be a poor guide, however, to what is ethically advisable. As one commentator has noted, the unwillingness of a court to overturn a conviction on appeal because of a conflict of interest "says little about the ethical propriety of the lawyer's conduct." ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER: PRACTICAL ANSWERS TO TOUGH QUESTIONS at 234 (Rodney J. Uphoff ed., American Bar Association 1995). IDS rules require appointed counsel to make timely, reasonable efforts to determine whether representation involves a conflict of interest. *See*

IDS Rule 1.7(a1) (identification of conflicts in noncapital cases); IDS Rule 2A.2(d1) (capital cases).

The conflict problems a criminal defense lawyer may encounter are discussed in more detail in Appendix 12-1 to this chapter.

**Automatic reversal.** If counsel brings a conflict to the trial court's attention and the trial court fails to inquire into the conflict, prejudice is presumed without a further showing and reversal is automatic. *See Holloway v. Arkansas*, 435 U.S. 475 (1978); *accord State v. Gray*, ___ N.C. App. ___, 736 S.E.2d 837 (2013); *cf. State v. Hunt*, ___ N.C. App. ___, 728 S.E.2d 409 (2012) (majority finds that voir dire of witness by trial judge was sufficient inquiry into possible conflict of interest and that full-blown evidentiary hearing was not required), *review granted*, ___ N.C. ___, 738 S.E.2d 360 (2013). Reversal likewise is required if after timely objection the trial court improperly requires continued representation. *Holloway*, 435 U.S. at 488. The court must grant counsel's motion to withdraw unless the possibility of conflict is "too remote" to warrant new counsel. *Id.*, 435 U.S. at 484.

*Holloway* involved a conflict based on counsel's simultaneous representation of co-defendants, but courts have held that the automatic reversal rule applies to other conflicts. *See, e.g., Spreitzer v. Peters*, 114 F.3d 1435, 1451 n.7 (7th Cir. 1997); *United States v. Cook*, 45 F.3d 388 (10th Cir. 1995) (stating that "a defendant's right to counsel free from conflicts of interest 'is not limited to cases involving joint representation of co-defendants . . . but extends to any situation in which a defendant's counsel owes conflicting duties to that defendant and some other third person'" (citation omitted)), *abrogated on other grounds by Neill v. Gibson*, 278 F.3d 1044 (10th Cir. 2001); *see also State v. Ballard*, 180 N.C. App. 637 (2006) (attorney represented defendant and a potential defense witness who had testimony that was exculpatory as to defendant but could implicate that witness in another matter; defendant's waiver of conflict-free counsel not knowing, voluntary, and intelligent). *But cf. State v. Phillips*, 365 N.C. 103 (2011) (holding that constitutional conflict of interest rules apply to multiple representation, either simultaneous or successive, but finding that alleged conflict in this case—that defense counsel could potentially be called as a witness to impeach testimony of State's witness—was properly addressed under *Strickland* standard of ineffectiveness; court also suggests in note 5 that record disclosed that alleged conflict did not adversely affect counsel's performance, the standard for assessing the impact of a conflict under *Cuyler*, discussed below).

**Conflicts adversely affecting counsel's performance.** If counsel fails to bring a conflict to the trial court's attention, the defendant must show that any conflict adversely affected trial counsel's performance. *See Cuyler v. Sullivan*, 446 U.S. 335 (1980). This standard is more difficult to meet than the *Holloway* standard but, since a showing of prejudice is not specifically required, may be easier to satisfy than the *Strickland* standard. *See Edens v. Hannigan*, 87 F.3d 1109 (10th Cir. 1996) (counsel ineffective where he jointly represented two defendants and failed to pursue plea bargain for less culpable defendant); *Griffin v. McVicar*, 84 F.3d 880 (7th Cir. 1996) (writ of habeas corpus granted where

counsel pursued weaker of two defenses because pursuit of alternative defense would jeopardize co-defendant).

After *Mickens v. Taylor*, 535 U.S. 162 (2002), a defendant must make this showing (that the conflict adversely affected counsel's performance) even if the trial court knew or should have known of the potential conflict. Under *Cuyler* and *Mickens*, the trial court must inquire if it is aware of a conflict. *See also State v. James*, 111 N.C. App. 785, 791 (1993) (trial judge erred in not conducting inquiry into conflict of which it was aware; when potential conflict is raised, trial judge must "take control of the situation" (citation omitted)). However, unless defense counsel has brought the conflict to the court's attention, a defendant does not get the benefit of the automatic reversal rule for the court's failure to inquire. (*Mickens* also clarified that to satisfy the *Cuyler* standard, a defendant need not show that an "actual" conflict existed that adversely affected counsel's performance; a conflict adversely affecting trial counsel's performance is the same as an actual conflict.) In *State v. Bunch*, 192 N.C. App. 724 (2008), the court of appeals stated that a defendant is not entitled to relief for his or her counsel's alleged conflict of interest if not raised by counsel, but the case is better interpreted as holding that a defendant is not automatically entitled to relief for the trial court's failure to inquire into a conflict not raised by counsel. *See State v. Mims*, 180 N.C. App. 403 (2006) (stating principles more clearly).

*Cuyler*, like *Holloway*, involved a conflict arising out of simultaneous representation of co-defendants, but courts have applied the *Cuyler* standard to other conflicts. *See State v. Choudhry*, 365 N.C. 215 (2011) (prosecutor, not defense counsel, brought to trial court's attention potential conflict that defense counsel previously represented a State's witness; judge's subsequent inquiry was insufficient to establish valid waiver by defendant, but defendant did not show actual conflict of interest adversely affecting counsel's performance requiring reversal); *State v. James*, 111 N.C. App. 785 (1993) (defense counsel represented prosecution witness in a separate matter); *State v. Loye*, 56 N.C. App. 501 (1982) (defendant's attorney under investigation for his own participation in criminal conduct involving defendant); *United States v. Nicholson*, 475 F.3d 241 (4th Cir. 2007) (simultaneous representation of defendant and second criminal client, whom defendant claimed had threatened to kill defendant). *But cf. Mickens v. Taylor*, 535 U.S. 162, 174–76 (2002) (noting that U.S. Supreme Court has not decided whether *Cuyler* rule applies to conflicts other than those arising from joint representation); *State v. Phillips*, 365 N.C. 103 (2011) [see parenthetical note regarding *Phillips* under "Automatic reversal," above].

### E. Raising Ineffective Assistance of Counsel Claims on Direct Appeal

Ineffective assistance claims are typically raised through a postconviction motion for appropriate relief. *See State v. House*, 340 N.C. 187 (1995) (stating general rule that ineffectiveness claims are appropriate subject of motion for appropriate relief); *State v. Harbison*, 315 N.C. 175 (1985). Most ineffectiveness claims cannot be raised on direct appeal because the record on appeal is insufficient to determine the claim. *See, e.g., State v. Morganherring*, 347 N.C. 408 (1997) (remanding for evidentiary hearing in superior court because record on appeal was insufficient to determine ineffectiveness claim); *State*

*v. Thomas*, 327 N.C. 630 (1990) (using supervisory powers to remand to superior court for findings necessary to determine ineffectiveness claim); *State v. King*, ___ N.C. App. ___, 721 S.E.2d 336 (2012) (dismissing without prejudice *Harbison* claim that trial counsel admitted defendant's guilt without consent). *But see, e.g., State v. Boyd*, 209 N.C. App. 418 (2011) (court finds record adequate to consider claim that counsel was ineffective in failing to object to video of defendant's statement to police, introduced by State on rebuttal after defendant testified; court denies claim as well as alternative request that court dismiss claim without prejudice to right to raise issue in motion for appropriate relief).

However, the North Carolina Supreme Court has indicated that ineffectiveness claims that can be raised on direct appeal—that is, those that are apparent on the record and require no further investigation or hearing to develop—must be raised or will be waived. *See State v. Fair*, 354 N.C. 131, 167 (2001) (so holding but also noting that "defendants likely will not be in a position to adequately develop many IAC [ineffective assistance of counsel] claims on direct appeal"). In light of the U.S. Supreme Court's decision in *Massaro v. United States*, 538 U.S. 500 (2003) (under federal law defendant may raise ineffectiveness claim in collateral proceeding even though defendant could have but did not raise claim on direct appeal), the state supreme court may be willing to reconsider its position. *See State v. Lawson*, 159 N.C. App. 534 (2003) (noting inconsistency between *Massaro* and *Fair* and inefficiencies created by *Fair*). Until then, appellate counsel is obliged to review the record for possible ineffectiveness claims that might be cognizable on direct appeal.

## 12.8 Attorney-Client Relationship

### A. Control and Direction of Case

The ABA Standards for the Defense Function state that "[c]ertain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel." ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 4-5.2(a) (3d ed. 1993). The decisions reserved for the client, with the advice of counsel, are: (i) what plea to enter; (ii) whether to accept a plea bargain; (iii) whether to waive jury trial; (iv) whether to testify; and (v) whether to appeal. (Under North Carolina law, a defendant may not waive the right to a jury trial in superior court, and a defendant who is sentenced to death may not waive the right to direct appeal.)

According to the ABA standards, strategic or tactical decisions—such as what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions to make, and what evidence to introduce—are the province of counsel. *See* ABA Standard 4-5.2(b); *see also State v. Luker*, 65 N.C. App. 644 (1983) (citing standards on this issue), *aff'd in part, rev'd in part*, 311 N.C. 301 (1984). The standards further provide that where feasible and appropriate, the attorney should consult with the client about such decisions. *See* ABA Standard 4-5.2(b); *see also* N.C. STATE BAR REV'D

RULES OF PROF'L CONDUCT R. 1.2, 1.4 (attorney should reasonably consult with client about means by which client's objectives are to be accomplished, keep client reasonably informed about status of matter, and promptly comply with reasonable requests for information); *Gov't of Virgin Islands v. Weatherwax*, 77 F.3d 1425 (3d Cir. 1996) (relying on *Strickland v. Washington*, court states that important strategic and tactical decisions should be made only after lawyer consults with client).

The N.C. Supreme Court has cited the ABA standards with approval but, based on its view that the attorney-client relationship is one of principal-agent, has taken the position that ultimately the attorney must carry out the client's wishes. Thus, although tactical decisions normally are for the attorney to make, "when counsel and a fully informed defendant client reach an absolute impasse as to . . . tactical decisions, the client's wishes must control." *State v. Ali*, 329 N.C. 394, 404 (1991) (choice of juror); *accord State v. Brown*, 339 N.C. 426 (1994) (trial strategy); *State v. Freeman*, 202 N.C. App. 740 (2010) (exercise of peremptory strike). *But see State v. Jones*, ___N.C. App. ___, 725 S.E.2d 415 (2012) (attorney need not comply with client's wishes to assert frivolous or unsupported claims); *State v. Williams*, 191 N.C. App. 96 (2008) (where defendant and counsel had not reached final decision about particular trial tactics, there was not absolute impasse).

The *Ali* opinion advises that where there is an absolute impasse over strategy between the attorney and client, the attorney "should make a record of the circumstances, her advice to the defendant, the reasons for the advice, the defendant's decision and the conclusion reached." *Ali*, 329 N.C. 394, 404; *see also* ABA Standard 4-5.2(c) & Commentary (advising that record should be made in manner that protects client confidentiality, such as memorializing matter in file). If the client's wishes are completely irrational, counsel may want to consider moving for a capacity evaluation since one component of capacity to stand trial is the ability to assist rationally in the defense. *See supra* Ch. 2, Capacity to Proceed.

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***Practice note:*** In some circumstances, if counsel reaches an absolute impasse with a client, he or she may wish to make a motion to withdraw. This manual does not address the circumstances in which a motion to withdraw may be appropriate. However, the court may not be able to require a defendant to forgo counsel as a condition of proceeding with his or her preferred course of action. In *State v. Colson*, 186 N.C. App. 281 (2007), the defendant wanted to testify on his own behalf against the advice of his lawyer, who had concerns about the truthfulness of the testimony. The court held that the trial judge erred by requiring the defendant to choose between testifying without counsel and continuing to be represented by counsel but foregoing testifying. While the case involved a choice between constitutional rights, the reasoning may apply to other trial decisions a defendant wishes to make. Absent a knowing and voluntary waiver of counsel, a trial court may not be able to require a defendant to proceed without counsel on the ground that counsel and the defendant disagree over the course of action to take. *Cf. State v. Chappelle*, 193 N.C. App. 313 (2008) (no error where defendant and trial counsel disagreed over trial tactics and defendant chose to waive counsel).

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The North Carolina appellate courts have not considered the impact of *Indiana v. Edwards*, 554 U.S. 164 (2008), on *Ali's* agency theory of representation. *Edwards* recognized that a defendant may be capable of proceeding to trial but incapable of representing himself or herself. If a trial judge finds a defendant capable of standing trial but refuses to accept the defendant's waiver of counsel because the defendant is incapable of self-representation, must the attorney still follow the defendant's wishes? The issue is unsettled. If counsel and a defendant reach an absolute impasse and counsel believes the defendant's requested action is unwise, counsel should bring the matter to the court's attention and obtain a ruling on the appropriate way to proceed. For a further discussion of *Indiana v. Edwards*, see *supra* § 12.6C, Capacity to Waive Counsel.

### B. Special Needs Clients

North Carolina's Revised Rules of Professional Conduct and the pertinent ABA Standards state that, to the extent possible, an attorney should seek to give mentally impaired or juvenile clients the same control over their case as fully functional adults. *See* N. C. STATE BAR REV'D RULES OF PROF'L CONDUCT R. 1.14 (clients with diminished capacity); ABA STANDARDS FOR JUVENILE JUSTICE, Standard 3.1 (1980). The North Carolina rules state that if the lawyer believes that a client is too young or too impaired to make informed choices in his or her best interest, the lawyer may take reasonably necessary protective action, including seeking appointment of a guardian ad litem. *See* REV'D RULE OF PROF'L CONDUCT 1.14(b) & cmt. 7 (rule authorizes attorney to seek guardian ad litem but comment recognizes that in many circumstances such an appointment may be more expensive or traumatic for client than warranted); ABA Standard for Juvenile Justice 3.1(b)(ii)(c); *cf.* North Carolina State Bar, 2004 Formal Ethics Opinion 11 (2005) (recognizing that a lawyer appointed to serve as both guardian ad litem and counsel for a parent with diminished capacity in a termination of parental rights proceeding must keep all communications confidential). The ABA juvenile justice standards recommend that, if appointment of a guardian is not possible, the lawyer should take the course of action that "a careful and competent person in the juvenile's position" would likely decide to take. ABA Standard for Juvenile Justice, Standard 3.1(b)(ii)(c)[3]; *see also* REV'D RULE OF PROF'L CONDUCT 1.14 cmt. 7 (in considering alternatives for client with diminished capacity, lawyer should be aware of any law that requires lawyer to advocate for least restrictive action on behalf of client).

Counsel should make accommodations to overcome communication barriers created by youth or mental or physical disability. Such accommodations may include seeking the assistance of an expert. *See generally* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 4-3.1 Commentary (3d ed. 1993) (establishment of attorney-client relationship with client with mental disability).

One component of capacity to stand trial is the ability of the defendant to assist in his or her defense. Consequently, in appropriate circumstances, counsel should consider seeking a capacity determination. *See supra* Ch. 2, Capacity to Proceed.

## 12.9 Repayment of Attorneys Fees

### A. Contribution vs. Reimbursement

There are essentially two different types of procedures utilized by states to obtain repayment of the costs of providing counsel to indigent defendants—contribution and reimbursement. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES, Standard 5-7.2 & Commentary (3d ed. 1992).

"Contribution" refers to situations in which the defendant makes a contribution to the cost of counsel, usually of a small, fixed amount at the beginning or end of the proceedings. The $60 appointment fee, described *supra* § 12.5E, $60 Appointment Fee in Criminal Cases, is a form of contribution.

"Reimbursement," called recoupment in North Carolina, applies to situations in which the defendant is ordered after the proceedings to pay for the representation provided. North Carolina primarily uses recoupment to recover the attorneys fees paid by the State to an appointed attorney or, if the defendant was represented by a public defender or other IDS-employed attorney, the monetary value of legal services provided. The following discussion deals with those cost-recovery procedures.

### B. Constitutionality of Recoupment Procedures

Cost recovery statutes must meet the standards established by the U.S. Supreme Court in *Fuller v. Oregon*, 417 U.S. 40 (1974). The requirements are as follows:

1. The procedures must guarantee the right to counsel without cumbersome obstacles.
2. The imposition of the burden of repayment may not be made without notice and a meaningful opportunity to be heard.
3. The entity deciding whether to require repayment must take cognizance of the person's resources, the other demands on his or her own and family's finances, and the hardships the person or family will endure if repayment is required. The purpose of this inquiry is to assure that repayment is not required as long as the person remains indigent.
4. The person must not be exposed to more severe collection practices than an ordinary civil debtor.
5. The person cannot be imprisoned for failing to pay as long as default is attributable to his or her poverty.

North Carolina's recoupment statutes have been found to satisfy these constitutional requirements. *See Alexander v. Johnson*, 742 F.2d 117 (4th Cir. 1984) (North Carolina's statutes and court decisions interpreting them meet the facial constitutional requirements established by the U.S. Supreme Court). In individual cases, however, orders related to recoupment have sometimes been stricken as unconstitutional or in violation of statutory requirements. *See infra* § 12.9E, Violations of Constitutional and Statutory Requirements.

### C. Types of Cases Subject to Recoupment

**Adult criminal cases.** G.S. 7A-455 authorizes recoupment from an adult defendant in a criminal case if he or she is convicted. *See also State v. Bass*, 53 N.C. App. 40 (1981) (recognizing conviction requirement). The statute also authorizes recoupment for other expenses incurred in representing the defendant. *See State v. Harris*, 198 N.C. App. 371 (2009) (trial judge could order indigent defendant to repay costs of trial transcripts [court states that trial judge had authority to make repayment a condition of post-release supervision, but Post-Release Supervision and Parole Commission generally decides conditions to impose; issue not addressed by court]). Because the statute requires a "conviction," there are some instances in which the court may not be able to assess fees even though the defendant does not completely prevail—for example, when a defendant receives a prayer for judgment continued (PJC) or is charged with a criminal offense and is found responsible for an infraction. *See also State v. Rogers*, 161 N.C. App. 345 (2003) (indigent defendant could not be held responsible for attorneys fees at trial level when conviction was reversed on appeal for ineffective assistance of counsel); G.S. 7A-455(c) (recoupment not permitted for appellate or postconviction proceedings if all matters that person raised in the proceeding are vacated, reversed, or remanded for a new trial or resentencing). Cases in other contexts suggest that a "conviction" includes an adjudication of guilt or plea of guilty or no contest without formal entry of judgment, but it is not clear from those cases whether it would be permissible to assess attorneys fees for a PJC. *See, e.g.*, *State v. Graham*, 149 N.C. App. 215 (2002) (PJC constitutes prior conviction for purposes of determining defendant's sentence for subsequent offense). Although G.S. 7A-455 precludes a court from entering a fee judgment against a person who is placed on probation pursuant to a deferred prosecution agreement, which does not constitute a conviction, many prosecutors condition deferred prosecution on the defendant's agreement to repay attorneys fees. *See generally* G.S. 15A-1341(a1) (person who receives deferred prosecution may be placed on probation as provided in probation article); G.S. 15A-1343(e) (authorizing attorneys fees as condition of probation).

**Criminal and other cases involving minors and dependent adults.** Recoupment is also authorized in criminal and certain civil proceedings involving minors or dependent adults. G.S. 7A-450.1 through G.S. 7A-450.4 authorizes recoupment from a parent or guardian of the costs of an attorney or guardian ad litem appointed for a minor or dependent adult. Under these statutes, whether to require a parent or guardian to repay fees is within the court's discretion, except that G.S. 7A-450.1 bars recoupment if the person for whom an attorney or guardian ad litem is appointed prevails. The statutes governing the particular proceeding may place additional limits on recoupment.

The principal types of cases in which a parent or guardian may be found liable for attorneys fees under G.S. 7A-450.1 through G.S. 7A-450.4, are:

- criminal cases (*see also* G.S. 7A-455(d));
- juvenile delinquency proceedings (*see also* G.S. 7B-2002);
- abuse, neglect, and dependency and termination of parental rights proceedings (*see also* G.S. 7B-603(a1), G.S. 7B-1108(b) (authorizing repayment of fees of guardian ad

litem for juvenile)); and
- involuntary commitment proceedings (*see also* G.S. 122C-224.1(a)).

**Counsel for adult parents.** G.S. 7B-603(b1) authorizes, although does not require, the court to order recoupment for the fees of attorneys appointed pursuant to G.S. 7B-602 (parent's right to appointed counsel in abuse, neglect, or dependency proceeding) and G.S. 7B-1101.1 (termination of parental rights proceeding [G.S. 7B-603(b1) refers to G.S. 7B-1101, but the correct statute is G.S. 7B-1101.1]). The parent may only be required to pay the attorneys fees if the child is found to be abused, neglected, or dependent, or if parental rights are terminated. The court must consider the parent's financial ability to pay in determining whether to order reimbursement.

**Cases not subject to recoupment.** No other appointed cases are covered by North Carolina's statutes. Thus, although the State incurs appointed counsel expenses in other non-criminal proceedings, such as civil contempt, involuntary commitment, and incompetency proceedings, no statute specifically authorizes recoupment.

It may be permissible for the courts to order recoupment when a person is convicted of criminal contempt, such as when a person willfully fails to pay child support in violation of a court order, because a finding of criminal contempt could be viewed as a conviction. *But cf. State v. Reaves*, 142 N.C. App. 629 (2001) (adjudication of criminal contempt is not prior conviction under structured sentencing); *see also Blue Jeans Corp. v. Amalgamated Clothing Workers of America*, 275 N.C. 503 (1969) (criminal contempt is sui generis—that is, one of kind). For civil contempt, there is no statute authorizing recoupment of attorneys fees. *See* John L. Saxon, McBride v. McBride*: Implementing the Supreme Court's Decision Requiring Appointment of Counsel in Civil Contempt Proceedings*, ADMINISTRATION OF JUSTICE MEMORANDUM No. 94/05 at 6 & n.45 (Institute of Government, May 1994).

**IDS rules.** The IDS rules addressing recoupment are: Rule 1.11 (recoupment of fees in noncapital and noncriminal cases); Rule 2A.4 (capital cases); Rule 2B.3 (appellate counsel in capital appeals); Rule 2C.3 (postconviction counsel); and Rule 3.3 (appellate counsel in noncapital and noncriminal appeals).

### D. Methods of Recoupment

There are essentially three recoupment methods, discussed below.

**Judgment.** G.S. 7A-455(b) provides for entry of judgment against a convicted defendant for the amount of fees found to be due. Although it may use the collection procedures available to other judgment creditors, the State typically does not execute on attorneys fee judgments. Instead, the State recovers the amount due under the judgment through the interception of tax refunds. *See* G.S. 105A-1 through G.S. 105A-16 (Setoff Debt Collection Act). The judgment also becomes a lien against the defendant's real property as provided in G.S. 7A-455(c). In criminal cases involving an adult criminal defendant,

entry of judgment is required when the statutory requirements are met; in other cases subject to recoupment, entry of judgment is in the court's discretion.

**Condition of probation.** In criminal cases, the court may make repayment of attorneys fees a condition of probation. *See* G.S. 15A-1340.37(c) (repayment to State of attorneys fees is permissible form of restitution); G.S. 15A-1343(e) (requiring court to order repayment of attorneys fees as condition of probation unless it finds extenuating circumstances). When a person receives an active sentence of imprisonment, the court may recommend repayment of attorneys fees as a condition of work release or post-release supervision. *See* G.S. 148-33.2(c); G.S.148-57.1(c); *State v. Wingate*, 149 N.C. App. 879 (2002) (permissible for court to recommend to Department of Correction that repayment of attorneys fees be made condition of work release).

**Order to pay clerk.** G.S. 7A-455(a) and (c) provide in criminal cases that if a person is partially indigent and is convicted, the court may order the person to pay a portion of the fees incurred to the clerk of court. It is unclear to what extent, if at all, this method of recovery is being used. The procedure appears to be a recoupment procedure following conviction. It does not appear to authorize the court to require payment by a partially indigent person earlier in the proceedings. (Another statute, G.S. 7A-450(d), requires a person who has been found indigent to advise the court if he or she becomes financially able to secure legal representation. Presumably, the court then may require the person to retain counsel, although it is unclear how often this statute is used.)

In noncriminal cases in which recoupment is authorized and the court requires repayment, the responsible person pays the amount due to the clerk of court. Judgment is entered only if payment is not made at the time of disposition. *See* G.S. 7A-450.3 [amended in 2005, by 2005 N.C. Sess. Laws Ch. 254 (S 594), to repeal the 90-day grace period following an order to pay and before entry of judgment].

In delinquency proceedings in which a responsible person has been ordered to pay attorneys fees incurred in representing a juvenile, the court may hold the person in contempt for failing to pay. *See* G.S. 7B-2002 (authorizing civil contempt for failure to pay); *see generally* G.S. 7B-2706 (authorizing contempt proceeding for failing to comply with order of court). In abuse, neglect, and dependency and termination of parental rights proceedings, the court may not have this authority. *See* 2005 N.C. Sess. Laws. Ch. 254 (S 594) (repealing G.S. 7B-603(c), which had authorized contempt proceedings against a parent or guardian for failing to comply with an order to pay attorneys fees). *But cf.* G.S. 7B-904(e) (authorizing contempt generally for violation of disposition order of court).

### E. Violations of Constitutional and Statutory Requirements

Although North Carolina's recoupment procedures have been found constitutional, individual orders have been stricken as unconstitutional or in violation of statutory requirements. Errors may include:

- Failing to afford the person an opportunity to be heard before imposing the

recoupment obligation (either as a judgment or as a condition of probation). *See State v. Crews*, 284 N.C. 427 (1974) (record failed to show that defendant had notice of and opportunity to be heard on recoupment judgment; judgment vacated without prejudice to State's right to reapply); *State v. Jacobs*, 172 N.C. App. 220 (2005) (judgment vacated where judge informed defendant of his intention to impose attorneys fees before counsel calculated his hours; no notice and opportunity to be heard on total hours or fees imposed); *State v. Washington*, 51 N.C. App. 458 (1981) (to same effect as *Crews*); *State v. Stafford*, 45 N.C. App. 297 (1980) (notice in affidavit of indigency of potential for entry of civil judgment not sufficient; even if notice had been sufficient, defendant was not afforded opportunity to be heard).

- Fixing an amount not supported by the evidence. *See generally State v. Killian*, 37 N.C. App. 234, 238 (1978) (restitution order "must be supported by the evidence" and "reasonably related to the damages incurred").
- Imposing unduly burdensome financial obligations as a condition of probation. *See generally State v. Hayes*, 113 N.C. App. 172 (1993) (defendant's probation could not be conditioned on payment of more than $3,000 per month in restitution, as defendant clearly would be unable to pay that amount); *State v. Smith*, 90 N.C. App. 161 (1988) (on appeal of probationary judgment, court holds that trial court was not authorized to condition probation on payment of total restitution of $500,000 over five years, which was greater than defendant was able to pay), *aff'd per curiam*, 323 N.C. 703 (1989); *see also* G.S. 15A-1340.36(a) (in determining amount of restitution, court must assess defendant's ability to make restitution); G.S. 15A-1343(e) (court not required to make repayment of attorneys fees a condition of probation if extenuating circumstances exist).
- Revoking a person's probation and activating his or her sentence for failing to pay a financial obligation without regard to the person's ability to pay. *See generally Bearden v. Georgia*, 461 U.S. 660 (1983) (unconstitutional for court to revoke probation and imprison person for failure to pay if he or she is unable to do so); *Alexander v. Johnson*, 742 F.2d 117 (4th Cir. 1984) (person cannot be imprisoned for failing to repay attorneys fees as long as default is attributable to his or her poverty); *State v. Hill*, 132 N.C. App. 209 (1999) (trial court erred in revoking probation without considering defendant's disability, which was reason for defendant's failure to make restitution as ordered); STEVENS H. CLARKE, LAW OF SENTENCING, PROBATION, AND PAROLE IN NORTH CAROLINA 24–26 (2d ed. 1997) (discussing cases recognizing that probation may not be revoked for inability to pay and questioning North Carolina cases placing burden of proof on defendant to show inability to pay).

# Appendix 12-1
# Dealing with Conflicts in Criminal Defense Representation*

## I. Sources of Law

### A. North Carolina Rules of Professional Conduct

#### 1. Rules

Rule 1.3 (Diligence): Requires lawyer to act with reasonable diligence in representing a client, which according to comment 1 to rule includes acting with "zeal" on client's behalf.

Rule 1.6 (Confidentiality of Information): Describes confidential information and limits on disclosure.

Rule 1.7 (Conflict of Interest: Current Clients): Regulates simultaneous representation and other conflicts.

Rule 1.9 (Duties to Former Clients): Regulates successive representation of clients (for example, representing a defendant when a former client will be a witness against the defendant).

Rule 1.10 (Imputation of Conflicts of Interest: General Rule): States general rule, with limited exceptions, that no lawyer in firm may knowingly represent client when any lawyer in firm would be prohibited from doing so by Rules 1.7 and 1.9.

Rule 1.16 (Declining or Terminating Representation): Describes grounds for mandatory and permissive withdrawal.

#### 2. Ethics Opinions

There are few ethics opinions about conflicts in criminal defense representation—under the 1973 Code of Professional Responsibility, 1985 Rules of Professional Conduct, or the Revised Rules of Professional Conduct (effective July 24, 1997, and amended Feb. 27, 2003). "CPR" signifies an opinion under the 1973 Code; "RPC" signifies an opinion under the 1985 Rules; "Formal Ethics Opinion" or "FEO" signifies an opinion under the current rules; and "Ethics Decision" refers to an unpublished opinion of the State Bar. Published opinions are available online at www.ncbar.gov.

RPC 65 (July 14, 1989) (public defender office is treated as single law firm for purposes of joint representation).

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*This paper was originally presented by John Rubin at the North Carolina Spring Public Defender Conference in May 2002 and May 2007. The paper has been revised to include developments since then, including the 2003 revisions to the North Carolina Revised Rules of Professional Conduct.

98 Ethics Decision 9 (Oct. 14, 1998) (unpublished opinion states that criminal defense lawyer may not represent defendant when lawyer must cross-examine former client about prior conviction in which lawyer represented former client) (copy attached).

2003 FEO 14 (Oct. 21, 2004) (prosecutor has disqualifying conflict of interest in habitual felon case if, while a defense attorney, he or she represented defendant on prior felony conviction being used to establish habitual felon status and now must inquire into prior conviction; defense attorney has disqualifying conflict of interest in any phase of case if, while a prosecutor, he or she prosecuted defendant on one or more of prior felony convictions).

2010 FEO 3 (Jan 21, 2011) (criminal defense attorney generally may not represent police officer in internal affairs case and defendant in criminal case in which officer is a prosecuting witness; opinion discusses limited exceptions).

## B. Sixth Amendment Right to Effective Assistance of Counsel

### 1. Principles

**Automatic reversal for failure to inquire.** *Holloway v. Arkansas*, 435 U.S. 475 (1978), and cases interpreting it, hold that if trial counsel brings a conflict to the trial court's attention, the trial court must hold a hearing on the issue; failure to do so is reversible error. *Accord State v. Gray*, ___ N.C. App. ___, 736 S.E.2d 837 (2013). *Cf. State v. Hunt*, ___ N.C. App. ___, 728 S.E.2d 409 (2012) (majority finds that voir dire of witness by trial judge was sufficient inquiry into possible conflict of interest and that full-blown evidentiary hearing was not required), *review granted*, ___ N.C. ___, 738 S.E.2d 360 (2013). Further, if the trial court holds a hearing, the court must allow counsel to withdraw unless the possibility of conflict is "too remote to warrant separate counsel." *Holloway*, 435 U.S. at 484. Regardless of whether trial counsel raises the issue, the trial judge must conduct an inquiry if he or she becomes aware of a potential conflict. *See State v. James*, 111 N.C. App. 785 (1993) (trial judge erred in not conducting inquiry into conflict of which it was aware; when potential conflict is raised, trial judge must "take control of the situation"; court orders new trial because record showed on face that counsel's multiple representation of defendant and prosecution witness adversely affected counsel's performance); *see also State v. Mims*, 180 N.C. App. 403 (2006) (trial judge erred in not conducting hearing regarding potential conflict of interest when prosecutor brought issue to judge's attention; another attorney in defense counsel's firm was representing a second defendant on charges arising out of same incident; court remands for hearing under actual conflict standard in *Cuyler* and *Mickens* [discussed below]).

**Actual conflict standard.** *Cuyler v. Sullivan*, 446 U.S. 335 (1980), and cases interpreting it, hold that if the trial court neither knew nor should have known of a conflict, the defendant must show on appeal that an actual conflict adversely affected trial counsel's performance. This standard is obviously more difficult to meet than the *Holloway* standard, although it may be easier to satisfy than the standard for ineffective assistance of counsel in *Strickland v. Washington*, 466 U.S. 668 (1984).

**Impact of *Mickens.*** In a five-to-four decision, the Court in *Mickens v. Taylor*, 535 U.S. 162 (2002), held that the *Holloway* automatic-reversal rule applies only when trial counsel brings the conflict to the trial court's attention; if counsel does not do so, the less protective *Cuyler* rule applies even when the trial court knew or should have known of the potential conflict. *Mickens* states that trial counsel must "object" to continued representation for the *Holloway* rule to apply. However, it may not always be clear to counsel whether it is necessary to move to withdraw—for example, when counsel is not certain of the identity of the State's witnesses or the substance of their potential testimony. It should be sufficient in those instances for counsel to bring the potential conflict to the judge's attention and ask the judge to take appropriate steps. For a further discussion of *Mickens* and ineffective assistance claims based on a conflict of interest, see *supra* § 12.7D, Conflicts of Interest.

### 2. A Poor Guide to What Is Ethically Proper?

There are only a few reported decisions in North Carolina finding that an attorney's conflict of interest warranted reversal of a conviction under the Sixth Amendment. *See State v. Ballard*, 180 N.C. App. 637 (2006) (attorney represented defendant and potential defense witness, and attorney could not call defense witness because testimony could implicate that witness in unrelated criminal charges); *State v. James*, 111 N.C. App. 785 (1993) (attorney represented defendant and key prosecution witness); *State v. Loye*, 56 N.C. App. 501 (1982) (attorney was under investigation for own participation in criminal conduct involving defendant); *see also United States v. Nicholson*, 475 F.3d 241 (4th Cir. 2007) (finding actual conflict of interest). *Cf. State v. Choudhry*, 365 N.C. 215 (2011) (prosecutor, not defense counsel, brought to trial court's attention potential conflict that defense counsel previously represented a State's witness; judge's subsequent inquiry was insufficient to establish valid waiver of conflict by defendant, but defendant did not show actual conflict of interest adversely affecting counsel's performance requiring reversal).

As one commentator has observed, the courts' unwillingness to overturn a conviction on appeal because the defendant was unable to establish that a conflict adversely affected counsel's performance "says little about the ethical propriety of the lawyer's conduct." ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER: PRACTICAL ANSWERS TO TOUGH QUESTIONS at 234 (Rodney J. Uphoff ed., American Bar Association 1995).

On the other hand, State Bar ethical requirements do not always satisfy constitutional conflict-of-interest standards. *See State v. Gray*, ___ N.C. App. ___, 736 S.E.2d 837 (2013) (trial court not relieved of obligation to inquire into potential conflict of interest where State Bar advised counsel that he could proceed with representation).

## C. Cases Involving Disqualification of Counsel by Trial Court

A trial judge may override a client's waiver of a conflict and remove counsel if he or she finds that an actual or serious potential for conflict exists. *See Wheat v. United States*, 486 U.S. 153, 164 (1988) (trial judge "must recognize a presumption in favor of petitioner's counsel of choice, but that presumption may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict"; evaluation of each case

should be left primarily to informed judgment of trial judge); *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) (court rejected State's argument that defendant had waived his attorney's conflict of interest, finding that trial judge did not adequately question or advise defendant and that defendant's right to conflict-free representation was not knowingly, voluntarily, and intelligently waived); *cf. State v. Yelton*, 87 N.C. App. 554 (1987) (potential conflict of interest was not sufficient to warrant interference with constitutionally guaranteed right of criminal defendant to retain and be represented by counsel of choice).

### D. Malpractice Cases

*See Belk v. Cheshire*, 159 N.C. App. 325 (2003) (court holds that criminal defendant has greater burden than in civil legal malpractice case to establish malpractice and that he failed to meet burden); *accord Dove v. Harvey*, 168 N.C. App. 687 (2005); *see also* Harold H. Chen, Note, *Malpractice Immunity: An Illegitimate and Ineffective Response to the Indigent-Defense Crisis*, 45 DUKE L.J. 783 (1996) (discussing whether public defenders and other appointed counsel should have immunity from legal malpractice claims).

## II. What Is a Conflict?

The authorities make the same basic point: *A client is entitled to the undivided loyalty of his or her attorney.* The critical question then, stated broadly, is: *Do you have competing loyalties or obligations that impair your obligation to your client?*

*See, e.g.*, N.C. STATE BAR REV'D RULES OF PROF'L CONDUCT R. 1.7 cmt. 1 ("Loyalty and independent judgment are essential elements in the lawyer's relationship to a client."); ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 4-3.5 Commentary (3d ed. 1993) [hereinafter ABA Standards] ("The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his or her client and free of any compromising influences and loyalties."); *see also* North Carolina State Bar, 2009 Formal Ethics Opinion 9 (Oct. 23, 2009) (describing reasonable procedures for a computer-based conflicts checking system).

## III. Conflicts Involving Single Client

### A. Personal Differences

Personal or strategic differences do not mandate withdrawal unless they affect your ability to represent your client effectively.

*See* REV'D RULE OF PROF'L CONDUCT 1.16(b) (permissive withdrawal rule states that "a lawyer may withdraw from representing a client if . . . (4) the client insists upon taking

action that the lawyer considers repugnant, imprudent, or contrary to the advice and judgment of the lawyer, or with which the lawyer has a fundamental disagreement; or . . . (7) the representation . . . has been rendered unreasonably difficult by the client"); ABA Standard 4-1.6(d) ("qualified lawyers should not seek to avoid appointment . . . except for good cause, such as: . . . the client or crime is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client"); *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 435 (1988) ("At the trial level, defense counsel's view of the merits of his or her client's case never gives rise to a duty to withdraw.").

## B. Taking Position Adverse to Client

The following examples are not always thought of as involving conflicts, but conflict concerns appear to be behind some of the rules.

### 1. Client Perjury

The proper course to take when dealing with client perjury (contemplated or completed) depends on rules and opinions beyond the scope of this paper. However, conflict concerns underlie in part the view that you should seek to withdraw when you believe your client will commit perjury. In that situation, you have a conflict between your obligation as an officer of the court not to present perjured testimony and your obligation to your client to advocate his or her cause and not reveal his or her confidences.

### 2. Physical Evidence

The proper course to take in dealing with physical evidence in your possession is beyond the scope of this paper. If, however, you determine that you have to turn over physical evidence, conflict concerns may bear on whether you stay in the case. The act of turning over physical evidence does not necessarily create a conflict requiring withdrawal. A conflict may arise, however, if you end up as a witness in regard to that evidence. Rule 3.7 of the Revised Rules of Professional Conduct prohibits a lawyer from acting as an advocate and witness in the same case except in certain circumstances. Underlying that rule, in part, are concerns about the potential conflict between representing, and being a witness against, a client.

## C. Taking Position Adverse to Lawyer

The classic example of this type of conflict is challenging a conviction based on the attorney's own ineffectiveness. *See, e.g., United States v. Del Muro*, 87 F.3d 1078 (9th Cir. 1996) (per curiam) (reversible error for court to require trial counsel to represent defendant on motion for new trial alleging counsel's own ineffectiveness).

## IV. Conflicts Involving Representation of Multiple Clients

### A. Representing Co-Defendants

#### 1. Permissible but Rarely Advisable

*See* ABA Standard 4-3.5(c) ("The potential for conflict of interest in representing multiple defendants is so grave that ordinarily defense counsel should decline to act for more than one of several codefendants . . . ."); REV'D RULE OF PROF'L CONDUCT 1.7 cmt. 23 (reaching same conclusion); FED. R. CRIM. P. 44(c) (in federal prosecutions, court must inquire when co-defendants are represented by same counsel and must take measures to protect each defendant's right to counsel unless there is good cause to believe no conflict is likely to arise); Gary T. Lowenthal, *Joint Representation in Criminal Cases: A Critical Appraisal*, 64 VA. L. REV. 939, 950 (1978) [hereinafter "Lowenthal I"] (survey of 136 public defender offices showed that 70% of offices strongly disfavored joint representation and 49% never represented more than one defendant in multiple defendant cases).

The above ABA Standard (and accompanying commentary) states, without explanation, that it is permissible to represent co-defendants at preliminary proceedings, such as bail hearings. Conflicts certainly could arise, however, at these and other pretrial proceedings.

#### 2. North Carolina Standard

Under Rule 1.7(a) of the Revised Rules of Professional Conduct, you may not represent a client if the representation involves a "concurrent conflict of interest" unless otherwise permitted by the rule. A concurrent conflict exists if (1) the representation of one client is directly adverse to another client or (2) the representation of a client may be materially limited by the lawyer's obligations to another client. Such representation is permissible only if the conditions in subsection (b) of Rule 1.7 are satisfied, including that:

1. you reasonably believe you can provide competent and diligent representation to each client, and
2. all of the clients give informed consent, confirmed in writing.

*Client consent alone is insufficient*. You must reasonably believe that the clients will not be prejudiced by joint representation.

#### 3. Withdrawal after Undertaking Representation

If your office undertakes to represent co-defendants and subsequently determines that common representation adversely affects one of the clients in violation of Rule 1.7, the office may need to withdraw from both cases. Continued representation of one client may violate the office's obligations to the client it no longer represents, who occupies the status of a "former client" under the rules. *See* REV'D RULE OF PROF'L CONDUCT 1.7 cmt. 4 ("Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to

the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client.").

Rule 1.9, discussed in V. below, sets forth an attorney's duties to former clients and, except as permitted by the rule, prohibits a lawyer from:

1. representing a person in the same or substantially related matter if that person's interests are materially adverse to the interests of a former client, or
2. using confidential information to the disadvantage of a former client or revealing confidential information of a former client.

Even if it is permissible for the office to keep one of the cases, it may be difficult to adopt a consistent policy on which case to keep. Do you keep the case you undertook first? The case that requires the most attorney time and skill? The case you're most likely to win? *See* Lowenthal I at 954–56 (discussing possible policies and their deficiencies).

#### 4. Release of Client Files

*See* RPC 153 (Jan. 15, 1993) ("[I]n cases of multiple representation a lawyer who has been discharged by one client must deliver to that client as part of that client's file information entrusted to the lawyer by the other client.").

### B. Representing Defendants and Client Witnesses

Problems similar to those arising with joint representation of co-defendants may arise when a current client in one case is a witness against another client in an unrelated case.

Under Rule 1.7(a)(2) of the Revised Rules of Professional Conduct, a lawyer may not represent a client if the representation may be materially limited by the lawyer's responsibilities to another client unless, as required under Rule 1.7(b), the lawyer reasonably believes that the representation will not be adversely affected and both clients consent. *See also State v. Ballard*, 180 N.C. App. 637 (2006) (trial court erred in denying defense counsel's motion to withdraw; counsel represented defendant and defense witness with potentially exculpatory information but witness's testimony could implicate him in an unrelated crime and counsel therefore could not call witness); *State v. James*, 111 N.C. App. 785 (1993) (defendant's Sixth Amendment right to counsel was violated by attorney's representation of defendant and key prosecution witness); REV'D RULE OF PROF'L CONDUCT 1.7 cmt. 6 (discussing conflicts involved in cross-examining current client who is witness against another current client).

*See generally* Gary T. Lowenthal, *Successive Representation by Criminal Lawyers*, 93 YALE L.J. 1, 8–9 (1983) [hereinafter "Lowenthal II"] (survey revealed that in only 2.8% of cases did particular public defender office represent defendant when witness against defendant was current client; low percentage reflected office's policy of withdrawing when current client is witness against another client).

### C. Inconsistent Legal Positions in Unrelated Cases

In rare circumstances, a "positional conflict" may exist—that is, a situation in which clients have opposing interests in unrelated matters. *See Williams v. State*, 805 A.2d 880 (Del. 2002) (court holds that it would be unethical for lawyer to advocate conflicting legal positions in two capital murder appeals pending before same court; court therefore allows lawyer to withdraw from one of cases); REV'D RULE OF PROF'L CONDUCT 1.7 cmt. 24 (discussing possibility of positional conflict).

### D. Excessive Caseload

The burden on an attorney of coping with an excessive caseload may be thought of as creating a conflict between clients. Courts may be unwilling to characterize such a situation as a conflict, however, which could trigger the *Holloway/Cuyler* rules on ineffective assistance rather than the *Strickland* standard. *See generally* 3 LAFAVE, CRIMINAL PROCEDURE § 11.9(a), at 868 & n.12.

## V. Conflicts Involving Successive Clients

### A. The Problem

Representing a current client in a case in which a former client is a witness may give rise to a conflict between an attorney's obligation to

- represent the current client diligently while
- maintaining the confidences of the former client.

### B. Potential Conflict #1: Same or Substantially Related Matters

**Grounds for withdrawal.** Rule 1.9(a) of the Revised Rules of Professional Conduct establishes a general protective rule regarding successive representation. It prohibits successive representation in the *same or substantially related matter* if the former and current client's interests are materially adverse unless the former client gives informed consent, confirmed in writing. Although the rule states that only the former client must consent, you may want to obtain the consent of both the former and current client since both are potentially affected.

**Meaning of "same or substantially related."** When is a matter the "same or substantially related" for purposes of Rule 1.9(a)?

The rule clearly applies to situations in which an attorney represented the former client in an earlier stage of the case—for example, if an attorney represented two co-defendants initially and withdrew from representing one of them—because the representation would involve the "same" matter.

The rule likewise applies to situations involving the same events or transactions even though the cases are brought separately. A matter is "substantially related" if it involves "the same transaction or legal dispute." REV'D RULE OF PROF'L CONDUCT 1.9 cmt.3.

The rule also may apply to situations in which there is a substantial relationship between the earlier representation and the issues in the current case, even though the former and current cases involve unrelated transactions. Factors to consider include: (1) Was the earlier representation brief or extended? (2) Did you acquire confidential information that could be useful in the current case? (3) How important is the former client to the prosecution's case against your current client? (4) How important is it for you to challenge the former client's credibility as a witness? These factors may warrant withdrawal from the current case under the "substantially related" rule even if you might be able to represent the current client without actually using or disclosing confidential information in violation of Rule 1.9(c) (discussed in more detail below). *See* Lowenthal II at 38 (discussing considerations); *see also* REV'D RULE OF PROF'L CONDUCT 1.9 cmt. 3 (a matter is "substantially related" if there is "a substantial risk that information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter").

### C. Potential Conflict #2: Use or Disclosure of Confidential Information

**Grounds for withdrawal.** Rule 1.9(c) prohibits a lawyer from using information relating to the representation of a former client to the former client's disadvantage, or from disclosing information relating to the representation of a former client. Rule 1.6 elaborates on a lawyer's duty to maintain confidentiality, protecting not only attorney-client communications but also other information acquired in the course of the professional relationship with the former client. *See* REV'D RULE OF PROF'L CONDUCT 1.6 cmt. 3 (defining duty of confidentiality), cmt. 19 (duty of confidentiality continues to apply after lawyer-client relationship ends).

**Exceptions.** There are two main exceptions to the prohibition on use or disclosure:

1. Under Rule 1.6(a), if the former client consents to disclosure, an attorney may use or reveal the information.
2. Under Rule 1.9(c), if the information has become "generally known," an attorney may use or reveal the information.

Although these exceptions meet counsel's obligation to the former client, their satisfaction may not meet counsel's obligation to the current client and may not be sufficient to allow continued representation of the current client. *See State v. Gray*, ___ N.C. App. ___, 736 S.E.2d 837 (2013) (counsel's former client, whom State intended to call as witness against counsel's current client, consented to use of any confidential information obtained during previous representation, but current client refused to waive potential conflict; trial court's failure to inquire into potential conflict as to current client required reversal even though State Bar advised counsel that former client's waiver of conflict allowed him to proceed with representation of current client).

**Cross-examination about prior conviction.** An unpublished opinion of the North Carolina State Bar, 98 Ethics Decision 9 (Oct. 14, 1998) (attached), states that an attorney has a conflict of interest, requiring withdrawal or client consent, if he or she would need to cross-examine a former client about a prior conviction resulting from a case in which the attorney represented the former client. The opinion states that although the conviction may be "generally known" within the meaning of Rule 1.9(c), cross-examination about the conviction would inevitably lead to inquiry into additional, confidential facts related to the conviction that are not a matter of public record. Under the imputed conflict principles in Rule 1.10, this opinion also may apply when another attorney in the office handled the previous case (although note inquiry and opinion # 3 in the opinion).

The concern about confidentiality seems both over- and under-inclusive. It may be over-inclusive because generally cross-examination about a prior conviction is limited to the fact of conviction (as required by Evidence Rule 609 on impeaching a witness by a prior conviction), which is a matter of public record. Cross-examining a former client about a conviction in a case the attorney handled may still be potentially awkward, however, and may warrant withdrawal. The opinion is under-inclusive because the only question it addresses involves cross-examination. Rule 1.9(c) prohibits an attorney from using confidential information before trial as well as during trial. For example, in plea bargaining an attorney could not reveal confidential information of a former client in an effort to convince the prosecution that its case against the attorney's current client is weak.

The unpublished State Bar opinion, like an unpublished appellate court decision, provides guidance to attorneys, but it is not binding precedent. It is not clear why the State Bar decided not to publish the opinion, but it may be willing to consider other approaches in light of the demands and requirements of public defender work.

A later published opinion repeats the concern expressed in the unpublished opinion about cross-examination regarding a prior conviction. However, that opinion deals with a narrower set of facts—namely, the limitations in habitual felon cases on defense attorneys who become prosecutors and vice versa—and may be limited to that context. *See* 2003 FEO 14 (Oct. 21, 2004) (prosecutor has disqualifying conflict of interest in habitual felon case if, while a defense attorney, he or she represented defendant on prior felony conviction being used to establish habitual felon status and now must inquire into prior conviction on cross-examination during habitual felon phase; opinion notes that prosecutor could remain in case if he or she only presented certified copy of conviction and cross-examination was unnecessary; opinion also notes that defense attorney has disqualifying conflict of interest if, while a prosecutor, he or she prosecuted defendant on one or more of prior felony convictions).

### D. Potential Conflict #3: Diligence on Behalf of Current Client

Rule 1.3 provides that an attorney must act with reasonable diligence on behalf of a client. As indicated in the commentary, this rule includes the obligation to act with zeal on the client's behalf. In the context of successive representation, a conflict may arise if the attorney's obligations to a former client affect the attorney's zealous representation of the

current client. For example, to avoid treading on confidential information, an attorney might be too restrained in cross-examining a former client.

### E. Reviewing Former Client's Files

In my opinion, an attorney should review a former client's file before determining the appropriate steps to take. I see no ethical prohibition on reviewing a former client's file. If after reviewing the file the attorney believes that a conflict exists—for example, the attorney learns of confidential information that would be useful in representing the current client—the attorney should obtain the necessary client consent or withdraw.

Not reviewing the former client's files seems problematic with respect to both the current and former client. An attorney's obligation to zealously represent the current client under Rule 1.3 includes conducting a full factual investigation, which would seem to include reviewing the office's files. Further, without looking at the former client's file, an attorney might continue to represent the current client even though a conflict exists. Information in the former client's file may be imputed to the attorney under Rule 1.10 regardless of whether the attorney actually knows of it. *See* RPC 65 (July 14, 1989) (imputing conflict in public defender's office in joint representation situation). *But see generally* 3 LAFAVE § 11.9(a), at 874 (although some courts impute conflicts in successive representation situation, others allow successive representation if public defender office utilizes firewall that keeps information of former client from current attorney).

Not everyone may agree with this position. For example, in Lowenthal II at 13–16, the public defender offices surveyed had varying policies on access to a former client's files:

| | |
|---|---|
| Office will not represent current defendant regardless of what is in former clients' files | 21% |
| No access permitted to former clients' files | 15% |
| Access to and use of former clients' files with supervisor's permission | 3% |
| Access only by lawyer who represented former client | 3% |
| Access and use permitted for all trial lawyers | 58% |

The surveys revealed additional policies on use of information from former clients' files. Some offices disallowed use of attorney-client communications but allowed use of other information obtained during the course of representing the former client; this approach, however, may conflict with North Carolina's ethics rules, which define confidential information as including information obtained in the course of representation. Other offices allowed the use of information if it could be obtained from other sources—a kind of "independent discovery" rule for conflict situations. Several offices left the matter to the individual attorney's judgment. *See* Lowenthal II at 16–17.

## VI. Procedural Matters

### 1. If I am an assistant public defender, when do I have to get the court's permission to withdraw?

Under the Public Defender plans governing appointment of counsel in Public Defender districts, the court is supposed to assign all of the indigent criminal cases to the Public Defender (although in some districts the court may assign a case to a private attorney on the approved list if the court discovers a conflict before sending the case to the Public Defender). If the Public Defender discovers a conflict before an attorney in the office undertakes representation, the Public Defender need not move to withdraw. Instead, depending on the local Public Defender appointment plan, the Public Defender either makes the assignment to a private attorney or returns it to the court for assignment from the approved list. Once an attorney in the Public Defender's office has undertaken representation (for example, the attorney has appeared), the attorney should formally move to withdraw if withdrawal of the office becomes necessary. Under the local plan, the court or the Public Defender then assigns the case to a private attorney on the approved list.

### 2. Do I need to withdraw if I am an assistant public defender and the case is being reassigned to another assistant public defender in my office?

Probably not. While an ethics opinion, RPC 58 (July 14, 1989), states that the court and client must consent when an appointed private attorney wishes to give a case to another attorney in his or her firm, the opinion does not appear to apply to appointments of the Public Defender, who appears through assistant public defenders from his or her office. Further, the opinion apparently was intended to prevent attorneys who are not on the appointed list from handling cases without permission. This rationale would not seem to apply to reassignments within a full-time Public Defender's office, in which all of the attorneys do criminal defense work.

### 3. Do I have to disclose confidential information to support a motion to withdraw?

In most instances, no. Ordinarily, you need only indicate to the court that you have a conflict and perhaps the general basis for the conflict—for example, a former client is a witness in the current case. In some instances, a trial court might hold an in camera hearing to inquire further. *See State v. Yelton*, 87 N.C. App. 554, 557 (1978). The U.S. Supreme Court has cautioned, however, that trial courts should be wary of infringing on privileged attorney-client communications. *See Holloway v. Arkansas*, 435 U.S. 475, 487 & n.11 (1978).

### 4. What sort of showing should be made of client consent?

Rules 1.7 and 1.9 require that the client give his or her informed consent, confirmed in writing. "Informed consent" means the agreement of the client after the lawyer has communicated adequate information and explanation to the client. *See* REV'D RULE OF PROF'L CONDUCT 1.0(f). "Confirmed in writing" means a writing by the affected client or a

writing by the lawyer to the client confirming an oral consent by the client. *See* REV'D RULE OF PROF'L CONDUCT 1.0(c). You should obtain consent from all affected clients even if not explicitly required by the rules. In addition, although apparently not required, you may want to put consents or waivers of conflicts on the record. Advice of separate counsel is generally not required. *See generally* 3 LAFAVE, CRIMINAL PROCEDURE §11.9(c), at 906 (noting, however, that some courts have encouraged codefendants to consult with independent counsel before waiving conflict in joint representation situation).

### 5. May a prosecutor move to disqualify a defense attorney on the basis of a conflict?

Yes, but the court should scrutinize more carefully motions brought by an adversary in the proceeding. *See Yelton*, 87 N.C. App. 554, 556–57 (opposing party may not use motion to disqualify as technique to harass). If the prosecutor brings such a motion, you may ask the court to require the prosecutor to show the basis for the conflict. For example, if the disqualification motion is based on the prosecutor's claim that a former client will be a witness against the defendant you represent, ask that the prosecutor identify the evidence to be offered by the witness so that an assessment of any conflict can be made.