

MAINE STATE LEGISLATURE

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MAINE COMMISSION ON INDIGENT LEGAL SERVICES

TO: JOINT STANDING COMMITTEE ON JUDICIARY
CHIEF JUSTICE, MAINE SUPREME JUDICIAL COURT
GOVERNOR, STATE OF MAINE

FROM: MAINE COMMISSION ON INDIGENT LEGAL SERVICES

SUBJECT: ANNUAL REPORT

DATE: JANUARY 16, 2018

Established by the Legislature in 2009, the Maine Commission on Indigent Legal Services is an independent Commission whose purpose is to provide efficient, high-quality representation to indigent criminal defendants, juveniles charged with juvenile crimes and parents in child protective cases, among others, consistent with federal and state constitutional and statutory obligations. The Commission is made up five Commissioners appointed by the Governor and confirmed by the Senate.

The Commission provides indigent legal services primarily through a system of private assigned counsel representing indigent people facing a loss of liberty in cases brought by the State of Maine. The Commission sets standards for attorneys providing indigent legal services, and attorneys are assigned to individual cases by the court from rosters created and maintained by the Commission. The Commission also provides training and supervision to attorneys on its rosters, as well as providing funds for investigative and expert services necessary for the representation of indigent clients. The work of the Commission is funded by an annual appropriation from the Legislature.

At the present time, due to the resignation of one Commissioner and the untimely death of another, there are two vacancies on the Commission. Accordingly, the Commission has only

three active Commissioners. This report is submitted pursuant to 4 M.R.S.A. § 1804 (3) (H).

COST TRENDS AND BUDGET ANALYSIS

Overall, during calendar year 2017, the cost of providing indigent legal services declined and revenue from counsel fee reimbursements increased. Attorney vouchers represent the vast majority of the cost of indigent legal services. In 2017, voucher costs totaled approximately \$16,544,000, compared to \$16,980,000 in calendar year 2016. Over the same time period, the number of new cases also declined slightly, 25,916 in 2017 compared to 26,237 in 2016, as did the number of vouchers submitted, 30,816 in 2017 compared to 31,316 in 2016. In addition to attorney vouchers, the Commission pays for services to support indigent representation such as experts, investigators, transcript costs, interpretation costs, etc. The cost of these non-counsel indigent legal services in 2017 totaled \$905,500 compared to \$1,001,000 in 2016.

To help offset the total cost of indigent legal services, the Commission, with the assistance of the Judicial Branch, collects reimbursement of counsel fees from people who are ordered to make such reimbursement and pursuant to statutory authority to set off bail against counsel fees paid. The collected reimbursement funds are used by the Commission to defray the cost of indigent legal services, thereby reducing the general fund appropriation necessary to cover these costs. During 2017, the Commission applied reimbursement revenue in the amount of \$758,000 toward the cost of indigent legal services, compared to \$698,000 in 2016.

On a fiscal year basis, the Commission experienced a budget shortfall during the last two months, May and June, of Fiscal Year 2017 (FY'17). The shortfall did not arise from increasing or unanticipated costs, but rather, because for FY'17, the Legislature appropriated substantially less funds to cover the cost of indigent legal services than it had in FY'16. The Commission's All Other appropriation for the current fiscal year totaled \$21,234,807, which reflects an amount

equal to the All Other appropriation for FY'16, plus \$2.8 million projected to be needed to cover the cost of the accumulated shortfall from FY'17.

Half-way into the current fiscal year, the Commission has observed that the anticipated shortfall from FY'17 was less than expected and FY'18 costs have run at or slightly below projections. As a result, Commission costs are currently under budget by approximately \$800,000. The Commission is cautiously optimistic that costs will remain under budget for the balance of the fiscal year.

The amount allocated to cover All Other costs for FY'19 equals \$18,372,705 (equal to the All Other Appropriation for FY'16). These funds, and funds to cover the Commission's personal services costs, however, have been placed in an Other Special Revenue (OSR) account. The Commission sees two issues with the current status of this allocation. First, although the Commission has been assured that it has access to these funds, the placement of the Commission's operating budget in an OSR account is unusual, and the Commission is concerned that unnecessary technical issues could arise that would hamper the Commission's ability to cover its costs in the regular manner. Accordingly, for predictability, the Commission would like to see these funds transferred into a regular general fund account. Second, the amount currently allocated to the OSR account covers the Commission's anticipated All Other and Personal Services costs, but does not account for the Commission's current OSR accounts that cover counsel fee reimbursements and training costs. In the current budget, these OSR accounts use no general fund money but are funded by counsel fee reimbursements and by registration fees for training. The Commission would like its existing OSR accounts, which again use no general fund dollars, to be re-allocated for FY'19.

Technical budget issues aside, the Commission believes, based on recent cost trends, that

the amount allocated for FY'19 should be sufficient to cover FY'19 costs. Note, however, that indigent legal services costs can be unpredictable. Historically, when the Judicial Branch operated the indigent legal services system, a period of stable costs was occasionally followed by unanticipated cost increases. The current FY'19 budget reflects essentially four years of flat funding, and although the Commission projects that its current allocation will be sufficient, history suggests caution in relying on these projections.

LEGISLATION AFFECTING THE COST AND QUALITY OF INDIGENT LEGAL SERVICES

The most significant legislation affecting the cost and quality of indigent legal services passed in 2017 was the biennial budget's creation of the Working Group to Improve the Provision of Indigent Legal Services. The Working Group met over the summer and fall, and much of its work focused on improving representation through increased oversight and evaluation of attorney performance. The Working Group also focused on bolstering the Commission's resources for financial analysis by the creation of a "chief financial officer" position within the Commission. The Working Group's recommendations are now before the Legislature for discussion and implementation. Note that independent of any action on the Working Group recommendation, the Commission is considering the implementation of a "resource counsel" system to immediately expand its capacity for oversight and evaluation.

The biennial budget also contained an amendment to Maine's bail code directing that when bail owned by a defendant is set off, the bail will go first to restitution, but second to reimbursement of counsel fees. The Judicial Branch has implemented this statutory priority, and as a result, the Commission has seen an increase in counsel fee reimbursement revenue. As stated above, this revenue is used to defray the cost of indigent legal services.

Regarding other legislation that might affect the cost of indigent legal services, the Commission responded to 25 requests for fiscal analysis of bills pending during the first regular session of the current legislature. The Commission reported to the Office of Program and Fiscal Review (OFPR) that most of these bills would not have increased the Commission's costs. LD 654, however, was enacted and will create additional costs for the Commission. The bill creates an entirely new version of the crime of Gross Sexual Assault – essentially, a lower standard of culpability that previously applied only to Unlawful Sexual Contact was imported into the Gross Sexual Assault statute. The Commission reported that it anticipated increased costs of \$18,000 for FY'18 and \$20,000 for FY'19. The original fiscal note prepared by OFPR contained an appropriation for the Commission of \$15,000 for FY'18 (reduced to reflect an effective date several months into the fiscal year) and \$20,000 for FY'19. In the Appropriations Committee process, the fiscal note was amended to eliminate the appropriation, and the final fiscal note urged the Commission to strive to manage the anticipated new costs within its existing budget.

Based on Commission analysis, OFPR created fiscal notes to reflect increased costs for indigent legal services on five other bills. Of these, three bills died and two were carried over on the appropriations table. The two carry over bills would have 1) expanded the list of predicate prior offenses that can raise a domestic violence assault from a misdemeanor to a felony and 2) made a third offense violation of a protective order a felony crime.

In terms of legislative initiatives, the Commission submitted a proposed biennial budget to the Governor's office and to the Legislature. The Commission also submitted legislation seeking to clarify that petitions for a writ of certiorari to the United States Supreme Court were included within the definition of indigent legal services. The legislation received an ought to pass as amended recommendation from the Judiciary Committee, but was not enacted by the full

Legislature. Finally, the Commission responded to several data requests from the Working Group to Improve the Provision of Indigent Legal Services.

COST CONTAINMENT MEASURES

New language enacted in the biennial budget required that this report set forth cost containment measures. In the time since enactment of the budget in July, the Commission has implemented some cost containment measures and is working on others.

The Commission directed staff to review existing rosters to ensure that attorneys did not appear on rosters overly distant from their office locations. This review resulted in 30 lawyers being removed from 9 different rosters. The Commission has also directed staff to impose more stringent geographic limitations when responding to attorney requests to appear on rosters in multiple courts, and the staff is doing so. In terms of day-to-day operations, during 2017 the Commission has cut its postage costs nearly in half by using email instead of regular mail to notify counsel of action on their requests for funds for experts and investigators and by diligently encouraging attorneys to set up direct deposit for voucher payments.

In terms of matters in progress, the Commission has focused discussion at its meetings on 1) the maximum fees for various case types contained in its fee schedule and the process for reviewing vouchers that exceed the target maximum, 2) travel and mileage costs, and 3) a more comprehensive system for geographic limitations on rosters. Because guidelines for maximum fees and travel and mileage reimbursement are contained in the fee schedule, which is an administrative rule, the Commission is considering proposing amendments to the rule and engaging in the administrative rulemaking process to implement those changes.

The Commission has also implemented changes that increase its ability to track specific cost drivers. The Commission has worked with the vendor of its voucher payment system, and

the attorneys using that system, to create reports that can isolate individual cost items, such as review of electronic discovery or travel, so they can be tracked over time. In addition, per the amendments contained in the biennial budget, the staff provides more detailed monthly reporting to the Commission on the costs of experts and investigators, etc., and action on requests for funds for such assistance.

Finally, when as mentioned above the Judicial Branch implemented the new legislative priority for bail setoffs, they reached out to the Commission seeking less cumbersome ways (other than email and telephone) to verify voucher payment information. The voucher system vendor proposed a solution, a contract amendment was agreed, and a new app is on the verge of going live so that court clerks will have electronic access to voucher payment information. This should further increase revenue from bail setoffs and reduce staff work for both the Commission and the Judicial Branch.

CONTRACTS

The Commission utilizes a flat fee contract model to provide indigent legal services in one county, Somerset, to cover all adult criminal and juvenile cases. The contract is of long standing, having existed for more than 10 years under the Judicial Branch before the Commission was created. The current contract is in its second of two authorized one-year extensions. The Commission will be deciding shortly whether to put this contract out to bid, and if so, the terms of any RFP. Based on accounts from judges and prosecutors, high quality representation is provided under the contract by attorneys who have been providing this service for many years. Compared to the cost of cases generally, the cost per case under the contract has varied. In FY'16, the cost per case under the contract was 11.8% less than the statewide average voucher cost, but in FY'17, the cost per case was 3.3% higher than the statewide average

voucher cost.

In 2016, the Commission decided to explore other areas for contracting indigent legal services. An RFP for appeal services was issued in September 2016. When bids were reviewed in January, 2017, however, the proposed bids were well in excess of the appeal costs under the existing system. As a result, the Commission decided not to award an appellate contract. The Commission remains open to exploring other options to contract for indigent legal services where such contracts can lead to both cost efficiency and quality representation.

The Commission has three current contracts for services other than indigent legal services. One contract is for our electronic voucher payment system, which is based on an RFP issued in early 2017 and has an initial term of three years. Another contract covers immigration law advice for assigned counsel, a service that was previously provided for free by a Maine non-profit agency. When in 2016 the Commission learned that this free service would no longer be offered, it decided to issue an RFP for these services. The RFP resulted in a reasonably priced contract that began in November 2016. This contract has been successful, and the first of two one-year extensions was implemented in November 2017. Finally, the Commission has a financial screener who is focused on verifying information supplied by people applying for assigned counsel. The Commission contracts with an internet database company that provides access to extensive information available only for use in the enforcement of government regulations. This is the principal search tool for verifying information from applicants for assigned counsel. The current contract is for 12 months.

TRAINING

During 2017, the Commission presented 18 training seminars attended by 267 attorneys. These trainings consisted of two distinct types. One type is minimum standard training that is

required for new attorneys to become eligible to receive indigent case assignments. The Commission presented two complete rounds of these trainings by video, one in June and the other in November, which accounted for 10 of the training seminars. The other type involves more advanced training targeted at improving the skills of attorneys already on the roster. Of these trainings, three – one live presentation and two video replays – covered representation in Juvenile cases and were free to participants due to a grant for juvenile defender training from the John T. Gorman Foundation. The Commission also presented live trainings in the areas of Child Protection law, OUI defense, and representation on Post-Conviction Review. Finally, the Commission presented video replays of the live OUI training and a previously recorded training on representation in Domestic Violence cases.

COMMISSION STAFF OPERATIONS

The Commission's central office staff consists of the Executive Director, the Deputy Executive Director, and an Accounting Technician. A fourth administrative support position remained vacant during 2017 as the remainder of the central office staff, by utilizing technology and sharing basic administrative tasks, was able to operate with this position vacant. The Commission believes that the administrative support position should be filled. There was no job turnover among the central office staff during 2017.

In addition to the central office staff, the Commission has 9 financial screener positions, 6 full-time and 3 part-time. The financial screener position in Portland became vacant at the end of 2016 and remained vacant throughout 2017 because, despite its request, the Commission did not receive a hiring freeze waiver from the Governor's Office, and hence, was not authorized to post the position. The Commission believes that the vacant screener position should be filled.

There was no turnover among the 8 remaining screener positions. The screeners covered

courts in 12 of Maine's 16 Counties. Cumberland had no coverage because the position was vacant, and Washington, Piscataquis, and Somerset Counties do not have screener coverage. Two of the part-time screeners cover Aroostook County and Hancock County. The third part-time screener reviews applications for assigned counsel from all over the state to verify the information supplied by the applicants.

Through November 2017, 10,390 applications for counsel were screened by Commission staff. For each applicant, the financial screener made a recommendation to the court, based on Commission indigency guidelines, as to whether the person qualified for counsel, and if so, whether the person should be deemed partially indigent and required to make periodic payments toward the cost of their representation, or whether the person did not qualify. In most, but not all cases, the court followed the recommendation of the financial screener. Statewide, 71% of applicants were found fully indigent, 20% were found partially indigent, and 9% were denied counsel. These percentages have remained stable with very little variation over the past 5 years.

MARVIN H. GLAZIER, 1944 - 2017

Commissioner Marvin H. Glazier, Esq., died on November 23, 2017, after a brief, but hard-fought battle with cancer. Marvin was the only Commissioner remaining from the five founding members of the Commission. Marvin brought extensive knowledge and wisdom about Maine's justice system and the importance of indigent legal services to the process of creating the independent system we have today. Marvin was a great lawyer with a successful practice who attracted more work from paying clients than he could do. Nevertheless, like many similarly situated lawyers in Maine, he always devoted a part of his practice to representing indigent clients, often in the most serious and complex cases. In addition, Marvin was always willing to volunteer his time to work on court improvements, and over the last seven years, to

improving the provision of indigent legal services statewide. We are grateful for his service, and he will be missed.