

Supreme Court Clerk's Office - Keller, Heather

From: Delaney, Jean <jedelaney@nd.gov>
Sent: Thursday, December 29, 2016 9:57 AM
To: (SUP) Clerk of Court Office
Subject: 20160436
Attachments: doc12178420161229103505.pdf

Dear Ms. Miller:

Kindly find attached comments on behalf of the Commission on Legal Counsel for Indigents in Court File No. 20160436.

Sincerely,

H Jean Delaney

NDCLCI

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H. Jean Delaney, Executive Director

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December 29, 2016

Penny Miller
Clerk of the ND Supreme Court
via email only

Re: Supreme Court File No. 20160436

Dear Ms. Miller:

The North Dakota Commission on Legal Counsel for Indigents submits this report in response to the Court's query following receipt of the petition of Mr. William Tilton and others.

The Commission was approached regarding a petition to relax the rules to permit out of state attorneys to represent defendants from Dakota Access Pipeline protests. The Commission has considered the petition and determined that it would not support it nor oppose it. As will be explained in further detail below, the Commission is meeting its mission of providing quality representation for all indigent defendants in the state of North Dakota. While there may be extraordinary costs associated with it, the Commission's employees and contractors are rising to challenges of providing quality representation in the large number of DAPL assignments.

Mr. William Tilton spoke to the Commission at its November 18, 2016 meeting, and requested the Commission join in support of a petition he would be filing to seek temporary loosening of the requirements for admission to practice law, to permit out-of-state attorneys to represent pipeline protesters. The Commission directed me to provide a letter to the Supreme Court, once the petition was filed, outlining how indigent defense has been impacted by the DAPL protester cases.

The Commission is governed by NDCC Ch. 54-61. It “provide[s] 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.” NDCC § 54-61-01. 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 submit a properly completed application for services, be found by the court to be “indigent,” and it must be a type of case in which one has a right to counsel at public expense.

The South Central Judicial District is the busiest judicial district for the Commission. Case assignment numbers have increased from 2905 in Fiscal Year 2012 to 4158 in FY16. This is an increase of 43%. Without including DAPL cases, FY17 looks to be at least as busy as last year. With the DAPL assignments, it is expected that there will be a significant increase in case assignments.

The Commission uses the term “case assignment” rather than “case” when referring to assignments. “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. It appears that in the SCJD, defendants are charged in one complaint with multiple counts, with one case number, so that one SCJD court file number/court case should be the same as one of the Commission’s case assignments.

Indigent defense services are provided in the SCJD through the four attorneys in its Bismarck- Mandan Public Defender office, 18 monthly adult criminal case contractors whose contracts limit the number of assignments the contractor takes per fiscal year, three juvenile contractors, and several hourly conflict contractors who are asked to take assignments when needed. Additional monthly contracts have been added recently over the past few months, to deal with the increases in case assignment numbers in the district. More contractors/contracts will be needed to handle some of the assignments later this fiscal year when the current monthly contractors have reached the number of assignments permitted under their contracts.

As of December 19, 2016, statistical records kept by the Commission reveal the following:

There have been 553 court cases filed in district court in the South Central Judicial District resulting from the DAPL protest; there were also 43 city transfer cases filed, however, the Commission does not provide attorneys in municipal matters and so will not include that number in any of its calculations.

The Commission has assigned attorneys in 291 case assignments arising out of the DAPL protest. This is approximately 53% of the DAPL court cases.

An attorney has been assigned in all cases in which someone has been found eligible to have indigent defense services provided by the Commission, and in which a notice of eligibility was sent to the Bismarck–Mandan Public Defender office directing the assignment of an attorney.

The Commission has assigned the DAPL matters to 81 attorneys. All four attorneys in the Bismarck-Mandan office have taken some assignments; eight public defenders from other public defender offices have been assigned cases; seventeen monthly contractors in the SCJD have been assigned; seven hourly/conflict contractors from the SCJD have taken assignments; and 45 hourly/conflict contractors from other districts and NW Minnesota have taken at least one each.

There are a few dates in which there were arrests of and resulting charges against many protesters from one event, under circumstances which required assignment of different counsel to each defendant. For one of these dates, 71 different attorneys have been needed; one attorney is a public defender from our Bismarck-Mandan office, seven are public defenders from other public defender offices, thirteen are monthly contractors in the SCJD; five are hourly/conflict contractors from the SCJD; and 45 are hourly/conflict contractors from other districts and NW Minnesota.

At this point, I'd like to commend the criminal defense bar in North Dakota, and the attorneys' willingness to help in these extraordinary circumstances. The great majority of the assignments were made to attorneys who already had monthly or conflict/hourly contracts with the Commission. When these attorneys were called and asked if the attorney would be willing to take one or more of these assignments, the majority of our contractors from other districts said yes. Former contractors and other attorneys who were known to specialize in criminal law were called and asked to sign a conflict contract and provide representation in one or more DAPL cases. Many said yes. Many of the attorneys who were unable to say yes to taking DAPL assignments indicated their willingness to take other regular criminal assignments in the SCJD if needed, either as a conflict contractor or a monthly contractor.

The DAPL case assignments are expected to be costly for this agency. The Commission has notified OMB that a deficiency appropriation in the amount of \$670,000 may be necessary for these matters. While there is no good way to determine how many more cases may be filed, the Commission assumed that it would be providing an attorney in a total of 490 criminal case assignments. It is my understanding that most of these matters are being set for jury trial, and at this time, a good portion of them are expected to be tried. The Commission's statistics show that a jury trial case assignment averages over 31 hours of attorney time; case assignments closed for other reasons (bench trial, plea agreements, etc.) average 5.5 hours. The Commission's contractors are paid at a rate of \$75/hour; monthly contracts are calculated to pay that same rate. Assuming one-half of the assignments will be disposed of by jury trial and one-half by other reason, a deficiency appropriation of at least \$670,000 will be needed. There would also be additional costs, such as attorney travel, mileage, witness fees, and other extraordinary expenses that are not included in that number. There will also be additional costs for any appeals.

In short, the DAPL case assignments have added significant work volume to an already

record-breaking year. The Commission and its employees and contractors are dedicated to their mission of providing high quality, professional, and effective defense services to those in need and will continue to fulfill it.

Sincerely,



H. Jean Delaney
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