

SB 2022
Senate Appropriations
January 12, 2021
Testimony of Travis W. Finck, Executive Director, NDCLCI

Good Afternoon. Chairman Holmberg, members of the Committee, my name is Travis Finck and I am the Executive Director of the North Dakota Commission on Legal Counsel for Indigents (hereinafter “the Commission”).

AGENCY STATUTORY RESPONSIBILITIES

The Commission is the agency which provides the attorneys and related services to indigent persons when there is a constitutional, statutory, or rule-based right to counsel at public expense. The Commission is governed by North Dakota Century Code Chapter 54-61. Section 54-61-01 provides that the Commission was “established for the purpose of developing and monitoring a process for the delivery of state-funded legal counsel services for indigents which are required under the Constitution of North Dakota and the United States Constitution and any applicable statute or court rule. The Commission shall provide indigent defense services for indigent individuals determined by the court to be eligible for and in need of those services pursuant to standards and policies of the commission governing eligibility for such services.”

The Commission has established Guidelines to Determine Eligibility for Indigent Defense Services (hereinafter “Guidelines”). For a person to have counsel provided by the Commission, the person must apply for services, be found to be “indigent” and it must be a type of case in which one has a right to counsel at public expense. Application for services is to be made on the Commission’s standard forms. However, the Commission does not make the determination of whether a specific applicant is eligible for services. Pursuant to the statute, the court makes the determination of eligibility.

Under the Guidelines, indigency is determined by looking at income resources, non-income resources (assets) of the applicant’s household, and exceptional factors that might otherwise justify a finding of indigency. Income guidelines are set at 125% of the federal poverty level threshold as defined by the U.S. Department of Health and Human Services.

The Commission’s mission is “to provide high quality, professional, and effective legal representation to eligible clients ... at reasonable cost to the community.” Services should be provided only to those persons who are eligible. It continues to be the policy of the Commission

to seek additional screening and review of applications by the court in questionable cases. Additional screening and review is also sought when it appears that a person may no longer be eligible, such as when someone who was in jail and temporarily unemployed, has bonded out and is now likely employed, and would no longer be considered indigent. To help ensure that services are provided only to eligible individuals, the Commission also provides training to those persons who make the eligibility determinations. For example, the undersigned provided training to many district court judges and clerks of court on January 5, 2020 over a Zoom call.

DELIVERY OF SERVICES

The Commission provides services through its employees in eight public defender offices across the state and through its monthly and conflict contractors. By statute, the Commission is required to contract for services at a minimum level of fifty percent of its biennial caseload. During fiscal year 2020, 68% of case assignments were handled by contract attorneys; 32% were handled by public defenders.

The Commission's monthly contractors each take a specified portion of cases in a geographic region. The conflict contractors take cases on a case assignment by case assignment basis. The Commission's public defenders/staff attorneys take case assignments in the geographical area in which their office is located, conflict matters in nearby districts and in other areas across the state when needed.

The indigent defense system is administered through the agency's administrative office in Valley City. The administrative office coordinates the delivery of indigent services throughout the state, including contracting with attorneys to provide services, staffing the public defender offices, providing support services and providing training to attorneys and staff.

CASE ASSIGNMENTS

The Commission uses the term "case assignment" rather than "case" when referring to assignments and has defined the term based on case type (such as criminal, probation revocation, juvenile delinquency, etc.). "Case assignment" is used so that assignment numbers from different areas of the state will mean the same thing across the state. For example, a criminal case assignment includes all cases arising from the same event whether the prosecution has charged the defendant in multiple complaints, each with its own case number, or whether the defendant has been charged in one complaint with multiple counts, but one case number. A criminal case assignment that includes a felony is considered to be a felony assignment, even if

some of the charges in the assignment are misdemeanors. Thus, it is one felony case assignment where the attorney represents a person charged with a felony DUI and with a misdemeanor driving under suspension charge, both arising from the same traffic stop.

The number of case assignments the agency handles has appeared to level off within the past few biennia. See Attachment 1. The case assignment numbers for FY 2020 dipped significantly which we deduce is an effect of the COVID 19 pandemic. However, we have seen an increase over normal number of cases assignments in the first few months of the current fiscal year. Furthermore, we have noticed a significant increase in the number of violent crimes to which the agency has been required to provide counsel, specifically homicide cases. As of January 5, 2021, the Commission was actively assigned to 27 open criminal case assignments with murder as the primary charge. The increased severity of a case assignment correlates directly with increased cost, as they often require investigators, experts, more attorney time, etc.

It is always difficult to forecast what the case assignment numbers will be in a future time period. The Commission has no control over the number of crimes committed and investigated, the number of persons charged, the charges filed and the number of persons who apply for services and are found eligible

AGENCY FUNDING

Traditionally, the Commission has been funded from two sources: the general fund and “fund 282” (the indigent defense administration fund). The indigent defense administration fund is funded through collection of two statutory fees paid by criminal defendants:

- 1) A \$35 indigent defense application fee pursuant to N.D.C.C. § 29-07-01.1; and
- 2) The Commission’s portion of a \$100 court administration fee (the indigent defense/facility improvement fee) pursuant to N.D.C.C. § 29-26-22(2). This fee is split pursuant to statute between the indigent defense administration fund and the court facilities improvement and maintenance fund, with the first \$750,000 collected per biennium going to the indigent defense administration fund, the next \$460,000 going to the court facilities improvement and maintenance fund, and any additional collections are split equally between the two.

The District Courts also have the authority to order reimbursement of attorney fees, however, any attorneys’ fees that are recouped go into the general fund, not fund 282. Those funds are not collected by the Commission, they are collected and accounted for by the Court.

The collection of the application fee and indigent defense/facility improvement fees is not guaranteed. District Judges, who impose the fees, have the discretion to impose or waive the fees in any particular case. It does appear as if this year the collections deposited into the special fund will be less than the previous biennia. See Attachment 2. We believe this is attributable to the slowdown in court proceedings related to COVID 19 procedures.

The major components making up the “base level” appropriation amount for the Commission are salaries and benefits, professional fees and services (legal fees), ITD expense, and rent of office space. As of November 30, 2020, these comprised 96.1 % of our expenditures for the biennium.

The Commission was directed to submit a budget containing a 10% reduction in general fund. The Commission felt it would be incapable of providing constitutionally mandated services under such a reduction and requested the Governor restore approximately half of the reduction, or \$919,000. The Governor in his executive budget did grant the Commission’s request and proposed the agency base budget general fund dollars be restored by \$919,000. When you consider other adjustments for salary increases proposed by the Governor, Microsoft 365 upgrades and the restoration of half of the reduction, there is a total general fund reduction of \$664, 959 in the Governor’s Executive Budget recommendation.

There are two bills that have been or will be introduced this session that will have a fiscal impact on the Commission. The first is HB 1035 which is the juvenile court rewrite. In the proposed HB 1035, the Commission will provide counsel to all children regardless of income of the parents. It is near impossible to anticipate the costs associated with this measure. However, we worked with the Court and compared their numbers to our database to estimate a fiscal impact of \$450,000 per biennium.

Additionally, it is our understanding the Department of Corrections and Rehabilitation will be seeking to expand the pre trial services program. In 2019 legislative session, the Legislature funded DOCR to create a pre trial services program. Necessarily, appointment of counsel is an essential part of the program. The Commission did not receive any funding to meet any of the additional administrative costs when the program was launched. If the program is expanded there will be a need for funding.

The number of full-time equivalent positions has remained the same in the Governor’s recommended budget. The agency is currently allotted 40 FTE.

The agency currently receives no federal funds or grants.

ACCOMPLISHMENTS AND CHALLENGES

The Commission has been able to accomplish some amazing things this current biennium thanks to the tireless dedication of the employees and contractors of the Commission. We have served as an integral part in the rollout of the pretrial service pilot program. The Commission did not receive any increase funding in relation to the program but have been able to successfully find attorneys to appear at initial appearances with clients. We have worked with the Court and the Pre-Trial service division of DOCR Parole and Probation to streamline a method of individuals applying for counsel. We have worked out orders in each pilot district to allow for earlier application, determination and appointment of counsel.

The Commission also opened a public defender office in Devils Lake, ND. The office was opened in the spring of 2020. The Commission recognized a need for an office due to the inability to contract with private counsel given the current contract rate. The office was established without extra FTE. We were able to transfer an FTE position from another office for an attorney position and are currently staffing the office with a temporary non-classified employee.

The Commission also moved all assignment of counsel to the Valley City administrative office in 2020. In previous years, the public defender office in a Judicial District would make the assignments. Contract attorneys or public defenders would then enter the information into our case reporting system. We have now streamlined this process and we assign all cases and enter all information. This has allowed us to make more informed up to date decisions on placement of resources. We have been able to take over the assignment of counsel because we have gone to an online cloud-based case management system. This system allows us to receive data from the court and assign counsel in a timelier manner across the state. Further, it has allowed us to provide uninterrupted services to the citizenry as many employees have had to work from home.

The two biggest challenges we face are the same now as it has been the last two legislative sessions, employee turnover due to compensation and contractor rate of pay.

The budget requests that were submitted to the Governor was a bare bones budget necessary to provide mandated services. Any further reduction to the base budget would likely result in us having to seek a deficiency appropriation. The Commission recognized the realities

of the world in only asking for a restoration of part of the decrease and did not ask for any other special requests. In the past, the agency has sought additional employee and contractor compensation to address turnover. The proverbial can has been kicked down the road but as turnover rates continue to vastly outpace other similar state agencies, we are running out of real estate.

Our system relies upon the use of private attorneys to serve as contractors to handle cases for the Commission. Our current rate of compensation for contractors is \$75 per hour and has not been increased since 2012. In comparison to Federal Criminal Justice Act appointments (federal court version of contract public defense) we continue to lag significantly behind. In calendar year 2020, the Federal CJA panel rate was \$152/hour, more than double the rate we are able to offer. It was recommended in 2019-2021 executive recommendation to increase funding for the contractors by \$5 per hour. However, the legislature did not fund the recommendation.

The Commission had no formal recommendations in its last financial audit.

I want to thank the Committee for your time and support. I assure you the Commission has always been good stewards of the funds entrusted to us and we will continue to do so.

I am happy to answer any questions you may have. The Commission's Deputy Director Todd Ewell and Account Budget specialist Aaron Petrowitz are also present for any questions.

Respectfully submitted this 12th day of January 2021

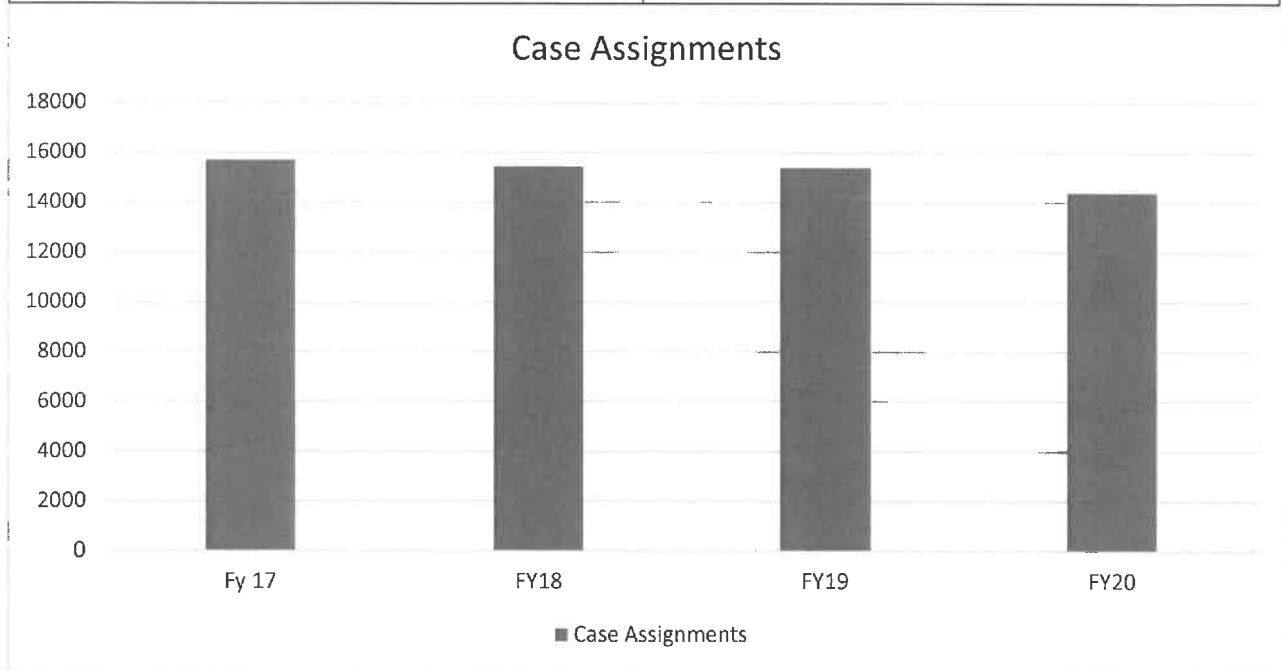
A handwritten signature in dark ink, appearing to read 'Travis W. Finck', is written over a horizontal line.

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ATTACHMENT 1

Fiscal Year	Number of Case Assignments
FY 2017	15700
FY2018	15452
FY2019	15395
FY2020	14395



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ATTACHMENT 2

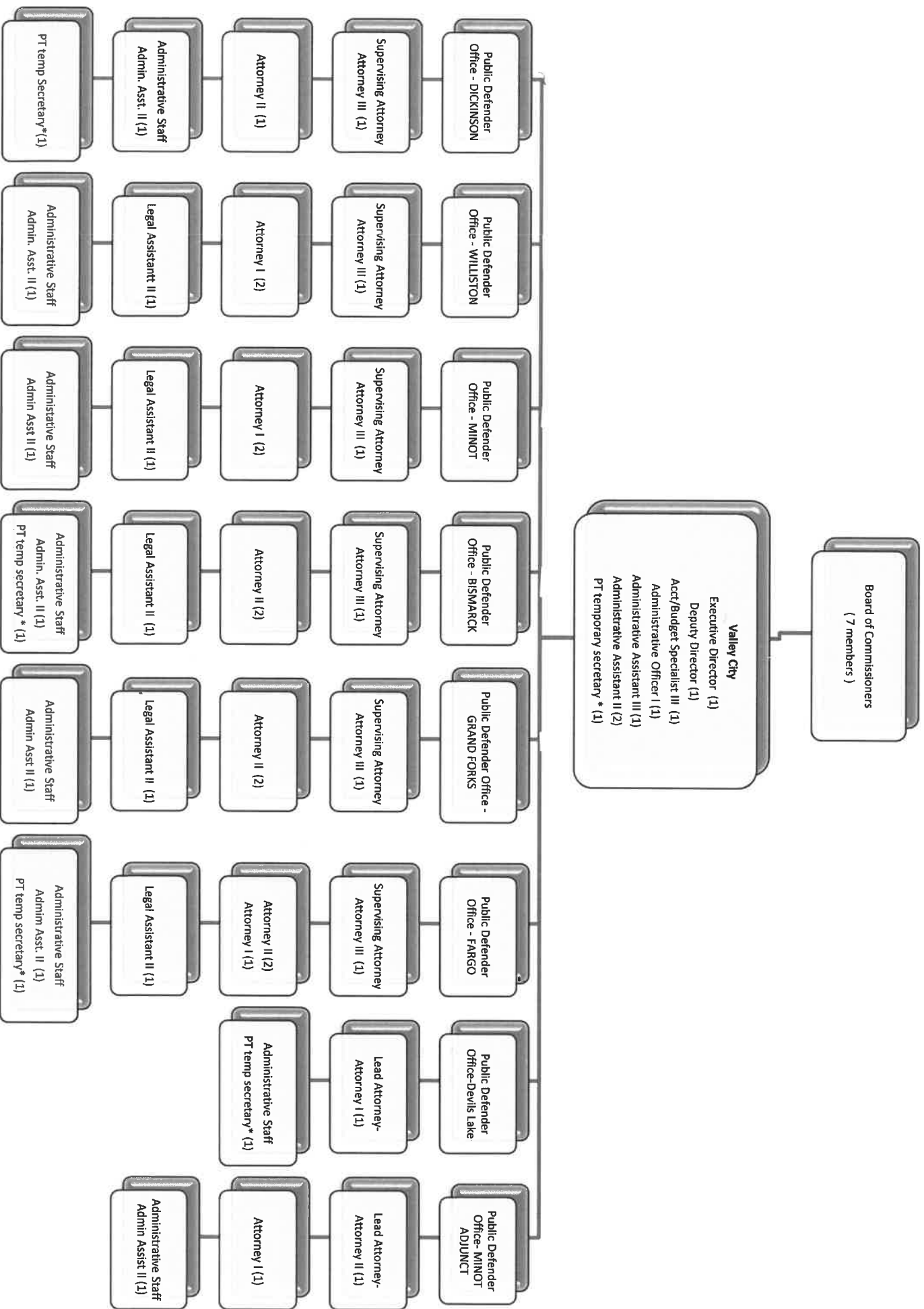
Biennium	Indigent Defense Facility Fee
2013-2015	\$1,722,499.27
2015-2017	\$1,502,355.27
2017-2019	\$1,503,823.46
2019-2021 (projected)	\$1,256,853.17



Biennium	Application Fee Collection
2013-2015	\$299,344.49
2015-2017	\$329,457.14
2017-2019	\$361,434.02
2019-2021 (projected)	\$289,052.59



Organizational Chart ND Commission on Legal Counsel for Indigents



* not an FTE position; temp, non-classified