

HB 1022  
House Appropriations  
Government Operations Division  
January 13, 2023  
Testimony of Travis W. Finck, Executive Director, NDCLCI

Good Morning Chairman Monson, 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. Most of the services provided by the Commission are in circumstances in which an individual is charged with a crime and jail time is a possible sanction, in juvenile matters, post-conviction matters and appeals of all the above.

There are a few exceptions to which an individual is presumed to be eligible for our services. The 67th Legislative Assembly passed landmark legislation in HB 1035 and amended the Juvenile Court Act. In doing so, the legislature made a commitment to children and families stating all children are presumed indigent, regardless of their income or the income of their parents.

When an individual desires counsel or services, 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 are 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 recently provided training to newly elected District Court Judges.

#### DELIVERY OF SERVICES

The Commission is administered through the Valley City administrative office. The administrative office coordinates the delivery of indigent defense services, assigns counsel, contracts with private attorneys to provide services, staffs the public defender offices, provides support services, and provides training to agency attorneys and staff. Attorneys and indigent defense services are provided through full-time state public defenders in seven offices across the state and through private contractors. The public defender offices are led by a supervising/lead attorney who reports directly to the Deputy Director. The Deputy Director then reports to the Director. All staff in the public defender offices report to the supervising/lead attorney in that office. Our supervising/lead attorneys are provided below:

Williston Public Defender Office: currently vacant  
Dickinson Public Defender Office: Mr. Kevin McCabe  
Bismarck-Mandan Public Defender Office: Mr. Justin Balzer  
Fargo Public Defender Office: Mr. Monty Mertz  
Grand Forks Public Defender Office: Mr. David Ogren  
Devils Lake Public Defender Office: Mr. Daniel Howell  
Minot Public Defender Office: Mr. Eric Baumann  
Minot Adjunct Public Defender Office: Office was closed 2022

The Commission also provides services through contracts with private firms. This is achieved in the form of monthly contracts for a specified number of cases for a predetermined amount of compensation. In addition, the agency contracts with conflict contractors who take conflict cases on a case assignment by case assignment basis. The current hourly rate for contractors is \$75 per hour. Our rate has remained constant while other organizations that contract with attorneys for services have continued to adjust their rates. This has caused us to fall further and further behind the rate paid to federal panel attorneys and continue to be significantly less than salaries earned in the private sector.

North Dakota Century Code section 54-61-02.1 mandates the Commission “shall contract for public defender services at a minimum level of fifty percent of its biennial caseload.” During fiscal year 2022, 72% of case assignments were handled by private contractors with 28% handled by full time public defenders.

#### 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 rebounded from the pandemic when courts and cases were slowed. FY 2021 was one of the busiest year the Commission has seen to date. FY 2022 remained at a similar level higher than had been previously seen. See Attachment 1. We have also seen an increase over the normal number of case 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. 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. 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 and collected by the Courts:

- 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. During FY 2022, the Indigent Defense Administration Fund received \$154,547.65 in application fees and \$750,000 from the Court Administration fee.

The District Courts also have the authority to order reimbursement of attorney fees pursuant to NDCC 29-07-01.1 (2). 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 case. A table outlining collections is provided below as attachment 2.

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 2022, these totaled 96.5 % of our expenditures for the biennium.

#### AUDIT FINDINGS

The Commission recently underwent an audit by the State Auditor's office in which no findings were made.

#### ACCOMPLISHMENTS

Our attorneys, staff, and contractors continue to do incredible work against all odds and for less pay than their counterparts. The ability to present this budget is an honor and a privilege to represent such a dedicated group of individuals.

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 new protection of children and families in the new Juvenile Court Act. The Commission asked for funds to offset the costs of the Juvenile Court act changes and increases in number of cases. The request was made based upon an estimate of an increase of 50% in the number of juvenile cases. The actual increase for FY 2022, which was the first full year of implementation of the new changes, was 46%.

The Commission has also played a major role in the expansion of the pretrial service program housed within the Department of Corrections. The Commission did not receive any increase funding in relation to the program but has been able to successfully find attorneys to appear at initial appearances with clients. Additionally, my assignment staff have spent numerous extra hours fitting into their already tight assignment schedules the assignment of counsel. We have worked with the Court and the Pre-Trial service division of

DOCR Parole and Probation to streamline a method of screening 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 trains all new pre-trial service agents on the guidelines for eligibility for public defense services.

The Commission participated last session in the first update to the mental competency laws in North Dakota in a very long time. We continue to be involved with the Supreme Court of North Dakota in helping to implement these new laws and look at ways to deal with the increases in mental health related issues on our court system. The undersigned had the privilege of representing the State of North Dakota on the national level by participating in the National Center for State Courts Task Force on State Court Response to Mental Health.

The Commission continues give North Dakota a presence on the national level. We have worked with partner organizations to bring world class training to North Dakota, recently holding an event in September of 2022 at the University of North Dakota. Further, we continue to consult with other states and leaders in public defense to make sure the Commission provides the most constitutionally effective services we can.

#### CHALLENGES

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. We can no longer afford to continue to turn a blind eye to these two issues as we are near a state of constitutional failure. I recently had the misfortune of having to provide notice to the Court in the Northwest Judicial District, that our three attorney office in Williston was vacant. We have now hired an attorney to work there who is brand new to the practice of criminal law. I informed the Court in the event we do not have enough contract attorney slots to cover the demand, we would have to implement a prioritization plan identifying what cases receive counsel and those that would not. It is worth noting that other states have had to implement such plans, and several have been sued for doing so. We unfortunately are left with no choice.

We have consistently brought information to this legislative body indicating we are vastly behind our counterparts in county government prosecutor offices in attorney salaries. Additionally, our staff continue to lag behind similarly classified staff in other government

agencies or branches. This is no longer sustainable. The American Bar Association's 10 Principles of a Public Defense Delivery System provide 10 black letter rules for an efficient system. Principle 8 provides there should be "parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system". This currently does not exist in North Dakota as we lose many qualified lawyers we hire and train to prosecutor offices. In fact, most of the attorneys in our agency could quit today and walk across the street to the State's Attorney office and receive a sizeable increase in salary. We did submit to the Governor a budget request to remedy this situation.

Because of the lack of pay parity, we have been unable to recruit or retain qualified attorneys to our positions. We currently have 4 vacancies out of 20 total full-time attorneys, this is a 20% vacancy. Two of these positions have been open for over a full calendar year. Additionally, we had 10 total positions turnover over during calendar year 2022 of 1/4 of all our employees. We were forced to close one of our offices because we were unable to recruit and staff the attorney position. In closing the office, we reclassified the attorney position down to an administrative assistant position and moved it to one of our other offices. This didn't negate the need for an attorney, it was simply a move to staff another office with a FTE rather than a temporary employee. While other agencies are now experiencing high turnover as well, this is something that has plagued the Commission for the seven years I have been involved in administration.

The next challenge we face is the inability attract private firms to provide contract services for the Commission. Our statute requires 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. Federal Criminal Justice Act appointments in 2022, federal court version of contract public defense, was at the rate of \$158/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. We again have asked in our budget and the Governor has recommended an increase in the amount of \$5 per hour raising the contract rate to \$80 per hour which is still significantly behind the federal CJA rate.

An additional hurdle the Commission faces is not having access to a qualified investigator to serve clients. Since the inception of the agency, the Commission has relied upon using investigators in the private sector to provide services to full-time attorneys and contractors. A lawyer has a duty to investigate all cases to which they are assigned. We have consistently paid \$65 per hour to investigators as not to exceed the rate paid to attorneys. It has become increasingly more difficult to find investigators in the private sector willing to perform work for the Commission at this rate. The National Association of Public Defenders has issued a position paper in May of 2020 on Public Defense Staffing for meaningful representation (a copy of which is attached) in which it notes “adequate investigation is the most frequent reason courts find ineffective assistance of counsel.” To remedy this problem, the Commission did request three FTE positions to begin an investigator program in the agency.

#### AGENCY BUDGET REQUESTS / EXECUTIVE RECOMMENDATIONS

The Commission authorized the undersigned to submit a budget with three decision packages.

- 1) \$450,000 to provide equity increases to employees to combat turnover and to assist in recruiting attorneys. The Governor **did not** recommend equity specific to the agency but has recommended an equity package in which specific positions are identified. It is believed the Commission would receive some money in that recommendation for attorney positions. All of this would be an increase to current biennium levels.
- 2) Three FTE Investigator Positions with an anticipated total of \$391,756.92. The Governor **did** include this in his executive recommendation. This would move the total FTE for the Commission from 40 this biennium to 43 FTE next biennium.
- 3) \$630,453 in funding next biennium and beyond to fund an increase in the Contractor rate of pay from \$75 per hour to \$80 per hour. The Governor **did** recommend this increase in his executive budget recommendation.



## BUDGET REQUEST BY LINE / PROGRAM

The Commission budget is a single line. The amount in the base budget is used to fund all aspects of the agency. The Commission is also given spending authority to spend funds in the special fund. The special fund has two specifically earmarked programs for \$60,000 in equity funding for attorney salaries in Williston and for the payment of the salary and benefits for the account budget specialist.

The Commission does not currently accept federal funds. There have been some preliminary negotiations with the Department of Health and Human Services about the potential to access federal IV-E funds for reimbursement of expenses in defending families.

The 2021-2023 base budget is \$21,289,213. This consists of \$19,294,363 in general fund dollars and \$1,994,850 in special fund spending authority. This is to support 40 FTE currently authorized by the legislature. We have no grants, estimated income in federal funds or capital assets.

## ONE TIME FUNDING CURRENT BIENNIUM AND RECOMMENDATIONS

The Commission does not currently have any one-time funding. Further, there is no one time funding being requested or recommended.

## AGENCY COLLECTIONS DEPOSITED IN GENERAL FUND OR SPECIAL FUND

As expressed above, the agency does have two fundings sources. The General fund and fund 282. The Court collects two fees and makes deposits into fund 282. The only fee that can be collected and deposited to the general fund is attorney reimbursement costs. This too is collected by the Court.

## IMPACT OF OTHER BILLS

There are several other bills working their way through the Legislature that may have a fiscal impact on the agency. In the event DOCR is given FTE to expand the pre-trial service program that will cause more work for our agency. Also, any bills that deal with crime and/or penalties in the state may have an effect on our budget. For example, it is anticipated if SB 2107 passes as currently written it could cause increased costs to handle

more jury trials. However, given not all bills have been filed at this point, I am unable to point to specific bills other than what is included above.

#### CLOSING

I want to thank the Committee for your time. I ask you consider the position in which the state finds itself regarding Indigent Defense. The time is now to fully fund the agency to provide constitutionally required services.

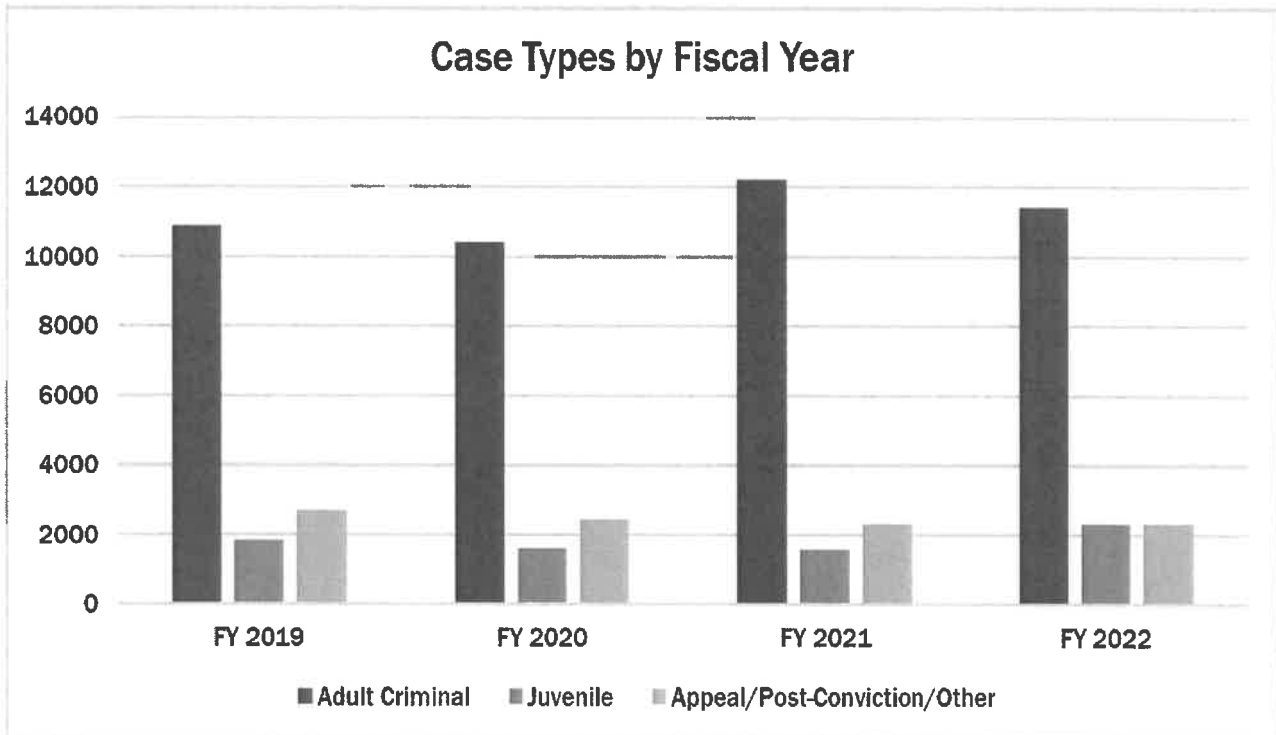
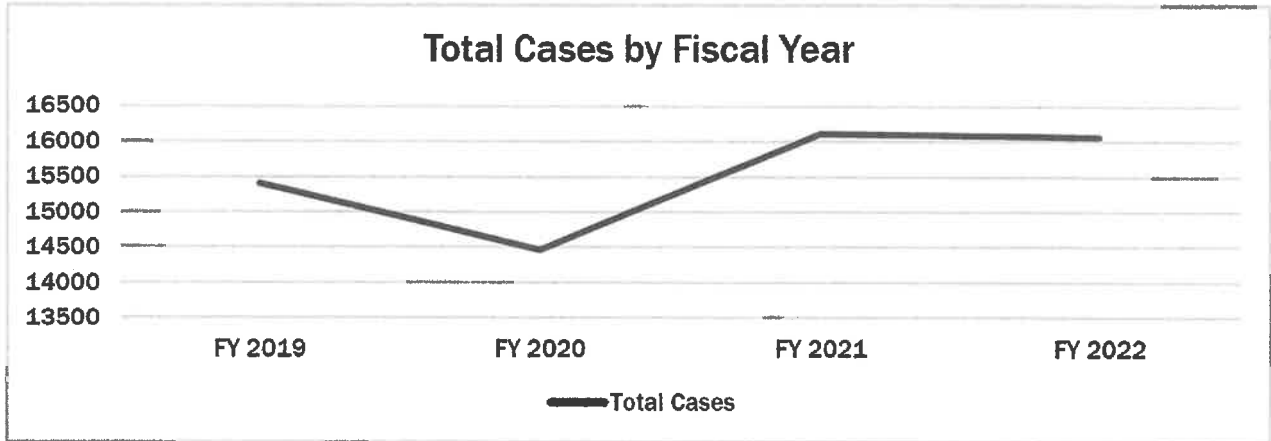
Respectfully submitted:



Travis W. Finck, Director  
N.D. Comm. on Legal Counsel for Indigents

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ATTACHMENT 1



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**ATTACHMENT 2**

<b>Biennium</b>	<b>Indigent Defense Facility Fee Collection</b>
2013-2015	\$1,722,499
2015-2017	\$1,502,355
2017-2019	\$1,503,823
2019-2021	\$1,279,060
<b>Current though November 2022</b>	<b>\$836,151</b>

<b>Biennium</b>	<b>Indigent Defense Application Fee Collection</b>
2013-2015	\$299,344
2015-2017	\$329,457
2017-2019	\$361,434
2019-2021	\$308,053
<b>Current through November 2022</b>	<b>\$209,420</b>