

NORTH DAKOTA COMMISSION ON LEGAL COUNSEL FOR INDIGENTS



Annual Report FY 2023

Dept. 188

Submitted by:

Travis W. Finck
Executive Director

LETTER FROM EXECUTIVE DIRECTOR

On behalf of the men and women who do the important work of the Commission, I submit this year's annual report. In reviewing previous annual reports in preparation for this report, I like to think we are moving in the right direction. This last fiscal year ending in June of 2023, we saw important milestone events in the history of the Commission.

Thanks to the support of the 68th Legislative Assembly, the Commission was able to give Target Market Equity raises to attorneys and employees who were low in compensation ratio as maintained by the North Dakota Office of Management and Budget. We have made some ground but as you can see later in this report, more ground needs to be made with support staff and attorneys alike.

Additionally, during the 68th Legislative Assembly, the legislature authorized budgetary support for increasing the contractor rate of compensation. The next annual report will contain the data to show the effectiveness of the contractor and employee increases on recruitment, retention, and managing caseloads.

The Commission has also seen advances in updating its performance guidelines. The Commission formed a work group chaired by Deputy Director Todd Ewell to review and suggest updates to the Criminal, Juvenile and Appellate practice standards.

The Commission has also continued to learn and share with public defense partners across the country. The Executive leadership team has taken an active role with the National Association for Public Defense and the National Association of Criminal Defense Lawyers. These relationships have helped North Dakota public defense navigate these difficult and trying times. Further, the relationships have helped to bring world class training to North Dakota and our attorneys.

This last fiscal year has also continued to have challenges. Turnover and inability to recruit competitively continue to plague the agency. While the case numbers in this report will focus on Fiscal Year 2023, which ended June 30, 2023, the turnover is more easily figured by calendar year. As of the date of this report, our agency has turned over 9 of the 41¹ FTE positions during calendar year 2023. While the amount of turnover in FTE positions is down from the previous calendar year, recruitment has been incredibly difficult. This has led to extraordinary case loads that need to be alleviated.

The Mission statement of the Commission is “to provide high quality, professional, and effective legal representation to eligible clients, consistent with the guarantees of the Constitution of the United States of America and North Dakota, and applicable North Dakota Statutes and rules, at a reasonable cost to the community”. To meet this mission, we will continue to need the support of our legislature to provide adequate funding to recruit the most qualified and retain the best. We need recognition from the Court and the executive branch so our agency can satisfactorily meet our constitutional charge. We must continue to embrace our values. In so doing, we will continue to meet the challenges of the day.

Dated this 30th day of November 2023.

Respectfully Submitted:



Travis W. Finck
Executive Director

¹ The Agency was 40 FTE for the fiscal year but we count turnover on calendar year. We increased to 41 FTE authorized on July 1, 2023.

Administration:

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

Purpose:

This Annual Report is being filed pursuant to North Dakota Century Code § 54-61-03(2)(f) and NDCC § 54-61-03(2)(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 “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 2023

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	18,225	24,650	31,075	37,500	43,925	50,350	56,775	63,200
Monthly Gross Income	1,519	2,054	2,590	3,125	3,660	4,196	4,731	5,267
Weekly Gross Income	350	474	598	721	845	968	1,092	1,215

(Add \$6,425 to annual gross income for each additional member in households of more than eight.)

These income levels reflect 125% of the official poverty level threshold as defined by the Department of Health and Human Services.

Asset Guideline 2023

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, seriousness of the charges, 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.

CASE TYPES IN WHICH NDCLCI PROVIDES SERVICES

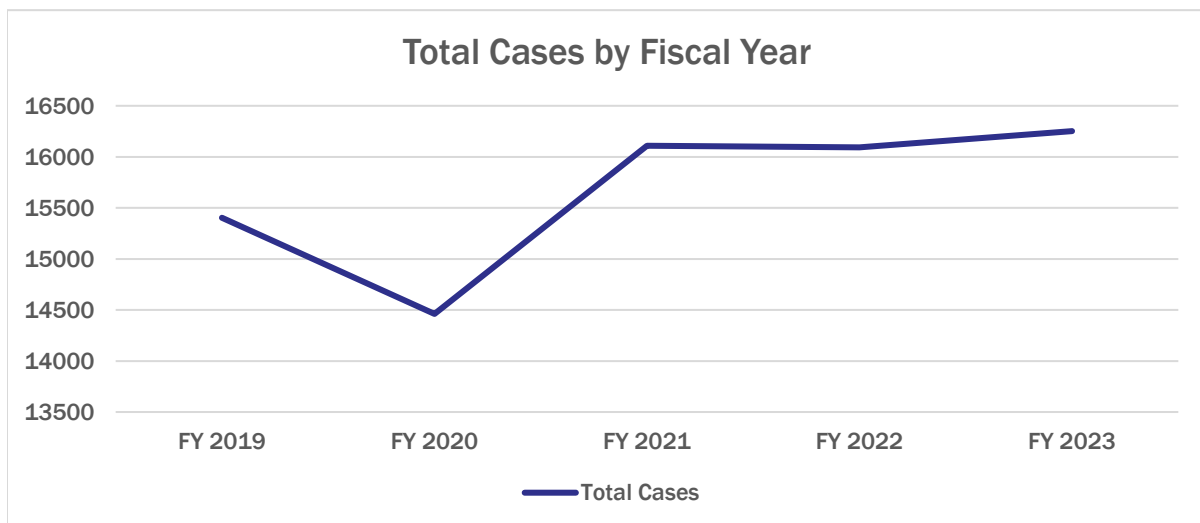
Generally, the North Dakota Commission on Legal Counsel for Indigents would provide services if an applicant were found to be indigent and there is a constitutional, statutory, or rule-based right to counsel. Most of the services provided by the Commission are in circumstances in which an individual is charged with a crime and jail

time is a possible sanction. The Commission also provides counsel in juvenile delinquency cases, representation for parents and children alike in Child in Need of Protection cases, we represent parents and children of sufficient competent ability to assist counsel in guardianship matters, Post-Conviction matters brought pursuant to the Uniform Post-Conviction Procedure Act and appeals of those matters.

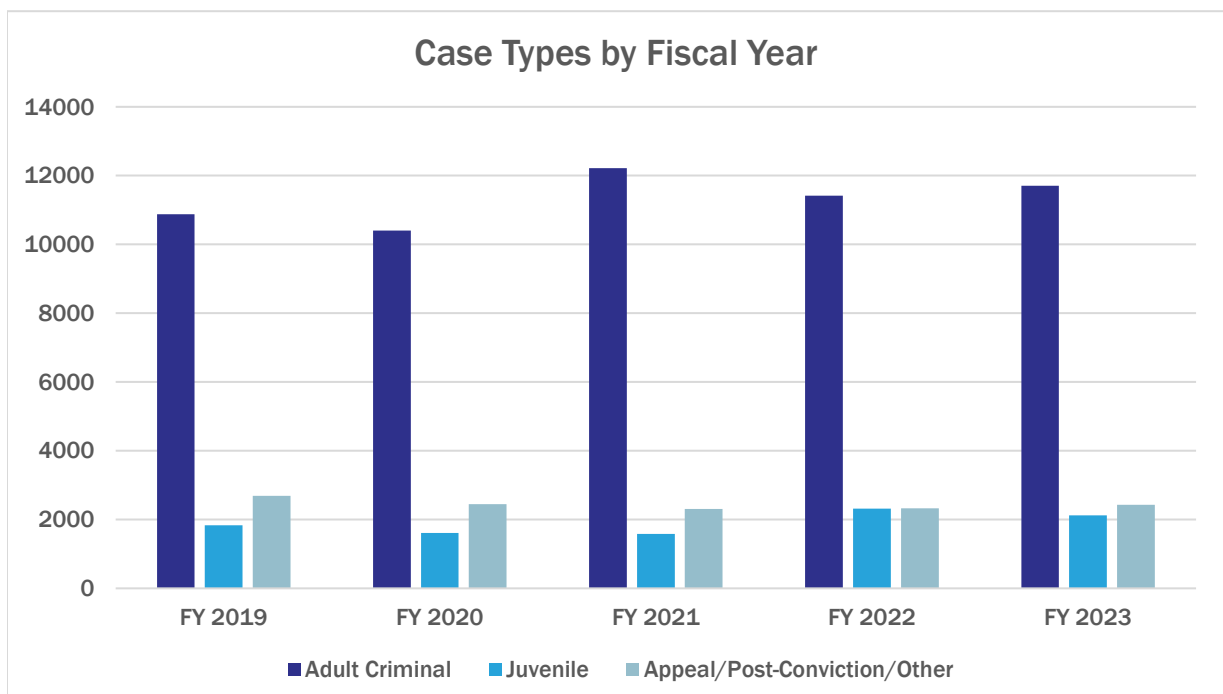
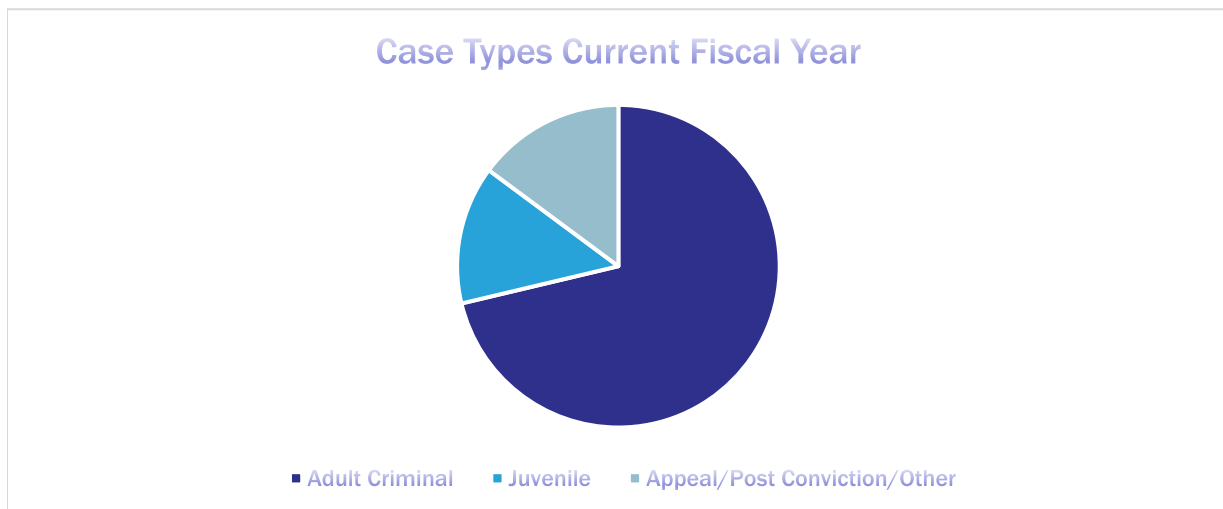
The Commission also provides counsel at initial appearances in criminal matters in which the court or a designee of the court have made the determination of indigence. This is accomplished through a partnership with pre-trial services, a division of the North Dakota Department of Corrections and Rehabilitation. The Commission has worked with Department of Corrections Pre-Trial Services to establish policy and procedure in each location pre-trial services is located. As an agency, 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 BY THE NUMBES

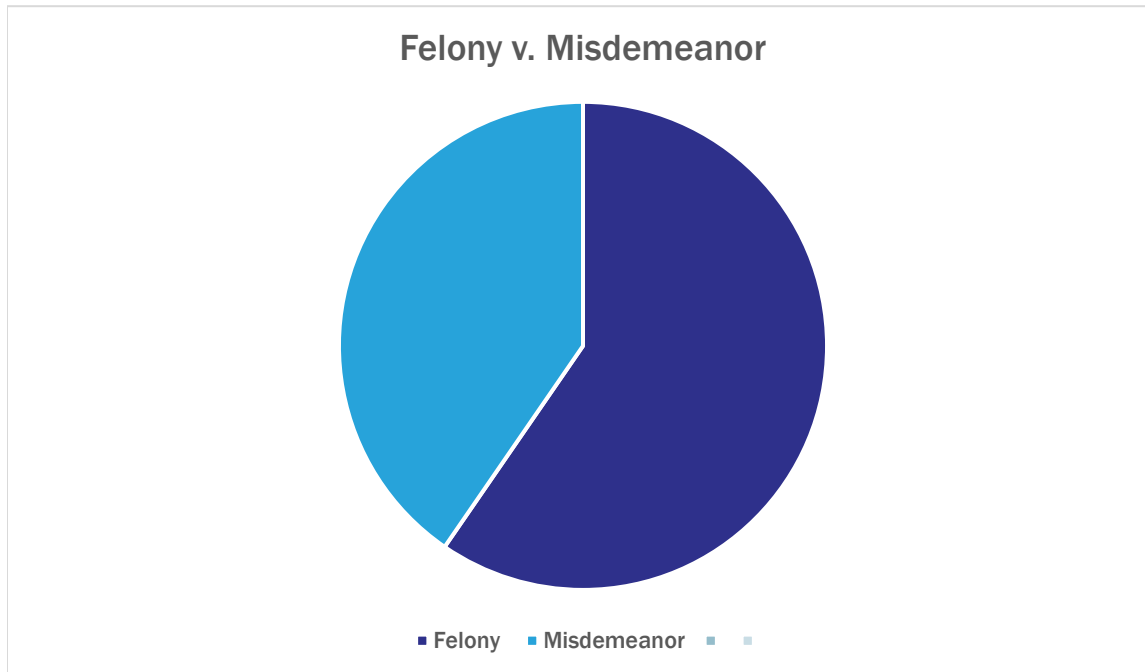
The Commission handled more cases in FY 2023 than in any other prior Fiscal Year. The Commission handled over 16, 200 case assignments in FY '23.



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. The case assignment types, when broken down by category, show adult criminal cases continue to be the vast majority of the Commission’s work. In the last fiscal year 72 percent of case assignments were Adult Criminal, 13 percent were juvenile cases (Delinquency, Child in Need of Protection, Guardianship) and 15 percent were Appeal, Post-Conviction, or other.



Of note in the adult criminal case assignments, we are seeing a trend where we are handling more Felonies than Misdemeanors. Of the adult criminal cases, 59 percent were Felony compared to 41 percent Misdemeanor.



Felonies take more time to complete the case given the increased consequences associated with a conviction. Increased consequences typically means more discovery from the government, more court hearings, etc. As the number of felonies charged is increased, the amount of time spent on cases will also increase.

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 train all Pre-Trial Service employees as well as they have begun making eligibility determinations in the districts in which they operate.

One concern the undersigned continues to struggle with is the application process itself. Unfortunately, to try and meet legislative mandates of being good stewards, the application form is cumbersome and long. The Commission is in the process of reviewing the eligibility guidelines in desire of making recommendations in the next budget regarding eligibility. The 125% of poverty mark has not been reviewed since inception. The line is always thin between meeting financial restrictions imposed by legislators and ensuring representation for those that truly cannot afford it. However, if a change were to be made, it would need to be funded.

DELIVERY OF SERVICES

The Commission is administered through the administrative office. In April of 2023, the Commission authorized the undersigned to find new office location for the Commission executive team. The Administrative Office was moved to Jamestown with the move being completed in September 2023. The mailing address has stayed at the P.O. Box in Valley City for the time being.

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. Indigent defense

services are provided through full-time state public defenders in seven offices across the state and through law firms who contract for services as independent 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. 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 with the staff in the administrative office reporting to Deputy Director Ewell. Our supervising/lead attorneys are provided below:

Williston Public Defender Office: currently vacant²

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 Howell³

Minot Public Defender Office: Mr. Eric Baumann

TURNOVER IN STAFF POSITIONS

Salaries for public defender and staff positions continue to be the primary motivating factor in employees leaving. As mentioned in the foreword, we have made some progress with the Target Market Equity funds and the increases authorized to be given in FY '24 and FY '25. However, we still appear to be behind our counterparts in prosecution and court offices. An attorney who is a recent graduate with no experience is starting at approximately \$70,000 per year with the

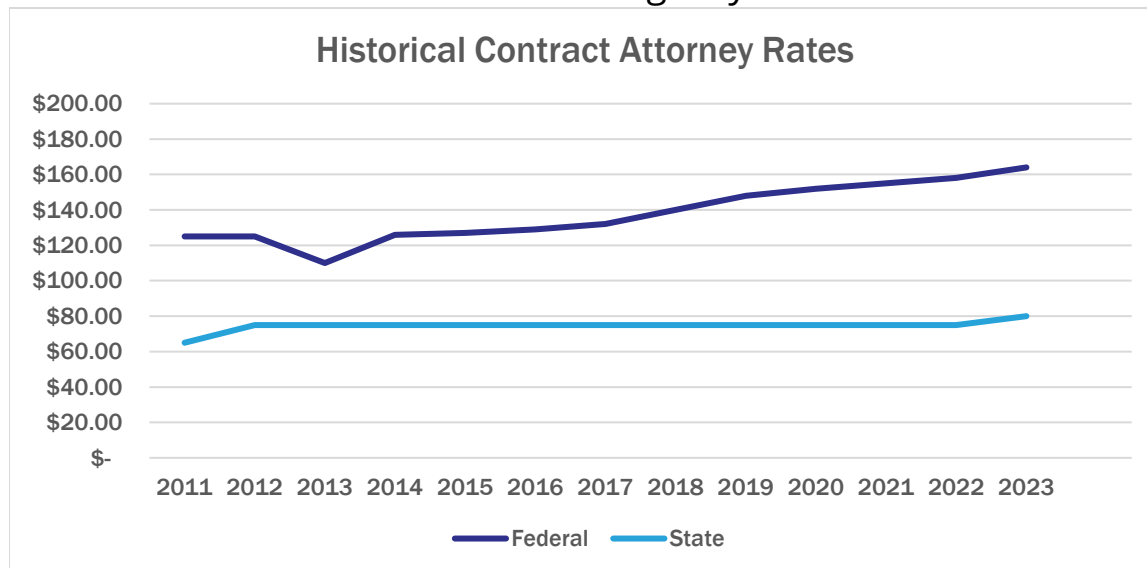
² Attorney has been hired and is set to start in December 2023.

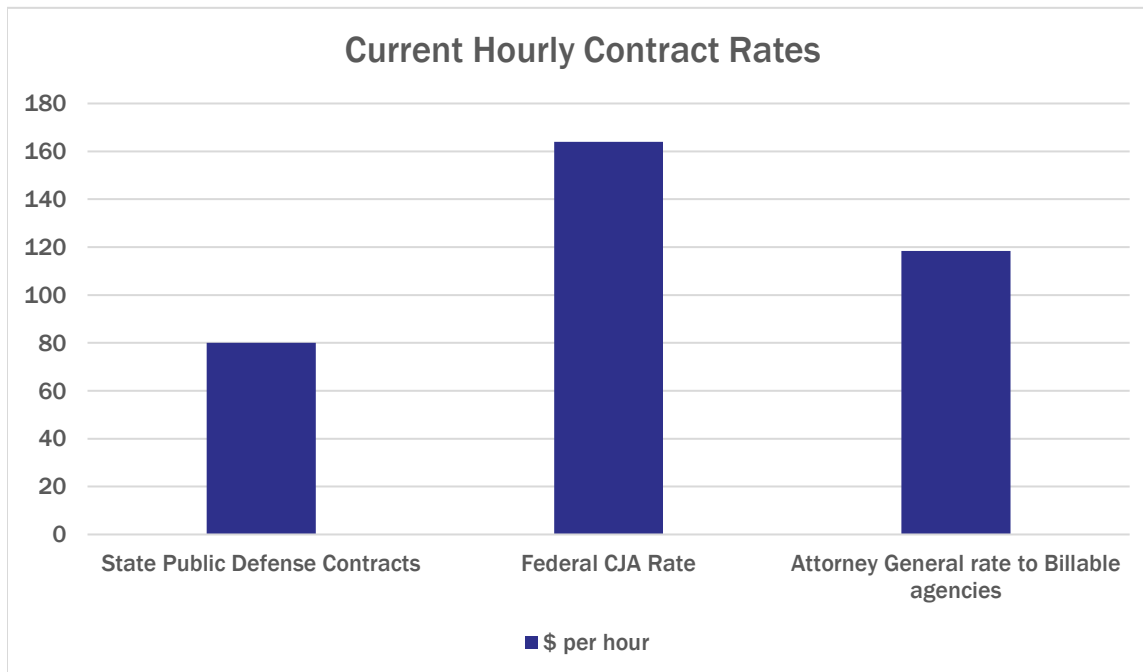
³ Attorney has put in his notice and last day with the agency will be end of December 2023.

Commission. If the employee completes the probationary period, they are given a 5% increase and would be earning approximately \$74,500 per year. By comparison, a new attorney in the Court system serving as a judicial law clerk starts at \$74,460 in District Court, whereas a new attorney with similar experience starting in Burleigh County State’s Attorney office makes \$90,584. Effective public defense delivery systems demand equitable resources between prosecution and defense.

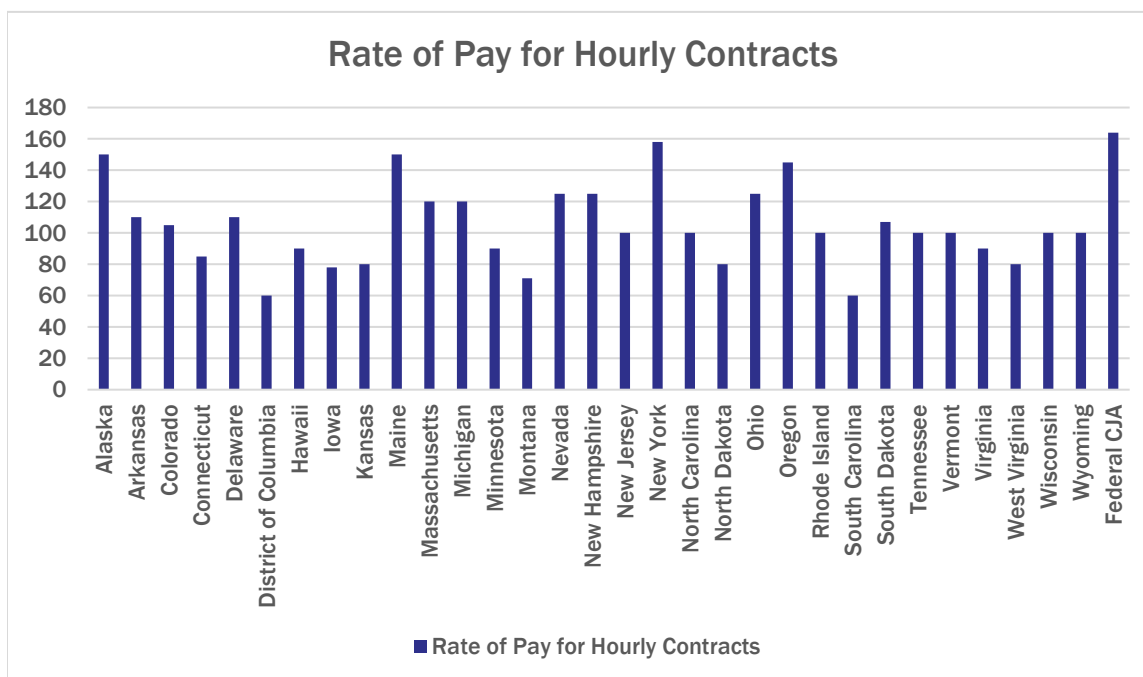
Contractors

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 hourly rate for contractors in FY '23 was \$75 per hour. The 68th Legislative Assembly provided funding and the Commission increased that rate for FY '24 to \$80 per hour. Government attorney contract rates should be the same whether it is the Attorney General’s office contracting with private law firms to act as special assistant attorney generals or if it is indigent defense contracting to provide a constitutionally guaranteed service. At the time of this report, the Attorney General’s office bills \$118.43 per hour for an attorney when work is done on behalf of a billable agency.





While the rate paid under our private contracts has increased, when compared to other public defender systems in the country, North Dakota is still towards the bottom of rates paid to contract public defenders.⁴



⁴ Based upon information publicly available and response from other State leaders.

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 2023, 72% of case assignments were handled by private contractors with 28% handled by full-time public defenders. For the biennium, the Commission full-time attorneys handled 27% of case assignments whereas private contractors handled 73%.

FINANCING THE AGENCY: Needs and Costs

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.

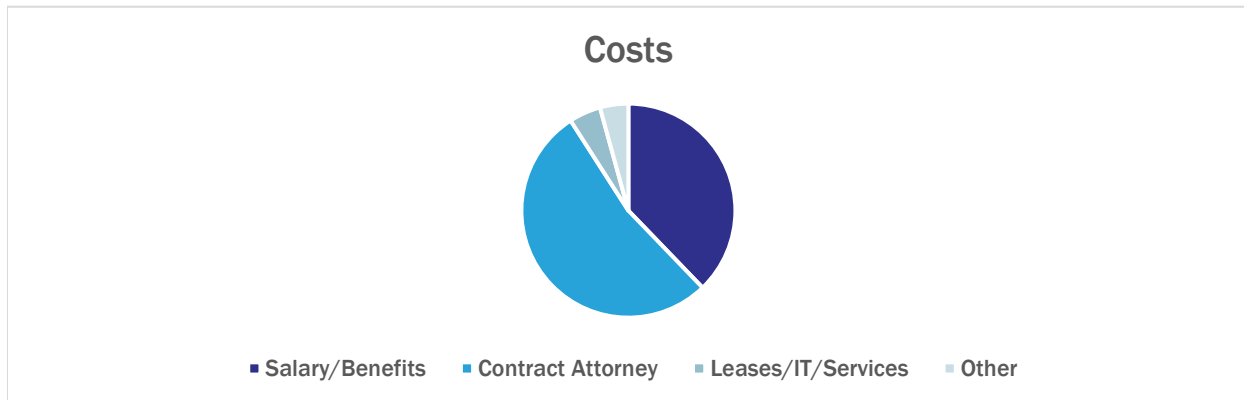
During FY ‘23, the Commission received \$157,730 from the Indigent Defense Application Fees. The Commission received \$418,945 from the Administration fee. For the biennium, the Commission was given original spending authority in the amount of \$1,994,850. With the disbursement of Target Market Equity funds by the 68th Legislative Assembly, the spending authority was increased to \$1,995,273.

However, total collections in the special fund for the biennium only totaled \$1,481,223. To offset the reduction in collection of fees in the special fund the last two biennia, the Commission has only spent what has been collected out of the special fund. In the biennium that ended with FY ‘23, the Commission only spent \$1,506,162 out of fund 282.

The general fund allocation of \$19,294,363 was increased to \$19,308,561 after disbursement of the Target Market Equity Funds. The

Commission spent \$18,648,042 and had a general fund turnback of \$660,518.67.

The majority, or approximately 96% of the Commissions costs last biennium were spent between salaries/benefits for employees, rent for office space, information technology costs, and contracts for professional services.



One expense within services we have been paying close attention to is the cost of using private investigators. Investigators alone cost the Commission \$94,148 in expenses paid to private sector last biennium. This number does not capture all the times an attorney would like to use an investigator and was unable to find one or unable to get one to work for the contract price the Commission can pay. North Dakota was one of the last state-run systems in the country to get private investigators on staff. The 68th Legislative Assembly increased the FTE by 1.0 to allow the Commission to hire an investigator. The spot has been filled and the next annual report will contain a year's worth of data.

Other Fees Assessed to Indigent Defendants

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 is responsible for

setting the presumed amount of attorney fee reimbursement. Those fees for FY '23 are provided in the chart below.

Case Type	Presumed \$ amount per case
Adult Misdemeanor	\$300.00
Adult Felony	\$575.00
Juvenile CHIP or delinquency	\$450.00
Termination of Parental Rights	\$750.00
Appeal Case	\$2,250.00
Post-Conviction Case	\$1,350.00

The Commission has not taken a position on the collection/imposition of fees. The undersigned is concerned with an indigent individual being assessed fees when they have already been determined to be indigent. Further, it is one of the only constitutional rights where the person exercising it is required to pay to do so. The Commission is staying abreast of movements in other jurisdictions regarding fees.

Correlation of Case Assignments and Costs

Case assignment numbers are the primary driver in the amount of money needed to fund the agency. As case numbers increase, the Commission needs to enter additional contracts as to maintain case load levels allowing an attorney to ethically practice law. Additionally, as case loads increase, we begin to see more conflicts of interest for attorneys which leads to attorneys having to travel outside of their home districts. Additionally, employee turnover is incredibly expensive and is driving agency costs.

Turnover in staff attorneys and/or contractors often forces the Commission to pay for a case twice. For example, when an attorney recently left one of our offices, we had to reassign several cases they had been working on. Since they had already expended time and money on the case, the new attorney was starting from square one and had to be compensated for the time and money on the same defendant. When turnover runs close to 25% annually, you can see why this cost becomes unmanageable. Further, there is a human cost

to the client. When an attorney is substituted for an attorney no longer in our employ or on contract, it often will lead to continuances. This causes a defendant to continue to wait for their day in court. If justice delayed is justice denied, and lack of parity with prosecutors in pay and resources is the primary reason attorneys leave our employ, then the lack of funding to pay our attorneys and contractors what they are worth is directly denying justice for a majority of those in North Dakota's criminal legal system.

NEEDS and GOALS OF THE AGENCY

We are an agency in transition. We are in the process of transitioning from the delivery systems of old which are reactionary and focus on completing cases, to a system of service delivery focusing on our client by providing holistic approach to representation. To achieve this, the Commission will be working on the following goals:

Review of the Process for Determining Indigency

Indigency has been determined by measuring 125% of the official poverty level threshold as defined by the Department of Health and Human Services since the inception of the agency. Each spring, the Commission reviews the federal levels and figures out 125% of the poverty guidelines. This establishes the income levels. The Commission's "Guidelines to Determine Eligibility for Indigent Defense Services" lay out the groundwork for what constitutes income, how to figure household size, etc.

These guidelines threshold levels have not been reviewed in many biennia. The rapidly increasing rate of inflation and the expense of living in a prosperous state like North Dakota, is not considered within the 125% guideline. Upon undertaking the official threshold review, we may find a significant higher number of case assignments. These people are likely those that are not considered indigent by our guidelines but still cannot afford to hire a private attorney. Thus, they are often left to face the great weight of the government on their own.

Expand Staff to Provide Holistic Representation

The most successful public defense delivery systems in reducing recidivism and making clients more productive members of society, are those that employ holistic services. Holistic defense is a client-centered and interdisciplinary model of public defense that addresses the circumstances driving poor people into the criminal justice system and the consequences of that involvement by offering comprehensive legal representation, social work support, and advocacy for the client. Public defender systems provide this in the following ways:

- Attorneys develop understanding of each of client's life from the beginning by undergoing training to understand clients' needs and goals;
- Investigators go into the community and get to know the people in our clients lives, to not only assist in defense, but to best understand our clients;
- Mitigation specialists are trained to understand client stories and to present them to prosecutors and the court if necessary to assist clients;
- Immigration attorneys consult with our lawyers as to potential effects on non-citizen cases; and
- Social Workers meet with clients and assist in obtaining medical care, housing, government benefits and other services with the goal of keeping clients out of the system.

While the Commission currently employs attorneys and just recently was approved to hire an on-staff investigator, we do not currently have any of the other positions. We have tried to negate the ability to bring them on to staff by finding partnerships. One such partnership is with the Human Service Zone directors in North Dakota. The undersigned has met with the Zone directors and distributed a list to all our attorneys with the names and contact information for specific persons in each zone to help with the social work component. However, there is not a case manager associated with the relationship which often leads to lack of follow through.

The addition of mitigation specialists could allow not only for mitigation at sentencing, but also for providing case management for services. The State of North Dakota has been pouring millions of dollars into “upstream” resources. The addition of more investigators and mitigation specialists would be part of the same larger effort. Providing the service through an FTE in defender offices is more cost effective than incarcerating someone for longer periods of time. Further, the human cost it would save is immeasurable.

Fund Recruitment and Retention Efforts

The Commission has undertaken many salary surveys over the past few years with similar findings; Commission attorneys and staff are underpaid in comparison to other government attorneys and staff. Pay parity between public defenders and prosecutors is recognized by the American Bar Association as one of the Ten Principles of a Public Defense Delivery System. Quite simply, we are not there. We are furthest behind in starting attorney salary and several administrative support positions.

Our administrative staff is often found training clerks of court in the judicial branch who are on a separate pay scale. Employees within the judiciary are compensated differently with step increases, where the Commission is hamstrung by administrative rules. Most county governments also have step increases for their prosecutors. The State of North Dakota needs to get all lawyers and staff, whether in the Executive branch (insurance commission, attorney general, public defenders), Judicial branch, or Legislative branch on a pay scale equivalent to county governments. All are budgeted with taxpayer funds but allowed to play by different rules. Parity is needed.

Case Loads Need to be More Manageable

Calendar year 2023 saw the release of new national case load standards, the Rand Study. The Rand Study focused on the number of hours needed to complete each case and the number of hours an

attorney can work in a year. The new study greatly reduces the number of cases an attorney should be handling in a year. If North Dakota were to strictly adopt the Rand standards, we would need to quadruple our attorneys.⁵

The Commission has been employing a modified version of the old standard, the 1973 National Advisory Commission on Criminal Justice Standards and Goals (NAC). We currently try and keep attorneys with no more than 300 case assignments in a year. This is with a mix of felony, misdemeanor, juvenile and other case assignments. We also focus on trying to keep the number of cases at any given time manageable. However, with turnover and the inability to fill open positions and contracts, we are often seeing attorneys with higher caseloads. This will need to be addressed.

Examine the Validity and Constitutionality of Fees

Principle 5 of the American Bar Association’s Ten Principles of a Public Defense Delivery System provides “jurisdictions should not charge an application fee for public defense services, nor should persons who qualify for public defense services be required to contribute to or reimburse defense services.” Currently, North Dakota Century Code 29-07-01.1 provides each applicant for “representation by counsel at public expense...shall submit a nonrefundable application fee of thirty-five dollars”. In FY ‘23, this fee was collected in the amount of \$157,730. Total collections of this fee in the 2021-2023 biennium totaled \$312,278. This amount would be a miniscule replacement in order to meet one of the principles as established by the American Bar Association.

The Other fee that was discussed earlier in this report is the attorney fee reimbursement. We are unable to report as to the amount collected due to reimbursement of attorney fees. The amount collected

⁵ This figure was based upon calculation done for the month of July 2023.

does not come back to the agency to fund indigent defense, it is collected by the Court and deposited in the general fund.

HIGHLIGHTS

The Commission has been able to increase salaries by using Target Market Equity funds give by the 68th Legislative Assembly. The Commission, with the funding provided by the legislature, was able to begin an in-house investigation program moving the agency in the direction of holistic defense. The Commission was able to work with national partners to bring high level effective training to North Dakota. Not only were we able to bring that training to North Dakota, we were able to bring it to the University of North Dakota School of Law.

The Commission has also been successful in forging partnerships for the betterment of our clients. We have partnered with the zone directors to establish direct contact information for services. We have established relationships with Job Service of North Dakota to get our clients to resources already in existence to help with employment. We have continued partnership with Department of Corrections and Rehabilitation to expand access to counsel at initial appearances.

Most importantly, we have provided services in a record number of case assignments while short-staffed. Our employees and independent contractors do amazing work. This report is submitted on behalf of all of them, and the great work they do. It has been and continues to be one of the greatest honors of my life to work along side the talented men and women who are the Commission.



Travis W. Finck
Executive Director