

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 15, 2019

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. From its inception until July 1, 2018, the Commission was made up five Commissioners appointed by the Governor and confirmed by the Senate. Pursuant to legislation passed during the second session of the 128th Legislature, effective July 1, 2018, the Commission now consists of nine members, two of whom are non-voting members, also appointed by the Governor and confirmed by the Senate. P.L. 2017, c. 430. During all of 2018, the Commission had only three active members with, prior to July 1, 2018, two vacancies. There are now six vacancies on the Commission.¹

The Commission provides indigent legal services primarily through a system of private assigned counsel² representing indigent people facing a loss of liberty in cases brought by the

¹ Despite the few members actually serving, the Commission has maintained a quorum, which was three members under former law and now consists of a majority of voting members currently serving.

² In Somerset County, representation in adult criminal and juvenile cases is provided pursuant to a contract, which is in its final year. The Commission expects that this contract arrangement will be addressed in the report from 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.

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

COST TRENDS AND BUDGET ANALYSIS

Overall, during calendar year 2018, the cost of providing indigent legal services has increased to some extent, but revenue from counsel fee reimbursements has also increased.

Attorney vouchers represent the vast majority of the cost of indigent legal services. In 2018, voucher costs totaled approximately \$17,753,000, compared to \$16,544,000 in calendar year 2017. Over the same time period, the number of new cases also increased, from 25,856 in 2017 to 27,324 in 2018. 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 2018 totaled \$1,110,000 compared to \$905,000 in 2017. Despite these increased costs for calendar year 2018, the Commission ended fiscal year 2018 with a surplus of over \$1 million that was returned to the general fund. In addition, for the current fiscal year, the Commission is on track with budget projections and should be able to meet its costs within its current budget.

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

Sixth Amendment Center discussed below, and the Commission plans to consider the comments of the Sixth Amendment Center in determining whether and in what manner to move forward with this contract.

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 2018, the Commission collected \$1.2 million in counsel fee reimbursements compared to \$794,000 in 2017. These increased revenues are available to cover the cost of indigent legal services.

The increase in reimbursement revenue stems from an amendment contained in the current biennial budget giving priority to counsel fee reimbursements in the setting-off of bail belonging to criminal defendants. The Judicial Branch has expended substantial effort to implement the new provision, which has resulted in increased resources for the Commission. The diligence of the Judicial Branch in this regard is greatly appreciated.

On a fiscal year basis, as stated above, the Commission returned over \$1 million to the general fund at the end of fiscal year 2018. Half-way into the current fiscal year, the Commission remains on track to cover all of its costs within its current budget.

Moreover, the Commission's All Other budget for fiscal year 2019 totals \$18.3 million. That is the same amount as the Commission's All Other budget for fiscal year 2016. For fiscal year 2017, the Commission's All Other budget was reduced, leading to a budget shortfall, but funds to cover the shortfall were included in the All Other budget for fiscal year 2018. When averaged, the All Other budget for each of those two years also totaled \$18.3 million. Accordingly, the Commission is on its fourth year of essentially flat funding and on track to meet its costs within that budget. Based on this history, the Commission is seeking the same amount of All Other funding for both years of the upcoming biennial budget. Overall, the cost of indigent legal services is stable.

EVALUATION AND SUPERVISION INITIATIVES

During 2018, the Commission undertook two initiatives to enhance its ability to evaluate and supervise assigned counsel.

RESOURCE COUNSEL

The Commission has designated 25 experienced attorneys from around the State as resource counsel for particular case types in various geographic locations. Each attorney on the Commission's roster has been notified who the resource counsel is in their geographic area for the case type(s) that they practice. Resource counsel are available to answer questions and provide guidance to attorneys regarding practice issues. In addition, all new lawyers joining the Commission roster are required to meet with resource counsel upon beginning practice. Based on feedback received by the staff, resource counsel are providing valuable advice and mentorship to lawyers in the field.

Resource counsel are also a valuable asset to the Commission's staff. Resource counsel expand the staff's ability to identify issues in the field, and when performance issues are identified, staff can engage resource counsel to address the issues with the attorney involved. The program has greatly enhanced the staff's ability to monitor attorney performance and intervene when necessary.

For their services, resource counsel are paid at the standard hourly rate of \$60 per hour for up to 10 hours per month, and the Commission is confident their services can be paid for with current resources.

FEEDBACK FORM

The Commission has also created and distributed a Feedback Form that clients and other actors in the system can use to communicate with the Commission about attorney performance.

Forms are being returned in moderate but steady numbers, perhaps three per month, and those that raise concerns are addressed with the lawyers involved. This process is also proving effective as a means to enhance staff oversight of attorneys providing indigent legal services.

LEGISLATION AFFECTING THE COST AND QUALITY OF INDIGENT LEGAL SERVICES

During 2018, the Legislature passed two significant pieces of legislation affecting the Commission directly. First, as stated above, the Legislature changed the size and composition of the Commission, increasing the number of Commissioners from 5 to 9 and specifying additional stakeholders to participate in the appointment process by making recommendations to the Governor, such as the Maine State Bar Association. The legislation also expanded the list of specific qualifications that at least one member of the Commission must possess. For example, one of the newly created positions must be filled by a person with experience in administration and finance.

The Legislature also commissioned an independent, non-partisan study of the provision of indigent legal services in Maine. The study is being performed by the Sixth Amendment Center and is underway. The study is being paid for by a transfer of \$110,000 from the Commission's fiscal year 2018 budget, and a report to the Legislature is expected in early 2019.

Regarding other legislation that might affect the cost of indigent legal services, the Commission responded to 5 requests from the Office of Program and Fiscal Review for fiscal analysis of bills pending during the second session of the last Legislature. The Commission reported that most of these bills would not have impacted the Commission's costs. The one exception was legislation to legalize adult-use marijuana, which eliminated various furnishing and possession offenses. The Commission estimated that eliminating these offenses would

reduce its costs by \$75,000, and the legislation passed with a fiscal note to that effect.

Two other bills were passed in the last session that had been carried over on the appropriations table. Both amended the Criminal Code, and the Commission had estimated cost increases associated with each, resulting in fiscal notes. One expanded the number of prior convictions that can raise a misdemeanor domestic violence offense to a felony and was accompanied by a \$6,000 appropriation. A second bill contained language making it easier to prosecute the Class A crime of drug trafficking that results in death or serious bodily injury and resulted in an \$11,000 appropriation.

COST CONTAINMENT MEASURES

During 2018, the Commission continued working on several cost containment initiatives that began during 2017. Specifically, the Commission continues to review existing rosters to ensure that attorneys do not appear on rosters overly distant from their office locations. During 2018, this review resulted in 43 lawyers being removed from 3 different rosters. In addition, Commission staff continue to impose more stringent geographic limitations when responding to attorney requests to appear on rosters in multiple courts.

For much of 2018, the Commission has focused on amending its fee schedule rule to address the maximum fees for various case types contained in its fee schedule and the process for reviewing vouchers that exceed the target maximum. After substantial discussion, the Commission is close to finalizing a proposed rule amendment that will go out to public comment as part of the standard rule-making process.

Finally, when as mentioned above the Judicial Branch implemented the new legislative priority for bail set-offs, they reached out to the Commission seeking less cumbersome ways (other than email and telephone) to verify voucher payment information. The Commission's

voucher system vendor proposed a low-cost solution that was implemented early in 2018. The Commission believes that this technical solution has played a large role in increasing collection of counsel fee reimbursements as described above.

TRAINING

During 2018, the Commission presented 13 training seminars attended by 120 attorneys. These trainings consisted of two distinct types. One type is minimum standards training that is required for new attorneys to become eligible to receive indigent case assignments. The Commission presented two complete rounds of these trainings in June and in November/December, which accounted for 8 of the training seminars. The other type of training provided during 2018 focused on Juvenile law and involved video replays of two trainings initially produced with a grant from the John T. Gorman Foundation. These replays were free to participants due to ongoing grant funding.

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 2018 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 2018.

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 2018 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 and will attempt to do so promptly in 2019.

There was no turnover among the 8 remaining screener positions, except that the part-time screener in Ellsworth retired on December 28, 2018. The Commission will also attempt to fill this position. The screeners covered courts in 12 of Maine's 16 Counties. Cumberland County 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.

During 2018, Commission staff screened 10,211 applications for counsel. 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, 70% of applicants were found fully indigent, 21% were found partially indigent, and 9% were denied counsel. These percentages have remained stable with very little variation over the past 5 years.