Guidelines to Determine Eligibility for Indigent Defense Services

I. Introduction

The ND Commission on Legal Counsel for Indigents provides indigent defense services in those matters in which a person has a constitutional, statutory, or rule based right to counsel, if the person is "indigent." Thus, the type of case must be one in which the party has a right to counsel, and the party must be indigent. If one of these conditions is not met, indigent defense services are not provided by the Commission.

II. Right to Counsel

A. Circumstances in which there is a right to counsel provided by the Commission

Parties may apply for indigent defense services to be provided by the ND Commission on Legal Counsel for Indigents when they have a "right to counsel." A party has a right to counsel provided by the Commission, under the following circumstances:

Defendant charged with a felony in District Court (N.D.R. Crim. P. 44 (a) (1)).

Defendant charged with a Class A or Class B Misdemeanor in District Court, unless the Court has determined that there is no possibility of imprisonment, including a suspended sentence of imprisonment or a deferred imposition of sentence (N.D.R. Crim. P. 44 (a) (2)), but not a matter transferred from or on appeal from Municipal Court.

Parent, legal guardian, or custodian, in the dispositional stage of any juvenile proceedings regarding allegations of unruliness or delinquency (NDCC § 27-20-26 (1)). A parent, legal guardian, or custodian does not have a right to an attorney in the adjudicatory stage of a juvenile proceeding regarding allegations of unruliness or delinquency.

Parent, legal guardian, or custodian, in a deprivation matter under the Uniform Juvenile Court Act (NDCC § 27-20-26 (1)).

Child in any juvenile case, at custodial, post-petition, and informal adjustment stages (NDCC § 27-20-26 (1)).

Parent in a termination of parental rights proceeding under NDCC Ch. 27-20.

Parent in a termination of parental rights proceeding under NDCC Ch. 14-15, except for a parent who consents to termination of parental rights for a child

being placed for adoption by a licensed child placing agency. For services to be provided by the Commission to such parent, the court must first have ordered the state's attorney to serve as legal counsel for the parent, and then found that the state's attorney has shown a conflict exists in representing the parent.

Parties in a guardianship action brought under the Uniform Juvenile Court Act (NDCC § 27-20-26).

Interstate Compact on Juvenile matters when required pursuant to NDCC § 27-22-02.

Juvenile in an abortion proceeding brought under NDCC Ch. 14-02.1.

Respondent in a child support enforcement action (Order to Show Cause or arrest on warrant) - but only if a judicial determination has been made that jail is a likely sanction, and only as to the "contempt" portion of the case.

Respondent in a civil contempt proceeding under NDCC Ch. 27-10, but only if a judicial determination has been made that jail is a likely sanction.

Respondent in confinement proceedings for those with communicable diseases brought under NDCC Ch. 23-07.6.

Petitioner suspected of having human immunodeficiency virus requesting review of a Protective Order issued under NDCC Ch. 23-07.4 (NOTE: The right to counsel is only for review of an order issued by the State Health Officer, and is not available at the administrative agency stage).

Developmentally disabled respondent in a hearing for psycho surgery under NDCC Ch. 25-01.2.

Defendant in an extradition proceeding (NDCC Ch. 29-30.3 and Ch. 29-06.1).

Petitioner in a pending Uniform Post Conviction Act proceeding brought under NDCC Ch. 29-32.1.

Proceedings under NDCC § 12.1-04.1-20 through § 12.1-04.1-25 regarding an individual found not guilty of a charge by reason of lack of criminal responsibility.

Upon appeal of any case in the categories listed above.

B. Circumstances in which there is no right to counsel provided by the Commission

Defendant charged with a Class A or Class B Misdemeanor in District Court, where the Court has determined that there is no possibility of imprisonment, including no possibility under a suspended sentence of imprisonment or a deferred imposition of sentence.

Municipal court misdemeanors transferred or appealed to District Court (NDCC § 40-18-06.2; id. § 40-18-15.1; id. § 40-18-19; id. § 29-07-01.1 (1)).

Any other appeal or post-conviction matter seeking relief from a conviction resulting from a violation of a municipal ordinance. NDCC § 29-07-01.1 (1).

Defendant charged with the violation of a home rule county ordinance (NDCC § 11-09.1-14; id. § 29-07-01.1 (1)).

Defendant charged with an infraction (NDCC § 12.1-32-03.1).

Parent, legal guardian, or custodian in an informal adjustment proceeding or in a proceeding commenced under section 27-20-30.1 (disposition of a child needing continued foster care services) (NDCC § 27-20-26 (1)).

Parent, legal guardian, or custodian in the adjudicatory state of a juvenile proceeding regarding allegations of unruliness or delinquency (NDCC § 27-20-26 (1)).

Respondent in a mental health civil commitment matter (NDCC §§ 25-03.1-09 (2), 25-03.1-13 (4), 25-03.1-26, 25-03.1-31).

Respondent in a sex offender civil commitment matter (NDCC § 25-03.3-09 (3)).

Defendant or Respondent in a forfeiture matter.

Defendant's Rule 35 Motion to Reduce Sentence brought after the expiration of the time to appeal, or if an appeal was filed, brought after the dismissal of the appeal or the Supreme Court's mandate in the appeal.

Petitioner in a habeas corpus matter under NDCC Ch. 32-22.

Where a case has concluded and nothing is currently pending before the Court.

III. Determining Indigency

A. Application Process

A party seeking indigent defense services has the burden of showing that he or qualifies for indigent defense services. Services will not be provided unless a properly completed application is submitted, and a finding made by the court that the party qualifies for services.

Applications for appointed counsel shall be made on the standard application form provided by the Commission. See Appendix A (application forms for criminal, juvenile, and civil matters).

Only those cases for which an attorney can be provided by the Commission should be listed on the application.

1. When to apply/re-apply?

A party seeking indigent defense services must apply for services for each "case assignment." See Appendix B (What constitutes a "Case Assignment"). If a party is applying at one time for services on multiple case assignments, a single application may be submitted, but it is important to note all of the court file numbers on the application.

Indigent defense services are only provided for the duration of a "case assignment." Once that case assignment terminates, services are no longer provided, even though the court file may still be an open file. If the "case assignment" has terminated, and the party wants indigent defense services in the matter, such as for a later hearing, the party must re-apply for services.

An exception is for a direct appeal of a criminal matter or a post-conviction matter. The defendant does not need to reapply for services for a timely direct appeal of a criminal conviction or a timely appeal of the denial of a petition for post-conviction relief, if the defendant had an attorney provided by the Commission for the underlying criminal or post-conviction case.

Another exception is for the appeal of an order or judgment terminating parental rights. A party whose parental rights were terminated, does not need to reapply for counsel for a timely direct appeal of the order or judgment terminating those rights, if the party was represented by an attorney provided by the Commission on the underlying TPR matter.

2. Who should apply?

Generally, the party seeking indigent defense services must complete the application.

However, in a matter under the Uniform Juvenile Court Act, a child under the age of 18, is not considered indigent if the child's parent can provide for full payment of legal services. (NDCC § 27-20-26 (2)). Therefore, if counsel is sought for a child under the age of 18 in a Uniform Juvenile Court Act matter, the parent(s) should complete the application. If the parent(s) refuse to complete the application, the court should order the parent(s) to do so. If the parent does not do so, or is absent from the jurisdiction, the child can fill out the application with the parent's information to the best of the child's ability. The person who is responsible for reviewing the applications should then write on the application that the parent refused to complete the application or that the parent is absent from the jurisdiction.

In a matter under the Uniform Juvenile Court Act, where counsel is sought for a "child" under the age of 20 for a delinquent act committed when the child was under the age of 18, or for a "child" between the ages of 18 and 21 who is in need of continued foster care services, the child should complete an application for indigent defense services. The child should use the application captioned "For an Adult in a Juvenile Case." This is the same form that a parent who is seeking an attorney for him/herself in a juvenile matter would use.

3. Application Fee

Pursuant to NDCC 29-07-01.1, there is a $35 application fee which is due at the time an application is filed in a criminal case, in District Court. There is no statutory authority to charge the $35 application fee for any other type of case.

This fee may be waived or reduced if the applicant cannot afford to pay it. If the fee is not waived, and had not been paid when the application was submitted, the amount is added to any costs that are ordered to be reimbursed at the conclusion of the case.

An application cannot be rejected because the fee is not paid at the time it is filed.

4. Review of the Application

a) Who may review the application?

Review of applications for indigent defense services in criminal, civil, or family cases may be done by a judge, or delegated by the judge to a referee, or staff in the clerk of court office or district administration staff. Review of applications for indigent

defense services in juvenile cases may be done by a judge, or delegated by the judge to a referee, staff in the juvenile court or district administration staff.

Review of applications should be delegated only to those persons who have been provided appropriate training on (a) the circumstances under which a party is entitled to appointed counsel, (b) the circumstances under which additional information is required before determining eligibility, and (c) application of the financial guidelines for eligibility.

b) Sufficiency of information

All applications received are to be reviewed for adequacy of information. Incomplete applications, and applications with missing information, such as those with lines drawn through the assets lists, or with all zeros without some explanation as to why the applicant has no income or assets, shall be promptly returned to the applicant, along with a clear explanation of what additional information is need. See Appendix C (Sample notice of inadequate information).

c) Decision on the application

A decision on an application must be made within 48 hours of filing and the applicant promptly notified of the results. If the decision is that the applicant is eligible, notice shall be given immediately to the Commission or lead firm, as indicated in Section IV Assignment of Counsel, so that counsel may be promptly assigned.

B. Determining Eligibility

1. General Guidelines

a) Close questions regarding an applicant's indigency should be resolved in favor of eligibility. This will assist case processing, protect constitutional rights, and will be balanced by more active recoupment procedures.

b) Early appointment of counsel is desirable, for the parties, the attorneys, and the court. Therefore, it is important that a prompt determination be made as to whether the applicant qualifies for indigent services.

c) The eligibility determinations for indigent defense services based on financial resources should not impose an extensive time burden on court officials.

d) The applicant should be reminded of the penalties for giving false information in the eligibility determination process.

e) Early in the proceedings, the applicant must be notified by the judge presiding in the case and by indigent defense counsel that the applicant may be subject to recoupment for the fees and expenses of counsel.

f) Any indication of anticipatory transfer of assets by defendant to create the conditions for eligibility for defense services should be scrutinized and dealt with decisively.

g) The judge may wish to inquire periodically throughout the proceedings regarding substantial changes in the applicant's financial status. If it is determined that the applicant no longer qualifies for indigent defense services, the Commission requests that an order be entered to that effect, and counsel be released from the representation. If the case has progressed to the point where releasing counsel from representation will have an extreme disruption on the flow of court proceedings, this information should be considered in the recoupment process at the end of the court proceedings.

2. Automatic qualification for indigent defense services

Eligibility for TANF (Temporary Aid to Needy Families), SSI (Supplemental Security Income, not Social Security benefits), and Medical Assistance for the Elderly, is determined based on poverty threshold guidelines, and include asset limitations. If an applicant is personally receiving any of these governmental benefits, he or she also qualifies for indigent defense services. In order to automatically qualify under this provision, the applicant must attach documentation to the application which show that he/she personally receives one of these benefits. If documentation is not attached, the entire application must be completed, and eligibility is determined by a review of the entire application.

3. Factors to be considered in determining eligibility when the applicant is not automatically qualified

When determining whether a party is eligible for indigent defense services, consideration should be given to all of the following factors:

a) income resources;
b) non-income resources; and
c) exceptional factors such as extraordinary financial conditions that would prevent the applicant from hiring an attorney

a) Income Resources

The financial guidelines used to assess indigency are set at 125% of the federal poverty level. The United States Department of Health and Human Services makes an annual determination of the poverty level threshold. These guidelines are updated annually in January. Every office should have a form with the most current guidelines; this form is captioned "Income Guidelines." The 2014 Income Guidelines are attached to this document as Appendix D. The most current form may be obtained from the office of the Executive Director of the Commission, or on the Commission's website.

Applicants with income resources in excess of 125% of the federal poverty level, as indicated on the current version of the "Income Guidelines," will generally not qualify for indigent defense services. However, such applicant should not be automatically denied services, consideration should be given to the exceptional factors in Section III (B) (3) (c), on page 10.

To determine income resources, the person reviewing the application must determine the applicant's total income resources and the applicant's household size.

The applicant's income resources include total cash receipts before taxes of the applicant and those persons who are legally responsible for the applicant.

1) Sources of income resources

Income resources include the value of any of the following:

a. money, wages and salaries before any deductions;
b. income from self-employment after deductions for business or farm expenses;
c. regular payments from social security, strike benefits from union funds, veteran's benefits, training stipends, alimony, child support and military family allotments or other regular support from an absent family member or someone not living in the household, or foster care payments;
d. public or private employee pensions, and regular insurance or annuity payments;
e. income from dividends, interest, rents, royalties, estates or trusts;
f. benefits from a governmental income maintenance program (unemployment compensation, or state or county general assistance or home relief);
g. food or rent received in lieu of wages;
h. money which is received from sale of real or personal property, or received from tax refunds, gifts, one-time insurance payments or compensation for injury;
i. non-cash benefits (Food Stamps, etc.); and

j. payments from rental of Indian Trust Land and Tribal per capita payments authorized by the Indian Claims Commission.

Bail funds should not be included in determining defendant's income.

Some applicants will only know their net income. Gross income may be imputed by adding a 27% estimated tax withholding.

2) Determining who is legally responsible for the applicant:

A husband and wife have a mutual duty of support (NDCC § 14-07-03). Therefore, the spouse's income and assets should be considered when determining whether the applicant qualifies for indigent defense services. If there is some reason in a specific case why the spouse's income or assets should not be considered, the applicant should indicate this on the application form, and give a detailed explanation. (An example of an exception to the general rule might be a situation where a husband and wife keep their income, assets, and liabilities totally separate from each other.)

A natural parent or adoptive parent is legally responsible for an applicant who is under the age of 18.

Indigency of a child under the age of 18 in a matter brought under NDCC Ch. 27-20 should be determined by the financial status of the parents. NDCC § 27-20-26 (2).

A step-parent, guardian, or parent whose rights have been terminated is not legally responsible for an applicant who is under the age of 18.

Parents or other relatives who provide housing or other care for an applicant who is 18 years of age or older generally will have no legal responsibility for the applicant.

Eligibility for services for an adult under guardianship is based upon the resources of the applicant, not the resources of the guardian.

3) Determining Household Size

All individuals who are actually dependent on the applicant for financial support should constitute a single household for purposes of assessing income levels for eligibility for indigent defense services.

The applicant, the applicant's spouse and children who are the legal responsibility of the applicant are included as members of a single household. Adult children, step-children, grandchildren, parents, other relatives, girlfriends/boyfriends, girlfriends' and boyfriends' children, and other non-related persons who reside in the household will

generally not be considered the legal responsibility of the applicant and should not be counted as part of the household for purposes of determining eligibility. However, in exceptional circumstances, such persons can be considered as part of the "household" (such as when the applicant's grandchildren live with the applicant, but the parent of the children is absent and not supporting the children).

If the applicant has indicated that the spouse's income and assets should not be considered for some specified reason, the spouse should not be included in the members of the household.

b) Non-Income Resources

These guidelines for non-income financial resource levels are offered as resource levels at or below which eligibility for defense services should be considered. If the applicant and those persons who are legally responsible for the applicant have non-income resources above these levels, the applicant will generally not qualify for indigent defense services. However, such applicant should not be automatically denied services; consideration should be given to any exceptional financial conditions which would prevent the applicant from hiring an attorney, and the estimated cost of defense services.

Absent exceptional circumstances, an applicant with equity in real and/or personal property in excess of $20,000 will not be considered indigent.

Indian Trust Land should not be considered when assessing non-income resources (Note: title to Indian Trust Lands in held by the federal government).

Personal property used to generate income, such as tools necessary for employment, should not be considered if it cannot be sold or encumbered without unnecessary hardship.

c) Exceptional Factors (Factors to consider that may or may not justify a finding that an applicant is eligible for indigent defense services, even though the applicant otherwise does not meet the eligibility criteria.)

An applicant whose income resources or non-income resources exceed these guidelines may still be eligible to receive indigent defense services based on the following factors:

a. Current income prospects, taking into account seasonal variations in income;
b. Age or physical infirmity of household members;

c. Outstanding and extraordinary medical bills or other necessary expenses which the applicant is paying for the applicant or for persons for whom the applicant is legally responsible;
d. The liquidity or non-liquidity of the applicant's non-income resources;
e. The estimated cost of obtaining private legal representation and other defense costs with respect to the particular matter for which assistance is sought;
f. The nature of the criminal charge; and
g. The anticipated complexity of the defense.
h. The obligation of the applicant to pay child support will not be considered an exceptional factor. The actual payment of child support pursuant to a court order, when such payment is a large percentage of the applicant's income, may be considered in the appropriate case, but only when supported by documentation of the order and documents showing such payment.

In order to consider a request for consideration of exceptional factors, written documentation must generally be included with the application.

C. Denial of Eligibility

A notification will be promptly sent to an applicant who is found to be ineligible for indigent defense services.

If the determination was made by someone other than a district court judge, the notification must contain a statement that the determination of ineligibility was an administrative decision based on information provided in the application. It must include a notice to the applicant that he or she has the right to request that a district court judge review the decision to deny indigent defense services. The notification must contain language indicating that the applicant must specify the grounds for the request and provide any additional information necessary for the judge to make a determination on the merits. See Appendix E (sample denial form); Appendix F (sample Order Upon Judge's Review of Finding of Ineligibility for Indigent Defense Services).

A criminal defendant is not required to submit an additional fee to have the district court judge review the decision to deny indigent defense services. Similarly, if the defendant's circumstances change and he/she reapplies for services in a case assignment in which services were previously denied, no additional fee is required.

IV. Assignment Process

A. Assignment of Counsel

Assignment of counsel is the responsibility of the Commission or a designee of the Commission.

In those districts where the Commission has opened a public defender office which serves as "lead firm" or has contracted with a lead firm, the court shall provide the Notice of Eligibility for Appointed Counsel to the lead firm for assignment of counsel.

In those districts where there is no lead firm, the court shall provide the Notice of Eligibility for Appointed Counsel to the Office of the Executive Director of the Commission for assignment of counsel.

A unit administrator may enter into an agreement with the Commission to allow clerk staff to assign counsel based on an assignment schedule provided by the Executive Director of the Commission.

Assignment of conflict counsel is the responsibility of the Commission and will be handled by the Commission, by a public defender office, or by the lead firm, where one is available.

An indigent person has no right to counsel of his or her own choosing, and counsel will not be assigned based on the party's request for certain counsel, or vague claims of dissatisfaction with a particular attorney in prior cases, but rather by the standard procedures for assignment of counsel.

B. Notification of Assignment of Counsel

Notification to the applicant of assignment of counsel is the responsibility of the Commission or its designee.

Procedures already in place in each office for assigned counsel to obtain copies of files shall continue.

V. Review of a determination that applicant is eligible for indigent defense services

It 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 would effect their eligibility. Additional screening is necessary to curb abuses, and to insure that services are available for those who are truly indigent.

It is not unusual that the timelines are such that counsel must be provided immediately upon application, without the opportunity to double check questionable information. Therefore, if the applicant has submitted a complete application and it appears from the information submitted in the application and in any additional submitted documentation that the applicant does qualify for services, services should be provided prior to any additional screening process to as to not cause a delay in the case.

Additional screening of applications will be conducted in the following instances:

a. Applications filed by an adult that indicate no income (unless the applicant is incarcerated in the State Penitentiary);
b. Applications that are substantially different from a prior application which was used to determine that the applicant was ineligible for indigent defense services;
c. Upon the request of the state's attorney or the Commission;
d. Upon receipt of information from any member of the public purporting to show that the applicant is not indigent;
e. As prescribed by a random screening program adopted by the judicial district or by the Office of the State Court Administrator, or the by the Commission; and
f. Sua sponte by the judge.

Further screening requires the applicant to meet with a representative of the court and bring with them ~~a~~ current bank statements and a copy of the prior year's income tax return.

At the meeting the court shall make inquiry as to past employment, and current status of unemployment compensation, workers compensation, disability payments, welfare benefits, and other sources of support, including inquiry regarding current household arrangements. Whenever possible, the meeting shall be done privately. The screener must note the results of the meeting and attach them to the application.

If after screening, the screener determines that the applicant does not appear to be eligible for indigent defense services, the screener shall send a written notification to the applicant of the determination and the basis for the determination. A copy of the notification shall be sent to the defense attorney, and the Commission.

If it is determined that the applicant does not meet the criteria for indigent defense services, the Commission requests that the Court enter an order to that effect, and release counsel from the representation. If the case has progressed to the point where releasing

counsel from representation will have an extreme disruption on the flow of court proceedings, representation may be continued.

VI. Substitution of Appointed Counsel

Prior to any appearance by the attorney in a case, a substitution of counsel may be made by the lead firm or the Commission upon notification by assigned counsel of a conflict of interest.

If counsel discovers a conflict of interest after he or she has made an appearance on the case, counsel must file a Motion to Withdraw as Counsel.

The motion must be served upon any opposing counsel and the defendant. A hearing should be requested when required by the Policy on Withdrawal.

VII. Complaint Procedure

Court staff receiving complaints regarding an indigent defense attorney's responsiveness to clients or the court, or their effectiveness in representing clients, or their ability to establish a working relationship with clients, must provide the complainant with a copy of the Commission's form: "Complaint Procedure." See Appendix G (complaint form). This same form should be given to an applicant who is requesting assignment of a different attorney.

This procedure requires that the applicant put the complaint in writing before the Commission will respond to it.

Judicial concerns related to the performance of counsel should be referred to the Office of the Executive Director of the Commission.

VIII. Assessment and Collection of Fees for Indigent Defense Services

Recoupment of indigent defense costs and expenses is authorized by statute in criminal matters, post-judgment proceedings, and juvenile matters. NDCC § 12.1-32-08; id. § 27-20-49; id. § 29-07-01.1; id. § 29-32.1-05. In juvenile matters, the parents are responsible for the attorneys fees and expenses for a child under the age of 18. If the child is aged 18 or older, the child is responsible for his/her own attorney fees and expenses.

Unless the Court finds that there is no likelihood that the indigent party is or will be able to pay attorney's fees and expenses, the court, in its judgment or conviction, order following a revocation or other post-conviction proceeding, or order or judgment following a hearing under chapter 27-20, shall order the party to reimburse the presumed amount of indigent defense costs and expenses, and notify the party of the right to a hearing. See Appendix H for presumed amounts.

If the party or the state requests a hearing, the Court shall schedule a hearing at which the actual amount of attorney's fees and expenses must be shown. Following this hearing, the court determines the amount of reimbursement, and the method of payment, considering the financial resources of the party and the nature of the burden that reimbursement will impose.

Version March 20, 2014