

MAINE STATE LEGISLATURE

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MAINE COMMISSION ON INDIGENT LEGAL SERVICES

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

FROM: MAINE COMMISSION ON INDIGENT LEGAL SERVICES

SUBJECT: ANNUAL REPORT

DATE: JANUARY 15, 2021

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 to provide counsel. 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 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 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 POSTURE

Overall, during calendar year 2020, the cost of providing indigent legal services has decreased due to the court closures caused by the pandemic. The pandemic-related closures have created a backlog of approximately 8,800 felony criminal cases. Although the Commission has seen a moderate increase in the number of new cases, the average cost per voucher has declined, resulting in fewer costs incurred during 2020. In November 2020, the average voucher cost fiscal year to date was \$451.27. As more cases are placed on trial list due to the pandemic closure, it is anticipated the average cost per voucher will increase as more cases are prepared for trial. Collections from counsel fee reimbursements¹ remain strong but have declined since last year. Nevertheless, the Commission enters 2021 facing a significant budget challenge outlined below.

SUPPLEMENTAL BUDGET REQUEST

In November 2020, the Commission submitted an FY21 supplemental budget request to the Governor's office seeking two new positions, one additional staff attorney and one field auditor position, and a one-time additional allotment to cover the costs of indigent legal services. This personal services request reflects the Commission's desire to immediately expand its capacity to oversee attorney performance, enhance attorney training, and impose greater

¹ During 2020, the Commission, with the assistance of the Judicial Branch, collected \$1,040,916 in counsel fee reimbursements, slightly less than it collected in 2019.

financial oversight. With current staffing levels, the Commission lacks resources needed to provide adequate training, evaluation, and supervision of assigned counsel to ensure the provision of high quality indigent legal services. The request for an additional two staff positions was also included in the FY'20 supplemental budget request.

The staff attorney position would enhance capacity for training and supervision of attorneys. The Commission also lacks resources to ensure effective financial oversight of attorney billing and internal Commission operations. These deficiencies were recently highlighted in report by OPEGA that attributed them, in part, to understaffing. The field auditor position would develop a program for detailed review of individual attorney billing, as well as to provide financial analysis with respect to ongoing Commission operations. These positions will allow the Commission to immediately begin addressing the identified deficiencies by expanding the Commission's ability to provide necessary training, evaluation and supervision of attorney performance and to provide needed financial oversight.

The one-time allotment will allow the unencumbered balance forward to cover the expected cost of indigent legal services in fiscal year 2020-21. The unencumbered balance forward arises from the reduction in court activity due to the pandemic in the last four months of fiscal year 2019-2020. Allotment of these funds is necessary because for fiscal year 2020-21, the Legislature appropriated substantially less than amount required to cover the cost of indigent legal services. Allotment of the balance forward will eliminate that shortfall and, hence, eliminate the need for supplemental funding to fully cover the cost of indigent legal services in fiscal year 2020-21. Failure to allot these funds will leave the Commission unable to cover the cost of indigent legal services in fiscal year 2020-21.

BIENNIAL BUDGET REQUEST

The Commission budget is devoted exclusively² to providing constitutionally required indigent legal services. The Commission's biennial budget request seeks to embrace and implement the recommendations from the Sixth Amendment Center report and address issues raised in the recent OPEGA report. The Commission believes that these reforms are essential to improve the quality of indigent legal services in Maine and to meet the State's Constitutional obligation to provide effective assistance of counsel in indigent cases. Moreover, the Commission's staff is small³ and broadly acknowledged to be insufficient to meet the Commission's current needs. The Sixth Amendment Center and OPEGA reports indicate that the Commission has no mechanism to measure attorney performance against practice standards or any other mechanism in place to formally measure, assess or oversee the quality of representation. The Commission has not developed standards for the evaluation of assigned counsel and contract counsel. *See* 4 M.R.S. § 1804(2)(D).

Additional Funding for Indigent Legal Services

This \$5.6 million request provides the funding necessary to maintain the Commission's operations at their current level of \$18.3 million. Since fiscal year 2016-2017, the Commission has routinely received All Other funding of \$18.3 million. The Commission has operated with this flat-funding amount for many years and continues to project that it will require \$18.3 million

²The Commission's All Other budget is used to pay attorneys for services provided to people who are entitled to representation as State expense, as well as to pay for experts, investigators, and other services necessary to the provision of adequate representation. The budget also pays for operational costs such as office supplies and equipment and information technology, including a customized attorney voucher system. Operational costs constitute just under 1.1% of the Commission's All Other expenditures.

³ The Commission has 10 full-time and 3 part-time staff. Of these, only four are devoted to managing Commission operations. Six full-time and 3 part-time financial screeners assist the courts with determining an applicant's entitlement to representation at state expense and collect reimbursement for counsel costs expended from those who are adjudged able to pay. These positions generate revenues that are then applied to the cost of indigent legal services.

per year to fund current operations. Because of one-time funding in fiscal year 2019-2020, the All Other baseline budget for each year of the current biennium equals \$15.5 million. The cases opened in the Commission's billing system have steadily increased while the funding has remained flat. During FY 2015, 6,934 misdemeanor and felony criminal cases and 955 Child Protection Petition cases were opened. During FY 2020, 8,342 misdemeanor and felony criminal cases and 1,390 Child Protection Petition cases were opened. This is an increase of 1,408 misdemeanor and felony criminal cases and 435 Child Protection Petition cases. The Commission's funding request is necessary to meet the State's constitutional obligation to provide representation at State expense to indigent individuals.

Increase in Central Office Staff

This \$2.2 million request for 10 new staff members implements the recommendation of the Sixth Amendment Center and OPEGA to expand Commission staff. The positions will provide for one attorney to observe attorney evaluation and performance, one attorney to oversee training of attorneys, one non-attorney training staff supervised by the attorney, one attorney to oversee the Commission's internal financial operations and payment of attorney vouchers, one Auditor I position focused on financial operations and voucher payment supervised by the attorney, one Audit Director position and two Field Examiner II positions focused on reviewing the billing practices of attorneys in the field, one trial resource attorney position and one resource attorney for sentencing issues including mental health and substance abuse.

Kennebec County Public Defender Office

This \$4.2 million request seeks to establish 17 positions to create a Public Defender Office pilot project in Kennebec County. The positions will provide for a District Defender, A Deputy District Defender, two Homicide and Serious Felony Defenders, two Senior Assistant

Public Defenders, three Assistant Public Defenders, three Paralegals, two Investigators, two Social Workers, and one Office Manager. This pilot project is necessary to implement the recommendation of the Sixth Amendment Center to explore a transition to a Public Defender system through a pilot project in a single county.

Statewide Appellate Public Defender Office

This \$5 million request establishes 20 positions to create a statewide Public Defender Office to handle Appeals and Post-Conviction Review Cases. The positions will provide for a Director of Appeals and Post-Conviction Review, a Deputy Director of Appeals, a Deputy Director for Post-Conviction Review, three Senior Assistant Appellate Defenders, five Assistant Appellate Defenders, one Senior Post-Conviction Defender, two Assistant Post-Conviction Defenders, four Paralegals, one Post-Conviction Mitigation Specialist, and one Post-Conviction Investigator. This request is necessary to implement the recommendation of the Sixth Amendment Center to create a statewide Appellate Defender Office.

Attorney Hourly Rate Increase

This \$23 million request provides funding to raise the hourly rate paid to attorneys representing indigent clients who are entitled to representation at State expense from \$60 per hour to \$100 per hour.⁴ This request implements the recommendation of the Sixth Amendment Center and would ensure that the Commission can retain qualified attorneys to provide indigent legal services. The number of rostered attorneys has slowly been declining. This is in part due to the inadequate hourly rate as stated in the Sixth Amendment Center report. The hourly rate was last raised in July 2015 from \$55 per hour to \$60 per hour.

⁴ The Sixth Amendment Center recommended additional compensation of \$25 per hour for designated case types such as murder, sexual assaults, and post-conviction review.

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. Since the Sixth Amendment Center issued its report, the report's findings and recommendations have been the focus of Commission deliberations. In December 2019, the Commission created subcommittees to work on responses to the Sixth Amendment Center report in four key areas: (1) financial oversight; (2) consideration of implementing a Public Defender office; (3) attorney training; and (4) attorney practice standards, including the Lawyer of the Day process. Subcommittee work continued thorough out 2020, leading to the following proposals:

- A statewide appellate public defender office and a trial level public defender office in Kennebec County, both included in the biennial budget request.
- Substantial changes to the attorney eligibility and specialized panel rules, including more rigorous attorney qualifications and training.
- A new five-day new attorney training program scheduled to begin in Fall 2021 covering adult criminal, juvenile, and child protection.
- Several recommendations for improvement to the Commission's financial controls, including investing resources in both billing software upgrades and staffing to fully implement the warning flag system, draft rules and guidance to incorporate billing standards and provide attorney training on billing and record-keeping.
- The Commission requested that the Advisory Committee on the Rules of Professional Conduct amend the Maine Rules of Professional Conduct to include ABA Model Rule 3.8 (b) & (c) regarding the special responsibilities of a prosecutor. The Commission also sent communication to the outgoing Judiciary Chairs urging them to work with the incoming members of the Judiciary Committee of the 130th Legislature to implement the recommendations of the Sixth Amendment Center report and limit prosecutor interactions with pro se defendants, as would have been accomplished by LD 2171 of the 129th Legislature.

OPEGA REPORT

On December 10, 2019, the Government Oversight Committee (GOC) voted for a detailed review of the Commission by the Office of Program Evaluation and Government Accountability (OPEGA) and approved the following scope of work:

1. Adequacy of systems and procedures used by MCILS staff to process payments and expenditures associated with providing legal representation to clients who have been determined to be indigent or partially indigent.
2. Reasonableness of and consistency in the application of standards, criteria and procedures which inform the determination of whether a defendant/client is indigent.
3. Reasonableness of and consistency in the application of criteria and procedures used in determining, ordering and monitoring payments towards counsel fees by those who have been determined to be partially indigent.
4. Sufficiency of response by MCILS, or MCILS staff, to internally identified concerns and ~~to~~ recommendations made in reports which examined or evaluated the operations of the Commission regarding financial oversight.
5. Adequacy of the oversight structure of MCILS in ensuring that operations align with and accomplish the organization's purpose.

On January 10, 2020, the GOC voted to expedite two elements of the scope of work, items 1 and 5 above. OPEGA published its first [report](#) on items 1 and 5 in November 2020 and concluded the following:

- Issue 1: There are no established policies and procedures governing expenditures and payments - and MCILS expectations for billing practices may not be effectively communicated to attorneys.
- Issue 2: Data available to MCILS staff via Defender Data is unreliable and potentially misleading.
- Issue 3: Current monitoring efforts of attorney vouchers are inefficient and of limited effectiveness.
- Issue 4: Invoice-level review of non-counsel invoices may be of limited effectiveness in identifying certain types of noncompliance.
- Issue 5: Audit or review procedures have not been established and current audit efforts

used by MCILS are limited, inconsistent, and of limited scope, depth and effectiveness.

- Issue 6: The agency charged with administering MCILS's purpose is under-staffed.
- Issue 7: MCILS staff operates without clearly-defined roles and uses current staff inefficiently.
- Issue 8: The Commission receives insufficient support for necessary operations.
- Issue 9: A weak oversight structure impacts the ability of MCILS to adequately meet its statutory purpose.

The OPEGA report concluded with a recommendation that the Commission should begin work on the development of a formal, strategic plan with a framework driven by and addressing each of the elements contained within Commission's statutory purpose—to provide efficient, high-quality representation to indigent criminal defendants, juvenile defendants and children and parents in child protective cases, consistent with federal and state constitutional and statutory obligations. Part 2 of OPEGA's report on items 2, 3, 4 is expected in the first half of 2021.

The Commission now has the benefit of both the Sixth Amendment report and the OPEGA report and feels well positioned to make the kinds of significant changes needed to accomplish its statutory mission. The Commission will, however, need the support of both the Administration and the Legislature to be able to enact its proposed reforms.

LEGISLATION AFFECTING THE COST AND QUALITY OF INDIGENT LEGAL SERVICES

On March 10, 2020, the Judiciary Committee held a work session for LD 1067, An Act To Promote Fairness and Efficiency in the Delivery of Indigent Legal Services, the concept bill that was carried over from last session as a vehicle to implement recommended changes from the Sixth Amendment Center report. The Committee decided to use LD 1067 as a proposal to fund a working group consisting of 12 members from the Commission, the Judiciary, and the Legislature to design and propose a plan for Maine to adopt a public defender system. The

Committee voted unanimously that LD 1067 ought to pass. The Committee also unanimously voted for a joint order on a sunset provision for 4 MRS 1804 § 4 which would allow for the standards under subsection 2, paragraph B to become routine technical instead of major substantive for a period of time, most likely until spring or summer of 2021. The Legislature did not have a final vote on either bill prior to adjournment due to the pandemic. The Commission supports both bills.

RECORDING OF ATTORNEY-CLIENT PHONE CALLS

In June 2020, the Commission became aware of a serious issue involving jails recording attorney-client phone calls and in at least one instance turning over this recording to the prosecution. The Commission alerted all rostered counsel of the need for their phone numbers to be included on the “no-record” registry and worked to investigate the scope of the problem. The Commission gathered rostered attorney phone numbers and alerted the two vendors that manage the collect call system at the county jails that these attorney phone numbers needed to be placed on the no-record registry. These efforts were merely a stopgap measure and the Commission urges the Legislature to pass legislation to put safeguards in place to prevent any future recording of a privileged attorney-client call.

ASSIGNED COUNSEL FOR COMMITTED YOUTH

The Commission, in collaboration with the Department of Corrections and the Judicial Branch, implemented a new program which provides post-adjudication representation for juveniles, under juvenile court jurisdiction, who have been committed to a juvenile detention facility. The Judicial Branch agreed to assign an attorney to each juvenile at the time that the juvenile is committed to the juvenile detention facility and the Commission has created a list of experienced juvenile defense attorneys to participate in the program. These attorneys will:

- Provide representation at the juvenile’s annual judicial reviews in court;
- Provide representation at the juvenile’s classification meetings and quarterly review meetings at the juvenile detention facility;
- Provide advocacy and support as the juvenile progresses through the commitment program at the juvenile detention facility;
- Communicate with the professional and treatment team working with the juvenile; and
- Assist and advocate for a juvenile’s needs in transition planning to help ensure successful community reintegration.

RESPONSE TO COVID-19 PANDEMIC

The Commission has undertaken the following actions since the beginning of the pandemic in March 2020:

- Provided attorneys on the criminal roster with a sample motion for reduction of jail sentences in light of the COVID-19 outbreak and provided juvenile attorneys with links to national guidance and pleadings for use in obtaining release of juveniles from detention.
- Urged all counsel to seek release for clients held in lieu of bail and worked to identify certain jails where populations were not dropping as quickly as others and reach out to local counsel urging them to actively seek releases.
- Worked with the court on using technology to connect attorneys and clients to avoid the need for in-person visits at jails.
- Worked with the court to create a pilot program in Region 3 for the assignment of counsel for defendants who were waiting for initial appearance due to the postponement of most court proceedings. The goal of the program was to provide early, effective representation to people awaiting a court date on a summons.
- Facilitated discussions between the Office of Child and Family Services and parents’ attorneys about department policies on in-person visitation.

COMMISSION STAFF OPERATIONS

In November 2020, John Pelletier resigned his position as Executive Director, a position he held since the Commission’s inception. The Commission’s central office staff currently

consists of 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.

During 2020, the Executive Director and Deputy Director reviewed over 28,600 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.

Financial screeners interview applicants for assigned counsel and assist applicants to complete the financial application submitted to the court. During 2020, Commission staff screened over 7000 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, 73% of applicants were found fully indigent, 21% were found partially indigent, and 6% were denied counsel.