

NORTH DAKOTA COMMISSION ON LEGAL COUNSEL FOR INDIGENTS



Annual Report FY 2024

Dept. 188

Submitted by:

Travis W. Finck
Executive Director

LETTER FROM EXECUTIVE DIRECTOR

It is my honor and privilege to submit the annual report of the North Dakota Commission on Legal Counsel for Indigents. This report highlights the success of our agency even while being faced with the various difficulties discussed herein. We continue to see rising case numbers, we continue to suffer turnover at unacceptable rates, and the gap continues to widen when evaluating resource disparity.

The hard work of the men and women who constitute our 41 full-time employees and the many of those who serve as independent contractors providing services, is what keeps us afloat. We have seen record case numbers. One concerning trend in addition to rising case loads is a continued shift towards more felony representation than misdemeanors.

While we continue to exercise our duty to the best of our ability, there is a real need for additional assistance. 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”. Without additional funding and support for the Commission to achieve our constitutionally mandated mission, we will fail. Failure is not a reasonable or acceptable cost to our North Dakota communities.

Turnover and inability to recruit competitively continue to plague our agency. While the case numbers in this report will focus on Fiscal Year 2024, which ended June 30, 2024, the turnover is more easily figured by calendar year. As of the date of this report, our agency has turned over 10 of the 41 FTE positions during calendar year 2024. This continues to put on a trend of 25% turnover annually. The majority reason we lose

employees is related to pay. Our agency cannot continue to exist with this level of turnover.

This report will also highlight the extraordinary work done by our employees and contractors. They continue, in the face of all the adversity mentioned above, to perform admirably.

Dated this th20 day of November 2024.

Respectfully Submitted:

A large, stylized handwritten signature in black ink, appearing to read 'Travis W. Finck', is written over the signature line.

Travis W. Finck
Executive Director

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
Veronica Wiesz, Admin. Staff Officer I
Erin Fossen, Admin. Staff Officer I
Kimberly Preabt, 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 form. 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 2024

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	18,825	25,550	32,275	39,000	45,725	52,450	59,175	65,900
Monthly Gross Income	1,569	2,129	2,690	3,250	3,810	4,371	4,931	5,492
Weekly Gross Income	362	491	621	750	879	1,009	1,138	1,267

(Add \$6,725 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 2024

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

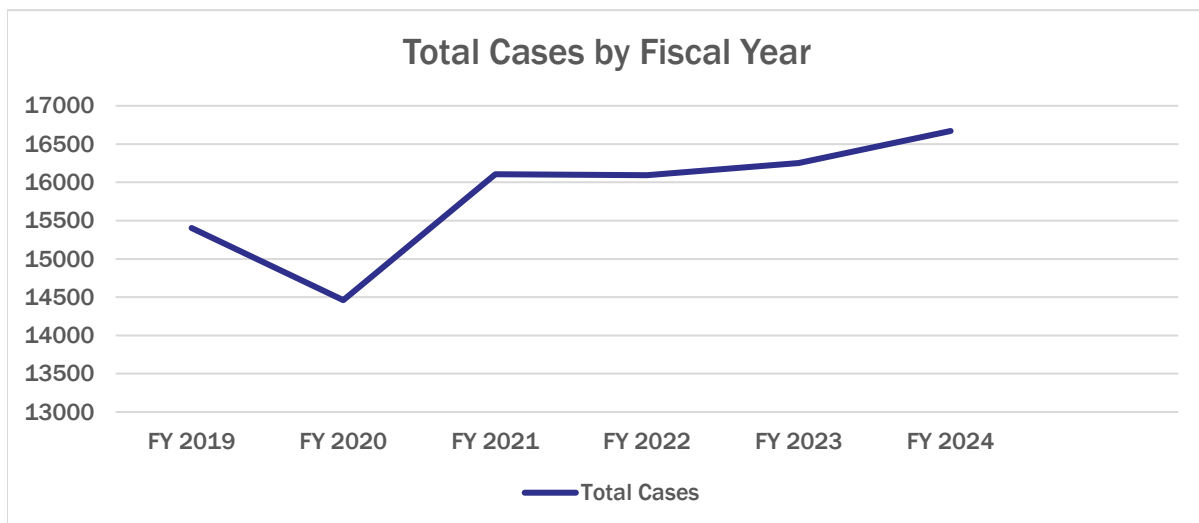
Generally, the North Dakota Commission on Legal Counsel for Indigents would provide services if an applicant were found to be indigent and there is a constitutional, statutory, or rule-based right to counsel. Most of the services provided by the Commission are in circumstances in which an individual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

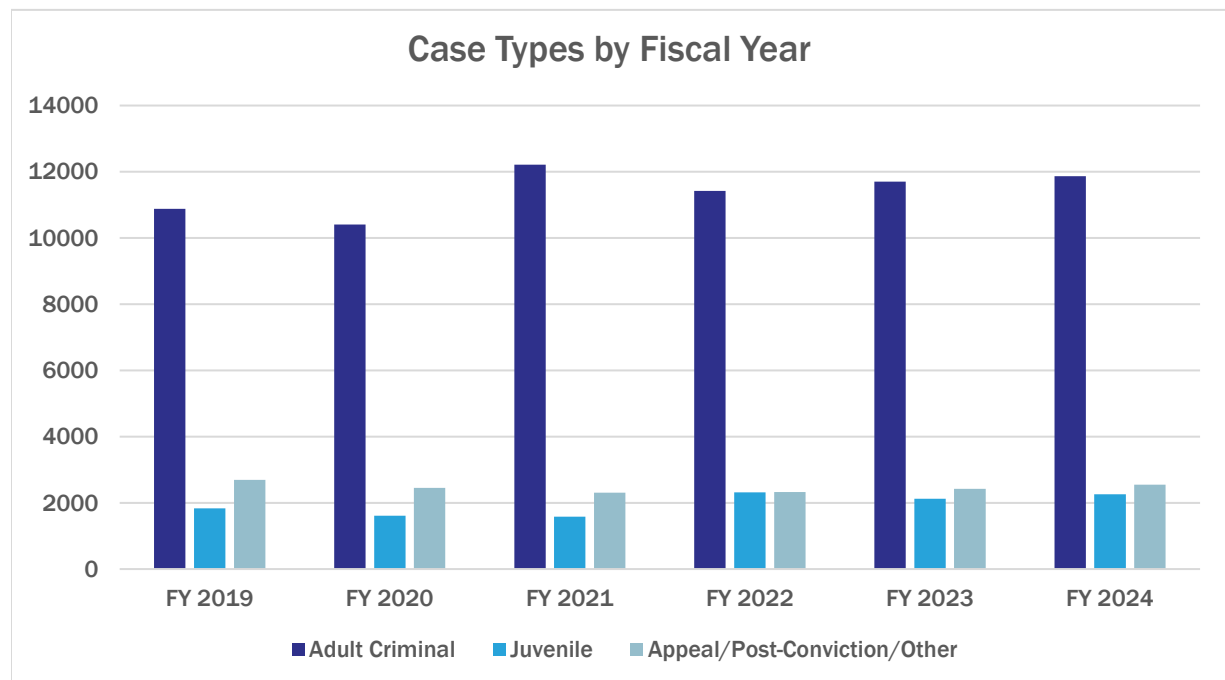
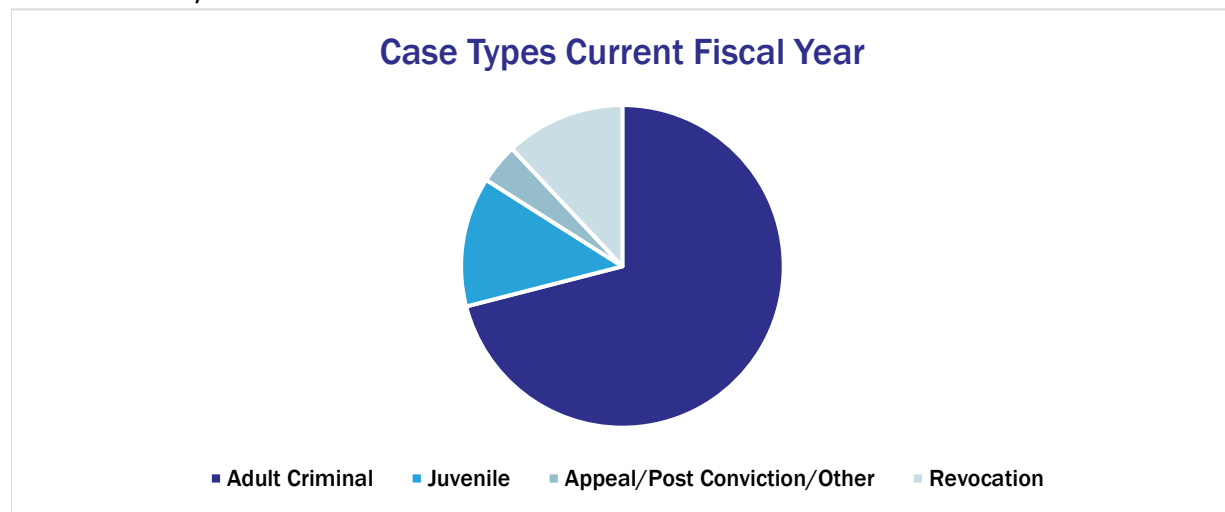
The Commission also provides counsel at initial appearances in criminal matters in which the court or a designee of the court have made the determination of indigence. This is accomplished through a partnership with Pre-Trial Services, a division of the North Dakota Department of Corrections and Rehabilitation. The Commission has worked with Department of Corrections Pre-Trial Services to establish policy and procedure in each location pre-trial services are being provided. 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. Failure to do so in the coming years may expose the state to litigation.

CASE TYPES BY THE NUMBERS

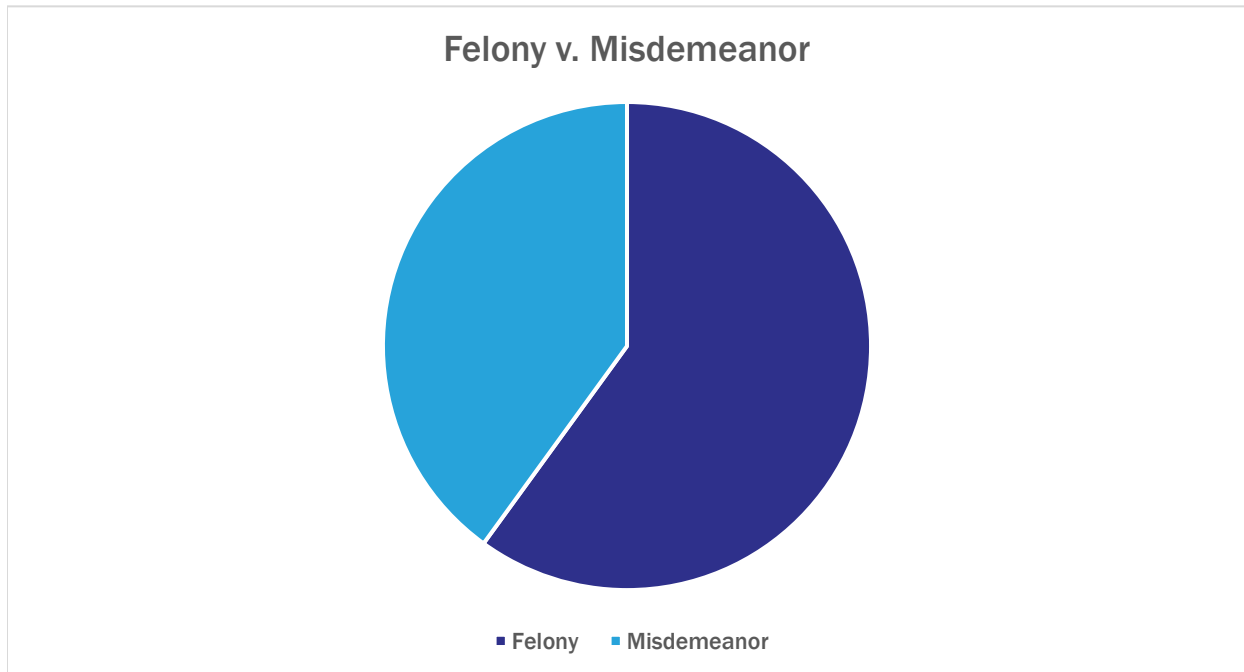
The Commission handled more cases in FY 2024 than in any other prior Fiscal Year. The Commission handled 16,671 case assignments in FY '24, which was an increase of almost 3% when compared to FY '23.



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 case assignment types, when broken down by category, show adult criminal cases continue to be a majority of the Commission’s case load. In the last fiscal year 71% of case assignments were new adult criminal cases, 12% were adult revocation of probation case assignments, 13% were juvenile cases (Delinquency, Child in Need of Protection, Guardianship) and 4 % were Appeal, Post-Conviction, or other.

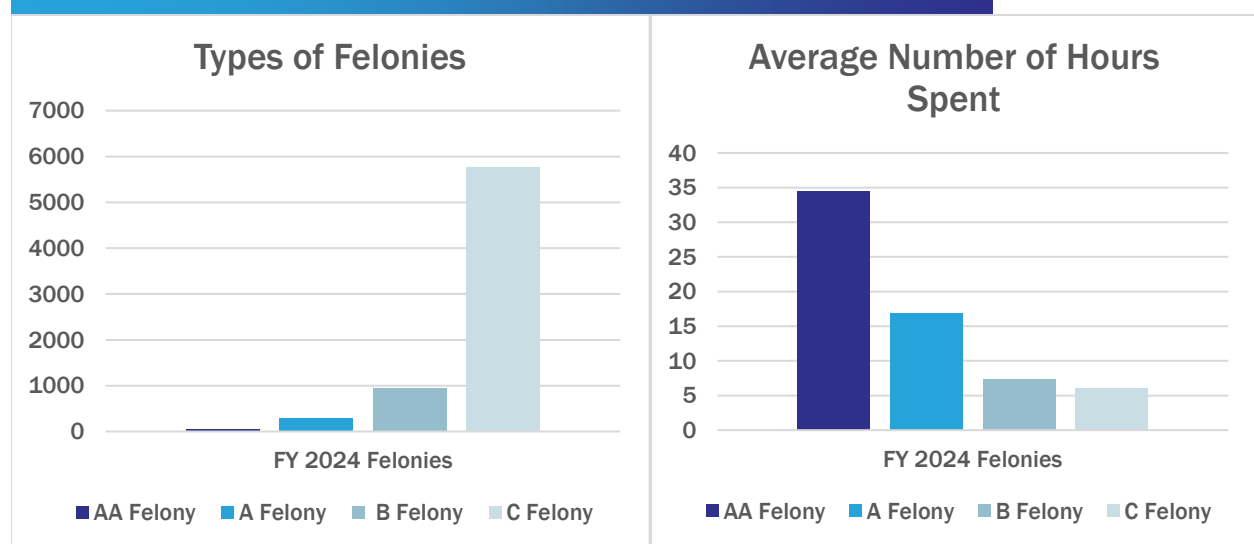


Of note in the adult criminal case assignments, we are seeing a trend where we are handling more Felonies than Misdemeanors. Of the adult criminal cases, 59% were Felony compared to 41% Misdemeanor.



Felonies take more time to complete the case given the increased consequences associated with a conviction. Increased consequences typically mean 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.

Another trend we are noticing is the number serious felony level cases. In FY' 2024 our attorneys were assigned in 13 case assignments alleging Murder. We also assigned attorneys in 46 sex offense cases where the possible penalty was life in prison. These types of cases are extremely time consuming and difficult cases. When an attorney or contractor is assigned a case assignment by our agency, we have them report case hours when the case assignment is closed. Below are two charts that show just how much more time, on average, the serious felony cases take over the lower-level felonies.



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. Admittedly, as the number of case assignments continues to increase and staffing levels remain the same, it becomes more difficult to review applications.

The Commission tries to prevent unintentional abuses by providing training to all agency employees on the guidelines. Additionally, the Director and Deputy Director have provided trainings to individual judges and clerks of court and answered any eligibility questions on an as needed basis. 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.

DELIVERY OF SERVICES

The Commission is administered through the administrative office which is in Jamestown. 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 six 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 attorney who reports to the Deputy Director. The Deputy Director then reports to the Director. All staff in the public defender offices report to the supervising attorney in that office with the staff in the administrative office reporting to the Executive Director. Our supervising attorneys are provided below:

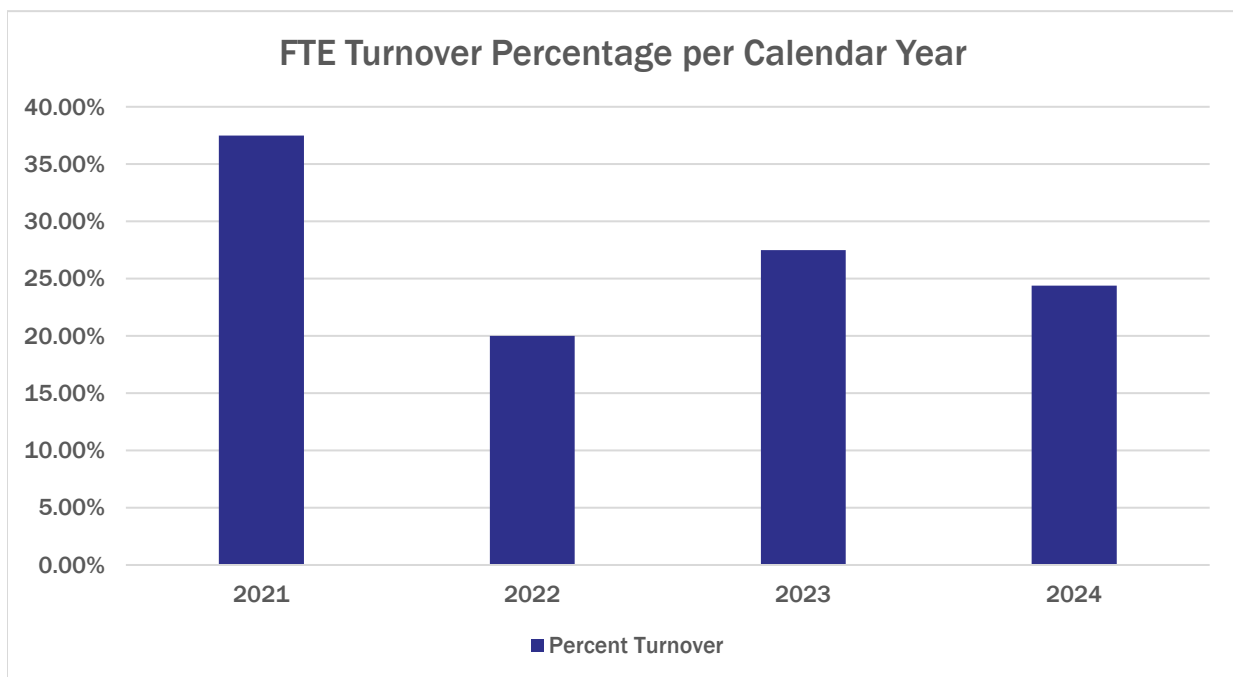
Williston Public Defender Office: Mr. Eric Lundberg
Dickinson Public Defender Office: Mr. Kevin McCabe
Bismarck-Mandan Public Defender Office: Mr. Justin Balzer
Fargo Public Defender Office: Mr. Monty Mertz
Grand Forks Public Defender Office: Mr. David Ogren
Minot Public Defender Office: Mr. Eric Baumann

One change from the last annual report is the closure of the Devils Lake Public Defender Office. The Commission voted to close that office in FY' 24 because we were unable to fill the attorney vacancy. The former

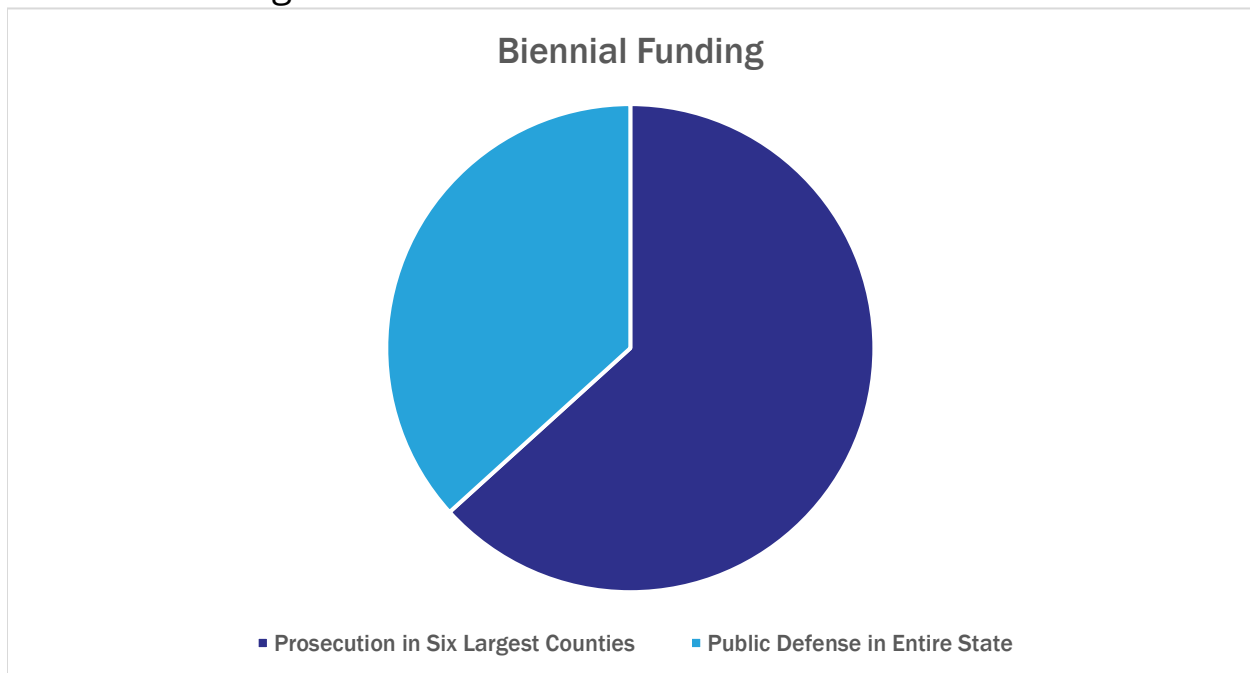
lead attorney left to go work in the state’s attorney office in the same county. We advertised the position at the rate we are budgeted to pay and had 0 qualified applicants in close to six months. A remaining administrative position was transferred from Devils Lake to the Jamestown administrative office to help with the increased demand to assign cases and provide additional support statewide.

TURNOVER IN STAFF POSITIONS

Salaries for public defender and staff positions continue to be the primary motivating factor for employees leaving. We continue to be behind our counterparts in prosecution and court offices. This is largely driven by the disparate number of dollars budgeted to the public defender system versus those budgeted to prosecutors. Effective public defense delivery systems demand equitable resources between prosecution and defense. This inequity has led to a FTE turnover of 24.4% for calendar year 2024 (as of the date of the report). When you add in the turnover in part time positions we employ to try and fill FTE gaps, we have averaged over 25% turnover. This is unsustainable.



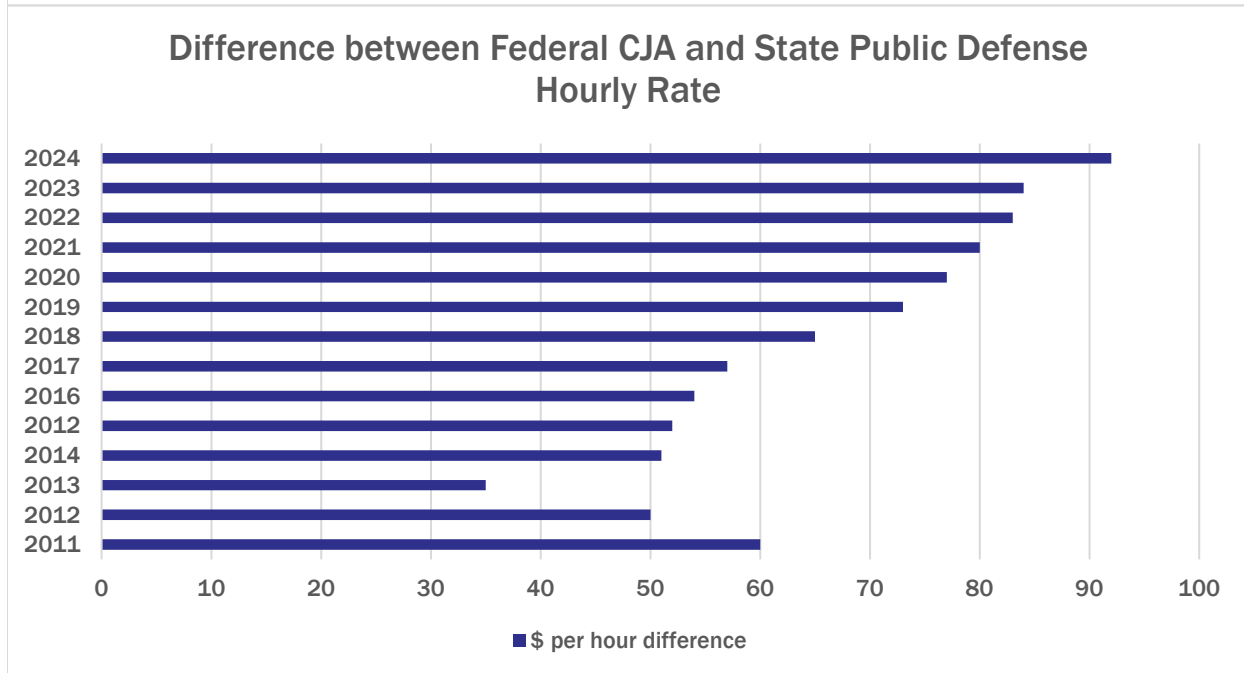
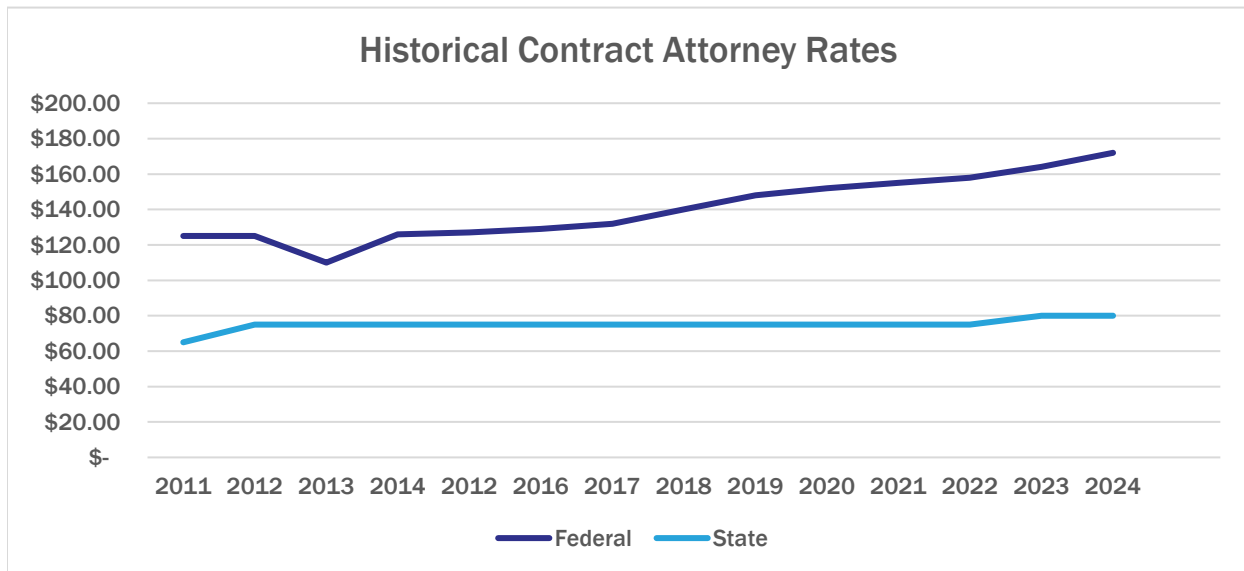
The primary difference between public defense funding and prosecution funding, is the difference between state and local government. Our agency is funded by state funds. Prosecutors are all paid for by county budgets. Counties meet monthly and have yearly budgets wherein the legislature meets once every two years. Thus, like last session when target equity money was given, the counties have a chance to meet and exceed moves by the state disadvantaging state recruitment and retention efforts. To illustrate, there are six public defender offices across the state in Burleigh, Cass, Grand Forks, Stark, Ward and Williams counties. In those six counties alone, the state’s attorney budget for one fiscal year combines to approximately \$19,487,789ⁱ, doubled for the biennium the big six counties budget is approximately \$38,975,578 for prosecution and attorney services. The Commission’s original appropriation for the biennium was \$22,620,120. Public defense services are funded at 53% of the rate of prosecution when evaluating the six counties where our offices are located.



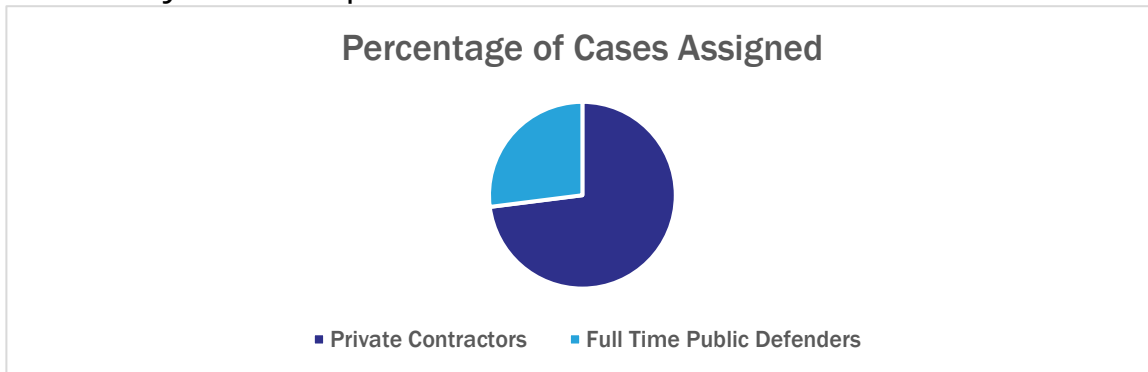
CONTRACTORS

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 68th Legislative Assembly provided funding and the Commission increased that rate for FY '24 to \$80 per hour. The increase, while beneficial, has not kept pace with the increases in federal government public defense work. We are now further behind in hourly rate as compared to the federal government than we were during calendar year 2023 when the increase was given. To remain competitive, the Commission has put forth a budget that would set the hourly rate as a percentage of the federal rate.



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 2024, 73% of case assignments were handled by private contractors with 27% handled by full-time public defenders.



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 2023-2025 biennium in the original appropriation consists of \$20,608,898 from the general fund, and \$2,011,222 in spending authority from the Indigent Defense fund. Fund 282 is comprised of two statutorily created fees:

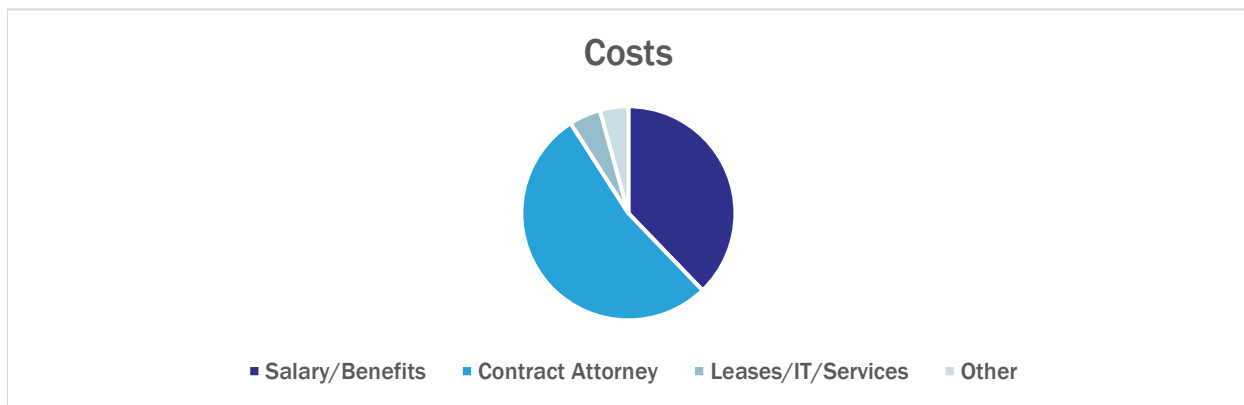
- 1) NDCC 29-07-01.1: Indigent Defense application fee of \$35; and
- 2) NDCC 29-26-22(2): Court administration fee of \$100 assessed to all defendants. The first \$750,000 is deposited in the fund, the next \$460,000, goes to Court facilities improvement, and then the remaining collections are split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

During FY ‘24, the Commission received \$158,838.32 from the Indigent Defense Application Fees. The Commission received \$750,000 from the Administration fee. For the biennium, the Commission was given original spending authority in the amount of \$2,011,222. Currently total collections in the special fund for the biennium are on pace to vastly underfund spending authority from the special fund.

The general fund allocation of \$20,608,898 was increased to \$21,137,085.88 with a reimbursement from the newly created vacant

and new FTE pool. The money was reimbursed for the hiring of the new FTE investigator. The Commission still has some funds remaining in the vacant FTE pool from which it can draw with an expected reimbursement in the first few months of calendar year 2025.

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.



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). Those funds are collected by the Court and placed in the general fund bearing no impact on our agency's appropriation. NDCC 29-07-01.1(4).

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 to ensure attorneys are meeting their professional and ethical obligations. Lawyers need sufficient time to competently represent each client. Additionally, as caseloads increase, we begin to see more conflicts of interest for attorneys which leads to attorneys having to travel outside of their

home districts. Furthermore, 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. When turnover runs close to 25% annually, it is easy to 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, 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

Quite simply, we need more resources. We are an agency in transition. We are in the process of transitioning from a reactionary system focused on completing cases to a system focusing on the needs of the client. Transition is hard when you lack resources and experience an annual average turnover more than 25%. To achieve this, the Commission will be working on the following goals:

Review of the Process for Determining Indigency

The Commission has approved a new eligibility form and has circulated it for comment. By shortening the form and providing instructions, the Commission is hopeful the shortened form will be less overwhelming for potential clients and have a timelier review process.

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 individuals into the criminal legal 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 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 has one investigator on staff, we do not currently have any of the other positions. The American Bar Association’s 10 Principles of a Public Defense Delivery System, Principle 9 provides public defense providers “should adopt a client-centered approach to representation based around understanding a client’s needs and working with them to achieve their goals. Public Defense providers should have the assistance of investigators, social workers, mitigation specialists, experts, and other specialized professionals necessary to meet public defense needs.”

The addition of mitigation specialists could allow not only for mitigation at sentencing, but also for providing case management 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. We have proposed a budget for 2025-2027 budget that would impose a wage scale like that of the Judicial System and most prosecutors. While we are an executive branch agency, our work is more closely mirrored to that of the Judicial Branch.

We need funding to secure interns to get them interested in public defense. The attorney general's office provides a paid fellowship every summer for a law student. We do not have a similar item in our budget and are forced to examine ability to pay based upon caseloads and costs biennium to date. Upon a recent recruiting trip to North Dakota's only law school, that is a recurring question always on law students mind when considering practical learning: is there any pay? We need funding to be competitive when hiring so we are not sitting with vacant positions for six months at a time.

Case Loads Need to be More Manageable

Calendar year 2023 saw the release of new national case load standards known as 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 the number of attorneys.ⁱⁱ

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 mix of felony, misdemeanor, juvenile and other case assignments should be no more than 25 per month. However, with turnover and the inability to fill open positions and contracts, we are often seeing attorneys with higher caseloads. Of the 80 persons who were employed as attorneys or working on contract, 41 were contracted or employed at some point in the year to take at least 25 case assignments per month. Of those 41 persons, 27 exceeded an annual average of 25 per month. Thus, 66% of our full-time employees or contractors exceeded the Commission's case load standards.

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 '24, this fee was collected in the amount of \$158,838.32. Total collections of this fee in the 2021-2023 biennium totaled \$312,278. This amount would be a miniscule replacement 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 due to the fact the court collects those fees and deposits them in the general fund.

Review Counsel at Initial Appearance Practice

The Commission has begun the important work of reviewing the process of initial appearances and the presence of public defenders at the initial appearances. Funding and support will be needed from our legislative partners. Funding counsel at initial appearance has been shown to save back end legal system costs. A study in Cook County

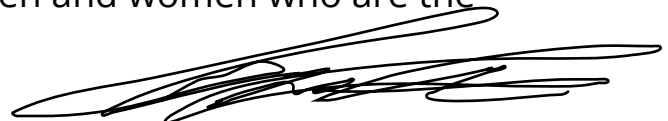
Illinois estimated providing counsel to clients within 24 hours of arrest could save the county between \$12.7 and \$43.9 million and even eventually allow the county to close twenty-two jail units.ⁱⁱⁱ

HIGHLIGHTS

The Commission continues to partner with local, state, and national partners to provide high quality training for our public defenders and contract providers. The continuing legal education seminars that are required to be offered to our attorneys have become some of the best and well attended trainings available to practitioners in the state of North Dakota.

Most importantly, we have provided services in a record number of case assignments while short-staffed. We have restructured our agency with the closure of one office and reassignment of the FTE positions to better achieve our mission. The passionate and determined staff continually amaze us with their ability to meet the mission considering the resource gap while tirelessly supporting indigent persons across the state. Albert Einstein once said, “in the middle of every difficulty lies opportunity”. We have extreme difficulty in turnover, lack of resource parity, and increasing case numbers. However, our opportunity lies within the people we have place. With additional support, we can sufficiently meet the challenges of the day.

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 alongside the talented men and women who are the Commission.



Travis W. Finck
Executive Director

ⁱ Based upon data available on the Internet for the most recent budget in each county mentioned.

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

ⁱⁱⁱ Access to Counsel at First Appearance: A Key Component of Pretrial Justice, Policy Brief prepared by the National Legal Aid & Defender Association, p. 7, through a grant provided by the John D. and Catherine T. MacArthur Foundation’s Safety and Justice Challenge, citing Bryan L. Sykes, Eliza Solowiej & Evelyn J. Patterson, The Fiscal Savings of Accessing the Right to Legal Counsel Within Twenty-Four Hours of Arrest: Chicago and Cook County, 2013, 5 U.C. IRVINE L. REV. 813, 815 (2015), <https://scholarship.law.uci.edu/cgi/viewcontent.cgi?article=1219&context=ucilr>. “Units” are defined as “wings, blocks, stories, or PODS” of a detention facility. *Id.* at 831.