

MAINE STATE LEGISLATURE

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MAINE COMMISSION ON INDIGENT LEGAL SERVICES

January 14, 2022

Governor Janet Mills
Chief Justice Valerie Stanfill, Maine Supreme Judicial Court
Senator Anne Carney, Senate Chair of the Judiciary Committee
Representative Thomas Harnett, House Chair of the Judiciary Committee

Delivered via Email

Re: **Annual Report of the Maine Commission on Indigent Legal Services**
4 M.R.S.A. §1804(3)(H)

Governor Mills, Chief Justice Stanfill, Senator Carney, and Representative Harnett:

The Maine Commission on Indigent Legal Services, (“MCILS”), by and through its Executive Director, Justin Andrus, respectfully presents its annual report. Pursuant to 4 M.R.S.A. §1804(3)(H):

By January 15th of each year, [the Commission shall] submit to the Legislature, the Chief Justice of the Supreme Judicial Court and the Governor an annual report on the operation, needs and costs of the indigent legal services system. The report must include:

- (1) An evaluation of contracts; services provided by contract counsel and assigned counsel; any contracted professional services; and cost containment measures; and
- (2) An explanation of the relevant law changes to the indigent legal services covered by the commission and the effect of the changes on the quality of representation and costs.

Overview

The Maine Commission on Indigent Legal Services 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. MCILS sets standards for attorneys providing indigent legal services, and attorneys are assigned to individual cases by the court from lists of eligible counsel created and maintained by MCILS. MCILS also provides funds for investigative and expert services necessary for the representation of indigent clients. The work of MCILS is funded by an annual appropriation from the Legislature.

In calendar year 2021, 354 MCILS-approved assigned counsel opened 28,571 cases, averaging 73 cases per counsel. Each individual counsel is a private citizen of the State of Maine who has agreed to provide the services necessary to permit the State to discharge its constitutional and statutory obligations to every citizen, part-time resident, and visitor to the State. Every person who has reason to come within the jurisdiction of the State of Maine is among the constituency those counsel serve. MCILS thanks each of them for their dedicated service, and willingness to prioritize the public good above personal reward.

MCILS would also like to thank those with whom we have outside relationships that support our mission. We have received outstanding support from MaineIT, our Bureau of Human Resources contacts, and the Bureau of Budget. Many State employees, already with tremendous works loads, took on our tasks and projects, and brought them to fruition.

Finally, MCILS thanks the judges and particularly the clerks who have moved mountains to ensure that consumers of indigent legal services have access to justice. The clerks in particular have had to weather our changing procedures, and shifting requests. Without their patience, diligence and care, MCILS could not discharge its function.

MCILS began the year in midst of change of leadership, and under intense scrutiny following the publications of both the Sixth Amendment Center's report, *The Right to Counsel in Maine: Evaluation of Services Provided by the Maine Commission on Indigent Legal Services*, of April 2019, and the OPEGA report of December 2020. Using both of those reports as lodestars, MCILS worked throughout the year to implement resolutions to the issues each identified. MCILS has experienced significant successes through that work and has identified solutions to many of those issues that remain. A detailed report on MCILS responses to both publications is appended to this letter, together with a report on MCILS efforts to comport with the American Bar Association's *Ten Principles of a Public Defense Delivery System*. Please consider those memoranda part of this report.

1. An evaluation of contracts; services provided by contract counsel and assigned counsel; any contracted professional services; and cost containment measures

In calendar year 2021, MCILS relied exclusively on services provided by assigned counsel to provide direct client services. MCILS saw a decline in the number of counsel seeking assignments to serve indigent clients from January into the summer. Since August, there has been a rebound in the number of available counsel.

MCILS counsel have successfully staffed every case in which the Court sought to make an assignment of counsel, together with those cases in which MCILS assigned counsel directly. No client was deprived of counsel. At times, however, MCILS had to search for appropriate counsel.

MCILS counsel report that there are three primary stressors that cause them to withdraw from eligibility to receive assignments either temporarily or permanently, or to consider doing so. The single greatest cause for withdrawal reported is the insufficiency of the resources available to counsel. While the rate of pay for assigned counsel increased from \$60 to \$80 per hour in 2021, at that rate it remains impossible for counsel to meet the expenses of staff, benefits, and overhead while retaining a reasonable wage. Parity with a prosecutor, including staff, would require a rate of at least \$100 per hour simply for payroll. MCILS must continue to work toward providing its assigned counsel with rate of pay that will provide parity with the State and allow a reasonable wage to counsel after expenses.

The second primary stressor reported to MCILS is difficulty navigating conflicting demands on attorney time, especially from different courts. To ensure that every indigent defense case is staffed, MCILS counsel are generally required to practice in more than one county, and many are frequently asked to take specific cases in counties that can be distant from counsel's office. Counsel have stepped up reliably to assume responsibility for these cases but doing so results in court scheduling that calls for an individual to be in two places at once, and further results in significant travel time. We have appreciated the Courts' willingness to consider changes to scheduling practices and to resume the more widespread use of remote appearances to help assuage these pressures, while recognizing that it is not always possible for a Court to do so.

Long term resolution of the scheduling and travel issues calls for an increase in the number of counsel available to serve clients in those counties that do not have a dense attorney population. That increase must come in two forms. First, incentives must be developed to induce attorneys to join the MCILS system generally, and to agree to be located in areas in which counsel are in need. The Access to Justice Tax Credit is a start in this direction. In addition, student loan forgiveness or abatement programs should be made available to counsel. Counsel must have access to the same types of legal research and other business systems that the State has available. Group health insurance must become realistic. These changes all require the participation of outside stakeholders.

Further, MCILS has asked for the authority and funding to hire State employed public defenders. To fully meet its constitutional and statutory obligations, MCILS must see that initiative proceed, and be expanded. As discussed below, there are benefits to an employed public defense system that must be realized for MCILS to fully achieve its mission. Many of those benefits can accrue to assigned private counsel in addition to employed counsel, making an investment in that system productive statewide. In the context of addressing the need to increase the number of counsel available to serve clients in currently underserved areas, MCILS would use the opportunity to employ client-serving counsel in part to create squads of attorneys who could travel to areas of need to provide those services. With the help of the Court in scheduling those attorneys, it would become possible for those employed counsel to become a very efficient mechanism for addressing changes in attorney availability across the state.

The third major stressor reported to MCILS is the ongoing evolution of MCILS itself. Over the course of this year, MCILS has made many changes to its operating practices, and we recognize that each one calls for resilience on the part of assigned counsel to adapt to those changes. MCILS has additional changes to make but doing so piecemeal risks alienating the people we rely on at each change. Instead, MCILS asks for the support to make its next evolution now, and once.

Following the publication of the Sixth Amendment Center report, MCILS resolved to introduce the concept of a public defender office to indigent defense in Maine. MCILS continues in that request. As proposed, the public defender office would serve as part of a hybrid system providing service to indigent clients through both managed assigned counsel and through employed defenders. That system would provide the ability for MCILS to provide genuine mentorship and training and engage in meaningful quality control and oversight to both employed and contracted counsel. In addition, MCILS must receive the resources it needs to develop effective programs fostering diversion programs; presenting effective mitigation evidence; and, working across the bar to foster trial level advocacy that supports effective appellate work. Providing resources to these programs will tend to reduce the net-cost of the collateral consequences of certain convictions and to better prepare people leaving the criminal justice system to become productive members of society, rather than repeat offenders.

MCILS and its attorneys have made great strides this year. From this point forward, however, MCILS requires the authority and funding to complete its evolution into an integrated public defense provider, so that counsel – assigned and employed – have the resources and flexibility across the state to provide consistent excellence to consumers.

Attorney Costs: With respect to existing operations, MCILS is meeting its immediate task of providing service in every appropriate case, within its budget. As of January 13, 2022, there were 279 attorneys actively seeking assignments. There were no counties in which there were no attorneys seeking cases of any specific case type. There are periods however, including the present, in which there is one or more county in which there are no local attorneys seeking cases of specific types.

The following table sets out the case statistics by case-type for 2021:

Case Type	New Cases	Vouchers Paid	Approved Paid	Average Amount
Appeal	157	188	285547.19	\$1,518.87
Child Protection Petition	2,377	4,848	2988213.12	\$616.38
Drug Court	10	122	183812	\$1,506.66
Emancipation	77	66	22695.97	\$343.88
Felony	6,778	6,745	4813782.57	\$713.68
Involuntary Civil Commitment	1,142	1,144	250861.51	\$219.28
Juvenile	600	739	355263.63	\$480.74
Lawyer of the Day - Custody	2,783	2,626	690817.72	\$263.07
Lawyer of the Day - Juvenile	288	246	56613.09	\$230.13
Lawyer of the Day - Walk-in	1,779	1,631	456947.18	\$280.16
Misdemeanor	10,027	9,674	3489502.11	\$360.71
Petition for Modified Release Treatment	5	54	27642.38	\$511.90
Petition for Release or Discharge	1	10	7031.53	\$703.15
Petition for Termination of Parental Rights	369	902	648481.74	\$718.94
Post-Conviction Review	71	86	169401	\$1,969.78
Probate	48	28	37029.4	\$1,322.48
Probation Violation	1,347	1,446	623647.83	\$431.29
Represent Witness on Fifth Amendment Issue	17	15	6640.12	\$442.67
Resource Counsel Criminal	0	25	4654	\$186.16
Resource Counsel Juvenile	0	4	136	\$34.00
Resource Counsel Protective Custody	2	5	794	\$158.80
Review of Child Protection Order	681	2,565	1413159.65	\$550.94
Revocation of Administrative Release	12	11	3946.36	\$358.76
Summary	28,571	33,180	\$16,536,620.10	\$498.39

The total cost of direct payments to attorneys of \$16,536,620 is an increase from \$13,440,142 in 2020. MCILS attributes this difference to the period in which there were fewer in-court events for counsel. In calendar year 2019, the last pre-pandemic period for comparison, direct payments to attorneys totaled \$17,299,475. MCILS does expect an increase in the total of payments to attorneys as the result of the increase in the hourly rate. Because the rate did not go into effect until July, and because counsel bill MCILS in arrears, the impact of the rate change is not yet fully reflected in the total.

Contracts: Other than services MCILS receives from the State directly, there are three outside contracts. The first is a contract with an attorney skilled in immigration law. Immigration counsel is available to confer with MCILS counsel on any case in which there may be immigration consequences. Because immigration law is complicated, and changes frequently, this service is essential to MCILS operations. The services immigration counsel provides vary from month to month, but the effective cost to MCILS is much less than it would cost to engage immigration counsel on an *ad hoc* basis at a typical hourly rate.

The second contract is between MCILS and Justice Works, an outside vendor that provides the MCILS case management and billing system. This contract was the product of competitive bidding in 2016 and is in its last extension. MCILS relies on this service for the core of its financial relationship with assigned counsel. MCILS is working with MaineIT to identify a successor product.

Finally, MCILS has a contract with Attorney Jamesa Drake to develop a training curriculum for attorneys joining MCILS to become assigned counsel. That contract calls for Attorney Drake to produce that training once. The training is an important addition to the ability of MCILS to train counsel. Fulfillment of this training is delayed at the request of MCILS due to the pandemic.

Cost Containment: Cost containment measures in 2021 have focused on publishing detailed expectations for attorney billing and ensuring that attorney vouchers and non-counsel invoices receive effective review. MCILS has also reinforced its payment timing rules. Two new audit staff members have been hired to add to the financial review supported by our existing staff. The audit staff have developed an audit process. MCILS anticipates that process will roll out in March. Because adequate services both from counsel and from non-counsel providers is a constitutional guarantee, cost containment for MCILS means ensuring that payments are appropriate, rather than trying to eliminate services to reduce the overall cost.

2. An explanation of the relevant law changes to the indigent legal services covered by the commission and the effect of the changes on the quality of representation and costs.

4 M.R.S.A. §1804 – Commission Responsibilities

Section 1804 was amended to authorize the use of employed attorneys to provide indigent legal services. MCILS asked for this amendment to permit flexibility in staffing indigent defense cases, however MCILS was not provided the headcount or budget to implement employed counsel.

Section 1804 was also amended to require the Commission to establish a system to audit financial requests and payments, and to recoup payments where necessary. Commission staff are working toward implementation of this system as a necessary component of ensuring that the financial resources allocated to indigent defense are properly spent on that defense.

At this time there are no additional costs related to this amendment.

15 M.R.S.A. §815 – Communication between prosecutor and unrepresented defendant

Section 815 was enacted to prevent most communication between a prosecutor and an unrepresented defendant, absent a knowing and voluntary waiver. MCILS supported this change because, among other benefits, it alleviates the concern that an unrepresented defendant will plead guilty to a charge in exchange for an offer from the State without the benefit of counsel as to the collateral consequences of the conviction.

This section has had the effect of driving unrepresented defendants to MCILS early in the lifespan of a charge, allowing MCILS the opportunity to provide advice to those defendants. While this increases the number of people MCILS interacts with, doing so is consistent with its defense function. MCILS does not yet have enough data to determine what impact this section will have on its costs.

36 M.R.S.A. §5219-ZZ – Access to justice credit

Section 5219-ZZ creates the opportunity for up to five eligible attorneys in each year from 2022 to 2027 to receive a credit of \$6,000 against state income taxes in each of five years. One of the requirements of eligibility for the credit is participation in the MCILS program. Another is a commitment to open, join, or purchase a law practice in an underserved area.

MCILS supports this effort to promote participation in its program, particularly in underserved areas. As implemented, however, the credit is not available to most existing counsel as an incentive to remain in the program and does not provide its complete relief within the income band of most new counsel.

In conclusion, MCILS has heard and responded to the criticisms leveled against it by owning its shortcomings and working quickly and effectively to cure them. There is still a lot of work to do, however. MCILS asks for its seat at the table, the prerogative to implement its vision, and the support to permit it to deliver on its promise.

Respectfully submitted,

/s/ Justin W. Andrus
Justin W. Andrus, Esq.
Executive Director
MCILS

cc: Commissioners
MCILS Staff
MCILS Eligible Counsel
MCILS Interested Party Distribution List