

STATE OF NEW HAMPSHIRE  
2024 - 2025  
BIENNIUM BUDGET REQUEST



JUDICIAL COUNCIL

This hand-out contains background information about the Judicial Council, and other information and data supporting the Judicial Council's budget needs for the coming biennium.

**Judicial Council  
Mission:**

To oversee the delivery of effective legal representation to indigent New Hampshire residents in criminal, child protection and guardianship court proceedings and to engage in public/private partnerships for civil legal services.

As an executive branch agency, the Judicial Council serves to fulfill a major constitutional obligation by providing legal services in indigent criminal cases throughout the state.

The Council also fulfills other statutory directives necessary to providing lawyers and guardians in child protection cases and guardianship proceedings.

In recent years, the Council has expanded its role in delivering civil legal services and its commitment to them through expanded funding for New Hampshire Legal Assistance and through a contract with CASA of New Hampshire.

**BACKGROUND AND ROLE OF THE JUDICIAL COUNCIL**

The Judicial Council refers to both the board that serves as an institutional forum on issues affecting the administration of justice, and to a state agency, also called the Judicial Council, which executes the board's statutory duties of overseeing the delivery of legal services in a variety of criminal and civil legal matters.

The Council is made up of 22 members: 4 members of the judicial branch administrative council, appointed pursuant to supreme court rules; the attorney general or designee; a clerk of the superior court, selected by the chief justice of the superior court; a clerk of the circuit court, selected by the administrative judge of the circuit court; the president-elect of the New Hampshire Bar Association; the chairperson of the senate judiciary committee or a designee from such committee appointed by the chairperson; the chairperson of the house judiciary committee or a designee from such committee appointed by the chairperson; 8 other members appointed by the governor and council, 3 of whom shall be members of the New Hampshire Bar Association of wide experience who have been admitted to practice in the state for more than 5 years, and 5 of whom shall be members of the public who are not lawyers; 5 other members appointed by the chief justice of the supreme court, 3 of whom shall be members of the New Hampshire Bar Association of wide experience who have been admitted to practice in the state for more than 5 years, and 2 of whom shall be members of the public who are not lawyers. RSA 494:1.

The state agency has three employees: the executive director and two full-time staff.

The Judicial Council has 8 budget lines representing various criminal and civil legal services. The Judicial Council has a unique and varied role with each individual program.

- Civil Legal Services, Org. 1098
- Court-appointed Special Advocates (CASA), Org. 1099
- Non-CASA Abuse and Neglect, Org. 1101
- Guardian ad Litem, Org. 1092
- Public Defender, Org. 1094
- Contract Counsel, Org. 1093
- Assigned Counsel, Org. 1091
- Ancillary Non-Counsel Services, Org. 1103

Since being established by the Legislature in 1946, the Judicial Council's duties have expanded and are now defined in RSA 494:3 as follows: to serve as an institutional forum for the on-going and disinterested consideration of issues affecting the administration of justice; survey and study continuously the administration of justice within the state and the organization, procedure, practice, rules and methods of administration and operation of the courts of the state; to devise ways of simplifying judicial procedure, expediting the transaction of judicial business, and of improving the administration of justice; to recommend and provide general information to the general court, to the supreme court, to the superior court, to the circuit court, to any public official, department or agency or to the state bar association, either upon request or upon the council's own motion, such changes in the law or in the rules, organization, operation or methods of conducting the business of the courts, or with respect to any other matter pertaining to the administration of justice, as it may deem desirable; to serve as a catalyst for the discussion of legal and judicial issues through seminars, forums and special studies, and any other means, within the limits of available state and private funding; to administer the indigent defense delivery system and ensure its quality and cost effectiveness, pursuant to RSA 604-A and RSA 604-B; to provide legal and guardian-ad-litem services in child protection cases, pursuant to RSA 169-C:10, RSA 604-A, and RSA 170-C:13; and to provide legal services for indigent proposed wards in guardianship proceedings brought under RSA 463 and RSA 464-A.

The Legislature has, through other statutes, expanded the Judicial Council's payment and administrative responsibilities to other cases as well.

**Civil Legal Services,  
Org. 1098  
RSA 525-A:2**

*To provide equal justice through civil legal services to New Hampshire's poor, including legal advice, representation, and advocacy through a state appropriation.*

- This program represents the State's commitment to provide the poor with access to civil legal services through the work of New Hampshire Legal Assistance.
- NHLA assists vulnerable seniors, veterans, unemployed workers, disadvantaged youth, disabled individuals and families with children by providing numerous civil legal services.
- State funding has been used to help NHLA clients with problems such as affordable housing, prevention of homelessness, subsistence income, access to health care, consumer rights, youth education, long-term care, and safety from domestic abuse.

**The Judicial Council requests additional funding of \$750,000 for FY24 and \$750,00 for FY25 for New Hampshire Legal Assistance.**

- Additional funding for the 2024-2025 biennium will support NHLA's Domestic Violence Advocacy Project (DVAP). DVAP was founded over 20 years ago to provide civil legal aid to survivors of domestic violence, sexual assault, stalking and human trafficking.
- The Judicial Branch's 2022 Report of Task Force on Domestic Violence Cases noted that less than 15% of domestic violence survivors have representation at protective order hearings.
- NHLA has 5 community-based law offices and represents clients throughout New Hampshire but it cannot accept every case with current staffing.
- Additional funding would allow NHLA to represent more clients referred to them and specifically more clients who are believed to be at the highest risk of physical harm. Funding would support the work of attorneys and paraprofessionals focused on this representing domestic violence survivors, and would support increased staffing to handle these high risk cases.

**Court-appointed  
Special Advocates  
(CASA),  
Org. 1099  
RSA 490:26-f**

*To provide guardian-ad-  
litem services to abused  
or neglected children in  
child protection cases  
through a public-private  
partnership.*

- This program represents the state's contribution toward partial funding for Court-Appointed Special Advocates of NH (CASA) for GAL services in child-protection cases.
- The Judicial Council enters into a contractual relationship with CASA following an RFP and competitive bid process.
- RSA 169-C:10 requires the appointment of a GAL in an abuse and neglect case. Per statutory mandate, courts must appoint CASA in the first instance. At its inception, the rationale for providing funding to CASA was that through its investment in supervision, recruitment, and support for a legal position, the State was able to provide the services of a well-trained and supervised volunteer to serve as GAL.
- This line is impacted by the increasingly complex and time-consuming nature of abuse and neglect and termination of parental rights cases.

**The Judicial Council requests additional funding of \$200,000 for FY24 and \$200,00 for FY25 for CASA of New Hampshire.**

- CASA is the preferred provider of GAL services – their volunteer advocates receive extensive training and supervision.
- The public private partnership between the State of New Hampshire and CASA funds a relationship with children that is not possible under the private reimbursement model: In FY22, advocates spent over 89,900 hours, drove over 463,374 miles, and had more than 15,250 visits with children. Under the current reimbursement rates for paid guardians ad litem, that time commitment would likely cost the state over \$8 million.
- Cases and children have become more complex. With pandemic, delays in reporting and then delays in provision of necessary services exacerbated the issues faced by the children CASA serves. CASA's small legal staff is now involved in almost 1/3 of all cases.
- The State's funding represents just a portion of CASA's operating costs. CASA has been focused on recruiting and training more advocates while retaining experienced staff. Additional funding will be used to address workforce shortage challenges, increased need for legal staffing, and continued recruitment and retention of volunteers.

**Non-CASA Abuse and Neglect, Org. 1094  
RSA 169-C:15:III(a)**

*To provide guardian-ad-litem and court-approved services to abused or neglected children in child protection cases, when CASA is unavailable.*

In cases brought under the Child Protection Act involving a neglected or abused child, the court must appoint a Court Appointed Special Advocate (CASA) as guardian ad litem for the child. However, if a CASA GAL is unavailable for appointment, the court may then appoint an attorney or other GAL as guardian at litem for the child.

Under the prior \$60 per hour rate, the cost for non-CASA GAL's has varied significantly over the past 5 years:

FY18	FY19	FY20	FY21	FY22
\$304,972	\$381,218	\$358,893	\$174,794	\$152,302

The decrease in expenditures for FY21 and FY22 corresponds to the decrease in filings during 2020 and 2021, which were down by approximately 37% during the pandemic. However, in 2022, filing rates in juvenile abuse and neglect cases returned to their pre-pandemic numbers:

*Juvenile Abuse & Neglect Petitions Cases Filed (Per Calendar Year)*

2018	2019	2020	2021	2022
1,353	1,374	1,023	1,002	1,348

**The Judicial Council requests a budget of \$400,000 for FY24 and \$400,000 for FY25 for non-CASA Abuse and Neglect cases.**

Total FY22 expenditures for this account were \$167,844. The FY23 budget for this account is \$167,156. As of January 31, 2023, year-to-date expenditures for non-CASA GAL's have been approximately \$152,302.

The Judicial Council has a pending request for an additional \$187,500 in order to pay current and expected court-approved invoices for these services for the remainder of FY23, which, if approved, would result in a **revised budget of \$354,656 for FY23.**

The cost for non-CASA GAL services has increased and will likely continue to do so due to an increase in court filings and the new compensation rate (\$90 per hour) in these cases.

The funds currently budgeted for non-CASA GAL services are insufficient to pay the court-approved invoices expected to arrive between now and the end of the current fiscal year. Based on the monthly average of expenditures since October 1, 2022 (the effective date of the rate change) and the belief that the full impact of the rule change has not yet manifest in approved invoices to date, the Judicial Council anticipates that the budget request of \$400,000 for each year of the biennium will be the minimum necessary to meet the anticipated expenditures in this account over the next biennium.

**Guardian ad Litem, Org.1092  
RSA 170-C:13, RSA 464-A:6, RSA Ch. 463**

*To provide indigent parent representation, GAL services, and court approved services in termination of parental rights cases, and to provide GAL and court-approved services for indigent proposed wards in guardianships.*

- This program is the source for payment of a variety of forms of court representation, including attorneys for parents and GALs for children in termination of parental rights (TPR) cases, and attorneys for proposed wards in adult and minor guardianship proceedings. Additionally, since October, 2021, this account also pays for court-approved services other than counsel in termination and guardianship cases
- Under the prior \$60.00 per hour rate, the expenditures under this account has ranged significantly over the past five years:
  - FY18      FY19      FY20      FY21      FY22
  - \$563,029    \$775,495    \$754,812    \$706,354    \$661,083
- The new \$90 per hour compensation rate will be major factor in the actual cost for representation for expenditures covered by this account over the next biennium. Since the rule change went into effect, the Judicial Council has seen a steady increase (roughly \$7,000 per month) in the amount of court-approved payments.

**The Judicial Council requests a budget of \$1,008,050 for FY24 and \$1,008,050 for FY25 for the cases covered under the Guardian ad Litem account.**

Total FY22 expenditures for this account were \$661,083. The FY23 budget for this account is \$550,016. As of January 31, 2023, year-to-date expenditures for this account have been \$488,299.

The Judicial Council has a pending request for an additional \$299,000 in order to pay current and expected court-approved invoices for these services for the remainder of FY23, which, if approved, would result in a **revised budget of \$849,016 for FY23.**

The funds currently budgeted for this account are insufficient to pay the court-approved invoices expected to arrive between now and the end of the current fiscal year. Based on the monthly average of expenditures since October 1, 2022 (the effective date of the rule change) and the belief that the full impact of the rule change has not yet manifest in approved invoices to date, the Judicial Council anticipates that the account will require a minimum budget of \$1,008,050 for each year of the next biennium.

**Public Defender,  
Org. 1094  
RSA 604-B; 494:3, VI;  
604-B:8**

*To provide constitutionally required indigent representation in criminal case, to administer the statewide public defender system, and to ensure its quality and cost-effectiveness.*

- Since 1977, the Council has overseen the funding for New Hampshire's indigent defense system, fulfilling the state's constitutional obligations to provide counsel to indigent adults charged with jailable criminal offenses and juveniles in delinquency proceedings. Its contract with the New Hampshire Public Defender (NHPD) achieves the mandates of the Sixth Amendment right to counsel and the guarantees of Part 1, Article 15 of the New Hampshire Constitution.
- The Public Defender is the backbone of New Hampshire's indigent defense system, handling the vast majority of indigent criminal defense cases in all New Hampshire courts. Their legal services are provided pursuant to a contract with the Council, following an RFP and competitive bid process.
- This program alone has the capacity to provide high quality defense on a statewide basis, particularly in the most sophisticated and complex legal matters. The Public Defender maintains the capacity (though unfunded) to handle death-penalty cases and has been designated in RSA 135-E to handle the defense of those persons alleged to be Sexually Violent Predators.
- The Public Defender is nationally recognized for the quality of its staff and its commitment to proper oversight and training, and historically this has enhanced its ability to recruit capable attorneys.

**The Judicial Council requests a budget of \$27,794,554 for FY24 and \$27,794,554 for FY25 for the Public Defender Program.**

Prior to the pandemic, NHPD handled 85% of the indigent cases. However, since the pandemic, the Public Defender has experienced significant staff attorney turnover. Hundreds of non-conflict cases have been assigned outside of the program or placed on a hold list. Despite temporary salary increases and federal funding for lateral hires, the Public Defender is unable to meet the current demand for services.

Under new leadership, NHPD has focused on recruitment and retention. Although there is still significant attrition, the departure of more experienced senior lawyers has decreased, and the state-wide hold list has been reduced 40% since October, 2022. The additional funding request is targeted at aiding staff retention and providing NHPD with resources necessary to handle increased IT and discovery demands that has become increasingly more common in criminal cases. This appropriation would continue a 10% temporary salary increase from April of 2022 (\$1,841,713), fund steps 12 to 15 for attorneys, investigators and support staff, and fund an additional 5% salary increase (necessary to remain competitive with other public defender and prosecutor positions). It would also create 8 new IT paralegal positions – to assist with high-volume and electronic discovery – and other necessary IT upgrades

The importance of this budget to the efficient administration of justice and the protection of constitutional rights cannot be overstated. Inadequate funding in this program will result in cost-shifting to other, more costly, components of the indigent defense budget.



**Contract Attorney Program, Org. 1093  
RSA 604-A:2**

*To administer constitutionally required indigent representation in criminal conflict cases and to ensure its quality and cost-effectiveness.*

- Contract attorneys serve as the statutory backup to the Public Defender pursuant to RSA 604-A:2, primarily when the Public Defender cannot take cases due to a conflict of interest, or the prosecution of multiple defendants in a related case.
- This program provides services based on a "flat-rate per case" payment system.
- There are currently 20 active contracts (total of 26 lawyers). All contract attorneys must meet the Council's eligibility standards and the quality of representation is regularly monitored.
- The Council is responsible for oversight, review and financial management of this program.
- Attorney turnover, increased assignments and the rate increase from the prior biennium will continue to impact expenditures in this line.

**The Judicial Council requests a budget of \$2,630,000 for FY24 and \$2,630,000 for FY25 for Contract Counsel in indigent defense cases.**

This program has also experienced unprecedented attrition with nine fewer attorneys between FY22 and FY23. The departing attorneys account for approximately 900 cases.

Unlike the Public Defender program, contract attorneys are not obligated to take appointments.

Costs in this line have been and will continue to be impacted by changes to the contract over the current biennium, which increased fees for representation of incarcerated clients and a fee for contract counsel's administrative costs.

**Assigned Counsel, Org. 1091  
RSA 604-A:2; RSA 604-A:1-a; RSA 169-C:10, II (a)**

*To provide constitutionally required indigent representation in criminal conflict cases and to provide statutorily required representation and court-approved services other than counsel to accused parents in child protection cases.*

- This line funds two distinct types of representation – criminal defense and parent representation.
- In criminal cases, assigned counsel are appointed to represent indigent defendants when the Public Defender and contract counsel are unavailable.
- The system is based on an hourly rate of payment, with a structure of fee caps in place through court rules.
- Attorneys are also appointed to represent indigent parents in child protection cases brought by DCYF.
- Unpredictable factors, such as the state's homicide rate, the opioid crisis, and special cases (e.g., YDC prosecutions) can have a significant impact on this program.

**The Judicial Council requests a budget of \$5,080,000 for FY24 and \$5,080,000 for FY25 for Assigned Counsel in indigent defense and child protection cases.**

The present inability to assign all pending criminal cases, and the doubling of the need for lawyers in parent representation cases between FY14 and FY18 indicate that the increased need for private attorneys will continue throughout the next biennium.

At the request of the Judicial Council, the Supreme Court increased the reimbursement rate for court-appointed representation. The \$60 per hour rate set in 1992, increased to \$90 per hour on 10/1/22; the \$100/hour rate for serious felonies increased to \$125/hour.

Total FY22 expenditures for this account were \$1,617,217. The FY23 budget for this account was \$1,592,784. Of that amount, \$1,000,000 was budgeted for representation in criminal and delinquency cases, and \$592,784 was budgeted for representation for parents in abuse and neglect cases. By December 2022, the expenditures for this account were \$1,408,327 (almost 70% of the FY23 budget for indigent criminal cases, and 20% more than was budgeted for abuse and neglect cases). In January 2023, the Judicial Council requested and received an additional appropriation of \$1,600,000. The **revised budget for FY23** (also accounting for a prior transfer from this account) **is now \$3,092,785.**

The funds originally budgeted for this account were insufficient to pay the court-approved invoices for current fiscal year. Based on the expenditures since the rate increase and the belief that the full impact of the rule change has not yet been realized, the Judicial Council anticipates that the account will require a minimum budget of \$5,080,000 for each year of the next biennium.

**Ancillary Non-Counsel Services, Org. 1103  
RSA 604-A:6**

*To provide litigation services which the court determines are necessary to an adequate defense in a criminal case.*

- Ancillary Non-Counsel services are those services which the court determines are necessary to an adequate defense in an indigent criminal case. NH RSA 604-A:6 requires the Judicial Council to pay for these services.
- Most commonly these services include language interpretation, private investigators, blood analysis, transcripts, depositions of witnesses, toxicology experts, witness fees, psychological examinations, forensic experts, accident reconstruction experts, and a wide range of specialists in criminal behavior, psychology and psychiatry.

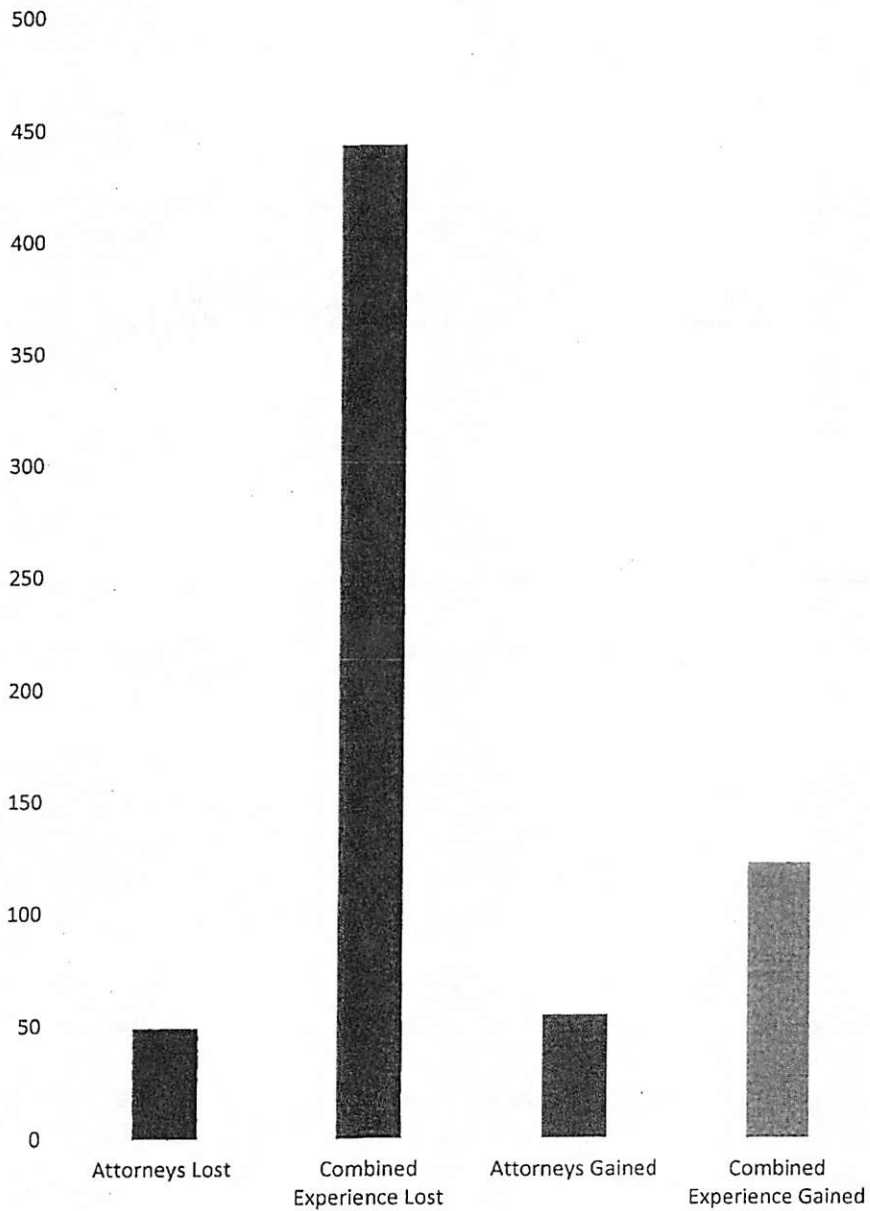
**The Judicial Council requests a budget of \$2,530,000 for FY24 and \$2,530,000 for FY25 for Ancillary Non-Counsel Services.**

Total FY22 expenditures for this line were \$1,889,447. The FY23 budget for this line was \$1,030,553. An additional \$99,999 was transferred into this line in November of 2022, resulting in the current budget of \$1,130,552. In January of 2023, the Judicial Council requested and received an additional appropriation of \$1,500,000. **The revised budget for FY23 (also accounting for a prior transfer to this account) is now \$2,630,552.**

The Judicial Council also anticipates that the Youth Detention Center (YDC) criminal prosecutions will generate significant additional non-counsel costs over the next biennium..

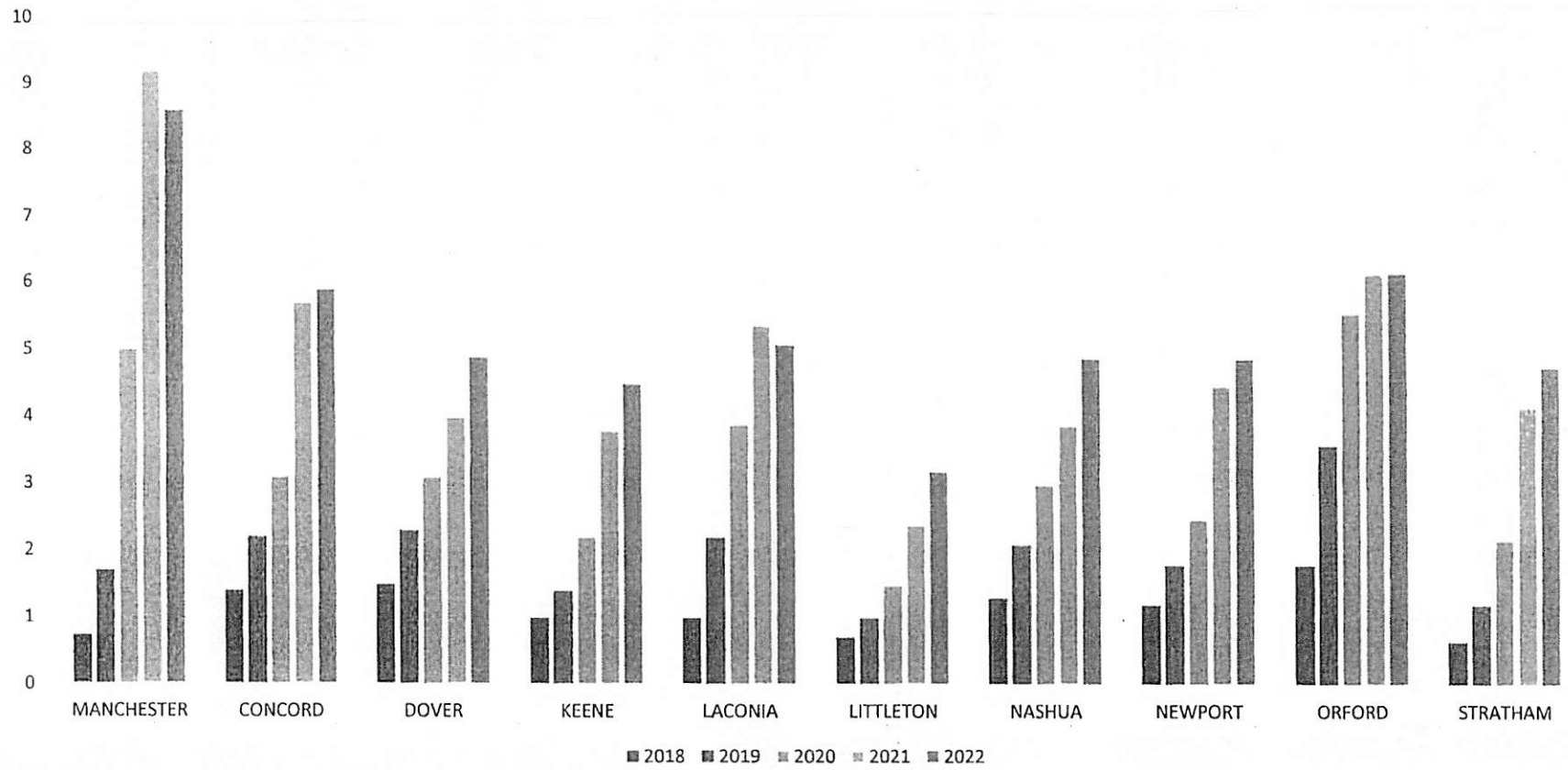
The funds originally budgeted for this account were insufficient to pay the court-approved invoices for current fiscal year. Based upon FY23 expenditures, the Judicial Council anticipates that the account will require a minimum budget of \$2,530,000 for each year of the next biennium.

**Impact of Public Defender Departures  
Since Issuance of March 13, 2020  
Executive Order 2020-04\***



\*An order declaring a state of emergency due to Novel Coronavirus (COVID-19)

Data Size per Office (TB)  
2018 - 2022



# NH still struggling to ensure poor people have an attorney. 'We are just treading water.'

**Annmarie Timmins**

New Hampshire Bulletin

Late last year, several of Newmost experienced attorneys accepted an urgent invite to the state Supreme Court's conference room. The state Supreme Court justices, including Chief Justice Gordon MacDonald, made a big ask.

Crushing caseloads had driven a mass exodus of public defenders, leaving 185 criminal defendants too poor to hire an attorney facing incarceration with no one to defend them. Would the lawyers around the table take some of those cases for as little as \$60 an hour, a fraction of the \$350 to \$450 hourly rate their firms typically charge. And regardless of how much time and staff each case took, their payment would be capped at \$1,400 for a misdemeanor and \$4,100 to \$8,000 for felonies.

All said yes. One, Michael Ramsdell, a former criminal prosecutor now at Sheehan Phinney, delayed his retirement to take several. While this mitigated the crisis, it has not resolved it. Legal advocates say it is now time for lawmakers to step in and fulfill their constitutional obligation to provide indigent clients facing incarceration a free lawyer.

The state Supreme Court, New Hampshire Judicial Council, and New Hampshire Public Defender program say it's critical the state increase the hourly rates and caps on payments and make permanent the temporary pay raises public defenders received.

Raising the rates and caps is estimated to cost \$3.6 million annually according to the New Hampshire Judicial Council, which oversees the indigent defense program. Without the increase, recruiting and retaining lawyers for indigent defendants will remain a significant challenge, legal advocates said. Making the temporary pay raises to public defenders permanent is estimated to cost \$2.3 million annually.

"Right now we are just treading water," said Supreme Court Justice Patrick Donovan, who is heading up the court's Criminal Defense Task Force, formed a year ago to address the crisis. "We need more resources. We need more attorneys to start taking these cases. But people can't afford to take these cases

and make a living because you are not just losing money with that case, but also losing money on other cases that you can't accept while doing that case."

Asked about increasing the hourly rate increases, Gov. Chris Sununu's chief of staff, Jayne Millerick, said he has already supported additional funding for indigent defense and "remains committed to the exceptional New Hampshire indigent defense program and the outstanding attorneys that work tirelessly to represent their clients. Given that the assigned attorneys rates haven't increased for decades, Governor Sununu is supportive of this process moving forward to seek additional funds from the legislature for the proposed hourly rate increases."

His position on making the temporary pay raises to public defenders permanent remains a question.

"The Governor is not yet prepared to make long-term financial commitments through general funds relative to the request by the state's public defender program, given economic uncertainty," his office said in an email.

But it is legislators who must first agree to include increases in the state budget.

One, Rep. Bob Lynn, a Windham Republican member of the House Fiscal Committee, said he'd be open to budget increases but would want specifics, including the extent the state is relying on contract attorneys, which sign agreements with the state to take cases at reduced rates. He would also want to know how the proposed hourly payment compares the going rate for attorneys.

"I understand the importance of the entire indigent defense program," said Lynn, a retired superior court judge. "\$60 an hour seems pretty low for an attorney's compensation. I could be proven wrong on that, but I would be surprised."

Republican Rep. Karen Umberger of Kearsarge who serves as chairwoman of the Joint Legislative Fiscal Committee and the House Fiscal Committee, both of which make funding decisions for the indigent defense program, said she also supported the increases. "We as a state, in my opinion, cannot let this go on for much longer," she said.

## A safety net sidelined

Poor criminal defendants whose charges carry a possible jail or prison sentence have long received state-funded free legal representation one of the three ways.

The New Hampshire Public Defender program typically takes about 85 percent of indigent cases, declining only those where it has a conflict of interest. Fourteen percent of the remaining cases are primarily sent to contract attorneys who sign annual agreements with the state to take indigent cases at \$60 to \$100 an hour, depending on the severity of the charges. The last 1 percent are given to non-contract lawyers that can be persuaded to take the case regardless of the payout, said Sarah Blodgett, executive director of the New Hampshire Judicial Council, which oversees the state's indigent defense program.

The pandemic and increasing complexity of cases flipped that equation after public health concerns and crushing caseloads drove 49 public defenders to resign between 2020 and 2022, taking with them 450 years of legal experience, said Tracy Scavarelli, director of legal services at the state's Public Defender Program. Temporary pay increases have helped the program bring on 44 new attorneys, but they are far less experienced, with a combined 87 years of experience, meaning other lawyers in the program must devote some of their time to training them.

Meanwhile, eight contract attorneys did the same, Blodgett said.

Losses of both people and experience forced the Public Defender Program to restrict the number of cases it accepted for the first time in about 25 years, Blodgett said. It cut its cases from nearly 28,000 in 2019 to about 14,800 this year.

Only juveniles, already incarcerated clients, and people charged with a major crime such as homicide and sexual assault could count on getting a public defender, according to Scavarelli. The situation has improved since the pandemic's early days, she said, but some of the Public Defender Program's offices around the state continue to restrict new intakes; nearly 1,000 cases are on hold now, 712 in circuit courts and 282 in superior courts.

Those resignations and subsequent loss of legal experience triggered the crisis MacDonald and Donovan aimed to address in their August meeting with lawyers at the court. The state needed private attorneys to



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# *Granite State* **NEWS COLLABORATIVE** *Connecting New Hampshire*

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The so-called "Great Resignation" that continues to affect businesses and organizations across the country has hit **New Hampshire Public Defender** — essentially the state's largest law firm—where 32 attorneys have departed over the past 15 months.

New Hampshire Public Defender contracts with the state of New Hampshire to provide representation to indigent clients in criminal, juvenile, and involuntary commitment proceedings throughout the state.

"We're losing an attorney every two weeks," said NHPD Executive Director Randy Hawkes. "We try to find competent lateral hires but it's difficult. The job market is favorable for anyone looking right now and the pay rates for private practice far and away outstrip public defender pay scales."

Attorney salaries at NHPD start at \$53,000 with a cap of \$86,900 after 11 years. Lateral hires allow attorneys to come in from other firms at the same pay rate they were receiving.

By comparison, Hawkes said most salaries at New Hampshire county attorneys' offices start in the 60s and attorneys at Committee for Public Counsel Services (the Massachusetts version of NHPD) will be starting at just over \$63,000 in December.

"There's been an outflux, if you will, across our southern border," he said.

Sarah Blodgett, director of the New Hampshire Judicial Council, which provides funding for the Public Defender, the Indigent Defense Fund and the Contract Attorney Program, said the council recently received \$900,000 in federal funding for the next two years that can be used for lateral hires.

"Randy has been aggressively recruiting lawyers from across the country to come to Public Defender's office and has had some success," she said. "And now we have this pot of money, but as Randy said, we're competing with better salaries and frankly easier jobs. This is a hard job."

## **Supreme Court Task Force**

In September, New Hampshire Supreme Court Chief Justice Gordon MacDonald requested that a task force be formed and chaired by Justice Patrick Donovan to address NHPD's attrition problem, which has led to approximately 2,000 criminal cases in the Circuit Court without appointed counsel.

The task force, made up of attorneys and judges from around the state, released a report with recommendations on Oct. 27.

The report states that NHPD and county attorneys across the state are confronting "dangerously high caseloads" and recommends increased recruitment efforts, early case resolution, a scheduling pause, public awareness, training and mentoring, rule changes that would allow pro hac vice (allowing attorneys from outside jurisdictions to represent indigent clients), and additional funding.

"This problem is significant. Ultimately, more resources are needed by the public defender's office and the county attorneys' offices across the state," Justice Donovan said. "The private bar needs to step in as well."

In August, Superior Court Judge John C. Kissinger e-mailed more than 20 attorneys asking for their help in what he referred to as "a crisis in securing representation for indigent criminal defendants in Merrimack County."

According to the task force report, Judge Kissinger has successfully recruited private practitioners to accept cases in Merrimack County, and one task force recommendation includes investigating how to secure malpractice coverage for retired practitioners willing to accept cases on a pro bono basis.

## **High caseloads, low pay taking a toll**

NHPD's contract establishes case limits of 70 open cases per attorney and allows the program to limit the intake of new cases when those levels have been reached.

Hawkes said NHPD caseloads have exceeded contractual limits statewide for more than two years.

In August, before the new lawyers started, there were only 123 attorneys on staff who averaged 91 open cases each. This is 30 percent above the maximum set by NHPD's state contract.

Today a quarter of all public defenders in the state have more than a hundred open cases.

"The new lawyers are all very intelligent, capable, committed lawyers who will become excellent public defenders. But we cannot give them 80 or 90 cases on day one. There is a learning curve, and caseloads must be developed over time," Hawkes said.

Another factor that keeps attorney caseloads high is attrition. When experienced attorneys leave an office, Hawkes explained, that office must absorb the cases the departing attorney leaves behind.

"As caseloads have risen, public defenders have gone above and beyond their obligations because they don't want defendants to go unrepresented. But burgeoning caseloads have taken a toll on our staff," he said. "Public Defender has seen unprecedented attrition over the past year and a half."

Prior to the pandemic, Hawkes said about 10 to 12 attorneys left NHPD.

"Unfortunately, the situation today is a challenge for us at a time when we need every able body in the indigent defense system we can maintain," he said. "It's particularly troubling when we lose experienced attorneys. The criminal justice system, not only public defenders but prosecutors—it behooves the entire system to retain experienced people because they know how to move cases and they work well together."

Hawkes explained that the departure of experienced NHPD attorneys presents the "doubly painful" issue of remaining caseloads.

"When our experienced counsel leave, they often have over a hundred cases that have to be absorbed by the remaining attorneys in that office," he said. "And this exacerbates the caseload crisis."

The ultimate measure of what constitutes competent and diligent representation, Hawkes continued, is "whether an attorney has sufficient time to meet with all clients, review all discovery (including audio and video evidence), conduct all necessary investigation, consult with experts when necessary, file appropriate motions and conduct pretrial litigation, attend all pretrial conferences and other hearings, explore diversion or treatment options, negotiate with prosecutors, and prepare adequately for trial."

Current workloads, he stressed, "threaten NHPD attorneys' ability to do those things, and the Rules of Professional Conduct provide no exception for lawyers who represent indigent persons charged with crimes."

### **Contract and Assigned Cases**

Robin Melone, a criminal defense attorney and president of the New Hampshire Association of Criminal Defense Lawyers, as well as a task force member, described the NHPD, which represents approximately 85 percent of cases coming through the system, as a crucial first line of defense.

When the NHPD cannot take cases because of conflicts of interest, she continued, cases get pushed to the Judicial Council for assignment.

The two mechanisms for assigning cases through the Judicial Council are contract and assigned cases.

Contract cases allow an attorney to take a certain number of units of wage each fiscal year in exchange for a flat fee per case. If, at the end of the year, the attorney doesn't complete his or her contracted units, he or she is required to pay the money back.

The reimbursement rate for fiscal year 2021 was set by the Judicial Council at \$300 per unit.

A Class A felony case, which includes serious crimes such as murder or sex crimes, equals 8.3 units, or \$2,490. Misdemeanor cases are one unit, or \$300.

The other form of contracting through the Judicial Council includes assigned cases.

These often include conflict cases involving situations where Public Defender is unable to accept co-defendants in a criminal case.

In a situation like this, attorneys who have agreed to be assigned cases work for \$60 an hour for most cases and \$100 for Felony 1 crimes.

Melone has taken both contract and assigned cases as a criminal defense attorney and said she understands the difficulties that can arise for attorneys in terms of time, money, and work.

She believes the discussion about money and public defenders has often been seen as awkward but that it remains a reality that needs to be addressed.

"If attorneys in bankruptcy or real estate or other practices talk about money, it's not a problem. But because criminal defense is considered a passion and a drive for most people who do it, talking about money becomes a gauche and inappropriate thing to do," she said. "But I think that people can both love the law and also be businesspeople, you know. I don't do this for charity."

Melone said she thinks public defenders need to be paid better for their time, adding that this is one of the keys to keeping a viable Public Defender's office in the state, but that money is not the only issue.

"People don't do this for the money, but the financial piece is becoming more of an issue. Salaries have not been adjusted and I think we need to do everything we can to nurture and show value to the experienced attorneys that we have," she said. "If we continue to lose them, I have serious concerns about the program."

### **Private criminal defense**

Richard Guerriero, president of the New Hampshire Bar Association, is currently a private criminal defense attorney but spent 20 years at the Public Defender as its director of training.

While he's encouraged, the courts and the bar are working to solve the problems with the public defender shortage, ultimately, he believes the solution involves more funding.

"The private criminal defense bar must do all that it can to help, but volunteerism is only going to diminish the crisis, not solve it," he said. "You have to remember that contract and assigned counsel lose money at the current rates, so although everyone is stepping up to do more, it is a big ask, especially on the heels of the pandemic."

Guerriero said his firm has accepted as many contract and assigned counsel cases as they are able to, but they are at their limit and he worries that it will be very difficult for untrained volunteer attorneys to provide competent representation.

"Criminal defense is an area of law that requires special training and knowledge, just like family law, tax law, or other areas," he said. "The good news is that our court and our bar recognize the importance of the right

to counsel. I am confident that the problem will be solved and that the bar will do everything in its power to work with the courts towards that end."

### **Maintaining balance: A prosecutor's perspective**

Strafford County Attorney Thomas Velardi said that Chief Justice MacDonald asked him to join the criminal defense task force to make it a multilateral collaborative effort.

One of the themes he continues to emphasize as part of the task force, and in his day-to-day work, is that the criminal justice system is "a gentle balance between prosecution bar, defense bar, and bench."

"Any time that suddenly becomes unbalanced with any one of those three legs of the stool, so to speak, you're going to have problems for the other two legs. It's simply unavoidable," he said. "I was very gratified that the chief justice asked me to join. My fellow county attorneys supported my joining the task force as president of our association."

Velardi said he found the meetings, chaired by Justice Donovan, to be productive. He echoed Hawkes's concern regarding the lack of experience issue that comes with attrition.

"When you have a significant amount of attrition on either side of the bar, in order to replace those people who are likely to have more experience than the people replacing them, you have a steep curve to educate your opponent," he said.

Velardi described the defense bar as the inverse of the prosecution bar and said, "One can't thrive and survive without the other being healthy."

"The county attorneys are concerned about this because even though we're widely known to prosecute offenders, the offenders are part of our constituents. We need to make sure we're minding the constitutional rights of the accused, as well. That's why prosecutors are part of this dialogue," he said.

Asked if he was optimistic the gap in counsel for indigent criminal defense will be alleviated in the coming year, Justice Donovan said he has hope that it will be but hesitated to say the problem will be solved in that time frame.

"I am, by nature, optimistic," he said. "So, will it be alleviated? I hope so. Will it be fixed? Not in 12 months' time."