

2023 HOUSE APPROPRIATIONS

HB 1022

**Department 188 - Commission on Legal Counsel for Indigents
House Bill No. 1022**

Executive Budget Comparison to Base Level

	General Fund	Other Funds	Total
2023-25 Executive Budget	\$21,230,966	\$2,018,356	\$23,249,322
2023-25 Base Level	19,294,363	1,994,850	21,289,213
Increase (Decrease)	\$1,936,603	\$23,506	\$1,960,109

Selected Budget Changes Recommended in the Executive Budget

	General Fund	Other Funds	Total
1. Provides funding for state employee salary and benefit increases, of which \$602,041 is for salary increases and \$171,868 is for health insurance increases	\$752,293	\$21,616	\$773,909
2. Adds 3 FTE investigator positions	\$488,092	\$0	\$488,092
3. Adds funding to increase the legal fee rate from \$75 per hour to \$80 per hour	\$630,453	\$0	\$630,453

A summary of the executive budget changes to the agency's base level appropriations is attached as an appendix.

A copy of the draft appropriations bill containing the executive budget recommendations is attached as an appendix.

Selected Bill Sections Recommended in the Executive Budget

Indigent defense administration fund - Sections 2 and 3 would amend North Dakota Century Code Sections 29-07-01.1 and 54-44.1-11 to provide for the Commission on Legal Counsel for Indigents to transfer its unspent general fund appropriation authority to the indigent defense administration fund each biennium until the balance of the fund reaches \$3 million.

Continuing Appropriations

Indigent defense administration fund - Sections 29-07-01.1 and 29-26-22 - Funding is from a \$35 nonrefundable fee for court-appointed defense services and from a \$100 court administration fee in all criminal cases except infractions. The first \$750,000 collected is used for indigent defense services, the next \$460,000 is used for court facilities, and additional amounts are deposited equally into the two funds.

Deficiency Appropriations

There are no deficiency appropriations for this agency.

Significant Audit Findings

The State Auditor reported no significant audit findings.

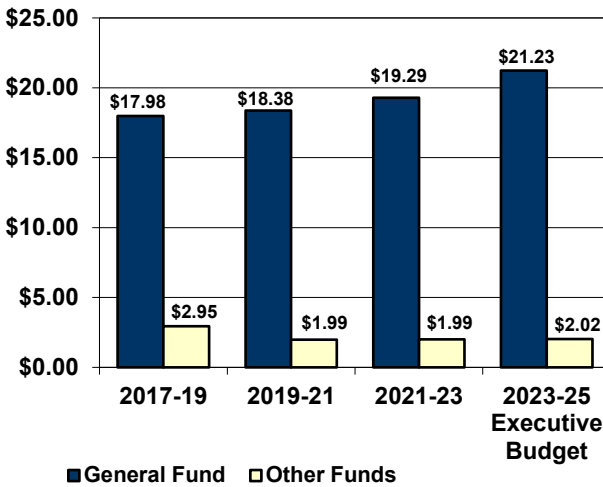
Major Related Legislation

At this time, no major related legislation affecting this agency has been introduced.

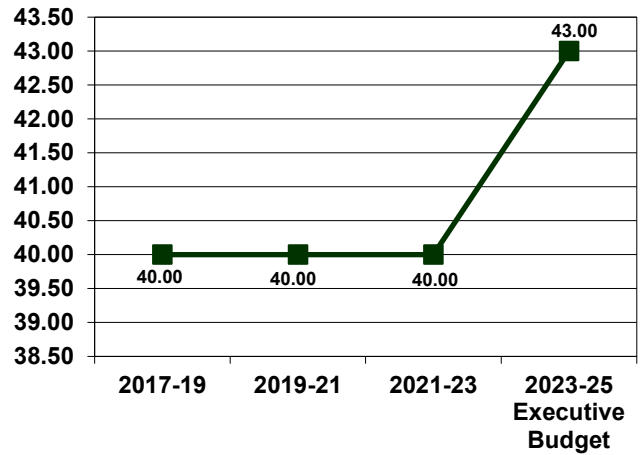
Historical Appropriations Information

Agency Appropriations and FTE Positions

Agency Funding (Millions)



FTE Positions



Ongoing General Fund Appropriations

	2015-17	2017-19	2019-21	2021-23	2023-25 Executive Budget
Ongoing general fund appropriations	\$16,982,909	\$17,983,876	\$18,384,627	\$19,294,363	\$21,230,966
Increase (decrease) from previous biennium	N/A	\$1,000,967	\$400,751	\$909,736	\$1,936,603
Percentage increase (decrease) from previous biennium	N/A	5.9%	2.2%	4.9%	10.0%
Cumulative percentage increase (decrease) from 2015-17 biennium	N/A	5.9%	8.3%	13.6%	25.0%

Major Increases (Decreases) in Ongoing General Fund Appropriations

2017-19 Biennium

1. Increased funding for operating expenses \$130,919
2. Increased funding for professional fees due to increased caseloads to provide a total of \$10,227,500 for professional fees \$500,000

2019-21 Biennium

None \$0

2021-23 Biennium

1. Added funding to provide legal counsel to juveniles \$325,000

2023-25 Biennium (Executive Budget Recommendation)

1. Adds 3 FTE investigator positions \$488,092
2. Adds funding to increase the legal fee rate from \$75 per hour to \$80 per hour \$630,453

One-Time General Fund Appropriations

	2015-17	2017-19	2019-21	2021-23	2023-25 Executive Budget
One-time general fund appropriations	\$122,275	\$0	\$0	\$0	\$0

Major One-Time General Fund Appropriations

2017-19 Biennium	
None	\$0
2019-21 Biennium	
None	\$0
2021-23 Biennium	
None	\$0
2023-25 Biennium (Executive Budget Recommendation)	
None	\$0

Commission on Legal Counsel for Indigents - Budget No. 188
House Bill No. 1022
Base Level Funding Changes

	Executive Budget Recommendation			
	FTE Positions	General Fund	Other Funds	Total
2023-25 Biennium Base Level	40.00	\$19,294,363	\$1,994,850	\$21,289,213
2023-25 Ongoing Funding Changes				
Base payroll changes		\$52,209	\$1,890	\$54,099
Salary increase		585,569	16,472	602,041
Health insurance increase		166,724	5,144	171,868
Adds 3 FTE investigator positions	3.00	488,092		488,092
Adds funding to increase the legal fee rate from \$75 per hour to \$80 per hour		630,453		630,453
Adds funding for the ITD rate increase		13,556		13,556
Consolidates line items				0
Total ongoing funding changes	3.00	\$1,936,603	\$23,506	\$1,960,109
One-time funding items				
No one-time funding items				\$0
Total one-time funding changes	0.00	\$0	\$0	\$0
Total Changes to Base Level Funding	3.00	\$1,936,603	\$23,506	\$1,960,109
2023-25 Total Funding	43.00	\$21,230,966	\$2,018,356	\$23,249,322
<i>Federal funds included in other funds</i>			\$0	
<i>Total ongoing changes as a percentage of base level</i>	7.5%	10.0%	1.2%	9.2%
<i>Total changes as a percentage of base level</i>	7.5%	10.0%	1.2%	9.2%

Other Sections in Commission on Legal Counsel for Indigents - Budget No. 188

	Executive Budget Recommendation
Indigent defense administration fund	Sections 2 and 3 would amend Sections 29-07-01.1 and 54-44.1-11 to provide for the Commission on Legal Counsel for Indigents to transfer its unspent general fund appropriation authority to the indigent defense administration fund each biennium until the balance of the fund reaches \$3 million.

HOUSE BILL NO. 1022
(Governor's Recommendation)

Introduced by

Appropriations Committee

(At the request of the Governor)

A bill for an Act to provide an appropriation for defraying the expenses of the commission on legal counsel for indigents and to amend and reenact sections 29-07-01.1 and 54-44.1-11 of North Dakota Century Code.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. APPROPRIATION. The funds provided in this section, or so much of the funds as may be necessary, are appropriated out of any moneys in the general fund in the state treasury, not otherwise appropriated, and from special funds derived from other income, to the commission on legal counsel for indigents for the purpose of defraying the expenses of the commission on legal counsel for indigents, for the biennium beginning July 1, 2023 and ending June 30, 2025, as follows:

	<u>Base Level</u>	<u>Adjustments or Enhancements</u>	<u>Appropriation</u>
Commission on Legal Counsel	<u>\$21,289,213</u>	<u>\$1,960,109</u>	<u>\$23,249,322</u>
Total All Funds	<u>\$21,289,213</u>	<u>\$1,960,109</u>	<u>\$23,249,322</u>
Less Estimated Income	<u>1,994,850</u>	<u>23,506</u>	<u>2,018,356</u>
Total General Fund	<u>\$19,294,363</u>	<u>\$1,936,603</u>	<u>\$21,230,966</u>
Full-time Equivalent Positions	40.00	3.00	43.00

SECTION 2. AMENDMENT. Subsection 4 of section 29-07-01.1 of the North Dakota Century Code is amended and reenacted as follows:

4. The indigent defense administration fund is a special fund in the state treasury. The state treasurer shall deposit in the fund all application fees collected under subsection 1 and any unspent general fund appropriation pursuant to section 54-44.1-11. All money in the indigent defense administration fund are appropriated on a continuing basis to the commission on legal counsel for indigents to be used in the administration of the indigent defense system. If the balance of the fund on July 31 of any odd numbered year is over \$3,000,000, the excess amount is to be transferred to the general fund.

SECTION 3. AMENDMENT. Section 54-44.1-11 of the North Dakota Century Code is amended and reenacted as follows:

54-44.1-11. Office of management and budget to cancel unexpended appropriations - When they may continue. (Effective through July 31, 2023-2025)

Except as otherwise provided by law, the office of management and budget, thirty days after the close of each biennial period, shall cancel all unexpended appropriations or balances of appropriations after the expiration of the biennial period during which they became available under the law. Unexpended appropriations for the state historical society and legal counsel for indigent defense are not subject to this section and the state historical society and the legal counsel for indigent defense shall report on the amounts and uses of funds carried over from one biennium to the appropriations committees of the next subsequent legislative assembly. Unexpended appropriations for the North Dakota university system are not subject to this section and the North Dakota university system shall report on the amounts and uses of funds carried over from one biennium to the next to subsequent appropriations committees of the legislative assembly. The chairmen of the appropriations committees of the senate and house of representatives of the legislative assembly with the office of the budget

may continue appropriations or balances in force for not more than two years after the expiration of the biennial period during which they became available upon recommendation of the director of the budget for:

1. New construction projects.
2. Major repair or improvement projects.
3. Purchases of new equipment costing more than ten thousand dollars per unit if it was ordered during the first twelve months of the biennium in which the funds were appropriated.
4. The purchase of land by the state on a "contract for deed" purchase if the total purchase price is within the authorized appropriation.
5. Purchases by the department of transportation of roadway maintenance equipment costing more than ten thousand dollars per unit if the equipment was ordered during the first twenty-one months of the biennium in which the funds were appropriated.
6. Authorized ongoing information technology projects.

Office of management and budget to cancel unexpended appropriations - When they may continue. (Effective after July 31, 2023-2025) The office of management and budget, thirty days after the close of each biennial period, shall cancel all unexpended appropriations or balances of appropriations after the expiration of the biennial period during which they became available under the law. Unexpended appropriations for the state historical society and legal counsel for indigent defense are not subject to this section and the state historical society and the legal counsel for indigent defense shall report on the amounts and uses of funds carried over from one biennium to the appropriations committees of the next subsequent legislative assembly. The chairmen of the appropriations committees of the senate and house of representatives of the legislative assembly with the office of the budget may continue appropriations or balances in force for not more than two years after the expiration of the biennial period during which they became available upon recommendation of the director of the budget for:

1. New construction projects.
2. Major repair or improvement projects.
3. Purchases of new equipment costing more than ten thousand dollars per unit if it was ordered during the first twelve months of the biennium in which the funds were appropriated.
4. The purchase of land by the state on a "contract for deed" purchase if the total purchase price is within the authorized appropriation.
5. Purchases by the department of transportation of roadway maintenance equipment costing more than ten thousand dollars per unit if the equipment was ordered during the first twenty-one months of the biennium in which the funds were appropriated.
6. Authorized ongoing information technology projects.

2023 HOUSE STANDING COMMITTEE MINUTES

Appropriations - Government Operations Division
Brynhild Haugland Room, State Capitol

HB1022
1/13/2023

A BILL for an Act to provide an appropriation for defraying the expenses of the commission on legal counsel for indigents.
--

8:30 AM Chairman Monson Opened the hearing on HB1022

Members present: Chairman Monson, Vice Chairman Brandenburg, Representatives Bellew, Meier, Pyle, Mock

Members absent: Representative Kempenich

Discussion Topics:

- Provide Attorneys
- Poverty Guild Lines
- Service agreement between counties and cities

Presenter: Travis Finck, Executive Director – ND Commission on Legal Counsel for Indigents (NDCLCI), Testimony #13122, #13119, and #13159 #13118 #13158

Presenter: Zachary Pelham - Chairman NDCLCI – Testifies in favor. (Testimony #13121)

Presenter: Kevin McCabe – Public Defender – NDCLCI -Testified in favor (Testimony #13123)

Additional written testimony: Tony Weiler, President ND Bar Association #13096
Debra Hoffarth, Licensed Attorney #13048 Jackson Lofgren, Licensed Attorney#13014

9:31 AM Chairman Monson Adjourned the hearing.

Robyn Engelstad, Committee Clerk, Donna Lynn Knutson

2023 HOUSE STANDING COMMITTEE MINUTES

Appropriations - Government Operations Division Brynhild Haugland Room, State Capitol

HB1022
1/24/2023

A BILL for an Act to provide an appropriation for defraying the expenses of the commission on legal counsel for indigents.
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3:49 PM Chairman Monson Opened the hearing on HB1022.

Members present: Chairman Monson, Vice Chairman Brandenburg, Representatives Bellew, Meier, Pyle, Mock, Kempenich

Discussion Topics:

- Attorney to investigator ratio
- Attorney availability and access

Todd Ewell, Deputy Director, ND Commission on Legal Counsel for Indigents.
Testifying in support of. (#13120)

Travis Finck, Executive Director, ND Commission on Legal Counsel for Indigents-
Answers questions for the committee

Additional written testimony: Legislative Council, (#16441)

5:11 PM Chairman Monson Adjourned the hearing.

Amy Liepke, Committee Clerk

2023 HOUSE STANDING COMMITTEE MINUTES

Appropriations - Government Operations Division Brynhild Haugland Room, State Capitol

HB 1022
2/2/2023

A BILL for an Act to provide an appropriation for defraying the expenses of the commission on legal counsel for indigents

Chairman Monson opened meeting at 2:45 PM

Members present: Chairman Monson, Vice Chair Brandenburg, Rep. Bellew, Rep. Meier, Rep. Pyle,
Absent: Rep. Kempenich, Rep. Mock

Discussion Topics:

- Salary increase.
- Committee action
- Amendment (23.0251.01001)

Travis Finck, Executive Director ND Commission on Legal Counsel for Indigents, orally answered questions for the committee

Representative Meier moved to amend HB 1022 (1/3 of the 482,000) (Get 1 FTE for the investigator position. Section 2-3 would amend Sections 29-07-01.1 & 54-44.1-11)

Representative Pyle seconded motion.

Roll call vote:

Representatives	Vote
Representative David Monson	Y
Representative Mike Brandenburg	Y
Representative Larry Bellew	N
Representative Keith Kempenich	AB
Representative Lisa Meier	Y
Representative Corey Mock	AB
Representative Brandy Pyle	Y

Motion carried 4-1-2

Representative Meier moved a DO PASS as amended. (23.0251.01001)

Representative Pyle seconded motion.

Roll call vote:

Representatives	Vote
Representative David Monson	Y
Representative Mike Brandenburg	Y
Representative Larry Bellew	N

Representative Keith Kempenich	AB
Representative Lisa Meier	Y
Representative Corey Mock	AB
Representative Brandy Pyle	Y

Motion carried 4-1-2

Bill carrier: Representative Meier

Chairman Monson closed meeting at 3:16 PM

Amy Liepke, Committee Clerk By: Leah Kuball

2023 HOUSE STANDING COMMITTEE MINUTES

Appropriations Committee Brynhild Haugland Room, State Capitol

HB 1022
2/8/2023

BILL for an Act to provide an appropriation for defraying the expenses of the commission on legal counsel for indigents

3:15 PM Chairman Vigesaa- Meeting was called to order and roll call was taken:

Members present; Chairman Vigesaa, Representative Kempenich, Representative B. Anderson, Representative Bellew, Representative Brandenburg, Representative Hanson, Representative Kreidt, Representative Martinson, Representative Mitskog, Representative Meier, Representative Mock, Representative Monson, Representative Nathe, Representative O'Brien, Representative Pyle, Representative Richter, Representative Sanford, Representative Schatz, Representative Schobinger, Representative G. Stemen and Representative Swiontek.

Members not Present- Representative J. Nelson and Representative Strinden

Discussion Topics:

- Amendment

Representative Meier- Explains amendment 23.0251.01001 (Testimony #19967)

Representative Meier- Move to adopt the amendment.

Representative Monson Seconds the motion.

Roll Call Vote

Representatives	Vote
Representative Don Vigesaa	Y
Representative Keith Kempenich	Y
Representative Bert Anderson	Y
Representative Larry Bellew	N
Representative Mike Brandenburg	Y
Representative Karla Rose Hanson	Y
Representative Gary Kreidt	Y
Representative Bob Martinson	Y
Representative Lisa Meier	Y
Representative Alisa Mitskog	Y
Representative Corey Mock	Y
Representative David Monson	Y
Representative Mike Nathe	Y
Representative Jon O. Nelson	A

Representative Emily O'Brien	Y
Representative Brandy Pyle	Y
Representative David Richter	Y
Representative Mark Sanford	Y
Representative Mike Schatz	N
Representative Randy A. Schobinger	Y
Representative Greg Stemen	Y
Representative Michelle Strinden	A
Representative Steve Swiontek	Y

Motion Carries 19-2-2.

Representative Meier Move for a Do Pass as Amended

Representative Monson Seconds the motion.

Roll Call Vote

Representatives	Vote
Representative Don Vigesaa	Y
Representative Keith Kempenich	Y
Representative Bert Anderson	Y
Representative Larry Bellew	N
Representative Mike Brandenburg	Y
Representative Karla Rose Hanson	Y
Representative Gary Kreidt	Y
Representative Bob Martinson	Y
Representative Lisa Meier	Y
Representative Alisa Mitskog	Y
Representative Corey Mock	Y
Representative David Monson	Y
Representative Mike Nathe	Y
Representative Jon O. Nelson	A
Representative Emily O'Brien	Y
Representative Brandy Pyle	Y
Representative David Richter	Y
Representative Mark Sanford	Y
Representative Mike Schatz	N
Representative Randy A. Schobinger	Y
Representative Greg Stemen	Y
Representative Michelle Strinden	A
Representative Steve Swiontek	Y

Motion Carries 19-2-2 Representative Meier will carry the bill.

Chairman Vigesaa Closed the meeting for HB 1022 3:24 PM

Risa Berube, Committee Clerk

2-8-23
JA

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1022

Page 1, replace lines 10 through 18 with:

	<u>Base Level</u>	<u>Adjustments or Enhancements</u>	<u>Appropriation</u>
Commission on legal counsel for indigents	\$20,964,213	\$1,927,204	\$22,891,417
Legal counsel for juveniles	325,000	(325,000)	0
Total all funds	\$21,289,213	\$1,602,204	\$22,891,417
Less estimated income	1,994,850	19,487	2,014,337
Total general fund	\$19,294,363	\$1,582,717	\$20,877,080
Full-time equivalent positions	40.00	1.00	41.00"

Renumber accordingly

STATEMENT OF PURPOSE OF AMENDMENT:

House Bill No. 1022 - Comm. on Legal Counsel for Indigents - House Action

	<u>Base Budget</u>	<u>House Changes</u>	<u>House Version</u>
Comm. on Legal Counsel for Indigents	\$20,964,213	\$1,927,204	\$22,891,417
Legal counsel for juveniles	325,000	(325,000)	
Total all funds	\$21,289,213	\$1,602,204	\$22,891,417
Less estimated income	1,994,850	19,487	2,014,337
General fund	\$19,294,363	\$1,582,717	\$20,877,080
FTE	40.00	1.00	41.00

Department 188 - Comm. on Legal Counsel for Indigents - Detail of House Changes

	<u>Adjusts Funding for Base Payroll Changes¹</u>	<u>Adds Funding for Salary and Benefit Increases²</u>	<u>Adds an FTE Investigator Position³</u>	<u>Adds Funding to Reduce Employee Turnover⁴</u>	<u>Adds Funding to Increase the Legal Fee Rate⁵</u>	<u>Adds Funding for ITD Rate Increase⁶</u>
Comm. on Legal Counsel for Indigents	\$54,099	\$616,315	\$137,781	\$150,000	\$630,453	\$13,556
Legal counsel for juveniles						
Total all funds	\$54,099	\$616,315	\$137,781	\$150,000	\$630,453	\$13,556
Less estimated income	1,890	17,597	0	0	0	0
General fund	\$52,209	\$598,718	\$137,781	\$150,000	\$630,453	\$13,556
FTE	0.00	0.00	1.00	0.00	0.00	0.00

	<u>Consolidates Line Items⁷</u>	<u>Total House Changes</u>
Comm. on Legal Counsel for Indigents	\$325,000	\$1,927,204
Legal counsel for juveniles	(325,000)	(325,000)
Total all funds	\$0	\$1,602,204
Less estimated income	0	19,487
General fund	\$0	\$1,582,717
FTE	0.00	1.00

JA
2-8-23

¹ Funding is adjusted for base payroll changes.

² The following funding is added for 2023-25 biennium salary adjustments of 4 percent on July 1, 2023, and 4 percent on July 1, 2024, and increases in health insurance premiums from \$1,429 to \$1,648 per month:

	<u>General Fund</u>	<u>Other Funds</u>	<u>Total</u>
Salary increase	\$438,445	\$12,335	\$450,780
Health insurance increase	<u>160,273</u>	<u>5,262</u>	<u>165,535</u>
Total	\$598,718	\$17,597	\$616,315

³ Funding for 1 FTE investigator position is added.

⁴ Funding of \$150,000 from the general fund is added to alleviate employee turnover for nonattorney positions.

⁵ Funding is added from the general fund to increase the legal fee rate from \$75 per hour to \$80 per hour.

⁶ Funding from the general fund is added for the Information Technology Department rate increase.

⁷ The legal counsel for juveniles line item funding is transferred to the Commission on Legal Counsel for Indigents line item to return the agency budget to a single line item.

REPORT OF STANDING COMMITTEE

HB 1022: Appropriations Committee (Rep. Vigesaa, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (19 YEAS, 2 NAYS, 2 ABSENT AND NOT VOTING). HB 1022 was placed on the Sixth order on the calendar.

Page 1, replace lines 10 through 18 with:

	<u>Base Level</u>	<u>Adjustments or Enhancements</u>	<u>Appropriation</u>
Commission on legal counsel for indigents	\$20,964,213	\$1,927,204	\$22,891,417
Legal counsel for juveniles	<u>325,000</u>	<u>(325,000)</u>	<u>0</u>
Total all funds	\$21,289,213	\$1,602,204	\$22,891,417
Less estimated income	<u>1,994,850</u>	<u>19,487</u>	<u>2,014,337</u>
Total general fund	\$19,294,363	\$1,582,717	\$20,877,080
Full-time equivalent positions	40.00	1.00	41.00"

Renumber accordingly

STATEMENT OF PURPOSE OF AMENDMENT:

House Bill No. 1022 - Comm. on Legal Counsel for Indigents - House Action

	Base Budget	House Changes	House Version
Comm. on Legal Counsel for Indigents	\$20,964,213	\$1,927,204	\$22,891,417
Legal counsel for juveniles	<u>325,000</u>	<u>(325,000)</u>	<u>0</u>
Total all funds	\$21,289,213	\$1,602,204	\$22,891,417
Less estimated income	<u>1,994,850</u>	<u>19,487</u>	<u>2,014,337</u>
General fund	\$19,294,363	\$1,582,717	\$20,877,080
FTE	40.00	1.00	41.00

Department 188 - Comm. on Legal Counsel for Indigents - Detail of House Changes

	Adjusts Funding for Base Payroll Changes ¹	Adds Funding for Salary and Benefit Increases ²	Adds an FTE Investigator Position ³	Adds Funding to Reduce Employee Turnover ⁴	Adds Funding to Increase the Legal Fee Rate ⁵	Adds Funding for ITD Rate Increase ⁶
Comm. on Legal Counsel for Indigents	\$54,099	\$616,315	\$137,781	\$150,000	\$630,453	\$13,556
Legal counsel for juveniles	<u>0</u>	<u>0</u>	<u>0</u>	<u>0</u>	<u>0</u>	<u>0</u>
Total all funds	\$54,099	\$616,315	\$137,781	\$150,000	\$630,453	\$13,556
Less estimated income	<u>1,890</u>	<u>17,597</u>	<u>0</u>	<u>0</u>	<u>0</u>	<u>0</u>
General fund	\$52,209	\$598,718	\$137,781	\$150,000	\$630,453	\$13,556
FTE	0.00	0.00	1.00	0.00	0.00	0.00

	Consolidates Line Items ⁷	Total House Changes
Comm. on Legal Counsel for Indigents	\$325,000	\$1,927,204
Legal counsel for juveniles	<u>(325,000)</u>	<u>(325,000)</u>
Total all funds	\$0	\$1,602,204
Less estimated income	<u>0</u>	<u>19,487</u>
General fund	\$0	\$1,582,717
FTE	0.00	1.00

¹ Funding is adjusted for base payroll changes.

² The following funding is added for 2023-25 biennium salary adjustments of 4 percent on July 1, 2023, and 4 percent on July 1, 2024, and increases in health insurance premiums from \$1,429 to \$1,648 per month:

	<u>General Fund</u>	<u>Other Funds</u>	<u>Total</u>
Salary increase	\$438,445	\$12,335	\$450,780
Health insurance increase	<u>160,273</u>	<u>5,262</u>	<u>165,535</u>
Total	\$598,718	\$17,597	\$616,315

³ Funding for 1 FTE investigator position is added.

⁴ Funding of \$150,000 from the general fund is added to alleviate employee turnover for nonattorney positions.

⁵ Funding is added from the general fund to increase the legal fee rate from \$75 per hour to \$80 per hour.

⁶ Funding from the general fund is added for the Information Technology Department rate increase.

⁷ The legal counsel for juveniles line item funding is transferred to the Commission on Legal Counsel for Indigents line item to return the agency budget to a single line item.

2023 SENATE APPROPRIATIONS

HB 1022

**Department 188 - Commission on Legal Counsel for Indigents
House Bill No. 1022**

First Chamber Comparison to Base Level

	General Fund	Other Funds	Total
2023-25 First Chamber Version	\$20,877,080	\$2,014,337	\$22,891,417
2023-25 Base Level	19,294,363	1,994,850	21,289,213
Increase (Decrease)	\$1,582,717	\$19,487	\$1,602,204

First Chamber Changes

A summary of the first chamber's changes to the agency's base level appropriations and the executive budget is attached as an appendix.

Selected Bill Sections Included in the First Chamber Version

There are no additional sections in House Bill No. 1022.

Continuing Appropriations

Indigent defense administration fund - North Dakota Century Code Sections 29-07-01.1 and 29-26-22 - Funding is from a \$35 nonrefundable fee for court-appointed defense services and from a \$100 court administration fee in all criminal cases except infractions. The first \$750,000 collected is used for indigent defense services, the next \$460,000 is used for court facilities, and additional amounts are deposited equally into the two funds.

Deficiency Appropriations

There are no deficiency appropriations for this agency.

Significant Audit Findings

The State Auditor reported no significant audit findings.

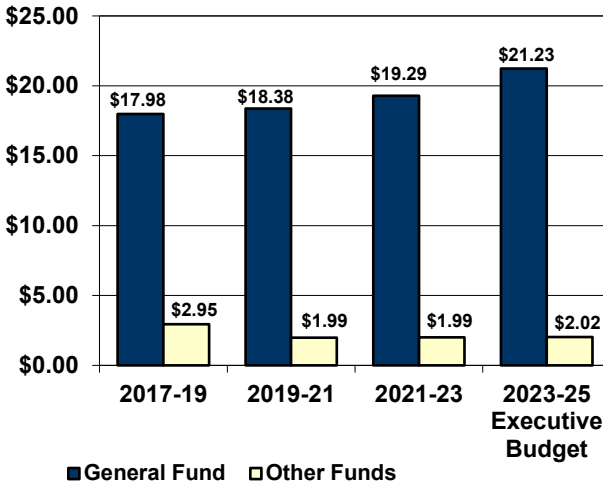
Major Related Legislation

House Bill No. 1289 - Provides for the court to waive unpaid fines and fees upon completion of a drug court program, including the court administration fee, a portion of which is deposited in the indigent defense administration fund.

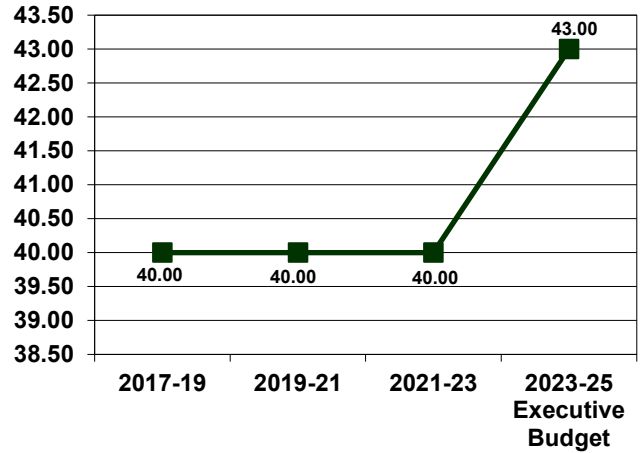
Historical Appropriations Information

Agency Appropriations and FTE Positions

Agency Funding (Millions)



FTE Positions



Ongoing General Fund Appropriations

	2015-17	2017-19	2019-21	2021-23	2023-25 Executive Budget
Ongoing general fund appropriations	\$16,982,909	\$17,983,876	\$18,384,627	\$19,294,363	\$21,230,966
Increase (decrease) from previous biennium	N/A	\$1,000,967	\$400,751	\$909,736	\$1,936,603
Percentage increase (decrease) from previous biennium	N/A	5.9%	2.2%	4.9%	10.0%
Cumulative percentage increase (decrease) from 2015-17 biennium	N/A	5.9%	8.3%	13.6%	25.0%

Major Increases (Decreases) in Ongoing General Fund Appropriations

2017-19 Biennium

- Increased funding for operating expenses \$130,919
- Increased funding for professional fees due to increased caseloads to provide a total of \$10,227,500 for professional fees \$500,000

2019-21 Biennium

None \$0

2021-23 Biennium

Added funding to provide legal counsel to juveniles \$325,000

2023-25 Biennium (Executive Budget Recommendation)

- Adds 3 FTE investigator positions \$488,092
- Adds funding to increase the legal fee rate from \$75 per hour to \$80 per hour \$630,453

One-Time General Fund Appropriations

	2015-17	2017-19	2019-21	2021-23	2023-25 Executive Budget
One-time general fund appropriations	\$122,275	\$0	\$0	\$0	\$0

Major One-Time General Fund Appropriations

2017-19 Biennium	
None	\$0
2019-21 Biennium	
None	\$0
2021-23 Biennium	
None	\$0
2023-25 Biennium (Executive Budget Recommendation)	
None	\$0

Commission on Legal Counsel for Indigents - Budget No. 188
House Bill No. 1022
Base Level Funding Changes

	Executive Budget Recommendation				House Version			
	FTE Positions	General Fund	Other Funds	Total	FTE Positions	General Fund	Other Funds	Total
2023-25 Biennium Base Level	40.00	\$19,294,363	\$1,994,850	\$21,289,213	40.00	\$19,294,363	\$1,994,850	\$21,289,213
2023-25 Ongoing Funding Changes								
Base payroll changes		\$52,209	\$1,890	\$54,099		\$52,209	\$1,890	\$54,099
Salary increase		585,569	16,472	602,041		438,445	12,335	450,780
Health insurance increase		166,724	5,144	171,868		160,273	5,262	165,535
Adds investigator positions	3.00	488,092		488,092	1.00	137,781		137,781
Adds funding to reduce employee turnover				0		150,000		150,000
Adds funding to increase the legal fee rate from \$75 per hour to \$80 per hour		630,453		630,453		630,453		630,453
Adds funding for the Information Technology Department rate increase		13,556		13,556		13,556		13,556
Consolidates line items				0				0
Total ongoing funding changes	3.00	\$1,936,603	\$23,506	\$1,960,109	1.00	\$1,582,717	\$19,487	\$1,602,204
One-Time Funding Items								
No one-time funding items				\$0				\$0
Total one-time funding changes	0.00	\$0	\$0	\$0	0.00	\$0	\$0	\$0
Total Changes to Base Level Funding	3.00	\$1,936,603	\$23,506	\$1,960,109	1.00	\$1,582,717	\$19,487	\$1,602,204
2023-25 Total Funding	43.00	\$21,230,966	\$2,018,356	\$23,249,322	41.00	\$20,877,080	\$2,014,337	\$22,891,417
<i>Federal funds included in other funds</i>			\$0				\$0	
<i>Total ongoing changes as a percentage of base level</i>	7.5%	10.0%	1.2%	9.2%	2.5%	8.2%	1.0%	7.5%
<i>Total changes as a percentage of base level</i>	7.5%	10.0%	1.2%	9.2%	2.5%	8.2%	1.0%	7.5%

Other Sections in Commission on Legal Counsel for Indigents - Budget No. 188

	Executive Budget Recommendation	House Version
Indigent defense administration fund	Sections 2 and 3 would amend Sections 29-07-01.1 and 54-44.1-11 to provide for the Commission on Legal Counsel for Indigents to transfer its unspent general fund appropriation authority to the indigent defense administration fund each biennium until the balance of the fund reaches \$3 million.	The House version includes no additional sections.

2023 SENATE STANDING COMMITTEE MINUTES

Appropriations - Government Operations Division Red River Room, State Capitol

HB 1022
3/7/2023

A bill for an act to provide an appropriation for defraying the expenses of the Commission on Legal Counsel for Indigents.

11:20 AM Chairman Wanzek called the meeting to order.
Senators Wanzek, Erbele, Roers, Dwyer, and Vedaa are present.

Discussion Topics:

- Agency statutory responsibilities
- Agency and Commission overview
- Employee/contractor services
- Funding and collections
- Potential Federal support
- Case assignments and expenses
- Other bills' impacts
- Challenges: non-competitive salaries, 25% turnover
- Potential Constitutional failure
- Juveniles presumed indigent
- Investigators
- Case numbers
- House amendments
- Cost of attorney turnover

11:22 AM Travis Finck, Executive Director of ND Commission on Legal Counsel for Indigents. Testimony #22384, #22380, #22383

11:52 AM Zachary Pelham, Chair of ND Commission on Legal Counsel for Indigents, testified affirmatively. Testimony #22381

11:56 AM Tony Weiler, President of the ND State Bar Association, testified in favor of HB 1022. Testimony#22255

11:58 AM Jonathan Byers, Lobbyist #1425, testified on behalf of the ND State Attorney's Association. (No written testimony)

12:01 PM Todd N. Ewell, Deputy Director of the ND Commission on Legal Counsel for Indigents, testified favorably. Testimony #22382

Additional Written Testimony:

Kevin McCabe, Supervising Attorney of Dickinson Public Defender's Office
Testimony #22395

Alex Cronquist, NDLC, #22728, #22744

12:06 PM Chairman Wanzek closed the meeting.
Carol Thompson, Committee Clerk

2023 SENATE STANDING COMMITTEE MINUTES

Appropriations - Government Operations Division Red River Room, State Capitol

HB 1022
3/20/2023

A bill for an act to provide an appropriation for defraying the expenses of the Commission on Legal Counsel for Indigents.
--

2:47 PM Chairman Wanzek called the meeting to order.
Senators Wanzek, Erbele, Roers, Dwyer, and Vedaa are present.

Discussion Topics:

- Salary
- New full-time employee (FTE) requests
- Equity funding
- Employee turnover
- Contract attorney hourly rate
- "Other" Fund sources
- Indigent status criteria

2:51 PM Travis Finck, Executive Director, ND Commission on Legal Counsel for Indigents, testified. Testimony #22384, #22380, #25991

2:59 PM Becky Ulberg, OMB Fiscal Management Analyst, testified. Testimony #25971

3:39 PM Ethan Leingang, LC Budget Analyst, testified. Testimony #25971

3:40 PM Senator Dwyer moved to amend HB 1022 to include a 6% salary increase for state employees the first year of the biennium and an additional 4% increase the second year.

Senator J. Roers seconded the motion.

Senators	Vote
Senator Terry M. Wanzek	Y
Senator Michael Dwyer	Y
Senator Robert Erbele	Y
Senator Jim P. Roers	Y
Senator Shawn Vedaa	Y

Motion passed 5-0-0

3:41 PM Senator Dwyer moved Do Pass to adopt HB as amended and send it to Full Appropriations.

Senator J. Roers seconded the motion.

Senators	Vote
Senator Terry M. Wanzek	Y
Senator Michael Dwyer	Y
Senator Robert Erbele	Y
Senator Jim P. Roers	Y
Senator Shawn Vedaa	Y

Motion passed 5-0-0

Senator Dwyer will carry HB 1022.

3:45 Chairman Wanzek closed the meeting.

Carol Thompson, Committee Clerk

2023 SENATE STANDING COMMITTEE MINUTES

Appropriations - Government Operations Division Red River Room, State Capitol

HB 1022
3/28/2023

A bill for an act to provide an appropriation for defraying the expenses of the Commission on Legal Counsel for Indigents.
--

10:40 AM Chairman Wanzek opened the meeting.
Senators Wanzek, Dwyer, J. Roers, Vedaa, and Erbele are present.

Discussion Topics:

- Salaries
- Full-time employees (FTEs)
- Bonus - treatment in Century Code
- Retention/recruitment bonuses
- Performance bonus

10:42 AM Legislative Council Budget Analyst and Auditor Alex Cronquist testified.
Testimony #26866

10:44 AM Senator Dwyer moved to adopt Amendment 23.0251.02002.
Senator Roers seconded the motion.

Senators	Vote
Senator Terry M. Wanzek	Y
Senator Michael Dwyer	Y
Senator Robert Erbele	Y
Senator Jim P. Roers	Y
Senator Shawn Vedaa	Y

Motion passed 5-0-0

10:45 AM Senator Dwyer made a Do Pass as Amended recommendation for HB 1022.
Senator Roers seconded the motion.

Senators	Vote
Senator Terry M. Wanzek	Y
Senator Michael Dwyer	Y
Senator Robert Erbele	Y
Senator Jim P. Roers	Y
Senator Shawn Vedaa	y

Motion passed 5-0-0

Senator Dwyer will carry this bill.

10:46 AM Chairman Wanzek closed the meeting.

Carol Thompson, Committee Clerk

2023 SENATE STANDING COMMITTEE MINUTES

Appropriations Committee Roughrider Room, State Capitol

HB 1022
3/30/2023

A BILL for an Act to provide an appropriation for defraying the expenses of the commission on legal counsel for indigents.
--

3:40 PM Vice Chairman Krebsbach opened the hearing on HB 1022.

Members present: Senators Bekkedahl, Krebsbach, Burckhard, Davison, Dever, Dwyer, Erbele, Kreun, Meyer, Roers, Schaible, Sorvaag, Vedaa, Wanzek, Rust, and Mathern.

Discussion Topics:

- Indigent legal counsel
- Committee action

3:40 PM Senator Dwyer introduced amendment LC 23.0251.02002, testimony # 27104

3:42 PM Senator Dwyer moved to adopt AMENDMENT LC 23.0251.02002.
Senator Vedaa seconded the motion.

Senators	Vote
Senator Brad Bekkedahl	Y
Senator Karen K. Krebsbach	Y
Senator Randy A. Burckhard	Y
Senator Kyle Davison	Y
Senator Dick Dever	Y
Senator Michael Dwyer	Y
Senator Robert Erbele	Y
Senator Curt Kreun	Y
Senator Tim Mathern	Y
Senator Scott Meyer	Y
Senator Jim P. Roers	Y
Senator David S. Rust	Y
Senator Donald Schaible	Y
Senator Ronald Sorvaag	Y
Senator Shawn Vedaa	Y
Senator Terry M. Wanzek	Y

Motion passed 16-0-0.

3:49 PM Senator Dwyer moved DO PASS AS AMENDED.
Senator Wanzek seconded the motion.

Senators	Vote
Senator Brad Bekkedahl	Y
Senator Karen K. Krebsbach	Y
Senator Randy A. Burckhard	Y
Senator Kyle Davison	Y
Senator Dick Dever	Y
Senator Michael Dwyer	Y
Senator Robert Erbele	Y
Senator Curt Kreun	Y
Senator Tim Mathern	Y
Senator Scott Meyer	Y
Senator Jim P. Roers	Y
Senator David S. Rust	Y
Senator Donald Schaible	Y
Senator Ronald Sorvaag	Y
Senator Shawn Vedaa	Y
Senator Terry M. Wanzek	Y

Motion passed 16-0-0.

Senator Dwyer will carry the bill.

3:50 PM Vice Chairman Krebsbach closed the hearing.

Kathleen Hall, Committee Clerk

4A
3-30-23

Fiscal No. 1

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1022

Page 1, replace lines 10 through 18 with:

"		<u>Adjustments or</u>	
	<u>Base Level</u>	<u>Enhancements</u>	<u>Appropriation</u>
Commission on legal counsel for indigents	\$20,964,213	\$1,655,907	\$22,620,120
Legal counsel for juveniles	<u>325,000</u>	<u>(325,000)</u>	<u>0</u>
Total all funds	\$21,289,213	\$1,330,907	\$22,620,120
Less estimated income	<u>1,994,850</u>	<u>16,372</u>	<u>2,011,222</u>
Total general fund	\$19,294,363	\$1,314,535	\$20,608,898
Full-time equivalent positions	40.00	1.00	41.00"

Renumber accordingly

STATEMENT OF PURPOSE OF AMENDMENT:

House Bill No. 1022 - Comm. on Legal Counsel for Indigents - Senate Action

	Base Budget	House Version	Senate Changes	Senate Version
Comm. on Legal Counsel for Indigents	\$20,964,213	\$22,891,417	(\$271,297)	\$22,620,120
Legal counsel for juveniles	<u>325,000</u>	<u> </u>	<u> </u>	<u> </u>
Total all funds	\$21,289,213	\$22,891,417	(\$271,297)	\$22,620,120
Less estimated income	<u>1,994,850</u>	<u>2,014,337</u>	<u>(3,115)</u>	<u>2,011,222</u>
General fund	\$19,294,363	\$20,877,080	(\$268,182)	\$20,608,898
FTE	40.00	41.00	0.00	41.00

Department 188 - Comm. on Legal Counsel for Indigents - Detail of Senate Changes

	Adjusts Funding for Salary and Benefit Plans ¹	Removes Salary Funding for Funding Pool ²	Total Senate Changes
Comm. on Legal Counsel for Indigents	\$127,212	(\$398,509)	(\$271,297)
Legal counsel for juveniles	<u> </u>	<u> </u>	<u> </u>
Total all funds	\$127,212	(\$398,509)	(\$271,297)
Less estimated income	<u>4,019</u>	<u>(7,134)</u>	<u>(3,115)</u>
General fund	\$123,193	(\$391,375)	(\$268,182)
FTE	0.00	0.00	0.00

¹ Salaries and wages funding is adjusted to provide for 2023-25 biennium salary increases of 6 percent on July 1, 2023, and 4 percent on July 1, 2024, and for adjustments to health insurance premium rates as follows:

	<u>General Fund</u>	<u>Other Funds</u>	<u>Total</u>
Salary increase	\$127,028	\$4,137	\$131,165
Health insurance increase	(\$3,835)	(\$118)	(\$3,953)
Total	\$123,193	\$4,019	\$127,212

The House provided salary adjustments of 4 percent on July 1, 2023, and July 1, 2024.

² Funding for new FTE positions and estimated savings from vacant FTE positions is removed as shown below. These amounts are available to the agency if needed by submitting a request to the Office of Management and Budget for a transfer from the new and vacant FTE funding pool.

JA
3-30-23

	<u>General Fund</u>	<u>Other Funds</u>	<u>Total</u>
New FTE positions	(\$137,781)	\$0	(\$137,781)
Vacant FTE positions	<u>(253,594)</u>	<u>(7,134)</u>	<u>(260,728)</u>
Total	(\$391,375)	(\$7,134)	(\$398,509)

REPORT OF STANDING COMMITTEE

HB 1022, as engrossed: Appropriations Committee (Sen. Bekkedahl, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (16 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1022 was placed on the Sixth order on the calendar. This bill does not affect workforce development.

Page 1, replace lines 10 through 18 with:

	<u>Base Level</u>	<u>Adjustments or Enhancements</u>	<u>Appropriation</u>
Commission on legal counsel for indigents	\$20,964,213	\$1,655,907	\$22,620,120
Legal counsel for juveniles	325,000	(325,000)	0
Total all funds	\$21,289,213	\$1,330,907	\$22,620,120
Less estimated income	<u>1,994,850</u>	<u>16,372</u>	<u>2,011,222</u>
Total general fund	\$19,294,363	\$1,314,535	\$20,608,898
Full-time equivalent positions	40.00	1.00	41.00"

Re-number accordingly

STATEMENT OF PURPOSE OF AMENDMENT:

House Bill No. 1022 - Comm. on Legal Counsel for Indigents - Senate Action

	Base Budget	House Version	Senate Changes	Senate Version
Comm. on Legal Counsel for Indigents	\$20,964,213	\$22,891,417	(\$271,297)	\$22,620,120
Legal counsel for juveniles	<u>325,000</u>	<u> </u>	<u> </u>	<u> </u>
Total all funds	\$21,289,213	\$22,891,417	(\$271,297)	\$22,620,120
Less estimated income	<u>1,994,850</u>	<u>2,014,337</u>	<u>(3,115)</u>	<u>2,011,222</u>
General fund	<u>\$19,294,363</u>	<u>\$20,877,080</u>	<u>(\$268,182)</u>	<u>\$20,608,898</u>
FTE	40.00	41.00	0.00	41.00

Department 188 - Comm. on Legal Counsel for Indigents - Detail of Senate Changes

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Legal counsel for juveniles	<u> </u>	<u> </u>	<u> </u>
Total all funds	\$127,212	(\$398,509)	(\$271,297)
Less estimated income	<u>4,019</u>	<u>(7,134)</u>	<u>(3,115)</u>
General fund	<u>\$123,193</u>	<u>(\$391,375)</u>	<u>(\$268,182)</u>
FTE	0.00	0.00	0.00

¹ Salaries and wages funding is adjusted to provide for 2023-25 biennium salary increases of 6 percent on July 1, 2023, and 4 percent on July 1, 2024, and for adjustments to health insurance premium rates as follows:

	General Fund	Other Funds	Total
Salary increase	\$127,028	\$4,137	\$131,165
Health insurance increase	(\$3,835)	(\$118)	(\$3,953)
Total	\$123,193	\$4,019	\$127,212

The House provided salary adjustments of 4 percent on July 1, 2023, and July 1, 2024.

² Funding for new FTE positions and estimated savings from vacant FTE positions is removed as shown below. These amounts are available to the agency if needed by submitting a request to the Office of Management and Budget for a transfer from the new and vacant FTE funding pool.

	<u>General Fund</u>	<u>Other Funds</u>	<u>Total</u>
New FTE positions	(\$137,781)	\$0	(\$137,781)
Vacant FTE positions	(253,594)	(7,134)	(260,728)
Total	(\$391,375)	(\$7,134)	(\$398,509)

TESTIMONY

HB 1022

January 13, 2023
Testimony to **House Appropriations-Government Operations**
By Jackson J. Lofgren
Testimony in Support of H.B. 1022

Chairman Monson and Committee Members:

My name is Jackson Lofgren and I reside in District 35. I have had the pleasure of practicing law in North Dakota for sixteen years. I have worked as a Special Assistant Attorney General and Assistant Morton County State's Attorney. For the last nine years I have been in private practice in Bismarck. I serve on the North Dakota Parole Board and am the State Bar Association's representative on the Commission on Legal Counsel for Indigents (Commission). I am also a past president of the North Dakota Association of Criminal Defense Lawyers. I am providing testimony in support of the Commission's budget request on my own behalf.

The Commission's work is extremely important. It is entrusted with providing vital legal services to criminally accused North Dakotans. The attorneys working for the Commission are charged with defending the constitutional rights of the indigent. Without their dedication we would have a criminal system but not a criminal *justice* system.

The Commission is in trouble. At every meeting the commissioners are provided with an update of all the open positions that cannot be filled. In my short time as a commissioner we have had to close an office in Minot and the Williston office, which is supposed to have three attorneys, has one lawyer who is a brand-new attorney. Even when the Commission can fill an opening, the employee often leaves within a short time to work for another state or county agency. Often for significantly more pay and better benefits.

Executive Director, Travis Finck, should be given praise for tirelessly working to triage the agency. But, it cannot be held together by duct tape and baling twine forever. I have spoken with many attorneys who provide contract legal services to the Commission. They are extremely frustrated with the low level of pay. The rate the Commission pays for defense work is less than half what the Federal government pays for comparable services. It is also lower than what most municipalities in North Dakota pay.

Without the Legislature's commitment to adequately fund the Commission our state will find itself in a constitutional crisis within the foreseeable future. The Commission will simply not have enough attorneys to provide representation throughout North Dakota. The court system will gridlock as criminal cases stall. Rights will be violated.

Please do not allow this to happen. The Commission's budget request is conservative and reasonable and I ask that you to approve it.

Thank You,

Jackson J. Lofgren

Jackson J. Lofgren
jlofgren@suhrandlofgren.com

WRITTEN TESTIMONY IN FAVOR OF HB 1022

House Appropriations – Government Operations Division

Hearing: January 13, 2023 8:30 a.m.

Testimony by Debra L. Hoffarth

I am a licensed attorney in the State of North Dakota and provide this written testimony in support of HB 1022. House Bill 1022 is a bill to provide appropriation to defray the expenses of the Commission on Legal Counsel for Indigents. This bill will provide much needed funding for the indigent defense program in North Dakota. This program is critical to upholding the constitutional rights of North Dakota citizens. Providing this funding will help retain attorneys who provide legal services to those who cannot afford it, which is critical to North Dakota's justice system.

Please give HB 1022 a “do pass” recommendation.

Debra L. Hoffarth, Minot, ND

Ryan Sandberg, Minot, ND

House Bill 1022
Testimony of Tony J. Weiler
House Appropriations-Government Operations Division
January 13, 2023

Representative Monson and Members of the House Education and Environmental Division of the House Appropriations Committee, my name is Tony Weiler, and I am the Executive Director of the State Bar Association of North Dakota (SBAND).

SBAND is the professional association of over 3,000 licensed North Dakota lawyers. On behalf of SBAND President Jennifer Albaugh and our Board of Governors, I present this testimony in support of HB1022, the Budget Appropriation of the North Dakota Commission on Legal Counsel for Indigents. SBAND appreciates the work done by the Commission and its hard-working attorneys to uphold the Constitutional rights of those accused of a crime. The Commission needs the requested budget and increases to pay its attorneys a better wage, and to hire investigators to do the important work necessary in a criminal defense case.

It is vital to fund the Commission to the maximum extent possible. The State Bar Association encourages a Do Pass.

Tony Weiler

tony@sband.org

701-220-5846

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

ONE PAGER PER REQUEST

The Commission authorized the undersigned to submit a budget with three decision packages. The only decision package the Governor did not include in the executive recommendation was \$450,000 to provide equity increases to employees to combat turnover and to assist in recruiting attorneys. The Governor did recommend an equity package in which specific positions are identified. It is believed the Commission would receive some money in that recommendation for attorney positions.

The \$450,000 was reached by comparing our attorney positions to positions in the Court and in prosecutor's offices where we have public defender offices. The amount requested is the number to bring those underpaid positions more in balance with like counterparts.

Respectfully submitted:



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

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

Good Morning Chairman Monson, members of the Committee, my name is Travis Finck and I am the Executive Director of the North Dakota Commission on Legal Counsel for Indigents (hereinafter "the Commission").

AGENCY STATUTORY RESPONSIBILITIES

The Commission is the agency which provides the attorneys and related services to indigent persons when there is a constitutional, statutory, or rule-based right to counsel at public expense. The Commission is governed by North Dakota Century Code Chapter 54-61. Section 54-61-01 provides that the Commission was "established for the purpose of developing and monitoring a process for the delivery of state-funded legal counsel services for indigents which are required under the Constitution of North Dakota and the United States Constitution and any applicable statute or court rule. The Commission shall provide indigent defense services for indigent individuals determined by the court to be eligible for and in need of those services pursuant to standards and policies of the commission governing eligibility for such services."

The Commission has established Guidelines to Determine Eligibility for Indigent Defense Services (hereinafter "Guidelines"). For a person to have counsel provided by the Commission, the person must apply for services, be found to be "indigent" and it must be a type of case in which one has a right to counsel at public expense. Most of the services provided by the Commission are in circumstances in which an individual is charged with a crime and jail time is a possible sanction, in juvenile matters, post-conviction matters and appeals of all the above.

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

When an individual desires counsel or services, application for services is to be made on the Commission's standard forms. However, the Commission does not make the determination of whether a specific applicant is eligible for services. Pursuant to the statute, the court makes the determination of eligibility.

Under the Guidelines, indigency is determined by looking at income resources, non-income resources (assets) of the applicant's household, and exceptional factors that might otherwise justify a finding of indigency. Income guidelines are set at 125% of the federal poverty level threshold as defined by the U.S. Department of Health and Human Services.

The Commission's mission is "to provide high quality, professional, and effective legal representation to eligible clients at reasonable cost to the community." Services should be provided only to those persons who are eligible. It continues to be the policy of the Commission to seek additional screening and review of applications by the court in questionable cases. Additional screening and review are also sought when it appears that a person may no longer be eligible, such as when someone who was in jail and temporarily unemployed, has bonded out and is now likely employed, and would no longer be considered indigent. To help ensure that services are provided only to eligible individuals, the Commission also provides training to those persons who make the eligibility determinations. For example, the undersigned recently provided training to newly elected District Court Judges.

DELIVERY OF SERVICES

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

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

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

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

CASE ASSIGNMENTS

The Commission uses the term "case assignment" rather than "case" when referring to assignments and has defined the term based on case type (such as criminal, probation revocation, juvenile delinquency, etc.). "Case assignment" is used so that assignment numbers from different areas of the state will mean the same thing across the state. For example, a criminal case assignment includes all cases arising from the same event whether the prosecution has charged the defendant in multiple complaints, each with its own case number, or whether the defendant has been charged in one complaint with multiple counts, but one case number. A criminal case assignment that includes a felony is considered to be a felony assignment, even if some of the charges in the assignment are misdemeanors. Thus, it is one felony case assignment where the attorney

represents a person charged with a felony DUI and with a misdemeanor driving under suspension charge, both arising from the same traffic stop.

The number of case assignments the agency handles has rebounded from the pandemic when courts and cases were slowed. FY 2021 was one of the busiest year the Commission has seen to date. FY 2022 remained at a similar level higher than had been previously seen. See Attachment 1. We have also seen an increase over the normal number of case assignments in the first few months of the current fiscal year. Furthermore, we have noticed a significant increase in the number of violent crimes to which the agency has been required to provide counsel. The increased severity of a case assignment correlates directly with increased cost, as they often require investigators, experts, more attorney time, etc.

It is always difficult to forecast what the case assignment numbers will be in a future time. The Commission has no control over the number of crimes committed and investigated, the number of persons charged, the charges filed and the number of persons who apply for services and are found eligible.

AGENCY FUNDING

Traditionally, the Commission has been funded from two sources: the general fund and "fund 282" (the indigent defense administration fund). The indigent defense administration fund is funded through collection of two statutory fees paid by criminal defendants and collected by the Courts:

- 1) A \$35 indigent defense application fee pursuant to N.D.C.C. § 29-07-01.1; and
- 2) The Commission's portion of a \$100 court administration fee (the indigent defense/facility improvement fee) pursuant to N.D.C.C. § 29-26-22(2). This fee is split pursuant to statute between the indigent defense administration fund and the court facilities improvement and maintenance fund, with the first \$750,000 collected per biennium going to the indigent defense administration fund, the next \$460,000 going to the court facilities improvement and maintenance fund, and any additional collections are split equally between the two. During FY 2022, the Indigent Defense Administration Fund received \$154,547.65 in application fees and \$750,000 from the Court Administration fee.

The District Courts also have the authority to order reimbursement of attorney fees pursuant to NDCC 29-07-01.1 (2). However, any attorneys' fees that are recouped go into

the general fund, not fund 282. Those funds are not collected by the Commission, they are collected and accounted for by the Court.

The collection of the application fee and indigent defense/facility improvement fees is not guaranteed. District Judges, who impose the fees, have the discretion to impose or waive the fees in any case. A table outlining collections is provided below as attachment 2.

The major components making up the "base level" appropriation amount for the Commission are salaries and benefits, professional fees and services (legal fees), ITD expense, and rent of office space. As of November 2022, these totaled 96.5 % of our expenditures for the biennium.

AUDIT FINDINGS

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

ACCOMPLISHMENTS

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

The Commission has been able to accomplish some amazing things this current biennium thanks to the tireless dedication of the employees and contractors of the Commission. We have served as an integral part in the new protection of children and families in the new Juvenile Court Act. The Commission asked for funds to offset the costs of the Juvenile Court act changes and increases in number of cases. The request was made based upon an estimate of an increase of 50% in the number of juvenile cases. The actual increase for FY 2022, which was the first full year of implementation of the new changes, was 46%.

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

DOCR Parole and Probation to streamline a method of screening individuals applying for counsel. We have worked out orders in each pilot district to allow for earlier application, determination, and appointment of counsel. The Commission also trains all new pre-trial service agents on the guidelines for eligibility for public defense services.

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

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

CHALLENGES

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

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

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

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

The next challenge we face is the inability attract private firms to provide contract services for the Commission. Our statute requires the use of private attorneys to serve as contractors to handle cases for the Commission. Our current rate of compensation for contractors is \$75 per hour and has not been increased since 2012. Federal Criminal Justice Act appointments in 2022, federal court version of contract public defense, was at the rate of \$158/hour, more than double the rate we are able to offer. It was recommended in 2019-2021 executive recommendation to increase funding for the contractors by \$5 per hour. However, the legislature did not fund the recommendation. We again have asked in our budget and the Governor has recommended an increase in the amount of \$5 per hour raising the contract rate to \$80 per hour which is still significantly behind the federal CJA rate.

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

AGENCY BUDGET REQUESTS / EXECUTIVE RECOMMENDATIONS

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

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

BUDGET REQUEST BY LINE / PROGRAM

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

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

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

ONE TIME FUNDING CURRENT BIENNIUM AND RECOMMENDATIONS

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

AGENCY COLLECTIONS DEPOSITED IN GENERAL FUND OR SPECIAL FUND

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

IMPACT OF OTHER BILLS

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

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

CLOSING

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

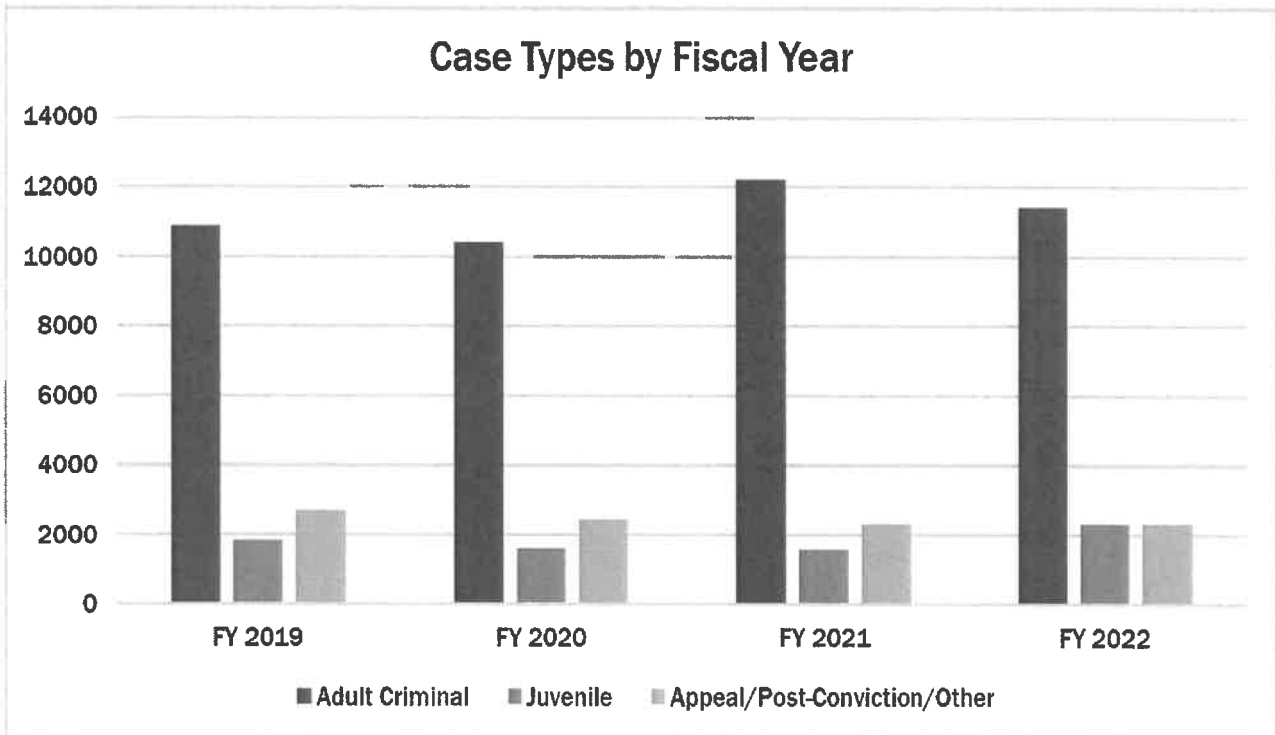
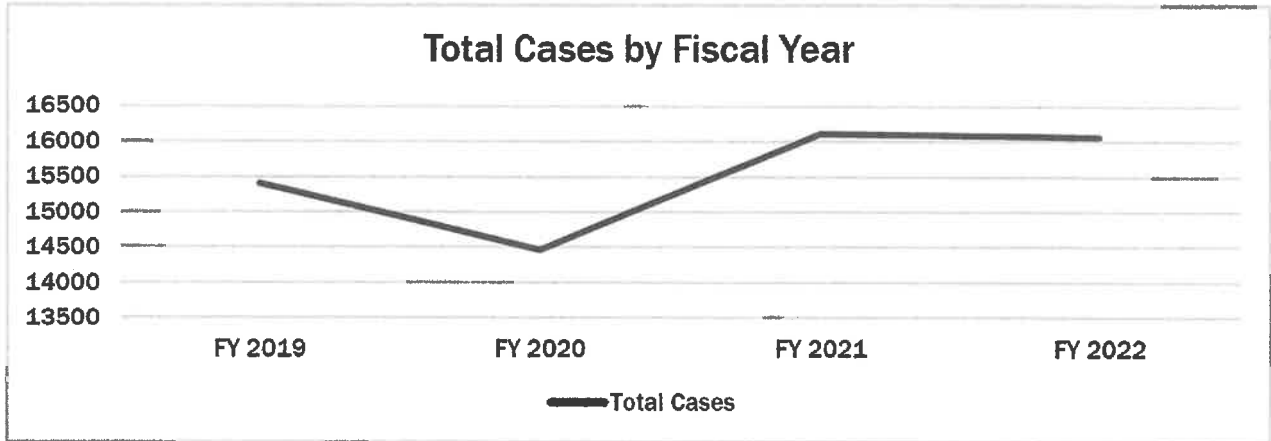
Respectfully submitted:



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

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

ATTACHMENT 1



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

ATTACHMENT 2

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

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

HB 1022
House Appropriations
Government Operations Division
January 13, 2023
Testimony of Todd N. Ewell, Deputy Director, NDCLCI

Good Morning Chairman Monson, members of the Committee, my name is Todd Ewell and I am the Deputy Director of the North Dakota Commission on Legal Counsel for Indigents (hereinafter "the Commission").

My goal today to highlight the cost of attorney turnover on not only the Commission, but on the criminal justice system in North Dakota. On average, departing attorneys leave a caseload of 36 case assignments to reassign to either other attorneys in the office, or to contract attorneys. These reassignments cost time, money, and frustration to the criminal justice system.

36 new attorney-client relationships need to be established. Under normal circumstances a criminal case is set for trial 90 to 120 days after the initial appointment. This means that attorneys have time to establish trust with their clients, review their case, and make relevant motions. Attorney departures typically bring cases to a standstill.

Attorneys are ethically required to be prepared for trial. The new attorney needs time to review and understand any case before he/she can competently proceed. Courts acknowledge these ethical requirements, which often translate to continuances of each reassigned case. These continuances cost the courts administrative time and delay any disposition of the case.

In the event the local public defender office can absorb those 36 cases, then the attorneys in that office have an additional 36 cases on top of their normal caseloads. This can cause additional stress and pressure on attorneys.

Being a trial attorney is like being a surgeon, except there is another surgeon in the operating room attempting to kill your patient. That is the best description of a trial work that I have ever heard.

The stress on the criminal justice system in North Dakota is bigger than that. Because when a client does go to prison because he lost at trial, the first thing he is going to claim is ineffective assistance of counsel. That is why the Courts grant those continuances. If the

attorneys are not properly prepared for trial, and an ineffective assistance claim is justified, then a new trial may be granted – and we start the whole process over.

This is an extreme example, but we are in extreme times.

Respectfully submitted:



Todd N. Ewell, Deputy Director

N.D. Comm. on Legal Counsel for Indigents

HB 1022
House Appropriations
Government Operations Division
January 13, 2023
Testimony of Zachary Pelham
Chairman of the North Dakota Commission on Legal Counsel for Indigents

Good Morning Chairman Monson, members of the Committee, my name is Zachary Pelham and I am Chairman of the North Dakota Commission on Legal Counsel for Indigents (hereinafter "the Commission"). I am an attorney in private practice with the Pearce Durick law firm in Bismarck.

I understand it may be extraordinary to have the chairman of a board or commission within the executive branch testify at a budget hearing. However, the Commission finds itself in extraordinary times and on the verge of constitutional collapse. As Mr. Finck has indicated, we are in dire straights because we can not find enough attorneys to provide the **constitutionally mandated** services we are required to provide by Constitution and Statute. The reality is my presence today is to express we truly are in very real danger in North Dakota.

The Commission has quarterly meetings in which Mr. Finck provides updates on staffing levels and changes in contracts and contractors. I can not recall a recent meeting where it has not been brought to our attention someone leaving an office or the inability to find a law firm willing to contract with the Commission. The reality is the Commission is unable to compete with county state's attorneys and other attorneys within state government. You will hear from one of our supervisors the reality of the situation with first hand accounts. Mr. Finck has laid out a budget to try and address these concerns. Now is the time for action, we cannot afford to delay a request for employee equity increases that has been denied the last few sessions.

Furthermore, we as the Commission have the legal authority to set the rate for contracts with private firms to provide services. However, just like employee raises, we are handcuffed on what we can do without the fiscal support of the legislature. The rate for contract services has not increased since 2012. Given the cost of inflation and the cost of running a business, it is not hard to see why some will not renew contracts and why others are hesitant to contract with the agency when there has not been an increase in a decade.


The reality is, if we do not get the support we need, we may indeed fail. If we fail, this will not be an indigent defense issue. This is bigger than that. It is a constitutional failure on behalf of the State of North Dakota. It will cause delays in the processing of criminal cases in North Dakota which will undoubtedly open the state to litigation. It will cause defendants to have their access to court delayed. It will cause victims to have to wait for a resolution to their case. It will affect all North Dakotans.

Mr. Finck, Mr. Ewell, the Valley City administrative team and the employees of the Commission continue to do great work trying to hold this all together, they need our support. The private firms who provide contract services, often at a loss to their bottom line need our support. We as a Commission need your support. By supporting the Commission's budget requests, you will be on the side of supporting and safeguarding liberty.

For that reason, I respectfully request you give our budget the due consideration it deserves as one of the few constitutionally mandated services the State of North Dakota provides.

Thank you for your time and I would stand for any questions.

Respectfully submitted:



Zachary Pelham
Chairman of the Commission

HB 1022
N.D. Comm. on Legal Counsel for Indigent
House Appropriations: Government Operations Division
Budget Presentation
January 13, 2023



North Dakota Century Code and Major Statutory Responsibilities

- The Commission operating statute is N.D.C.C. 54-61

The Statutory responsibilities of the Commission are found in NDCC 54-61-02

- The Commission is tasked with developing standards governing the delivery of indigent services. 54-61-02(1)(a)
- The Commission is tasked with implementing a process of contracting for legal services for indigents. 54-61-02 (1)(b)
- The Commission is tasked with establishing public defender offices in regions of the state as it considers necessary and appropriate. 54-61-02 (1)(c)
- The Commission is tasked with establishing a method for accurately tracking and monitoring caseloads of contract counsel and public defenders. 54-61-02 (1)(d)
- The Commission is tasked with approving and submitting a biennial budget to the Office of Management and Budget. 54-61-02 (1)(e)
- The Commission is further given statutory authority to do the following:
 - Enter into agreements with a County or City to provide services in which the County or city would have to provide. 54-61-02(2)
 - Adopt rules for the exercise of its authority. 54-61-02(3)
 - Request records from other agencies to verify indigence. 54-61-02(4)

The Purpose of the Agency's Various Programs

- The Commission is the agency which provides the attorneys and related services to indigent persons when there is a constitutional, statutory, or rule-based right to counsel at public expense.
- 54-61-01 provides that the Commission was “established for the purpose of developing and monitoring a process for the delivery of state-funded legal counsel services for indigents which are required under the Constitution of North Dakota and the United States Constitution and any applicable statute or court rule. The commission shall provide indigent defense services for indigent individuals determined by the court to be eligible for and in need of those services pursuant to standards and policies of the commission governing eligibility for such services.”
- The 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.
- The Commission consists of 7 members: 1 member of the legislature from each house, 2 appointed by the Governor (one must be from a county of not more than 10 thousand), 2 appointed by the Chief Justice (one must be from a county with a population of not more than 10 thousand) and one member appointed by the Board of Governors, State Bar Assoc.
- The Commission has 8 total offices: 7 regional public defender offices and the administrative office in Valley City.
- Org chart is attached to my testimony

Report on financial audit findings and actions taken

- The latest financial audit for the biennium ending June 30, 2021 as released by the office of the State Auditor did not identify any exceptions or defaults.

Full Time Equivalent Positions

- The Commission is requesting the FTE number be increased to 43.
- The three new positions would be for investigator positions.
- Currently the Agency has 40 FTE's

Funding and Collections:

- The Commission is funded through one line
- The one line consists of the general fund and the Indigent defense administration fund (282)
- Fund 282 is funded through the collection of statutory fees assessed in criminal cases:
 - 1) A \$35 indigent defense application fee pursuant to NDCC 29-07-01.1; and
 - 2) A portion of the \$100 court administration/indigent defense fee pursuant to NDCC 29-26-22(2). This fee is split pursuant to statute between the indigent defense administration fund and the court facilities improvement and maintenance fund, with the first \$750,000 collected per biennium going to the indigent defense administration fund, the next \$460,000 going to the court facilities improvement and maintenance fund, and any additional collections are split equally between the two
- The fee's are collected by the Judiciary and deposited with the State Treasurer.
- During FY 2022, \$154,547.65 was collected from the Application fees and \$750,000 received from Court Administration fee.
- The Court may also order Attorney Fee reimbursement which is deposited in the general fund

Funding in Comparison to Last Biennium with Executive Recommendation

- The total funds for the current Biennium are \$21,289,213
 - \$19,294,363 from the General Fund
 - \$1,994,850 in spending authority from the Special Fund, Fund 282
- The total funds recommended in the Governor's Executive Recommendation are \$23,249,322
 - \$21,230,966 from the General Fund
 - \$2,018,356 in spending authority from the Special Fund, Fund 282
 - The Executive Budget includes 3 FTE for investigator positions
 - The Executive Budget includes funding to allow the Commission to increase contract rates from \$75-80 per hour
- There are no one time funds contemplated in the Executive Recommendation.

Federal Funds

- The agency did not apply for any federal funds.
- There has been some preliminary negotiations with the Department of Health and Human Services about potential to access IV-E funds for parent representation in juvenile matters

Expenses

- The Agency is a single line and must pay for all expenses out of the single line.
- The major components making up the base level appropriation are salaries and benefits, professional fees and services (legal fees), ITD expense, and rent of office space
 - As of November 30, 2022, this constituted 96.5 % of the expenses so far this

Case Assignments

- The majority of the expenses of the Commission go directly to providing attorneys and services to persons who are constitutionally or statutorily entitled to legal representation
- The last time we presented a budget in front of the Committee, we were in the height of rebound from the Covid 19 pandemic.
 - At that time we predicted a rebound which we did in fact see. FY 2021 and FY 2022 have the two busiest years the Commission has seen. Through November 2022 in FY 2023, we are on pace to have the busiest year to date.
 - See Attached Graph

Other Bills Effect

- There are several bills working their way through the session that may have impact
 - Expansion of Pre-trial services: May be more administrative costs
 - SB 2107 seeks to add minimum mandatory penalties
 - May increase amount of time spent on cases increasing contract amounts
 - Any bills dealing with crime and penalties → Difficult to quantify

Accomplishments

- Our staff, attorneys and contractors continue to do incredible work against all odds and for less pay than their counterparts
- The agency served as an integral part in the continued expansion of the pretrial service pilot program in three judicial district
 - We were able to absorb the administrative oversight required without additional funding. However, continued expansion may cause need for more staff
- The Commission was able to staff and assign increases to the number of juvenile cases. The Commission estimated last session we would see an increase of 50%. Through the end of FY 2022, which was the first full year, the total was a 46% in juvenile cases
- The Commission participated substantially and continues to be an active partner in addressing the mental health impact on our courts
- We continue to give North Dakota a national presence and have been able to bring back national best practices to North Dakota and our clientele

Challenges

- The two biggest challenges facing the agency are the same now as they have been for the last few sessions:
 - 1) Turnover due to lack of competitive pay
 - We have been unable to recruit and retain employees. We had 10 of our 40 FTE turn over in the last calendar year and currently have 4 attorney spots we are trying to fill. When fully staffed I have 20 attorneys, which is a current vacancy rate of 20%
 - However, turnover continues to be vast, and exit interviews suggest it is a compensation issue. We have exceeded the turnover rate of the average of state agencies.
 - Last session I advised we will need to eventually address this issue or face a constitutional crisis. We did not receive any funds to address the issue. We do in fact now find us very near a crisis. I have had the displeasure of having to notify the Courts in the NWJD of the potential of not having enough attorneys to cover our responsibilities. In the event this does occur, we will need to enter a prioritization plan.
 - Several states that have instituted plans are facing litigation for doing so
- We did include a request for \$450,000 in this years' decision packages. The Executive recommendation did not include this request. The Governor did propose a pot of money to address positions, one of which is attorneys.

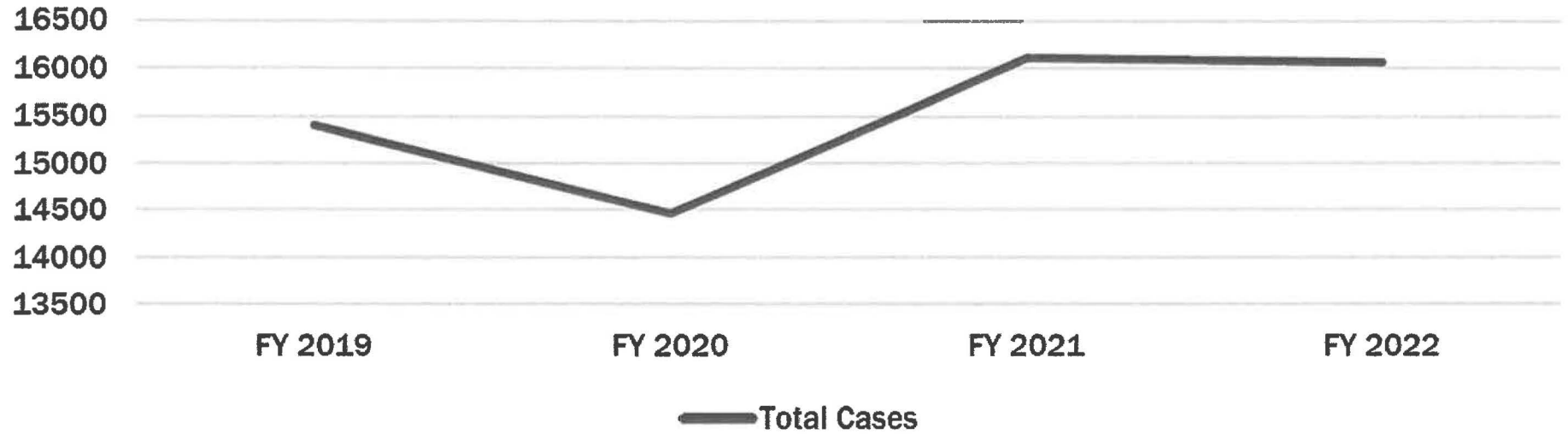
Challenges

- The second major challenge is difficulty in finding contractors to provide attorney services.
 - 2) Difficulty in finding contract attorneys given contractor rate of compensation
 - Our current rate of contractor compensation has not changed since 2012.
 - The Commission currently pays \$75 dollars an hour, in comparison the Federal CJA Pane rate for 2022 was \$158 per hour.
 - In 2019, the Governor recommended to increase this by \$5 per hour, which was not funded.
 - We did not seek funds for this increase last session given we were directed to submit a budget with a 10% reduction.
 - We did request it this session and the Governor's Executive recommendation agreed by proposing money to fund a \$5 per hour increase.
- Another challenge facing the Commission is not having access to qualified investigators
 - We can only pay investigators \$65 per hour given our hourly attorney rate
 - Very few in the state willing to provide that service
 - We as attorneys have an ethical duty to investigate each and every case, and with the caseload of a public defender, this is difficult to do without an investigator.
 - One of, if not the last state run system to not have investigators on staff
 - We did request 3 FTE, and the Governor did recommend the same in his executive recommendation.

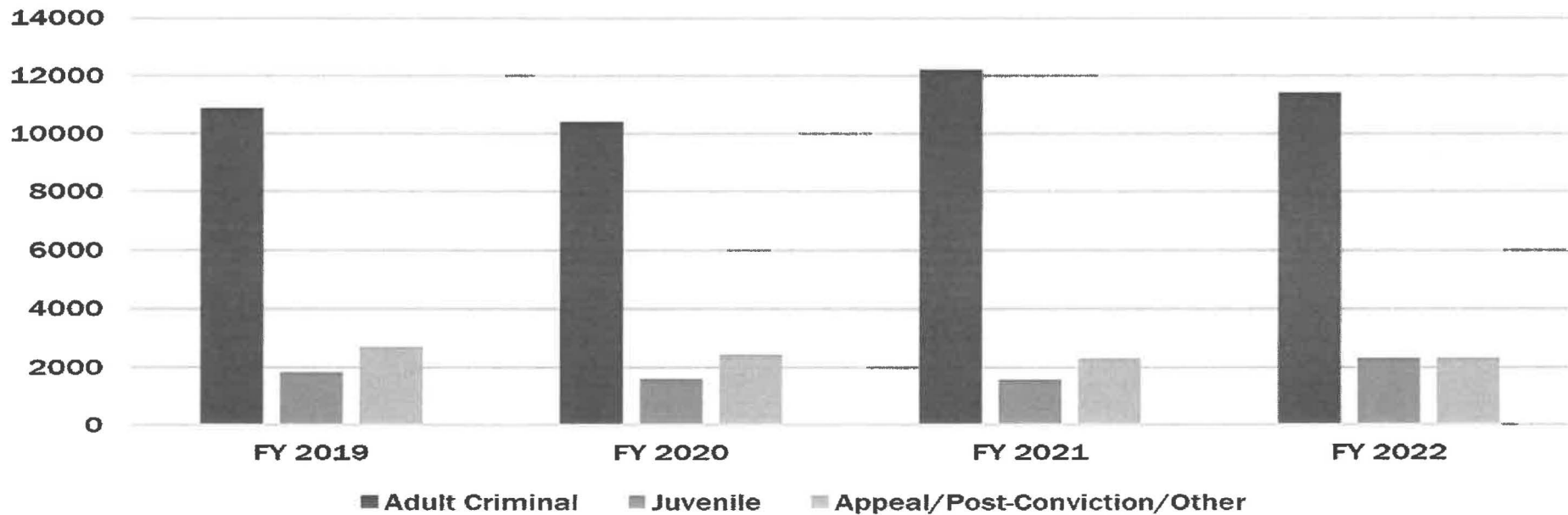
Agency Budget Requests / Executive Recommendations

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

Total Cases by Fiscal Year



Case Types by Fiscal Year



HB 1022
House Appropriations
Government Operations Division
January 13, 2023
Testimony of Kevin McCabe,
Supervising Attorney, Dickinson Public Defender's Office

Good morning, Chairman Monson, members of the Committee, my name is Kevin McCabe, and I am the Supervising Attorney of the Dickinson Public Defender's Office. I have been in my current position since the office opened in March of 2006, which puts it at just short of 17 years.

CHALLENGES

I'm here today to discuss my perspective on the two biggest challenges we face as an agency that Mr. Finck mentioned earlier, employee turnover due to compensation and contractor rate of pay.

To begin with, during the past seventeen years, we have had a total of six full time attorneys within our office besides myself. We have had two other persons who trained in our office prior to them becoming licensed to practice and one other person who was licensed but was hired as a temporary attorney because we did not have an agency opening at the time. Of the nine attorneys hired, one is still in the office, one was terminated, and the rest left because they told me that they could make a lot more money elsewhere or simply that the Commission cannot compete with what they are being offered elsewhere. Notably, of that group, three of them left to work as Assistant State's Attorneys, two of them in Stark County, where I am from. One of them is the current elected State's Attorney for the county. What I am seeing is not unique to my county or my district. For example, in McKenzie County, the current State's Attorney was a supervising attorney the Watford City office just prior to him being offered his current position and in Williams County, two of the current Assistant State's Attorneys used to be employed within our Williston Public Defender's Office, one of which was the supervising attorney. The State's Attorney in Mercer County was also a supervising attorney at one point in the past. I'm sure Mr. Finck could even list more examples. Any time I talk with any of these people and ask they why they left, I always get the same answer and they state it's because they can make more money working for the counties than they can with the Public

Defender's Offices.

This problem isn't going away, it's only getting worse. Recently, an attorney left our office in June of 2020. Per protocol, we advertised the open position along with the requirements and salary range. It took us over sixteen months before we hired another attorney in our office. This wasn't due to lack of trying. I called and begged anybody that I could think of to apply for the position. We received applications, but very few of the qualified applicants ever ended up interviewing. Most of them told us that they found better paying opportunities elsewhere, so they took their names out of consideration. Of those that did interview and were offered the position, each person declined the offer. When I spoke to them in a follow-up phone conversation, they claimed it was due to the low salary that was offered to them. So for that sixteen months, I was working alone covering as many cases as I could and we contracted the remainders out. Eventually, we did hire an attorney, but that person only lasted three months. So again, we were left with an open attorney position and this time it took ten months to fill. We ended up hiring a person that was underqualified for the position advertised, fresh out of law school, just having passed the bar. Which brings with it, its own set of challenges, as here I am training this person again not knowing how long the Commission can afford to keep her once she becomes well known within our district and is able to work on her own.

As I have said, I have been here for almost seventeen years. During those seventeen years I have been approached by numerous persons and agencies asking me to leave my position and go to work for them. About a year ago when I felt the agency was struggling and I was feeling overwhelmed with the workload, and not knowing when I would be getting another attorney in the office, I decided to cash in some chips. I talked to the Stark County State's Attorney and the Stark County Commission about going to work for them. On a Monday morning, a member of the commission and the State's Attorney called, and they asked me what it would take for me to work for them and I gave them an offer, which I thought was way above what they would agree to and about \$20,000 more than I was making here per year. To my amazement, that afternoon, I had a written offer from them on my desk for exactly what I asked for. I immediately accepted the offer and filed my resignation letter with Mr. Finck.

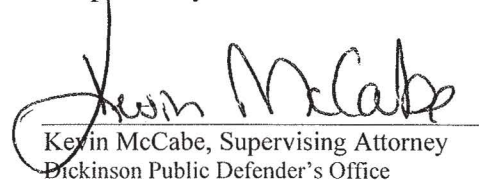
As you know, I'm still working for Public Defender's Office. Mr. Finck is a smooth talker. I received a counteroffer from the Commission, and Mr. Finck and I were able to

negotiate a deal which kept me employed with the Commission. I decided to come back for one reason and one reason only, and that is because I didn't want the Commission to have to close the Dickinson office and lay off the two assistants that were working with me. I stayed hoping that things would get better agency-wide, as this isn't only an attorney issue, I have lost staff to the court system after we've trained them, and my current administrative assistant and legal assistant are constantly being asked by different clerks of court to come work for them for higher pay. Plus, I know that there will be another opening at the Stark State's Attorney's office as a longtime assistant is retiring this year.

As for contractor rate of pay, I just want to say that our system will not work without attorneys willing to work as indigent defense contractors. But over the last five years, this is becoming a big struggle within our district. That position that I ultimately turned down with Stark County was eventually filled by a person that did a lot of contract work within our district. And as I previously mentioned, our position was open for ten months before we underfilled it. During that time, I called and begged this attorney to apply for it always getting the same answer, I like the work, but I would need more money than they are offering. Other contractors have quit taking indigent defense cases because they say that they cannot afford to take these cases anymore. Too much time spent on cases with too little pay. In two cases that I know of, contractors refuse to take our cases, but they take municipal cases simply because they get paid more per hour and those cases only reach the "B" misdemeanor level. In short, they get paid more, and work less on each case. Currently, in our district, most of the contractor attorneys are coming from out of town. They are traveling from Minot, Bismarck and in some cases, even South Dakota.

I want to thank the Committee for your time.

Respectfully submitted:


Kevin McCabe, Supervising Attorney
Dickinson Public Defender's Office



NAPD Policy Statement on Public Defense Staffing¹ (May 2020)

Staff supporting public defense counsel must be adequate for meaningful representation (2020)

Meaningful representation requires proper staff assistance. Public defense clients are constitutionally entitled to an adequate opportunity to present their claims fairly within the adversary system. To receive this representation, clients must be provided attorneys who have the basic tools of an adequate defense. Necessarily, this includes adequate staff to support the work of the lawyer. The type and number of staff assistance to the lawyer greatly affects the amount of work the attorney can do competently.²

Until empirical studies are further able to determine the number of staff necessary to support the lawyer, public defense systems, at a minimum, should provide one investigator for every three lawyers, one mental health professional, often a social worker,³ for every three lawyers, and one supervisor for every 10 lawyers. Additionally, there should be one paralegal and one administrative assistant for every 4 lawyers. Public defense organizations must have adequate staff or have access to adequate staff who perform necessary financial, IT, and human resource services.

Clients are constitutionally and ethically entitled to competent representation. A team of professionals is necessary for the competent defense of a client. Investigative, mental health, paralegal and administrative assistance are essential to the proper representation of clients. "Without access to what the United States

¹ This Statement does not address staffing for cases where the client faces life without parole or the death penalty.

² The particular dimensions of competent work duties of a criminal defense attorney are explained in American Bar Association's *Ethical Problems Facing the Criminal Defense Lawyer: Practical Answers to Tough Questions*, Edward C. Monahan and James Clark, Chapter 23, "Coping With Excessive Workload," (1995), pp. 320-328. "A lawyer who has the regular assistance of competently performing staff and adequate resources is able to handle substantially more work than one who has inadequate resources and limited staff support." *Id.* at 328.

³ A social worker has particular legal meanings in various jurisdictions. Public defense systems that do not use social workers use professionals that include client services advocates, social service advocates, and mitigation specialists. Some of these professionals do not have a formal degree in social work but have professional skills that include interviewing, recognizing mental health and substance abuse disorders, understanding the subjective meaning of behavior, recognizing mitigating factors and developing life histories with mitigation themes, conducting motivational interviewing. See generally, *2008 Supplementary Guidelines*, Guideline 5.1-Qualifications of the Defense Team (2018), found at: https://www.americanbar.org/groups/committees/death_penalty_representation/resources/aba_guidelines/2008-supplementary-guidelines/

Supreme Court terms the 'raw materials' of an effective defense, defenders cannot provide competent representation to indigent defendants."⁴

Scholars have recognized for at least 42 years the importance of support staff to quality representation. Professor Charles Silberman wrote:

...it is possible to provide a high quality of representation to indigent defendants. ...In Washington and Seattle... staff lawyers operate in much the same way as do members of large law firms. Indeed, they have access to a range of client services that only the largest and most prestigious law firms can command. These services include a staff of investigators...a staff of social workers or former probation officers to recommend sentencing alternatives to the probation department and/or the judge,...and "senior partners" to consult on difficult questions of law and strategy.⁵

National standards require support staff in order to be able to ensure competent representation.⁶ The American Bar Association (ABA) Standards for Criminal Justice *Providing Defense Services* (3d ed. 1992), Standard 5-1.4, Supporting services states, "The legal representation plan should provide for investigatory, expert, and other services necessary to quality legal representation."⁷

More than investigators are required. "Quality legal representation cannot be rendered either by defenders or by assigned counsel unless the lawyers have available other supporting services in addition to secretaries and investigators. Among these are access to necessary expert witnesses, as well as personnel skilled in social work and related disciplines to provide assistance at pretrial release hearings and at sentencing."⁸

⁴ Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 Hastings L. J. 1031, 1102 (2006) citing *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985). "Meaningful access to justice has been the consistent theme of these cases. We recognized long ago that mere access to the courthouse doors does not, by itself, assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense. Thus, while the Court has not held that a State must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy, see *Ross v. Moffitt*, 417 U. S. 600 (1974), it has often reaffirmed that fundamental fairness entitles indigent defendants to "an adequate opportunity to present their claims fairly within the adversary system," *id.* at 417 U. S. 612. To implement this principle, we have focused on identifying the "basic tools of an adequate defense or appeal," *Britt v. North Carolina*, 404 U. S. 226, 404 U. S. 227 (1971), and we have required that such tools be provided to those defendants who cannot afford to pay for them."

⁵ Charles Silberman, Criminal Violence, *Criminal Justice* 255 (1978), p. 306.

⁶ Principle 8 of the ABA *Ten Principles of a Public Defense Delivery System* (2002) states, "There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system." Its Commentary states, "There should be parity of workload, salaries and other resources (such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts) between prosecution and public defense."

⁷ Standard 5-1.4. Supporting services, "The legal representation plan should provide for investigatory, expert, and other services necessary to quality legal representation. These should include not only those services and facilities needed for an effective defense at trial but also those that are required for effective defense participation in every phase of the process. In addition, supporting services necessary for providing quality legal representation should be available to the clients of retained counsel who are financially unable to afford necessary supporting services." Found at:

<https://www.ils.ny.gov/files/Hurrell-Harring/Eligibility/Written%20Submissions/General/ABA%20Standards%20for%20Criminal%20Justice%20Providing%20Defense%20Services%201992.pdf>

⁸ Commentary to ABA Standards for Criminal Justice *Providing Defense Services* (3d ed. 1992) Standard 5-1.4.

Defenders have a responsibility to provide clients with both counsel and advice based on the law and facts of the case.⁹ Clients choose the outcome they desire. Attorneys are required to seek that outcome. However, along the way, clients deserve the best advice, including whether a community-based treatment option is in the client's best interest.

Also, counsel "must inform her client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less."¹⁰ This responsibility is reflected in national standards which require defense counsel to advise the client during plea negotiations of the "other consequences of conviction such as deportation, and civil disabilities."¹¹

For sentencing, defense counsel must address both direct and collateral consequences¹² and with the assistance of sentencing specialists present an individualized sentencing plan with information about the defendant's background and circumstances of the offense that are mitigating and favorable to the defendant.¹³ These defense generated plans require investigation and assistance

⁹ The ABA Model Rules of Professional Conduct state: *Client-Lawyer Relationship*, Rule 1.1 Competence, "A lawyer shall provide competent representation to a client...."; *Client-Lawyer Relationship*, Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer, "Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation...."; *Counselor*, Rule 2.1 Advisor, "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice...." See also, ABA Standards for Criminal Justice, Defense Function 4-5.1 Advising the Client; 4-5.2 Control and Direction of the Case (4th ed. 2017).

¹⁰ *Padilla v. Kentucky*, 559 U.S. 356 (2010).

¹¹ ABA Standards for Criminal Justice, Defense Function 4-5.4 Consideration of Collateral Consequences; 4-5.5 Special Attention to Immigration Status and Consequences (4th ed. 2017); National Legal Aid and Defender *Performance Guidelines for Criminal Defense Representation* (1994), Guideline 6.2, The Contents of the Negotiations.

¹² ABA Standards for Criminal Justice, Defense Function 4-8.3 Sentencing; National Legal Aid and Defender *Performance Guidelines for Criminal Defense Representation* (1994), Guideline 8.2(b) Sentencing Options, Consequences and Procedures, "(b) Counsel should be familiar with direct and collateral consequences of the sentence and judgment, including:

- (1) credit for pre-trial detention;
- (2) parole eligibility and applicable parole release ranges;
- (3) effect of good-time credits on the client's release date and how those credits are earned and calculated;
- (4) place of confinement and level of security and classification;
- (5) self-surrender to place of custody;
- (6) eligibility for correctional programs and furloughs;
- (7) available drug rehabilitation programs, psychiatric treatment, and health care;
- (8) deportation;
- (9) use of the conviction for sentence enhancement in future proceedings;
- (10) loss of civil rights;
- (11) impact of a fine or restitution and any resulting civil liability;
- (12) restrictions on or loss of license.

¹³ See, National Legal Aid and Defender *Performance Guidelines for Criminal Defense Representation* (1994), Guideline 8.1 Obligations of Counsel in Sentencing; 8.2 Sentencing Options, Consequences and Procedures; 8.3 Preparation for Sentencing; the Defense Sentencing Memorandum; 8.7 The Sentencing Process; American Bar Association *Standards for Criminal Justice: Prosecution and Defense Function* (4th ed. 2015), Standard 4-8.3 Sentencing, "...(d) Defense counsel should gather and submit to the presentence officers, prosecution, and court as much mitigating information relevant to sentencing as reasonably possible; and in an appropriate case, with the consent of the accused, counsel should suggest alternative programs of service or rehabilitation or other non-imprisonment options, based on defense counsel's exploration of employment, educational, and other opportunities made available by

from persons with skills to obtain information, identify and present mitigation and offer alternatives to incarceration.

Investigators

An investigator is necessary for a variety of reasons. A lawyer has the responsibility to investigate all cases.¹⁴ As part of their education, experience and professional networks, investigators have skills and expertise that attorneys do not have as part of their education. The investigation responsibilities for competent representation are substantial.¹⁵ Importantly, investigators who interview witnesses, obtain records

community services.”; American Bar Association *Standards for Criminal Justice: Sentencing*, (3d ed. 1994).

¹⁴ The ABA **Criminal Justice Standards, Defense Function (4th ed. 2015), Standard 4-4.1, Duty to Investigate and Engage Investigators, states:**

(a) Defense counsel has a duty to investigate in all cases, and to determine whether there is a sufficient factual basis for criminal charges.

(b) The duty to investigate is not terminated by factors such as the apparent force of the prosecution’s evidence, a client’s alleged admissions to others of facts suggesting guilt, a client’s expressed desire to plead guilty or that there should be no investigation, or statements to defense counsel supporting guilt.

(c) Defense counsel’s investigative efforts should commence promptly and should explore appropriate avenues that reasonably might lead to information relevant to the merits of the matter, consequences of the criminal proceedings, and potential dispositions and penalties. Although investigation will vary depending on the circumstances, it should always be shaped by what is in the client’s best interests, after consultation with the client. Defense counsel’s investigation of the merits of the criminal charges should include efforts to secure relevant information in the possession of the prosecution, law enforcement authorities, and others, as well as independent investigation. Counsel’s investigation should also include evaluation of the prosecution’s evidence (including possible re-testing or re-evaluation of physical, forensic, and expert evidence) and consideration of inconsistencies, potential avenues of impeachment of prosecution witnesses, and other possible suspects and alternative theories that the evidence may raise.

(d) Defense counsel should determine whether the client’s interests would be served by engaging fact investigators, forensic, accounting or other experts, or other professional witnesses such as sentencing specialists or social workers, and if so, consider, in consultation with the client, whether to engage them. Counsel should regularly re-evaluate the need for such services throughout the representation.

(e) If the client lacks sufficient resources to pay for necessary investigation, counsel should seek resources from the court, the government, or donors. Application to the court should be made *ex parte* if appropriate to protect the client’s confidentiality. Publicly funded defense offices should advocate for resources sufficient to fund such investigative expert services on a regular basis. If adequate investigative funding is not provided, counsel may advise the court that the lack of resources for investigation may render legal representation ineffective.

¹⁵ NLADA *Performance Guidelines for Criminal Defense Representation*, Guideline 4.1 addresses the investigation responsibility of counsel:

Investigation

(a) Counsel has a duty to conduct an independent investigation regardless of the accused’s admissions or statements to the lawyer of facts constituting guilt. The investigation should be conducted as promptly as possible.

(b) Sources of investigative information may include the following:

(1) *charging documents*

Copies of all charging documents in the case should be obtained and examined to determine the specific charges that have been brought against the accused. The relevant statutes and precedents should be examined to identify:

(A) the elements of the offense(s) with which the accused is charged;

(B) the defenses, ordinary and affirmative, that may be available;

(C) any defects in the charging documents, constitutional or otherwise, such as statute of limitations or double jeopardy.

(2) *the accused*

If not previously conducted, an in-depth interview of the client should be conducted as soon as possible and appropriate after appointment or retention of counsel. The interview with the client should be used to:

(A) seek information concerning the incident or events giving rise to the charge(s) or improper police investigative practices or prosecutorial conduct which affects the client’s rights;

and survey the crime scene allow a lawyer to meet the ethical responsibilities of not becoming a witness in a case as required by ABA *Model Rule of Professional Conduct* Rule 3.7 Lawyer As Witness.¹⁶

The duty to investigate is not subject to making compromises based upon circumstances. ABA *Criminal Justice Standards for the Defense Function* (4th ed), Standard 4-4.1 states, “(b) The duty to investigate is not terminated by factors such as the apparent force of the prosecution’s evidence, a client’s alleged admissions to others of facts suggesting guilt, a client’s expressed desire to plead guilty or that there should be no investigation, or statements to defense counsel supporting guilt.”¹⁷

“The lack of adequate investigation is the most frequent reason that courts find ineffective assistance of counsel.”¹⁸

Most importantly, investigators assisting attorneys with their special skills change outcomes for clients.¹⁹

(B) explore the existence of other potential sources of information relating to the offense;
(C) collect information relevant to sentencing.

(3) *potential witnesses*

Counsel should consider whether to interview the potential witnesses, including any complaining witnesses and others adverse to the accused. If the attorney conducts such interviews of potential witnesses, he or she should attempt to do so in the presence of a third person who will be available, if necessary, to testify as a defense witness at trial. Alternatively, counsel should have an investigator conduct such interviews.

(4) *the police and prosecution*

Counsel should make efforts to secure information in the possession of the prosecution or law enforcement authorities, including police reports. Where necessary, counsel should pursue such efforts through formal and informal discovery unless a sound tactical reason exists for not doing so.

(5) *physical evidence*

Where appropriate, counsel should make a prompt request to the police or investigative agency for any physical evidence or expert reports relevant to the offense or sentencing.

(6) *the scene*

Where appropriate, counsel should attempt to view the scene of the alleged offense. This should be done under circumstances as similar as possible to those existing at the time of the alleged incident (e.g., weather, time of day, and lighting conditions).

(7) *expert assistance*

Counsel should secure the assistance of experts where it is necessary or appropriate to:

- (A) the preparation of the defense;
- (B) adequate understanding of the prosecution’s case;
- (C) rebut the prosecution’s case.

¹⁶ ABA Model Rule of Professional Conduct Rule 3.7 Lawyer As Witness, states:

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case; or
- (3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer’s firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

¹⁷ Found at:

https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/

¹⁸ Norman Lefstein, ABA *Securing Reasonable Caseloads: Ethics and Law in Public Defense* (2011) p. 69.

¹⁹ “Adequate investigation is the most basic of criminal defense requirements and often the key to effective representation. An early study of public defender offices in the wake of the expansion of the right to counsel in *Argersinger* found that institutional resources were the most prevalent explanation for the variation in effectiveness scores among defender programs. Specifically, an in-depth analysis of nine urban public defender programs found that success in the courtroom was frequently tied to the availability of investigators. Investigators, with their specialized experience and training, are often more skilled than attorneys, and invariably more efficient, at performing critical case preparation tasks such

Mental health professionals

Mental health professionals, often social workers, are necessary to address mental health issues in an increasing number of cases and to develop defense generated sentencing alternatives. Mental health professionals have skills and expertise that attorneys do not have as part of their education. For instance, social workers are skilled at understanding the subjective meaning of behaviors, the undeveloped minds of juveniles and young adults. Social workers are trained in evidence-based motivational interviewing skills,²⁰ assessing substance abuse and mental health disorders, creating community-based alternative sentence plans focused on treatment, developing life histories and mitigation. They have networks of social service providers.

Most importantly, social workers assisting attorneys with their special skills change outcomes for clients.

Paralegals, administrative assistants

Much like nurses assisting doctors and meal assistants helping feed patients in a hospital or nursing home, dental hygienists helping dentists, paralegals and administrative assistants perform important tasks that allow the attorney to focus on matters unique to the responsibilities of the lawyer.²¹

Supervision

as gathering and evaluating evidence and interviewing witnesses. Without the facts ferreted out by an investigation, a defender has nothing to work with beyond what she might learn from a brief interview with the client. With such limited information regarding the strength and nature of the case, any attorney would be hard pressed to make the sensible strategic decisions necessary to adequately defend an accused or even have any leverage in plea bargaining.” Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 Hastings L. J. 1031, 1097 (2006).

²⁰ The scientific support for motivational interviewing is substantial:

- Baer, J.S., & Peterson, P.L. (2002). Motivational interviewing with adolescents and young adults. In W.R. Miller & S. Rollnick (Eds), *Motivational Interviewing: Second Edition*. New York, NY: Guilford Press, 320-332.
- Carroll, K.M, Ball, S.A., Nich, C., Martino, S., Frankforter, T.L., Farentino, C., Kunkel, L.E., Mikulich-Gilbertson, S.K., Morgenstern, J., Obert, J.L., Polcin, D., Snead, N., & Woody, G.E. (2006). Motivational interviewing to improve treatment engagement and outcome in individuals seeking treatment for substance abuse: A multisite effectiveness study. *Drug and Alcohol Dependence*, 81, 301-312.
- Ginsburg, J.D.I., Mann, R.E., Rotgers, F., & Weekes, J.R. (2002). Motivational interviewing with criminal justice populations.
- W.R. Miller & S. Rollnick (Eds), *Motivational Interviewing: Second Edition*. New York, NY: Guilford Press, 320-332.
- Lundahl, B. & Burke, B.L. (2009). The effectiveness and applicability of motivational interviewing: a practice-friendly review of four meta-analyses. *Journal of Clinical Psychology*, 65, (11) 1232-1245.
- Miller, W.R. & Rollnick, S. (1991). *Motivational Interviewing: Preparing People to Change Addictive Behavior*. New York, NY: Guilford Press.
- Miller, W.R. & Rollnick, S. (2002). *Motivational Interviewing: Second Edition*. New York, NY: Guilford Press.

²¹ “In addition to access to experts and investigators, defenders need the full complement of support services and technology that a modern law office would require. Secretaries and paralegals can assist with clerical and administrative tasks, client communication, and case preparation and free up time for legal work only the attorney can handle.” Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 Hastings L. J. 1031, 1101 (2006).

Proactive supervision and coaching foster systematic competent representation and compliance with the Rules of Professional Conduct.

The days of the unsupervised lone ranger are long gone. Proactive supervision is essential in public defense systems. Principle 7 of the National Association for Public Defense Foundational Principles (2017) states:

Appropriate Supervision of All Public Defense Lawyers and Other Public Defense Professionals Is Essential, Public defense providers must provide regular and timely supervision as needed of all lawyers and other professionals. The objective of supervision is to assure that all defense services provided by lawyers are competent within the meaning of rules of professional conduct and effective pursuant to prevailing professional standards. Accordingly, supervision should determine if sufficient time, thought, and resources are being devoted to a wide variety of defense tasks, such as interviewing and counseling of clients, securing pretrial release of incarcerated clients, completion of fact investigations prior to formulating recommendations about plea agreements, formal and informal discovery is conducted, and preparation for pretrial hearings, trials, and sentencing proceedings. Supervision should also include continuous monitoring of lawyer workloads to assure that all essential tasks of defense representation are being completed.

The ABA Rules of Professional Conduct, Rule 5.1: Responsibilities of a Partner or Supervisory Lawyer, requires supervisors to “make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.” The Comment to the Rule requires hands-on management. Lawyers with managerial authority within a firm must “make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.”

Active management to help staff help clients receive quality representation includes setting expectations; conducting performance coaching process (mutually creating performance criteria making implicit expectations explicit, ongoing feedback, regular performance reviews); observing employees perform; conducting file reviews; delegating and staff reporting; brainstorming; doing mock presentations; conducting staff meetings; doing case reviews.²²

²² Case reviews are a pivotal discipline to advance competent representation in public defense systems. Case review is a method of “looking at, assessing, and analyzing an entire case from other professionals not directly involved in the case. ...Cases are comprehensively reviewed at a point in time when the defense team is ready for the next significant event in the case. Because case reviews invite defense teams to meet and share extant case facts and theories with attorneys and other professionals who are not representing the client, the review provides ‘multiple vantage points from which to view reality.’” See Ed Monahan, Jim Clark, Ph.D., (editors), Chapter 6 “Creating and Leading the Mitigation Team,” *Tell the Client’s Story: Mitigation in Criminal and Death Penalty Cases* (2017). P. 155. The case review process is a critical methodology because one “of the most robust discoveries in the scientific literature concerning decision making and judgment is that decision makers routinely select quick-and-easy, shoot-from-the-hip approaches to making important decisions instead of using approaches that are thoughtful, deliberative, and demonstrably most fruitful according to experience and national standards. ...This shortcut approach is known as *satisficing*, which is a neologism that combines *satisfy* and *suffice*. It values speed and closure over the delay required to deliberate and achieve optimal results. Professionals *satisfice* in order to deal with the overwhelming number of decisions and the complexity of possible alternatives. Without doubt, attorneys preparing to try difficult cases choose to *satisfice* because of such cognitive overload.” *Id.*

Essential organizational specialists

In addition to lawyers, investigators, paralegals, administrative staff and supervisors needed to support the office, a public defender program also requires most of the services a business needs including financial, information technology (IT), and human resources (HR). These services are not optional for a proper functioning professional organization.

Public defense programs have many organizational structures and relationships in state, county and city governments. Some public defense programs are freestanding nonprofits unattached to a governmental entity. These various structures mean that some public defense programs have some or all of these functions provided by the state, county or city financial, IT, human resource specialists while others do not have any governmental assistance. Because of this wide range of organizational structures and relationships, we do not offer specific ratios for the staff to provide these financial, IT, and human resources services.

Nevertheless, it is crucial that we communicate that these services are indispensable. The professionals who provide this type of assistance have the expertise organizations need that lawyers do not possess.

Public defense organizations must have adequate staff or have access to adequate staff who perform these services.²³

IT

As reliant as defenders are on IT resources to perform their day-to-day work, and considering the ever-increasing role that digital evidence plays in defense litigation,²⁴ the program's management of case information electronically, and the responsibility to provide funding authorities and the public with program data, it is essential that defender organizations have or have access to adequate IT staff to be able to represent their clients efficiently and effectively.²⁵

Defender IT staff can perform critical services such as:

²³ The National Study Commission on Defense Services, Guidelines for Legal Defense Systems in the United States (1976) address the essential nature of professional business staff:

4.1 Task Allocation in the Trial Function: Specialists and Supporting Services

"....Professional business management staff should be employed by defender offices to provide expertise in budget development and financial management, personnel administration, purchasing, data processing, statistics, record-keeping and information systems, facilities management and other administrative services if senior legal management are expending at least one person-year of effort for these functions or where administrative and business management functions are not being performed effectively and on a timely basis....." Found at:

http://www.nlada.net/sites/default/files/nsc_guidelinesforlegaldefensesystems_1976.pdf

²⁴ Increasingly, law enforcement has the IT technical acumen and manpower to develop their cases often with in-house forensics capabilities.

²⁵ See generally, a 2003 survey indicated that "IT staffing levels can vary significantly by the size of the company. For example, the typical IT staffing ratio (the number of employees supported by each IT worker) is 1:27 among all companies included in the survey. However, companies with 500 or fewer employees typically have an IT staffing ratio of about 1:18, while companies with 10,000 or more employees have a ratio of about 1:40." Organizing for Results: IT Structures and Staffing Survey by people3, Mercer Human Resource Consulting, and ITAA, found at:

<https://www.workforce.com/news/ratio-of-it-staff-to-employees> The Gartner 2013 Key IT Metrics Report shows that the Cross-Industry average of IT Full Time Employees as a percentage of Total Employees is 5%. <https://www.gartner.com/en/documents/2324316> Note that these survey and studies are not public defense specific and do not account for IT assistance and analysis of digital evidence in a legal context.

- Helping attorneys figure out how to access digital discovery, e.g., making accessible surveillance video contained in a forensic copy of a cheap, proprietary hardware security system;
- Modifying digital discovery to make it easier to work with, e.g., converting proprietary video to standard formats so it can be viewed on tablets or converting phone records to easy-to-read spreadsheets;
- "Enhancing" digital evidence to assist with case development, e.g., amplifying and noise-reducing a surreptitious recording so it can be understood and transcribed, or zooming into part of a surveillance video to focus on an incident taking place in a crowded area;
- Assessing and reporting on discovery contents, e.g., given a raw forensic dump of a computer or phone, the attorney may want to look at internet history or get a high-level idea of what significance the device contents has to the case;
- Documenting crime scenes and physical evidence via video, photography, and scale diagrams;
- Creating exhibits for use in court, ranging from physical models and large, mounted photographic prints to PowerPoint presentations;
- Acting as a liaison with digital forensic experts; translating geek-to-lawyer, helping attorneys identify issues for which they need experts.

HR

Human resource professionals provide knowledge, experience and expertise that attorneys do not possess. The nature of their services varies and depending on the organization can include creating job descriptions, recommending pay scales, doing employee relations, conducting training, recruiting, managing a performance evaluation process.²⁶

Ideally, the financial, IT, human resources services will be provided by staff directly accountable to the Chief Defender to make sure that the services are provided according to the priority of the Chief Defender and in a way that guarantees the necessary legal confidentiality.

If the financial, IT and human resource services are not provided by employees of the defender program, it is important to emphasize that the Chief Defender must guarantee that the financial, IT, and HR services are provided in a way that ensures the Chief Defender retains hiring and decision-making on personnel actions and in a way that ensures legal confidentiality necessary for a law firm, which is bound by the Rules of Professional Conduct.

Promotes reduced costs

Like support staff for medical doctors, it is cost effective for lawyers to have assistants perform administrative tasks.

Promotes timely, competent resolution of cases

²⁶ The ratio of human resource staff to employees reported in a 2015 Society for Human Resource Management *How Organizational Staff Size Influences HR Metrics* found at: <https://www.shrm.org/ResourcesAndTools/business-solutions/Documents/Organizational%20Staff%20Size.pdf> for small organizations was 3.40 per 100, for medium organizations was 1.22 per 100 and for large organizations was 1.03 per 100.

Adequate support staff promotes timely resolution of cases which reduces costs for jails and reduces frustrations by clients, client families, victims, prosecutors, judges. When lawyers have assistants who can answer phone calls, schedule meetings and locate and arrange court appearances for witnesses, obtain documents, take photographs, and prepare and file pleadings, the lawyers are less likely to need continuances.

As an expert witness stated in Louisiana litigation, “The lack of social work assistance adversely affects the Louisiana defenders’ ability both to obtain pre-trial release for their clients and to advocate more effectively at sentencing. Particularly given the lack of adequate mental health services in Louisiana, having social workers to assist defenders could make a tremendous difference for clients.”²⁷

Minimum staffing

Cases are becoming more complex across the range of cases. Recent changes in police and prosecution practices, including the widespread use of police video camera recordings, have increased the need for investigator and paralegal assistance for defender lawyers. Whether a lawyer has 150 felony cases a year or 400 misdemeanor²⁸ cases a year, many of those cases will require significant investment of time by non-lawyer professionals. Particularly complex cases, such as sex abuse felony cases or juvenile transfer of jurisdiction cases, or misdemeanor driving while intoxicated cases that have newly introduced scientific evidence, can increase the need for non-lawyer assistance.²⁹

Until empirical studies are further able to determine the number of staff necessary to support the lawyer, public defense systems, at a minimum, should provide, one investigator for every three lawyers, one mental health professional, often a social worker, for every three lawyers, and one supervisor for every 10 litigators. Additionally, there should be one paralegal and one administrative assistant for every 4³⁰ lawyers.³¹ Public defense organizations must have adequate staff or have

²⁷ Affidavit of Robert C. Boruchowitz on the adequacy of the public defense system throughout the state of Louisiana *Bob Josh Allen Et Al v. LA State Governor Et Al*, Case Number C655079 (May 2017) p. 35, found at:

https://www.splcenter.org/sites/default/files/documents/2017.05.04_boruchowitz_report.pdf

²⁸ For purposes of this Statement, misdemeanor is used to mean a crime punishable by up to 12 months of incarceration.

²⁹ There are other factors that can increase or decrease the need for staff assistance. A defender who has cases in multiple rural counties that involve substantial regular travel will need more staff to assist with more of the work. A defender whose docket consists of primarily minor traffic violations will likely need less staff assistance.

³⁰ See Sixth Amendment Center, *The Right to Counsel in Rural Nevada: Evaluation of Indigent Defense Services* (September 2018), p. 123; found at:

http://sixthamendment.org/6AC/6AC_NV_report_2018.pdf (Support staff necessary for effective representation “includes one supervisor for every ten attorneys; one investigator for every three attorneys; one social service caseworker for every three attorneys; one paralegal for every four felony attorneys; and one secretary for every four felony attorneys.”; Bureau of Justice Assistance, United States Department of Justice’s *Keeping Defender Workloads Manageable* (2001), p.10, found at: <https://www.ncjrs.gov/pdffiles1/bja/185632.pdf>.)

³¹ See 4.1 Task Allocation in the Trial Function: Specialists and Supporting Services, the National Study Commission on Defense Services, *Guidelines for Legal Defense Systems in the United States* (1976) found at:

http://www.nlada.net/sites/default/files/nsc_guidelinesforlegaldefensesystems_1976.pdf

4.1 Task Allocation in the Trial Function: Specialists and Supporting Services

Defender organizations should analyze their operations for opportunities to achieve more effective representation, increased cost effectiveness and improved client and staff satisfaction through

access to adequate staff who perform necessary financial, IT, and human resource services.

Conclusion: Meaningful Representation Requires Proper Staff Assistance

In order to have meaningful defense representation, the defense must put the prosecution's case through the "crucible of meaningful adversarial testing." *United States v. Cronin*, 466 U.S. 648, 656-57 (1984).

To provide this meaningful defense, the responsibilities of an attorney representing a client facing the loss of liberty are substantial. The attorney must:

- meet with and interview the client promptly
- seek to have the judicial appointment decision made at first appearance prior to the consideration of pretrial release
- seek appropriate pretrial release
- investigate the case
- obtain expert analysis as necessary
- obtain and review discovery
- create the theory of the case
- conduct appropriate legal research
- file and argue motions with evidentiary hearings as appropriate
- communicate and negotiate with prosecutor
- respond to prosecutor motions

specialization. The decision to specialize legal and supporting staff functions should be made whenever the use of specialization would result in substantial improvements in the quality of defender services and cost savings in light of the program's management and coordination requirements; provided that, attorney tasks should never be specialized where the result would be to impair the attorney's ability to represent a client from the beginning of a case through sentencing.

Proper attorney supervision in a defender office requires one full-time supervisor for every ten staff lawyers, or one part-time supervisor for every five lawyers.

Social workers, investigators, paralegal and paraprofessional staff as well as clerical/secretarial staff should be employed to assist attorneys in performing tasks not requiring attorney credentials or experience and for tasks where supporting staff possess specialized skills.

Defender offices should employ investigators with criminal investigation training and experience. A minimum of one investigator should be employed for every three staff attorneys in an office. Every defender office should employ at least one investigator.

Professional business management staff should be employed by defender offices to provide expertise in budget development and financial management, personnel administration, purchasing, data processing, statistics, record-keeping and information systems, facilities management and other administrative services if senior legal management are expending at least one person-year of effort for these functions or where administrative and business management functions are not being performed effectively and on a timely basis.

The primary responsibility for managing, evaluating and coordinating all services provided to a client should be borne by the attorney. The attorney should conduct the initial interview with the client and make an evaluation of the case prior to entry by specialists and supporting staff into the case with the exception of specific ministerial duties necessary to start the attorney's file.

Except where an assigned counsel plan provides such services, defender organizations should provide appointed counsel with specialist and supporting services in cases not involving a present or potential conflict of interest.

Defender offices should employ staff to gather and maintain information on all aspects of the available pre-trial diversion options and to assist defense counsel and defendants both in determining the suitability of any given program and in expediting the client's entry into a program when the client so desires.

The attorney investigator and supervisor ratios are confirmed in Footnote 23 of Principle 8 of the ABA *Ten Principles of a Public Defense Delivery System* (2002): "See NSC, *supra* note 2, Guideline 4.1 (includes numerical staffing ratios, e.g.: there must be one supervisor for every 10 attorneys, or one part-time supervisor for every 5 attorneys; there must be one investigator for every three attorneys, and at least one investigator in every defender office)."

- prepare for trial
- present an alternative sentencing plan in appropriate cases
- keep the client informed throughout.³²

Proper staffing is necessary to enable a public defense lawyer to comply with all of these responsibilities to meet legal and ethical standards of practice. Public Defender attorneys cannot provide meaningful representation to the clients they are appointed to without proper staff assistance.

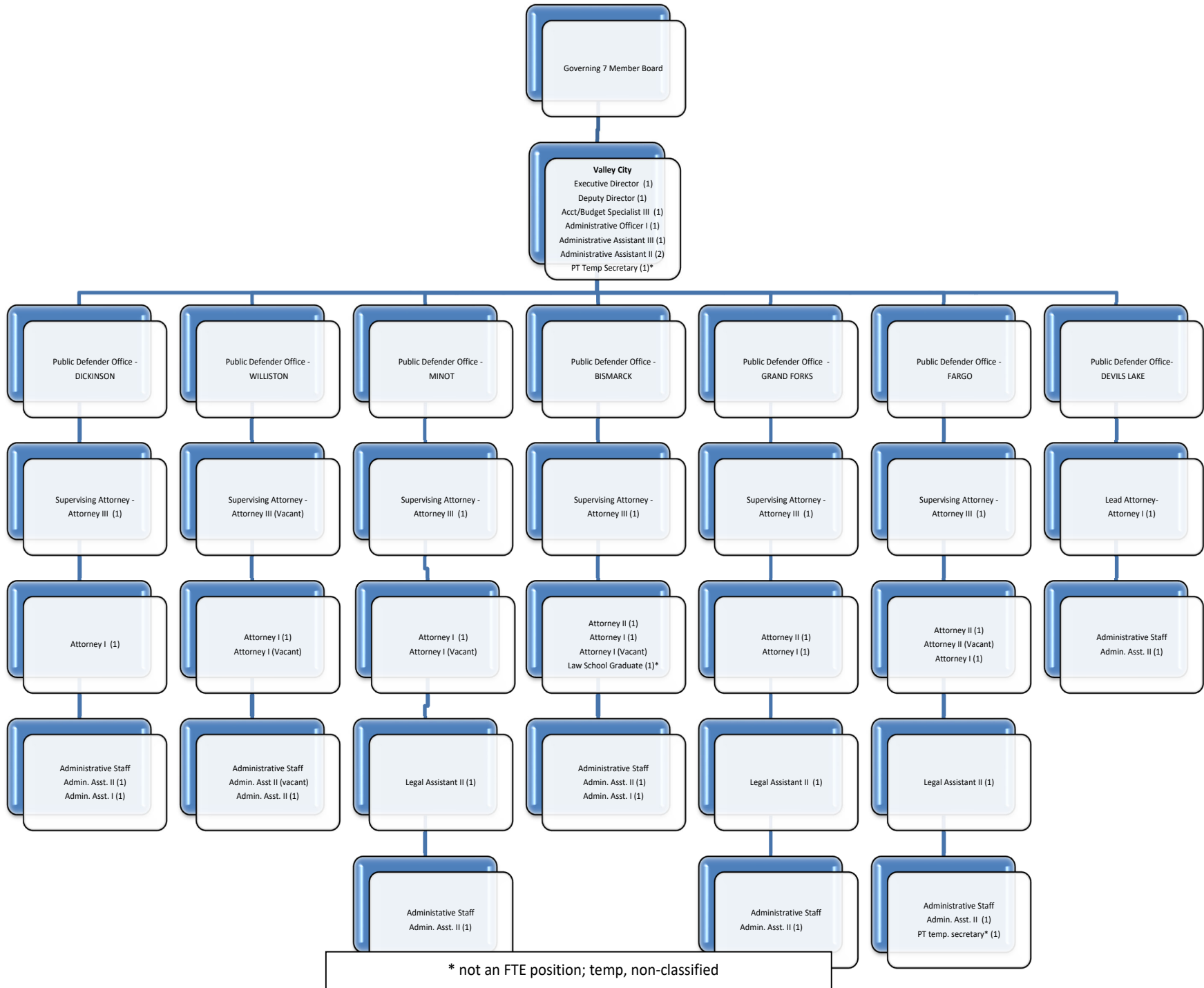
There are serious financial and social consequences to inadequate staffing. Clients pay the costs of representation that is not meaningful. The criminal legal system pays the costs of delayed resolutions. The public has less reason to have confidence that the process is properly adversarial and produces results that are reliable and valid. Public defenders who do not have the investigator, social worker, administrative and paralegal assistance to support their representation have far less capacity to provide meaningful representation to each client.



Organizational Chart

ND Commission on Legal Counsel For Indigents

1/05/2023



* not an FTE position; temp, non-classified

Commission on Legal Counsel for Indigents - Budget No. 188
House Bill No. 1022
Base Level Funding Changes

	Executive Budget Recommendation				House Version				House Changes to Executive Budget Increase (Decrease) - Executive Budget			
	FTE Positions	General Fund	Other Funds	Total	FTE Positions	General Fund	Other Funds	Total	FTE Positions	General Fund	Other Funds	Total
2023-25 Biennium Base Level	40.00	\$19,294,363	\$1,994,850	\$21,289,213	40.00	\$19,294,363	\$1,994,850	\$21,289,213	0.00	\$0	\$0	\$0
2023-25 Ongoing Funding Changes												
Base payroll changes		\$52,209	\$1,890	\$54,099				\$0		(\$52,209)	(\$1,890)	(\$54,099)
Salary increase		585,569	16,472	602,041				0		(585,569)	(16,472)	(602,041)
Health insurance increase		166,724	5,144	171,868				0		(166,724)	(5,144)	(171,868)
Adds 3 FTE investigator positions	3.00	488,092		488,092				0	(3.00)	(488,092)		(488,092)
Adds funding to increase the legal fee rate from \$75 per hour to \$80 per hour		630,453		630,453				0		(630,453)		(630,453)
Adds funding for the ITD rate increase		13,556		13,556				0		(13,556)		(13,556)
Consolidates line items				0				0				0
Total ongoing funding changes	3.00	\$1,936,603	\$23,506	\$1,960,109	0.00	\$0	\$0	\$0	(3.00)	(\$1,936,603)	(\$23,506)	(\$1,960,109)
One-Time Funding Items				\$0				\$0				\$0
No one-time funding items				\$0				\$0				\$0
Total one-time funding changes	0.00	\$0	\$0	\$0	0.00	\$0	\$0	\$0	0.00	\$0	\$0	\$0
Total Changes to Base Level Funding	3.00	\$1,936,603	\$23,506	\$1,960,109	0.00	\$0	\$0	\$0	(3.00)	(\$1,936,603)	(\$23,506)	(\$1,960,109)
2023-25 Total Funding	43.00	\$21,230,966	\$2,018,356	\$23,249,322	40.00	\$19,294,363	\$1,994,850	\$21,289,213	(3.00)	(\$1,936,603)	(\$23,506)	(\$1,960,109)
<i>Federal funds included in other funds</i>			\$0				\$0				\$0	
<i>Total ongoing changes as a percentage of base level</i>	7.5%	10.0%	1.2%	9.2%	0.0%	0.0%	0.0%	0.0%				
<i>Total changes as a percentage of base level</i>	7.5%	10.0%	1.2%	9.2%	0.0%	0.0%	0.0%	0.0%				

Other Sections in Commission on Legal Counsel for Indigents - Budget No. 188

	Executive Budget Recommendation	House Version
Indigent defense administration fund	Sections 2 and 3 would amend Sections 29-07-01.1 and 54-44.1-11 to provide for the Commission on Legal Counsel for Indigents to transfer its unspent general fund appropriation authority to the indigent defense administration fund each biennium until the balance of the fund reaches \$3 million.	

23.0251.01001
Title.

Prepared by the Legislative Council staff for
the House Appropriations - Government
Operations Division Committee
February 3, 2023

Fiscal No. 1

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1022

Page 1, replace lines 10 through 18 with:

	<u>Base Level</u>	<u>Adjustments or Enhancements</u>	<u>Appropriation</u>
Commission on legal counsel for indigents	\$20,964,213	\$1,927,204	\$22,891,417
Legal counsel for juveniles	325,000	(325,000)	0
Total all funds	\$21,289,213	\$1,602,204	\$22,891,417
Less estimated income	1,994,850	19,487	2,014,337
Total general fund	\$19,294,363	\$1,582,717	\$20,877,080
Full-time equivalent positions	40.00	1.00	41.00"

Renumber accordingly

STATEMENT OF PURPOSE OF AMENDMENT:

House Bill No. 1022 - Comm. on Legal Counsel for Indigents - House Action

	Base Budget	House Changes	House Version
Comm. on Legal Counsel for Indigents	\$20,964,213	\$1,927,204	\$22,891,417
Legal counsel for juveniles	325,000	(325,000)	_____
Total all funds	\$21,289,213	\$1,602,204	\$22,891,417
Less estimated income	1,994,850	19,487	2,014,337
General fund	\$19,294,363	\$1,582,717	\$20,877,080
FTE	40.00	1.00	41.00

Department 188 - Comm. on Legal Counsel for Indigents - Detail of House Changes

	Adjusts Funding for Base Payroll Changes ¹	Adds Funding for Salary and Benefit Increases ²	Adds an FTE Investigator Position ³	Adds Funding to Reduce Employee Turnover ⁴	Adds Funding to Increase the Legal Fee Rate ⁵	Adds Funding for ITD Rate Increase ⁶
Comm. on Legal Counsel for Indigents	\$54,099	\$616,315	\$137,781	\$150,000	\$630,453	\$13,556
Legal counsel for juveniles	_____	_____	_____	_____	_____	_____
Total all funds	\$54,099	\$616,315	\$137,781	\$150,000	\$630,453	\$13,556
Less estimated income	1,890	17,597	0	0	0	0
General fund	\$52,209	\$598,718	\$137,781	\$150,000	\$630,453	\$13,556
FTE	0.00	0.00	1.00	0.00	0.00	0.00

	Consolidates Line Items ²	Total House Changes
Comm. on Legal Counsel for Indigents	\$325,000	\$1,927,204
Legal counsel for juveniles	(325,000)	(325,000)
Total all funds	\$0	\$1,602,204
Less estimated income	0	19,487
General fund	\$0	\$1,582,717
FTE	0.00	1.00

¹ Funding is adjusted for base payroll changes.

² The following funding is added for 2023-25 biennium salary adjustments of 4 percent on July 1, 2023, and 4 percent on July 1, 2024, and increases in health insurance premiums from \$1,429 to \$1,648 per month:

	<u>General Fund</u>	<u>Other Funds</u>	<u>Total</u>
Salary increase	\$438,445	\$12,335	\$450,780
Health insurance increase	160,273	5,262	165,535
Total	\$598,718	\$17,597	\$616,315

³ Funding for 1 FTE investigator position is added.

⁴ Funding of \$150,000 from the general fund is added to alleviate employee turnover for nonattorney positions.

⁵ Funding is added from the general fund to increase the legal fee rate from \$75 per hour to \$80 per hour.

⁶ Funding from the general fund is added for the Information Technology Department rate increase.

⁷ The legal counsel for juveniles line item funding is transferred to the Commission on Legal Counsel for Indigents line item to return the agency budget to a single line item.

House Bill 1022**Testimony of Tony J. Weiler****Senate Appropriations-Government Operations Division****March 7, 2023**

Senator Wanzek and Members of the Government Operations Division of the Senate Appropriations Committee, my name is Tony Weiler, and I am the Executive Director of the State Bar Association of North Dakota (SBAND).

SBAND is the professional association of over 3,000 licensed North Dakota lawyers. On behalf of SBAND President Jennifer Albaugh and our Board of Governors, I present this testimony in support of HB1022, the Budget Appropriation of the North Dakota Commission on Legal Counsel for Indigents. SBAND appreciates the work done by the Commission and its hard-working attorneys to uphold the Constitutional rights of those accused of a crime. The Commission needs the requested budget, primarily to increase pay for its attorneys, and to hire investigators to do the important work necessary in a criminal defense case.

It is vital to fund the Commission to the maximum extent possible. The State Bar Association encourages a Do Pass.

Tony Weiler

tony@sband.org

701-220-5846

HB 1022
N.D. Comm. on Legal Counsel for Indigent
Senate Appropriations: Government Operations Division
Budget Presentation
March 7, 2023



North Dakota Century Code and Major Statutory Responsibilities

- The Commission operating statute is N.D.C.C. 54-61

The Statutory responsibilities of the Commission are found in NDCC 54-61-02

- The Commission is tasked with developing standards governing the delivery of indigent services. 54-61-02(1)(a)
- The Commission is tasked with implementing a process of contracting for legal services for indigents. 54-61-02 (1)(b)
- The Commission is tasked with establishing public defender offices in regions of the state as it considers necessary and appropriate. 54-61-02 (1)(c)
- The Commission is tasked with establishing a method for accurately tracking and monitoring caseloads of contract counsel and public defenders. 54-61-02 (1)(d)
- The Commission is tasked with approving and submitting a biennial budget to the Office of Management and Budget. 54-61-02 (1)(e)
- The Commission is further given statutory authority to do the following:
 - Enter into agreements with a County or City to provide services in which the County or city would have to provide. 54-61-02(2)
 - Adopt rules for the exercise of its authority. 54-61-02(3)
 - Request records from other agencies to verify indigence. 54-61-02(4)

The Purpose of the Agency's Various Programs

- The Commission is the agency which provides the attorneys and related services to indigent persons when there is a constitutional, statutory, or rule-based right to counsel at public expense.
- 54-61-01 provides that the Commission was “established for the purpose of developing and monitoring a process for the delivery of state-funded legal counsel services for indigents which are required under the Constitution of North Dakota and the United States Constitution and any applicable statute or court rule. The commission shall provide indigent defense services for indigent individuals determined by the court to be eligible for and in need of those services pursuant to standards and policies of the commission governing eligibility for such services.”
- The 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.
- The Commission consists of 7 members: 1 member of the legislature from each house, 2 appointed by the Governor (one must be from a county of not more than 10 thousand), 2 appointed by the Chief Justice (one must be from a county with a population of not more than 10 thousand) and one member appointed by the Board of Governors, State Bar Assoc.
- The Commission has 8 total offices: 7 regional public defender offices and the administrative office in Valley City.

Report on financial audit findings and actions taken

- The latest financial audit for the biennium ending June 30, 2021 as released by the office of the State Auditor did not identify any exceptions or defaults.

Full Time Equivalent Positions

- The Commission is requesting the FTE number be increased to 43.
- The three new positions would be for investigator positions. The House added one FTE supervisor investigator
- Currently the Agency has 40 FTE's

Funding and Collections:

- The Commission is funded through one line
- The one line consists of the general fund and the Indigent defense administration fund (282)
- Fund 282 is funded through the collection of statutory fees assessed in criminal cases:
 - 1) A \$35 indigent defense application fee pursuant to NDCC 29-07-01.1; and
 - 2) A portion of the \$100 court administration/indigent defense fee pursuant to NDCC 29-26-22(2). This fee is split pursuant to statute between the indigent defense administration fund and the court facilities improvement and maintenance fund, with the first \$750,000 collected per biennium going to the indigent defense administration fund, the next \$460,000 going to the court facilities improvement and maintenance fund, and any additional collections are split equally between the two
- The fee's are collected by the Judiciary and deposited with the State Treasurer.
- During FY 2022, \$154,547.65 was collected from the Application fees and \$750,000 received from Court Administration fee.
- The Court may also order Attorney Fee reimbursement which is deposited in the general fund

Funding in Comparison to Last Biennium with Executive Recommendation

- The total funds for the current Biennium are \$21,289,213
 - \$19,294,363 from the General Fund
 - \$1,994,850 in spending authority from the Special Fund, Fund 282
- The total funds recommended in the Governor's Executive Recommendation are \$23,249,322
 - \$21,230,966 from the General Fund
 - \$2,018,356 in spending authority from the Special Fund, Fund 282
 - The Executive Budget includes 3 FTE for investigator positions
 - The Executive Budget includes funding to allow the Commission to increase contract rates from \$75-80 per hour
- There are no one time funds contemplated in the Executive Recommendation.

Federal Funds

- The agency did not apply for any federal funds.
- There has been some preliminary negotiations with the Department of Health and Human Services about potential to access IV-E funds for parent representation in juvenile matters
- We did not receive any funds during the special session

Expenses

- The Agency is a single line and must pay for all expenses out of the single line.
- The major components making up the base level appropriation are salaries and benefits, professional fees and services (legal fees), ITD expense, and rent of office space
 - As of November 30, 2022, this constituted 96.5 % of the expenses so far this

Case Assignments

- The majority of the expenses of the Commission go directly to providing attorneys and services to persons who are constitutionally or statutorily entitled to legal representation
- The last time we presented a budget in front of the Committee, we were in the height of rebound from the Covid 19 pandemic.
 - At that time we predicted a rebound which we did in fact see. FY 2021 and FY 2022 have the two busiest years the Commission has seen. Through November 2022 in FY 2023, we are on pace to have the busiest year to date.
 - See Attached Graph
 - We have seen 10734 case assignments in the first 8 months. Extrapolating out, it would put us right around 16,100 case assignments once again.

Other Bills Effect

- There are several bills working their way through the session that may have impact
 - Any bill increasing a criminal penalty may cost more
 - Expansion of Pre-trial services: May be more administrative costs
 - SB 2107 seeks to add minimum mandatory penalties. This was changed to presumptive sentences; we are unable to assess the financial impact of a presumptive sentence
 - May increase amount of time spent on cases increasing contract amounts
 - Any bills dealing with crime and penalties → Difficult to quantify

Accomplishments

- Our staff, attorneys and contractors continue to do incredible work against all odds and for less pay than their counterparts
- The agency served as an integral part in the continued expansion of the pretrial service pilot program in three judicial district
 - We were able to absorb the administrative oversight required without additional funding. However, continued expansion may cause need for more staff
- The Commission was able to staff and assign increases to the number of juvenile cases. The Commission estimated last session we would see an increase of 50%. Through the end of FY 2022, which was the first full year, the total was a 46% in juvenile cases
- The Commission participated substantially and continues to be an active partner in addressing the mental health impact on our courts
- We continue to give North Dakota a national presence and have been able to bring back national best practices to North Dakota and our clientele

Challenges

- The two biggest challenges facing the agency are the same now as they have been for the last few sessions:
 - 1) Turnover due to lack of competitive pay
 - We have been unable to recruit and retain employees. We had 10 of our 40 FTE turn over in the last calendar year and currently have 4 attorney spots we are trying to fill. When fully staffed I have 20 attorneys, which is a current vacancy rate of 20%
 - However, turnover continues to be vast, and exit interviews suggest it is a compensation issue. We have exceeded the turnover rate of the average of state agencies.
 - Last session I advised we will need to eventually address this issue or face a constitutional crisis. We did not receive any funds to address the issue. We do in fact now find us very near a crisis. I have had the displeasure of having to notify the Courts in the NWJD of the potential of not having enough attorneys to cover our responsibilities. In the event this does occur, we will need to enter a prioritization plan.
 - Several states that have instituted plans are facing litigation for doing so
 - We did include a request for \$450,000 in this years' decision packages. The Executive recommendation did not include this request. The Governor did propose a pot of money to address positions, one of which is attorneys.

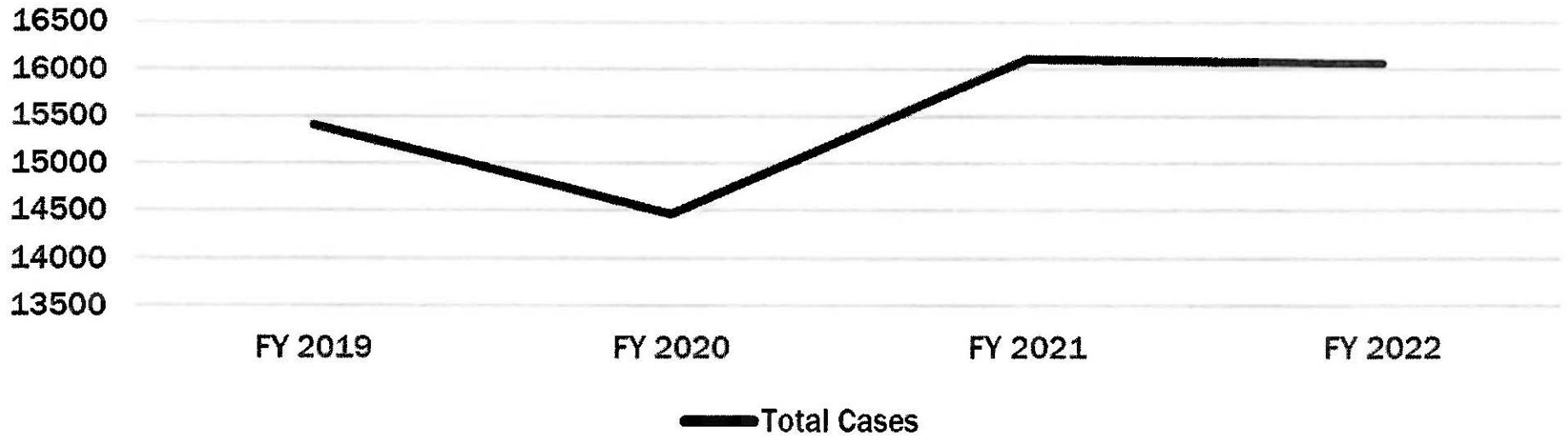
Challenges

- The second major challenge is difficulty in finding contractors to provide attorney services.
 - 2) Difficulty in finding contract attorneys given contractor rate of compensation
 - We are statutorily required to use private contracts on 50% of our caseload per biennium. During FY 2022, we contracted at 72%, largely due to turnover.
 - Our current rate of contractor compensation has not changed since 2012.
 - The Commission currently pays \$75 dollars an hour, in comparison the Federal CJA Pane rate for 2022 was \$158 per hour.
 - In 2019, the Governor recommended to increase this by \$5 per hour, which was not funded.
 - We did not seek funds for this increase last session given we were directed to submit a budget with a 10% reduction.
 - We did request it this session and the Governor's Executive recommendation agreed by proposing money to fund a \$5 per hour increase.
- Another challenge facing the Commission is not having access to qualified investigators
 - We can only pay investigators \$65 per hour given our hourly attorney rate
 - Very few in the state willing to provide that service
 - We as attorneys have an ethical duty to investigate each and every case, and with the caseload of a public defender, this is difficult to do without an investigator.
 - One of, if not the last state-run system to not have investigators on staff
 - We did request 3 FTE, and the Governor did recommend the same in his executive recommendation.

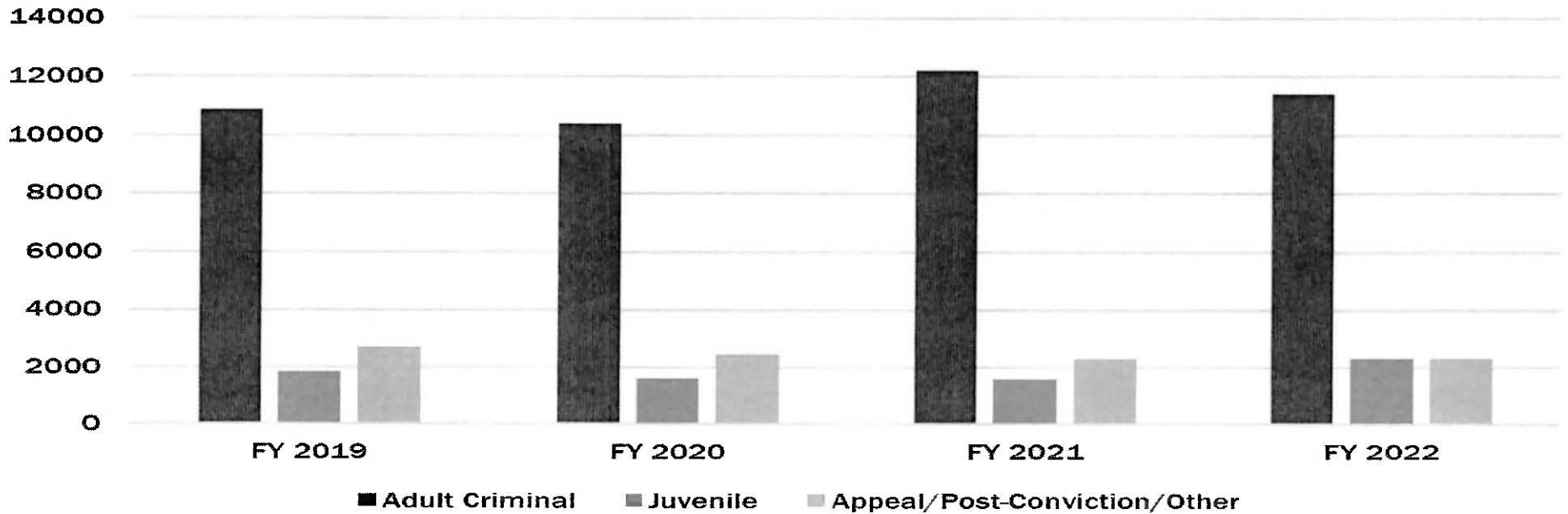
Agency Budget Requests / Executive Recommendations/First Chamber edits

- The Commission authorized the undersigned to submit a budget with three decisions packages.
- \$450,000 to provide equity increases to employees to combat turnover and to assist in recruiting attorneys. The Governor **did not** recommend equity specific to the agency but has recommended an equity package in which specific positions are identified. It is believed the Commission would receive some money in that recommendation for attorney positions. All of this would be an increase to current biennium levels. The House added \$150,000 in funding for non attorney employee salaries above the 4% and 4%. Attorneys are slated to receive funding from the targeted equity portion in OMB budget.
- Three FTE Investigator Positions with an anticipated total of \$391,756.92. The Governor **did** include this in his executive recommendation. This would move the total FTE for the Commission from 40 this biennium to 43 FTE next biennium. The House approved 1 FTE, a supervisory investigator position.
- \$630,453 in funding next biennium and beyond to fund an increase in the Contractor rate of pay from \$75 per hour to \$80 per hour. The Governor **did** recommend this increase in his executive budget recommendation. The House did add the increase funding for attorney contract rates.

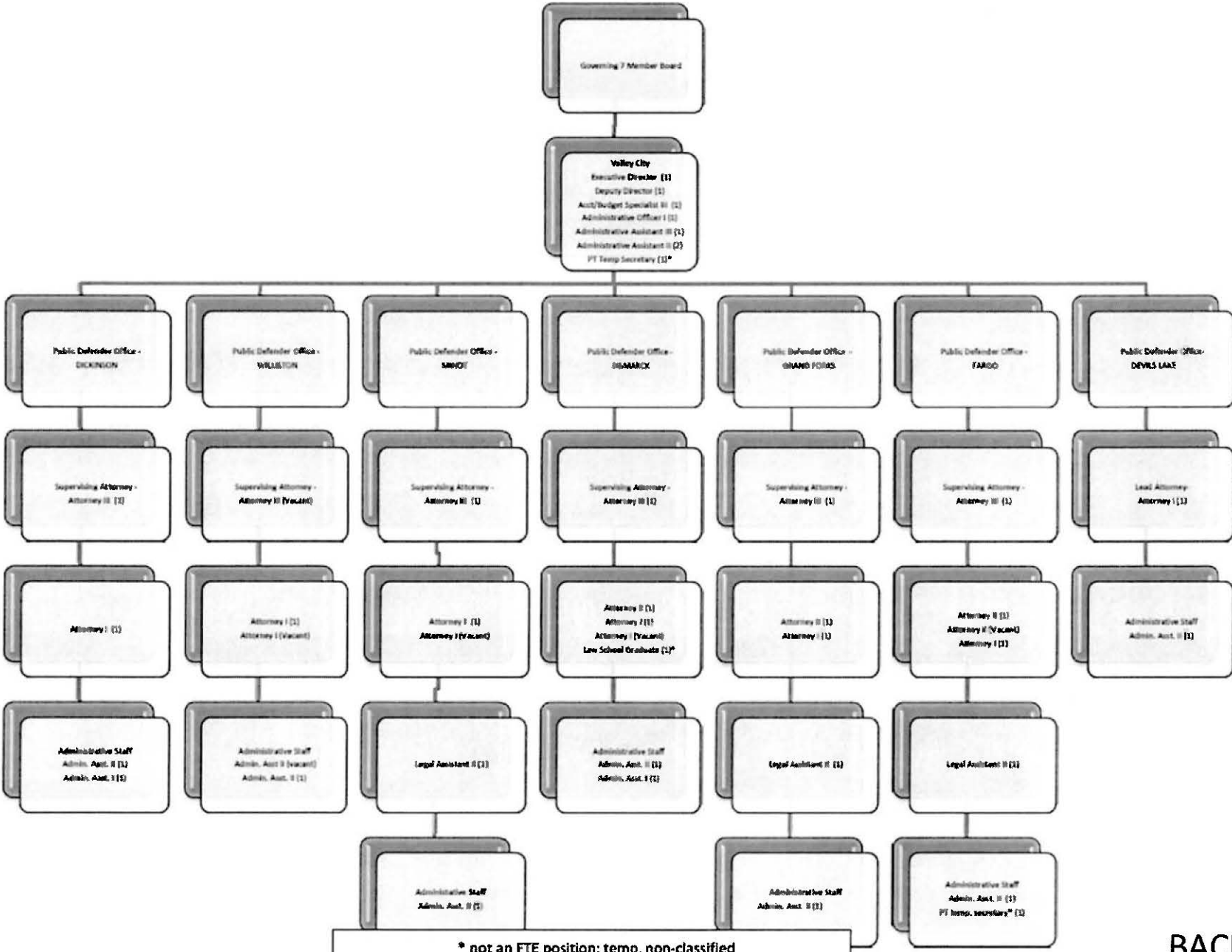
Total Cases by Fiscal Year



Case Types by Fiscal Year



Organizational Chart
ND Commission on Legal Counsel For Indigents
1/05/2023



* not an FTE position; temp, non-classified

BACK

BACK

	<u>Base Level</u>	<u>Adjustments or Enhancements</u>	<u>Appropriation</u>
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Total general fund	\$19,294,363	\$1,582,717	\$20,877,080
Full-time equivalent positions	40.00	1.00	41.00

	Adjusts Funding for Base Payroll Changes ¹	Adds Funding for Salary and Benefit Increases ²	Adds an FTE Investigator Position ³	Adds Funding to Reduce Employee Turnover ⁴	Adds Funding to Increase the Legal Fee Rate ⁵	Adds Funding for ITD Rate Increase ⁶
Comm. on Legal Counsel for Indigents	\$54,099	\$616,315	\$137,781	\$150,000	\$630,453	\$13,556
Legal counsel for juveniles	<u> </u>	<u> </u>	<u> </u>	<u> </u>	<u> </u>	<u> </u>
Total all funds	\$54,099	\$616,315	\$137,781	\$150,000	\$630,453	\$13,556
Less estimated income	<u>1,890</u>	<u>17,597</u>	<u>0</u>	<u>0</u>	<u>0</u>	<u>0</u>
General fund	\$52,209	\$598,718	\$137,781	\$150,000	\$630,453	\$13,556
FTE	0.00	0.00	1.00	0.00	0.00	0.00

	Consolidates Line Items ⁷	Total House Changes
Comm. on Legal Counsel for Indigents	\$325,000	\$1,927,204
Legal counsel for juveniles	<u>(325,000)</u>	<u>(325,000)</u>
Total all funds	\$0	\$1,602,204
Less estimated income	<u>0</u>	<u>19,487</u>
General fund	\$0	\$1,582,717
FTE	0.00	1.00

¹ Funding is adjusted for base payroll changes.

² The following funding is added for 2023-25 biennium salary adjustments of 4 percent on July 1, 2023, and 4 percent on July 1, 2024, and increases in health insurance premiums from \$1,429 to \$1,648 per month:

	<u>General Fund</u>	<u>Other Funds</u>	<u>Total</u>
Salary increase	\$438,445	\$12,335	\$450,780
Health insurance increase	<u>160,273</u>	<u>5,262</u>	<u>165,535</u>
Total	\$598,718	\$17,597	\$616,315

³ Funding for 1 FTE investigator position is added.

⁴ Funding of \$150,000 from the general fund is added to alleviate employee turnover for nonattorney positions.

⁵ Funding is added from the general fund to increase the legal fee rate from \$75 per hour to \$80 per hour.

⁶ Funding from the general fund is added for the Information Technology Department rate increase.

⁷ The legal counsel for juveniles line item funding is transferred to the Commission on Legal Counsel for Indigents line item to return the agency budget to a single line item.

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March 7, 2023
Testimony of Zachary Pelham
Chairman of the North Dakota Commission on Legal Counsel for Indigents

Good Morning Chairman Wanzek, members of the Committee, my name is Zachary Pelham and I am Chairman of the North Dakota Commission on Legal Counsel for Indigents (hereinafter "the Commission").

I understand it may be extraordinary to have the chairman of a board or commission within the executive branch testify at a budget hearing. However, the Commission finds itself in extraordinary times and on the verge of constitutional collapse. As Mr. Finck has indicated, we are in dire straights because we can not find enough attorneys to provide the constitutionally mandated services we are required to provide by Constitution and Statute. The reality is my presence today is to express we truly are in very real danger in North Dakota.

The Commission has quarterly meetings in which Mr. Finck provides updates on staffing levels and changes in contracts and contractors. I can not recall a recent meeting where it has not been brought to our attention someone leaving an office or the inability to find a law firm willing to contract with the Commission. The reality is the Commission is unable to compete with county state's attorneys and other attorneys within state government. Now is the time for action, we cannot afford to delay a request for employee equity increases that has been denied the last few sessions.

Furthermore, we as the Commission have the legal authority to set the rate for contracts with private firms to provide services. However, just like employee raises, we are handcuffed on what we can do without the fiscal support of the legislature. The rate for contract services has not increased since 2012. Given the cost of inflation and the cost of running a business, it is not hard to see why some will not renew contracts and why others are hesitant to contract with the agency when there has not been an increase in a decade.

The reality is, if we do not get the support we need, we may indeed fail. If we fail, this will not be an indigent defense issue. This is bigger than that. It is a constitutional failure on behalf of the State of North Dakota. It will cause delays in the processing of criminal

cases in North Dakota which will undoubtedly open the state to litigation. It will cause defendants to have their access to court delayed. It will cause victims to have to wait for a resolution to their case. It will affect all North Dakotans.

Mr. Finck, Mr. Ewell, the Valley City administrative team and the employees of the Commission continue to do great work trying to hold this all together, they need our support. The private firms who provide contract services, often at a loss to their bottom line need our support. We as a Commission need your support. By supporting the Commission's budget requests, you will be on the side of supporting and safeguarding liberty.

For that reason, I respectfully request you give our budget the due consideration it deserves as one of the few constitutionally mandated services the State of North Dakota provides.

Thank you for your time and I would stand for any questions.

Respectfully submitted:



Zachary Pelham
Chairman of the Commission

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Testimony of Todd N. Ewell, Deputy Director, NDCLCI

Good Morning. Chairman Wanzek, members of the Committee, my name is Todd Ewell and I am the Deputy Director of the North Dakota Commission on Legal Counsel for Indigents (hereinafter "the Commission").

My goal today to highlight the cost of attorney turnover on not only the Commission, but on the criminal justice system in North Dakota. On average, departing attorneys leave a caseload of 36 case assignments to reassign to either other attorneys in the office, or to contract attorneys. These reassignments cost time, money, and frustration to the criminal justice system.

36 new attorney-client relationships need to be established. Under normal circumstances a criminal case is set for trial 90 to 120 days after the initial appointment. This means that attorneys have time to establish trust with their clients, review their case, and make relevant motions. Attorney departures typically bring cases to a standstill.

Attorneys are ethically required to be prepared for trial. The new attorney needs time to review and understand any case before he/she can competently proceed. Courts acknowledge these ethical requirements, which often translate to continuances of each reassigned case. These continuances cost the courts administrative time and delay any disposition of the case.

In the event the local public defender office can absorb those 36 cases, then the attorneys in that office have an additional 36 cases on top of their normal caseloads. This can cause additional stress and pressure on attorneys.

The stress on the criminal justice system in North Dakota is even more complex. Because when a client does go to prison because he lost at trial, the first thing the client is going to claim is ineffective assistance of counsel. That is why the Courts grant those continuances. If the attorneys are not properly prepared for trial, and an ineffective assistance claim is justified, then a new trial may be granted – and we start the whole process over.

Potential victims and clients alike have spent years awaiting a resolution to cases

simply due to attorney turnover. Cases that typically go to trial in 4 to 6 months routinely take 2 years or more to resolve. Memories fade, witnesses move, and all parties suffer.

Respectfully submitted:

A handwritten signature in black ink, appearing to read "Todd Ewell", is written over a horizontal line. The signature is cursive and somewhat stylized.

Todd N. Ewell, Deputy Director

N.D. Comm. on Legal Counsel for Indigents

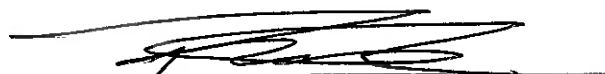
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Testimony of Travis W. Finck, Executive Director, NDCLCI

ONE PAGER PER REQUEST

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

- 1) \$450,000 in equity increases for employees.
 - a. The Governor **did not** recommend this package. The executive budget called for a targeted equity approach. In the targeted equity approach attorney positions would receive equity funding.
 - b. The House agreed with the targeted equity and added \$150,000 for funding increases of non-attorney positions.
 - c. We are satisfied with the equity increases included in the house version.
- 2) Three FTE investigator positions with a total of \$391,756.92
 - a. The Governor **did** recommend this package.
 - b. The House **did** approve 1 FTE investigator position of a supervisory investigator amounting to \$137,761 per biennium.
 - c. The Commission can work with the addition of the 1 FTE to establish the program and reapproach in future sessions to expand the program upon proving usefulness.
- 3) Increase the contract rate \$5 /hour to a total of \$80/hour. The total cost was \$630,453.
 - a. The Governor **did** recommend this package.
 - b. The House **did** recommend this package.
 - c. The Commission requested a minimal increase of \$5 per hour. The contract rate has not been adjusted since 2012.

Respectfully submitted:



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

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Testimony of Travis W. Finck, Executive Director, NDCLCI

Good Morning. Chairman Wanzek, members of the Committee, my name is Travis Finck and I am the Executive Director of the North Dakota Commission on Legal Counsel for Indigents (hereinafter "the Commission").

AGENCY STATUTORY RESPONSIBILITIES

The Commission is the agency which provides the attorneys and related services to indigent persons when there is a constitutional, statutory, or rule-based right to counsel at public expense. The Commission is governed by North Dakota Century Code Chapter 54-61. Section 54-61-01 provides that the Commission was "established for the purpose of developing and monitoring a process for the delivery of state-funded legal counsel services for indigents which are required under the Constitution of North Dakota and the United States Constitution and any applicable statute or court rule. The Commission shall provide indigent defense services for indigent individuals determined by the court to be eligible for and in need of those services pursuant to standards and policies of the commission governing eligibility for such services."

The Commission has established Guidelines to Determine Eligibility for Indigent Defense Services (hereinafter "Guidelines"). For a person to have counsel provided by the Commission, the person must apply for services, be found to be "indigent" and it must be a type of case in which one has a right to counsel at public expense. Most of the services provided by the Commission are in circumstances in which an individual is charged with a crime and jail time is a possible sanction, in juvenile matters, post-conviction matters and appeals of all the above.

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

When an individual desires counsel or services, application for services is to be made on the Commission's standard forms. However, the Commission does not make the determination of whether a specific applicant is eligible for services. Pursuant to the statute, the court makes the determination of eligibility.

Under the Guidelines, indigency is determined by looking at income resources, non-income resources (assets) of the applicant's household, and exceptional factors that might otherwise justify a finding of indigency. Income guidelines are set at 125% of the federal poverty level threshold as defined by the U.S. Department of Health and Human Services.

The Commission's mission is "to provide high quality, professional, and effective legal representation to eligible clients at reasonable cost to the community." Services should be provided only to those persons who are eligible. It continues to be the policy of the Commission to seek additional screening and review of applications by the court in questionable cases. Additional screening and review are also sought when it appears that a person may no longer be eligible, such as when someone who was in jail and temporarily unemployed, has bonded out and is now likely employed, and would no longer be considered indigent. To help ensure that services are provided only to eligible individuals, the Commission also provides training to those persons who make the eligibility determinations. For example, the Commission often provides training to newly elected District Court Judges and Clerks of District Court.

DELIVERY OF SERVICES

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

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

The Commission also provides services through contracts with private firms.

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

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

CASE ASSIGNMENTS

The Commission uses the term "case assignment" rather than "case" when referring to assignments and has defined the term based on case type (such as criminal, probation revocation, juvenile delinquency, etc.). "Case assignment" is used so that assignment numbers from different areas of the state will mean the same thing across the state. For example, a criminal case assignment includes all cases arising from the same event whether the prosecution has charged the defendant in multiple complaints, each with its own case number, or whether the defendant has been charged in one complaint with multiple counts, but one case number. A criminal case assignment that includes a felony is considered to be a felony assignment, even if some of the charges in the assignment are misdemeanors. Thus, it is one felony case assignment where the attorney

represents a person charged with a felony DUI and with a misdemeanor driving under suspension charge, both arising from the same traffic stop.

The number of case assignments the agency handles has rebounded from the pandemic when courts and cases were slowed. FY 2021 was one of the busiest years the Commission has seen to date. FY 2022 remained at a similar level higher than had been previously seen. See Attachment 1. We have also seen an increase over the normal number of case assignments in the first few months of the current fiscal year. Furthermore, we have noticed a significant increase in the number of violent crimes to which the agency has been required to provide counsel. The increased severity of a case assignment correlates directly with increased cost, as they often require investigators, experts, more attorney time, etc.

It is always difficult to forecast what the case assignment numbers will be in a future time. The Commission has no control over the number of crimes committed and investigated, the number of persons charged, the charges filed and the number of persons who apply for services and are found eligible.

AGENCY FUNDING

Traditionally, the Commission has been funded from two sources: the general fund and "fund 282" (the indigent defense administration fund). The indigent defense administration fund is funded through collection of two statutory fees paid by criminal defendants and collected by the Courts:

- 1) A \$35 indigent defense application fee pursuant to N.D.C.C. § 29-07-01.1; and
- 2) The Commission's portion of a \$100 court administration fee (the indigent defense/facility improvement fee) pursuant to N.D.C.C. § 29-26-22(2). This fee is split pursuant to statute between the indigent defense administration fund and the court facilities improvement and maintenance fund, with the first \$750,000 collected per biennium going to the indigent defense administration fund, the next \$460,000 going to the court facilities improvement and maintenance fund, and any additional collections are split equally between the two. During FY 2022, the Indigent Defense Administration Fund received \$154,547.65 in application fees and \$750,000 from the Court Administration fee.

The District Courts also have the authority to order reimbursement of attorney fees pursuant to NDCC 29-07-01.1 (2). However, any attorneys' fees that are recouped go into

the general fund, not fund 282. Those funds are not collected by the Commission, they are collected and accounted for by the Court.

The collection of the application fee and indigent defense/facility improvement fees is not guaranteed. District Judges, who impose the fees, have the discretion to impose or waive the fees in any case. A table outlining collections is provided below as Attachment 2.

The major components making up the "base level" appropriation amount for the Commission are salaries and benefits, professional fees and services (legal fees), ITD expense, and rent of office space. As of November 2022, these totaled 96.5 % of our expenditures for the biennium.

AUDIT FINDINGS

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

ACCOMPLISHMENTS

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

The Commission has been able to accomplish some amazing things this current biennium thanks to the tireless dedication of the employees and contractors of the Commission. We have served as an integral part in the new protection of children and families in the new Juvenile Court Act. The Commission asked for funds to offset the costs of the Juvenile Court act changes and increases in number of cases. The request was made based upon an estimate of an increase of 50% in the number of juvenile cases. The actual increase for FY 2022, which was the first full year of implementation of the new changes, was 46%.

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

DOCR Parole and Probation to streamline a method of screening individuals applying for counsel. We have worked out orders in each pilot district to allow for earlier application, determination, and appointment of counsel. The Commission also trains all new pre-trial service agents on the guidelines for eligibility for public defense services.

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

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

CHALLENGES

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

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

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

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

The next challenge we face is the inability attract private firms to provide contract services for the Commission. Our statute requires the use of private attorneys to serve as contractors to handle cases for the Commission. Our current rate of compensation for contractors is \$75 per hour and has not been increased since 2012. Federal Criminal Justice Act appointments in 2022, federal court version of contract public defense, was at the rate of \$158/hour, more than double the rate we are able to offer. It was recommended in 2019-2021 executive recommendation to increase funding for the contractors by \$5 per hour. However, the legislature did not fund the recommendation. We again have asked in our budget and the Governor has recommended an increase in the amount of \$5 per hour raising the contract rate to \$80 per hour which is still significantly behind the federal CJA rate.

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

AGENCY BUDGET REQUESTS / EXECUTIVE RECOMMENDATIONS / HOUSE CHANGES

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

- 1) \$450,000 to provide equity increases to employees to combat turnover and to assist in recruiting attorneys. The Governor **did not** recommend equity specific to the agency but has recommended an equity package in which specific positions are identified. It is believed the Commission would receive some money in that recommendation for attorney positions. All of this would be an increase to current biennium levels. The House **Did** include \$150,000 in funding for non-attorney positions.
- 2) Three FTE Investigator Positions with an anticipated total of \$391,756.92. The Governor **did** include this in his executive recommendation. This would move the total FTE for the Commission from 40 this biennium to 43 FTE next biennium. The House **trimmed** the three FTE down to 1, a supervisory investigator.
- 3) \$630,453 in funding next biennium and beyond to fund an increase in the Contractor rate of pay from \$75 per hour to \$80 per hour. The Governor **did** recommend this increase in his

executive budget recommendation. The House **Did** adopt the executive recommendation.

BUDGET REQUEST BY LINE / PROGRAM

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

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

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

ONE TIME FUNDING CURRENT BIENNIUM AND RECOMMENDATIONS

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

AGENCY COLLECTIONS DEPOSITED IN GENERAL FUND OR SPECIAL FUND

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

IMPACT OF OTHER BILLS

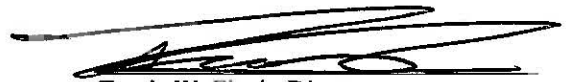
There are several other bills working their way through the Legislature that may have a fiscal impact on the agency. In the event DOCR is given FTE to expand the pre-trial service program that will cause more work for our agency. Also, any bills that deal with crime and/or penalties in the state may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

anticipated if SB 2107 passes as currently written it could cause increased costs to handle more jury trials. However, the Senate Judiciary changed the language to a presumptive sentences. Presumptive sentences are not something used in North Dakota, outside of presumptive probation, so we are not as certain as to the cost of SB 2107.

CLOSING

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

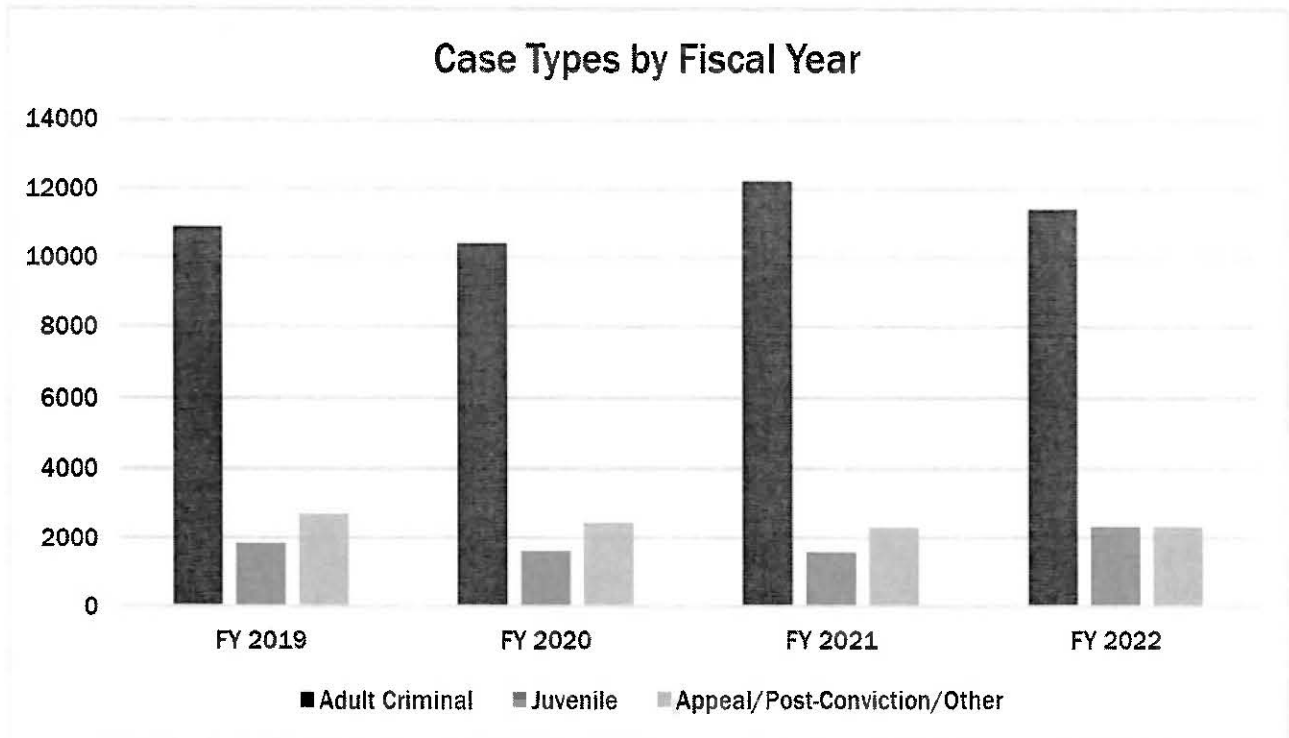
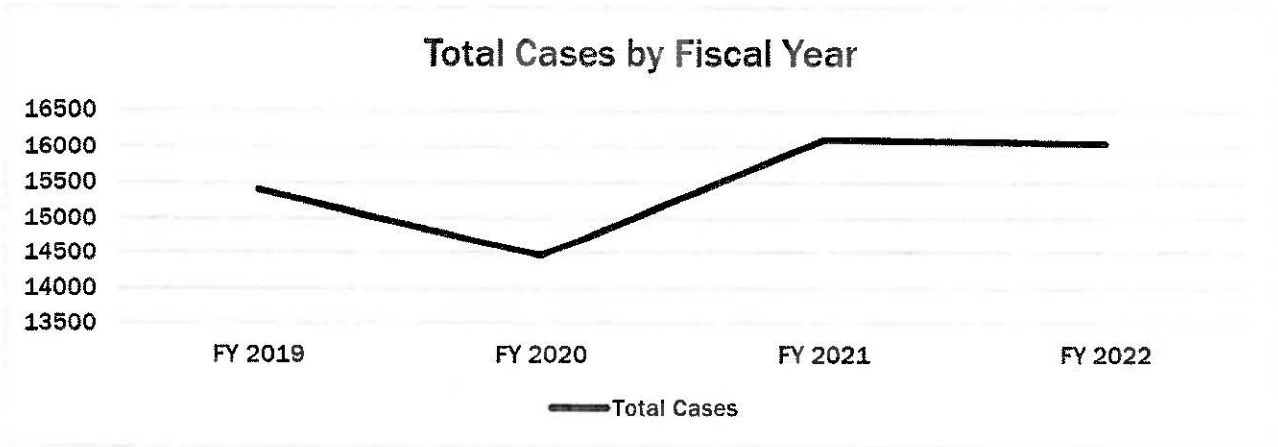
Respectfully submitted:



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

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Testimony of Travis W. Finck, Executive Director,
NDCLCI

ATTACHMENT 1



HB 1022
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Testimony of Travis W. Finck, Executive Director, NDCLCI

ATTACHMENT 2

Biennium	Indigent Defense Facility Fee Collection
2013-2015	\$1,722,499
2015-2017	\$1,502,355
2017-2019	\$1,503,823
2019-2021	\$1,279,060
Current though January 2023	\$910,975

Biennium	Indigent Defense Application Fee Collection
2013-2015	\$299,344
2015-2017	\$329,457
2017-2019	\$361,434
2019-2021	\$308,053
Current through January 2023	\$229,479

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March 7, 2023
Testimony of Kevin McCabe,
Supervising Attorney, Dickinson Public Defender's Office

Good morning, Chairman Wanzek, members of the Committee, my name is Kevin McCabe, and I am the Supervising Attorney of the Dickinson Public Defender's Office. I have been in my current position since the office opened in March of 2006, which puts it at just short of 17 years.

CHALLENGES

I'm here today to discuss my perspective on the two biggest challenges we face as an agency that Mr. Finck mentioned earlier, employee turnover due to compensation and contractor rate of pay.

To begin with, during the past seventeen years, we have had a total of six full time attorneys within our office besides myself. We have had two other persons who trained in our office prior to them becoming licensed to practice and one other person who was licensed but was hired as a temporary attorney because we did not have an agency opening at the time. Of the nine attorneys hired, one is still in the office, one was terminated, and the rest left because they told me that they could make a lot more money elsewhere or simply that the Commission cannot compete with what they are being offered elsewhere. Notably, of that group, three of them left to work as Assistant State's Attorneys, two of them in Stark County, where I am from. One of them is the current elected State's Attorney for the county. What I am seeing is not unique to my county or my district. For example, in McKenzie County, the current State's Attorney was a supervising attorney the Watford City office just prior to him being offered his current position and in Williams County, two of the current Assistant State's Attorneys used to be employed within our Williston Public Defender's Office, one of which was the supervising attorney. The State's Attorney in Mercer County was also a supervising attorney at one point in the past. I'm sure Mr. Finck could even list more examples. Any time I talk with any of these people and ask them why they left, I always get the same answer and they state it's because they can make more money working for the counties than they can with the Public

Defender's Offices.

This problem isn't going away, it's only getting worse. Recently, an attorney left our office in June of 2020. Per protocol, we advertised the open position along with the requirements and salary range. It took us over sixteen months before we hired another attorney in our office. This wasn't due to lack of trying. I called and begged anybody that I could think of to apply for the position. We received applications, but very few of the qualified applicants ever ended up interviewing. Most of them told us that they found better paying opportunities elsewhere, so they took their names out of consideration. Of those that did interview and were offered the position, each person declined the offer. When I spoke to them in a follow-up phone conversation, they claimed it was due to the low salary that was offered to them. So for that sixteen months, I was working alone covering as many cases as I could and we contracted the remainders out. Eventually, we did hire an attorney, but that person only lasted three months. So again, we were left with an open attorney position and this time it took ten months to fill. We ended up hiring a person that was underqualified for the position advertised, fresh out of law school, just having passed the bar. Which brings with it, its own set of challenges, as here I am training this person again not knowing how long the Commission can afford to keep her once she becomes well known within our district and is able to work on her own.

As I have said, I have been here for almost seventeen years. During those seventeen years I have been approached by numerous persons and agencies asking me to leave my position and go to work for them. About a year ago when I felt the agency was struggling and I was feeling overwhelmed with the workload, and not knowing when I would be getting another attorney in the office, I decided to cash in some chips. I talked to the Stark County State's Attorney and the Stark County Commission about going to work for them. On a Monday morning, a member of the commission and the State's Attorney called, and they asked me what it would take for me to work for them and I gave them an offer, which I thought was way above what they would agree to and about \$20,000 more than I was making here per year. To my amazement, that afternoon, I had a written offer from them on my desk for exactly what I asked for. I immediately accepted the offer and filed my resignation letter with Mr. Finck.

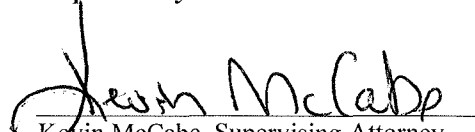
As you know, I'm still working for Public Defender's Office. Mr. Finck is a smooth talker. I received a counteroffer from the Commission, and Mr. Finck and I were able to

negotiate a deal which kept me employed with the Commission. I decided to come back for one reason and one reason only, and that is because I didn't want the Commission to have to close the Dickinson office and lay off the two assistants that were working with me. I stayed hoping that things would get better agency-wide, as this isn't only an attorney issue, I have lost staff to the court system after we've trained them, and my current administrative assistant and legal assistant are constantly being asked by different clerks of court to come work for them for higher pay. Plus, I know that there will be another opening at the Stark State's Attorney's office as a longtime assistant is retiring this year.

As for contractor rate of pay, I just want to say that our system will not work without attorneys willing to work as indigent defense contractors. But over the last five years, this is becoming a big struggle within our district. That position that I ultimately turned down with Stark County was eventually filled by a person that did a lot of contract work within our district. And as I previously mentioned, our position was open for ten months before we underfilled it. During that time, I called and begged this attorney to apply for it always getting the same answer, I like the work, but I would need more money than they are offering. Other contractors have quit taking indigent defense cases because they say that they cannot afford to take these cases anymore. Too much time spent on cases with too little pay. In two cases that I know of, contractors refuse to take our cases, but they take municipal cases simply because they get paid more per hour and those cases only reach the "B" misdemeanor level. In short, they get paid more, and work less on each case. Currently, in our district, most of the contractor attorneys are coming from out of town. They are traveling from Minot, Bismarck and in some cases, even South Dakota. In past conversations with attorneys considering working as contractors, I have been told that if there is ever a change to the pay rate, they might reconsider. With that in mind, I am asking that you approve the budget as Director Finck has requested.

With that, I want to thank the Committee for your time.

Respectfully submitted:


Kevin McCabe, Supervising Attorney
Dickinson Public Defender's Office

Prepared for the Senate Appropriations Committee

**Department 188 - Commission on Legal Counsel for Indigents
House Bill No. 1022**

First Chamber Comparison to Base Level

	General Fund	Other Funds	Total
2023-25 First Chamber Version	\$20,877,080	\$2,014,337	\$22,891,417
2023-25 Base Level	19,294,363	1,994,850	21,289,213
Increase (Decrease)	\$1,582,717	\$19,487	\$1,602,204

First Chamber Changes

A summary of the first chamber's changes to the agency's base level appropriations and the executive budget is attached as an appendix.

Selected Bill Sections Included in the First Chamber Version

There are no additional sections in House Bill No. 1022.

Continuing Appropriations

Indigent defense administration fund - North Dakota Century Code Sections 29-07-01.1 and 29-26-22 - Funding is from a \$35 nonrefundable fee for court-appointed defense services and from a \$100 court administration fee in all criminal cases except infractions. The first \$750,000 collected is used for indigent defense services, the next \$460,000 is used for court facilities, and additional amounts are deposited equally into the two funds.

Deficiency Appropriations

There are no deficiency appropriations for this agency.

Significant Audit Findings

The State Auditor reported no significant audit findings.

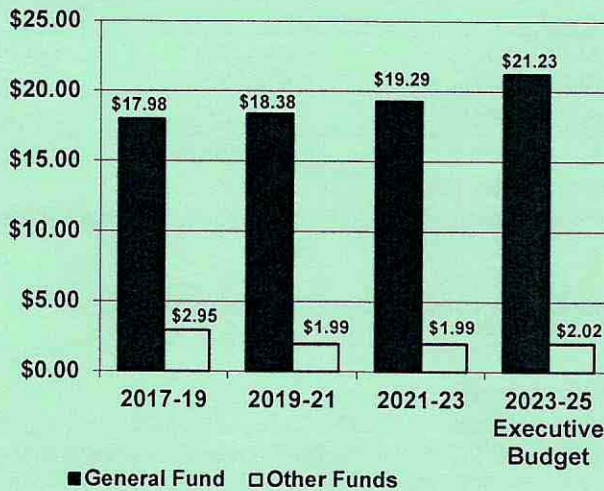
Major Related Legislation

House Bill No. 1289 - Provides for the court to waive unpaid fines and fees upon completion of a drug court program, including the court administration fee, a portion of which is deposited in the indigent defense administration fund.

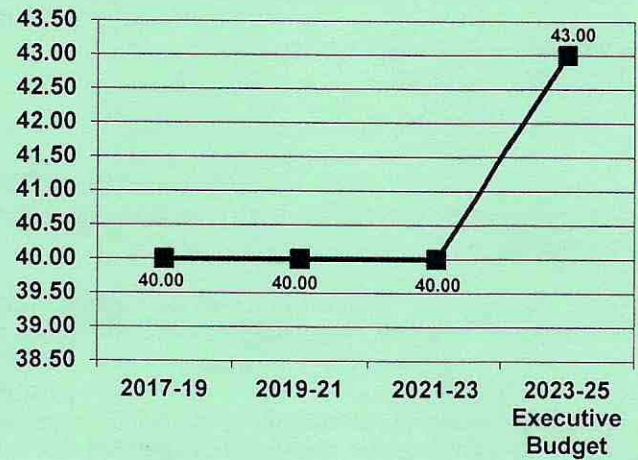
Historical Appropriations Information

Agency Appropriations and FTE Positions

Agency Funding (Millions)



FTE Positions



Ongoing General Fund Appropriations

	2015-17	2017-19	2019-21	2021-23	2023-25 Executive Budget
Ongoing general fund appropriations	\$16,982,909	\$17,983,876	\$18,384,627	\$19,294,363	\$21,230,966
Increase (decrease) from previous biennium	N/A	\$1,000,967	\$400,751	\$909,736	\$1,936,603
Percentage increase (decrease) from previous biennium	N/A	5.9%	2.2%	4.9%	10.0%
Cumulative percentage increase (decrease) from 2015-17 biennium	N/A	5.9%	8.3%	13.6%	25.0%

Major Increases (Decreases) in Ongoing General Fund Appropriations

2017-19 Biennium

- Increased funding for operating expenses \$130,919
- Increased funding for professional fees due to increased caseloads to provide a total of \$10,227,500 for professional fees \$500,000

2019-21 Biennium

None \$0

2021-23 Biennium

Added funding to provide legal counsel to juveniles \$325,000

2023-25 Biennium (Executive Budget Recommendation)

- Adds 3 FTE investigator positions \$488,092
- Adds funding to increase the legal fee rate from \$75 per hour to \$80 per hour \$630,453

One-Time General Fund Appropriations

	2015-17	2017-19	2019-21	2021-23	2023-25 Executive Budget
One-time general fund appropriations	\$122,275	\$0	\$0	\$0	\$0

Major One-Time General Fund Appropriations

2017-19 Biennium

None

\$0

2019-21 Biennium

None

\$0

2021-23 Biennium

None

\$0

2023-25 Biennium (Executive Budget Recommendation)

None

\$0

Commission on Legal Counsel for Indigents - Budget No. 188

House Bill No. 1022

Base Level Funding Changes

	Executive Budget Recommendation				House Version			
	FTE Positions	General Fund	Other Funds	Total	FTE Positions	General Fund	Other Funds	Total
2023-25 Biennium Base Level	40.00	\$19,294,363	\$1,994,850	\$21,289,213	40.00	\$19,294,363	\$1,994,850	\$21,289,213
2023-25 Ongoing Funding Changes								
Base payroll changes		\$52,209	\$1,890	\$54,099		\$52,209	\$1,890	\$54,099
Salary increase		585,569	16,472	602,041		438,445	12,335	450,780
Health insurance increase		166,724	5,144	171,868		160,273	5,262	165,535
Adds investigator positions	3.00	488,092		488,092	1.00	137,781		137,781
Adds funding to reduce employee turnover				0		150,000		150,000
Adds funding to increase the legal fee rate from \$75 per hour to \$80 per hour		630,453		630,453		630,453		630,453
Adds funding for the Information Technology Department rate increase		13,556		13,556		13,556		13,556
Consolidates line items				0				0
Total ongoing funding changes	3.00	\$1,936,603	\$23,506	\$1,960,109	1.00	\$1,582,717	\$19,487	\$1,602,204
One-Time Funding Items								
No one-time funding items				\$0				\$0
Total one-time funding changes	0.00	\$0	\$0	\$0	0.00	\$0	\$0	\$0
Total Changes to Base Level Funding	3.00	\$1,936,603	\$23,506	\$1,960,109	1.00	\$1,582,717	\$19,487	\$1,602,204
2023-25 Total Funding	43.00	\$21,230,966	\$2,018,356	\$23,249,322	41.00	\$20,877,080	\$2,014,337	\$22,891,417
<i>Federal funds included in other funds</i>			\$0				\$0	
<i>Total ongoing changes as a percentage of base level</i>	7.5%	10.0%	1.2%	9.2%	2.5%	8.2%	1.0%	7.5%
<i>Total changes as a percentage of base level</i>	7.5%	10.0%	1.2%	9.2%	2.5%	8.2%	1.0%	7.5%

Other Sections in Commission on Legal Counsel for Indigents - Budget No. 188

	Executive Budget Recommendation	House Version
Indigent defense administration fund	Sections 2 and 3 would amend Sections 29-07-01.1 and 54-44.1-11 to provide for the Commission on Legal Counsel for Indigents to transfer its unspent general fund appropriation authority to the indigent defense administration fund each biennium until the balance of the fund reaches \$3 million.	The House version includes no additional sections.

23.0251.02000

FIRST ENGROSSMENT

Sixty-eighth
Legislative Assembly
of North Dakota

ENGROSSED HOUSE BILL NO. 1022

Introduced by

Appropriations Committee

1 A BILL for an Act to provide an appropriation for defraying the expenses of the commission on
2 legal counsel for indigents.

3 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

4 **SECTION 1. APPROPRIATION.** The funds provided in this section, or so much of the funds
5 as may be necessary, are appropriated out of any moneys in the general fund in the state
6 treasury, not otherwise appropriated, and from special funds derived from federal funds and
7 other income, to the commission on legal counsel for indigents for the purpose of defraying the
8 expenses of the commission on legal counsel for indigents, for the biennium beginning July 1,
9 2023, and ending June 30, 2025, as follows:

	<u>Base Level</u>	<u>Adjustments or Enhancements</u>	<u>Appropriation</u>
12 Commission on legal counsel	\$20,964,213	\$1,927,204	\$22,891,417
13 for indigents			
14 Legal counsel for juveniles	<u>325,000</u>	<u>(325,000)</u>	<u>0</u>
15 Total all funds	\$21,289,213	\$1,602,204	\$22,891,417
16 Less estimated income	<u>1,994,850</u>	<u>19,487</u>	<u>2,014,337</u>
17 Total general fund	\$19,294,363	\$1,582,717	\$20,877,080
18 Full-time equivalent positions	40.00	1.00	41.00

Commission on Legal Counsel for Indigents - Budget No. 188
House Bill No. 1022
Base Level Funding Changes

	Executive Budget Recommendation				House Version				House Changes to Executive Budget Increase (Decrease) - Executive Budget			
	FTE	General	Other	Total	FTE	General	Other	Total	FTE	General	Other	Total
	Positions	Fund	Funds		Positions	Fund	Funds		Positions	Fund	Funds	
2023-25 Biennium Base Level	40.00	\$19,294,363	\$1,994,850	\$21,289,213	40.00	\$19,294,363	\$1,994,850	\$21,289,213	0.00	\$0	\$0	\$0
2023-25 Ongoing Funding Changes												
Base payroll changes		\$52,209	\$1,890	\$54,099		\$52,209	\$1,890	\$54,099				\$0
Salary increase		585,569	16,472	602,041		438,445	12,335	450,780		(147,124)	(4,137)	(151,261)
Health insurance increase		166,724	5,144	171,868		160,273	5,262	165,535		(6,451)	118	(6,333)
Retirement contribution increase				0				0				0
Adds investigator positions	3.00	488,092		488,092	1.00	137,781		137,781	(2.00)	(350,311)		(350,311)
Adds funding to reduce employee turnover				0		150,000		150,000		150,000		150,000
Adds funding to increase the legal fee rate from \$75 per hour to \$80 per hour		630,453		630,453		630,453		630,453				0
Adds funding for the Information Technology Department rate increase		13,556		13,556		13,556		13,556				0
Consolidates line items				0				0				0
Total ongoing funding changes	3.00	\$1,936,603	\$23,506	\$1,960,109	1.00	\$1,582,717	\$19,487	\$1,602,204	(2.00)	(\$353,886)	(\$4,019)	(\$357,905)
One-Time Funding Items				\$0				\$0				\$0
No one-time funding items				\$0				\$0				\$0
Total one-time funding changes	0.00	\$0	\$0	\$0	0.00	\$0	\$0	\$0	0.00	\$0	\$0	\$0
Total Changes to Base Level Funding	3.00	\$1,936,603	\$23,506	\$1,960,109	1.00	\$1,582,717	\$19,487	\$1,602,204	(2.00)	(\$353,886)	(\$4,019)	(\$357,905)
2023-25 Total Funding	43.00	\$21,230,966	\$2,018,356	\$23,249,322	41.00	\$20,877,080	\$2,014,337	\$22,891,417	(2.00)	(\$353,886)	(\$4,019)	(\$357,905)
<i>Federal funds included in other funds</i>			\$0				\$0				\$0	
<i>Total ongoing changes as a percentage of base level</i>	7.5%	10.0%	1.2%	9.2%	2.5%	8.2%	1.0%	7.5%				
<i>Total changes as a percentage of base level</i>	7.5%	10.0%	1.2%	9.2%	2.5%	8.2%	1.0%	7.5%				

Other Sections in Commission on Legal Counsel for Indigents - Budget No. 188

	Executive Budget Recommendation	House Version
Indigent defense administration fund	Sections 2 and 3 would amend Sections 29-07-01.1 and 54-44.1-11 to provide for the Commission on Legal Counsel for Indigents to transfer its unspent general fund appropriation authority to the indigent defense administration fund each biennium until the balance of the fund reaches \$3 million.	The House version includes no additional sections.

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.

23.0251.02002
Title.

Prepared by the Legislative Council staff for
the Senate Appropriations - Government
Operations Division Committee
March 27, 2023

Fiscal No. 1

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1022

Page 1, replace lines 10 through 18 with:

	<u>Base Level</u>	<u>Adjustments or Enhancements</u>	<u>Appropriation</u>
Commission on legal counsel for indigents	\$20,964,213	\$1,655,907	\$22,620,120
Legal counsel for juveniles	<u>325,000</u>	<u>(325,000)</u>	<u>0</u>
Total all funds	\$21,289,213	\$1,330,907	\$22,620,120
Less estimated income	<u>1,994,850</u>	<u>16,372</u>	<u>2,011,222</u>
Total general fund	\$19,294,363	\$1,314,535	\$20,608,898
Full-time equivalent positions	40.00	1.00	41.00"

Renumber accordingly

STATEMENT OF PURPOSE OF AMENDMENT:

House Bill No. 1022 - Comm. on Legal Counsel for Indigents - Senate Action

	Base Budget	House Version	Senate Changes	Senate Version
Comm. on Legal Counsel for Indigents	\$20,964,213	\$22,891,417	(\$271,297)	\$22,620,120
Legal counsel for juveniles	<u>325,000</u>	<u> </u>	<u> </u>	<u> </u>
Total all funds	\$21,289,213	\$22,891,417	(\$271,297)	\$22,620,120
Less estimated income	<u>1,994,850</u>	<u>2,014,337</u>	<u>(3,115)</u>	<u>2,011,222</u>
General fund	\$19,294,363	\$20,877,080	(\$268,182)	\$20,608,898
FTE	40.00	41.00	0.00	41.00

Department 188 - Comm. on Legal Counsel for Indigents - Detail of Senate Changes

	Adjusts Funding for Salary and Benefit Plans ¹	Removes Salary Funding for Funding Pool ²	Total Senate Changes
Comm. on Legal Counsel for Indigents	\$127,212	(\$398,509)	(\$271,297)
Legal counsel for juveniles	<u> </u>	<u> </u>	<u> </u>
Total all funds	\$127,212	(\$398,509)	(\$271,297)
Less estimated income	<u>4,019</u>	<u>(7,134)</u>	<u>(3,115)</u>
General fund	\$123,193	(\$391,375)	(\$268,182)
FTE	0.00	0.00	0.00

¹ Salaries and wages funding is adjusted to provide for 2023-25 biennium salary increases of 6 percent on July 1, 2023, and 4 percent on July 1, 2024, and for adjustments to health insurance premium rates as follows:

	<u>General Fund</u>	<u>Other Funds</u>	<u>Total</u>
Salary increase	\$127,028	\$4,137	\$131,165
Health insurance increase	<u>(\$3,835)</u>	<u>(\$118)</u>	<u>(\$3,953)</u>
Total	\$123,193	\$4,019	\$127,212

The House provided salary adjustments of 4 percent on July 1, 2023, and July 1, 2024.

² Funding for new FTE positions and estimated savings from vacant FTE positions is removed as shown below. These amounts are available to the agency if needed by submitting a request to the Office of Management and Budget for a transfer from the new and vacant FTE funding pool.

	General <u>Fund</u>	Other <u>Funds</u>	<u>Total</u>
New FTE positions	(\$137,781)	\$0	(\$137,781)
Vacant FTE positions	<u>(253,594)</u>	<u>(7,134)</u>	<u>(260,728)</u>
Total	(\$391,375)	(\$7,134)	(\$398,509)

23.0251.02002
Title.

Prepared by the Legislative Council staff for
the Senate Appropriations - Government
Operations Division Committee
March 27, 2023

Fiscal No. 1

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1022

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Renumber accordingly

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House Bill No. 1022 - Comm. on Legal Counsel for Indigents - Senate Action

	Base Budget	House Version	Senate Changes	Senate Version
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FTE	40.00	41.00	0.00	41.00

Department 188 - Comm. on Legal Counsel for Indigents - Detail of Senate Changes

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Total all funds	\$127,212	(\$398,509)	(\$271,297)
Less estimated income	4,019	(7,134)	(3,115)
General fund	\$123,193	(\$391,375)	(\$268,182)
FTE	0.00	0.00	0.00

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Salary increase	\$127,028	\$4,137	\$131,165
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Total	\$123,193	\$4,019	\$127,212

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Total	(\$391,375)	(\$7,134)	(\$398,509)