

NORTH DAKOTA COMMISSION ON LEGAL COUNSEL FOR INDIGENTS



Annual Report FY 2022

Dept. 188

Submitted by:

Travis W. Finck
Executive Director

LETTER FROM EXECUTIVE DIRECTOR

It is once again my honor and privilege to submit the Annual Report of the Commission on Legal Counsel for Indigents. This last fiscal year has served as a year of change for the state regarding how the Commission provides services. The Commission assisted with drafting and ultimately securing the passage of HB 1035 (2021) and HB 1181 (2021). While these important reforms positively impact all North Dakotans, it has caused some challenges for our agency. Additionally, our agency continues to suffer irrepressible turnover and inability to recruit competitively.

While the case numbers in this report will focus on Fiscal Year 2022, which ended June 30, 2022, the turnover is more easily figured by calendar year. As of the date of this report, our agency has turned over 10 of the 40 FTE positions during calendar year 2022. For reasons provided below, this is an unsustainable business model. We will need to see meaningful increase in employee compensation to stay competitive with our counterparts in public sector employment. We have asked for help from the legislature before on compensation and have not been given sufficient funds to be competitive. This has forced the agency to notify the District and Supreme Court we may not be able to meet our mission.

I will end this foreword as identically as I did last year: "... we as an agency will need to make a recommendation to the Legislature to fund an increase in contractor compensation. The rate of contract compensation has remained stagnant. We are struggling to recruit and retain those in the private sector to take contract public defense work.

In summary, this report places us at a point in the history of the agency where we need the assistance of our partners in government. We are close to crossing the Rubicon in not being able to effectively provide services to indigent clients.

There is no certainty in indigent defense other than uncertainty. We have suffered historic turnover, had contractors not renew contracts because of no increase in compensation and a pandemic that has made our jobs more difficult. I fear we would have failed already if not for the commitment to excellence our employees and contractors exhibit every day. However, the time for action is now.”

Dated this 23rd day of November 2022.

Respectfully Submitted:

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

Travis W. Finck
Executive Director

Administration:

Travis W. Finck, Executive Director
Todd N. Ewell, Deputy Director
Aaron Petrowitz, Account Budget Specialist III
Brooke Nelson, Administrative Officer I
Jennifer Williams, Administrative Assistant III
LeAnn Schmidt, Administrative Assistant II
Jennifer Nagel, Administrative Assistant II

Purpose:

This Annual Report is being filed pursuant to North Dakota Century Code § 54-61-03(f) and NDCC § 54-61-03(g).

MISSION STATEMENT:

The North Dakota Commission on Legal Counsel for Indigents' mission is to provide high quality, professional, and effective legal representation to eligible clients, consistent with the guarantees of the constitutions of the United States and North Dakota, and applicable North Dakota statutes and rules, at reasonable cost to the community.

OPERATION OF THE AGENCY

The North Dakota Commission on Legal Counsel for Indigents (herein after the “Commission”) is governed by North Dakota Century Code § 54-61. North Dakota Century Code § 54-61-01 provides 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 the standards and policies of the commission governing eligibility for such services.”

ELIGIBILITY FOR SERVICES

The Commission has established Guidelines to Determine Eligibility for Indigent Defense Services (herein after “Guidelines”). To receive services provided by the Commission, an individual must apply for services, be found to be “indigent”, and it must be a circumstance in which there is a right to counsel. Application for services is made on the Commission’s standard forms. Pursuant to North Dakota Century Code, the Court, or its designee, reviews the application and determines eligibility. Upon a determination the individual is entitled to counsel, the Commission assigns counsel.

Under the Guidelines, indigency is determined by income resources, non-income resources and exceptional factors. The financial guidelines used to assess “income resources” are set at 125% of the federal poverty level as defined by the Federal Department of Health and Human Services. The income of an applicant is considered in conjunction with household size.

Income Guidelines 2022

These guidelines for gross income levels indicate income levels at or below which eligibility for indigent defense services should be considered.

Household Size	1	2	3	4	5	6	7	8
Annual Gross Income	16,988	22,888	28,788	34,688	40,588	46,488	52,388	58,288
Monthly Gross Income	1,416	1,907	2,399	2,891	3,382	3,874	4,366	4,857
Weekly Gross Income	327	440	554	667	781	894	1,007	1,121

(Add \$5,900 to annual gross income for each additional member in households of more than eight.)

These income levels reflect 125% of the official poverty guidelines updated periodically in the Federal Register by the U.S. Department of Health and Human Services under the authority of 42 U.S.C. 9902(2).

Asset Guideline 2022

This guideline indicates the level at or below which eligibility for indigent defense services should be considered.

Absent exceptional circumstances, an applicant with equity in real and/or personal property in excess of \$20,000 will not be considered indigent.

The Guidelines establish “non-income resources” limits as well. “Absent exceptional circumstances, an applicant with equity in real and/or personal property in excess of \$20,000 will not be considered indigent.”

The Guidelines further provide if an applicant for services exceeds income or non-income thresholds, the Court, or its designee, may still determine an applicant to be indigent and therefore entitled to services based upon exceptional factors. Exceptional factors include such things as current income prospects, age or physical infirmity, liquidity of the assets, etc.

The one exception to the eligibility requirements is all children are presumed to be indigent and eligible to receive appointed services in matters arising under the Juvenile Court Act. This includes delinquency actions unless a child appears with retained counsel or waives the right to counsel. A child is also presumed indigent and eligible for services in a child in need of protection matter in which the child is of sufficient competent age to assist the attorney in representation.

CIRCUMSTANCES IN WHICH NDCLCI PROVIDES SERVICES

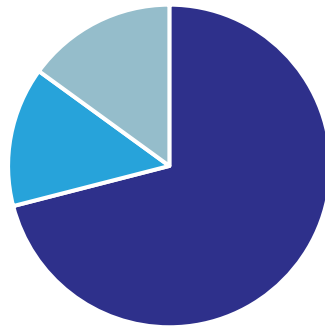
Generally, the North Dakota Commission on Legal Counsel for Indigents would provide services if an applicant were found to be indigent and there is a constitutional, statutory or rule based right to counsel. Most of the services provided by the Commission are in circumstances in which an individual is charged with a crime and jail time is a possible sanction, in juvenile matters, post-Conviction matters brought pursuant to the Uniform Post-Conviction Procedure Act and appeals of those matters.

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. The Commission did submit a fiscal note estimating an increase in juvenile delinquency matters. The fiscal note was the subject of several conference committee hearings with the legislature ultimately agreeing to provide \$325,000 to the Commission to offset these costs. The Commission had requested \$450,000 based upon an estimated case load increase of 50%. The actual increase for FY 2022, the first full year of the implementation, was approximately 46%.

In addition to the amplified time associated with assigning the increase in juvenile cases, we continue an expedited assignment process for the Pre-Trial Services Program.

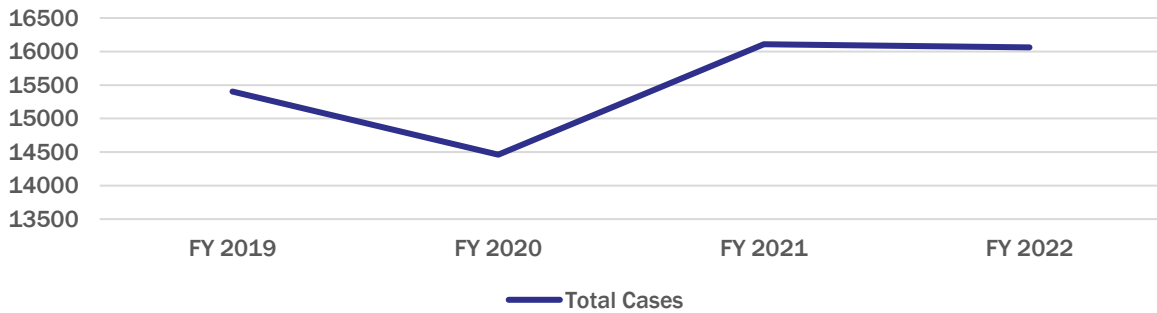
As part of Pre-Trial Services, we have been able to start to meet our constitutional requirement of providing counsel at initial appearances. We need to continue to push for an expansion of pre-trial services and to push for resources for our agency to provide services to individuals at the critical stage of arraignment.

Case Types Current Fiscal Year



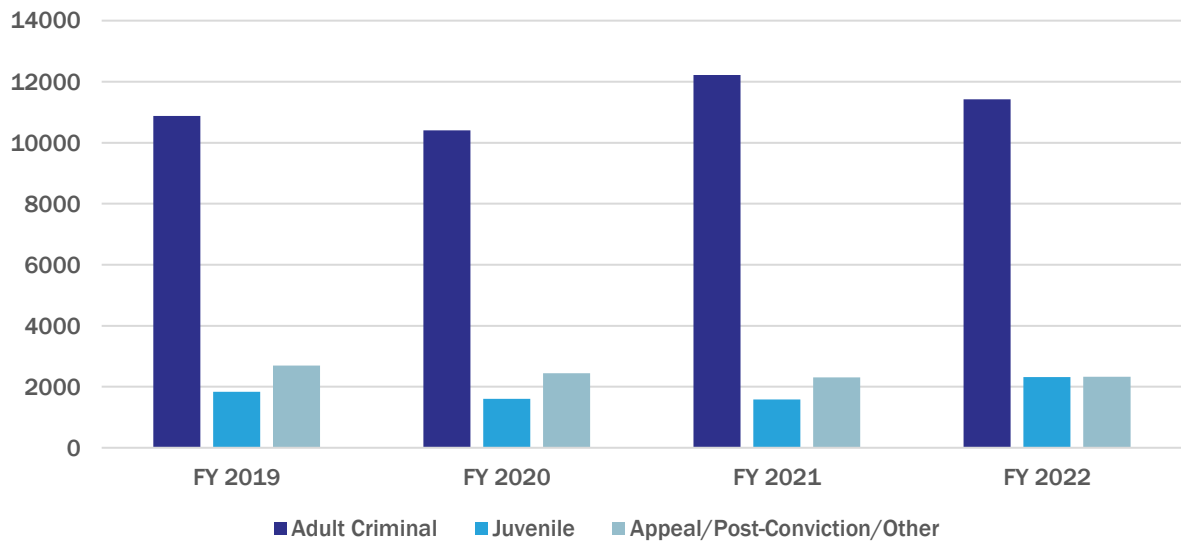
■ Adult Criminal ■ Juvenile ■ Appeal/Post Conviction/Other

Total Cases by Fiscal Year



— Total Cases

Case Types by Fiscal Year



■ Adult Criminal ■ Juvenile ■ Appeal/Post-Conviction/Other

COMPLIANCE WITH ELIGIBILITY GUIDELINES

The Commission has always strived to be good stewards of taxpayer money. Our Guidelines provide a standard to review eligibility determinations to ensure compliance. There are abuses to the system, both intentional and unintentional, which the agency seeks to uncover through review. It continues to be the policy of the Commission to seek additional screening and review of applicants by the Court in questionable cases. While the Commission does write letters requesting review, eligibility is a determination of the court, therefore, we do provide services in some cases where an individual is not entitled.

The Commission tries to prevent unintentional abuses by providing training to all agency employees on the guidelines. Further, the Director and Deputy Director have provided trainings to individual judges and clerks of court and answered any eligibility questions that have arisen. The Director or a designee meets with all new judges at orientation to cover the guidelines and the requirements for eligibility. We have also scheduled meetings with pre-trial service employees as well as they have begun making eligibility determinations in the districts in which they operate.

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 Commission appointed the undersigned as Executive Director starting April 1, 2020.

PUBLIC DEFENDER OFFICES

The Commission's public defenders take case assignments in the geographical area in which their office is located and conflict matters in nearby districts or across the state when needed. We had to discontinue the operations of one of our public defender offices due to an inability to staff the office. We were forced to do so when an employee resigned, and we were unable to hire a replacement.

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

TURNOVER IN STAFF POSITIONS

Salaries for public defender and staff positions continue to be the primary motivating factor in employees leaving. When an attorney leaves our employ, we are forced to reassign all their open cases, which often requires us to pay twice for one case.

I recently had the misfortune of having to provide notice to the Court, our three-attorney office in Williston is vacant due to turnover and we may not have enough attorneys to cover cases in which a judge has determined an individual eligible. In addition to reassigning cases, we

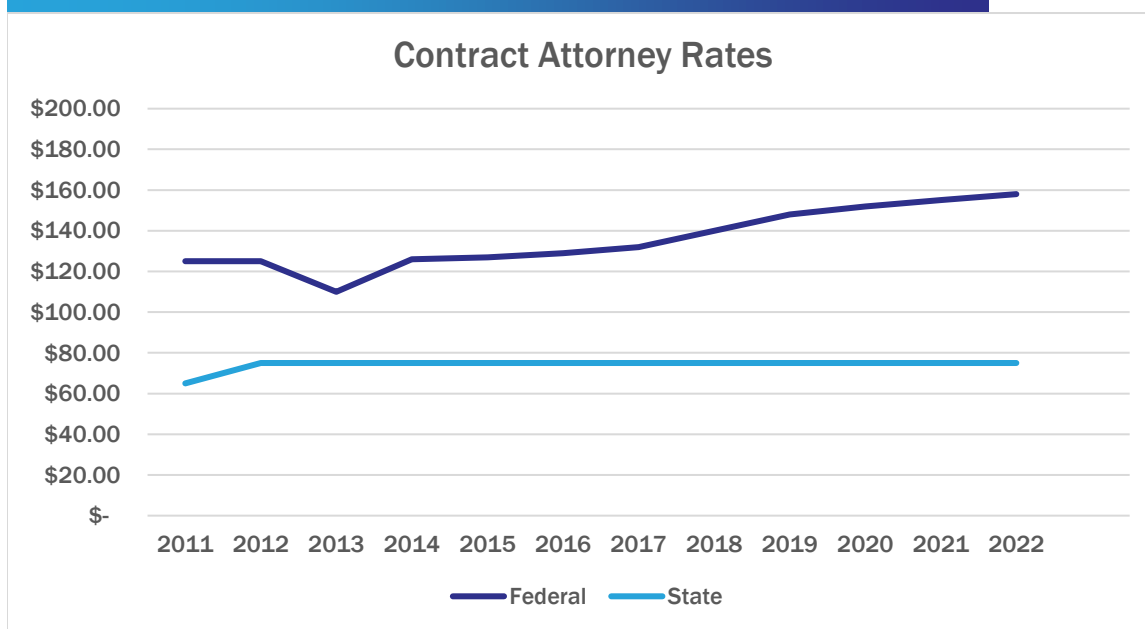
have the expense of training new employees and bringing them up to speed.

We are not able to be competitive within our legislative funding to recruit or retain employees. We have looked at different ways to try and provide services and bridge the gap while experiencing turnover. Even with the help of OMB Human Resources, providing targeted support, we have been unable to fill positions. Additionally, current laws and administrative code prevent us from being able to be competitive in an ever-changing market.

The rate of inflation has also increased the cost of living and made it more difficult to recruit or retain employees. As the cost of living has increased, so too has the amount of money we have had to offer to incoming applicants to get them hired. This has caused inequity issues within our offices. While the administrative code allows some flexibility to try and offset this, we continue to lag private sector employment and our counterparts in other branches of government.

CONTRACTORS

The Commission contracts with private law firms who provide indigent defense representation. This is achieved in the form of monthly contractors who agree to take a specified number of cases for a pre-determined amount of compensation and conflict contractors who take conflict cases on a case assignment by case assignment basis. The current hourly rate for contractors is \$75 per hour. Although our rate has remained constant, 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.

FINANCING THE AGENCY

The Commission is an executive branch agency which is financed by the general fund and fund 282, the “Indigent Defense Administration Fund”. Budgeting for the Commission in the 2021-2023 biennium consists of \$19,294,363 from the general fund, and \$1,994,850 in spending authority from the Indigent Defense fund. Fund 282 is comprised of two statutorily created fees:

- 1) NDCC 29-07-01.1: Indigent Defense application fee of \$35; and
- 2) NDCC 29-26-22(2): Court administration fee of \$100 assessed to all defendants. The first \$750,000 is deposited in the fund, the next \$460,000, goes to Court facilities improvement, and then the remaining collections are split equally.

During FY22, the Commission received \$ 154,547.65 from the Indigent Defense Application Fees. The Commission received \$750,000 from the Administration fee. The District Court also has the authority to order

reimbursement of attorney fees pursuant to NDCC 29-07-01.1(2). However, those funds are placed in the general fund and have no impact on our agency's appropriation. NDCC 29-07-01.1(4).

The Commission's expenses are primarily driven by the number of case assignments we handle. The Commission uses the term "case assignment" rather than a case so we can count matters consistently across the state, regardless of how a matter may be charged. The Commission has implemented a standard of what constitutes a case assignment for uniformity. In fiscal year 2020, the Commission handled approximately 14,400 case assignments. During fiscal year 2021, the case assignments rebounded dramatically. In the last fiscal year, the Commission handled 16,104 case assignments. In FY 2022, as evidenced by the charts above, the number of assignments held steady just above 16,000.

HIGHLIGHTS

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 report truly is an honor and a privilege to represent such a dedicated group of individuals.

The Commission has suggested and put out for comment changes to our guidelines led by Deputy Director Ewell. Our Guidelines to Determine Eligibility serve as the official guidance as to whether an individual is indigent and whether they are entitled to services. There have been many legislative changes over the years and the Commission felt it was time to update those guidelines.

The Commission has continued to assist with implementation of legislation passed last session. This has included work in the juvenile court reform and working with the Supreme Court to address the changes to the competency law and continue to apply best practices in dealing with mental health cases in North Dakota.

The Commission has also continued to work with the Pre-Trial Services program. Pre-Trial Services were expanded to the Northeast Judicial District with the expansion into Devils Lake. Director Finck, Deputy Director Ewell, and Assistant Jennifer Williams worked with the District Court, the Ramsey County States Attorney and pre-trial service leadership to set up the system in Ramsey County to ensure a smooth operation.

Lastly, we continue to work with partner organizations to further emphasize the importance of public defense in our state. The Commission's Executive Director and Deputy Director continue to give North Dakota a presence on the national level and continue to donate time to various organizations and groups working on issues germane to the Commission.

GOALS FOR FISCAL YEAR 2023

We absolutely need financial support from the Legislature to make us competitive in recruiting and retaining employees. We have been sounding the horn regarding the danger of lack of pay parity. The result has manifested in having to close one office and having a three-attorney office completely vacant. We have had to notify the Court we may not have enough attorneys to provide services to every eligible client. In the event we are short, we have developed a prioritization plan as to who will receive services.

The Commission continues to pursue ways to get more attorneys involved in indigent defense. We will work to develop strategies to work with partners to recruit talented attorneys and staff to work in public defense. We are working on different training opportunities with national partners to both bring training to North Dakota and to set up an established public defender training partnership. The Commission will continue to work with partners in criminal justice reform.

We are at a crossroads in the history of the agency. We need support from the Court and from the Legislature to continue to be able to

provide services constitutionally required. While the future is uncertain, you can rest assured each employee and contractor of the Commission will always continue to strive to be their best for their clients.

Respectfully submitted this 23rd day of November 2022.



Travis W. Finck
Executive Director