

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, 2020

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 of 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 2019, the Governor made eight nominations for Commissioners, seven voting members and one non-voting member. All nominations were approved by the Legislature, and the newly constituted Commission held its first meeting on August 13, 2019.

The Commission provides indigent legal services 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.

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

RESPONSE TO SIXTH AMENDMENT CENTER REPORT

During 2018, the Legislature contracted with the Sixth Amendment Center to study the delivery of indigent legal services in Maine. On April 4, 2019, the Center issued its report and briefed the Judiciary Committee on its findings. The report's findings can be summarized as follows:

- The current system provides inadequate qualification standards and training for attorneys, inadequate financial supervision of attorneys, and inadequate evaluation and supervision of attorney performance;
- Maine's initial appearance process 1) creates a gap in representation between the initial appearance where defendants are represented by a Lawyer of the Day and the time when another lawyer is assigned to handle the balance of the case, and 2) allows prosecutors to approach unrepresented defendants to discuss their case before they have been advised of, and waived, their right to counsel;
- The flat-fee contract model employed in Somerset County provides financial incentives to dispose of cases quickly and results in excessive caseloads;
- The hourly rate paid to assigned counsel is inadequate;
- The employment of financial screeners by MCILS creates a conflict of interest with the Commission's responsibility to provide zealous representation to defendants;

The Center recommended that:

- MCILS should promulgate more rigorous qualification standards, provide more rigorous training for attorneys representing indigent clients, and institute more effective financial supervision of attorneys, with the State providing additional staff and funding needed to accomplish these improvements;
- MCILS should institute a system that provides continuous representation by the same attorney from initial appearance until the case is resolved;
- Contracts that create financial incentives to limit work done on a case should be discontinued;
- Prosecutors should be barred from speaking to unrepresented defendants until after they have executed a waiver of counsel before a judge;
- The hourly rate paid to appointed attorneys should be increased so that attorneys are able to cover necessary overhead expenses and still earn a reasonable fee;
- MCILS should no longer have the responsibility for financial screening of people applying for counsel; and
- The State should fund and MCILS should implement a public defender system employing government attorneys to provide trial-court representation in Cumberland County and statewide representation on appeals.¹

Since the Sixth Amendment Center issued its report, the report's findings and recommendations have been the focus of Commission deliberations.² The Somerset contract

¹ The full findings and recommendations of the Sixth Amendment Center are attached to this report as an Appendix.

² At the time the report was issued, the Commission consisted of 2 members who had been appointed prior to the statutory amendment expanding the number of Commissioners. These Commissioners met only once, in May, after the report was issued. In June, the Legislature acted on the Governor's appointment of an entirely new slate of Commissioners. As stated above, the newly constituted Commission first met in August, 2019.

expired on June 30, 2019 and was not renewed. Representation in Somerset County is now provided by individual assigned counsel.

As stated above, the Commission now consists of 8 newly appointed Commissioners and, with the Sixth Amendment Center report in hand, is well positioned to undertake substantial steps to improve the delivery of indigent legal services in Maine. On October 8, 2019, the Commission voted to submit a supplemental budget request to the Governor's office seeking two new positions, one additional staff attorney and one field auditor position. This request reflects the Commission's desire to immediately expand its capacity to oversee attorney performance, enhance attorney training, and impose greater financial oversight. This initiative is a first step toward addressing the concerns raised in the report.

To help guide further steps, the Commission held a public hearing on November 19, 2019, where it heard testimony and received written comment from numerous stakeholders on the Sixth Amendment Center report.³ In addition, at its December meeting, the Commission received direct input from the Director of the Sixth Amendment Center, David Carroll. Also at that meeting, the Commission created sub-committees to work on responses to the Sixth Amendment Center report in four areas: financial oversight; consideration of implementing a Public Defender office; attorney training; and attorney practice standards, including the Lawyer of the Day process. Chair Josh Tardy has requested that the sub-committees work quickly with a target for preliminary recommendations by February 1, 2020.

COST TRENDS AND BUDGET POSTURE

Overall, during calendar year 2019, the cost of providing indigent legal services has

³ Copies of written comments submitted to the Commission can be found at the following link: https://www.maine.gov/mcils/meetings/past_meetings.html.

remained stable as compared to 2018. Although the Commission has seen a moderate increase in the number of new cases, the average cost per voucher has declined, resulting in slightly fewer costs incurred during 2019. Collections from counsel fee reimbursements⁴ remain strong, matching the robust collections seen in 2018. Nevertheless, the Commission enters 2020 facing a significant budget challenge.

Over the course of the last four fiscal years, the Commission has received All Other funding of \$18.3 million per year,⁵ and the Commission has projected costs to remain stable. Accordingly, in its budget request for the current biennium, the Commission sought continued All Other funding of \$18.3 million per year. The Governor's budget proposal, however, set All Other funding at \$15.5 million per year, and the Legislature appropriated funding at that level. As a result, despite Commission costs having remained stable for more than four years, without supplemental funding, the Commission will be unable to cover the cost of indigent legal services for most of May and all of June. Should that happen, a large amount of unpaid costs will be pushed into FY'21, which itself is underfunded at the \$15.5 million level.

The Commission has submitted a supplemental budget request to the Governor's office and will need support from the Administration and the Legislature to cover its costs during the balance of this fiscal year and the second year of the biennium.

⁴ During 2019, the Commission, with the assistance of the Judicial Branch, collected \$1.2 million counsel fee reimbursements, slightly more than it collected in 2018.

⁵ During FY'17, the Commission received All Other funding of \$15.5 million and was unable to cover its costs for most of May and all of June. As a result, the Commission carried a backlog of unpaid expenses into FY'18, and the Legislature appropriated additional funds for that fiscal year. When averaged, the All Other budget for each of those two years also totaled \$18.3 million.

LEGISLATION AFFECTING THE COST AND QUALITY OF INDIGENT LEGAL SERVICES

During 2019, the Commission responded to 18 requests from the Office of Program and Fiscal Review for fiscal analysis of 17 bills pending during the Legislative session, as well as one draft citizen's initiative. The Commission reported that most of these bills would not have impacted the Commission's costs, but the Commission did indicate that it anticipated increased costs with respect to 5 bills. Two of these bills were enacted. A bill authorizing the Commission to pay for the filing of petitions for certiorari to the United States Supreme Court resulted in an additional appropriation of \$9,000.00 for FY'20 and \$12,000.00 for FY'21. On the other enacted measure, which raised the class of crime for certain domestic violence crimes, the fiscal note did not result in any additional appropriation for the Commission.⁶ The three other bills for which the Commission identified additional costs were carried over to the second session of the Legislature.

COST CONTAINMENT MEASURES

In 2019, the Commission, together with the vendor for its attorney billing system, implemented a check on the hours counsel enter into the system for each day. When the system determines that an attorney has entered in excess of 12 hours for a single day, an email alert is sent to both to the attorney and to Commission staff. This enables the attorney to check the entries for the day in question and correct inaccuracies. In addition, attorneys are required to contact Commission staff to explain any inaccuracies discovered and to otherwise justify the number of hours billed for that particular day.

This system provides a number of benefits. First, the system prompts attorneys to

⁶ The Commission had estimated additional costs ranging from \$7,000.00 to \$14,000.00 per year.

identify errors in their billing practices, such as time entered on the wrong day or time entered incorrectly due to data entry errors. These checks have prompted numerous corrections resulting in fewer hours billed overall. Many of these errors would have been caught in the voucher review process in any event, but the alert system provides an additional layer of scrutiny before payments are approved. At last check, the alert system has generated just over \$6,000.00 in reductions in the amount billed to the Commission.

In addition, the alert system demonstrates to attorneys the need to focus on the accuracy of their billing practices. Over time, this should result in better billing practices and enhance the Commission's confidence in the accuracy of bills submitted by assigned counsel.

Finally, when hours are found to be accurate, the attorneys' recitation of their efforts on behalf of indigent clients provides an opportunity for additional scrutiny of attorney performance by Commission staff without any increased costs.

TRAINING

During 2019, the Commission presented 11 training seminars attended by 128 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, one in June and the other in November/December, accounting for 8 of the training seminars. The three other trainings addressed representation in Juvenile, Domestic Violence and OUI cases.

COMMISSION STAFF OPERATIONS

During 2019, the Commission was able to fill two staff positions that had remained vacant due to a hiring freeze. The Commission's central office staff now consists of the Executive Director, the Deputy Executive Director, an Accounting Technician, and an Office

Assistant I. In addition to the central office staff, the Commission has 9 financial screener positions, 6 full-time and 3 part-time. As stated above, the Commission hired a financial screener for Portland for the first time since the end of 2016. Among the remaining financial screener positions, a vacancy arose in Ellsworth due to retirement, but the Commission was able to fill that position. Otherwise, there was no turnover in Commission staff.

During 2019, the Executive Director and Deputy Director reviewed over 33,000 attorney vouchers for payment. Each voucher contains specific information about the attorney's activity on a case, as well as the case's outcome. The system also allows staff to question the attorney about issues identified in a voucher prior to its approval.⁷ Accordingly, the voucher review process allows Commission staff to assess the cost and quality of representation in each case before approving payment.

Financial screeners interview applicants for assigned counsel and assist applicants to complete the financial application submitted to the court. During 2019, Commission staff screened 10,545 applicants 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, 69% of applicants were found fully indigent, 22% were found partially indigent, and 9% were denied counsel. These percentages have remained stable with

⁷ Staff can also simply reduce a voucher under review. An aggregate amount of these reductions is not readily available to commission staff. These amounts, however, were included in data specifically requested from the Commission's billing system vendor for fiscal years 2016 through 2018. During that period, staff reduced vouchers by just over \$98,000.00 in the voucher review process.

very little variation over the past 6 years.