

IDS

OFFICE OF INDIGENT
DEFENSE SERVICES
SAFEGUARDING JUSTICE

October 29, 2021 Quarterly Commission Meeting
Meeting Material

IDS
Quarterly Commission Meeting
October 29, 2021 Meeting
1:00 PM – 5:00 PM
Proposed Agenda

OFFICE OF INDIGENT
DEFENSE SERVICES
SAFEGUARDING JUSTICE

Call to Order	Darrin Jordan
Introductions	
Minutes of July 30, 2021 Commission Meeting	
Adoption of Proposed Agenda	
State Government Ethics Act	
<i>Members of the commission/committee are hereby advised of their duty under the State Government Ethics Act to avoid conflicts of interest & the appearance of conflict & are instructed to refrain from participating in any matter coming before this commission/committee with respect to which there is a conflict of interest or appearance of conflict</i>	
Commission Business	Darrin Jordan
Adoption of 2022 Meeting Calendar	
Report of the Appointment Committee	
Chair and Vice-Chair Elections (January 2022 – December 31, 2023)	
Remarks from the Out-going Chair	
Director's Report on IDS Business	
Alamance County Early Representation Project	Mary Pollard
Contract Defender Program Update	
Update on Eight Year Plan	
Discussion of Legislative Session	
PAC Appropriation & Other Legislation of Interest	
Rate Increases for Private Assigned and Contract Counsel	
Fiscal Report	Elisa Wolper
Review of Fiscal Year 2020 - 2021	
Projections for Fiscal Year 2021 - 2022	
IVE Funding/ Parent Defender Reimbursement	
IDS Rules – Revise Rule 1.10 (Supporting Services in Non-capital Criminal and Non-criminal Proceedings)	Whitney Fairbanks
Update from the Field	
NC Prisoner Legal Services	Elizabeth H. Thomas
Informational Update on OJD Planning for Youth Homicide Appointments & Training Taskforce	Eric Zogry D. Tucker Charns
Public Business	
Informational Update on the work of NC CRED	James Williams
Other Business	
Waiver(s) of 1-year Fee Application Deadline	Chad Boykin
Quarterly Misconduct Report (if requested by Commission)	Whitney Fairbanks
Executive Session (if requested by Commission)	
Adjourn	Darrin Jordan
Next Meeting: January 21, 2022	

Safeguarding individual liberty & the Constitution by equipping the North Carolina public defense community with the resources it needs to achieve fair & just outcomes for clients



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DARRIN JORDAN

CHAIR

MEMORANDUM

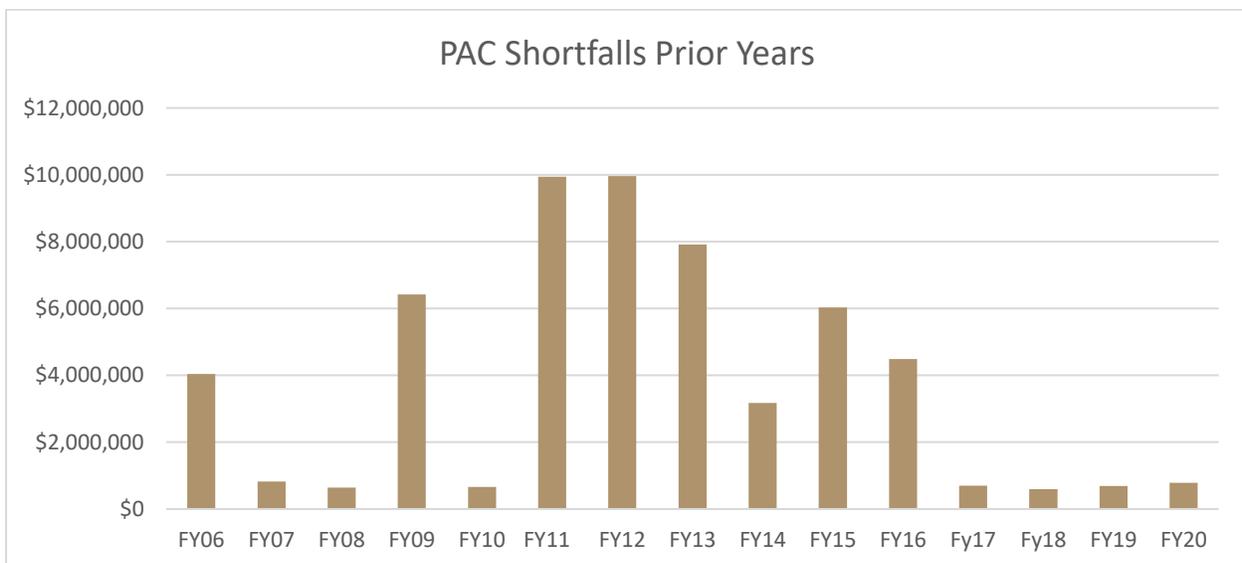
To: IDS Commission
From: Mary Pollard and Elisa Wolper
Re: Budget Committee Proposal
Date: October 29, 2021 Commission Meeting

The Budget Committee met on October 19, 2021 to review options and recommend potential rate increases for private assigned counsel for the current fiscal year. The Committee discussion covered the uncertainty surrounding potential expansion funding and safe-harbor language for the set off debt liabilities, due in turn to continued uncertainty about enactment of a budget for the current biennium.

Key facts considered by the Committee:

- ⇒ Balance in PAC fund carried from prior year of roughly \$1.8 Million
- ⇒ \$4.7 Million in reserve related to Set Off Debt (SOD) issues
- ⇒ Limited information on recent trends and potential changes in court activity, due to which I am projecting current year PAC demand matching resources, including the \$1.8 Million left from last year but not the SOD reserve
 - This also leaves untouched projected \$2.25 million in lapsed salary at year end; if not needed in the PAC, will revert
 - This does not include the one-time impact of starting a new Public Defender program, which would involve moving funds from the PAC to establish the new positions—while the long-term cost of the PD office is modest, the short-term cost is significant and will fall in the current year and FY2023
- ⇒ There is cautious optimism that there will be a budget that includes \$5 Million in recurring appropriation and \$1.8 Million in new court fees (annualized) as well as the safe harbor for SOD funds and a new Public Defender office in Cleveland/Lincoln
 - If this materializes, there would be \$6.8 Million in new recurring funding as well as \$6.5 Million in one-time funds that could be spread over several years
- ⇒ We continue to work with DHHS to access federal funds (Title IVE) to reimburse part of the cost of parent representation. We hope to receive some funds soon estimated at close to \$2 Million per year. The first of these receipts are earmarked for non-attorney resources for parent cases but, as the receipts build up, they will be available for the portion of rate increases that are tied to these cases.

- ⇒ If the costs of rate increases or other factors create shortfalls in future years, without additional expansion funding (see history) the shortfalls can snowball. If we get \$5 Million this year, it will probably be sometime before we can expect more.
- Unexpected factors include changes in receipt collection, increased indigency rates or average cost of cases, cost of catching up from pandemic related backlogs, increases in costs due to problems finding appointed counsel (travel costs from out of county, cost of withdrawals) decreased availability from lapsed salary as other unfunded items require those funds
 - While expansion in the Public Defender program would result in higher total spending on indigent defense, if it is accompanied by new PD funding, the size of the PAC fund and the cost of future rate increases will be smaller.
 - It has been many years since we had unexpected shortfalls, but we did see spending well above projected in FY2020 pre-pandemic—most likely due to a short-term increase in disposition costs that settled down over time, but created an issue in that one year.
 - Estimating the impact of rate increases is difficult because FY2020 and FY2021 were abnormal and FY2019, the best option to use, is old.



- ⇒ Given the crisis in PAC rates (the rates for District Court non-felony and Superior Court low-level felonies have not increased since they were cut from \$75 to \$55 and \$60 respectively in May 2011), it is important not to leave funds unspent.

Considering all these factors, the Budget Committee considered the following proposal, total annualized cost of \$9.875 Million. Comparable increases for contractors are included in these figures. Please note these are approximations based on older data pre pandemic.

Potential \$9.68 Million Rate Adjustments

		Current	Proposed
Low-Level Felonies in all courts to \$65	\$1.7 Million	\$60	\$65
High-Level Felonies in all courts to \$85 (inc. provisional capital)	\$800,000	\$80	\$85
All other District Court and Superior Court to \$65	\$5.7 Million	\$55 dist/\$60 Superior	\$65
Non-Capital Appeals -\$85 (HLF)-\$75 other types	\$350,000	\$80/\$60	\$85/\$75
Capital Trial (inc. Appeal and Post-Con) to \$100	\$350,000	\$90	\$100
Potentially Capital proceeding non-capital to \$100 (inc. LWOP, VHF, & juveniles who may be charged with 1 st degree murder)	\$420,000	\$80	\$100
\$5 Increases Private Investigators & Mitigators	\$360,000	\$50 PI, mitigators \$35-\$55	

HOW RISKY ARE THESE PROPOSALS OVER TIME?

The chart below looks at several multi-year scenarios, based on size of rate increase package and with and without IVE funds. These all assume the optimistic budget scenario and other factors we have identified.

The first column is the least risky. Using the expected new fees and appropriations and spreading the carryforward/reserve over several years, produces no shortfall for many years (all else equal!).

The second column poses significant shortfall risk unless we are certain to use the IVE receipts. The third column presents this package with IVE funding.

The fourth and fifth columns present a \$9 package with and without IVE funding respectively.

Scenario	\$8 Million Packet	\$10 M Packet (without IVE funds)	\$10 M packet (with IVE funds)	\$9 Million (without IVE funds)	\$9 Million (with IVE funds)
First Year of Shortfall	FY2029	FY2024	FY2025	FY2025	FY2028
Shortfall Amount That Year	\$50,000	\$1.6 Million	\$1.1 Million	\$1.1 Million	\$500,00
Shortfall 2 nd year	\$900,000	\$4.2 Million	\$2.7 Million	\$3 Million	\$1.2 Million

**note a shortfall of \$750,000 or less is insignificant in terms of payment delays---each \$1.5 Million represents a one-week delay*

WHAT WOULD BE IMPACT OF THESE HOURLY RATE INCREASES?

Our largest areas (case type) for PAC payments by individual case in FY2021 demand are listed below—the larger the volume, the more costly to address:

		By Fee Application	
Low Level Adult Felony	29,303	\$11,297,019	
Child Welfare	22,965	\$9,071,178	
District Court Misdemeanor/Traffic	29,365	\$6,766,804	
Capital Related	1,421	\$6,562,054	
High Level Felony	3,329	\$4,857,539	
Non Capital Appeals-Felony	501	\$1,681,495	
Competency	4,191	\$1,537,794	
Child Support Contempt	6,247	\$1,300,959	
DWI	3,566	\$1,109,770	
Juvenile Delinquency--All other	3,624	\$1,094,481	
Other Superior Court	1,060	\$884,379	

Finally, looking at the impact on the current amount paid per type of case:

Type of Case	Current Average Payment by Fee App (FY2020)	Impact \$5 increase	New average w/ \$10 M proposal
High Level Felony	\$1,929	\$128	\$2,186
Low Level Felony-Superior Court	\$467	\$39	\$506
Low Level Felony-District Court	\$313	\$26	\$339
District Court Misdemeanor	\$198	\$ 18	\$234
Child Welfare	\$394	\$36	\$466

North Carolina State Bar
Subcommittee on Compensation of Court-Appointed Counsel
September 24, 2021
10:00 a.m.
Zoom Videoconference Meeting

It is the duty of Committee members to avoid conflicts of interest and appearances of conflicts of interest in performing the duties as a member of the Subcommittee on Compensation of Court-Appointed Counsel and the North Carolina State Bar. Any member of the Subcommittee who is aware of any personal conflicts or appearances thereof with respect to the matters before this Subcommittee should disclose those at the meeting.

Agenda

- I. Welcome and State Government Ethics Act
- II. Approval of April 9, 2021 CCAC Meeting Minutes
- III. Discussion of the Results of the PAC Caseload and Compensation Survey
- IV. Discussion of, and Possible Vote to Approve, Report of the CCAC Subcommittee
- V. Other Items of Interest to the Subcommittee
- VI. Adjourn



THE NORTH CAROLINA STATE BAR



Private Appointed Counsel Caseload and Compensation Study

*A Report of the Subcommittee on
Compensation of Court-Appointed Counsel*

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BACKGROUND

The right to counsel is guaranteed by both the United States and North Carolina Constitutions.¹ This fundamental right requires "[m]ore than a warm body" sitting at the defense table;² it necessitates that defendants receive "effective assistance of competent counsel."³

The United States Supreme Court has recognized that "codified standards of professional practice . . . can be important guides" in determining whether an attorney's performance is constitutionally sufficient.⁴ The American Bar Association Criminal Justice Standards for the Defense Function provide performance and ethical guidance for defense counsel. The ABA Standards for the Defense Function instruct defense counsel on several legal tasks that are required for effective representation, including client communication, investigating facts, interviewing witnesses, performing legal research, filing motions, consulting with experts, engaging in negotiations and preparing for trial. The ABA Standards also discuss the dangers of excessive caseloads, stating that "[d]efense counsel should not carry a workload that, by reason of its excessive size or complexity, interferes with providing quality representation, endangers a client's interest in independent, thorough, or speedy representation, or has a significant potential to lead to the breach of professional obligations."⁵

All North Carolina attorneys, including private appointed counsel ("PAC"), are required to follow the North Carolina Rules of Professional Conduct. The following Rules of Professional Conduct have the potential of being impacted by excessive caseloads:

- *Rule 1.1 Competence:* A lawyer shall not handle a legal matter that the lawyer knows or should know he or she is not competent to handle without associating with a lawyer who is competent to handle the matter. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.
- *Rule 1.3 Diligence:* A lawyer shall act with reasonable diligence and promptness in representing a client.

¹ See U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."); N.C. Const.; art. I, sec. 23 ("In all criminal prosecutions, every person charged with crime has the right . . . to have counsel for defense . . .").

² *United States v. Smith*, 640 F.3d 580, 589 (4th Cir. 2011) (internal quotation marks omitted).

³ See *McMann v. Richardson*, 397 U.S. 759, 771 (1970) (stating that "defendants facing felony charges are entitled to the effective assistance of competent counsel."); *State v. Robinson*, 290 N.C. 56, 65-66 (1976) (discussing the "constitutional right of an indigent defendant in a criminal action to have the effective assistance of competent counsel.").

⁴ *Missouri v. Frye*, 566 U.S. 134, 145, 132 S. Ct. 1399, 1408 (2012); see also *Padilla v. Kentucky*, 559 U.S. 356, 366-67, 130 S. Ct. 1473, 1482 (2010) (stating that "American Bar Association standards and the like . . . may be valuable measures of the prevailing professional norms of effective representation.").

⁵ ABA Standards For Criminal Justice: Defense Function, Standard 4-1.8(a) (4th ed. 2017).

- *Rule 1.7(a) Conflict of Interest: Current Clients:* “[A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if . . . there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client”
- *Rule 1.16(a)(1) Declining or Terminating Representation:* “[A] lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if . . . the representation will result in violation of law or the Rules of Professional Conduct”

Similar to the ABA Standards for the Defense Function, the North Carolina Rules of Professional Conduct contain an explicit warning about the dangers of excessive caseloads: “A lawyer's work load must be controlled so that each matter can be handled competently.”⁶

FORMATION AND MEETINGS OF THE CCAC SUBCOMMITTEE

In early 2020, then-President Colon Willoughby established the Subcommittee on Compensation of Court-Appointed Counsel (“CCAC Subcommittee” or “Subcommittee”). The Honorable W. Allen Cobb, Jr. was appointed as Chair of the CCAC Subcommittee. Other Subcommittee members included Thomas W. Anderson, Thomas D. Anglim, Clark Bell, the Honorable Patrice A. Hinnant, Kevin Kiernan, Ronnie Mitchell, Michael R. Ramos, and Eben T. Rawls, along with advisory member and President-Elect Darrin D. Jordan. The Subcommittee also received input from President Willoughby, Alice Mine, Whitney Fairbanks and Mary Pollard. The Subcommittee was staffed by Deputy Counsel Alex Nicely.

The Subcommittee’s charge was twofold: (1) to examine whether excessive caseloads and reduced compensation rates are preventing private appointed counsel (“PAC”) from fulfilling their ethical and constitutional obligations to their clients; and (2) to study what actions, if any, the State Bar might undertake to support the fair compensation of lawyers who are appointed to represent indigent criminal defendants.

In March 2020, Subcommittee members reviewed two studies addressing the issues of reasonable caseloads and compensation of court-appointed counsel in North Carolina: *FY19 Private Appointed Counsel (PAC) Effective Pay Rate Study* by Margaret A. Gressens⁷; and *Improving Indigent Defense in North Carolina* by the North Carolina Commission on the Administration of Law and Justice.⁸

On June 22, 2020, Whitney Fairbanks, Interim Director of Indigent Defense Services (IDS), gave a presentation to the Subcommittee on the history and organizational structure of North Carolina’s

⁶ N.C. Rules of Prof’l Conduct R .1.3 cmt. 2 (N.C. State Bar 2021); but see *id.* At R. 1.3 cmt. 7 (“A pattern of negligent conduct is not excused by a burdensome case load or inadequate office procedures.”).

⁷ North Carolina Office of Indigent Defense Services, *FY19 Private Appointed Counsel (PAC) Effective Pay Rate Study* (March 2019).

⁸ North Carolina Commission on the Administration of Law and Justice, *Improving Indigent Defense in North Carolina* (October 2016).

indigent defense system. Ms. Fairbanks discussed the financing and organizational structure of IDS, the impact of the 2011 rate reductions on PAC,⁹ and the impact of the COVID-19 pandemic on PAC.

On October 7, 2020, the Subcommittee was joined by Mary Pollard, Executive Director of IDS. Ms. Pollard participated in a Subcommittee discussion on how the State Bar could provide assistance to PAC in North Carolina. Subcommittee members expressed interest in conducting a survey to consider the effects of the 2011 rate reductions on PAC.

In November 2020, the Subcommittee began drafting the Private Appointed Counsel Caseload and Compensation Survey. An initial draft of the survey was created in December 2020. The Subcommittee met on December 29, 2020, to revise the survey and identify the target population. The Subcommittee voted to approve the survey on April 9, 2021.

PAC CASELOAD AND COMPENSATION SURVEY

The Private Appointed Counsel Caseload and Compensation Survey was conducted in May and June 2021. What follows is a summary of the design, distribution and results of that survey. To emphasize research findings, certain survey questions and answers have been highlighted. A copy of the entire survey is available upon request.

Survey Design

The survey was created and conducted utilizing SurveyMonkey, an online survey program. The survey consisted of a maximum of 28 questions. Respondents were asked to provide information on a variety of topics, including demographics, work experience, compensation, attorney caseloads, sufficiency of time, and the motivating and inhibiting factors behind court-appointed work. While survey participation was not restricted to private appointed counsel, several questions early in the survey were designed to distinguish PAC from other attorneys. “Branching logic” was used to ensure that only relevant questions were presented to the respondents, as determined by the respondents’ own answers. For example, attorneys who indicated that they did not perform court-appointed work in 2019 were not asked follow-up questions concerning the details of their court-appointed work in 2019.

Survey Distribution and Response

On May 2, 2021, the survey was sent to 141 attorneys identified as specialists in criminal law and/or juvenile delinquency law. This first round of the survey closed on May 19, 2021, with a total of 48 criminal law and juvenile law specialists choosing to participate. These numbers reflect a response rate of 34.04%.

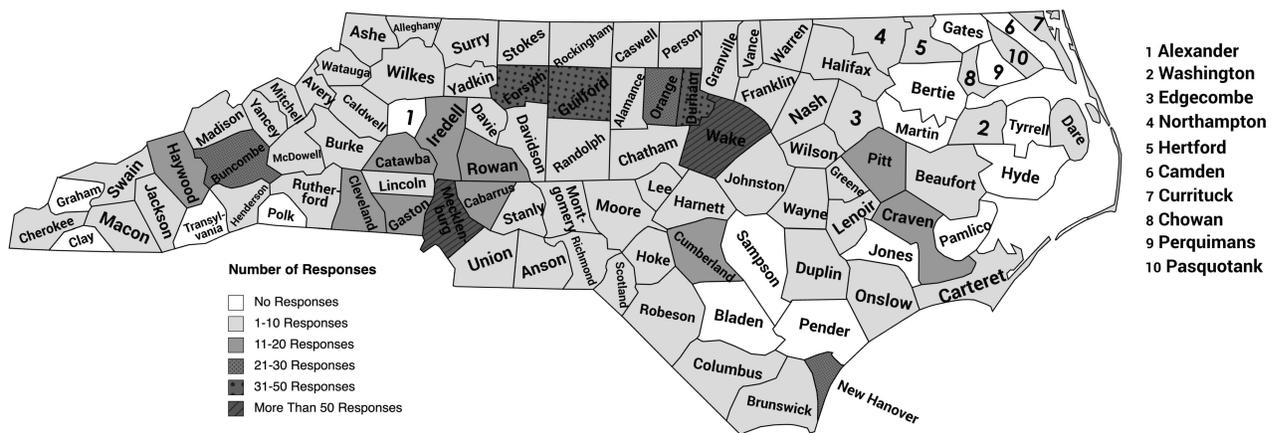
⁹ The 2011 Appropriations Act reduced IDS’s budget significantly and directed IDS to reduce hourly compensation rates paid to PAC. For more information on the 2011 rate reductions, see the February 1, 2015, *Report of the Commission on Indigent Defense Services*, found at <https://www.ncids.org/wp-content/uploads/2021/05/LegislatureReport2015.pdf>.

On June 1, 2021, the survey was emailed to the remaining 29,722 members of the Bar. 1,194 attorneys chose to participate in this second round of the survey. These numbers reflect a response rate of 4.02%. In total, the State Bar received 1,243 survey responses with an overall response of 4.16%.

Demographic Information

The survey yielded responses from 83 of North Carolina’s 100 counties. Figure 1 illustrates the distribution of responses received by each county.

Figure 1. Distribution of Survey Responses by County



Attorneys were asked to provide information about the location and the size of their practice. The majority of respondents practiced in cities, either as solo practitioners or in small law firms.

Q4 Where do you primarily practice law?

ANSWER CHOICES	RESPONSES	
In a large city (population over 200,000)	44.57%	554
In a medium city (population between 100,000 and 200,000)	14.40%	179
In a small city (population between 50,000 and 100,000)	11.83%	147
In a large town (population between 25,000 and 50,000)	9.09%	113
In a medium town (population between 10,000 and 25,000)	9.65%	120
In a small town (population between 2,500 and 10,000)	9.09%	113
In a rural area (population less than 2,500)	1.37%	17
TOTAL		1,243

Q3 What is the size of your firm?

ANSWER CHOICES	RESPONSES	
Solo practice	38.05%	473
Law firm – 2 to 5 members	23.57%	293
Law firm - 6 to 20 members	2.98%	37
Law firm – 21 to 50 members	4.83%	60
Law firm - 6 - 20 members	0.00%	0
Law firm – 50+ members	5.31%	66
Government office/agency	12.31%	153
Non-profit organization	1.45%	18
In-house counsel	3.70%	46
Retired	1.45%	18
Other	6.36%	79
TOTAL		1,243

Legal Experience and Court-Appointed Lists

The survey respondents were a very experienced group, with 44.89% reporting that they had been licensed to practice law for 20 years or more. 28.96% of respondents reported that they had been licensed for 10 to 20 years and the remaining 26.15% reported that they had been licensed for 10 years or less.

Question 7 of the survey asked respondents to indicate whether they were currently on a court-appointed list, used to be on a court-appointed list but no longer were on such a list, or had never been on a court-appointed list. Question 8 was presented to those respondents who indicated that they used to be on a court-appointed list and asked whether those attorneys *voluntarily chose* to remove themselves from the list.

Q7 Which of the following statements apply to you?

ANSWER CHOICES	RESPONSES	
I am currently on a court-appointed list.	27.92%	347
I used to be on a court-appointed list, but am no longer on a list.	30.09%	374
I have never been on a court-appointed list.	42.00%	522
TOTAL		1,243

Q8 Did you voluntarily choose to remove yourself from your local court-appointed counsel list?

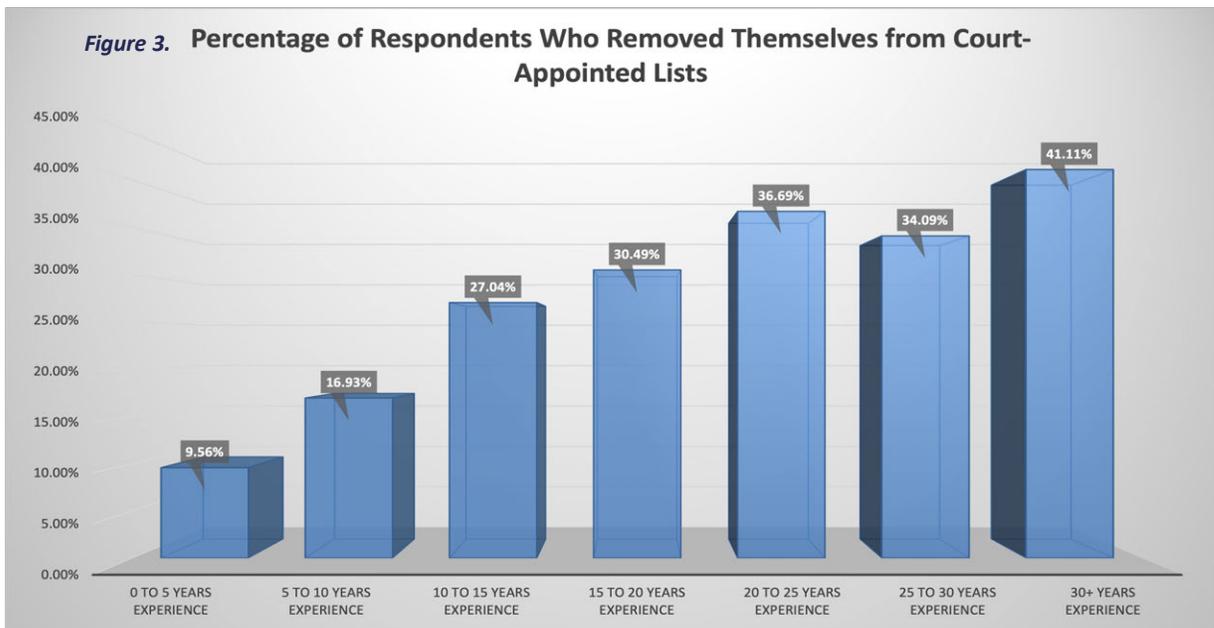
ANSWER CHOICES	RESPONSES	
Yes	97.33%	364
No	2.67%	10
TOTAL		374

The data obtained from Questions 7 and 8 was cross-tabulated and broken down by years of experience. Figures 2 and 3 below illustrate the results of this process and appear to indicate a direct relationship between years of experience and the decision to remove oneself court-appointed lists.

Figure 2. Q7 Which of the following statements apply to you?

	I AM CURRENTLY ON A COURT-APPOINTED LIST.	I USED TO BE ON A COURT-APPOINTED LIST, BUT AM NO LONGER ON A LIST.	I HAVE NEVER BEEN ON A COURT-APPOINTED LIST.	TOTAL
Q1: Less than 5 years	25.00% 34	10.29% 14	64.71% 88	10.94% 136
Q1: 5 to 10 years	24.87% 47	17.99% 34	57.14% 108	15.21% 189
Q1: 10 to 15 years	34.69% 68	27.04% 53	38.27% 75	15.77% 196
Q1: 15 to 20 years	34.76% 57	31.71% 52	33.54% 55	13.19% 164
Q1: 20 to 25 years	24.46% 34	37.41% 52	38.13% 53	11.18% 139
Q1: 25 to 30 years	25.76% 34	35.61% 47	38.64% 51	10.62% 132
Q1: More than 30 years	25.44% 73	42.51% 122	32.06% 92	23.09% 287
Total Respondents	347	374	522	1,243

Figure 3. Percentage of Respondents Who Removed Themselves from Court-Appointed Lists



Question 9 examined the motivation behind an attorney choosing to remove himself or herself from a court-appointed list. This question was asked only of those attorneys who answered “Yes” to Question 8. 69.7% of responding attorneys indicated that “low compensation rates” were a contributing factor to their decision to remove themselves from court-appointed lists.

Q9 Why did you voluntarily choose to remove yourself from your local court-appointed counsel list? (Select all that apply)

ANSWER CHOICES	RESPONSES	
Personal obligations	8.78%	31
Lack of time	15.86%	56
Discouragement from my employer or billable hour expectations	5.95%	21
Court-appointed work consumed the time and resources I needed to effectively represent my other clients	44.48%	157
Lack of resources or administrative support services	9.35%	33
Low compensation rates and/or financially burdensome to my practice	69.97%	247
Other (please specify)	27.20%	96
Total Respondents: 353		

2019 Caseload and Compensation

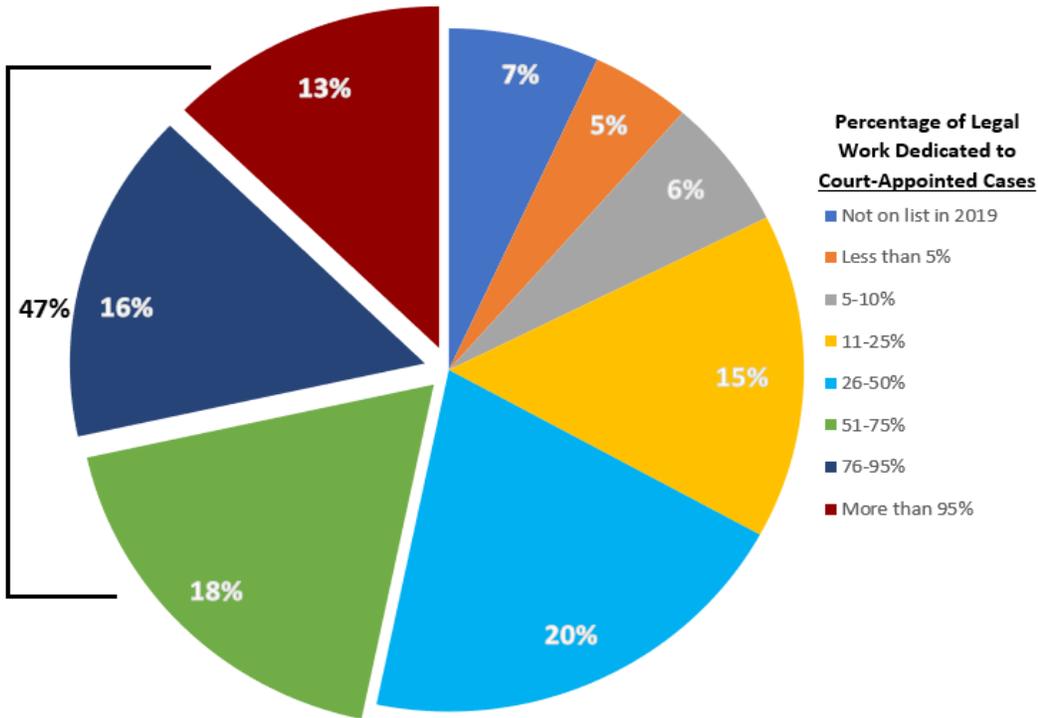
To help assess the impact of attorney workloads and compensation rates on indigent representation, a subset of the responding population was asked to provide detailed information about their court-appointed caseload. This portion of the survey was limited to attorneys who performed court-appointed work in 2019, as this was the most recent full year prior to the COVID-19 pandemic.

Attorneys were asked to provide information about the size and nature of their caseload in 2019, including the number of court-appointed cases that they handled, the percentage of their practice that was dedicated to court-appointed work, and the percentage of their income that was derived from court appointed work.

Q14 Approximately how many court-appointed cases did you handle in 2019?

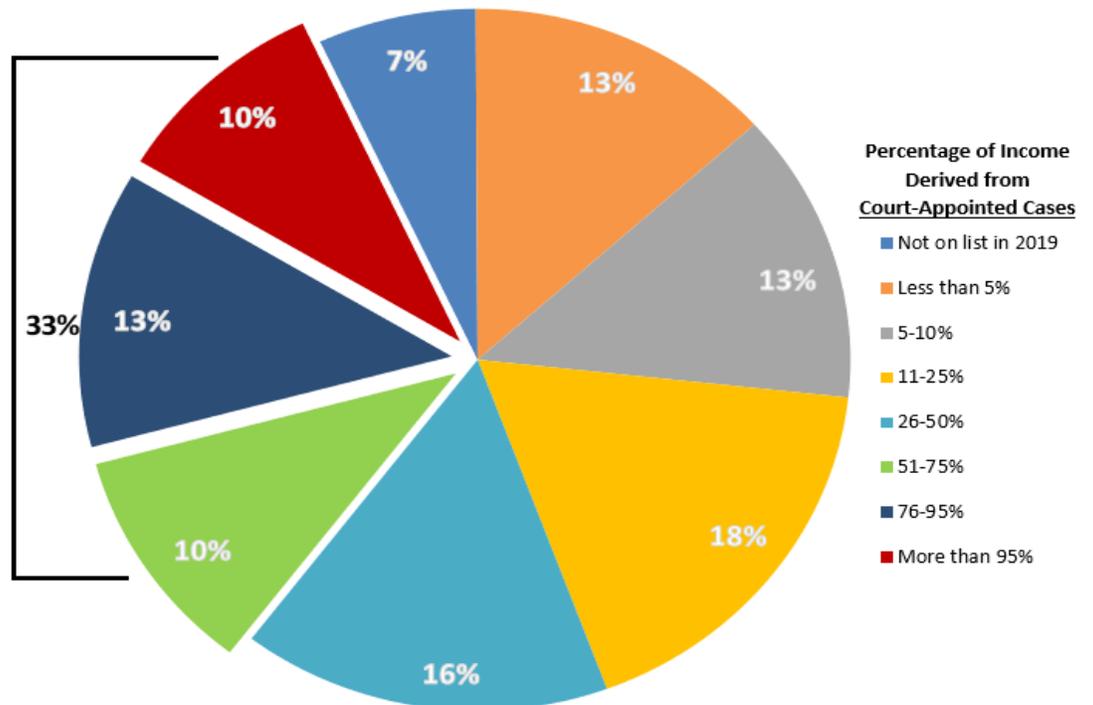
ANSWERS	RESPONSES	
0 to 5	11.74%	35
5 to 10	6.71%	20
11 to 20	6.71%	20
21 to 30	9.73%	29
31 to 40	2.68%	8
41 to 50	10.07%	30
51 to 60	3.36%	10
61 to 80	5.37%	16
81 to 100	8.72%	26
101 to 150	10.07%	30
151 to 200	8.72%	26
201 to 250	5.37%	17
251 to 300	6.04%	18
301 to 400	1.68%	5
401 to 500	2.01%	6
501+	1.01%	3
TOTAL RESPONSES		299
TOTAL CASES		42,978
AVERAGE CASES PER RESPONSE		143.74

Q15 What percent of your legal work in 2019 was dedicated to court-appointed cases?



47% of responding attorneys indicated that a majority of their work in 2019 was dedicated to court-appointed cases.

Q16 What percent of your income in 2019 was derived from court-appointed cases?



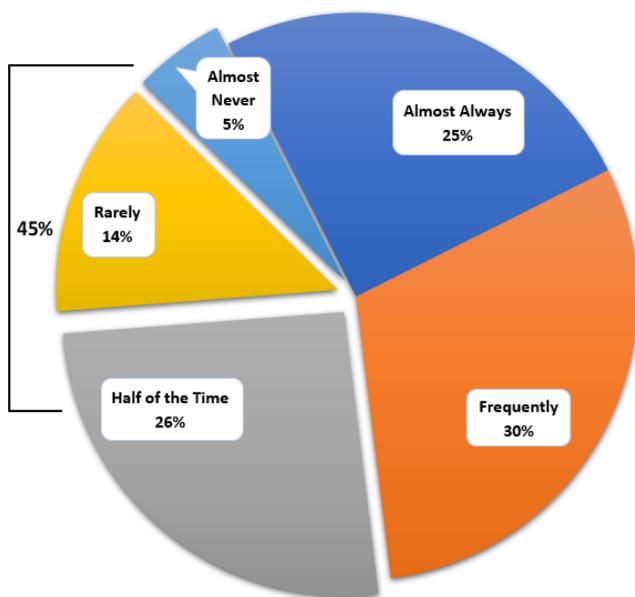
However, only 33% of respondents indicated they derived a majority of their income from court-appointed work.

Sufficiency of Time

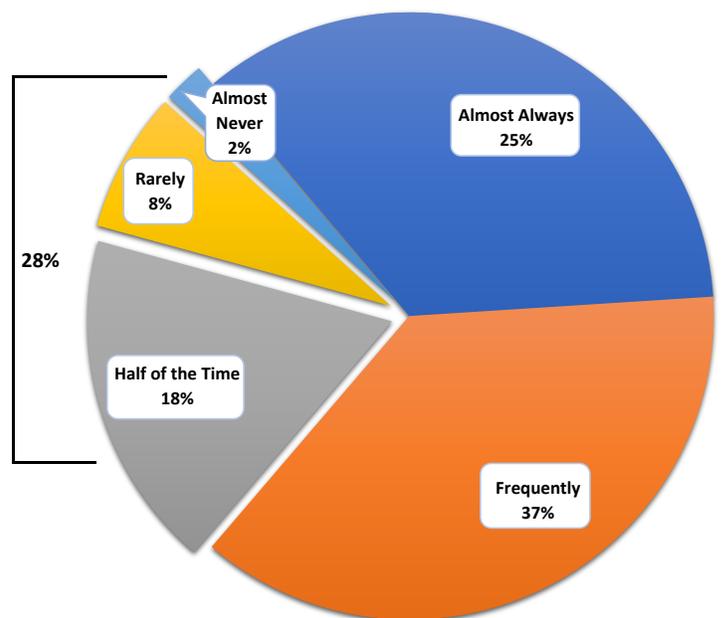
Attorneys were asked whether they had sufficient time to perform a series of essential tasks with reasonable effectiveness in their court-appointed cases, taking into consideration their current caseloads. Attorneys answered on a five-point Likert scale ranging from “almost never” to almost always.” A significant percentage of PAC reported that they often did not have sufficient time to complete essential tasks with reasonable effectiveness.

Q18 Considering your current caseload, please indicate whether you have sufficient time to perform the following tasks with reasonable effectiveness in hour court-appointed cases:

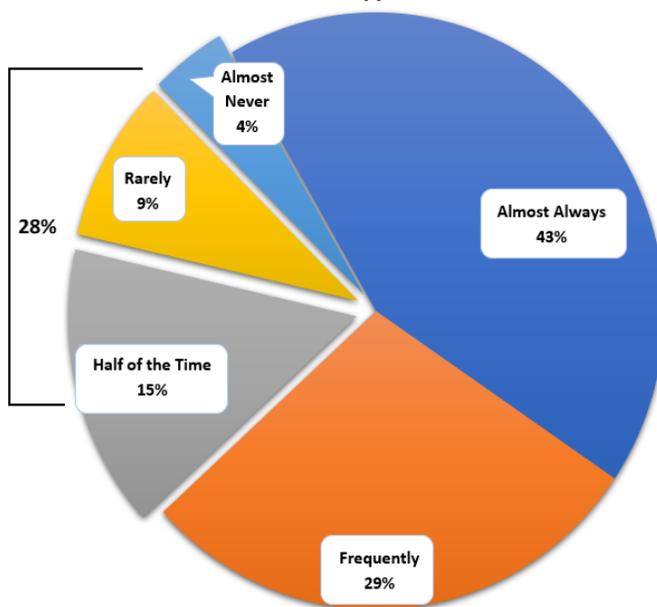
Sufficient Time to have In-Person Client Contact in 2019 Court-Appointed Cases



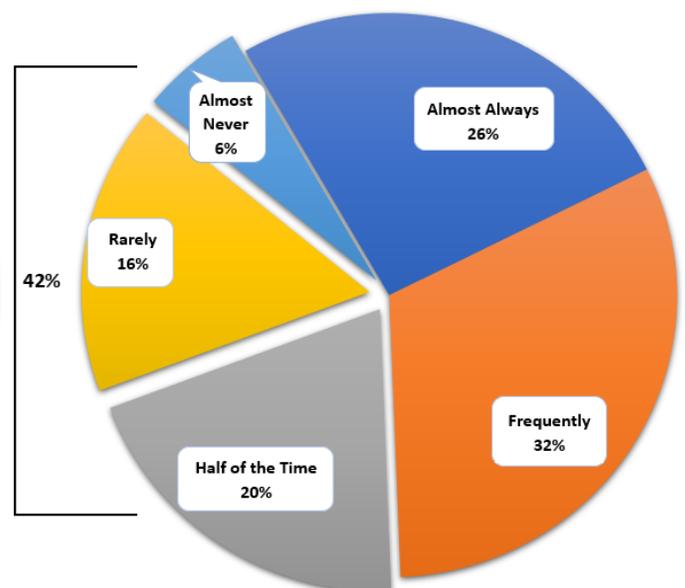
Sufficient Time for Client Communication in 2019 Court-Appointed Cases



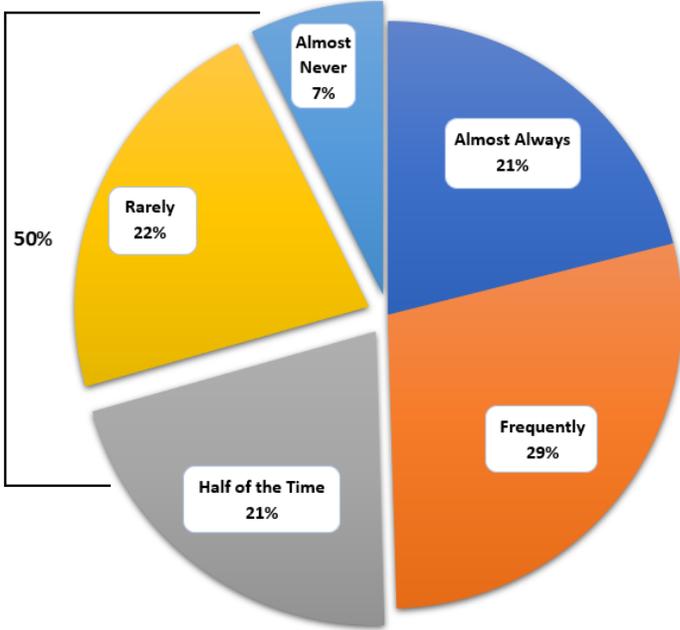
Sufficient Time for Discovery Review in 2019 Court-Appointed Cases



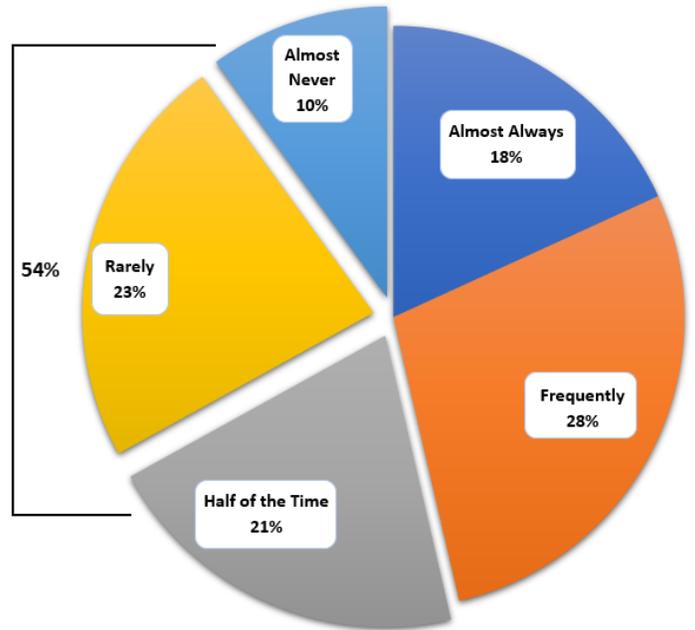
Sufficient Time for Drafting Motions and Other Pleadings in 2019 Court-Appointed Cases



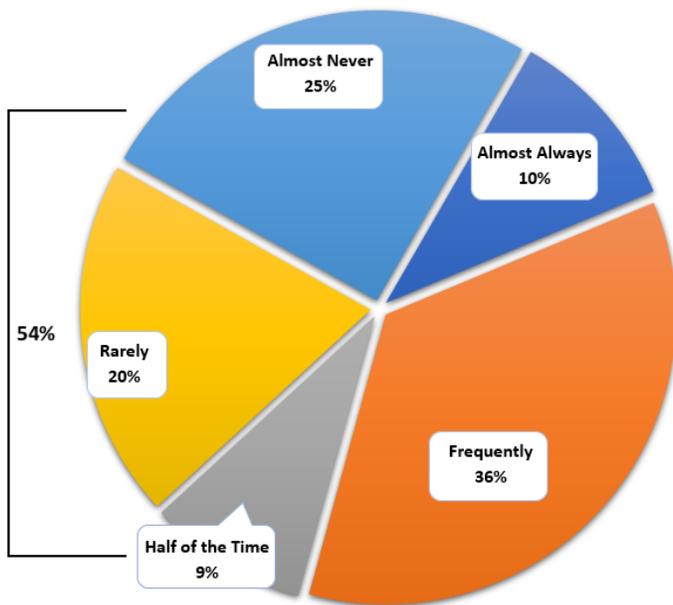
Sufficient Time to Perform Legal Research in 2019 Court-Appointed Cases



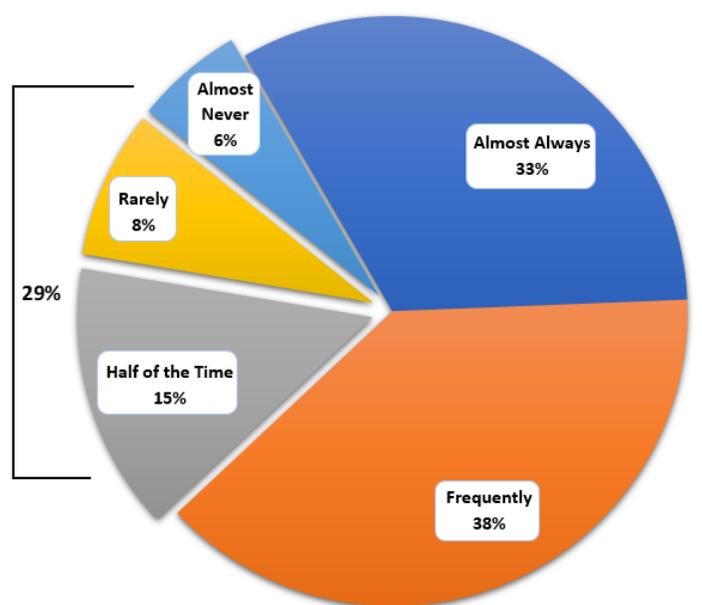
Sufficient Time for Interviews and Investigations in 2019 Court-Appointed Cases



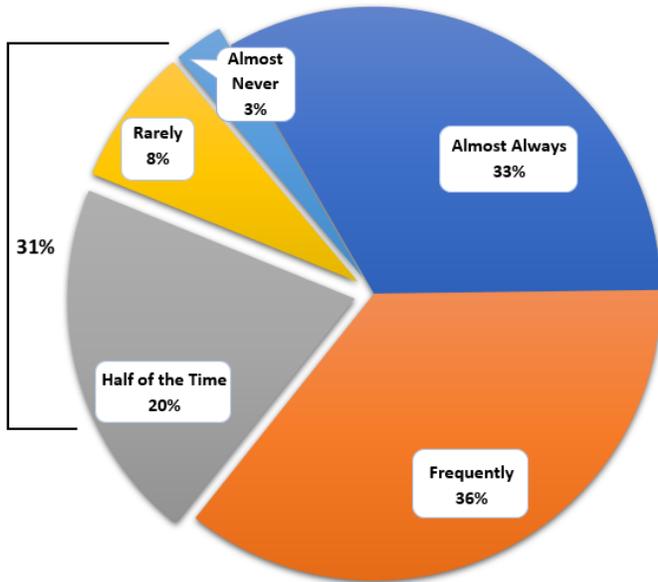
Sufficient Time to Obtain Expert Assistance in 2019 Court-Appointed Cases



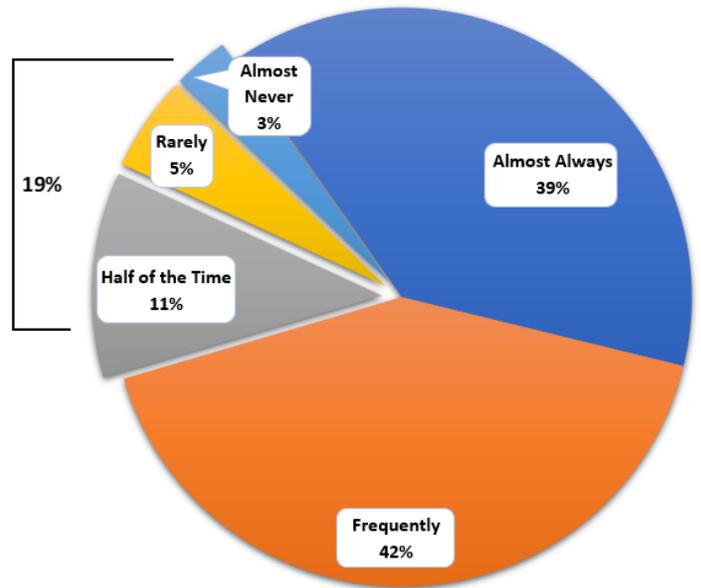
Sufficient Time for Negotiations in 2019 Court-Appointed Cases



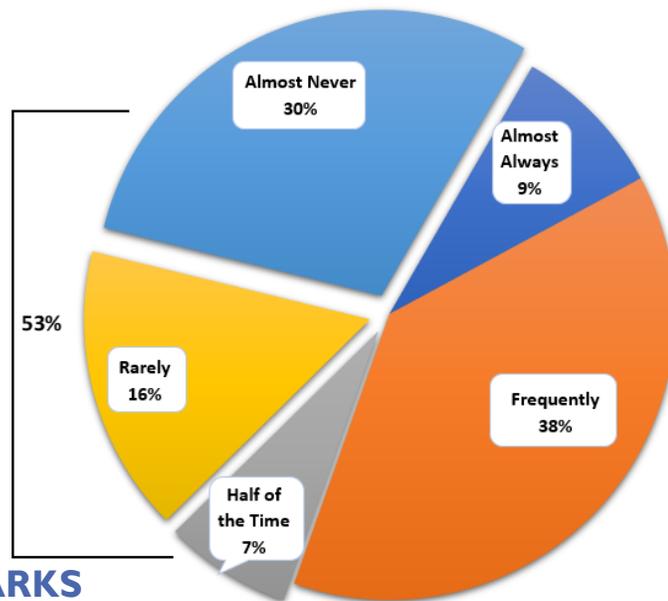
Sufficient Time to Prepare for Hearings/Trials in 2019 Court-Appointed Cases



Sufficient Time in Court in 2019 Court-Appointed Cases



Sufficient Time for Post-Trial Work in 2019 Court-Appointed Cases



CLOSING REMARKS

An alarming number of attorney respondents reported that, due to the size of their caseloads, they were unable to perform critical tasks with reasonable effectiveness. Moreover, attorney responses indicated that experienced attorneys are choosing to remove themselves from local court-appointed lists, contributing to the workloads of those attorneys remaining on the lists and leaving a less-experienced pool of attorneys to handle complex cases. When asked to explain their decision to remove themselves from court-appointed lists, a significant percentage of attorneys cited “low compensation rates” as a contributing factor. Based on the results of this survey, the Subcommittee is concerned that excessive caseloads may be hindering the ability of PAC to effectively represent their indigent clients.

OFFICE OF THE CAPITAL DEFENDER MEMORANDUM

TO: IDS Executive Director, IDS Commission Chair
FROM: ROBERT E. SHARPE, JR.
DATE: 10/27/2021
RE: OCD Status Report and Request For Increase to Potentially Capital PAC Rate At the Trial Level

As we all know, the goal of the Office of the Capital Defender (OCD), N.C. Indigent Defense Services (IDS), and the N.C. Courts is, simply put, to do justice.

OCD’s role is to provide qualified counsel and useful resources to indigent persons charged with a crime for which the death penalty is a possible punishment. The vast majority of North Carolinians who are over 18 years of age and charged with First-Degree Murder are indigent because the private cost of such a representation would often range in the six digits.

There exists a continuing shortage of attorneys ready, willing, and able to accept potentially capital cases. Even those persons with the skill and inclination to do the work are overburdened with cases to an extent that is unsustainable.

In October of 2020, OCD reported to the IDS Commission that the caseload was rapidly growing, presumably due to COVID’s impact on dispositions.

OCD described a plan to improve recruitment, increase the number of appointments per qualified attorney, and utilize out of county counsel with greater frequency. Over the past year, these things have been done, but the general roster number remains inadequate.

Since September 1, 2020, OCD has added 40 people to the capital roster. This is a greater recruitment than normal.

Since October 1, 2020, OCD has had 37 people withdraw from the capital roster. Below, I give their stated reasons, their number, and whether I believe that pay rate played a role in the decision.

<u>REASON</u>	<u>Number</u>	<u>Financial Implicated</u>	<u>Percentage</u>
Job Change	6	YES	16.2%
Judgeship	4	YES	10.8%
Retired	9	No	24.3%
Passed Away	2	No	5.4%
Financial	5	YES	13.5%
Health	4	No	10.8%
Unknown/Other	7	Unknown	18.9%

Since November 1, 2020, OCD has seen the number of pending cases across the state go from approximately 1,800 to 2,200. A 22% increase in one year.

Today, our roster is at 356 – the lowest point since my arrival 6 years ago.¹

RECOMMENDATIONS

At the creation of IDS potentially capital cases paid \$95 per hour, felonies paid \$65, and misdemeanors paid \$55. This \$95 rate was greater than the rate paid for federal misdemeanor cases. Hence, many of the state's top defense attorneys were attracted to state capital work.

The \$95 rate was paid without regard to the state's charging decisions.

In the years that followed, IDS increased the various rates, but these increases were short lived. Rate reductions due to funding issues became a necessity.

IDS created rate tiers for potentially capital cases. One rate for cases that the state declared they were seeking death in, another for cases where a year had passed without declaration or the state had declared that they were not seeking death, and a third rate for the time between appointment and declaration.

At or near IDS's inception, capital defense counsel made 5.5% more than attorneys doing federal misdemeanors, 46% more than attorneys handling state felonies, and 72% more than attorneys handling state misdemeanors.

The three current capital counsel rates are \$80, \$85, and \$90 per hour.

If there were still a single capital rate and IDS paid the attractive wage of its inception, then counsel would earn over \$160 per hour at 5.5% above the federal rate.

Today, **most attorneys who dispose of first-degree murder cases, will do so making the \$80 rate.** This is the same rate that appointed counsel is paid for Class D felonies such as; Child Abuse Inflicting Serious Physical Injury, First-Degree Burglary, Death by Vehicle, First-Degree Arson, Sell or Deliver a Controlled Substance to a Person Under 16 But More than 13 Years of Age, and Armed Robbery.

In the past, there was a greater financial incentive for the best trial counsel to do this work. This allowed OCD to be more selective in its roster selection process and incentivized trial attorneys to want to do this difficult work.

I would recommend a single rate for capital trial counsel. This has advantages for counsel and IDS staff and no longer gives prosecutors the ability to control counsel's rate indirectly or otherwise. I would recommend an amount that creates a clear divide between counsel who perform upper-level felony work and capital trial counsel. **A rate that would meaningfully incentivize skilled trial counsel across the state to do state capital work.**

¹ In 2015, the roster number was much higher. However, many of those on the roster had ceased practicing law or had otherwise stopped doing capital work.

I believe **OCD's greatest competitor for skilled trial counsel is the federal appointed system. A matching rate of \$160 per hour is optimal, but a lesser amount may still be viewed as competitive** by skilled trial counsel across the state.

If this is not possible, then **IDS may wish to adopt a fee schedule that provides additional pay based on counsel's experience.** Foreseeable problems would include administering such a system and concern that so-called less experienced counsel are being appointed.

If it cannot increase the capital rate, then **IDS may need to consider lowering the capital roster standards.** This is not optimal.

