



# 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.<sup>1</sup> This fundamental right requires "[m]ore than a warm body" sitting at the defense table;<sup>2</sup> it necessitates that defendants receive "effective assistance of competent counsel."<sup>3</sup>

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.<sup>4</sup> 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."<sup>5</sup>

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.

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<sup>1</sup> 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 . . .").

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

<sup>3</sup> 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.").

<sup>4</sup> *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.").

<sup>5</sup> 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.”<sup>6</sup>

## 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. Gressens<sup>7</sup>; and *Improving Indigent Defense in North Carolina* by the North Carolina Commission on the Administration of Law and Justice.<sup>8</sup>

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

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<sup>6</sup> 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.”).

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

<sup>8</sup> 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,<sup>9</sup> 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%.

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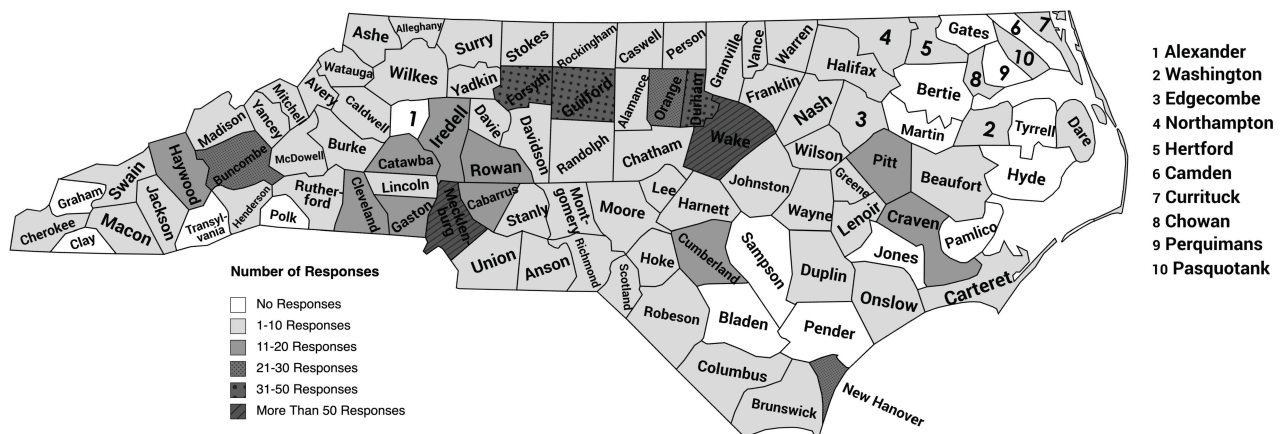
<sup>9</sup> The 2011 Appropriations Act reduced IDS’s budget significantly and directed IDS to reduce hourly compensation rates paid to PAC. For more information on the 2011 rate reductions, see the February 1, 2015, *Report of the Commission on Indigent Defense Services*, found at <https://www.ncids.org/wp-content/uploads/2021/05/LegislatureReport2015.pdf>.

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
<b>TOTAL</b>		<b>1,243</b>

## 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?

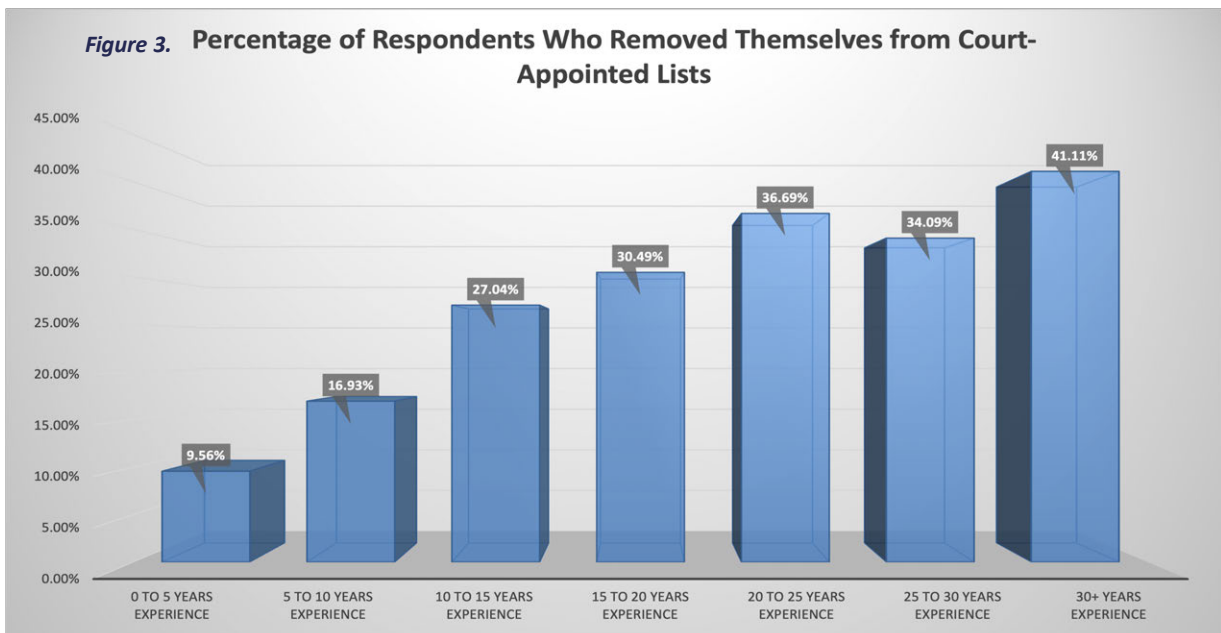
ANSWER CHOICES	RESPONSES	
Yes	97.33%	364
No	2.67%	10
TOTAL		374

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

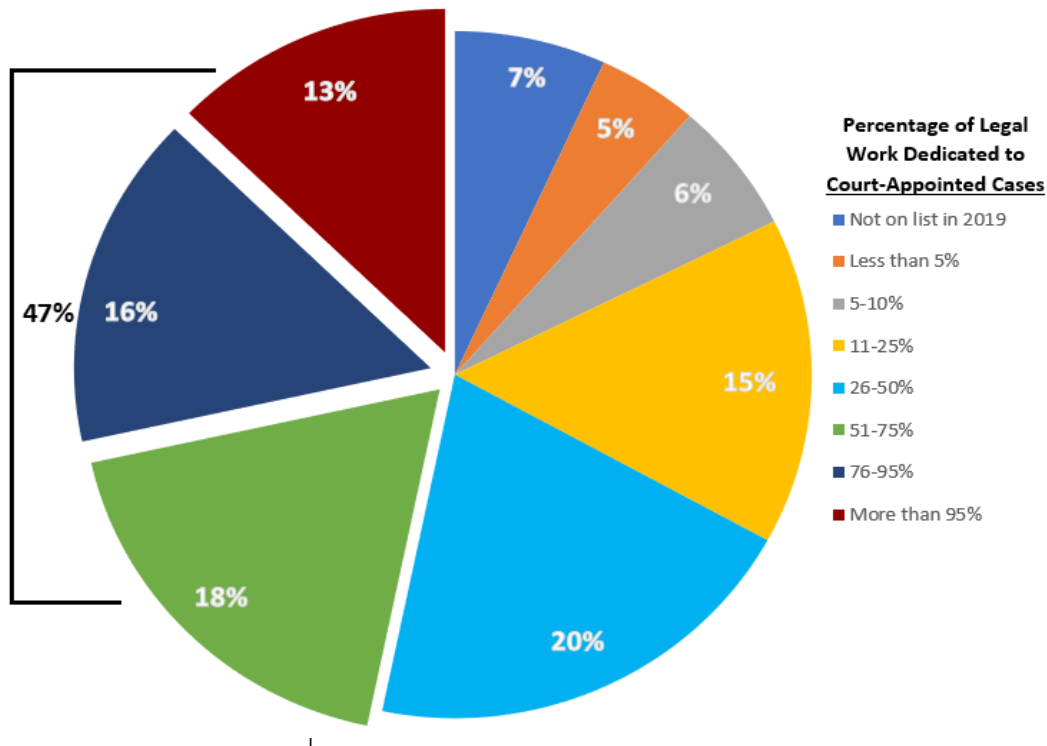
To help assess the impact of attorney workloads and compensation rates on indigent representation, a subset of the responding population was asked to provide detailed information about their court-appointed caseload. This portion of the survey was limited to attorneys who performed court-appointed work 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?

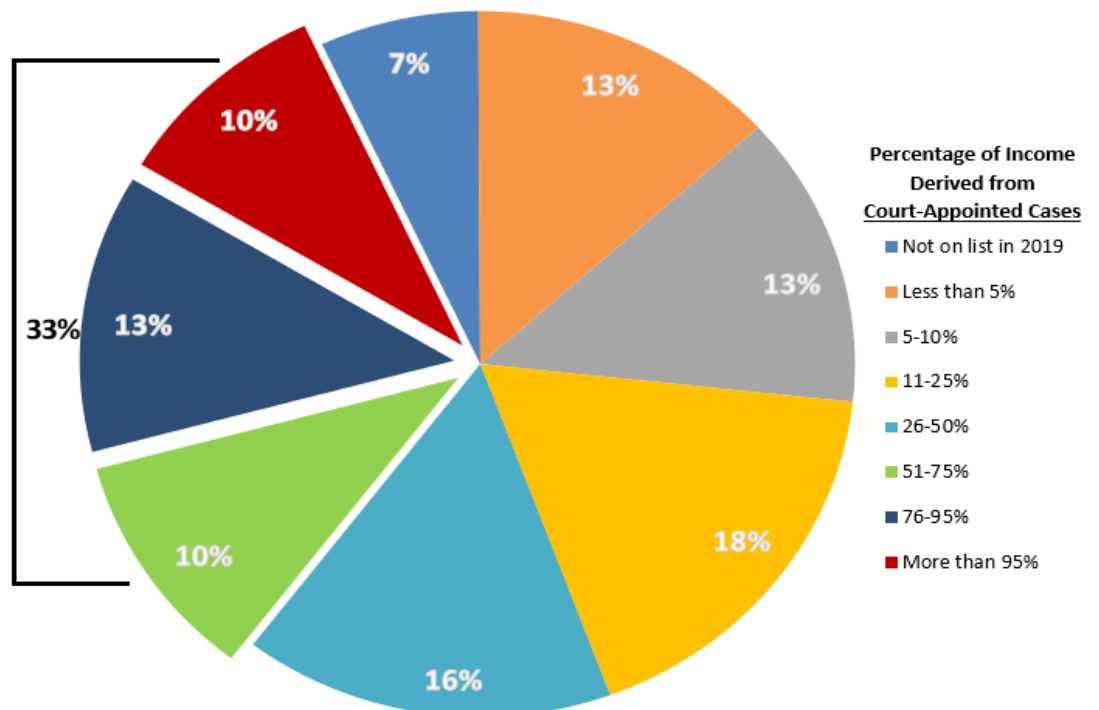
ANSWERS	RESPONSES	
0 to 5	11.74%	35
5 to 10	6.71%	20
11 to 20	6.71%	20
21 to 30	9.73%	29
31 to 40	2.68%	8
41 to 50	10.07%	30
51 to 60	3.36%	10
61 to 80	5.37%	16
81 to 100	8.72%	26
101 to 150	10.07%	30
151 to 200	8.72%	26
201 to 250	5.37%	17
251 to 300	6.04%	18
301 to 400	1.68%	5
401 to 500	2.01%	6
501+	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?**



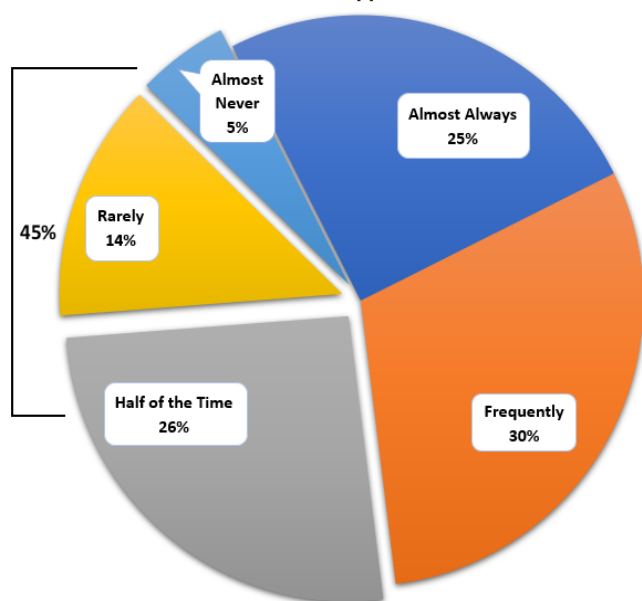
However, only 33% of respondents indicated they derived a majority of their income from court-appointed work.

## Sufficiency of Time

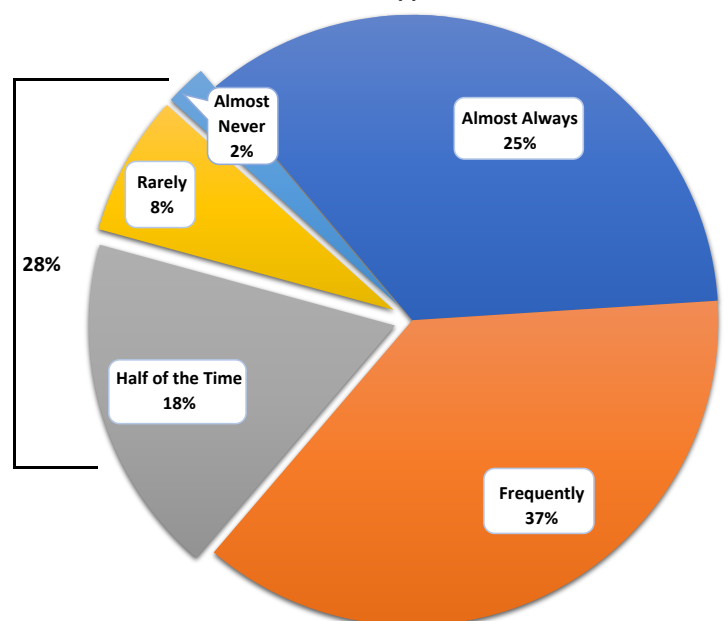
Attorneys were asked whether they had sufficient time to perform a series of essential tasks with reasonable effectiveness in their court-appointed cases, taking into consideration their current caseloads. Attorneys answered on a five-point Likert scale ranging from “almost never” to almost always.” 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:**

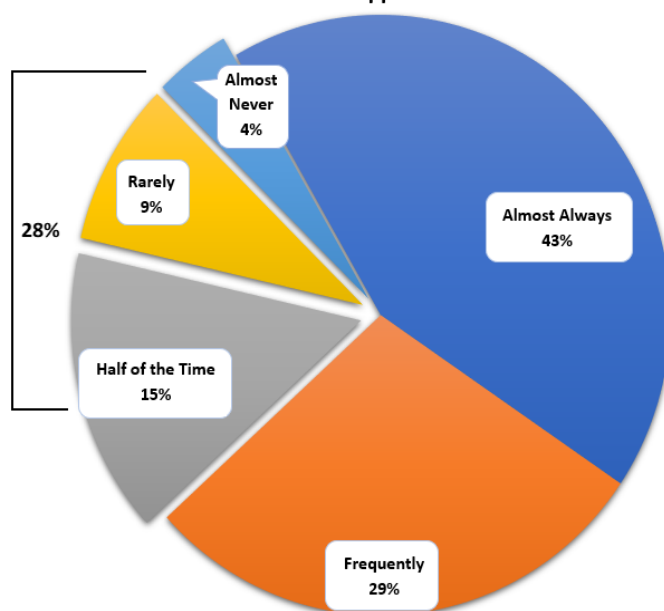
**Sufficient Time to have In-Person Client Contact  
in 2019 Court-Appointed Cases**



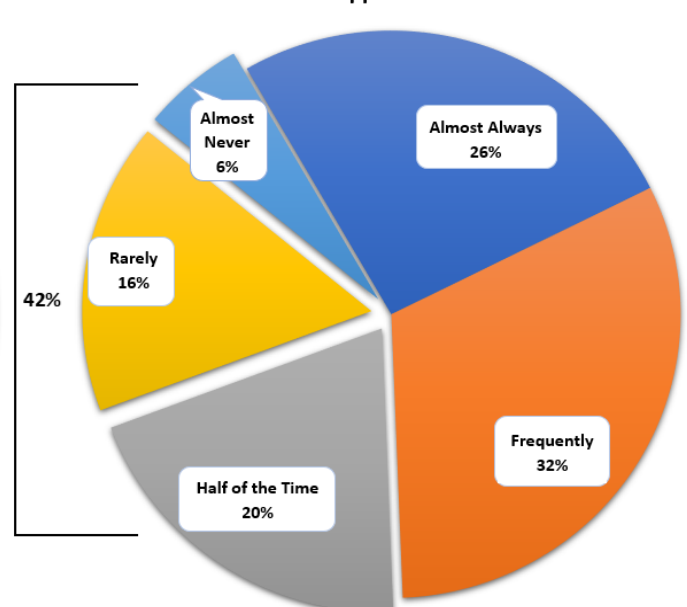
**Sufficient Time for Client Communication in  
2019 Court-Appointed Cases**



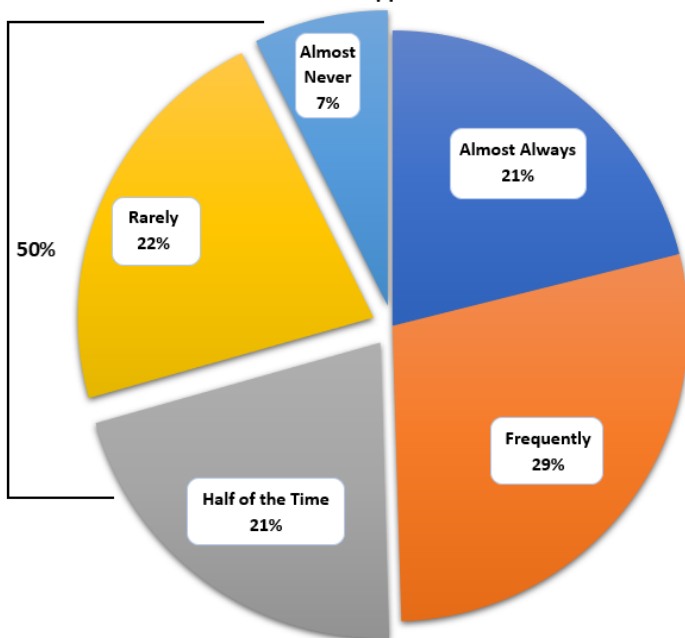
**Sufficient Time for Discovery Review  
in 2019 Court-Appointed Cases**



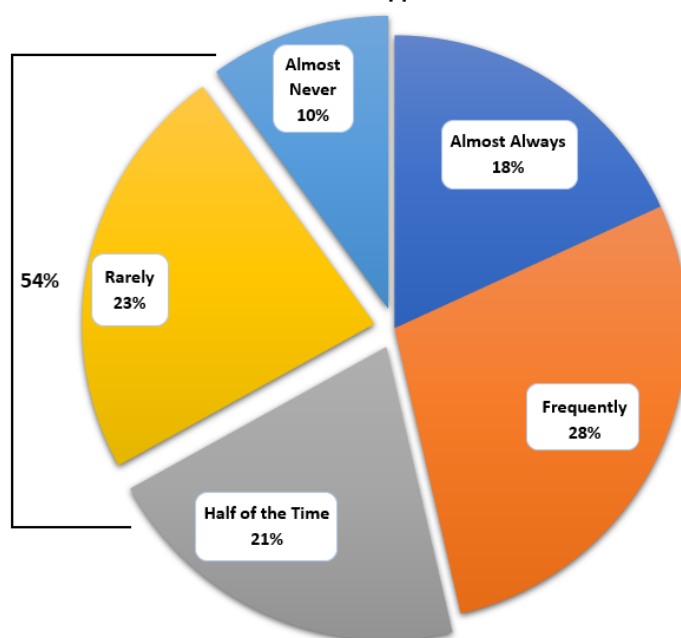
**Sufficient Time for Drafting Motions and Other Pleadings  
in 2019 Court-Appointed Cases**



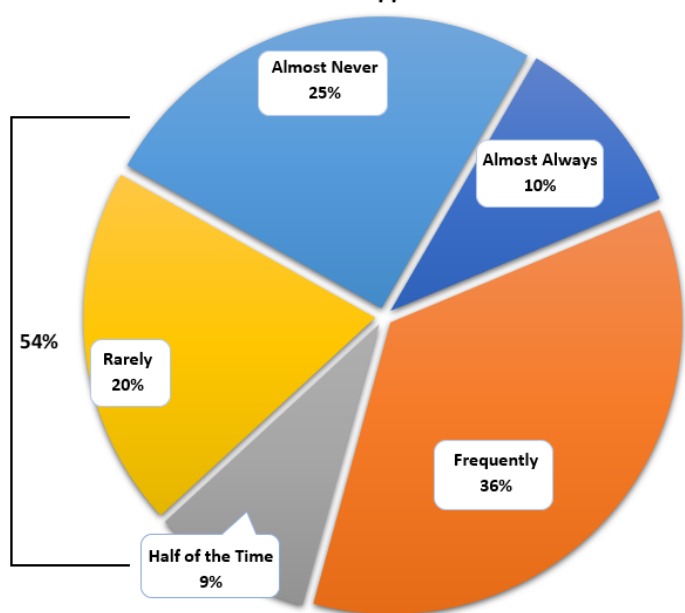
Sufficient Time to Perform Legal Research  
in 2019 Court-Appointed Cases



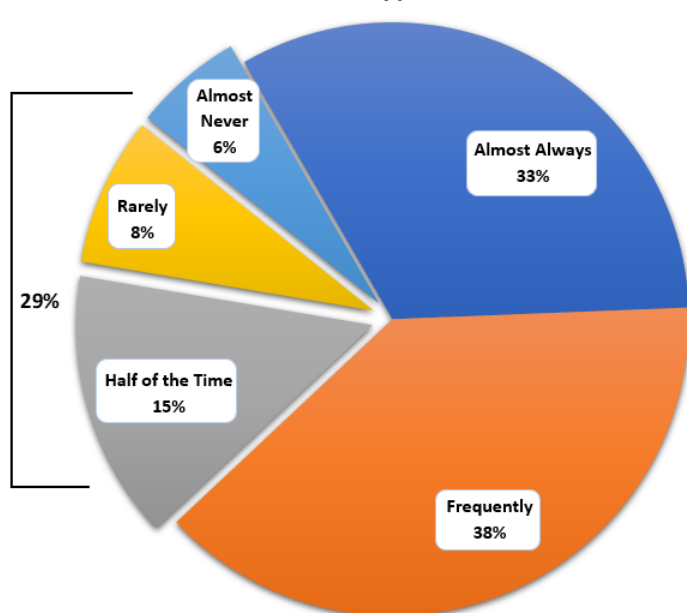
Sufficient Time for Interviews and Investigations  
in 2019 Court-Appointed Cases



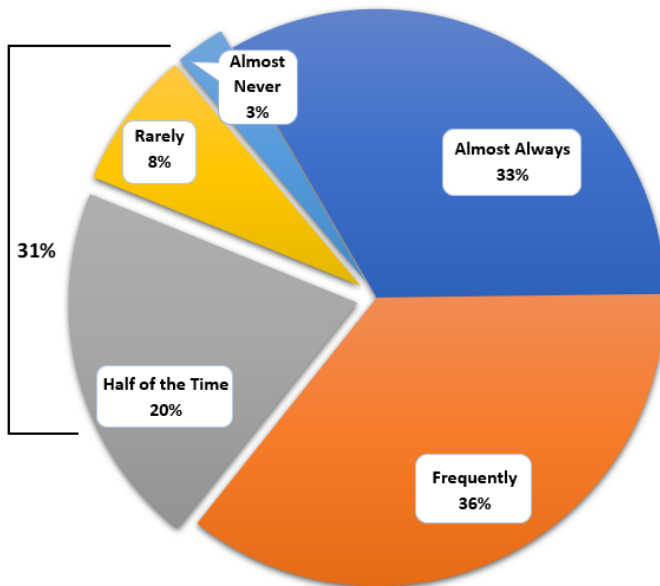
Sufficient Time to Obtain Expert Assistance  
in 2019 Court-Appointed Cases



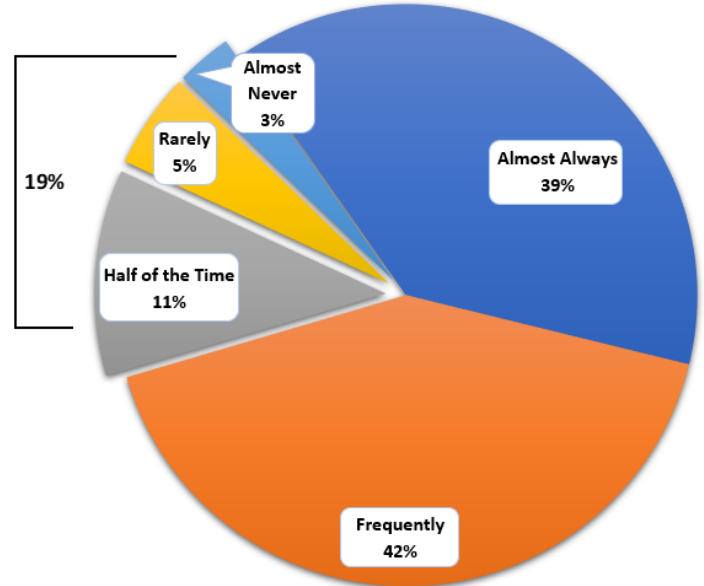
Sufficient Time for Negotiations  
in 2019 Court-Appointed Cases



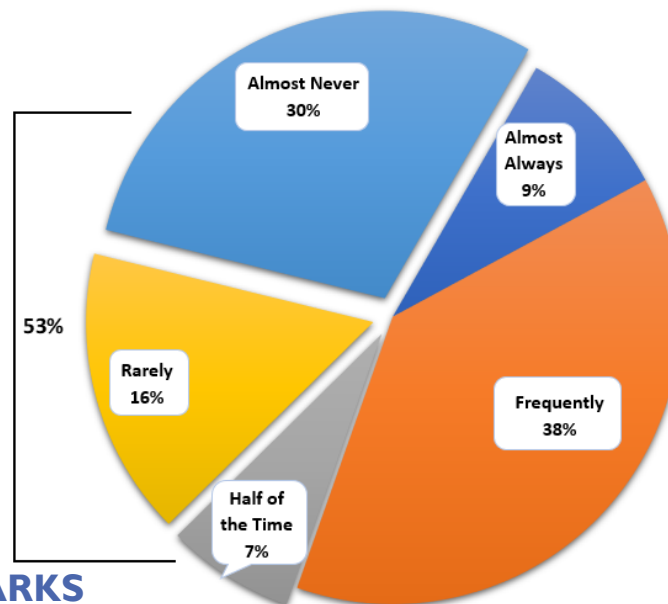
Sufficient Time to Prepare for Hearings/Trials  
in 2019 Court-Appointed Cases



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.