

COMMISSION ON LEGAL COUNSEL FOR INDIGENTS - DEPT 188
ANNUAL REPORT - FISCAL YEAR 2017
Submitted by H. Jean Delaney, Executive Director

MISSION STATEMENT

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

ELIGIBILITY FOR SERVICES

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. In order 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.

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 statute, the court makes the determination of eligibility.

Generally, there is a right to counsel at public expense for indigent persons who are charged with felonies and misdemeanors in North Dakota state district court, those who are parties in matters brought under the Uniform Postconviction Procedure Act, and in some juvenile and miscellaneous matters. There is also a right to counsel at public expense for indigent

persons in appeals from these matters to the North Dakota Supreme Court. There is no right to counsel provided by the Commission in most civil matters, municipal court matters, and in federal court.

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 federal Department of Health and Human Services. Currently, for a household of three, gross income cannot exceed \$2,127 per month. The asset guideline is set at \$20,000. Thus, if an applicant for services is in a household of three, and has gross income of \$3000 per month, or has \$25,000 in equity in a home, the applicant would not be considered indigent, absent some exceptional factors that could otherwise justify a finding of indigency. These exceptional factors could include such things as large medical bills being paid by the applicant.

The Commission's mission is to provide services at reasonable cost to the community. Services should be provided only to those persons who are eligible. The Guidelines note that "i[t] is in the interest of all parties, the court, and the public, to insure that indigent defense services are provided in appropriate cases. However, there are abuses to the system, both intentional and unintentional. Applicants are not always forthcoming with their income information, and do not always inform the court of changes which could affect their eligibility. Additional screening is necessary to curb abuses, and to insure that services are available for those who are truly indigent."

It has been the policy of the Commission to seek additional screening and review of applications by the court in questionable cases. Additionally, in 2014, the Commission had implemented an Indigent Defense Task Force to investigate possible abuses of the system and to look at strategies for improvement. The Task Force members included Representative Kim Koppelman, who is one of the Commission's members, two judges, public defenders and contract attorneys, a court clerk, and a director of juvenile court services.

In 2015 House Bill 1022, the Legislature directed the Commission to "report to the sixty-fifth legislative assembly regarding the effectiveness of limits and procedures used to ensure that defense services are provided only to indigent clients." The Task Force thoroughly reviewed the

indigent defense system, and made several findings of procedures that are effective in ensuring services are provided only to eligible persons, and it also made several recommendations. These findings and recommendations were adopted by the Commission at its October 2016 meeting, and the Commission submitted its Report to the Legislature on January 25, 2017.

The findings/recommendations were in three main areas: training, updating the form applications for services, and review of indigency determinations.

Training on the Guidelines to Determine Eligibility for Indigent Defense Services is of primary importance to ensure compliance. It was found that the Commission should continue to provide training to those persons who make the eligibility determinations, and look at new and additional ways to reach them. During past years, the Commission had provided training to court clerks individually, in their counties, and through Go To Trainings organized by the judiciary. Since the Recommendations were adopted, the Commission has provided group training on the Guidelines at district judges' meetings in all districts, and at a meeting with judicial referees; to newly appointed and elected judges at their new judge orientations; and to the state's attorneys at their 2017 winter meeting. The Commission recently provided a computer accessed training on the Guidelines to its employees and contract attorneys, and to the district court clerks in one district. The Commission will continue to offer training on the Guidelines, and is setting up trainings with clerks in other districts.

The applications for services were updated with simpler language to make it easier to obtain necessary information on income and assets, and includes an authorization of the applicant for investigation of the applicant's income and assets, and a release of information from any source that might have such information.

As to review of the eligibility determination, it was found that the Commission should continue to randomly spot check applications in the different judicial districts to ascertain compliance with the Guidelines. This is a valuable way to make sure that the person for whom services was provided is truly eligible for services. The Commission continues to do this.

It was recommended that the Commission consider, develop and implement a process to review eligibility of persons who have bonded out of jail when they were initially found eligible while in jail. The current procedure is to send out a letter asking the Court to reassess eligibility of a person who found to be eligible if it looks like the person was temporarily indigent due to incarceration, but who is likely employed upon release. The Commission is exploring whether

it should implement a more formal process.

It was found that the Commission should ascertain whether statutory revision is necessary to ensure compliance with the Guidelines. The Commission supported 2017 HB 1235 which amended the Commission's governing statute to give greater access to relevant records to permit it to verify eligibility when spot checking applications, and when questions arise as to eligibility in a specific case.

Finally, it was recommended that there be no changes as to which entity determines eligibility. Pursuant to NDCC §54-61-01, the court makes the determination of eligibility. It is most effective to have the court, or the clerk of court as the court's designee, determine eligibility. To have another entity, such as the Commission, make this determination would be more expensive, and due to the large number of applications, findings of eligibility would be delayed, which would lead to delayed assignment of counsel.

The Commission reported to the sixty-fifth legislature assembly that "[t]he vast majority of the clients to whom services are provided are truly indigent. The policies and procedures currently in place are effective in ensuring that services are provided only to indigent persons." Implementation of the task force recommendations has further ensured that services are provided only to indigent persons.

DELIVERY OF SERVICES/COMPENSATION

The system is administered through the agency's administrative office in Valley City. The administrative office coordinates the delivery of indigent services throughout the state, including contracting with attorneys to provide services, staffing the public defender offices, providing support services, and training attorneys and staff.

The Commission provides attorney services through its full time state employee public defenders in eight offices across the state, and through its monthly and conflict contractors. By statute, the Commission is required to, and does contract for services, at a minimum level of fifty percent of its biennial caseload. During the 2015-17 biennium, 67% of case assignments were handled by contract attorneys; 33% were handled by public defenders.

The Commission's monthly contractors each take some specified portion of cases in some specified geographic region. The conflict contractors take cases on a case assignment by case

assignment basis. The Commission currently has approximately 70 monthly contractors and over 100 conflict contractors. The conflict contractors are paid at the rate of \$75.00 per hour, and the monthly contractors' payments are calculated to correspond to that same rate based on yearly average number of case assignments and average hours worked per assignment. This is far less than federal panel attorneys are paid (they are paid \$132/hour in non-capital cases – cases which do not involve the death penalty) and significantly less than attorneys in private practice are paid. In some areas of the state it is difficult to find attorneys who are willing and able to provide services at \$75/hour. In some rural areas, there may be just too few attorneys to provide services for the number of case assignments. To provide representation in these situations, the Commission must import attorneys from other areas. This leads to additional costs, such as for travel time and mileage.

The Commission's public defenders take case assignments in the geographical area in which their office is located, and conflict matters in nearby districts or across the state when needed. There has been a high turnover rate of employees in its public defender offices, and some difficulty in filling positions, reportedly due in large part to the lower salaries paid to its employees. In 2016, a salary survey was conducted of North Dakota positions similar to positions in the Commission. The survey showed, in many areas, that our agency employees are paid significantly less than those employees in comparable governmental positions, especially those in the state's attorneys' offices. The Commission did ask, in an optional package submitted with its budget request for the 2017-19 biennium, for funding to bring the salaries on par with comparable positions in the state's attorneys' offices. With the economic circumstances then existing, the request was denied, however the Commission felt it was important to bring this issue to the Governor and Legislature's attention.

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" rather than "case" is used so that assignment numbers from different areas of the state will mean the same thing across the state. For example, for a criminal case assignment, all cases arising from the same event are considered

part of the “case assignment” 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 Commission has an internet accessed case reporting system which the attorneys use to provide case assignment information. The attorneys are required to enter assignments within one month of the assignment, and closing within one month of the conclusion of the case assignment. Closing information includes hours worked, disposition, and other salient information. This system is crucial to the agency for tracking individual, office, and district caseloads.

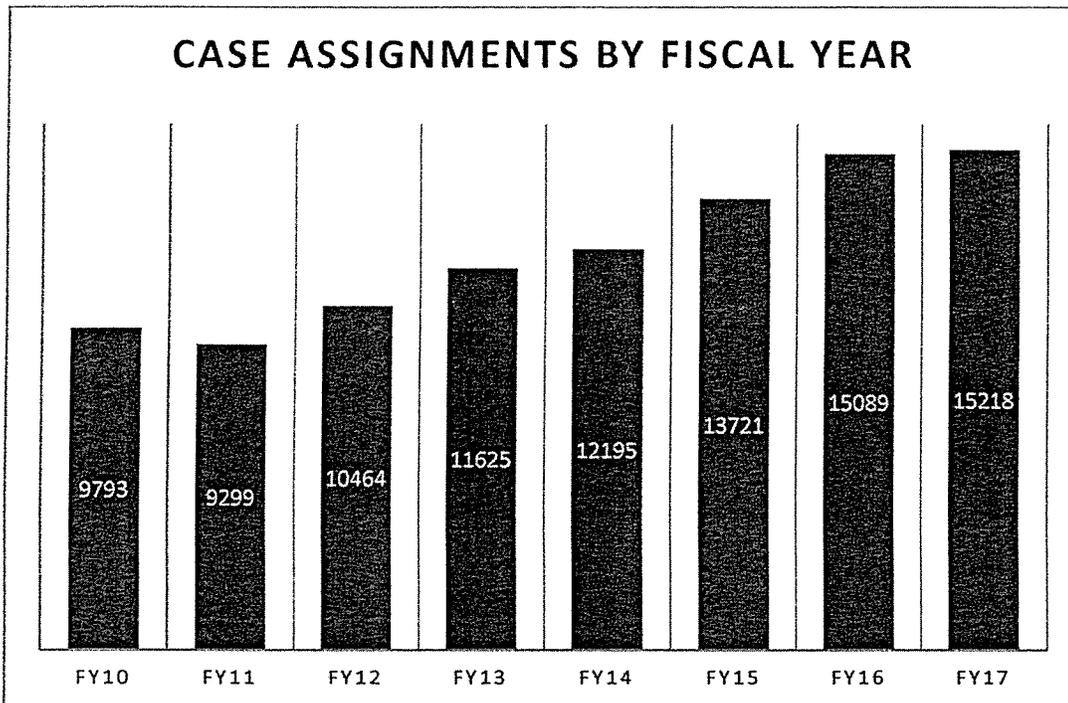
CASELOADS

Case assignment numbers have continued to increase state-wide, but not at the astronomical pace seen during the oil boom. In FY2017, the Commission provided legal counsel services in more case assignments than in any year prior – services were provided in more than 15,200 case assignments. This number represents a small - approximately 1% - increase from FY2016, and a 31% increase from FY2013.

State-wide, the total number of the more serious felonies (double A felonies, A felonies, and B felonies) remains high and continues to increase. There were 973 of these felony assignments in FY2013, 1,382 in FY2016, and 1,406 in FY2017. This is an increase of 45% since 2013, and an increase of 1.7% since 2016. These more serious felony case assignments, with their more significant penalties, are generally more costly. They generally take more attorney time. For example, a double A felony that goes to jury trial averages more than 100 hours of attorney time, while a misdemeanor that goes to jury trial averages about 15 hours. These serious felonies are more likely to have more extraordinary expenses, such as private investigators and experts, than case assignments with less serious charges.

The number of appellate assignments, state-wide, has also increased. In FY2013, there

were 78 appellate assignments. In FY17, there were 115, a 47% increase. Appeals are often time consuming, taking an average of 28 hours, and can involve large, additional costs, such as the cost of transcripts of hearings and trial in the lower court, which can cost up to several thousand dollars.



The Commission tracks case assignments by judicial district. Four of the eight judicial districts saw an increase in case assignment numbers. During FY2017, attorneys in the East Central Judicial District handled 3,537 assignments. This is a 43% increase since FY2013, and an 11% increase since FY2016. During FY2017, attorneys in the South Central Judicial District provided services in 4,442 case assignments, which is a 34% increase since FY2013 and a 6% increase since FY2016. Attorneys in the Southeast Judicial District handled 1,253 assignments in FY17, an increase of 17% from FY13, and an increase of 6% since FY16. Attorneys in the Northeast Central Judicial District provided services in 1,328 case assignments in FY17. This is a 16% increase since FY13, and a 3% increase since FY16.

Attorneys in the North Central Judicial District provided services in 1,608 assignments in FY2017; this number is less than in FY16, but it is higher than in any other year, and is 77% higher than in FY13. Attorneys in the Northwest Judicial District handled 1,538 case

assignments in FY17. This is less than in FY15 and FY16, but is higher than in any other year, and is 39% higher than in FY13. There were 932 assignments in the Northeast Judicial District which is on par with other assignments during the period of FY10 through FY14. There were 580 assignments in the Southwest Judicial District in FY17. This is similar to assignment numbers during the time period of FY11 through FY14.

It is hard to forecast at this time whether the increases in case assignment numbers state-wide will continue. Projecting the first three months of FY2018 over the entire year, it is not unlikely that there will be case assignments in excess of 15,000.

FINANCING OF THE AGENCY

The Commission's budget for the 2015-17 biennium was originally \$20,411,017, which consisted of \$18,304,103 in general fund dollars, and \$2,106,914 from other funds. These other funds consist of \$200,000 from the strategic investment and improvements fund as one-time funding for contract services fees for the 2015-17 biennium, and \$1,906,914 from the Commission's special fund.

The Commission's special fund is funded through collection of two statutory fees paid by defendants – the Commission's portion of the indigent defense/facility improvement fee, and the indigent defense application fee. The district courts also have the authority to order reimbursement of attorney fees, however, any attorneys' fees that are recouped go into the general fund, not the Commission's special fund.

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 particular case. Also, with the passage of Marsy's Law, the application fee and indigent defense/facility improvement fee are no longer the first priorities for collection among fines and fees ordered by the court to be paid. Traditionally, the application fee and the indigent defense facility improvement fee were collected from defendants as first and second priorities, before any other fees or fines; however, with the passage of Marsy's Law, the collection of restitution is now the first priority, and as a result, it was expected that there will be reduced collection of the application and indigent defense/facility improvement fees.

After the 4.05% and 2.5% allotments, the Commission's budget for the 2015-17 biennium

was reduced to \$19,212,098, with general fund dollars reduced to \$17,105,184, and special fund dollars remaining the same. The Commission diligently reduced its spending in an attempt to meet the reduced budget. However, most of the Commission's budget goes directly to providing required attorney services, either through our public defender offices or contracted attorney services, and related expenses, such as private investigators, experts, and the like, which are necessary for a constitutionally adequate defense. The Commission has no control over how many assignments there are in any given time frame, nor can an attorney take an unlimited number of assignments and provide constitutionally adequate services. With the increased caseload, anticipated high costs of the DAPL cases, and anticipated higher costs associated with the implementation of Marsy's Law, and the expectation of reduced collections due to Marsy's Law, the Commission was concerned that the reduced budget would be insufficient to sustain the Commission through June 30, 2017, and requested a deficiency appropriation. In 2017 HB 1024 the Legislature authorized \$189,000 or so much as necessary from the strategic investment and improvement fund to defray the Commission's expenses up to June 30, 2017, and granted \$1,027,000 in spending authority for our DAPL expenses incurred after June 30, 2015 and ending June 30, 2019.

During the remainder of FY2017, the Commission continued to be extremely careful with its spending. While there were more case assignments state-wide, and some increased attorney time due to Marsy's Law, the Commission was able to cover most case assignments by public defenders and monthly contractors – entering into some short term monthly contracts at times, rather than using hourly contractors except when absolutely necessary, which resulted in less hourly bills. \$76,758 in DAPL expenses were covered by the DAPL spending authority. The Commission was able to turn back \$62,100.36 of the general fund appropriation at the close of the biennium. Thus, the Commission did not need the \$189,000 SIF fund appropriation to otherwise cover necessary expenses, and these unspent funds were transferred back to the strategic investment and improvement fund.

Funding for the Commission for the 2017-19 biennium consists of \$17,983,876 from the general fund, \$1,919,747, from the Commission's special fund, for a total of \$19,903,623, and the remaining spending authority of \$950,242 for costs of the DAPL case assignments.

GOALS FOR FY2018

The Commission will continue 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 will continue to implement the recommendations of the Indigent Defense Task Force to help ensure that indigent defense services are provided only to indigent clients.

The Commission will continue to encourage the interest of new attorneys in public defense, especially those attorneys in rural areas. This will be done by continuing to encourage its public defenders and contract attorneys to mentor new attorneys who show an interest in indigent defense, and by encouraging and supporting its offices in having interns and externs from the law school.

The Commission will continue to monitor caseloads to permit attorneys sufficient time to devote to each client's case and to avoid attorney burnout.

The Commission will continue to advocate to increase its employees' compensation, and will update its salary survey with the goal of requesting funding for salary increases during the next legislative session.

The Commission will conduct a review of agency standards and policies, and work on updating them, where appropriate.

Respectfully submitted, this 21st day of December, 2017



H. Jean Delaney