

# NORTH DAKOTA COMMISSION ON LEGAL COUNSEL FOR INDIGENTS



## Annual Report 2021 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 Commission on Legal Counsel for Indigents. Whereas my last annual report highlighted the immense pressures on the system that COVID 19 brought, this year had equally as difficult challenges. The “boomerang” effect of cases coming back, appears now to be a trend of increasing cases rather than a bounce back after Covid 19. Further, after another year of historic turnover, our agency looks at difficult decisions on the horizon.

While the case numbers in this report will focus on Fiscal Year 2021, which ended June 30, 2021, the turnover is more easily figured by calendar year. As of the date of this report, our agency has turned over 13 of the 40 FTE positions. 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.

Additionally, 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 since 2012. 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 29<sup>th</sup> day of November 2021.

Respectfully Submitted:



Travis W. Finck  
Executive Director

**Administration:**

Travis W. Finck, Executive Director  
Todd N. Ewell, Deputy Director  
Aaron Petrowitz, Account Budget Specialist II  
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(2)(f).

**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 2021

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	16,100	21,775	27,450	33,125	38,800	44,475	50,150	55,825
Monthly Gross Income	1,342	1,815	2,288	2,760	3,233	3,706	4,179	4,652
Weekly Gross Income	310	419	528	637	746	855	964	1,074

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.

**CIRCUMSTANCES IN WHICH NDCLCI PROVIDES SERVICES**

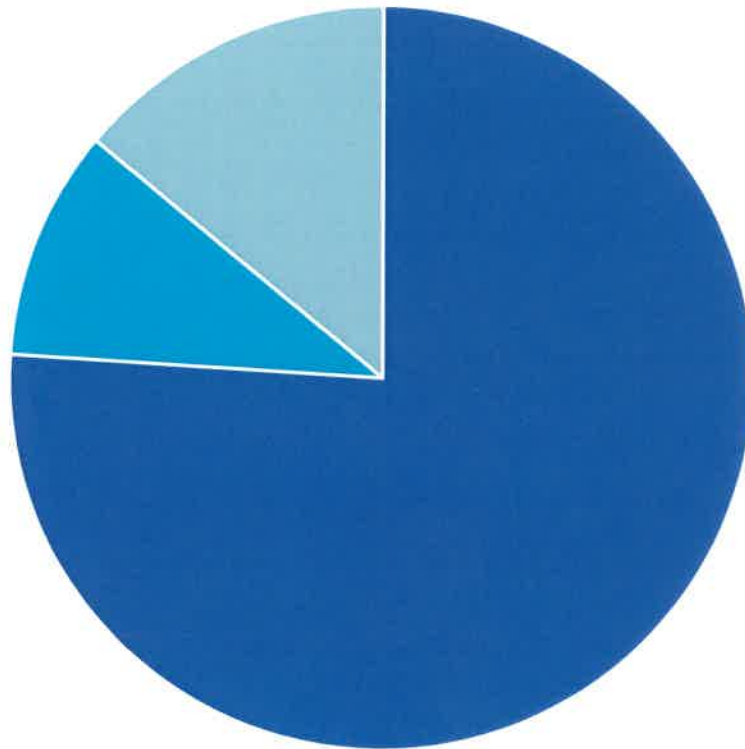
Generally, the North Dakota Commission on Legal Counsel for Indigents would provide services if an applicant is found to be indigent and there is a constitutional, statutory or rule based right to counsel. Most of the services provided by the Commission are in circumstances in which an individual is 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 67<sup>th</sup> 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 and provided that 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 next annual report will contain numbers from Fiscal Year 2022 which will be the first full year of the new juvenile court processes.

In addition to increases in the administrative process for 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 the 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



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

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## COMPLIANCE WITH ELIGIBILITY GUIDELINES

The Commission has always strived to be good stewards of the taxpayer's 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 eight 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 has eight public defender offices across the state. 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 Director and Deputy 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: Mr. Yancy Cotrill starts 12/6/2021  
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: Ms. Kalli Hoffmann

### TURN OVER 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 they have which often requires us to pay twice for one case. In addition, we are getting very close to not having sufficient attorney coverage to cover cases in which a judge has determined an individual eligible. In addition to reassigning cases, we have the expense of training a new employee and bringing them up to speed.

We are not able to be competitive within our legislative funding to recruit or retain employees. Of the attorneys who have left our employ, 5 have left to become prosecutors. Counties have continued to increase their pay and benefits causing us to fall further behind. We are also struggling in recruiting against county positions and have fewer applicants applying.

The rate of inflation has increased the cost of living. 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.

We have taken steps to try and reduce turnover and increase applications short of legislative appropriation. We have worked with our partners at HRMS to be creative in recruiting. We have established relationships with the law school to recruit young attorneys and have even created positions for new graduates awaiting bar results. However, both times we have done



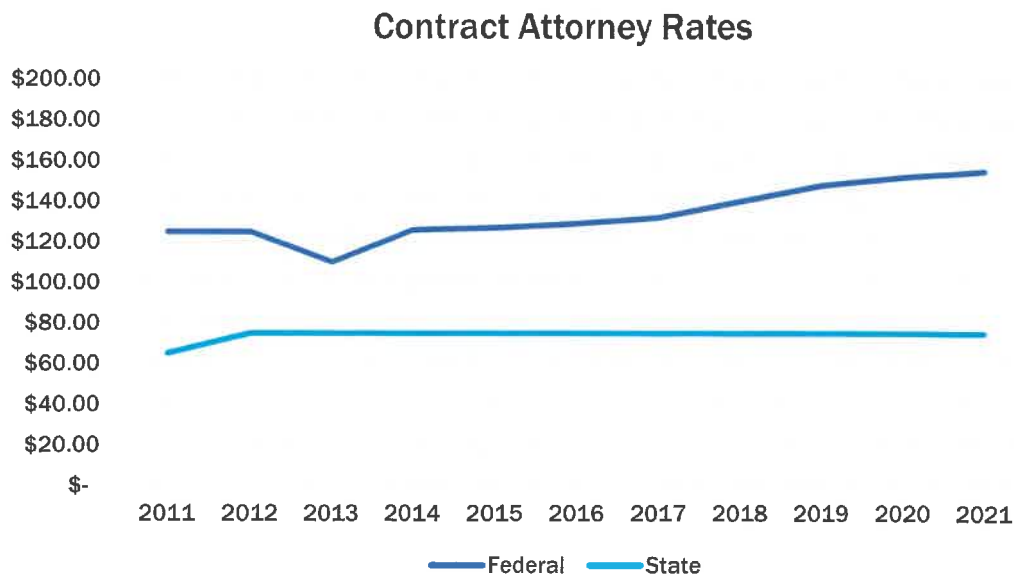
that the attorney has worked for us for less than a year and then left to become a prosecutor.

Additionally, we recreated our job postings to sell the beauty and lifestyle that North Dakota provides to entice out-of-state candidates to come to North Dakota. We post with partner organizations that have national presences to try and find qualified employees. However, we have been largely unsuccessful in recruiting candidates for positions.

## CONTRACTORS

The Commission contracts with private attorneys to 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 contracts who take conflict cases on a case assignment by assignment basis. The current hourly rate for contractors is \$75 per hour. Meanwhile, while 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 the hourly rate earned in the private sector.

Additionally, we as a state agency have now fallen behind the hourly compensation rates paid to public defenders on city contracts in many cities across the state.



### Contract Attorney Rates for Indigent Defense



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 2021, 67% of case assignments were handled by private contractors with 33% handled by full time public defenders.

## FINANCING THE AGENCY

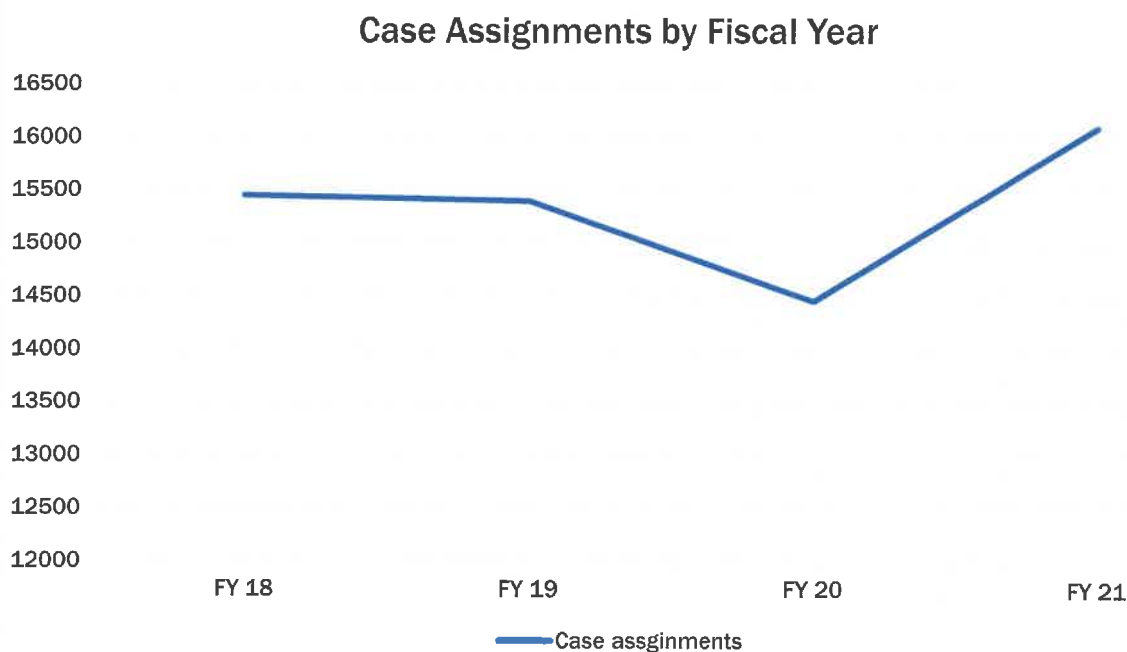
The Commission is an executive branch agency which is funded by the general fund and fund 282, the “Indigent Defense Administration Fund”. Funding for the Commission in the 2019-2021 biennium consists of \$18,384,627 from the general fund, and \$1,990,035 in spending authority from the Indigent Defense 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 FY21, the Commission received \$ 157,261.40 from the Indigent Defense Application Fees. The Commission received \$529,060.41 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 our agency’s appropriation. NDCC 29-07-01.1(4).

At the close of fiscal year 2021, the Commission turned back \$844,101.24 in general fund dollars.

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 things 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. Case assignments had decreased over the first fiscal year of the biennium in comparison to prior years. 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. A sheet is attached showing the case assignments in each judicial district.



One negative impact of the COVID 19 pandemic that continues to plague our attorneys is the number of cases an attorney is carrying at one time. The North Dakota Supreme Court in an Emergency Order issued by the Chief Justice, suspended all jury trials for a period from March 16, 2020 through July 1, 2020. During that time, our attorneys continued to work cases. However, those cases that were set for trial were continued and placed on top of the increased new case assignments our attorneys are seeing. This requires our attorneys to be in several court rooms at once and often in several jurisdictions at once. The Commission has worked

with the Court Administrator's Office and the Supreme Court to make sure we can have an attorney at every hearing. However, as funding for contract attorneys and discrepancy in pay between prosecutors and defenders continues to occur, we are coming dangerously close to being unable to provide services in all the cases in which the Court determines someone to be eligible.

## HIGHLIGHTS

The biggest highlight of the agency the last year has been the ability to survive. 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.

Additionally, the Commission has suggested and put out for comment changes to our guidelines. 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 assisted at the last legislative session with some monumental substantive changes to the criminal justice system. As previously mentioned, we participated substantially in drafting and assisting in getting the new Juvenile Court Act passed by the legislature. A group assembled by the Commission, which included the Director, Amy Mihulka-Legal Assistant II in Fargo, and public defense contractor Nicholas Thornton worked with prosecutors, the State Hospital, and legislators to draft and pass a bill to reform the competency process in North Dakota criminal cases. All of these are steps in the right direction.

The Commission has also continued to work with the Pre-Trial Services program to move the ball forward on bail reform in North Dakota. We continue to search for ways to meet our constitutional mission.

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. The Executive Director continues his work with the National Judicial Task Force to Examine State Court's Response to Mental Illness. The Deputy Director has also assisted with drafting the National

Association of Public Defender’s proposal on the effective way to use reliable electronic means for court during the pandemic.

## GOALS FOR FISCAL YEAR 2022

The Commission will need to evolve to meet the demands of a changing clientele. This will require commitment from our government partners to meet our constitutional requirements.

The Commission will need to request increases in compensation. Public defender staff and contract attorneys continue to be paid less than their counterparts. The Commission did not ask for legislative increases in the last budget but did have conversations in House Appropriations when the financial picture for North Dakota brightened. However, we were not awarded any increases beyond that offered to all state employees.

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.

In conclusion, the Commission will continue to build on excellence. We have been able to continue to exist due to the dedication of our agency employees and contractors, but we need help.

Respectfully submitted this 29<sup>th</sup> day of November 2021.



Travis W. Finck  
Executive Director

Count of Assignment No			
Judicial District	Case Type2	HighestLevel2	Total
EC	App and Post Conv		25
	Other		576
	Criminal	Felony	2,070
		Misd	1,309
	Juvenile		345
<b>EC Total</b>			<b>4,325</b>
NC	App and Post Conv		13
	Other		188
	Criminal	Felony	746
		Misd	403
	Juvenile		186
<b>NC Total</b>			<b>1,536</b>
NE	App and Post Conv		8
	Other		163
	Criminal	Felony	513
		Misd	426
	Juvenile		164
<b>NE Total</b>			<b>1,274</b>
NEC	App and Post Conv		21
	Other		191
	Criminal	Felony	754
		Misd	337
	Juvenile		175
<b>NEC Total</b>			<b>1,478</b>
NW	App and Post Conv		18
	Other		176
	Criminal	Felony	590
		Misd	571
	Juvenile		124
<b>NW Total</b>			<b>1,479</b>
SC	App and Post Conv		32
	Other		670
	Criminal	Felony	1,976
		Misd	959
	Juvenile		437
<b>SC Total</b>			<b>4,074</b>
SE	App and Post Conv		13
	Other		133
	Criminal	Felony	505
		Misd	463
	Juvenile		93
<b>SE Total</b>			<b>1,207</b>
SW	App and Post Conv		7
	Other		74
	Criminal	Felony	240
		Misd	350
	Juvenile		60
<b>SW Total</b>			<b>731</b>
<b>Grand Total</b>			<b>16,104</b>