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Indigent Defense Committee Report

February 23, 1999

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To: The Honorable Michael H. Michaud, Senate Chair
The Honorable Elizabeth Townsend, House Chair
Members of the Joint Standing Committee on Appropriations
and Financial Affairs

From: Jennifer Moeller Lechner
Director of Bar Relations

Date: February 23, 1999

Re: Indigent Defense Committee Report

Attached please find a report from the Indigent Defense Committee that was submitted to Chief Justice Daniel Wathen on June 5, 1998. This report highlights the responsibilities and needs of those who represent indigent defendants. Please do not hesitate to contact me if the Maine State Bar Association can be of further help.



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June 5, 1998

Chief Justice Daniel Wathen
65 Stone Street
Augusta, ME 04330

Dear Chief Justice Wathen:

Enclosed please find the report from the Indigent Defense Committee which you pointed for the purpose of reviewing Maine's court-appointment system for indigent defendants who face criminal charges. This Committee has elected to refer to the report as the "Stanley Brown Report" in honor of the late Stanley Brown, Esq. who was a member of this Committee. Not only did Stan Brown give us his time and insight, but he also was a representation of what a good criminal defense lawyer really is. He was a tenacious and fiercely-independent individual who took pride in defending the rights of the poor and the downtrodden in the State of Maine. Unfortunately, Stan passed away before the report was completed and thus it is in his honor that we have named the report after him.

The task you set before this Committee was not only expansive but also complex. There are many issues relating to Maine's system for court appointment which this Committee discussed. It is the unanimous opinion of this Committee that many of these issues need to be dealt with at some future date and that a Standing Committee should be appointed to deal with those issues. The Committee, because of time and resource constraints, chose to take one of the thorniest of the issues and present it to you as a first step in rectifying what this Committee sees as one of the many problems which now exist.

The Committee has, upon the submission of this report, disbanded and scheduled no further meetings believing that its initial goals have been met in reviewing Maine court-appointment system and outlining the needs they perceive should be addressed. All of us, however, I am sure are willing to provide whatever support we can in dealing with the Legislature

Chief Justice Daniel Wathen

June 5, 1998

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in support of an increase in the hourly rate of pay for court-appointed attorneys which is the issue we have focused on in our report.

I hope this Committee has met with your expectations in attempting to deal with the tasks you set before us. I know that the cause is unpopular and will be a difficult one to sell to the Legislature. Hopefully, however, for the reasons set forth in our report, the Legislature will see in its infinite wisdom the need for an increase in the rate of pay for court-appointed attorneys.

Respectfully Submitted,

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Judicial Liaisons:

Associate Justice Robert W. Clifford

Justice G. Arthur Brennan

Judge Jeffrey Hjelm

Executive Summary

1. The Advisory Committee on Indigent Defense examined the provision of counsel to indigent persons in Maine. The Committee recommends that the Supreme Judicial Court appoint a Standing Committee to continue oversight of the subject. The Committee recommends an immediate increase of the per hour fee as a valuable first step in addressing some of the problems identified.

2. The Constitutions of the United States and Maine, various provisions of the Maine Statutes, and the Maine Rules of Criminal Procedure require the provision of competent counsel to indigent persons facing significant threats to their liberties. The State of Maine is at serious risk of failing to meet this constitutional standard.

3. Maine's current system of indigent defense provides the State with one of the lowest cost programs in the nation.

4. The hourly fee for counsel has not been raised for over 10 years. In that time inflation has increased costs by 50%. The \$40 fee of 1987 would need to be a \$60 fee in 1998 just to remain comparable.

5. In addition to the burdens of inflation, the electronics and communications revolutions have substantially increased the costs of running a law office. The lawyer representing indigent persons must face these costs which are far in excess of inflation.

Final Report of the Advisory Committee on Indigent Defense

This Committee was formed in 1997 to assess Maine's system for providing mandatory representation to indigent persons in criminal and other cases. Our Final Report examines the constitutional and statutory rights to counsel. It then examines the costs of Maine's system in comparison with other states. Maine's private attorneys have done an excellent job of keeping down the constitutionally required cost of indigent defense. However, a decade of inflation has placed an unfair burden on Maine's attorneys. The costs of law practice have increased with inflation. They have also increased with the technological revolutions of the past decade. A \$40 hourly fee that may have been adequate, though not generous, in 1987 when it was last increased has become clearly inadequate today.

Introduction

The United States and Maine Constitutions and Americans' commitment to justice insist upon a fair trial for the criminal accused. Americans may choose to punish harshly convicted criminals. But, punishment may only take place after a conviction by jury or judge or a plea of guilty in accordance with enacted laws of the Legislature guided by the United States and Maine Constitutions. Our experiences with dictatorial systems in which crime and punishment are decided by the whim of the dictator persuade us that we want it no other way. They also make the American criminal justice system, despite its flaws, one of the envies of the non-democratic world. The Maine Legislature has extended the right of legal representation to other situations in which citizens face a significant loss of liberty. Examples include the termination of parental rights, child protective situations, and commitment to mental institutions.

An essential feature of fair criminal proceedings is the right of the impoverished criminal accused to the representation of an attorney provided at State expense in serious criminal cases. The landmark United States Supreme Court case of Gideon v. Wainwright, 372 U.S. 335 (1963) enshrines this right.

In the process of looking at Maine's system for representing indigents, this Committee dealt with many issues which need to be addressed. Among those issues are the following: oversight of those who undertake court-appointed cases; training for new attorneys handling court-appointed cases; categorization of crimes by the nature of their complexity and the effort needed in defense of the same; the financial caps placed on cases; the current hourly rate of pay and the need to retain and recruit qualified attorneys who will present vigorous defenses for those in need; the manner in which attorneys get appointed to handle indigent defendants; whether there is sufficient oversight in the assignment of complex cases to attorneys; and the need for more money for technical and expert assistance. All these issues are complex and need further review. To that extent, with exception of the issue of the hourly rate of pay, it is the recommendation of this Committee that a Standing Committee be appointed to review the needs and, if necessary, to make recommendations for modifications to our current system.

The Committee chose to study the need for an increase in the hourly rate of pay. We deem this to be highly important to the resolution of other issues. It was the belief of this Committee that with a sufficient increase in the hourly rate of pay, more qualified attorneys might be drawn into the arena and other issues, such as training and oversight, might be improved.

The Committee discussed at length the various systems which now exist in the United States for representing indigent defendants. They range from public-defender systems to court appointments of attorneys on a case-by-case basis, similar to the system now in existence in Maine. Maine's system remains one of the least expensive methods for paying attorneys to represent indigent defendants. However, Maine's current rate of pay is inadequate. The signs, are clear that "the wheels could come off," and the system could break down. It is gravely important not to allow that to happen.

The Constitutional Necessity of Competent Counsel

The Sixth Amendment to the United States Constitution and Article I Section 6 of the Maine Constitution guarantees the right to counsel for persons accused of committing a crime. The United States Supreme Court has interpreted the Sixth Amendment to require each state to provide counsel to any person accused of a crime before they can be sentenced to incarceration. The Maine Rules of Criminal Procedure (Rule 44(a)) specifically state:

If the defendant in a proceeding in which the offense charged is murder or a Class A, Class B, or Class C crime appears in any court without counsel, the court shall advise the defendant of the defendant's right to counsel and assign counsel to represent defendant at every stage of the proceeding unless the defendant elects to proceed without counsel or has sufficient means to employ counsel. If a defendant in a proceeding in which the offense charged is a Class D or Class E crime appears without counsel, the court shall advise the defendant of the defendant's right to counsel and shall assign counsel to represent the defendant unless the defendant elects to proceed without counsel or has sufficient means to employ counsel or has sufficient means to employ counsel or unless the court concludes that in the event of conviction a sentence of imprisonment will not be imposed.

Maine obviously recognizes the constitutional necessity of appointing counsel in all felony cases and in all cases where a jail sentence is sought. This constitutional right to counsel also embodies within it a constitutional right to the effective and competent assistance of counsel.

As early as 1932 the United States Supreme Court in Powell v. Alabama, 287 U.S. 45 (1932) held that the right to counsel also means the right to effective assistance of counsel. Appointing incompetent counsel is tantamount to a denial of counsel. More and more competent counsel have decided to refuse appointed cases because the compensation on these cases

oftentimes does not meet overhead costs associated with the case. The State of Maine is faced with appointing counsel who lack the knowledge necessary to mount an adequate, much less an effective, defense for many defendants charged with serious crimes.

The statements contained in the 1987 "Report of the Maine State Bar Association's Commission to Evaluate Maine's Court Appointment System" are true today: "While ethical responsibilities fall to the bar, constitutional and statutory obligations fall to the state...There must be continual balance between the willingness of the private bar to perform the services and the willingness of government to pay a reasonable portion of the cost...Unless the Legislature provides adequate funding, problems now tolerable will become intolerable. Good people, performing a thankless service for an indifferent public and government, find it increasingly tempting and economically necessary to refuse appointments."

It is difficult to identify the precise point at which counsel fail to provide constitutionally adequate representation of indigent criminal defendants. Certainly, many Maine attorneys are serving ably, and at considerable personal cost, to make real the mandate of competent representation. However, the Committee's studies and the observations of its members suggest that there are critical deficiencies in the system in Maine. Expert observers regard Maine's system of reliance solely on individual retained counsel as the most likely to provide incompetent services. In Maine appointments are made officially by judges. However, time pressures may force judges to rely on recommendations by various court functionaries. These non-lawyers may or may not have any ability to determine lawyer qualifications. Members of the Committee reported their own awareness of inexperienced lawyers being appointed to more serious cases than their expertise merited.

A Committee member and a volunteer law student assistant to the Committee reviewed vouchers submitted to several courts from appointed counsel. The data revealed that many of the attorneys accepting court appointments are relatively inexperienced.

Maine faces the possibility of being sued by a defendant who feels that he was not given competent counsel. Other states have had to face this problem (e.g. Georgia and Mississippi). Increasing the fees paid to indigent defense counsel so the provision of constitutionally mandated competent counsel will become the norm, in the long run will be less expensive than defending the inevitable law suit.

The Maine Legislature has Recognized the Necessity of Indigent Representation in both Criminal and Non-Criminal Situations

Section 810 of Title 15 of the Maine Revised Statutes codifies the Constitutional mandate for indigent representation in serious criminal matters. The statute specifies the need for "competent defense counsel" and mandates that courts provide "reasonable compensation" to the counsel.

The Maine Legislature also provides for the appointment of counsel for indigents in hearings on the revocation of probation (17A MRSA 1206) and in post-conviction relief proceedings (15 MRSA 2129). The Legislature mandates the appointment of counsel in various aspects of proceedings against juvenile offenders when the child or parents cannot afford counsel (15 MRSA 3306 and 3404).

The Legislature has also recognized the essential nature of legal representation in situations which do not involve criminal punishment but which do make important determinations about citizens' rights and liberties. The Legislature authorizes the appointment of counsel at state expense to represent indigent Mainers facing the termination of parental rights (22 MRSA 4052), child protective proceedings (22 MRSA 4005), court ordered sterilization (34B MRSA 7008), and the admission to and retention in mental treatment facilities (34B MRSA 3864, 5475, and 5478). Representation of indigent Mainers in these situations constitutes a significant portion of indigent representation by Maine attorneys.

Maine's Indigent Defense System Provides a Bargain for Maine Citizens

Cost comparisons in this report are based on data compiled by the Spangenberg Group. Spangenberg provided data for indigent defense expenditures in 22 states. Expenditures were calculated for FY '97 in 18 states and for FY '96 were obtained from the Administrative Office of the Court. The FY '97 figures from Maine are still being compiled and were not available at the time this draft was written.

In one cost-per-case analysis, all twenty-two states were used for comparison. They are Colorado, Connecticut, Delaware, Florida, Georgia, Iowa, Indiana, Kentucky, Louisiana (FY '96), Massachusetts (FY '96), Maryland, Minnesota (FY '96), Missouri, Montana, North Carolina, New Jersey, New Mexico, Ohio (FY '96), Oregon, Rhode Island, Vermont, Wisconsin, and West Virginia.

The cost-per-case in Maine is \$283.00. The cost-per-case in 8 of these states is in the \$290.00 to \$330.00 range; in 4 states, the cost-per-case is between \$365.00 and \$456.00. Two states have significantly higher costs. The cost-per-case is \$473.00 in Wisconsin and \$649.00 in New Jersey.

The eight states which have lower cost-per-case expenditures range from \$163.00 to \$240.00. The lowest costs are in Kentucky (\$163) and Louisiana (\$165). The other states are Delaware (\$206), Georgia (\$210), Ohio (\$220), Maryland (\$239), Minnesota (\$230), and Connecticut (\$240).

In a second cost-per-case analysis, only those states of comparable population and geographic area were used for comparison with Maine. These include Connecticut, Massachusetts, New Mexico, Rhode Island, Vermont, and West Virginia. All of these states,

with the exception of Connecticut, have a cost-per-case which is higher than Maine. They range from \$302 to \$398. The cost-per-case in Connecticut is \$240. Vermont, which is smaller in population but is similar to Maine in many ways has the highest per case cost (\$398). It should be noted that there is a class action suit pending in Connecticut which alleges that overwhelming caseloads and inadequate resources in the Connecticut Public Defender program prevents the plaintiff class from receiving their right to a constitutionally adequate level of representation.

The final analysis is not based on cost-per-case but on per capita expenditures. Maine's per capita cost of \$3.44 is lower than any of the 22 states used for comparison. Seven states (GA., IN., KY., LA., MO., OH., RI) have a per capita range of \$4.39 to \$5.40. Connecticut's per capita cost is \$6.35. Four states (CO., MD., NC., NJ.) have costs ranging from \$7.27 to \$7.42. Nine states (DEL., FLA., IA., MA., MN., NM., VT., WI., WV.) have costs ranging from \$9.08 to \$11.99 (Vermont is \$9.30). The cost in Oregon is the highest at \$17.57.

Although the figures discussed above are based on the best data available, there are a number of factors that impact the reliability of the comparisons.

1. The cost-per-case figure used in the above analysis for Maine includes child protective cases, other district court cases, superior court cases, and appellate court cases. The cost-per-case figures from the Spangenberg Group are based on categories of capital, felony, misdemeanor, juvenile, appeal, and "other." The type of case included in the "other" category varies from state to state. In ten states, the "other" category is not defined. Three states (MA., NJ., WV.) include child protective cases in this category. Other types of cases include parole and probation revocations, civil commitments, children in need of supervision, termination of parental rights, guardian ad litem, and mental health cases. Maine breaks out the cost of child protective cases from other district court cases but, because it is not possible to break out the cost of "other" cases in the states used for comparison, the child protective cases in Maine were included in the figure used for comparison. The cost-per-case figure for Maine, if child protective cases are excluded, is \$263.

2. Fourteen states used for comparison are death penalty states. Although one would expect these states to have higher cost-per-case figures, 6 of them are lower than in Maine.

3. Maine figures do not include money spent for experts and investigators if these costs are not included in the voucher submitted by the attorney. In states which have a public defender office, experts and investigators are included in cost-per-case expenditures.

4. All of the states used for comparison have some type of public defender office. Some of them are established on a statewide basis while others only operate PD offices in selected counties. The percentage of cases handled by these offices varies from state to state. Most states use a combination of contract and individually assigned counsel for cases not handled by public defender offices.

Inflation and the Increased Cost of Operating a Law Practice Require an Increase in the Hourly Rate for Indigent Defense Work

Maine's hourly rate of \$40 per hour for indigent defense counsel has remained unchanged since 1987. The Federal Reserve Advisory Board reports that from January 1987 to January 1998 the cost of living increased 50.5%. \$60 per hour in 1998 is the equivalent of \$40 per hour in 1987.

Operating costs have also risen significantly for all businesses in Maine over the last decade. Lawyers who do court-appointed cases are generally solo practitioners or practitioners in small firms with modest budgets and limited staff support. These firms, like other small businesses, have experienced a sharp rise in overhead due to technological advances which require more and more capital equipment and periodic upgrades for the lawyer to stay competitive.

A recent USA Today "Snapshot" disclosed that small businesses spent \$138 billion on information technology in 1997, up 17% from 1996. Of these expenses, more than half were related to telecommunications; the other half encompassed computer hardware and software, technological support services, networking and on-line services. While such equipment is more user friendly every year, it is also more costly, consuming a larger than ever portion of the budget of every small professional office.

Although competition in the telecommunications industry has increased, prices have not dropped proportionally; rather, the variety of products has simply widened, necessitating more frequent and more sophisticated purchases: Last year's computer may be obsolete this year, incompatible with the newest software or of insufficient capacity to expand or to perform basic functions.

The small law practice in Maine is no different than any other small business subjected to the harsh economic realities of the information age. A year or so ago, according to a study of law firm economics, the average annual expense per lawyer for equipment alone, not including staff, rental, subscriptions, supplies, CLE and utilities, was \$8,210. Ten years ago expenses for equipment would have amounted to a single typewriter and a single telephone line, at a cost of only a few hundred dollars a year. At that time fax machines were an oddity; now they are commonplace, requiring an additional dedicated telephone line in the law office, and a good quality fax machine costing between \$500 and \$1,500. Cellular telephones, once considered ostentatious, are now a staple of all business life: Lawyers, for whom communications is a vital part of their profession, are now rarely seen without a phone in the vehicle. The cost of such enhanced communications, allowing the professional to keep in touch at all times, may amount to several hundred dollars per month, including the equipment expense, basic monthly charges, air time, roamer charges and long distance fees.

The photocopiers of ten years ago are obsolete, if not worn out, replaced by faster and costlier machines, accompanied by more expensive leases, warranties and service contracts.

Personal computers, available only in the larger offices ten years ago, and then only for basic word processing, are now found on every lawyer's desk. Law offices, like the courts, have finally gone computer." A personal computer for use in a law firm costs between \$1,000 and \$2,000. Laptops range from \$1,500 to \$5,000. Computer installation and maintenance may add hundreds of dollars to office overhead. Frequent upgrades are necessitated by capacity overloads and new and more varied uses. A good modem costs several hundred dollars, and a laser jet printer, printing copy of a quality suitable for court filings, costs as much as \$2,000. Specialized software, now a staple of all law offices, may cost an additional \$1,000 and is subject to frequent changes. Training for attorneys and support staff is an inevitable concomitant of every new purchase. Technical support for computer users costs as much as \$5 per minute, the equivalent of \$300 per hour--seven-and-a-half times the \$40/hour rate for court appointed counsel! The Internet has changed the way lawyers communicate, do research and stay informed. E-mail adds varying monthly fees to the lawyer's budget, as do subscription and per minute usage fees for the simplest legal research services. Lastly, for offices that installed modern computer systems a few years ago, the "year 2000 problem" looms as a threat to their operations, a problem with very expensive and time-consuming remedies.

Those who predict the future envision regular teleconferencing by computer or via satellite communications, even videoconferencing by cellular phone from a vehicle. There will be no escape! All law offices will be on-line and within reach of the courts, clientele and staff. The small law firms who serve indigent persons are no exception to this wave. There is nothing peculiar to law that allows court-appointed counsel to escape the increase in telecommunications costs and availability. Adequate representation for persons accused of crime now includes not only basic office staff and research ability; it also includes a level of telecommunications services that will become the norm in all professional offices. Court-appointed counsel are not "lawyers on the cheap;" they are professionals with a constitutional obligation to keep up to date on the latest technology and to serve their clients and the public with quality representation in every sense of the word.