ACLU
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Maine

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March 8, 2024

By Hand-Delivery and Email
Tamara Rueda, Clerk
Kennebec County Superior Court
1 Court Street, Suite 101
Augusta, ME 04330

Re: *Andrew Robbins, et al v. Maine Commission on Indigent Legal Services, et al* No. KENSC-CV-22-54

To Whom It May Concern:

Enclosed for filing in the above-captioned case, please find the following:

1. Plaintiff's Motion for Leave to Amend and Supplement Complaint and Proposed Order;
2. Proposed First Amended Class Action Complaint for Injunctive and Declaratory Relief and Class Action Petition for Habeas Relief, attached as Attachment A to Plaintiff's Motion for Leave[1];
3. Exhibits 1-7 to the Proposed First Amended Class Action Complaint;
4. Plaintiff's Request for Trial Protection.

If you have any questions about this filing, I can be reached at (207) 619-6224.

[1] We have not provided a redline comparison document of the proposed First Amended Complaint and the original Complaint due to the significant updates, but if that would assist the Court we are glad to do so.

Very truly yours,

/s/ Zachary Heiden
Zachary Heiden,

Counsel for Plaintiffs

cc: Honorable Aaron Frey (by email),
Attorney General
Sean D. Magenis, AAG (by email),
Office of the Attorney General
Eric Samson (by email and mail),
Sheriff of Androscoggin County
Peter Johnson (by email and mail),
Sheriff of Aroostook County
Kevin Joyce (by email and mail),
Sheriff of Cumberland County
Scott R. Nichols (by email and mail),
Sheriff of Franklin County
Scott Kane (by email and mail),
Sheriff of Hancock County
Ken Mason (by email and mail),
Sheriff of Kennebec County
Patrick W. Polky (by email and mail),
Sheriff of Knox County
Todd B. Brackett (by email and mail),
Sheriff of Lincoln County
Christopher Wainwright (by email and mail),
Sheriff of Oxford County
Troy Morton (by email and mail),
Sheriff of Penobscot County
Robert Young (by email and mail),
Sheriff of Piscataquis County
Joel Merry (by email and mail),
Sheriff of Sagadahoc County
Dale P. Lancaster (by email and mail),
Sheriff of Somerset County
Jason Trundy (by email and mail),
Sheriff of Waldo County
Barry Curtis (by email and mail),
Sheriff of Washington County
William L. King, Jr. (by email and mail),

Sheriff of York County

STATE OF MAINE
KENNEBEC, ss.

SUPERIOR COURT
Docket No. KENSC-CV-22-54

ANDREW ROBBINS, et al.,

Plaintiffs,

v.

MAINE COMMISSION ON INDIGENT LEGAL SERVICES, et al.,

Defendants.

PLAINTIFFS' MOTION FOR LEAVE TO AMEND AND SUPPLEMENT COMPLAINT

PLAINTIFFS' MOTION FOR LEAVE TO AMEND AND SUPPLEMENT COMPLAINT

Under Rule 15 of the Maine Rules of Civil Procedure and this Court's February 27, 2024 Order ("Combined Order"), Plaintiffs move for leave to amend and supplement their complaint. A copy of the proposed First Amended Complaint and Petition for a Writ of Habeas Corpus is attached as *Attachment A*. Defendants object to this motion.

I. Justice Requires the Court to Permit Plaintiffs to Amend the Complaint to Reflect Recent Events and Comply with the Court's Combined Order.

Justice requires that the Court permit the Plaintiff Class to amend and supplement their complaint. Plaintiffs may amend their complaint "only by leave of the court," but "leave shall be freely given when justice so requires." M.R. Civ. P. 15(a). Moreover, the Court may permit Plaintiffs "to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented." M.R. Civ. P. 15(d) (permitting supplemental pleadings even if the original pleading was "defective in its statement of a claim for relief or defense"). In its Combined Order, the Court authorized the

parties to file motions “to amend pleadings and add parties,” so long as such motions are filed by March 8, 2024.

Throughout its Combined Order, the Court acknowledged that Plaintiffs’ original Complaint alleged that Maine failed to provide “actual representation,” but also noted that “there have been new factual developments” since the case was filed. *Combined Order*, fn. 7; *see also Combined Order*, 13 (“Much has changed for Class Members since this case was filed almost two years ago.”) The Court was even more explicit in an earlier order, noting that, while the current parties “turned their focus” to attempting (with the Court’s permission) to reach a settlement, Maine’s system for providing lawyers to indigent defendants deteriorated. See *Order on Joint Motion for Preliminary Settlement Approval* (September 13, 2023), 15-16.

When, as here, Plaintiffs seek to amend their complaint to reflect events that have occurred since the original complaint was filed, “the appropriate procedure is to move to supplement the pleadings pursuant to M.R.Civ.P. 15(d).” *Steinberg v. Elbthal*, 463 A.2d 731, 733 (Me. 1983). A Rule 15(d) motion “will often avoid the delay and expense associated with commencement of a second action involving related facts, and should ordinarily be granted unless the opposing party can demonstrate that allowing the motion will prejudice his position or unreasonably delay the litigation.” *Id.* Permitting supplemental pleadings is especially appropriate when, as here, the complaint seeks prospective injunctive relief, making the facts as they currently exist much more important than the facts as they existed at the time the original complaint was filed.

Here, Plaintiffs are amending and supplementing their complaint to address the Court’s explicit directions in its Combined Order and not for any reasons of bad faith or delay. *See Holden v. Weinschenk*, 1998 ME 185, ¶6, 715 A.2d 915 (observing that leave to amend should

be freely given in the absence of bad faith or dilatory tactics). Moreover, throughout this litigation, the current defendants have been capably represented by the Office of the Attorney General, and the subject of this litigation has generated substantial public attention. And at least as of the Court's August 2023 hearing and September 2023 order on the parties' initial motion for settlement approval (if not earlier), Defendants have been on notice of the Court's concerns about the declining numbers of available counsel and the escalating crisis of non-representation. It will, therefore, come as no surprise to any of the newly named individuals that they are indispensable participants in this case.

II. The Proposed First Amended Complaint and Petition for Writ of Habeas Corpus Is Necessary in Order to Address the Court's Explicit Directive.

The Court has ordered the parties to adjudicate the "federal and state claims and defenses" related to the State's failure to meet the obligations recognized in *Gideon*. *Combined Order*, 16. In addition, the Court has ordered the parties to avoid piecemeal litigation, recognizing that claims related to nonrepresentation and claims related to the risk of future deprivations "should be resolved in the same case." *Combined Order*, 13. These twin directives can only be accomplished by the addition of new parties and new claims.

This Court has previously recognized that the State of Maine is "the real party in interest in this case." *Order on Joint Motion for Preliminary Settlement Approval*, 18. The State of Maine, like all other states, is obligated to "furnish counsel" to those accused of crimes who are unable to afford counsel on their own. *See Gideon v. Wainwright*, 372 U.S. 335, 343-345 (1963); *see also Peterson v. State of Maine* (Dock. No. SJC-23-2), Final Decision and Order (January 12, 2024), 12 ("If a defendant cannot afford to hire an attorney, the State has an affirmative obligation to assign counsel.") States may attempt to address this obligation in a variety of ways, including through the creation of independent agencies, such as the Maine Commission on

Indigent Legal Services, to administer aspects of its indigent defense system. But the State may not discharge its fundamental constitutional obligation by purporting to assign it to a specific person, agency, or political subdivision: the constitutional obligation to preserve the right to counsel rests with the State itself.

Plaintiffs' proposed First Amended Complaint and Petition for a Writ of Habeas Corpus adds as a Defendant the Governor of the State of Maine, who is constitutionally obligated to "take care that the laws of the state" are faithfully executed. Me. Const. art. V, §13. The proposed First Amended Complaint also adds as a Defendant the Attorney General of the State, who is the "chief law enforcement officer of the State," and who is responsible for ensuring the enforcement of Maine's laws, including all laws obligating the state to provide counsel to indigent defendants. Finally, the proposed First Amended Complaint adds as a Defendant the State of Maine itself, based on the Court's previous recognition that the State of Maine is the "real party in interest" in this case.

In addition, Plaintiffs have added a claim for a petition for a writ of habeas corpus on behalf of the Court-certified Subclass of unrepresented individuals. Under Maine law, habeas corpus is the appropriate remedy when a petitioner challenges the legality of a deprivation of liberty. 14 M.R.S. §§5501, 5511. This petition has named as Respondents, as it must, the Sheriffs responsible for unlawfully restraining subclass members in violation of their constitutional rights. 14 M.R.S. §5515. Based on the stated position of the Attorney General's office in a parallel case for habeas corpus relief, Plaintiffs have also named as a Respondent the State of

Maine itself, in order to ensure that "complete relief" in this matter can be achieved. *See Peterson*, State Respondents' Memorandum of Law (October 27, 2023), 4.[1]

III. Conclusion.

For these reasons, Plaintiffs request that the Court permit them to amend and supplement their complaint.

March 8, 2024

Respectfully submitted.

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[1] Plaintiffs are not abandoning their Maine Administrative Procedure Act claim and intend to preserve arguments for its reinstatement on appeal, but they are not re-pleading the APA claim in the proposed First Amended Complaint based on the Court's order dismissing that count.

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Counsel for Plaintiffs

STATE OF MAINE
KENNEBEC, ss.

SUPERIOR COURT
Docket No. KENSC-CV-22-54

ANDREW ROBBINS, et al.,

Plaintiffs,

v.

MAINE COMMISSION ON INDIGENT LEGAL SERVICES, et al.,

Defendants.

ORDER

Upon consideration of the Plaintiffs' Motion to Amend and Supplement the Pleadings, the following is hereby ORDERED as follows:

1. Plaintiffs' Motion to Amend and Supplement the Pleadings is GRANTED;
2. Plaintiffs are directed to effectuate service on the newly added Defendant/Respondents in the manner prescribed by Rule 5 of the Maine Rules of Civil Procedure;
3. Defendants/Respondents are directed to file their Answer and to raise any objections or defenses authorized by Rule 12 of the Maine Rules of Civil Procedure no later than April 5, 2024.

It is so ordered.

Date:

____
Justice, Maine Superior Court

ATTACHMENT A

Proposed First Amended Class Action Complaint

STATE OF MAINE
KENNEBEC, SS.

SUPERIOR COURT
DOCKET NO. KENSC-CV-22-54

ANDREW ROBBINS; BRANDY GROVER; RAY MACK; MALCOLM PEIRCE; and LANH DANH HUYNH, on behalf of themselves and all other similarly situated,

Plaintiffs-Petitioners,

v.

STATE OF MAINE; MAINE COMMISSION ON INDIGENT LEGAL SERVICES; JAMES BILLINGS, in his official capacity as Executive Director of the Maine Commission on Indigent Legal Services; JOSHUA TARDY, in his official capacity as Chair of the Maine Commission on Indigent Legal Services; DONALD ALEXANDER, RANDALL BATES, MEEGAN BURBANK, MICHAEL CANTARA, MICHAEL CAREY, ROGER KATZ, KIMBERLY MONAGHAN, and DAVID SOUCY, in their official capacities as Commissioners of the Maine Commission on Indigent Legal Services; JANET MILLS, in her official capacity as Governor of Maine; AARON M. FREY, in his official capacity as Attorney General of Maine;

Defendants, and

STATE OF MAINE; ERIC SAMSON, in his official capacity as Sheriff of Androscoggin County; PETER JOHNSON, in his official capacity as Sheriff of Aroostook County; KEVIN JOYCE, in his official capacity as Sheriff of Cumberland County; SCOTT R. NICHOLS, in his official capacity as Sheriff of Franklin County; SCOTT KANE, in his official capacity as Sheriff of Hancock County; KEN MASON, in his official capacity as Sheriff of Kennebec County; PATRICK W. POLKY, in his official

capacity as Sheriff of Knox County; TODD B. BRACKETT, in his official capacity as Sheriff of Lincoln County; CHRISTOPHER WAINWRIGHT, in his official capacity as Sheriff of Oxford County; TROY MORTON, in his official capacity as Sheriff of Penobscot County; ROBERT YOUNG, in his official capacity of Sheriff of Piscataquis County; JOEL MERRY, in his official capacity as Sheriff of Sagadahoc County; DALE P. LANCASTER, in his official capacity as Sheriff of Somerset County; JASON TRUNDY, in his official capacity as Sheriff of Waldo County; BARRY A. CURTIS, in his official capacity as Sheriff of Washington County; and WILLIAM L. KING, JR., in his official capacity as Sheriff of York County,

Respondents.

FIRST AMENDED CLASS ACTION COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF AND CLASS ACTION PETITION FOR HABEAS RELIEF

Plaintiffs Andrew Robbins, Brandy Grover, Ray Mack, Malcolm Peirce, and Lanh Danh Huynh hereby allege as follows:

INTRODUCTION

1. The right to assistance of counsel in criminal proceedings is a bedrock of our criminal justice system. Guaranteed by both the Sixth Amendment of the United States Constitution and Article 1, Section 6 of the Maine Constitution, the right ensures that the state will provide counsel to indigent defendants facing the possibility of imprisonment. *See Gideon v. Wainwright*, 372 U.S. 335, 344-345 (1963); *State v. Cook*, 1998 ME 40, ¶ 6, 706 A.2d 603. In the half-century since *Gideon*, the United States Supreme Court has expanded that obligation in significant ways, requiring the states to provide counsel to indigent defendants facing incarceration, including for misdemeanors, and extending protections to juveniles in delinquency

proceedings. But the animating principle has remained the same: it is the state's responsibility to ensure that "any person haled into court, who is too poor to hire a lawyer," is provided with an adequate legal defense. *Gideon*, 372 U.S. at 344.

2. The right to counsel means more than just the bare appointment of an attorney for trial: the state must provide *effective* counsel—and must do so under circumstances that allow for competent and meaningful representation. *See United States v. Cronic*, 466 U.S. 648, 659-660 (1984). This right attaches as soon as the prosecution commences—that is, the defendant's "first appearance before a judicial officer at which defendant is told of the formal accusation against him and restrictions are imposed on his liberty." *Rothgery v. Gillespie County*, 554 U.S. 191, 194 (2008). Once the right attaches, the state must provide counsel "within a reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself." *Id*. at 212 (cleaned up). In this state, Maine Rule of Unified Criminal Procedure 44 "implements the constitutional right to counsel in a criminal proceeding," guaranteeing appointment of counsel at the initial appearance and continuous representation once the right attaches. *State v. Smith*, 677 A.2d 1058, 1060 (Me. 1996); M.R.U. Crim. P. 5(e), 44(a)(1) (requiring the court to "assign counsel to represent the defendant at every stage of the proceeding").

3. This lawsuit challenges the failure of the State of Maine and its officials to adequately develop, maintain, supervise, administer, and fund an indigent-defense system that provides effective representation to indigent defendants once the right to counsel attaches and throughout the entire criminal legal process. Maine is unique in the country as the only state in which appointed private attorneys provide almost *all* indigent defense. There is no serious question that this system is broken. As Chief Justice Stanfill recently recognized, "[w]e are in a constitutional crisis." State of the Judiciary Address of Chief Justice Valerie Stanfill to 2d Reg.

Sess. 131st Legis., at 7 (Feb. 21, 2024). The State "depend[s] on the private bar" to provide attorneys to indigent defendants, yet "there are fewer and fewer lawyers available and willing to take cases." *Id.* According to the most recent annual report from the Maine Commission on Indigent Legal Services ("MCILS" or "Commission"), since 2017, the number of private attorneys eligible to represent indigent defendants has fallen from 402 to 295—of whom just 134 are actively seeking assignments. Over the same period, the number of cases brought by prosecutors has risen from 25,824 to 30,656 per year. As a result, "[w]e have people sitting in jail every day—frequently a dozen or more in Aroostook County alone—without an attorney because there is no one to take their cases." State of the Judiciary Address, *supra*, at 7.

4. The State has delegated to MCILS the responsibility for administering the State's indigent-defense system. By law, MCILS is responsible for "[d]evelop[ing] and maintain[ing] a system that employs public defenders, uses appointed private attorneys and contracts with individual attorneys or groups of attorneys," and "shall consider other programs necessary to provide quality and efficient indigent legal services." 4 M.R.S. § 1804(3)(A). But that under-staffed, under-resourced agency—and the system of predominantly private attorneys that it oversees—is not capable of meeting the demand for legal services that the State itself creates. The result is two significant violations of the State's constitutional obligations.

5. First, the State is now routinely failing to appoint counsel for indigent defendants for extensive periods after their right to an attorney attaches. As just discussed, hundreds of attorneys have stopped accepting cases from the MCILS roster, resulting in a worsening crisis as courts work through the enormous backlog of cases created by the pandemic and as the number of prosecutions continues to rise. Based on data distributed by the state courts, as of March 4, 2024, there were 428 indigent criminal defendants, charged in 561 separate cases, who had not been

provided with an attorney, of whom 109 were incarcerated. There were 366 cases in which the defendant had been waiting for appointment of counsel for over 10 days, 273 cases in which the defendant had been waiting for appointment of counsel for over 20 days, and an unbelievable 204 cases in which the defendant had been denied the assistance of counsel for over 30 days.

6. Second, the State is failing to ensure that counsel, once appointed, have the training and supervision necessary to provide effective representation. Specifically, the State and its officials have failed to promulgate and enforce standards; to monitor and evaluate the performance of rostered attorneys; or to adequately train and compensate rostered attorneys as necessary to maintain a system of effective representation for indigent clients. The resulting system routinely and systematically denies indigent criminal defendants their constitutional right to effective representation.

7. The State's lawyer-of-the-day program encapsulates these twin failures. The State designates a "lawyer of the day" to provide representation at the 48-hour hearing for in-custody defendants and at the initial appearance for out-of-custody defendants. As implemented, this program is under-resourced to the point of constitutional deficiency. On any given day, as few as two lawyers may be on hand to meet with over eighty defendants. This regime does not come close to providing an adequate number of lawyers to even meet with—let alone provide constitutionally competent representation to—defendants in need of counsel concerning the implications of potential pleas or advocacy on bail and conditions of release. And, once the lawyer of the day has finished for the day, people accused of crimes are forced to wait many more days, weeks, or months before their actual attorney is assigned.

8. The State employs this same constitutionally deficient program to designate temporary lawyers at the newly created seven-day review hearings for unrepresented in-custody

defendants. Under the November 3, 2023, standing order issued by the Trial Court Chiefs, in-custody defendants who have not yet been provided counsel must "be brought before the court on the next convenient date on which in-custody arraignments are held, but in no event later than seven (7) days after the date of the initial appearance," and a lawyer of the day may be designated to appear on behalf of the defendant at the seven-day review hearing on a limited basis. Standing Order 1-2. But these seven-day hearings are merely a "limited, short-term response to an ongoing crisis" and "do not address the fundamental need—'to get a lawyer working, whether to attempt to avoid [a] trial or to be ready with a defense when the trial date arrives.'" *Peterson v. Johnson*, No. SJC-23-2, at 29, 31-32 (Jan. 12, 2024) (Douglas, J.) (quoting *Rothgery*, 554 U.S. at 210). By definition, lawyers of the day "do not have an ongoing relationship with a defendant, they typically represent multiple defendants" in a given appearance, and "[b]oth the time they are able to devote to an individual client and the scope of their representation is more limited than assigned counsel's." *Id*. at 25.

9. Plaintiffs are members of a certified class of indigent defendants who are entitled to State-appointed counsel in criminal proceedings. They sue to vindicate the class members' right to adequate legal representation that is enshrined in the Maine and United States constitutions. More specifically, Plaintiffs seek a judgment under 42 U.S.C. § 1983 that the deficiencies in the State of Maine's system create an unconstitutional risk that indigent criminal defendants will be denied the benefit of effective assistance of counsel at all stages of their cases in violation of the Sixth Amendment of the United States Constitution and Article I, Section 6 of the Maine Constitution. Plaintiffs respectfully request appropriate declaratory and injunctive relief.

10. The Court has also certified a subclass of class members who remain unrepresented after their initial appearance or arraignment (unless the class member has waived their right to

counsel). The members of this subclass sue to vindicate indigent defendants' right to be appointed counsel within a reasonable time after the right to counsel attaches and during every stage of the proceedings. More specifically, the subclass seeks a judgment under 42 U.S.C. § 1983 that the State's failure to provide counsel violates the Sixth Amendment of the United States Constitution and Article I, Section 6 of the Maine Constitution, and respectfully requests appropriate declaratory and injunctive relief. The subclass further seeks a writ of habeas corpus releasing them from detention and restrictive conditions of release and other equitable remedies, on the grounds that they are being unlawfully detained without counsel in violation of their state and federal constitutional rights.

THE PARTIES

11. Plaintiff Andrew Robbins is a Maine resident who was arrested in the summer of 2021 on weapons charges. He was initially released on bail, but was taken back into custody following a subsequent October 30, 2021, arrest for violating his conditions of release and violating a protective order, as well as misdemeanor drug possession. At his initial appearance, Mr. Robbins was represented by a lawyer of the day, but was subsequently assigned to another lawyer. At the time the initial complaint was filed in March of 2022, Mr. Robbins had met his attorney only once—for an approximately 30-second conversation at his door during the summer of 2021 (while he was out on release). When the complaint was first filed, Mr. Robbins had never had a follow-up visit from his lawyer, nor had his lawyer ever arranged a video call, communicated with him about a plea offer, or reviewed his discovery materials with him. When Mr. Robbins received a copy of his discovery material, he observed that it contained materials relating to another defendant, but as far as Mr. Robbins knows the attorney he was initially assigned never took any action based on this mistake. And while Mr. Robbins has two young daughters, who his wife is

attempting to care for alone (while working full time), his attorney had, at the time the initial complaint was filed, refused to ask for a bail hearing following his October 30, 2021, arrest. Mr. Robbins has now completed his sentence.

12. Plaintiff Brandy Grover is a Maine resident currently residing in Rockland, Maine on community release. Ms. Grover was previously arrested on July 9, 2021, for aggravated trafficking. Ms. Grover developed a substance-abuse disorder after being prescribed opioids following an injury in her job as a certified nursing assistant. She is currently in recovery, but she briefly relapsed following the deaths of three people close to her. After her arrest, Ms. Grover was assigned a lawyer through the lawyer-of-the-day system, who did not advocate for her release, creating the impression for Ms. Grover that the lawyer believed she was better off in jail. Ms. Grover believes that her lawyer was annoyed and angry at her for not taking a plea deal. At the time of filing of the initial complaint, Ms. Grover had otherwise been unable to get in touch with her lawyer, who did not take her calls or the calls of family members, leaving Ms. Grover to resort to writing letters, which remained unanswered (either by phone or letter) when the complaint was filed. Ms. Grover eventually pled to Class B trafficking and was subsequently sentenced to community release.

13. Plaintiff Ray Mack is a Maine resident currently incarcerated in Kennebec County Jail awaiting trial following his May 27, 2021, arrest on charges of possession of a firearm and threat with a dangerous weapon. Mr. Mack pled not guilty at his initial appearance, but he did not feel that he had sufficient information about the proceedings to understand what was happening. Mr. Mack describes his initial appearance as “entirely one-sided.” His lawyer at the initial appearance spoke with the court, but not with Mr. Mack, and Mr. Mack was not able to participate in the proceedings. Prior to the filing of the initial complaint, Mr. Mack had only minimal contact

with his attorney, who had not taken the time to review his discovery with him or discuss the proceedings in any detail. Mr. Mack is currently serving his sentence at Maine State Prison.

14. Plaintiff Malcolm Peirce is a Maine resident who was charged with several drug-related charges, as well as a charge of escape. Mr. Peirce was represented by a lawyer-of-the-day attorney during his initial appearance. His first assigned attorney had to withdraw from the representation due to a conflict of interest, and Mr. Peirce has had minimal contact—a handful of conversations each lasting only a few minutes—with his second state-appointed attorney. Their last phone call left Mr. Peirce with the impression that this attorney did not want Mr. Peirce to contact him. At the time of filing the initial complaint, Mr. Peirce had not heard from his attorney since this call, and Mr. Peirce's attorney had likewise not responded to a request to provide copies of discovery (which Mr. Peirce believes the attorney had not reviewed). Mr. Peirce has since entered a guilty plea and is serving a sentence at Federal Medical Center, Devens.

15. Plaintiff Lanh Danh Huynh is a Maine resident who was incarcerated at Maine Correctional Center in Windham, Maine. Mr. Huynh was arrested on June 1, 2021, for possession of a firearm and bail violations. Mr. Huynh pled not guilty, but he did not feel that he had sufficient information about the charges against him to decide how to plead. At the time of filing the initial complaint, Mr. Huynh had had only minimal contact with his state-appointed attorney, despite being charged almost eight months earlier. He had yet to see or review any of the discovery materials in his case and had encountered significant difficulty contacting his attorney, who did not return his calls. When Mr. Huynh tried calling his lawyer's office, he was told his lawyer was in court or busy, but his lawyer never called back. He had likewise tried having his brother and friends call this lawyer's office to set up a meeting or call, but to no avail. His attorney had otherwise had no engagement with his case; he had not filed any motions on his behalf, including

any motions for Mr. Huynh to be released on bail, and he had not informed Mr. Huynh of any details about the proceedings.

16. Defendant-Respondent State of Maine is the proper defendant and party in interest with respect to the Plaintiff Class's Section 1983 claims. *See* Order Denying Preliminary Settlement Approval at 18 (Sept. 13, 2023) (quoting defense counsel's statements in this litigation that the "ultimate party in interest, again, is the State of Maine.") The State of Maine, like all other states, is obligated to "furnish counsel" to those accused of crimes who are unable to afford counsel on their own. *See Gideon v. Wainwright*, 372 U.S. 335, 343-345 (1963); *see also Peterson v. Johnson*, No. SJC-23-2, Final Decision and Order, at 12 (January 12, 2024) ("If a defendant cannot afford to hire an attorney, the State has an affirmative obligation to assign counsel.") States may attempt to fulfill this obligation in a variety of ways, including through the creation of independent agencies, such as the Maine Commission on Indigent Legal Services, to administer aspects of its indigent-defense system. But the State of Maine may not discharge its fundamental constitutional obligation by purporting to assign it to a specific person, agency, or political subdivision: the constitutional obligation to safeguard the right to counsel rests with the State itself. State of Maine is likewise the proper respondent and party in interest with respect to the Plaintiff Subclass's habeas claims, because members of the Subclass are held in the State's custody upon the State's order. *Peterson v. Johnson*, SJC-23-2, State Respondent's Memorandum of Law (Oct. 27, 2023) (State of Maine's request to intervene as respondent to ensure that "complete relief" in the matter could be achieved); *Peterson*, SJC-23-2, Final Decision and Order (Jan. 12, 2024) (permitting habeas action to proceed against Respondent State of Maine, Party in Interest, following motion to intervene as Defendant by State of Maine); *see also Betschart v. Garrett*, 3:23-cv-01097-CL,

2023 WL 7220562 (D. Or. Nov. 14, 2023) (permitting habeas action to proceed against respondent State of Oregon, following motion to intervene by State of Oregon).

17. Defendant MCILS is statutorily directed 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"; "ensure the delivery of indigent legal services by qualified and competent counsel in a manner that is fair and consistent throughout the State"; and "ensure adequate funding of a statewide system of indigent legal services, which must be provided and managed in a fiscally responsible manner, free from undue political interference and conflicts of interest." 4 M.R.S. § 1801. MCILS is responsible for "[d]evelop[ing] and maintain[ing] a system that employs public defenders, uses appointed private attorneys and contracts with individual attorneys or groups of attorneys," and "consider[ing] other programs necessary to provide quality and efficient indigent legal services." 4 M.R.S. § 1804(3)(A). MCILS is further responsible for "develop[ing] criminal defense . . . training and evaluation programs for attorneys throughout the State to ensure an adequate pool of qualified attorneys." 4 M.R.S. § 1804(3)(D).

18. Defendant James Billings is the Executive Director of MCILS. He is required by statute to "[e]nsure that the provision of indigent legal services complies with all constitutional, statutory, and ethical standards," 4 M.R.S. § 1805(1), and to "[a]dminister and coordinate delivery of indigent legal services and supervise compliance with commission standards," *id.* § 1805(3).

19. Defendant Joshua Tardy is an MCILS Commissioner and Chair of the Commission.

20. Defendants Donald Alexander, Randall Bates, Meegan Burbank, Michael Cantara, Michael Carey, Roger Katz, Kimberly Monaghan, and David Soucy are MCILS Commissioners.

21. Defendant Janet Mills is the Governor of Maine. Article V, Section 12 of the Maine Constitution requires the Governor to "take care that the laws be faithfully executed." This command includes a duty to ensure that the State fulfills the constitutional right to counsel to indigent defendants in criminal proceedings. As the unitary head of the Executive Branch of Maine government, the Governor is responsible for ensuring that the operations of the Executive Branch are carried out in a manner consistent with the Maine and United States Constitutions.

22. Defendant Aaron M. Frey is the Attorney General of Maine, the "chief law officer of the State." *Superintendent of Ins. v. Attorney Gen.*, 558 A.2d 1197, 1199 (Me. 1989) (quotation omitted). His duties include serving as the "legal representative of the people of the State in pursuing the public interest." *Id.* at 1202. This duty carries with it the responsibility of ensuring that the enforcement of Maine's laws are carried out in a manner consistent with the Constitution. The Maine Attorney General is authorized to direct and control prosecutions of homicides and major crimes as well as crimes involving public officials. 5 M.R.S. § 200-A. The Maine Attorney General "shall consult with and advise the district attorneys in matters relating to their duties." 5 M.R.S. § 199.

23. Respondents Eric Samson, Peter Johnson, Kevin Joyce, Scott Nichols, Scott Kane, Ken Mason, Patrick Polky, Todd Brackett, Christopher Wainwright, Troy Morton, Robert Young, Joel Merry, Dale Lancaster, Jason Trundy, Barry Curtis, and William King are the Sheriffs for each county in Maine. By law, in Maine, a county "sheriff has the custody and charge of the county jail and of all prisoners in that jail and shall keep it in person, or by a deputy as jailer, master or keeper." 30-A M.R.S. § 1501; *see also* 30-A M.R.S. § 454 (requiring each county, whose law enforcement responsibilities rest on sheriffs, to provide for detention facilities).

JURISDICTION AND VENUE

24. This Court has jurisdiction over this action pursuant to 4 M.R.S. § 105, 5 M.R.S. § 8058, 14 M.R.S. §§ 5951-5963, and 14 M.R.S. § 6051(13).

25. This Court has personal jurisdiction over the defendants-respondents pursuant to 14 M.R.S. § 704-A(2) and 14 M.R.S. §§5511, 5513.

26. Venue is proper in Kennebec County pursuant to 14 M.R.S. § 501 and 14 M.R.S. §§ 5511, 5513.

BACKGROUND

I. The Right to Counsel under the Maine and U.S. Constitutions.

27. The Sixth Amendment guarantees that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI.

28. In the landmark decision *Gideon v. Wainwright*, 372 U.S. 355, 345-346 (1963), the Supreme Court held that the Sixth Amendment requires states to provide counsel to indigent criminal defendants. *Gideon*'s guarantee applies in any case that could result in imprisonment. *See Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972) (accused must receive counsel when case could result "in the actual deprivation of a person's liberty").

29. Under the U.S. Constitution, the right to assistance of counsel attaches as soon as the State initiates "adversarial judicial proceedings" against a defendant—that is, at the defendant's first appearance when he is "told of the formal accusation against him and restrictions are imposed on his liberty." *Rothgery,* 554 U.S. at 194, 198, 211. After the right attaches, the State must provide "appointed counsel during any critical stage of the . . . proceedings," and "counsel must be

appointed within a reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself." *Id*. at 212 (cleaned up).

30. Article I, Section 6 of the Maine Constitution provides that "[i]n all criminal prosecutions, the accused shall have a right to be heard by the accused and counsel to the accused, or either, at the election of the accused."

31. Under Maine law, Maine Rule of Unified Criminal Procedure 44 "implements the constitutional right to counsel in a criminal proceeding," guaranteeing appointment of counsel at the initial appearance and continuous representation once the right attaches. *State v. Smith*, 677 A.2d 1058, 1060 (Me. 1996); M.R.U. Crim. P. 5(e), 44(a)(1) (requiring the court to "assign counsel to represent the defendant *at every stage of the proceeding*") (emphasis added).

32. Maine and federal courts have emphasized the importance of assigning counsel at the initial appearance and throughout the early stages of representation, including plea negotiations, pretrial investigation, and advocacy regarding bail and conditions of release. "From the time of [defendant's] arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important," is "perhaps the most critical of the proceedings." *Powell v. Alabama*, 287 U.S. 45, 57 (1932). The Supreme Court has emphasized "the vital need for a lawyer's advice and aid during the pretrial phase." *Estelle v. Smith*, 451 U.S. 454, 469 (1981) (quotations omitted). And "[t]he importance of assigning counsel at initial appearance was emphasized by the late Justice Harry Glassman in his 1967 treatise on the rules of criminal procedure." *State v. Peterson*, No. SJC-23-2, at 13 n.12 (quoting Glassman, Maine Practice: Rules of Criminal Procedure Annotated § 44.2 at 394-395 (1967)).

33. The right to counsel is not fulfilled by the mere appointment of counsel; satisfaction of this constitutional obligation requires the *assistance* of counsel, and specifically the *effective*

assistance of counsel. *United States v. Cronic*, 466 U.S. 648, 654 (1984) ("[I]t has long been recognized that the right to counsel is the right to the effective assistance of counsel." (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970))); *McGowan v. State*, 2006 ME 16, ¶ 9, 894 A.2d 493. If mere appointment of counsel were sufficient, the right would be "a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel." *Cronic*, 466 U.S. at 654 (quotation marks omitted).

34. Because "the adversarial process protected by the Sixth Amendment requires that the accused have 'counsel acting in the role of an advocate,'" the right to effective assistance is the "right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." *Cronic*, 466 U.S. at 656 (quoting *Anders v. California*, 386 U.S. 738, 743 (1967)). Once "the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." *Id.* at 656-657. In short, effective counsel is counsel that can, and does, put the prosecutor's case to the test.

35. When assessing effectiveness of counsel, "prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable." *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) (cleaned up).

36. As relevant here, the American Bar Association has outlined ten principles to evaluate whether a state is providing assistance of counsel at all critical stages of a proceeding ("ABA Principles").[1] These standards are:

a. The public defense function, including the selection, funding, and payment of defense counsel, is independent.

[1] *See* American Bar Association, Ten Principles of a Public Defense Delivery System, *available at* https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.pdf (last visited Feb. 24, 2022).

b. Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.

c. Clients are screened for eligibility, and defense counsel is assigned and notified of appointment as soon as feasible after clients' arrest, detention, or request for counsel.

d. Defense counsel is provided sufficient time and a confidential space within which to meet with the client.

e. Defense counsel's workload is controlled to permit the rendering of quality representation.

f. Defense counsel's ability, training, and experience match the complexity of the case.

g. The same attorney continuously represents the client until completion of the case.

h. There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.

i. Defense counsel is provided with and required to attend continuing legal education.

j. Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.

II. Indigent Defense in Maine and MCILS.

37. State law provides:

> Before arraignment, competent defense counsel must be assigned by the court unless waived by the accused after being fully advised of the accused's rights by the court if the court determines that the accused is indigent and the accused is charged with murder or a

> Class A, B or C crime, except when the accused has not had an initial appearance on the complaint.
>
> Competent defense counsel must be assigned by the court unless waived by the accused after being fully advised of the accused's rights by the court if the court determines that the accused is indigent and that:
>
> A. There is a risk upon conviction that the accused may be sentenced to a term of imprisonment;
>
> B. The accused has a physical, mental or emotional disability preventing the accused from fairly participating in the criminal proceeding without counsel; or
>
> C. The accused is a noncitizen for whom the criminal proceeding poses a risk of adverse immigration consequences.

15 M.R.S. § 810. The statute is supplemented by Rule 44 of the Maine Rules of Unified Criminal Procedure, which "implements the constitutional right to counsel in a criminal proceeding." *State v. Smith*, 677 A.2d 1058, 1060 (Me. 1996). Rule 44 specifies that a defendant has a right to be represented by counsel "at every stage of the proceeding," unless the defendant waives that right or "the court concludes that in the event of conviction a sentence of imprisonment will not be imposed." M.R.U. Crim. P. 44(a)(1). Rule 5(e) of the Maine Rules of Unified Criminal Procedure further provides that "[w]hen a person is entitled to court-appointed counsel, the court shall assign counsel to represent the defendant not later than the time of the initial appearance, unless the person elects to proceed without counsel." M.R.U. Crim. P. 5(e). The rules of criminal procedure "are unambiguous" in "requir[ing] the court to assign counsel to represent an indigent defendant 'not later than' the initial appearance to 'represent the defendant at every stage of the proceedings.'" *Peterson v. Johnson*, No. SJC-23-2, at 13 (citations omitted). These court rules "have the force of law" and "all laws in conflict therewith shall be of no further force or effect." *Id.* at 14 (citations omitted).

38. The State's current system of indigent defense took shape in 2009, with the passage of legislation creating MCILS.

39. MCILS was created to address concerns about the increasing cost and lack of independent oversight of the indigent-defense system, which was then funded and administered by the judiciary. A February 2009 report ("Clifford Commission Report")[2] attributed increased costs to a surge in felony charges (due to changes to rules and applicable laws) and an increase in the number of criminal defendants qualifying as indigent. The Clifford Commission Report recommended "that Maine implement an indigent legal services system that is independent from the judiciary, and that provides the training and oversight necessary to ensure quality representation to Maine's citizens."

40. According to its enabling legislation, MCILS is "an independent commission whose purpose is 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." 4 M.R.S. § 1801. The Commission is tasked with "ensur[ing] the delivery of indigent legal services by qualified and competent counsel in a manner that is fair and consistent throughout the State" and "ensur[ing] adequate funding of a statewide system of indigent legal services, which must be provided and managed in a fiscally responsible manner, free from undue political interference and conflicts of interest." *Id.*

41. As described in detail below, *see infra*, ¶¶ 64-92, Defendants have failed to fulfill these fundamental duties, leaving Maine with a system that both actually and constructively denies defendants assistance of counsel in their criminal proceedings.

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[2] Indigent Legal Services Commission, Clifford Commission Report 10, *available at* https://www.maine.gov/mcils/sites/maine.gov.mcils/files/documents/Clifford-Commission-Report.pdf (Feb. 2009).

42. While courts are more accustomed to evaluating compliance with the Sixth Amendment in the context of the effectiveness of an individual attorney's performance, the Constitution's guarantee of the assistance of counsel is implicated when criminal defendants are—either actually or constructively—denied the assistance of counsel altogether. *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000). The two claims—ineffective assistance of counsel, on the one hand, and denial of counsel, on the other—are distinct. *Penson v. Ohio*, 488 U.S. 75, 88 (1988). A denial of counsel claim is not a claim of substandard representation but rather it is a claim of nonrepresentation, caused either by the actual failure to provide an attorney or by providing an attorney who is not able to provide real assistance. *Cronic*, 466 U.S. at 658-660.

43. While Defendants' actual and constructive violations of the right to counsel are widespread, three particular failures stand out with respect to this litigation: (1) Defendants' failure to provide counsel to hundreds of indigent defendants at all, leaving those defendants waiting for weeks or months without representation; (2) Defendants' failure to fulfill their statutory obligations; and (3) Defendants' flawed implementation of the lawyer-of-the-day system.

A. Non-Representation.

44. There is no overstating the damage wrought to an indigent criminal defendant's constitutional right to counsel when he is not appointed counsel *at all* in a timely manner. As the Supreme Court recounted in *Gideon*:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty,

> he faces the danger of conviction because he does not know how to establish his innocence.

Gideon, 372 U.S. at 345 (internal quotation marks and citation omitted).

45. A skilled attorney assists her client not only in the courtroom, but throughout all stages of the case. A lawyer, more than a layperson, has experience with the types of evidence that must be gathered to prepare a defense, and how to gather them. Witnesses must be interviewed before memories grow stale. Requests for preservation of evidence must be made, and discovery must be requested and reviewed. Plea bargains must be negotiated. Bail and conditions of release must be advocated for. There is a tremendous risk that, when counsel is not provided on a timely basis, the damage to the defendant's ability to contest the charges against him can never be repaired.

46. "As defendants wait for weeks, or months, for an initial appearance, their chances of defeating the charges dwindle. Delay in investigation impedes preparation of a defense and is a sure-fire prescription for miscarriages of justice and convicting innocents at trial. The days immediately after an arrest can be the most critical to the development of a defense. Delaying an accused's access to counsel . . . hinders counsel's ability to find and talk to witnesses, gather physical evidence, and document the defendant's mental, physical, and emotional state near the time of the alleged crime, so even when an attorney finally does appear, the damage to the case may be irreparable." Pamela R. Metzger and Janet C. Hoeffel, *Criminal (Dis)appearance*, 88 Geo. Wash. L. Rev. 392, 409 (2020) (cleaned up).

47. Case outcomes are not the only aspect to suffer from a delay. There are downstream effects of going without counsel after an arrest or initial appearance. Prompt pretrial release for eligible individuals "preserves a defendant's ability to work, maintain family connections, and avoid the significant physical and mental hazards associated with pretrial detention." *Id*. at 400

(citations omitted). Additionally, even a brief period of pre-trial detention "creates a risk of unimaginable violence, trauma, injury, and illness," and heightens the risk of suicide and adverse health outcomes. *Id*. at 407. Defendants may "lose jobs and face eviction," and without employment they may "fall behind on rent payments, car payments, and bills for utilities, food, and medication." *Id.* at 408. Moreover, "families suffer the absence of an economic provider or child caretaker." *Id*.

48. Since the filing of the original Complaint, the Defendants' failure to provide competent counsel to all indigent persons facing criminal charges has reached crisis levels. Hundreds of attorneys have stopped accepting cases from the MCILS roster. According to MCILS's January 16, 2024 Annual Report, since 2017, the number of rostered attorneys has fallen from 402 to 295; as of January 9, 2024, just 134 of those rostered attorneys were actively seeking assignments. Over that same period, the annual number of cases brought by prosecutors has risen from 25,824 to 30,656. The shortage of qualified and rostered defense attorneys is particularly acute in rural areas, forcing judges and MCILS to appoint attorneys from other counties despite the significant travel this requires.

49. Many counties have no MCILS-rostered attorneys available at all to take certain categories of criminal cases. As of March 4, 2024, there was one lawyer available to take assignments for serious violent felonies and domestic violence in the Alfred Unified Criminal Docket, and zero lawyers available for sex offenses or drug offenses. There were zero lawyers available to take assignments for serious violent felonies, other felonies, sex offenses, domestic violence, or drug offenses in the Aroostook Unified Criminal Docket. There were zero lawyers available to take assignments for serious violent felonies, other felonies, sex offenses, domestic violence, or drug offenses in the Auburn Unified Criminal Docket. There were zero lawyers

available to take assignments for serious violent felonies, other felonies, sex offenses, domestic violence, or drug offenses in the Augusta Unified Criminal Docket. There were zero lawyers available to take assignments for serious violent felonies, other felonies, sex offenses, domestic violence, or drug offenses in the Bangor Unified Criminal Docket. There were zero lawyers available to take assignments for serious violent felonies, other felonies, sex offenses, domestic violence, or drug offenses in the Belfast Unified Criminal Docket. There were zero lawyers available to take assignments for serious violent felonies, other felonies, sex offenses, domestic violence, or drug offenses in the Farmington Unified Criminal Docket. There were zero lawyers available to take assignments for serious violent felonies, other felonies, sex offenses, domestic violence, or drug offenses in the Portland Unified Criminal Docket. And there was one lawyer available to take assignments for drug offenses, and zero lawyers available to take assignments for serious violent felonies, other felonies, sex offenses, or domestic violence in the Rockland Unified Criminal Docket.

50. Because Defendants have failed to develop and resource a public defense system that is capable of responding to the ever-growing demand for prosecutions, people entitled to court-appointed counsel often wait weeks or months for counsel to be assigned.

51. Based on data distributed by the state courts, as of March 4, 2024, there were 428 individual defendants entitled to counsel who had not yet been provided with an attorney (on 561 separate charges), and 109 of those people were incarcerated. There were 366 cases in which defendants had been waiting for appointment of counsel for over 10 days, 273 cases in which defendants had been waiting for appointment of counsel for over 20 days, and 204 cases in which defendants had been waiting for appointment of counsel for over 30 days.

52. As the Aroostook County District Court recently recognized in one such case of non-representation, “Mr. Fisher has suffered a violation of his right to counsel.” *Maine v. Fisher*, AROCD-CR-23-40015, 23-40737, 24-40021 (2/16/2024) (Langner, J.) (finding constitutional violation based on failure to timely appoint counsel, but then refusing to dismiss case, order release, or provide any remedy other than ordering MCILS to “ramp[] up its efforts to locate an attorney for Mr. Fisher”).

53. When an indigent criminal defendant is awaiting the assignment of their constitutionally required attorney, the State purposely delays scheduling their next court date.

54. The consequences of the delays in appointment of counsel are disastrous. Unrepresented criminal defendants are denied the opportunity to properly investigate their claims, effectively engage in plea negotiations, or advocate effectively for release on their own recognizance or a reasonable reduction in their bail amount.

55. Unrepresented individuals are unable to meaningfully participate in plea negotiations. In the weeks or months following initial appearance, unrepresented individuals have no realistic chance of negotiating a favorable plea deal, even if that would be the most favorable outcome. Delays in appointment of counsel lead to the inability to preserve evidence, the denial of discovery, and waiver or failure to assert the speedy trial right, and all of these failures leave the indigent defendant at severe disadvantage for plea bargaining. Prosecutors know that they can decline to negotiate without fighting motions to suppress, expending time and resources to go to trial, or risking exposure of damaging information about law enforcement. In some cases, desperate indigent defendants attempt to negotiate their own guilty plea in exchange for release. Without timely appointment of counsel, the guilty pleas extracted from unrepresented individuals

are not the product of a functioning adversarial system, but instead result from an imbalance of power between the prosecutor and the indigent defendant.

56. Unrepresented individuals are unable to conduct pretrial investigation and prepare their defense while going weeks or months without counsel. Unrepresented defendants are unable to adequately secure witnesses, review discovery, or request preservation of evidence. The delays can result in the permanent loss of evidence such as eyewitness accounts, security videos, forensic evaluations, and crime scene documentation.

57. Unrepresented individuals are unable to adequately advocate for changes in bail status. Although unrepresented in-custody defendants are entitled to seven-day review hearings and may be designated a lawyer of the day, that appearance is by definition temporary and limited, and "do[es] not address the fundamental need—'to get a lawyer working, whether to attempt to avoid [a] trial or to be ready with a defense when the trial date arrives.'" *Peterson v. Johnson*, No. SJC-23-2, at 29, 31-32 (quoting *Rothgery*, 554 U.S. at 210). Counsel's assistance is necessary for investigating and gathering evidence in support of release, identifying space in appropriate programs, crafting a conditional release plan, and effectively advocating for release. Detention orders risk jailing individuals who would not face another day of incarceration if counsel were able to adequately argue for their release.

58. For unrepresented individuals who are in custody and denied the chance to obtain prompt pretrial release with the assistance of counsel, the impacts are even more far-reaching. Detained individuals may be unable to access necessary services such as medical care, mental health treatment, and substance use treatment while detained without counsel. Detained individuals may lose their jobs and lose contact with their families because they are locked up longer than necessary, due to their inability to adequately advocate for modification of their bail.

59. The only way out for some unrepresented defendants trapped in this coercive system is to plead guilty. Individuals who are innocent and who wish to defend their innocence are forced to wait in jail, while individuals who are willing to plead guilty may be released.

60. Defendant State of Maine has failed to manage the risk of serious deprivation of constitutional rights created by these inadequacies.

61. Defendant Frey has failed to exercise any oversight responsibilities to ensure that criminal prosecutions are carried out in a manner consistent with the Constitution.

62. Defendant Mills has failed to take care that the laws guaranteeing the effective right to counsel are faithfully executed.

63. Defendant MCILS has failed to establish and operate a system for providing "efficient, high-quality representation to indigent criminal defendants," has failed to "ensure the delivery of indigent legal services by qualified and competent counsel in a manner that is fair and consistent throughout the State and to ensure adequate funding of a statewide system of indigent legal services," and has failed to "[d]evelop criminal defense . . . training and evaluation programs for attorneys throughout the State to ensure an adequate pool of qualified attorneys." 4 M.R.S. § 1801; 4 M.R.S. § 1804(3)(D).

B. Failure to Fulfill Statutory Obligations

64. State statutes impose obligations that guide the State's stewardship of its indigent-defense system. Both MCILS and its Executive Director have failed to comply with these statutory commands in multiple different categories. These failures make it impossible for MCILS to fulfill its overarching constitutional and statutory role—namely, "to provide efficient, high-quality representation to indigent criminal defendants, juvenile defendants, and children and parents in

child protective cases." 4 M.R.S. § 1801; *see also Gideon*, 372 U.S. at 344-45; *Cook*, 1998 ME 40, ¶ 6, 706 A.2d 603.

65. The Sixth Amendment Center, a nonprofit organization dedicated to ensuring compliance with the Sixth Amendment in localities around the country, has catalogued MCILS's systemic failures in this area. In particular, it detailed MCILS's failings in a 2019 report commissioned by the Maine Legislative Council, a 10-member body consisting of the President of the Senate, the Speaker of the House, and the Republican and Democratic Floor Leaders and Assistant Floor Leaders of each body. *See* Sixth Amendment Center, *The Right to Counsel in Maine: Evaluation of Services Provided by the Maine Commission on Indigent Legal Services* (2019), excerpts of which are attached hereto as Exhibit 1.[3] Among other deficiencies, the report found that MCILS failed to impose adequate attorney qualification standards; ensure training of new attorneys and continuing education for experienced attorneys; adequately supervise attorneys; ensure meaningful representation at critical stages of criminal proceedings; compensate attorneys to cover overhead and an adequate fee; or guard against conflicts of interest. Ex. 1, at iv-ix.

66. These failures are also documented in extensive detail in government reports and MCILS's own assessment of its operations.

67. On January 10, 2020, the Maine Legislature's Government Oversight Committee directed its Office of Program Evaluation & Government Accountability ("OPEGA") to review MCILS's operations.[4] As described in the resulting report (attached as Exhibit 2), the Legislature requested that OPEGA focus on (as relevant here) the "adequacy of the oversight structure of

[3] *See* Sixth Amendment Center, The Right to Counsel in Maine: Evaluation of Services Provided by the Maine Commission on Indigent Legal Services, *available at* https://sixthamendment.org/6AC/6AC_me_report_2019.pdf (last visited February 24, 2022).

[4] Office of Program Evaluation & Government Accountability of the Maine State Legislature, Report on the Maine Commission on Indigent Legal Services, *available at* https://legislature.maine.gov/doc/4769 (Jan. 2020).

MCILS in ensuring that operations align with and accomplish the organization's purpose." Ex. 2, at 1. The Report concluded that, among other failings, "overall . . . MCILS lacks adequate standard operating procedures and formal written policies to govern its primary functions." *Id.* 33.

68. MCILS's Executive Director subsequently wrote a series of three memoranda in December 2021 and January 2022[5] discussing MCILS's compliance with various obligations, each of which likewise reveals the Commission's failure to fulfill its duties. These memoranda discuss MCILS's compliance with (1) its statutory obligations ("MCILS Statutory Memorandum," attached as Exhibit 3); (2) recommendations from the Sixth Amendment Center and OPEGA reports ("MCILS OPEGA Memorandum," attached as Exhibit 4); and (3) the ABA's Ten Principles ("MCILS Ten Principles Memorandum," attached as Exhibit 5).

69. An individual MCILS Commissioner provided his own commentary on the Executive Director's Ten Principles Memorandum ("Commissioner Redline," attached as Exhibit 6), concluding that the memorandum—which itself recognized MCILS's failings—nevertheless did not go far enough in recognizing how substantially MCILS underperforms its obligations.

1. Development of Standards

70. First, section 1804(2) requires MCILS to develop standards "governing the delivery of indigent legal services," including:

> A. Standards governing eligibility for indigent legal services. The eligibility standards must take into account the possibility of a defendant's or civil party's ability to make periodic installment payments toward counsel fees and the cost of private legal services in the relevant geographic area;
>
> B. Standards prescribing minimum experience, training and other qualifications for contract counsel, assigned counsel and public defenders;

[5] The MCILS Ten Principles Memorandum is dated January 2021, but it was produced in January 2022.

> C. Standards for assigned counsel, contract counsel and public defender case loads;
>
> D. Standards for the evaluation of assigned counsel, contract counsel and public defenders. The commission shall review the standards developed pursuant to this paragraph at least every 5 years or earlier upon the recommendation of the executive director;
>
> E. Standards for independent, quality and efficient representation of clients whose cases present conflicts of interest;
>
> F. Standards for the reimbursement of expenses incurred by assigned counsel, contract counsel and public defenders, including attendance at training events provided by the commission; and
>
> G. Other standards considered necessary and appropriate to ensure the delivery of adequate indigent legal services.

4 M.R.S. § 1804(2).

71. Likewise, section 1804(3)(M) provides that the Commission "shall . . . [e]stablish procedures for handling complaints about the performance of counsel providing indigent legal services." *Id.* § 1804(3)(M).

72. MCILS has not developed these standards and procedures. As OPEGA explained, "even when standards are required to be established specifically in statute, MCILS relies on informal methods or does not address the standard at all." Ex. 2, at 33.

73. In particular, the OPEGA Report details that MCILS has not promulgated *any* standards or procedures regarding evaluation of counsel (subsection 2(D)); conflicts of interest (subsection 2(E)); or complaints about the performance of counsel (subsection 3(M)). *Id.*

74. Absent any standards in this area, MCILS has no mechanism for monitoring or rectifying the experience Plaintiffs have had in their cases—namely, attorneys who do not return their calls, set up meetings, review their discovery with them, or generally take an active role in moving their cases forward. *See supra*, ¶¶ 11-15.

75. And because Maine is unique as the only state where appointed private attorneys provide nearly *all* indigent defense, there may be no one else able to step in when an appointed attorney is unavailable. *See* Ex. 1, at 26.

76. MCILS has had ample time to comply with these obligations. The statutory mandates to implement requirements surrounding case load and conflicts of interest were enacted in 2009, and so have been in place for over a decade. P.L. 2009, ch. 419, § 2. The statutory mandates surrounding evaluation of counsel and a complaint procedure were enacted in 2017, likewise providing MCILS sufficient time to comply. P.L. 2017, ch. 284, Pt. UUUU, §§ 1, 2 (AMD).

77. Moreover, this failure makes it impossible for MCILS to fulfill its constitutional and statutory obligations. With no standards for evaluating counsel, reviewing complaints about counsel, or resolving conflicts of interest, the Commission cannot evaluate whether indigent defendants are provided "qualified and competent counsel," let alone rectify any cases where they are not. 4 M.R.S. § 1801.

2. Attorney Qualification, Training, and Compensation

78. MCILS's failure to promulgate these standards is particularly problematic given its deficient standards for attorney qualifications and training. As described by the Sixth Amendment Center, "[j]ust as you would not go to a dermatologist for heart surgery, a real estate or divorce lawyer cannot be expected to handle a complex criminal case competently." Ex. 1, at 27. And yet, that is precisely what the State's system allows.

79. MCILS is required by statute to "[d]evelop criminal defense, child protective and involuntary commitment representation training and evaluation programs for attorneys throughout the State to ensure an adequate pool of qualified attorneys." 4 M.R.S. § 1804(3)(D). It is also

required to "[e]stablish minimum qualifications to ensure that attorneys are qualified and capable of providing quality representation in the case types to which they are assigned, recognizing that quality representation in each of these types of cases requires counsel with experience and specialized training in that field." *Id.* § 1804(3)(E).

80. The standards and systems MCILS has established with respect to attorney qualifications and training are woefully inadequate.

81. To receive an assignment from the Commission, in most cases an attorney need only attend a "Commission-approved training course for the area of the law for which the attorney is seeking to receive assignments." 94-649 C.M.R. ch. 2, § 4 (2) (2010).

82. This requirement can be satisfied by attending a single training course in criminal law. Ex. 1, at 30.

83. While there are greater qualifications for certain categories of serious offenses such as homicide and sex offenses, even in those cases an attorney can request a waiver. 94-649 C.M.R. ch. 3, §§ 3, 4 (1) (2010).

84. Thus, regardless of background, training, or prior case experience, MCILS allows attorneys to take on criminal representations after attending a single-day "Minimum Standards" course. This system does not satisfy MCILS's statutory obligation to "ensure that attorneys are qualified and capable of providing quality representation in the case types to which they are assigned," 4 M.R.S. § 1804(3)(E), particularly when coupled with MCILS's non-existent standards for evaluating counsel or resolving complaints about counsel, *see supra*, ¶ 73.

85. As an MCILS Commissioner has explained, the Commission's "basic eligibility requirements remain too low." *See* Correspondence from Ron Schneider (Jan. 10, 2022), attached as Exhibit 7. The Commission does "not want to admit that there are lawyers receiving assignments

who should not be receiving them or are not really ready to receive them, even though full-time defense lawyers and judges could name them." *Id.* As a result, "MCILS still does not ensure that every assigned lawyer has the necessary ability, training and experience necessary to handle the case assigned to them as MCILS still permits lawyers just out of law school with a one-day Commission-sponsored or Commission-approved training course to represent a person, who, by definition, faces jail, involuntary confinement in a hospital, or the loss of custody of a child." Ex. 6, at 5.

86. And while MCILS technically requires specialized training for certain representations, a recent report found that "more than 1 of every 8 case assignments that required specialized representation was given to an attorney who was supposed to be ineligible to serve."[6]

87. MCILS's mechanisms for training and supervision are also statutorily and constitutionally deficient. MCILS does not require appointed attorneys to obtain any training in any specific practice area, beyond the minimal requirements that the attorney must meet to first be placed on the roster. And while MCILS created a "Resource Counsel Program" to provide appointed attorneys with a resource for mentoring and supervision, the 25 attorneys who staff this program are capped at providing 10 hours of mentoring each month—a total of 250 hours to mentor and supervise the hundreds of attorneys responsible for thousands of criminal representations in the state. Ex. 1, at 31. MCILS also has no authority to require any attorney to cooperate with this program, nor does it have any sort of planning for helping resource counsel attorneys identify performance problems or training needs.

3. Monitoring the Indigent Defense System

[6] Samantha Hogan and Agnel Philip, *Lawyers Who Were Ineligible to Handle Serious Criminal Charges Were Given Thousands of These Cases Anyway*, Maine Monitor (Feb. 23, 2021), *available at* https://www.themainemonitor.org/lawyers-who-were-ineligible-to-handle-serious-criminal-charges-were-given-thousands-of-these-cases-anyway.

88. MCILS is separately required to establish certain processes for monitoring the indigent defense system. These include a statutory obligation to "[e]stablish a method for accurately tracking, monitoring and enforcing caseloads of assigned counsel, contract counsel and public defenders." 4 M.R.S. § 1804(3)(G).

89. But MCILS does not actually know when a case is assigned, as a court does not directly inform MCILS that a lawyer has been assigned to a case.

90. As MCILS itself acknowledges, the Commission "does not yet have processes and procedures that track caseloads in real time." Ex. 3, at 104. MCILS does not have a target date for implementing such a system. *Id.*

91. While a lawyer can open a new matter in MCILS's database, many wait to do so until the case has been resolved and they start the process to apply for their voucher.

92. Absent this information, there is no way for MCILS to fulfill its obligation to track and monitor caseloads of assigned counsel. Learning of the representation after the fact is of little use because MCILS does not have an accurate understanding of an attorney's caseload at a given point in time, nor can MCILS take any responsive actions based on attorney caseload.

4. MCILS's Executive Director

93. The statutory scheme likewise imposes a series of obligations on the Executive Director of MCILS. The Executive Director must, among other obligations, "[e]nsure that the provision of indigent legal services complies with all constitutional, statutory and ethical standards," 4 M.R.S. § 1805(1), "[a]ssist the commission in developing standards for the delivery of adequate indigent legal services," *id.* § 1805(2), and "[a]dminister and coordinate delivery of indigent legal services and supervise compliance with commission standards," *id.* § 1805(3).

94. As detailed above, *see supra*, ¶¶ 64-92, MCILS has failed in each of these categories: the provision of indigent legal services does not comply with all constitutional, statutory, and ethical standards, 4 M.R.S. § 1805(1); MCILS has failed to develop standards for the delivery of adequate indigent legal services, *Id.* § 1805(2); and MCILS does not coordinate and supervise the delivery of indigent legal services, *id.* § 1805(3).

95. Moreover, given that the Commission has no way of tracking active MCILS cases, *see supra*, ¶¶ 89-90, it is impossible for the Executive Director to fulfill his statutory obligation to "[a]dminister and coordinate delivery of indigent legal services," 4 M.R.S. § 1805(3).

96. The Executive Director has thus failed in fulfilling these statutory obligations.

* * *

97. Defendants' lax approach to their statutory and constitutional obligations has resulted in a system that fails to provide attorneys to indigent defendants at their initial appearance and at every stage of the proceedings, resulting in denial of counsel under the federal and state constitutions.

98. And, Defendants' lax approach to their statutory and constitutional obligations creates an unconstitutional risk that indigent defendants who are eventually provided with an attorney will be assigned an attorney who is ill-prepared and incapable of providing effective representation under the federal and state constitutions.

99. As discussed above, the constitutional right to counsel is not fulfilled by the mere appointment of counsel. *See supra*, ¶¶ 33-34; *Cronic*, 466 U.S. at 654. But to the extent Maine does appoint counsel, the mere appointment of counsel is sometimes the best that Maine's current system provides. Without any standards for evaluating conflicts of interest, or attorneys' performance, MCILS has no baseline for establishing what effective representation requires—let

alone mechanisms for measuring how appointed counsel are performing. And even where MCILS has ostensibly put standards in place—for example, with respect to attorney qualifications and training—these standards are far too low to ensure effective representation. *See supra*, ¶¶ 80-85.

100. The systemic structural limitations in Maine's system, including but not limited to MCILS's failure to even satisfy its own statutory requirements, have resulted in a system that denies the Plaintiff class actual representation, as guaranteed by *Gideon* and its progeny. "Actual representation assumes a certain basic representational relationship," *Hurrell-Harring v. New York*, 15 N.Y.3d 8, 22 (2010), which is impossible to develop and maintain when attorneys do not meet or communicate with their clients. *See Public Defender, Eleventh Jud. Cir. Of Fla. v. State*, 115 So. 3d 261, 278 (Fla. 2013) (finding denial of counsel where attorneys were "mere conduits for plea offers," did not communicate with clients, were unable to investigate the allegations, and were unprepared for trial).

C. The Lawyer-of-the-Day System

101. Rule 5 of the Maine Rules of Unified Criminal Procedure allows for the assignment of a "lawyer for the day . . . for the limited purpose of representing the [defendant] at the initial appearance or arraignment." M.R.U. Crim. P. 5(e). These lawyers appear at 48-hour hearings for in-custody defendants, at the initial appearance, and at the newly instituted seven-day bail review hearings for defendants not yet appointed counsel.

102. There is no per se problem with a lawyer-of-the-day system. But the State's lawyer-of-the-day system, as implemented, violates two fundamental tenets of effective representation: effective assistance of counsel at the outset of a criminal case and continuous representation through the completion of a case.

103. First, it is critical that a defendant receive effective representation "at the earlier stages of a criminal case." *Kuren v. Luzerne County*, 637 Pa. 33, 80 (2016). Indeed, the "right to counsel is as important in the initial stages of a criminal case as it is at trial." *Id.*; *see also* ABA Principle 3.

104. The State's lawyer-of-the-day system fails to ensure effective representation at the start of a defendant's case, because it is woefully under-resourced. In Androscoggin County, for example, two lawyers of the day typically represent 200 defendants, with one lawyer estimating that they had about 5 minutes with each defendant. Ex. 1, at 52-53. Likewise, in Cumberland County there are an average of two lawyers of the day to handle 80 defendants. *Id.* at 52. These attorneys must set up a makeshift office in the courthouse, or else meet with defendants while in lock-up, requiring them to attempt to describe constitutional rights to an entire group of in-custody defendants, effectively leading to a group waiver of constitutional rights. *Id.*; *see also Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122, 1124 (W.D. Wash. 2013) (finding that a "meet and plead" system, where clients met their attorneys for the first time in court and immediately accepted a plea bargain without discussing their cases in a confidential setting, resulted in the lack of a representational relationship that violated the Sixth Amendment).

105. This problem is not one of limited representation, *State v. Galarneau,* 2011 ME 60, ¶ 8, 20 A.3d 99*,* but rather of no real representation at all. Because attorneys are often forced to communicate with defendants as a group, the "basic representational relationship" necessary for "[a]ctual representation" is lacking. *Hurrell-Harring*, 15 N.Y.3d at 22.

106. The resource challenges are particularly acute for in-custody hearings, in which the lawyer of the day is also responsible for making arguments for release on bail. As detailed by

MCILS's rules for criminal practice,[7] the attorney should conduct an initial interview and investigation, including health (mental and physical) and employment background, criminal history, and the general circumstances of the alleged offense. Recent amendments to the bail statute allow for further argument based upon caretaking responsibilities and other factors. *See* 15 M.R.S. § 1026 (4)(C)(4), (12)-(14); P.L. 2021, ch. 397, § 5 (AMD). Yet the current lawyer-of-the-day system provides insufficient time and resources for the assigned attorney to meaningfully confer on these topics with each person on the docket.

107. Compounding this problem, the defendant is typically assigned a different lawyer to handle the case going forward, resulting in a lack of continuous representation and requiring a new attorney who is unfamiliar with the case to step in. *See* ABA *Standards for Criminal Justice*, Standards 5-6.2 cmt**.** (3d ed. 1992) (explaining that "the risk of substandard representation" increases given the new attorney's low familiarity with the case).

108. Mr. Robbins and Mr. Peirce both had to switch attorneys after initially being assigned a lawyer through the lawyer-of-the-day system.

109. Even for defendants who do not switch attorneys after their initial assignment, the lawyer-of-the-day system does not provide adequate time for defendants to have any meaningful communication with their assigned lawyers at their initial appearance or 48-hour hearing.

110. Mr. Mack, for example, pled not guilty at his initial appearance, but did not feel that he had sufficient information about the proceedings to understand what was happening, and he did not speak or otherwise participate at all in court. Nor did Mr. Mack feel that his attorney

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[7] Maine Commission on Indigent Legal Services, Chapter 102: Standards of Practice for Attorneys Who Represent Adults in Criminal Proceedings (Feb. 27, 2012), *available at* https://www.maine.gov/mcils/sites/maine.gov.mcils/files/inline-files/Adult%20Criminal%20Standards%20Final%20Adopted%20to%20SOS%20effdate.pdf.

adequately advocated for him with respect to bail, pushing Mr. Mack to independently request that the state revisit bail in his case.

111. The same was true with respect to Mr. Huynh, who pled not guilty at his initial appearance, but did not feel that he had adequate information about the proceedings or the charges against him to decide how to proceed.

CLASS ACTION ALLEGATIONS

112. Plaintiffs bring this class action lawsuit pursuant to Rule 23 of the Maine Rules of Civil Procedure on behalf of all indigent persons who are now or who will be before a state court in Maine under formal charge of having committed any offense, the penalty for which includes the possibility of confinement, incarceration, imprisonment, or detention in a correctional facility (regardless of whether actually imposed) and who qualify for representation through Maine's indigent-defense system.

113. The Court granted the Plaintiffs' Motion for Class Certification on July 15, 2022, explaining "that Plaintiffs have met the requirements of both Rule 23(a) and Rule 23(b)(2)." The Court thus certified a class consisting of: "All individuals who are or will be eligible for the appointment of competent defense counsel by the Superior or District Court pursuant to 15 M.R.S. § 810 because they have been indicted for a crime punishable by imprisonment, and they lack sufficient means to retain counsel."

114. The Court certified a Subclass on February 27, 2024, "consisting of Class Members who remain unrepresented after initial appearance or arraignment, unless the right to counsel has been waived by an individual Class Member." The Court further found that "creation of this subclass does not create a conflict between claims common to the entire class and would promote expeditious resolution of the case."

115. As reflected in the Court's orders, there are important questions of law and fact raised in this case that are common to the Class and to the Subclass, including:

i. Whether the State has violated the state and federal constitutions by failing to provide members of the Subclass with counsel a reasonable time after the right to counsel attaches and throughout all stages of the proceedings;

ii. Whether the State has failed to comply with its statutory obligations to implement an effective indigent-defense system, including specific obligations to develop standards governing the delivery of indigent legal services; establish training programs and attorney qualifications; and monitor the indigent-defense system;

iii. Whether the State's failure to adequately fund the delivery of indigent-defense services, and, in particular, to ensure that attorneys are appropriately compensated, results in the provision of constitutionally deficient representation;

iv. Whether the State's implementation of the lawyer-of-the-day system fails to ensure the provision of effective representation at the start of a defendant's case, and at the newly created seven-day review hearings conducted for members of the Subclass; and

v. Whether the State's failure to implement, administer, and oversee an adequate public defense system results in a violation of the state and federal constitutions.

116. The claims of the Plaintiffs as Class representatives are typical of the claims of the Class as a whole. Like all the Class members, the Class representatives are being denied their right to counsel in violation of the Sixth Amendment to the U.S. Constitution and Article I, Section 6

of the Maine Constitution as a result of Defendants' ongoing failure to adequately establish, supervise, administer, and fund indigent-defense services.

117. Also like all Class members, the Class representatives are being harmed by MCILS's ongoing failure to enact regulations setting standards for an adequate public defense system.

118. As discussed above, MCILS's failure to adopt standards or develop procedures governing the delivery of indigent-defense services creates a series of systemic failings. *See supra*, ¶¶ 64-92.

119. Without any procedure for evaluating counsel, MCILS has no way of knowing when particular attorneys fail to provide effective representation. MCILS has not even taken the basic step of setting up a formal system for reporting complaints about particular attorneys, which would allow it to investigate particular attorneys as necessary. These attorneys thus remain in the pool of rostered attorneys, continually picking up new defendants who likewise receive ineffective representation, even when it was clear to all that the attorney had a track record of failing to perform even basic functions of representation.

120. Likewise, without any procedure for evaluating conflicts of interest, MCILS leaves it to individual attorneys to identify conflicts and then recuse themselves from a case. MCILS has no way of knowing whether this is happening, and therefore has no way of preventing attorneys from representing defendants even when they are conflicted.

121. Even when MCILS has promulgated standards—with respect to attorney qualifications and training, for example—MCILS fails to ensure compliance with these standards, and, regardless, the standards are too low to guarantee effective representation.

122. The common questions of law and fact articulated above predominate over any individualized questions that may arise out of the Plaintiffs' or Class members' criminal cases. Accordingly, a class action is superior to other available methods for the fair and efficient adjudication of the allegations raised in this matter.

123. Defendants have failed to adequately establish, supervise, administer, and fund an indigent-defense system, thereby violating the rights of poor defendants across the State. In this way, Defendants have acted and refused to act on grounds generally applicable to the entire Class, making it appropriate for the Court to issue final injunctive and declaratory relief for all Class members.

124. The Class representatives will fairly and adequately protect the interests of the Class. The interests of the Class representatives are not in conflict with the interests of any other indigent defendant, and the Class representatives have every incentive to pursue this litigation vigorously on behalf of themselves and the Class as a whole.

125. The Class representatives are being represented by experienced, well-resourced counsel in this matter, including the American Civil Liberties Union of Maine, Preti Flaherty, Beliveau & Pachios, LLP, and Goodwin Procter LLP. The ACLU of Maine—an affiliate of the nationwide American Civil Liberties Union—has more than five decades of experience defending the civil liberties of the people of Maine, including through state and federal civil-rights actions. Counsel at Preti, Flaherty, Beliveau & Pachios, LLP, possess expertise in complex litigation, administrative law, and matters relating to Maine state government. And counsel at Goodwin Procter LLP have extensive experience litigating complex actions in trial and appellate courts, including a significant track record of litigating civil-rights suits in conjunction with ACLU affiliates.

COUNT I:
VIOLATION OF THE SIXTH AMENDMENT OF THE U.S. CONSTITUTION
(42 U.S.C. § 1983)
Plaintiff Class v. All Defendants

126. Plaintiffs reallege the preceding paragraphs as though fully set forth herein.

127. 42 U.S.C. § 1983 provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

128. The Sixth Amendment to the United States Constitution, as applicable to the States through the Fourteenth Amendment, provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

129. As courts have explained, where, as here, plaintiffs sue for prospective relief in conjunction with the state's provision of indigent-defense services, the plaintiffs' burden is to demonstrate "the *likelihood* of substantial and immediate irreparable injury, and the inadequacy of remedies at law." *Luckey v. Harris*, 860 F.2d 1012, 1017 (11th Cir. 1988) (quotations marks omitted; emphasis added). Plaintiffs have not yet been sentenced (or, in some cases, convicted). They seek prospective relief to avoid future harm from the state's ongoing provision of insufficient indigent-defense services in their case. As a result, there is no need for plaintiffs to show prejudice in any individual case. *See id.* (differentiating a suit for prospective relief from a *Strickland* action where "a party seeks to overturn his or her conviction"). Plaintiffs can instead state a claim for relief based on, for example, "systemic" actions that "hamper the ability of their counsel to defend them" and "effectively deny them their eighth and fourteenth amendment right to bail." *Id.*

130. Applying these principles, the State's indigent-defense system violates the Sixth Amendment in three ways.

131. First, Defendants have failed to provide attorneys to the Subclass of individuals within a reasonable time after the right to counsel attaches to allow for adequate representation at every critical stage, and have failed to provide attorneys to the Subclass at all critical stages of the proceedings.

132. Second, Defendants have failed to develop and implement an effective system for the appointment of counsel for indigent defendants. In particular, MCILS has failed to (i) set and enforce standards for counsel conflicts of interest and attorney performance; (ii) monitor and evaluate rostered attorneys; (iii) ensure adequate funding and support for rostered attorneys; and (iv) provide training to rostered attorneys. Even when MCILS has set standards (with respect to attorney qualifications, for example), these standards are both insufficiently rigorous and not sufficiently enforced.

133. Third, Defendants' implementation of the lawyer-of-the-day program to provide representation at criminal defendants' 48-hour hearings, initial appearances, and seven-day review hearings creates an unconstitutional risk of ineffective representation. No attorney reasonably can be expected to adequately represent all their clients when they are responsible for up to 100 defendants upon walking into court in the morning. Under these conditions attorneys are forced to describe constitutional rights to large groups of defendants, making it impossible to advise every defendant as to the proper course of action in his or her individual case. And designation of lawyers of the day to appear at the newly created seven-day hearings are merely a "limited, short-term response" and "do not address the fundamental need—'to get a lawyer working, whether to attempt

to avoid [a] trial or to be ready with a defense when the trial date arrives.'" *Peterson v. Johnson*, No. SJC-23-2, at 29, 31-32 (quoting *Rothgery*, 554 U.S. at 210).

134. The problems with the lawyer-of-the-day program persist throughout a defendant's case. A defendant who is not given effective counsel at the critical initial stages of his or her proceeding may make choices—as to whether to plead guilty, for example—that are impossible to undo later in the case. Denial of bail at the initial hearing also has serious consequences for the remainder of the case, with pre-trial detention significantly increasing the probability of conviction, primarily due to an increase in guilty pleas.[8]

135. Defendants have acted and threatened to act under the color of state law in depriving Plaintiffs of rights guaranteed by the Constitution and laws of the United States.

136. As a result, Plaintiffs are entitled to preliminary and permanent injunctive relief, a declaratory judgment, costs and attorney's fees, and such other relief as the Court deems just.

137. Because Defendants have acted and threatened to act under the color of state law to deprive Plaintiffs of rights guaranteed by the Constitution and laws of the United States, Plaintiffs may sue and seek relief pursuant to 42 U.S.C. § 1983.

COUNT II:
VIOLATION OF ARTICLE 1, SECTION 6 OF THE MAINE CONSTITUTION
(Maine Civil Rights Act, 5 M.R.S. § 4682)
Plaintiff Class v. All Defendants

138. Plaintiffs reallege the preceding paragraphs as though fully set forth herein.

139. Article I, Section 6 of the Maine Constitution provides that "[i]n all criminal prosecutions, the accused shall have a right to be heard by the accused and counsel to the accused, or either, at the election of the accused."

[8] Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J. Law Econ. & Org. 511, 514 (2018).

140. As courts have explained, where, as here, plaintiffs sue for prospective relief in conjunction with the state's provision of indigent-defense services, the plaintiffs' burden is to demonstrate "the *likelihood* of substantial and immediate irreparable injury, and the inadequacy of remedies at law." *Luckey v. Harris*, 860 F.2d 1012, 1017 (11th Cir. 1988) (quotations marks omitted; emphasis added). Plaintiffs have not yet been sentenced (or, in some cases, convicted). They seek prospective relief to avoid future harm from the state's ongoing provision of insufficient indigent-defense services in their case. As a result, there is no need for plaintiffs to show prejudice in any individual case. *See id.* (differentiating a suit for prospective relief from a *Strickland* action where "a party seeks to overturn his or her conviction"). Plaintiffs can instead state a claim for relief based on, for example, "systemic" actions that "hamper the ability of their counsel to defend them" and "effectively deny them their eighth and fourteenth amendment right to bail." *Id.*

141. Applying these principles, the State's indigent-defense system violates Article I, Section 6 in three ways.

142. First, Defendants have failed to provide continuous representation of counsel to the Subclass of individuals at the initial appearance and at every stage of the proceedings.

143. Second, Defendants have failed to develop and implement an effective system for the appointment of counsel for indigent defendants. In particular, MCILS has failed to (i) set and enforce standards for counsel conflicts of interest and attorney performance; (ii) monitor and evaluate rostered attorneys; (iii) ensure adequate funding and support for rostered attorneys; and (iv) provide training to rostered attorneys. Even where MCILS has set standards (with respect to attorney qualifications, for example), these standards are both insufficiently rigorous and not sufficiently enforced.

144. Third, Defendants' implementation of the lawyer-of-the-day program to provide representation at criminal defendants' 48-hour hearings, initial appearances, and seven-day review hearings creates an unconstitutional risk of ineffective representation. No attorney reasonably can be expected to adequately represent all their clients when they are responsible for up to 100 defendants upon walking into court in the morning. Under these conditions attorneys are forced to describe constitutional rights to large groups of defendants, making it impossible to advise every defendant as to the proper course of action in his or her individual case. And designation of lawyers of the day to appear at the newly created seven-day hearings are merely a "limited, short-term response to an ongoing crisis" and "do not address the fundamental need—'to get a lawyer working, whether to attempt to avoid [a] trial or to be ready with a defense when the trial date arrives.'" *Peterson v. Johnson*, No. SJC-23-2, at 29, 31-32 (quoting *Rothgery*, 554 U.S. at 210).

145. The problems with the lawyer-of-the-day program persist throughout a defendant's case. A defendant who is not given effective counsel at the critical initial stages of his or her proceeding may make choices—as to whether to plead guilty, for example—that are impossible to undo later in the case. Denial of bail at the initial hearing also has serious consequences for the remainder of the case, with pre-trial detention significantly increasing the probability of conviction, primarily due to an increase in guilty pleas.[9]

146. Defendants have acted and threatened to act under the color of state law in depriving Plaintiffs of rights guaranteed by the Maine Constitution and laws of Maine.

147. As a result, Plaintiffs are entitled to preliminary and permanent injunctive relief, a declaratory judgment, costs and attorney's fees, and such other relief as the Court deems just.

[9] Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J. Law Econ. & Org. 511, 514 (2018).

148. Because Defendants have acted and threatened to act under the color of state law to deprive Plaintiffs of rights guaranteed by the Maine Constitution and laws of Maine, Plaintiffs may sue and seek relief pursuant to the Maine Civil Rights Act, 5 M.R.S. § 4682.

COUNT III:
PETITION FOR A WRIT OF HABEAS CORPUS
(14 M.R.S. §§ 5501-5546 and Maine Const. art. I, § 10)
Plaintiff Subclass v. Respondents Sheriffs and State of Maine

149. Habeas corpus is the appropriate remedy when a petitioner challenges "the fact or duration of his confinement" or seeks a "quantum change" to a less restrictive form of custody, *Gonzalez-Fuentes v. Molina*, 607 F.3d 864, 873 (1st Cir. 2010). In this case, members of the Subclass challenge the fact of their confinement and restrictive conditions of release, which, they allege, has become unconstitutional because they have not been provided with the assistance of counsel.

150. Under the Suspension Clause of the Maine Constitution, "the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." Me. Const. art. I, § 10.

151. Under Maine's habeas statute, "[e]very person unlawfully deprived of his personal liberty by the act of another . . . shall of right have a writ of habeas corpus." 14 M.R.S. § 5501; *see also* 14 M.R.S. § 5511 (authorizing "any person" to seek writ of habeas corpus on behalf of "any party alleged to be imprisoned or restrained of his liberty but not convicted and sentenced"); 14 M.R.S. § 5513.

152. Due process prohibits the State from physically detaining defendants before trial unless specific procedural safeguards are met, including providing counsel at any adversarial hearing. *United States v. Salerno*, 481 U.S. 739, 755 (1987).

153. An action in habeas corpus is available "to protect and vindicate [a person's] right of personal liberty be freeing [the person] from illegal restraint." *Roussel v. State*, 274 A.2d 909, 913 (Me. 1971).

154. Because Defendants State of Maine and County Sheriffs have detained the Plaintiff Subclass unlawfully without counsel in violation of their constitutional rights, the Plaintiff Subclass are entitled to freedom from that illegal restraint under the habeas corpus provisions of the Maine Constitution and 14 M.R.S. § 5501 *et seq*.

* * * * *

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request the following relief:

I. A declaratory judgment that Defendants have denied the Subclass the right to assistance of counsel by failing to provide them with continuous representation of counsel within 48 hours of their initial appearance and at all stages of representation, in violation of the Sixth Amendment to the United States Constitution and Article I, Section 6 of the Maine Constitution;

II. Injunctive relief requiring Defendants to provide continuous representation of counsel to all members of the Subclass within 48 hours of the initial appearance and at all stages of representation, and ordering equitable relief for all Subclass members not provided counsel within 48 hours of initial appearance, including but not limited to release without conditions from custody, provision of sufficient money for the Subclass members to hire private attorneys, or dismissal of charges without prejudice.

III. A writ of habeas corpus declaring that the Subclass have been unlawfully detained in violation of their Sixth Amendment and Article I, Section 6 rights on the grounds they have been detained without counsel, and ordering equitable relief including but not limited to release without conditions from custody, provision of sufficient money for the Subclass members to hire private attorneys, or dismissal of charges without prejudice.

IV. A declaratory judgment that Defendants have denied the guarantee of assistance of counsel to the Class through their failure to ensure adequate gatekeeping, supervision, and training of state-appointed counsel, in violation of the Sixth Amendment to the United States Constitution and Article I, Section 6 of the Maine Constitution;

V. Injunctive relief requiring Defendants to guarantee the assistance of counsel to Plaintiffs and those similarly situated by establishing adequate gatekeeping, supervision, and training of state-appointed counsel, consistent with the Sixth Amendment to the United States Constitution and Article I, Section 6 of the Maine Constitution;

IV. An order requiring MCILS to adopt such statutorily required rules;

V. A declaratory judgment holding that the MCILS's implementation of the lawyer-of-the-day program violates the Sixth Amendment to the United States Constitution and Article I, Section 6 of the Maine Constitution;

VI. Injunctive relief requiring MCILS to ensure adequate representation of indigent defendants at their 48-hour hearings and their subsequent seven-day bail review

hearings, consistent with the Sixth Amendment to the United States Constitution and Article I, Section 6 of the Maine Constitution;

VII. An award to Plaintiffs of costs and attorney's fees; and

VIII. Any such other and further relief that this Court deems just and proper.

March 8, 2024

Respectfully submitted.

ANDREW ROBBINS, BRANDY GROVER, RAY MACK, MALCOLM PEIRCE, and LANH DANH HUYNH

By their attorneys:

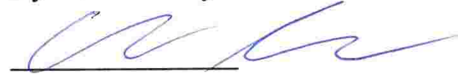

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EXHIBIT 1

THE RIGHT TO COUNSEL IN MAINE

EVALUATION OF SERVICES PROVIDED BY THE MAINE COMMISSION ON INDIGENT LEGAL SERVICES

APRIL 2019

SIXTH AMENDMENT CENTER

The Right to Counsel in Maine: Evaluation of Services Provided by the Maine Commission on Indigent Legal Services
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PREPARED BY
The Sixth Amendment Center is a non-partisan, non-profit organization providing technical assistance and evaluation services to policymakers and criminal justice stakeholders. Its services focus on the constitutional requirement to provide effective assistance of counsel at all critical stages of a case to the indigent accused facing a potential loss of liberty in a criminal or delinquency proceeding.

PREPARED FOR
The Maine Legislative Council is a ten-member body consisting of five members from each legislative chamber, including: the President of the Senate, Speaker of the House, bi-cameral Republican and Democratic Floor Leaders and their Assistant Floor Leaders. The Legislative Council governs the administration of the Maine Legislature.

EXECUTIVE SUMMARY

In 1963, the U.S. Supreme Court declared in *Gideon v. Wainwright* that it is an "obvious truth" that anyone who is accused of a crime and who cannot afford the cost of a lawyer "cannot be assured a fair trial unless counsel is provided for him." In the intervening 56 years, the U.S. Supreme Court has clarified that the Sixth Amendment right to counsel means every person who is accused of a crime is entitled to have an attorney provided at government expense to defend him whenever that person is facing the potential loss of his liberty and is unable to afford his own attorney. Moreover, the appointed lawyer needs to be more than merely a warm body with a bar card. The attorney must also be effective, the U.S. Supreme Court said again in *United States v. Cronic* in 1984, subjecting the prosecution's case to "the crucible of meaningful adversarial testing." Under *Gideon*, the Sixth Amendment right to effective counsel is an obligation of the states under the due process clause of the Fourteenth Amendment.

Through legislation enacted in 2009, the legislature created the Maine Commission on Indigent Legal Services (MCILS) and commanded that it: "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"; "ensure the delivery of indigent legal services by qualified and competent counsel in a manner that is fair and consistent throughout the State"; and "ensure adequate funding of a statewide system of indigent legal services, which must be provided and managed in a fiscally responsible manner, free from undue political interference and conflicts of interest." ME. REV. STAT. ANN. tit. 4, § 1801 (2018).

Since its inception, MCILS has never used governmentally employed attorneys to provide representation. Instead, MCILS either pays attorneys $60 per hour or, in Somerset County, pays a consortia of attorneys a fixed fee under contract. Maine is the only state in the country that provides all indigent defense services through private attorneys.

There are two principal reasons that other states have moved away from using only private attorneys to provide all indigent defense services, and Maine has struggled with both since the creation of MCILS. First, it is difficult to predict and contain costs in a private attorney system. A system can estimate future caseloads based on prior year trends and apply average estimated costs per case, by case type, to calculate what funding will be required to deliver its mandated services, but there is no guarantee that past averages will continue to apply to future years. Second, it is difficult to

supervise private attorneys to ensure they can and do provide effective representation. For example, despite the statutory command for MCILS to provide "high-quality" representation, the State of Maine expects MCILS to maintain oversight of nearly 600 attorneys, handling cases in 47 courthouses presided over by approximately 90 justices, judges, and magistrates, with a staff of just three people (excluding financial screeners that perform no oversight functions).

In 2017, the Maine legislature created the Working Group to Improve the Provision of Indigent Legal Services that determined that MCILS does not have systemic oversight and evaluation of attorneys and is in need of stronger fiscal management and recommended an independent assessment. In March 2018, the Maine Legislative Council contracted the Sixth Amendment Center (6AC) to evaluate right to counsel services provided by MCILS and to recommend any needed changes. Limitations of time and resources prevent most indigent defense evaluations from considering every court, public defense system, and service provider in a given state, and so this study looks closely at five counties: Androscoggin, Aroostook, Cumberland, Somerset, and York.

Chapter 1 (p. 5 to 23) provides introductory information on the history of the right to counsel in Maine, an explanation of Maine's justice systems, and the study methodology. Chapter II (p. 24 to 35) begins the assessment by evaluating Maine's attorney qualification, training and supervision and makes the following finding:

FINDING 1: MCILS attorney qualification standards are too lenient, resulting in an excessive number of attorneys on panels, and there are no attorney recertification requirements. MCILS has only limited new attorney training and lacks requirements that ongoing attorney training relate to defense-specific subject areas. MCILS lacks appropriate supervision of attorneys.

Under MCILS' qualification requirements, an attorney who graduated from law school two years ago and hung out their shingle in a private practice, with no supervision or training, can have two jury trials and two judge trials and then be appointed to represent indigent defendants in every type of criminal case other than a homicide or sex offense. More worrisome perhaps is that indigent defendants charged with Class E crimes, carrying up to six months in jail, can be represented by an attorney who just received their bar card and completed a single training course in criminal law, as long as the lawyer has an email address, telephone number, and a confidential space to meet with clients.

MCILS does not require attorneys appointed to represent the indigent to obtain training in the fields in which they provide indigent legal representation (beyond that required to first be placed on the roster for appointments in operating under the influence or domestic violence cases). Similarly, MCILS has not established any requirements for

supervision of attorneys appointed to provide indigent legal representation. After the start of the assessment, MCILS identified 25 attorneys statewide to serve as resource counsel and provide mentoring to less experienced attorneys. However, these attorneys are each capped at providing only 10 hours of mentoring per month, and the resource counsel attorneys do not have authority to require any mentee to cooperate.

Chapter III (p. 36 to 62) assesses how and when in the criminal justice process defendants are informed about their right to counsel, how they are approved or denied for MCILS services, and when attorneys are appointed to represent indigent defendants. After a description of the criminal process in Maine, Chapter III makes four findings:

Finding 2: Although the courts' advice of rights video has many admirable qualities, few courts follow up with a colloquy to ensure that indigent defendants saw the video and comprehend their rights before waiving counsel. Some prosecutors in some jurisdictions engage in plea discussions with uncounseled defendants, and some courts actively encourage such negotiations. These practices result in actual denial of counsel.

In every courtroom observed in all of the sample counties, the same video is played before the judge is on bench enumerating defendants' rights. No one ensures that defendants have watched the video, understand the language spoken in the video, or have the mental capacity to understand the video, and it is often the case that tardy defendants enter without ever seeing the video at all.

Moreover, under U.S. Supreme Court case law a plea negotiation is a critical stage of the case, meaning the negotiation cannot happen unless counsel is present or the defendant's right to counsel has been knowingly, voluntarily, and intelligently waived. Despite this, throughout the sample counties, prosecutors talk to uncounseled defendants to negotiate guilty pleas. This was most prevalent in the south where larger court populations, and not enough lawyers of the day, exacerbate the problems.

Finding 3: Oversight of financial screeners by MCILS creates the appearance of a conflict of interest with its duty to provide zealous representation to indigent defendants.

MCILS employs eight people to conduct financial screening of defendants who request appointment of counsel. Indigent defense systems must require their participating attorneys to adhere to their ethical duty to zealously defend in the stated interests of the client, including advocating against the imposition of fines, fees, and other assessments. MCILS cannot assure that appointed attorneys fight against the imposition on indigent defendants of fees related to the cost of the defense, while

MCILS is simultaneously tasked with trying to collect fees assessed for the cost of representation.

A situation in Cumberland County transformed this appearance of a conflict of interest by MCILS into an actual conflict of interest. A statewide hiring freeze left vacant the MCILS financial screener position that covered Cumberland County. At the time of our site visit, the MCILS lawyers for the day were signing as notaries the financial affidavits of the defendants they advise and represent, which are then submitted to the court. This process places the lawyer in the position of a potential witness against the client, in the event the affidavit is challenged. Finally, conflict of interest concerns aside, having lawyers perform at $60/hour a service that is normally performed by a financial screener paid $12.75/hour is simply not cost efficient governance.

Finding 4: MCILS' "lawyer of the day" system primarily serves the need to move court dockets, while resulting in a lack of continuous representation to the detriment of defendants. There is often a critical gap in representation while a substantive lawyer is identified and appointed. Additionally, the lawyer of the day practices under the Somerset contract result in a direct conflict of interest.

MCILS provides for a "lawyer of the day" to appear at 48-hour hearings for in custody defendants and at initial appearance for out of custody defendants. The number of lawyers serving as lawyer for the day is generally insufficient to even meet with, much less actually provide representation to, the number of defendants scheduled on each day's docket. For example, on an average day in Cumberland County's Portland District Court there are two lawyers for the day to handle 80 defendants.

The lawyer for the day system provides limited representation because it is only "for the day," not for the case. In most instances the "lawyer of the day" does not continue with the case. Instead, courts make a formal appointment off of a roster of MCILS approved lawyers. Some judges like to select the individual attorney to appoint in a given case, some leave it to their clerks to do after the hearing, and some use a rotational system where the next attorney on the list is appointed. However, a gap in representation occurs when those appointments are delayed.

The lawyer of the day program in Somerset County produces a direct conflict of interest. The contract attorneys can be hired by non-indigent defendant who appear in court while the contract attorneys are serving as lawyer for the day. That is, the attorney could reject a defendant for appointed counsel and then accept the case as a private retainer. This central role of the contract attorneys in meeting as lawyer for the day every person who is hailed into court creates a monopoly of sorts, as attorneys outside of Somerset County said they are effectively prevented from establishing a practice in Somerset County. That is, the contract attorneys keep not only all the

assigned work but also most of the private work, since the contract has provided them a personal introduction to all defendants.

Finding 5: Despite there being many excellent assigned lawyers providing representation to the indigent accused throughout Maine, there are also too many attorneys throughout the state who do not perform adequately.

In one of the studied counties, the Sheriff estimated, due to the volume of prisoner complaints, that about 25% of assigned attorneys do not visit their clients in jail to prepare their cases. He was also concerned about attorneys not accepting calls from the jail. He said prisoners stop calling when their calls are not accepted. Consistent with that report, one judge estimated that 25% of assigned counsel have not met with their clients before the first dispositional conference date. She reported that up to 10% of attorneys withdraw or become a second chair if the case goes to trial.

MCILS data tends to confirm these observations of the sheriffs. For example, the 6AC requested three years of data on jail visits on cases billed out of Cumberland County. The data reveal a number of attorneys that often visit clients, but a concerning number of folks that do not. For example, in 2017, one attorney billed MCILS $111,771 for cases arising in Cumberland County, including $3,024 for 96 jail visits. By contrast, another attorney billed MCILS $171,880, but did not bill any time for even a single jail visit. Certainly it is possible, though unlikely, that the attorney simply decided it was not worth the time to bill jail visits, but the point is that MCILS and the State of Maine do not know because of a lack of oversight.

The final substantive chapter, Chapter IV (p. 63-70), assesses the extent to which MCILS ensures that lawyers have sufficient time to work on cases, especially in relation to attorneys being assigned too many cases. This Chapter makes one finding:

Finding 6: Despite the lack of MCILS workload limits, excessive caseloads may not be an issue in most counties in Maine. However, insufficient time is an issue in Somerset County, where the combination of high caseloads and the fixed fee contract system produce financial incentives to dispose of cases without adequate preparation.

Even factoring in "lawyer of the day" duties in most jurisdictions, the attorneys with the most cases handled in Aroostook, Androscoggin, Cumberland, and York Counties do not appear to have excessive appointed caseloads. The one place where there are definitely time sufficiency issues is in Somerset County. Over the past six years, the average number of hours spent per indigent defense case has declined. For example, in FY 2013, on average the lawyers spent 6.78 hours per adult case in FY 2013. By FY 2018, the number dropped to 2.99 hours on average per adult criminal case (a decrease of approximately 56%). Importantly, MCILS does not require from the Somerset

County Project reporting of adult criminal cases to be distinguished by severity, which would allow MCILS to more accurately track attorney workloads. That said, 2.99 hours per adult criminal case is extremely and unreasonably low, even if every case was a class D or E charge.

Chapter V (p. 71-85) discusses attorney compensation and evaluates MCILS ability to provide fiscal oversight of state resources. The Chapter makes two findings:

Finding 7: MCILS' fixed fee contract causes a financial conflict of interest. MCILS' hourly rate is inadequate to both cover overhead and provide lawyers an adequate fee.

Fixed fee contracts, in which a lawyer earns the same pay no matter how many cases he is required to handle, create financial incentives for a lawyer to dispose of cases as quickly as possible, rather than as effectively as possible for the client. In FY 2017, the average fee per case under the Somerset contract was $573.16, slightly higher than the average billed by the assigned counsel elsewhere (statewide $554.80). The average hours per case spent in Somerset, at 3.27, was *much lower* than the statewide average of 9.25 (assuming the 2017 rate was $60/hour), resulting in the Somerset hourly rate paid for counsel being $174.97. So, in Somerset County, the State of Maine is paying attorneys three times the rate it pays everyone else and getting approximately one third less work.

The hourly compensation rate in Maine ($60/hour) is not enough to cover overhead and ensure a reasonable fee. As a comparison, the South Dakota Supreme Court set public counsel compensation hourly rates at $67 per hour in 2000. To ensure that attorneys are perpetually paid both a reasonable fee and overhead, the court also mandated that "court-appointed attorney fees will increase annually in an amount equal to the cost of living increase that state employees receive each year from the legislature." Assigned counsel compensation in South Dakota now stands at $95 per hour. For comparison purposes, a $95 hourly fee in South Dakota in 2019 is equivalent to a $114.95 hourly fee in Maine in 2019.

Finding 8: A significant number of attorneys bill in excess of eight hours per day, five days per week, for 52 weeks per year. MCILS does not exert adequate financial oversight of private attorneys.

"Over-billing" was a topic raised frequently throughout the state. In Maine, attorneys do not submit vouchers under penalty of perjury. No statutes or MCILS rules limit attorney hours by day or by year. MCILS conducts no audits. Not surprisingly, a review of MCILS vouchers over the past five years generated serious concerns in some instances about whether limited taxpayer resources are being used effectively.

If an attorney works eight hours per day, five days per week, for 52 weeks a year, that attorney should make no more than $124,800 at the current $60 per hour MCILS rate. In FY 2018, 25 attorneys billed MCILS in excess of 40 hours per week. The top biller in FY2018 billed more than 88 hours per week. As part of this review, the 6AC reached out to the Federal Defender Services Division of the Administrative Office of the United States Courts. Although they are not allowed to confirm the number of cases appointed, the Federal Defender Services, Legal and Policy Division, confirmed that eight of these 25 lawyers received federal court appointments during this same time period.

To remedy these issues, Chapter VI (P. 86-96) sets out a series of recommendations:

RECOMMENDATION 1: The State of Maine should remove the authority to conduct financial eligibility screenings from the Maine Commission for Indigent Legal Services. The reconstituted Task Force on Pretrial Justice Reform should determine the appropriate agency to conduct indigency screenings.

RECOMMENDATION 2: The State of Maine should statutorily bar communication between prosecutors and unrepresented defendants, unless and until defendants have been informed of their right to appointed counsel, a judge has conducted the legally required colloquy, and a defendant has executed a written waiver of the right to counsel in each case to ensure that all waivers of the right to counsel are made knowingly and voluntarily.

RECOMMENDATION 3: Except for ministerial, non-substantive tasks, the State of Maine and the Maine Commission on Indigent Legal Services should require that the same properly qualified defense counsel continuously represents the client in each case, from appointment through disposition, and personally appears at every court appearance throughout the pendency of an assigned case.

RECOMMENDATION 4: MCILS should use its current statutory power to promulgate more rigorous attorney qualification, recertification, training, supervision, and workload standards. The State of Maine should statutorily require financial oversight by requiring that MCILS limit the number of permissible billable hours, subject to waiver only upon a finding of need for additional capacity. The State of Maine should fund MCILS at a level to ensure rigorous training and effective substantive and financial oversight of attorneys.

RECOMMENDATION 5: The State of Maine should statutorily ban all public defense contracts that provide financial disincentives to or that otherwise interfere with zealously advocating on behalf of the defendants' stated interests, including the use of fixed fee contracts. Maine should require that any public defense contract include reasonable caseload limits, reporting requirements on

any private legal work permitted, and substantial performance oversight, among other protections.

RECOMMENDATION 6: The State of Maine should fund MCILS at a level that allows private attorneys to be compensated for overhead expenses plus a reasonable fee (i.e., $100 per hour). MCILS should be authorized to provide additional compensation of $25 per hour for designated case types such as murder, sexual assaults, and postconviction review.

RECOMMENDATION 7: The State of Maine should authorize and fund MCILS at an appropriate level to employ state government attorneys and support staff to operate a statewide appellate defender office and a Cumberland County trial level public defender office.

THE RIGHT TO COUNSEL IN MAINE

EVALUATION OF SERVICES PROVIDED BY THE MAINE COMMISSION ON INDIGENT LEGAL SERVICES

APRIL 2019

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overseeing the Scottsboro Boys' Alabama trial appointed a real estate lawyer from Chattanooga, Tennessee, who was not licensed in Alabama and was admittedly unfamiliar with the state's rules of criminal procedure.[101] The *Powell* Court concluded that defendants require the "guiding hand" of counsel;[102] that is, the attorneys a state provides to represent indigent defendants must be qualified and trained to help those defendants advocate for their stated legal interests.

This report is concerned principally with the right to counsel that is mandated by the Sixth Amendment, as it is provided to adults at the trial level in Maine; that is, representation provided to indigent adults who face the possible loss of their liberty as punishment for a crime. Throughout Maine under the indigent legal system administered by the MCILS, many of the same attorneys provide all indigent legal representation – both that required under the federal constitution and that required or allowed under Maine law though not mandated by the Sixth Amendment. This means that attorneys are appointed to represent adults and children in a variety of case types, at both trial and appeal, and must be competent not only in criminal and delinquency law but also in a broad range of civil law areas.

Finding 1: MCILS attorney qualification standards are too lenient, resulting in an excessive number of attorneys on panels, and there are no attorney recertification requirements. MCILS has only limited new attorney training and lacks requirements that ongoing attorney training relate to defense-specific subject areas. MCILS lacks appropriate supervision of attorneys.

The first thing that must occur in a system to provide effective assistance of counsel is to select the attorneys who are available to provide that representation. National standards, as compiled in the *ABA Ten Principles*, require that, "[w]here the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar."[103]

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[101] A retired local attorney who had not practiced in years was also appointed to assist in the representation of all nine co-defendants.

[102] Powell v. Alabama, 287 U.S. 45, 68-69 (1932). ("The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.").

[103] American Bar Ass'n, ABA Ten Principles of a Public Defense Delivery System, Principle 2 (Feb. 2002).

Since its inception, MCILS has never used governmentally employed attorneys to provide representation to the indigent accused, leaving Maine as the only state in the country that provides all indigent defense services through private attorneys.[104] There are two principal reasons that other states have moved away from using only private attorneys to provide all indigent defense services, and Maine has struggled with both since the creation of MCILS. First, it is difficult to predict and contain costs in a private attorney system. (*See* Chapter V.). A system can estimate future caseloads based on prior year trends and apply average estimated costs per case, by case type, to calculate what funding will be required to deliver its mandated services, but there is no guarantee that past averages will continue to apply to future years. Second, it is difficult to supervise private attorneys to ensure they can and do provide effective representation. For example, continual changes in technology make digital evidence such as video surveillance, social media posts, and smart phone searches crucial for defense discovery and investigation in many criminal cases. Likewise, the opioid crisis has added layers of complexity to the resolution of many criminal, delinquency, child protection, and mental health cases.

MCILS struggles to oversee the services provided by private lawyers. Indigent legal services in Maine are provided at trial and appeal by nearly 600 private attorneys,[105] handling cases in 47 courthouses presided over by approximately 90 justices, judges, and magistrates.[106] Despite the statutory command for MCILS to provide "high-

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[104] For comparison, 25 states in addition to Maine fund all appellate and trial indigent defense services: Alabama, Alaska, Arkansas (except counties responsible for office facilities, equipment, and supplies), Colorado, Connecticut, Delaware, Florida, Hawaii, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Montana, New Hampshire, New Mexico, North Carolina, North Dakota, Rhode Island, Vermont, Virginia, West Virginia, and Wisconsin. In each of these states, some portion of services are delivered through state government employees. For example, even though Massachusetts primarily uses private counsel, serious felonies and primary juvenile delinquency services are provided by governmentally employed public defenders. Similarly, even though trial services in Oregon are provided by private attorneys under contract, a significant portion of appellate services are provided by state government employed lawyers.

In the other 24 states that require counties to fund some portion of indigent defense services, there is at least one public defender office employing government attorneys (either state- or county-funded) in every state.

[105] Five hundred ninety-three individual attorneys were appointed to one or more cases during fiscal years 2014 to 2018. Attorney billing reflects an extremely wide range in the number of hours each attorney devotes to providing indigent legal services. For example, one attorney billed the state a total of $1,189,361 over those five years (and average of $237,872.27 per year); while one attorney billed the state for just $144.00 in one year (2018).

[106] Maine has one Supreme Judicial Court, 24 superior court justices (including active retired) in 17 different courthouses, 50 district court judges (including active retired) in 29 different courthouses, and nine family law magistrates (including active retired), each of whom can potentially preside over a case in which counsel is appointed to provide indigent legal services. *See Supreme Court*, STATE OF ME. JUD. BRANCH, https://www.courts.maine.gov/maine_courts/supreme/index.shtml; *Superior Court* Justices, STATE OF ME. JUD. BRANCH, https://www.courts.maine.gov/maine_courts/superior/justices.shtml; *Superior Courthouse Directory*, STATE OF ME. JUD. BRANCH, https://www.courts.maine.gov/maine_courts/superior/directory.shtml; *District Court Judges*, STATE OF ME. JUD. BRANCH, https://www.

quality" and "conflict-free" representation, the State of Maine expects MCILS to maintain oversight of these approximately 600 attorneys with a staff of just three people.[107]

Attorney qualifications

Although attorneys graduate from law school with a strong understanding of the principles of law, legal theory, and generally how to think like a lawyer, no graduate enters the legal profession automatically knowing how to be an intellectual property lawyer, a consumer protection lawyer, or an attorney specializing in estates and trusts, mergers and acquisitions, or bankruptcy.[108] Specialties must be developed. Just as you would not go to a dermatologist for heart surgery, a real estate or divorce lawyer cannot be expected to handle a complex criminal case competently. As the American Bar Association explained more than 20 years ago, "[c]riminal law is a complex and difficult legal area, and the skills necessary for provision of a full range of services must be carefully developed. Moreover, the consequences of mistakes in defense representation may be substantial, including wrongful conviction and death or the loss of liberty."[109]

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courts.maine.gov/maine_courts/district/judges.shtml; District Courthouse Directory, STATE OF ME. JUD. BRANCH, https://www.courts.maine.gov/maine_courts/district/directory.shtml; *Family Law Magistrates*, STATE OF ME. JUD. BRANCH, https://www.courts.maine.gov/maine_courts/family/magistrates.html.

[107] MCILS employs an executive director, a deputy executive director, and an accounting technician, who collectively provide the entirety of the oversight of the indigent legal services in Maine. *Staff Directory*, MAINE COMM'N ON INDIGENT LEGAL SERVS., https://www.maine.gov/mcils/about/staff.html (last visited Mar. 19, 2019). MCILS also employs eight financial screeners, whose role is limited to interviewing defendants to determine indigency in the courts.

For comparison, there are approximately 600 private attorneys who provide conflict representation in Colorado through the Office of Alternate Defense Counsel, which has a central staff of 14 employees. *See Staff*, OFFICE OF THE ALTERNATE DEFENSE COUNSEL, https://www.coloradoadc.org/oadccontacts/oadc-staff (last visited Mar. 19, 2019). This is in addition to the 13 staff in the central administrative office of the Colorado State Public Defender, who administer the public defender offices serving Colorado's 17 counties. *See Central Administrative Office*, OFFICE OF THE COLORADO STATE PUBLIC DEFENDER, http://www.coloradodefenders.us/offices/central-administration/ (last visited Mar. 19, 2019).

[108] Christopher Sabis and Daniel Webert, *Understanding the Knowledge Requirement of Attorney Competence: A Roadmap for Novice Attorneys*, 15 GEO. J. LEGAL ETHICS 915, 915 (2001-2002) ("The American Bar Association (ABA) Model Rules of Professional Conduct (Model Rules) provide that an attorney must possess and demonstrate a certain requisite level of legal knowledge in order to be considered competent to handle a given matter. The standards are intended to protect the public as well as the image of the profession. Failure to adhere to them can result in sanctions and even disbarment. However, because legal education has long been criticized as being out of touch with the realities of legal practice and because novice attorneys often lack substantive experience, meeting the knowledge requirements of attorney competence may be particularly difficult for a lawyer who recently graduated from law school or who enters practice as a solo practitioner.").

[109] AMERICAN BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES, Standard 5-1.5 and commentary (3d ed. 1992).

For these reasons, national standards require that each attorney must have the qualifications, training, and experience necessary for each specific case to which they are appointed.[110] Attorneys must know what legal tasks need to be considered in each and every case they handle, and then how to do them. As national standards explain, an attorney's ability to provide effective representation depends on his familiarity with the "substantive criminal law and the law of criminal procedure and its application in the particular jurisdiction."[111] Rule 1.1 of the Maine *Rules of Professional Conduct* requires all lawyers to be "competent" in carrying out their duties to clients.[112] Failure to adhere to the state's *Rules of Professional Conduct* may result in disciplinary action against the attorney, up to and including the loss of the attorney's license to practice law.[113]

MCILS is statutorily required to develop standards "prescribing minimum experience, training and other qualifications" for the attorneys who provide indigent legal representation.[114] MCILS also must "establish minimum qualifications to ensure that attorneys are qualified and capable of providing quality representation in the case types to which they are assigned, recognizing that quality representation in each of these types of cases requires counsel with experience and specialized training in that field."[115]

Attorneys desiring to be appointed to represent indigent people in Maine must apply to MCILS.[116] The minimum requirements for every attorney are that they: must have an office or use of confidential space, a telephone number where messages can be left, and a working email account;[117] and must either demonstrate to MCILS proficiency over the preceding three years in the area of law in which the attorney wants to be appointed or complete an MCILS approved training course for that area of the law (law areas as designated by MCILS are criminal defense, juvenile defense, civil commitment, child protective, or emancipation).[118]

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[110] *See, e.g.*, AMERICAN BAR ASS'N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 6 (Feb. 2002) ("Defense counsel's ability, training, and experience match the complexity of the case."). The ABA explains further in commentary that: "Counsel should never be assigned a case that counsel lacks the experience or training to handle competently, and counsel is obligated to refuse appointment if unable to provide ethical, high quality representation." AMERICAN BAR ASS'N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, commentary to Principle 6 (Feb. 2002).

[111] NATIONAL LEGAL AID & DEFENDER ASSOCIATION, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 1.2(a) (1995).

[112] ME. R. PROF'L CONDUCT 1.1 ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

[113] ME. R. PROF'L CONDUCT 8.4(a), 8.5(a).

[114] ME. REV. STAT. ANN. tit. 4, § 1804(2)(B) (2018).

[115] ME. REV. STAT. ANN. tit. 4, § 1804(3)(E) (2018).

[116] 94-649 Code Me. R. ch. 2, § 2 (Sept. 17, 2015).

[117] 94-649 Code Me. R. ch. 2, § 3 (Sept. 17, 2015).

[118] 94-649 Code Me. R. ch. 2, § 4 (Sept. 17, 2015).

MCILS has promulgated slightly greater qualification requirements for certain types of cases that MCILS considers to be "complex in nature due to the allegations against the person as well as the severity of the consequences if a conviction occurs."[119] The cases requiring greater qualifications are homicide, sex offenses,[120] serious violent felonies,[121] operating under the influence, domestic violence,[122] juvenile defense, protective custody matters, Law Court appeals, and post-conviction review.[123] The additional qualifications MCILS requires an attorney to have to be placed on the roster for appointment at the trial level for the designated criminal cases are:[124]

Case-Type	Practice experience	Trial experience	CLE or Knowledge	References
Homicide	5 yrs crim law	First chair 5 fel trials (at least 2 jury; at least 2 homicide, ser viol fel, or sex off) in past 10 yrs; AND First chair homicide trial in past 15 yrs OR second chair homicide trial in past 5 yrs	Knowledge of evidentiary issues in homicide cases, including DNA, fingerprint analysis, mental health, eyewitness ID	3 letters
Sex offenses	3 yrs crim law	First chair 3 fel trials (at least 2 jury) in past 10 yrs		
Serious violent felonies	2 yrs crim law	First chair 4 trials (at least 2 jury; at least 2 crim) in past 10 yrs		
Operating under the influence	1 yr crim law	First chair 2 crim trials and 2 contested hrgs in past 10 yrs	4 hrs OUI defense CLE in past 3 yrs	
Domestic violence	1 yr crim law	First chair 2 crim trials and 2 contested hrgs in past 10 yrs	4 hrs dom viol CLE in past 3 yrs	

In any of these specialized case types, an attorney can request from the MCILS executive director a waiver of either the practice experience or trial experience requirements (but not both).[125]

119 94-649 Code Me. R. ch. 3, § 1(5) (June 10, 2016).

120 Sex offenses are defined by MCILS as being the commission of, conspiracy to commit, attempt to commit, or solicitation of sexual assaults, sexual exploitation of minors, incest, violation of privacy, aggravated sex trafficking, and patronizing prostitution of minor or person with mental disability. 94-649 Code Me. R. ch. 3, § 1(4) (June 10, 2016).

121 Serious violent felonies are defined by MCILS as being the commission of, conspiracy to commit, attempt to commit, or solicitation of aggravated attempted murder, aggravated assault, elevated aggravated assault, elevated aggravated assault on a pregnant person, kidnapping, burglary with a firearm, burglary with intent to inflict bodily harm, burglary with a dangerous weapon, robbery, arson, causing a catastrophe, aggravated trafficking of scheduled drugs, aggravated trafficking of counterfeit drugs, and aggravated furnishing of scheduled drugs. 94-649 Code Me. R. ch. 3, § 1(3) (June 10, 2016).

122 Domestic violence cases are defined by MCILS as being the commission of, conspiracy to commit, attempt to commit, or solicitation of domestic violence, any class D or E offense against a family or household member or dating partner, class D stalking, and violation of a protection order. 94-649 Code Me. R. ch. 3, § 1(2) (June 10, 2016).

123 94-649 Code Me. R. ch. 3, § 3 (June 10, 2016).

124 94-649 Code Me. R. ch. 3, § 3(1)-(5) (June 10, 2016).

125 94-649 Code Me. R. ch. 3, § 4 (June 10, 2016).

In short, under MCILS' qualification requirements, an attorney who graduated from law school two years ago and hung out their shingle in a private practice, with no supervision or training, can have two jury trials and two judge trials and then be appointed to represent indigent defendants in every type of criminal case other than a homicide or sex offense. More worrisome perhaps is that indigent defendants charged with Class E crimes, carrying up to six months in jail, can be represented by an attorney who just received their bar card and completed a single training course in criminal law, as long as the lawyer has an email address, telephone number, and a confidential space to meet with clients.

Attorney training & supervision

The Maine *Rules of Professional Conduct* recognize that ongoing training is necessary for attorneys to maintain their familiarity with criminal law and procedure, as well as their competence to provide effective representation.[126] Similarly, all national standards, including those of the National Advisory Commission on Criminal Justice Standards and Goals,[127] require that the indigent defense system provide attorneys with access to a "systematic and comprehensive" training program,[128] at which attorney attendance is compulsory, in order to maintain competence from year to year.[129]

Training must be tailored to the types and levels of cases for which the attorney seeks public appointment. If, for example, the lawyer has not received training on the latest forensic sciences and case law related to drugs, then the government should ensure that lawyer is not assigned to drug-related cases. If a public defense provider does not have the "knowledge and experience to offer quality representation to a defendant in a particular matter," then the attorney is obligated to move to withdraw from the case,

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[126] ME. R. PROF'L CONDUCT 1.1, cmt. [6] ("To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.").

[127] Building upon the work and findings of the 1967 President's Commission on Law Enforcement and Administration of Justice, the Administrator of the U.S. Department of Justice Law Enforcement Assistance Administration appointed the National Advisory Commission on Criminal Justice Standards and Goals in 1971, with DOJ/LEAA grant funding to develop standards for crime reduction and prevention at the state and local levels. The NAC crafted standards for all criminal justice functions, including law enforcement, corrections, the courts, and the prosecution. Chapter 13 of the NAC's report sets the standards for the defense function. NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON THE COURTS, ch.13 (The Defense) (1973).

[128] NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON THE COURTS, ch. 13 (The Defense), Standard 13.16 (1973) ("The training of public defenders and assigned counsel panel members should be systematic and comprehensive.").

[129] *See* AMERICAN BAR ASS'N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 9 (Feb. 2002) ("Defense counsel is provided with and required to attend continuing legal education"). The commentary explains: "Counsel and staff providing defense services should have systematic and comprehensive training appropriate to their areas of practice and at least equal to that received by prosecutors." AMERICAN BAR ASS'N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, commentary to Principle 9 (Feb. 2002).

or better yet to refuse the appointment at the outset.[130] Ongoing training, therefore, is an active part of the job of being a public defense provider. Finally, public defense attorneys must be supervised and regularly evaluated.[131]

All Maine attorneys are required to complete 12 hours of continuing legal education each year, at least one hour of which must be in professional responsibility,[132] while MCILS only requires that attorneys representing the indigent complete eight hours of continuing legal education each year.[133] Most assigned counsel report meeting their CLE requirements by attending a court-run two-day conference each year. MCILS does not require attorneys appointed to represent the indigent to obtain any CLE or training in any specific area of practice and, in particular, there is no requirement for CLE or training in the fields in which they provide indigent legal representation (beyond that required to first be placed on the roster for appointments in operating under the influence or domestic violence cases).

MCILS has not established any requirements for supervision of attorneys appointed to provide indigent legal representation. In June 2018, MCILS began a "Resource Counsel Program" to assist MCILS staff by having experienced assigned counsel eventually provide "mentoring, supervision, and evaluation of private assigned counsel."[134] In the fall of 2018, MCILS identified 25 attorneys statewide to serve as resource counsel and provide mentoring to less experienced attorneys. That said, the 25 resource counsel attorneys are each capped at providing 10 hours of mentoring per month, and the program is not available in the mental health practice area. The

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130 National Advisory Commission on Criminal Justice Standards and Goals, Report of the Task Force on the Courts, ch. 13 (The Defense), Standard 13.16 (1973); *see also* National Legal Aid & Defender Association, Performance Guidelines for Criminal Defense Representation, Guidelines 1.2(b), 1.3(a) (1995) ("Prior to handling a criminal matter, counsel should have sufficient experience or training to provide quality representation," and "[b]efore agreeing to act as counsel or accepting appointment by a court, counsel has an obligation to make sure that counsel has available sufficient time, resources, knowledge and experience to offer quality representation to a defendant in a particular matter. If it later appears that counsel is unable to offer quality representation in the case, counsel should move to withdraw.").

131 *See* American Bar Ass'n, ABA Ten Principles of a Public Defense Delivery System, Principle 10 (Feb. 2002) ("Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards"). The commentary adds, "Counsel and staff providing defense services should have systematic and comprehensive training appropriate to their areas of practice and at least equal to that received by prosecutors."

132 Me. State Bar R. 5 ("Except as otherwise provided in this subdivision, every attorney required to register in accordance with these rules of this state shall complete 12 credit hours of approved continuing legal education in each calendar year. At least one credit hour in each calendar year shall be primarily concerned with professionalism. . . . Qualifying professionalism education topics include professional responsibility, legal ethics, substance abuse and mental health issues, diversity awareness in the legal profession, and malpractice and bar complaint avoidance topics including law office and file management, client relations, and client trust account administration.").

133 94-649 Code Me. R. ch. 2, § 5 (Sept. 17, 2015).

134 MCILS, June 12, 2018 Commissioner's Meeting Packet, Agenda item 3, *available at* https://www.maine.gov/mcils/meetings/minutes/Commission%20Packet%20June%202018.pdf.

> judge in the court. Although any rostered lawyer could sign up for this duty, in Aroostook County two local lawyers predominantly handle this function.[215]
>
> "Lawyer of the day" duties for out of custody defendants are more evenly dispersed among attorneys than the practice of one or two attorneys handling most of the lawyer of the day duties for in custody defendants. This is because it is more likely that an attorney will be appointed to cases for which they appear as the lawyer of the day.[216]

The Cumberland County system relies on group announcements to apprise defendants of legal rights, including an invocation that they may have to wait hours to consult with the lawyer for the day. As elsewhere in the state, the number of lawyers serving as lawyer for the day is generally insufficient to even meet with, much less actually provide representation to, the number of defendants scheduled on each day's docket. On an average day in Cumberland County's Portland District Court, there are two lawyers for the day to handle 80 defendants; about 12 of the cases are serious crimes and only about half of those defendants have retained counsel.

When the judge takes the bench in Cumberland District Court, the lawyers for the day exit the courtroom carrying stacks of financial affidavit forms. They set up a makeshift office in a conference room where out of custody defendants line up to meet with them. The lawyer for the day tries to describe constitutional rights in the lockup to a whole group of in custody defendants. There is a lack of confidentiality for both of these interviews. One defense lawyer hates to be assigned as lawyer for the day because he believes a group waiver of rights is unconstitutional.

Another defense attorney reports being expected to represent up to 30 people on a single docket as lawyer of the day. The lawyer of the day is required to advise all defendants at court, whether indigent or not. the lawyer is supposed to receive discovery with a written plea offer from the district attorney's office on the day before court, and is expected to meet the client the next day and advise them. Some attorneys advise defendants without having received discovery. This lawyer believes there should be MCILS standards on follow-through by the lawyer for the day to provide information to successor counsel, because many attorneys do not do so. MCILS did not offer or provide any training for the role as lawyer of the day.

In Androscoggin County, two lawyers of the day are typically expected to represent 200 defendants. One lawyer, who will no longer accept assignment as lawyer for the

[215] Over the past four years, one attorney handled 617 in-custody lawyer of the day cases (32.25%) and a second attorney handled 11.55%. Twenty-eight other lawyers handled at least one day of in-custody lawyer of the day duties in Aroostook County over the past five years, but each handled less than 5% of the possible in-custody days.

[216] Nineteen lawyers were paid for out of custody lawyer of the day duties in Aroostook County from FY2014 to FY2018. The lawyer serving most frequently staffed 45 dockets (12.20%).

day, estimated having about five minutes to spend with each defendant.

Making the lawyer for the day available to non-indigent litigants exacerbates the denial of counsel to indigent defendants, conflicts with Maine state law on the scope of the right to counsel, and creates an unreasonable risk of solicitation in violation of ethical rules.

Appointment of counsel

Once a court determines that a defendant is eligible for appointment of counsel, then the court must appoint an MCILS attorney to represent that defendant.

Continuous representation from appointment through disposition

ABA *Principle 7* requires that the same attorney initially appointed to a case continuously represent the defendant through disposition of the case.[217] Commonly referred to as "vertical representation," the continuous representation by the same attorney is contrasted with "horizontal representation" – a representational scheme whereby one attorney represents the client during one court proceeding before handing off the client's case to another attorney to cover the next stage.

As the American Bar Association explains, "horizontal representation" is uniformly implemented as a cost-saving measure in the face of excessive workloads and to the detriment of clients. In fact, the ABA rejects the use of horizontal representation in any form, stating specifically that: "[c]ounsel initially provided should continue to represent the defendant throughout the trial court proceedings and should preserve the defendant's right to appeal, if necessary."[218]

In explaining why horizontal representation is so harmful to clients, the ABA states:

> Defendants are forced to rely on a series of lawyers and, instead of believing they have received fair treatment, may simply feel that they have been "processed by the system." This form of representation may be inefficient as well, because each new attorney must begin by familiarizing himself or herself with the case and the client must be re-interviewed. Moreover, when a single attorney is not responsible for

[217] AMERICAN BAR ASS'N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 7 (2002).

[218] AMERICAN BAR ASS'N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 7 cmt. (2002).

discussion at pages 51 to 57), they are allowed to bill a minimum fee of $150 even if their time spent is less than 2 ½ hours.[269] Additionally, attorneys are reimbursed by MCILS for case related expenses like collect calls, copying more than 100 pages, and travel other than to and from the attorney's "home district and superior court."[270] Attorneys are not reimbursed for their overhead expenses (e.g., rent, office utilities, professional insurance, legal research tools & resources, etc.).[271]

In 2013, the National Association of Criminal Defense Lawyers published a comprehensive study of the rates of compensation paid to private attorneys to provide representation to indigent people, whether under contract or appointed on a case by case basis, in all fifty states[272] and found generally that the low compensation rates provided to lawyers across America are a "serious threat to our criminal justice system."[273] The requirement that attorneys who represent the poor be adequately compensated does not arise out of concern for the welfare of the attorneys. Rather, adequate compensation for the attorney is required to ensure that the attorney provides effective representation to each client. Inadequate compensation "leads to a decrease in the overall number of attorneys willing to accept court appointments"[274] and can "encourage some attorneys to accept more clients than they can effectively represent in order to make ends meet."[275]

To underscore just how a $60 per hour rate does not afford both a reasonable fee *and* coverage of actual overhead expenses, one need only to look at a few other states whose assigned counsel compensation rates were challenged through litigation:

- *West Virginia*: The West Virginia Supreme Court determined in 1989 that court appointed attorneys in that state were forced to "involuntarily subsidize the State with out-of-pocket cash,"[276] because the then-current rates did not cover attorney overhead. "Perhaps the most serious defect of the present system," the court found, "is that the low hourly fee may prompt an appointed lawyer to advise a client to plead guilty, although the same lawyer would advise a paying client in a similar case to demand a jury trial."[277] A now 30-year-old survey of more than 250 West Virginia lawyers who were taking appointed cases (i.e.,

[269] 94-649 Code Me. R. ch. 301, § 5 (eff. July 1, 2015).
[270] 94-649 Code Me. R. ch. 301, § 3.2. (eff. July 1, 2015).
[271] 94-649 Code Me. R. ch. 301, § 3.1. (eff. July 1, 2015).
[272] National Association of Criminal Defense Lawyers, Rationing Justice: The Underfunding of Assigned Counsel Systems (Mar. 2013).
[273] National Association of Criminal Defense Lawyers, Rationing Justice: The Underfunding of Assigned Counsel Systems 12 (Mar. 2013).
[274] National Association of Criminal Defense Lawyers, Rationing Justice: The Underfunding of Assigned Counsel Systems 15 (Mar. 2013).
[275] National Association of Criminal Defense Lawyers, Rationing Justice: The Underfunding of Assigned Counsel Systems 16 (Mar. 2013).
[276] Jewell v. Maynard, 383 S.E.2d 536 (W. Va. 1989).
[277] Jewell v. Maynard, 383 S.E.2d 536, 540 (W. Va. 1989).

EXHIBIT 2

FINAL

REPORT

Maine Commission on Indigent Legal Services (MCILS) – An evaluation of MCILS's structure of oversight and the adequacy of its systems and procedures to administer payments and expenditures.

Report No. SR-MCILS-19

a report to the
Government Oversight Committee
from the
Office of Program Evaluation & Government Accountability
of the Maine State Legislature

November

2020

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DANIELLE D. FOX
DIRECTOR

MAINE STATE LEGISLATURE
OFFICE OF PROGRAM EVALUATION AND
GOVERNMENT ACCOUNTABILITY

November 9, 2020

Sen. Justin M. Chenette, Chair
Rep. Anne-Marie Mastraccio, Chair
Members Government Oversight Committee

As directed by the 129th Legislature's Government Oversight Committee (GOC), and in accordance with the scope approved by the Committee, OPEGA has completed the first phase of a review of the Maine Commission on Indigent Legal Services (MCILS). The GOC, on January 10, 2020 directed OPEGA to expedite a review of 2 of the 5 evaluation areas listed in the project direction statement which can be found in Appendix A. OPEGA anticipated presenting this expedited report in April, but this was delayed due to the adjournment of the Legislature because of COVID 19. The project direction statement was approved on December 10, 2019. The two evaluation areas addressed in this report are the:

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; and
2. adequacy of the oversight structure of MCILS in ensuring that operations align with and accomplish the organization's purpose.

OPEGA would like to thank the management and staff of MCILS for their cooperation throughout this review.

In accordance with Title 3 §997 sub-§1, OPEGA provided MCILS an opportunity to review the report draft for the purposes of providing a formal agency comment to be included with this report. Their response can be found at the end of this report.

Sincerely,

Danielle D. Fox
Director, OPEGA

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Maine Commission on Indigent Legal Services - An evaluation of MCILS's structure of oversight and the adequacy of its systems and procedures to administer payments and expenditures.

Part I. Introduction and Background

About the Maine Commission on Indigent Legal Services and OPEGA's evaluation

As written in statute, the purpose of the Maine Commission on Indigent Legal Services (MCILS) is to provide efficient, high quality representation to indigent criminal defendants, juvenile defendants and children and parents in child protective cases. MCILS is comprised of the Commission itself and what we will refer to in this report as the "agency." The agency refers to the office staff who administer the day-to-day functions of MCILS and supports the workings of the Commission.

The Government Oversight Committee (GOC) directed OPEGA to expedite two elements of a broader evaluation of MCILS on January 10, 2020[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.
- Adequacy of the oversight structure of MCILS in ensuring that operations align with and accomplish the organization's purpose.

This evaluation will speak to each of those areas and what OPEGA found. Our review of the financial functions includes an examination of the systems used by the agency to process invoices, vouchers and payments and the methods employed by the agency to detect potential overbilling. OPEGA accessed from the agency, or independently obtained, MCILS's financial data to evaluate both the adequacy of those systems, and the methods employed by the staff, in administering the financial responsibilities of the agency. In Part II of this report, OPEGA details our analysis of the financial data and identifies issues with the effectiveness and efficiency of those systems and methods. The data obtained by OPEGA covers financial information from FY09 through FY19. Unless otherwise indicated, our analysis of the data applies to that time period. With regard to MCILS's oversight structure, OPEGA applied a more qualitative approach to evaluate that structure and identify weaknesses. Part III of this report discusses the overall weakness of this structure, by describing inadequate staffing levels and inefficient use of staff resources within the agency, resulting in a lack of appropriate support to facilitate the Commission's responsibility to establish and

[1] See appendix A for Project Direction Statement

monitor a system intended to ensure that efficient, high quality legal representation is provided to criminal defendants in the state (and others) who are determined to be indigent or partially indigent.

Overview of MCILS

Establishment of MCILS and organizational structure

MCILS was established as an independent commission in 2009. Prior to its establishment, indigent legal services were administered by and funded through the Judicial Branch. MCILS assumed responsibility for providing indigent legal services on July 1, 2010. The Commission is made up of nine members (currently one vacancy), and is supported by an office staff of four, who administer the day-to-day operations of the agency. As stated in 4 MRSA §1801, the purpose of MCILS is to provide efficient, high-quality representation to indigent criminal defendants, juvenile defendants, and children and families in child protective cases. Indigent defendants are those without sufficient means to retain the services of competent counsel. This representation is provided in accordance with requirements established in statute and in both the Constitution of the United States and the Constitution of Maine. Statute requires that the Commission work to ensure the delivery of indigent legal services by qualified and competent counsel in a manner that is fair and consistent throughout the state and to ensure adequate funding of a statewide system of indigent legal services, which must be provided and managed in a fiscally responsible manner.

The purpose of MCILS is to provide efficient, high-quality representation to indigent criminal defendants, juvenile defendants, and children and families in child protective cases - 4 MRSA §1801.

In 2018, a change to 4 MRSA §1803 increased the number of members appointed to serve on the Commission from five to nine. Statute provides for certain representation on the Commission, including; one member with experience in administration and finance, one member with experience in child protection proceedings, and two members (non-voting) who are practicing attorneys providing indigent legal services.

As currently structured, MCILS agency staff includes an Executive Director, Deputy Executive Director, Accounting Technician, and an Office Associate, working in an office in Augusta; eight financial screening staff, who work at various courthouses across the state; and one investigator, who works part-time and remotely. The Office Associate position was vacant for over two years due to a hiring freeze – it was filled in June 2019.

For fiscal year 2020, the Legislature appropriated approximately $17.7 million for MCILS and $17.6 million for fiscal year 2021.

Representation for indigent or partially indigent

In Maine, representation for those who have been determined indigent, or partially indigent, is provided by attorneys in private practice, rather than state-employed public defense attorneys. The

Court assigns representation to a person by selecting an attorney from rosters maintained by MCILS, which are separated by region. In order to be listed on a roster, attorneys must have met basic requirements, along with certain ongoing requirements, such as continuing education. There are separate rosters for attorneys who provide specific types of services, or have a defense specialty, including homicide, sexual offenses, operating under the influence, domestic violence, serious violent felonies, and juvenile felony cases.

A client's status as indigent or partially indigent is determined by a judge based on financial information provided by the person requiring and seeking representation. At some court locations, a financial screener may be available to collect information to be considered as part of that judicial determination. The screener meets with the defendant, gathers financial information, including the defendant's assets, income, and expenses and uses this information to provide a recommendation to the judge. The judge may determine that the person is indigent or partially indigent, in which case a rostered attorney will be assigned. A person determined partially indigent will receive an order to make payments making up a portion of the assigned attorney's fees.

Attorney and non-counsel payments

A primary function of MCILS is to arrange for the payment of counsel fees and expenses to attorneys who have been assigned to represent indigent or partially indigent clients. Attorneys submit a voucher for payment to the agency via the electronic case management program, Defender Data. The Executive Director and Deputy Executive Director review these vouchers and approve attorney payments. The hourly rate for attorneys is currently $60, with maximum fee caps per type of case. Any services provided by vendors hired by the attorney, such as investigators, interpreters, and medical and psychological experts, are to be pre-approved by either the Executive Director or Deputy Executive Director. The vendor sends an invoice to the attorney, who verifies satisfactory completion of that work and then the invoice is submitted to the agency for processing. MCILS staff makes payment directly to the vendor.

A primary function of MCILS is to arrange for the payment of counsel fees and expenses to attorneys who have been assigned to represent indigent and partially indigent clients.

Until June 30, 2019, an alternate method to pay for legal services was facilitated by MCILS in the form of a single, fixed-fee contract in Somerset County. MCILS contracted with three private attorneys to provide indigent legal services, paying the attorneys a fixed monthly rate. Additionally, the attorneys were reimbursed for case related expenses, such as investigators and expert witnesses. This contract was not renewed and currently MCILS is not using this alternate method to pay for legal services.

Part II. Systems and Procedures Used by MCILS Staff to Process Payments and Expenditures Associated with Providing Legal Representation

Are the systems and procedures used by MCILS to process payments and expenditures associated with providing legal representation adequate?

OPEGA was tasked with determining the 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. In this section, we identify several issues with the systems and procedures used by the agency to process attorney and non-attorney payments.

- **There are no established policies and procedures governing expenditures and payments - and MCILS expectations for billing practices may not be effectively communicated to attorneys.**
- **Data available to MCILS staff via Defender Data is unreliable and potentially misleading.**
- **Current monitoring efforts of attorney vouchers are inefficient and of limited effectiveness.**
- **Invoice-level review of non-counsel invoices may be of limited effectiveness in identifying certain types of noncompliance.**
- **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.**

Some of these issues associated with the agency's financial procedures appear to be linked to our assessment of the MCILS oversight structure discussed in Part III, where we describe the interconnectedness of inadequate agency staffing and poor functioning of the Commission. Had the agency been appropriately staffed and the Commission been more functional, it is possible that some of these financial procedure issues may have been mitigated. OPEGA notes, however, that due to the prioritization of the two questions (financial procedures and oversight structure), we did not conduct a full review including all of the evaluation scope areas outlined in the GOC's original project direction statement. Thus, OPEGA did not fully establish the root cause for all identified issues. Nonetheless, there appears to be a link between the poorly functioning organizational oversight structure, inadequate staffing, and inadequate financial procedures.

One of the primary drivers for this review were the issues noted in a report issued by the Sixth Amendment Center (6AC) in April 2019. Of particular concern were the number of annual hours

billed by rostered attorneys and MCILS's ability to identify such occurrences—which were later reported by the media as potential examples of overbilling and/or fraud. Appendix C of this report includes a comparison of the previously reported attorney billing analysis conducted by the 6AC to an analysis conducted by OPEGA, using data we independently obtained directly from the billing service provider. As described in the Appendix, the magnitude of the 6AC's finding appears to be overstated. However, the underlying issues—attorneys billing for large amounts of hours annually and MCILS's ability to identify when that happens—remain valid. These issues are explored in this Part and are discussed in detail in Issue 3.

Issue 1. There are no established policies and procedures governing expenditures and payments and - MCILS's expectations for billing practices may not be effectively communicated to attorneys.

The system used by MCILS staff to govern billing practices by rostered attorneys, and to guide the agency's approval of payments, is limited. Necessary policies and procedures that would outline expectations for attorneys submitting vouchers are sparse and are not in written form or otherwise codified. Of greater concern, the few standards that do exist in writing -the (established) fee schedule in agency rules which outline allowable and covered expenses -may not be effectively communicated to attorneys. A process, or system, reliant upon unwritten standards which are not widely communicated to attorneys—when agency review of payment submissions is governed by those standards—is one of potentially limited effectiveness.

Among the sparse procedures, OPEGA did observe some standards developed by the Executive Director and Deputy Executive Director, for their use in approving certain work event entries on attorney vouchers—procedures which they describe as "informal." Specifically, these unwritten standards guide staff's treatment of attorney voucher entries billing for the attorney's time spent on common, or generic, work activities. These standards include maximums for events, like opening a file – which is subject to a limit of .5 of one hour (the system records time in tenths of an hour). If an attorney submits a voucher that includes an entry for opening a file exceeding that amount of time, and the attorney provided no note to explain the duration of time taken to complete that activity, MCILS staff would presumably reject, or question, that entry on the voucher. It is important to note again that these billing standards are not established as policies and are otherwise unwritten. Based on the frequency with which OPEGA noted nonconformity with these informal standards, it also appears that these standards may not be communicated effectively to rostered attorneys.

Voucher-level review conducted by MCILS staff relies on information entered into Defender Data by attorneys who are provided only sparse, informal guidance on billing standards.

A fee schedule, governing payments to assigned counsel, written and formally established in agency rules (94-649 Chapter 301), states the hourly rate paid to attorneys (currently $60) and outlines which services are to be billed under that rate. The rules state that "routine office expenses are considered to be included in the hourly rate." Among the routine office expenses defined in the fee

schedule are office overhead, utilities, and secretarial services. MCILS staff has interpreted secretarial services to include most paralegal services[2]. In other words, if an attorney worked for 10 hours on a particular case and a paralegal also provided 2 hours of work in support, the attorney is only authorized to be paid for 10 hours of work (not twelve) in accordance with MCILS's stated interpretation of the rule. However, we identified multiple instances indicating a voucher was submitted billing for hours which included paralegal (or other non-counsel) time. This is important because that time, if approved, is paid at the attorney's hourly rate. While we do not know the extent to which this occurs, one attorney's perspective[3] indicated that the practice was common:

> *In speaking with a myriad of other MCILS rostered attorneys who also employ paralegals, it is clear we track our paralegals' time in similar fashion as others doing this work do. The general consensus seems to be that paralegal time for tasks that attorneys normally do, but a paralegal actually does the work in their stead, is billed under the attorney working on the case. Without exception, the six attorneys I spoke with unequivocally stated the time is captured and submitted with MCILS vouchers.*

As a result of the agency's lack of policies and procedures and limited communication of (informal, unwritten) billing standards, MCILS-rostered attorneys may not have an awareness, or an understanding, of what is expected of them, or what expenses are covered and allowable. Thus, these attorneys may be billing MCILS incorrectly. Monitoring efforts to detect and correct instances of incorrect attorney billings fall on MCILS. However, as discussed on page 8/Issue 3, issues with existing monitoring efforts implemented by MCILS make detection difficult.

Additionally, OPEGA notes that the absence of policies and procedures to govern expenditures and payments may have the potential to financially impact those who have been deemed partially indigent. Because partially indigent clients are ordered to contribute to counsel costs (up to the voucher cap), incorrect billings may change the actual amount the client is obligated to pay. MCILS staff has agreed that this situation is possible, but noted that it was probably a rare occurrence. Further, MCILS staff told us that such a situation would be potentially difficult to reconcile, and that they have no mechanism in place to check and correct this, if it does occur.

- Formal policies and procedures should be established by MCILS management to better define allowable and covered expenses. These policies and procedures would clarify expectations for billing and invoicing practices that if proactively communicated, would improve the effectiveness of the system to approve expenditures and process payments to rostered attorneys and non-counsel service providers.

[2] MCILS does allow for some paralegal services to be reimbursed at their own, lower rate in murder cases, but this is subject to preapproval and is to be separately invoiced and not billed through Defender Data.
[3] Letter from rostered attorney to MCILS Executive Director.

Issue 2. Data available to MCILS staff via Defender Data is unreliable and potentially misleading.

With the lack of established and available policies and procedures to educate and guide attorneys towards compliance with MCILS's desired timekeeping and attorney voucher submission practices, the responsibility for ensuring the accuracy of billing entries and identifying instances of noncompliance, rests almost entirely upon agency staff. MCILS's Executive Director and Deputy Executive Director attempt to fulfill this responsibility primarily through their review of work events listed on attorney vouchers. During this review by agency staff, particular attention is paid to the duration of each event (such as phone conferences with clients, reviewing files, composing correspondence, etc.) and any notes associated with an event, or attached to the voucher generally, to explain the billed entries. Using the attorney voucher data OPEGA obtained, we reviewed these notes, as well as attorney responses to MCILS staff notifications (communicated via Defender Data system) that the attorney may have exceeded some limit or billed incorrectly. In this review, OPEGA noted multiple scenarios when the effectiveness and efficiency of MCILS's current review system (which triggers the notifications to attorneys) is impeded because of the quality and accuracy of the data in the Defender Data system, which they rely upon. The quality and accuracy of the data are unreliable and potentially misleading. OPEGA found that entries made by attorneys into the Defender Data System:

The quality and accuracy of the data impedes the effectiveness and efficiency of the agency's current system of attorney voucher review.

- captured or entered the hours of multiple attorneys under one attorney;
- batched multiple small work events into one large single-event entry;
- captured and entered work hours on the wrong date; and
- captured and entered the work hours of staff—particularly paralegals—under an attorney.

These scenarios all increase the amount of time recorded for a single, discrete entry. With the exception of incorrectly capturing and entering the work hours of staff (i.e. paralegal hours entered as attorney hours), the entirety of the aggregated time in these scenarios may reflect time appropriately spent on a case which would be otherwise allowable and billable to MCILS. However, due to the lack of consistency in how attorneys record time events and the prevalence of data entry errors, these scenarios may generate false-alarms requiring follow-up action from both MCILS staff and response from the billing attorney.

Additionally, the quality and accuracy of the data limits the potential effectiveness of any future, high-level, data analysis to potentially identify and flag outlying values. Such analysis may identify lengthy durations for particular work events, or days, or billings from one attorney that are inconsistent with those of attorneys performing similar work.

OPEGA also observed that when MCILS does identify and correct an incorrect value, only the voucher total is changed, leaving the incorrect value for the work event entry to remain in the data set. These incorrect values hinder the establishment of any baseline metrics, or standards, that could

be used to identify questionable attorney billings and any subsequent, overarching data analysis. Further, the incorrect values could also potentially hinder the use of more efficient techniques for review and audit by MCILS and by the Defender Data system itself. (See Issue 5).

It is important to note that these issues with the quality and accuracy of the data had an impact on the data analysis OPEGA performed for this review, and will ultimately limit our ability to identify specific attorneys for further audit work. (See page 21).

➤ The quality of available data in terms of consistency, accuracy, and reliability could be improved in several ways if the agency undertakes the following interrelated initiatives:

- Establish and communicate expectations and guidance outlining how time events are to be recorded in Defender Data to improve the consistency of the data;
- work with Justice Works to develop data-entry controls that reflect newly-established expectations and provide guidance to correct potential data issues, or errors, when they occur; and
- correct data errors within Defender Data at the time they are identified to improve the reliability of the data when used for data analysis or risk-based auditing.

Issue 3. Current efforts to monitor attorney vouchers are inefficient and of limited effectiveness.

There are multiple elements comprising the attorney voucher review process currently used by MCILS staff. Below, OPEGA identifies issues within those elements of the voucher review process which have the effect of limiting its overall efficiency and effectiveness.

Event-Level Voucher Review, Generally

Event-level voucher entries are individual entries on a voucher reporting time spent by an attorney on a case-related activity (reviewing discovery, preparing email, phone conversation).

Event-level voucher review has been described as representing a significant portion of both the MCILS Executive Director and Deputy Executive Director's daily work hours. This time-consuming effort purportedly involves manual review of all event-level entries on each attorney voucher (typically one per case). Event-level entries, typically reported in tenths of an hour, include things like: reviewing discovery; preparing email; and phone correspondence. Even accounting for the number of relatively simple vouchers submitted by attorneys billing for serving as lawyer of the day, or resource counsel[4], (14.4% of total vouchers), event-level voucher review appears to be a significant amount of work. The average annual number of vouchers paid by the agency from FY10 through FY19 was just over 28,000, containing roughly 450,000 individual events to be reviewed.

[4] Mentoring, supervision and evaluation of private assigned counsel providing indigent legal services is described in further detail on page 28.

This large number of vouchers (and events) reviewed calls into question, both the amount of staff time available for this work and the thoroughness of the review conducted by staff. OPEGA analyzed the number of vouchers approved by a single staff member in a day over this period. We found that in 36.7% of the days in which a staff member was approving vouchers, over 100 vouchers were approved – allowing less than four minutes and forty-eight seconds to review each voucher[5]. Table 1 lists several ranges of approvals completed by a single approver in one day, from 100 or less to 601 or more, and indicates how many times (days) approvals within each range occurred. Table 2 provides time per voucher reference points to better illustrate the time potentially available in a day for a single reviewer to review and approve various numbers of vouchers. Of particular interest were the eleven days from FY10 through FY19 in which an approver approved more than 400 vouchers in a day. Those occasions, however, as explained by the agency and preliminarily confirmed by OPEGA, were largely due to the availability of funds and do not accurately reflect time spent reviewing and approving those vouchers. On these occasions, the vouchers were reviewed and would have otherwise been approved and paid if funding were available at the time. Instead, the approved vouchers accumulated pending an appropriation and then later were approved simultaneously when the funds became available.

On almost 37% of the days in which a staff person was approving vouchers, they reviewed more than 100 vouchers – allowing less than 5 minutes to review each voucher.

Table 1: Number of Vouchers Approved by Single Approver in a Day

Number of Vouchers Approved	Number of Days	Percent of Total
601 or more	4	0.1%
501 to 600	5	0.2%
401 to 500	2	0.1%
301 to 400	15	0.5%
201 to 300	185	5.6%
101 to 200	1,010	30.4%
100 or less	2,103	63.3%
Total	3,324	100.0%

Source: OPEGA analysis of MCILS voucher data obtained from Justice Works.

Table 2: Single Approver Time Per Voucher Reference Points

Number of Vouchers	Time Per Voucher*
600	48s
500	58s
400	1m 12s
300	1m 36s
200	2m 24s
100	4m 48s

*Assuming an entire, eight-hour, work day spent only reviewing and approving vouchers.

[5] Based on a full, eight-hour, work day spent only reviewing and approving vouchers.

Defender Data Entries and Identifying Outlying Values

Despite the large number of vouchers and the significant staff burden associated with voucher review, neither the agency, nor the Defender Data system itself, appear to make effective use of technology for preventive controls against data entry errors. We noted that Defender Data will generate a flag alerting a billing attorney when an entry exceeds an established maximum voucher fee by case type (such as $3,000 for Class A crime) and then prompt a potential correction and/or addition of a note prior to final submission of the attorney voucher. However, we observed no other data entry controls preventing, or limiting, the input of values (particularly durations of events). Although the agency has some informal maximums (.5 of an hour for opening a file) and some values that, if included on a voucher would be considered questionable, the Defender Data system is not being utilized as a control by rejecting those entries or generating a flag prompting staff to follow up.

Our analysis of data from 2010 - 2019 found nearly 110,000 outlying values[6] across eight selected types of timekeeping events (such as opening or closing a file) with some appearing far beyond reason (such as 30 hours to prepare an email or a 20-hour phone call with a client). Most of the identified outlying values (81.4%) were either:

- flagged by MCILS and later corrected by the attorney;
- explained in the system by a note added to the timekeeping event entry;
- explained in the system by a note or by one attached to the voucher; or
- addressed using a voucher override by the Executive Director or Deputy Executive Director.

Although ultimately addressed, these outliers necessitated a member of MCILS staff to review and question the entry and, as needed, follow-up with the billing attorney. Data entry controls in the Defender Data system, such as preventing the attorney from entering a value that exceeds a maximum fee, or generating a flag when a reasonable value is exceeded, could reduce the amount of staff resources required to address such issues.

Monitoring High Annual and Daily Hours Worked

MCILS staff's system of voucher review does not monitor cumulative annual hours recorded as worked by an attorney.

In general, event-level review of each voucher does not provide MCILS with the information necessary to monitor cumulative annual hours worked by an attorney, and, until recently, did not allow for any monitoring of the daily hours worked by attorneys facilitating identification of rostered attorneys working potentially problematically high numbers of hours on a given day. Using the dataset OPEGA obtained directly from MCILS's billing service

[6] We defined outlying values as those that fell far from the median values for each type of event, and, more specifically, those exceeding boundaries calculated by finding the median, lower and upper quartile values, and interquartile range.

provider for our analysis in this review, we observed that instances of both high annual hours worked and high daily hours worked by attorneys occurred frequently in the time period reviewed, FY10 through FY19.

While 97.7% of attorney's annual fiscal year totals were below 2,080 work hours (40 hours a week for 52 weeks), there were 100 instances in which an attorney's annual total hours exceeded that threshold. Annual, fiscal year hours billed by attorney are stratified in Table 3. Table 4 provides average hours per week reference points to better illustrate the average time billed by attorneys.

Table 3: Annual Fiscal Year Hours Billed by Attorney (10 – year period)

Total Annual Hours	Average hours per week*	Number of Attorneys	Percent of Total
1,040 or less	20 or less	3,655	82.7%
1,041 to 2,080	20-40	663	15.0%
2,081 to 2,600	40-50	76	1.7%
2,601 to 3,120	50-60	16	0.4%
3,121 or more	More than 60	8	0.2%
Total		4,418	100.0%

Source: OPEGA analysis of MCILS voucher data obtained from Justice Works.
*Assuming 52 weeks worked per year.

Particularly noteworthy were eight instances in which an attorney billed over 3,120 hours in a fiscal year. The totals and average number of hours billed per week for these eight highest instances are presented in Table 4.

Table 4: Attorneys Exceeding 3,120 Hours in Any Fiscal Year

Fiscal Year	Work Attorney	Total Hours	Calculated Hours per Week
2018	Attorney A	4429.0	85.2
2014	Attorney B	3446.8	66.3
2019	Attorney C	3438.3	66.1
2015	Attorney D	3400.9	65.4
2014	Attorney D	3398.0	65.3
2013	Attorney B	3343.1	64.3
2017	Attorney E	3281.4	63.1
2013	Attorney F	3269.8	62.9

Source: OPEGA analysis of MCILS voucher data obtained from Justice Works.

In terms of daily hours billed, we identified 2,993 instances in which an attorney billed 16 or more hours in a single day. Most concerning were the 224 attorney and date combinations in which more

than 24 hours were billed in one day; these 224 instances ranged from 24.1 to 84.2 hours. Roughly 70% of these instances were recorded by six attorneys, as shown in Table 5.

Table 5: Attorneys with highest counts of billing more than 24-hour days	
Work Attorney	Count of 24+ Hour Days
Attorney G	41
Attorney B	32
Attorney A	27
Attorney E	25
Attorney D	19
Attorney F	13
Source: OPEGA analysis of MCILS voucher data obtained from Justice Works.	

12-Hour Alert Notification System

During the time period that the 6AC evaluated MCILS, the agency conducted its own internal investigations of high billing by attorneys. The Executive Director reviewed the billings by attorneys with over $150,000 in billings in any of the previous three fiscal years (FY16, FY17, FY18). [This investigation is described in detail on pages 18 through 20. Limitations with this investigation and other similar efforts are detailed in Issue 5.] Following this work, the Executive Director instituted a 12-hour alert notification system. Under this notification system, as attorneys submit vouchers for cases (generally upon conclusion of the case), Defender Data tracks the hours billed on a daily basis. When one or more submitted vouchers show an individual attorney billing more than 12 hours on a given day, the system generates an alert email that is sent to both the attorney and MCILS staff. These alerts are entered into and tracked using, what the agency refers to as its "High Daily Hours Tracking" spreadsheet.

The agency's 12-hour alert notification system is an ineffective control to address potential overbilling.

OPEGA reviewed this spreadsheet and found this monitoring tool to be an ineffective control, and the process used to track alerts, to be inefficient for a number of reasons.

- The alert is generated independently of voucher approvals within Defender Data, which means that attorneys are paid as usual before the attorney responds to the notification, or even if the attorney never responds.
- The alert system creates a flag for, but does not correct, potential issues. The alert may be generated **years** after the date on which the 12-hour threshold was reached, because attorney vouchers are primarily submitted when a case concludes which could be months, or years, after the start of the case. We observed some 12-hour alerts dating back to 12/4/2017, which could prove difficult for attorneys and/or MCILS to accurately reconcile.

- The responsiveness by attorneys to the alert notifications was poor. Of the 1,285 rows in the High Daily Hours Tracking spreadsheet containing at least one day with a 12-hour alert, 70.6% (907) showed no attorney response[7].
- The 12-hour threshold may be too low and not focused enough on true outliers or exceptions, as 12-hour days are not atypical for the profession. Of the 378 responses from attorneys in the spreadsheet, 131 (34.7%) indicated the hours were accurate - or the explanation provided by the attorney was accepted by the Executive Director. This process required follow-up and attention from both the attorney and MCILS. Common explanations offered by attorneys included the following:

    - The time was accurate, as attorneys either had lengthy days during the normal course of business or were trying to get caught up before, or after, a vacation or holiday.
    - The time was accurate, as the attorney was a rural practitioner which necessitates a lot of travel time.

  Other frequently noted explanations do not appear to be consistent with agency rules or desired billing practices:

    - More than one attorney's time was captured under one attorney's billing (the time worked was otherwise accurate).
    - Additional staff hours—such as a paralegal's time—were billed as the attorney's hours (even though this appears to be inconsistent with policy – see pages. 5-6).

  Another 70 (18.5%) of the 378 attorney responses indicated that the work was done, but entered on the wrong date.

- In terms of impact in dollars, the figure populating the "Amount Overbilled" column of the spreadsheet totals only about $6,400. However, in terms of the value, or effectiveness of the 12-hour flag as control, we note that this number ($6,400) is likely understated because in some cases attorneys can change the amount before the voucher is billed.

Identification of Double Billing

Despite the general lack of relevant responses to the Executive Director's investigation into high billing attorneys and the agency's general lack of follow-up (issues with audit and investigation processes are noted in Issue 5), one attorney's responses were useful in illustrating how double billing can occur. Double billing is unlikely to be identified through MCILS's current attorney voucher review process, and, in this attorney's case, was not.

[7] The Executive Director reported that while there are a large number of attorney non-responses, the number is lower than OPEGA's figure, as MCILS has not yet entered some attorney responses into the spreadsheet.

Double billing – more than one request by an attorney for payment for the same time – is unlikely to be identified through the current voucher-level review system.

As illustrated in the following bulleted examples, double billing is any scenario in which MCILS is paying for the same time twice. Our review of the attorney responses to the Executive Director's investigation into high billing attorneys and the results of the attorney's self-audit revealed three such scenarios. It also revealed concerns related to the agency's ability to identify double billing relying on the current system of voucher level review:

- Duplicate time entries—or the entering of the same work event more than once in Defender Data—can occur when more than one person (such as the attorney, office manager, and/or administrative assistant) all enter events into Defender Data, resulting in some overlap. For many work events, such as reviewing an email, or a phone call with a client, these instances are unlikely to be identified, flagged, and/or questioned by MCILS due to their routine nature. As observed by OPEGA in the attorney responses and the one attorney self-audit, only the attorney could accurately identify such instances.

- Overlapping time entries—or being paid for two different work events at the exact same time—can also occur under MCILS's current framework for the recording, billing, and approval for payment of attorney hours. Generally, attorneys submit a voucher containing all of the hours worked over the duration of a case at the conclusion of the case for MCILS approving payment. As work events are submitted at the voucher (or case) level—rather than an hourly accounting of time at the end of a day or week (like a traditional timecard)—it is difficult to identify when an attorney attributed the same exact hour(s) to two or more cases, and received payment for all. Reporting time at a voucher level either obscures or completely ignores the reality that attorneys may perform other, unrelated work events during lulls in other certain work events. Reporting this time accurately to avoid double billing requires adjustments to entries by attorneys, or their staff. For example, an attorney serving as lawyer of the day is paid for the entirety of their time spent at the courthouse with defendants, but during downtimes in the court throughout the day, the attorney may work on other indigent legal cases by emailing clients or reviewing case materials. Similarly, an attorney may be travelling for one client—which is billable time—but may be having phone conversations with other clients during that travel time, which is also a billable activity. If all of these events are recorded and entered without adjustment by either the attorney or attorney's staff, they will have been paid twice for their time. If the hours worked on a given day do not exceed 12 hours, the opportunity to observe these overlapping events and catch these occurrences will be very limited given the current system in place to record and bill for attorney hours and their subsequent review by MCILS for approval and payment.

- Over-allocation of time spent in court or travelling—or an attorney travelling to and being present in court for multiple cases, but billing the **entirety** (and not a portion) of that time to **each** of those cases—may be a less common occurrence than other examples of double billing. Regardless, these occurrences are at risk of being undetected by MCILS. In our review of attorney responses to MCILS, an over-allocation of time spent in court was

demonstrated by one particular attorney. In this instance, the attorney spent the day in court for multiple cases and sought to allocate their time by dividing the number of hours spent in court by the number of cases. However, some cases may be continued for a variety of reasons, and, as such, require only minutes of the attorney's time. In those cases, the attorney chose to not allocate the day's court time and removed them from the total cases for the day. For example, the attorney spent eight hours in court with 12 cases scheduled, but four were continued for various reasons. The attorney would then allocate their time to the eight remaining cases, resulting in one billable hour for each case. As explained in the attorney response, however, the attorney's staff would apply the hour per case to all 12 cases when entering vouchers in Defender Data. Thus, an eight-hour court day was turned into 12 billable hours. Again, while we have not confirmed the scope, or extent, to which this may occur, it appears as though if this scenario was known, it could be addressed in the near future—hence, its inclusion here.

Achieving Cost Savings – Financial Stewardship

Lastly, over the course of its broader, attorney voucher review in Defender Data, the agency's efforts have resulted in relatively few instances in which MCILS staff has manually adjusted a voucher total in response to an identified issue. We found only 1.1% of vouchers had totals overridden by staff, which represented an even smaller percentage—0.3% of total voucher expenditures. From FY10 to FY19, annual savings directly resulting from MCILS voucher overrides averaged just under $36,000—although this number does not capture voucher entries that are questioned by MCILS and later reduced by the submitting attorney. The average annual totals for voucher expenditures were roughly $13.5 million during that time. To whatever extent vouchers are being reviewed by staff, the process appears to be of limited effectiveness—particularly when viewed in light of the financial impact/realized savings.

➢ Assuming improvements are made to the overall quality of MCILS's attorney voucher data, the agency should reevaluate its process for reviewing attorney vouchers with the objective of improving both effectiveness and efficiency. At a minimum, the following process attributes should be considered by MCILS in reevaluating and potentially redesigning its attorney voucher review process.

- The process should identify, investigate and, as necessary, address the types of instances with the greatest potential impacts to financial stewardship and the quality of representation—high daily and annual hours worked by attorney.
- The process should utilize technology to identify and correct potential data entry errors when they occur, such as flagging the input of values in excess of established limits, instead of relying on manual review of vouchers to identify potential errors.
- The process should incorporate data and risk-based audit techniques to the greatest extent possible to potentially reduce the burden placed on the Executive Director and Deputy Executive Director by the manual review of vouchers—allowing them to focus on other important, but neglected, aspects of MCILS's purpose as discussed in Part III.

Additionally, we note that transitioning from a voucher-based payment system to a timecard-based payment system may address issues related to the timeliness and accuracy of daily hours worked. In the current voucher-based system, work events occur over the life of a case—which may last years—and are submitted at the conclusion of the case. Issues with billing errors may not be identified until well after the work events occur. Based on OPEGA's review of the data, it appears easy for attorneys to lose track of how many hours they worked/billed on a given day under such circumstances. Processing payments using a timecard-based system would require attorneys to log their daily work events and submit them for approval on a regular basis (such as every two weeks). As such, data entry would occur closer to the actual work events, putting MCILS staff in a better position to identify when high daily work hours occur and allow attorneys to see any potential duplicate or otherwise incorrect entries which could be addressed at that time.

Issue 4. Invoice-level review of non-counsel invoices may be of limited effectiveness in identifying certain types of noncompliance.

Although total annual non-counsel service provider invoices are far smaller than attorney vouchers, both in terms of counts and total dollars, OPEGA explored areas of risk associated with this type of expenditure. Through this work, we found that neither MCILS's process for the review and approval of non-counsel invoices, nor the data generated from the entry of necessary information from these invoices into Advantage (the State's accounting and vendor-payment system) for payment processing is effective in identifying certain types of non-compliance.

MCILS staff's system of individual vendor invoice review (for non-counsel services) is unlikely to identify duplicate charges, high daily billing or duplicate invoices.

Non-counsel service provider invoices are first reviewed individually by MCILS's Accounting Technician for compliance with established rates, reimbursement limits, agency pre-approvals, and the accuracy of invoice calculations prior to approval by the MCILS Executive Director. Upon approval, a limited amount of information from each invoice—essentially just the information required for processing and payment through Advantage—is entered into the system.

As MCILS reviews and processes each non-counsel invoice individually, staff are unlikely to identify potential billing issues that span more than one invoice. For example, a non-counsel service provider (such as a private investigator) may be working on multiple cases for multiple attorneys, and, accordingly, submit multiple invoices—none of which raise any issues when reviewed individually. However, when reviewed together, the invoices may reflect potential issues such as daily billed hours that are exceedingly high or exceed 24 hours in a given day. Similarly, the data contained within Advantage is limited to only what is required for the State's accounting system. This data lacks key elements that would be critical to performing any vendor analysis across multiple invoices: detailed service descriptions, dates of those detailed services, who performed the detailed services, and for which case the services were provided. Together, MCILS's review process and the data available via Advantage are of limited effectiveness in identifying instances of high-daily billing hours (a similar

concern to that of attorneys), duplicate charges (the same charge or service appearing on multiple invoices), or duplicate billings (the submission and payment of the same invoice more than once).

To best determine whether these scenarios are occurring, OPEGA accessed the available data from Advantage to develop a universe of invoices paid by MCILS. Although we were limited by the details of the data, we performed some high-level data analysis which enabled us to select a judgmental sample of 235 invoices (roughly 1.5% of the total paid invoices) to review for the concerns noted above (and others).

In our review of a series of invoices spanning just over three months from a frequently used vendor—which appears to be a sole proprietorship with no other employees—we observed billing for a high number of hours on several days across multiple invoices. These potential red-flags are presented in Table 6.

Table 6: Instances of billing for a high number of hours across multiple invoices by one vendor

Date	Number of Hours Billed	Number of Invoices
7/14/2017	19	5
7/17/2017	18	6
8/25/2017	19	4
9/4/2017	16	4

Source: OPEGA analysis of MCILS vendor invoices obtained from Fortis.

It should be noted that MCILS did describe a one-time audit of private investigation services invoices that identified similar concerns related to high daily billing hours. Vendors were asked to provide contemporaneous time records for dates with high billing hours. An outcome of the audit was that one vendor did not provide sufficient records and is no longer approved for MCILS-paid private investigation services. Despite the fact that this one-time audit by the agency identified issues that merited such action to be taken, similar reviews such as the one conducted have not been formalized or become part of the agency's regular review and monitoring of other non-counsel invoices. (See appendix D for additional results of OPEGA's review of non-counsel invoices.)

➢ Development of a broader audit/review procedure for non-counsel invoices and periodic use of a risk-based method to select and review invoices would allow the agency to identify and correct instances of inappropriate high daily billings, duplicate charges, duplicate payments, and potentially, other instances of noncompliance.

Issue 5. Defined policies and procedures for audit and investigation have not been established. Current methods used by MCILS are limited, inconsistent, and also of limited scope, depth and effectiveness.

As previously noted, MCILS lacks established policies and procedures governing the processing of vouchers, invoices, and expenditures. Similarly, the agency lacks defined policies and procedures for conducting audits and investigations of attorneys.

However, OPEGA did review three instances we were made aware of in which MCILS staff conducted an audit or investigation:

- A one-time review of private investigation services invoices;
- a review of one attorney's discovery materials to reconcile the volume of those materials with the hours billed for reviewing discovery; and
- an investigation into nine attorneys selected from the 6AC's reported highest billing attorneys.

For the last investigation listed above, OPEGA was able to assess the agency's procedures for audits and investigations which we describe as ad-hoc. We did this by accessing and reviewing the following materials:

- data provided by MCILS to the 6AC;
- data obtained by MCILS staff from its vendor and the subsequent data analysis they performed; and
- agency correspondence with two individual attorneys and correspondence to and from one firm (containing 3 of the 9 selected attorneys).

This investigation by the agency into the highest billing attorneys was limited to those 9 attorneys with over $150,000 in billings in any of the three fiscal years (FY16, FY17, and FY18) [8]. OPEGA found the scope of this internal agency investigation too limited to effectively identify the extent to which the issues raised by the 6AC[9] were occurring. For reference, the 6AC's evaluation covered all attorneys and spanned five years. OPEGA's own work for this report covered all attorneys spanning a period ten years—the entirety of MCILS's existence as an independent agency. The small data set used by MCILS limits the agency's opportunities to identify—and most importantly, correct, potentially problematic caseloads and/or billing practices of attorneys.

As a result of the agency's analysis on the high billing attorney data, the Executive Director wrote three letters: two to sole practitioners and one to a firm at which three of the high billing attorneys

[8] Ten attorneys were originally selected, with one of the ten excluded from further work, as the MCILS Executive Director had previously agreed to allow the submission and payment of many outstanding bills in a recent year from that attorney.
[9] The 6AC Report issued the following finding in regards to billing practices: "Finding 8: A significant number of attorneys bill in excess of eight hours per day, five days per week, for 52 weeks per year. MCILS does not exert adequate financial oversight of private attorneys."

worked. The letter informed the recipients that they were among the system's highest earners and provided the attorneys with their annual hours and high daily hours worked from the agency's records for reference. The Executive Director's letter also made the following request:

> *Please forward copies of any contemporaneous time records that you maintained outside of the Defender Data system for each day where total billing exceeded 16 hours. In addition, please provide any explanation you may have for the unrealistic billing totals and note that voucher ID and event information is provided for each of these days for assistance in identifying data errors, if any.*

Attorneys contacted as a result of an internal agency investigation into high billing provided various explanations – none of which were challenged by MCILS staff.

We observed that the Executive Director received three very different responses that varied in the extent to which they responded to the original request. The following responses to that request from the attorneys are intentionally described at a rather high-level in order to maintain confidentiality consistent with the manner in which MCILS treats investigative records:

Response 1:

- Respondent acknowledged billing errors related to dates billed, but did not believe bills were submitted for work that was not performed.
- Respondent stated steps were being taken to decrease the respondent's caseload and to implement a better record keeping system.
- Respondent did not provide contemporaneous time records.

Response 2:

- Respondent stated steps were being taken to decrease the respondent's caseload and to implement a better record keeping system.
- Respondent reported reviewing approximately 4,000 events (those provided by MCILS) and provided information (added a column to spreadsheet) to record correct event times. This respondent's self-audit identified roughly $35,000 in overbilling spanning a three-year period.
- Respondent provided the updated spreadsheets, but did not provide contemporaneous time records.

Response 3:

- Respondent acknowledged shortcomings with billing practices/record keeping.
- Respondent indicated that data provided by MCILS had been reviewed and that the respondent had identified some recurring issues:
    - o large time entries being the aggregate time for several attorneys;
    - o Defender Data defaulting to the assigned counsel on each billable entry, which requires a manual correction and leaves room for human error; and

    - included paralegal time for time spent working with attorneys, clients, courts, families, and service providers.
- Respondent identified a small number of duplicate entries and payments.
- Respondent did not provide contemporaneous time records, but did offer to make available to the Executive Director, summary spreadsheets reconciling time records with the agency's data.

OPEGA notes that no one provided contemporaneous time records and that, in general, the responses would not allow MCILS staff to independently confirm many of the claims made. We did not see that agency staff took steps to perform field audits or otherwise verify or challenge any of the responses. Similarly, we did not see evidence that MCILS took steps to quantify the potential areas of noncompliance (billing for paralegal time and duplicate payments) described in Response 3 or recoup any payments.

None of the attorneys included in the high billing investigation provided contemporaneous time records as requested by the Executive Director.

Additionally, based on the one case where an attorney responded with self-identified overbilling, it is apparent that there is no established agency process for determining, confirming, and/or agreeing upon a repayment amount. Further, there appeared to be little effort made by the agency to collect the overpayments, although this may have been partly due to the lack of an established mechanism to recoup these funds. There may also be a question surrounding where any repaid funds would go to either MCILS's account or the State's General Fund. OPEGA notes that the attorney's self-identified overpayment amounts were finalized on February 8, 2019 and at the time of this review, no reimbursement, or a plan for reimbursement payments, has been made.

Overall, the agency's audit/investigative process appeared informal and inconsistently administered. The process relied almost exclusively upon one self-audit by, and unverified responses from, only a few attorneys which were of varying quality. This information governed the agency's decisions (made at the discretion of the Executive Director) to pursue some overpayments and to not pursue other potential areas of noncompliance and overpayment. Together, these elements resulted in audit efforts of limited scope, depth, and effectiveness. Although the agency's enforcement actions, such as removing an attorney from the MCILS roster, in response to this information may otherwise appear to be straightforward decisions, OPEGA notes a complicating factor. A decision to remove an attorney from the roster may be first and foremost governed by a need to ensure an adequate number of attorneys sufficient to represent clients – particularly in certain regions of the state.

➢ Establishment of a formal audit process would serve as a more effective control than the current methods used by the agency and would provide for consistency in enforcement efforts. A more effective process could include policies and procedures that would guide the agency regarding:
    - how and when audits are to be conducted;
    - the records to be maintained by attorneys (and other non-counsel service providers) for potential MCILS review;

- a means of determining, confirming, and/or settling disputed overpayment amounts;
- a mechanism to recoup overpayments;
- penalties (including dismissal from the MCILS roster) for noncompliance; and
- consistent enforcement of all MCILS rules.

Data issues impede further analysis

At the outset of this review, OPEGA raised the possibility that our data analysis and follow-up work would allow us to separate instances of what appeared to be overbilling from actual overbilling. We anticipated this information could then be used to potentially identify likely overbilling attorneys for limited field audits of attorney billing and time records. Our work did reveal that the highest average weekly hours reported by the 6AC report and the media is much smaller than initially thought, yet the underlying issues and red flags remain. While we are unsure whether the desire for further work, or field audits, has decreased given awareness that the magnitude of the reported suspected overbilling was overstated, the selection of any attorneys for further work is problematic at this time due to underlying data issues.

Throughout our data analysis, we encountered numerous outlying event values that we later determined were false alarms based on the notes associated with those entries. The notes themselves indicated that attorneys and their staff were not always reporting time in discrete values by day and by attorney. This was a theme that extended throughout our review of MCILS's audit/investigative efforts revealing a significant level of inconsistency in the data entered into the billing system. In attorney responses to both MCILS Executive Director's high billing investigations and 12-hour alert notifications within the billing system, OPEGA observed that attorneys reported batching work events (such as aggregating the time spent on texts for the entirety of a case into one-time event on a single day) or combining the hours of multiple attorneys under one attorney on a single date. Working on this review clarified for us that the manner in which information is entered into Defender Data by attorneys, essentially serves the singular purpose of getting MCILS's approval and payment for the various events on a voucher. To achieve this purpose, the data does not necessarily need to be granular or subject to strict entry protocols. Consequently, the data does not allow for the type of broader analysis which would identify specific attorneys to review – those having potentially overbilled for payment of services – which was the kind of investigation OPEGA had originally envisioned.

Due to the data limitations noted here, an investigation into specific instances of potential overbilling would require labor-intensive field audits of event-level and records and possibly client files, in the possession of rostered attorneys. In consideration of the explanations provided to MCILS in the course of its own audit/investigative work, the relatively small number of identified overpayments, and the tremendous amount of resources required for field audits, the GOC and the Legislature may wish to consider foregoing this intense effort and to direct OPEGA to move forward with a focus on the potentially more-impactful work related to indigency determinations.

Part III. MCILS Structure of Oversight

Is the oversight structure of MCILS adequate?

OPEGA was tasked with determining the adequacy of the oversight structure of MCILS in ensuring that operations align with and accomplish the organization's purpose. We identified several interrelated issues that contribute to a structure which fails to provide adequate oversight of MCILS's operations - and of the Commission's statutory purpose to efficiently provide high-quality legal representation to indigent clients. The interrelated reasons for this inadequate oversight structure will require a holistic approach to remedy.

OPEGA found that the following appear to be the main contributors to the weakness of the oversight structure.

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

The agency appears to have little organizational structure, as staff have no established job descriptions, or other formal guidance, outlining job functions and responsibilities. Had such a structure, with clearly defined roles and responsibilities and written guidance, been established early on in MCILS's development, staff efforts might have been more appropriately focused on effectively and efficiently performing the agency's primary functions. This structure would have also possibly enabled the Commission to identify the specific functions that were inadequately covered in the agency so as to make targeted requests for additional staff.

OPEGA sees the function of establishing and maintaining a sufficiently resourced agency to effectively and efficiently achieve the organization's statutory purpose as a fundamental responsibility of any government entity. Despite a long-standing awareness at the agency level and among the Commission that staff levels were insufficient, it did not result in requests or substantive advocacy for an increase in staffing for the agency. Further, given this understanding that staffing was a concern, it appears that there has been little focus by the agency, or by the Commission, to identify how the organization should be structured to achieve its purpose.

Insufficient staff resources leave little opportunity for a focus on improvements to agency processes, systems, and broader structural issues.

In order to provide some context to this report's discussion of MCILS's oversight structure, it is important to note that MCILS's purview in providing legal services to the indigent (and partially

indigent) in Maine is extensive. The system is currently made up of 368 rostered attorneys appearing in courts throughout Maine. In FY19, rostered attorneys opened 27,437 cases, totaling approximately $17 million in attorney billing. In that year, MCILS processed and paid 32,575 attorney vouchers.

Issue 6. The agency charged with administering MCILS purpose is under-staffed.

OPEGA observed a lack of sufficient staff to adequately meet the full responsibilities of the agency. When we asked the Executive Director about review or improvements to specific agency operations, the Executive Director described that the current MCILS staff is the minimum necessary to allow the system to continue to function. Thus, there was little time available to consider new initiatives, or improvements, to wider substantive structural issues such as quality of representation, the lawyer-of-the-day program, or the use of single-source contracts to provide legal services. The Executive Director described that there was a general, ongoing awareness over the years amongst the Commission that the agency was short-staffed.

Although the agency's annual report is submitted to the Joint Standing Committee on Judiciary and the Governor in January of each year, the report does not appear to describe a staffing need (other than noting existing vacancies) or advocate for more staff. The report describes MCILS's office staffing as follows:

> *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 central office staff during 2017.*

Although MCILS staff vacancies are mentioned, OPEGA notes that the annual reports do not describe an urgent need for the vacancy to be filled, express a need for additional staff, or indicate what functions, or statutory requirements, are not being attended to as a result of insufficient staffing.

It was expressed to OPEGA that requests for additional staffing resources would not be looked on favorably due to the focus on meeting current operating costs and addressing agency budget shortfalls. Thus, despite the apparent staffing needs, MCILS did not advocate, or make formal requests to the Legislature, for additional staff in prior budget cycles until the most recent supplemental budget request in early 2020.

Issue 7. MCILS staff operates without clearly-defined roles and uses current staff inefficiently.

The absence of a clear and effective agency structure with defined roles, responsibilities and expectations, contributes to what OPEGA observed to be an inefficient use of existing staff.

In discussions with agency staff about their roles and responsibilities, it appeared to OPEGA that a substantial portion of management staff time was being spent on day-to-day operations, including a significant amount of administrative-level work. Below are some of the areas where OPEGA observed inefficient use of agency staff.

Rostering

The Deputy Executive Director performs monthly updates of each attorney roster, which are divided by region and then further by practice specialty. This function requires keeping track of and responding to communications from attorneys who want to be removed from the roster or change case type assignments, and updating information such as when an attorney moves to another firm. The Executive Director and Deputy Executive Director advise attorneys on eligibility requirements, including whether to apply for a waiver on certain requirements. They also conduct analysis of geographic distribution of attorneys when an attorney requests a new court location. There is also a process requiring attorneys to renew their roster status annually. This is a paper-driven process, which is described as time-consuming by the agency's Deputy Executive Director. Though a portion, or certain elements, of this work may require a higher level of response by management, there does not appear to be any consideration of assigning roster-related tasks to administrative-level staff.

Attorney Voucher Approval

As noted in Issue 3 on page 8, the Executive Director and Deputy Executive Director spend a substantial amount of time reviewing and approving individual attorney vouchers. Although reviewing expenditures and processing payments is a primary and critical MCILS function, the method of voucher-level review is neither effective nor efficient, as discussed in Issue 3 on pages 8-16. As this report has stated, OPEGA notes that a more targeted, risk-based approach would allow for management staff time to be used more efficiently and to better recognize the qualifications and experience level of the Executive Director and Deputy Executive Director. For initial review and basic processing of attorney vouchers, written instructions and guidance could be used to support employees with qualifications better matched with this primarily administrative function.

12-hour Notification Follow-up

An element of the recently established system intended to monitor for potential overbilling by attorneys – the 12-hour notification system– requires follow-up with an attorney whose voucher submission generated a flag in the Defender Data system. (See page 12.) Staff described this process as time-consuming, requiring reaching out to individual attorneys and manually recording the information collected as part of the follow-up effort.

Agency management's focus on day-to-day administrative duties impacts the capacity to provide policy support and strategic direction to the Commission.

OPEGA considers it to be an inefficient use of staffing resources to have management level positions undertaking administrative level work. Whether the Commission, as the oversight body for the agency, shares this view about the mismatch between staff qualifications and the functions they perform is unclear. It does not appear to OPEGA that this has been an area of focus of the Commission and, given the absence of MCILS staff job descriptions (or any written description of roles, expectations and tasks), it would be difficult for the Commission to provide oversight as to whether the current staff are undertaking an appropriate level of activities or are sufficiently focused on mutually understood priorities. The Executive Director reported having not had any formal performance evaluations. An apparent consequence of management positions being focused on day-to-day functions, is that there is no remaining capacity to provide appropriate policy support and strategic direction to the Commission, which would guide the agency in meeting its purpose and also allow for oversight of the agency's operational structure.

Issue 8. The Commission receives insufficient support for necessary operations.

OPEGA observed inconsistency in expectations between the Commission and the Executive Director as to who should be assuming the initiative for providing policy direction and engaging in strategic planning.

Statute sets out specific requirements on the Commission (4 MRSA §1804) and the Executive Director (4 MRSA §§1805 and 1805-A). Many of these requirements relate to the original establishment of the Commission, setting out what the Legislature considered to be necessary for the newly established entity to commence operations. Other than statute, there is no written expectation of the Commission's role and new Commissioners are not provided with any sort of training to orient them to their functional role. Similarly, other than statute, there is no written expectation of the Executive Director (or other staff) in the form of a job description – something we've noted previously in this report.

The lack of mutual understanding between the Commission and the Executive Director regarding responsibilities and expectations creates a risk of insufficient accountability for the provision of indigent legal services.

OPEGA observed a lack of clarity between the Commission and the Executive Director about whose responsibility it is to drive the strategic and policy direction of the agency and Commission. For example, OPEGA observed differing perspectives on whether the Commission is largely responsible for rule making and budgets or for wide-ranging oversight of the provision of indigent legal services across the state, including oversight of the work of the agency. This lack of clarity and mutual understanding regarding roles, responsibilities and expectations between the Commission and the Executive Director creates a risk to MCILS, and to the State, of insufficient accountability for the provision of indigent legal services in the State.

OPEGA cites the following examples to illustrate how the lack of clearly defined roles and mutual understanding of responsibilities impacts what information is provided to the Commission and therefore impacts the Commission's ability to provide robust oversight.

Information Provided to the Commission

For any Commission, or similar body, to effectively exercise oversight of an administering agency and to make key strategic and policy decisions towards the Commission's objectives, a consistent flow of useful and appropriate information is necessary. For MCILS, statute sets minimum requirements for information and documents to be provided to the Commission on a monthly and annual basis (4 MRSA §1805(7)). It appears to OPEGA, that this minimum standard is met. However, although technically sufficient to comply with statute, it appears to OPEGA that the Commission requires additional information to be able to provide effective oversight and decision-making focused on the purpose of MCILS. For example, although the Executive Director provides information to the Commission when requested, the Commission does not always appear to know what information it should request.

Previously we noted the lack of mutual understanding regarding responsibilities (among the Commission or the Executive Director) which continued to be apparent as we looked at the substance, format and content of information or materials provided to the Commission. OPEGA observed that it is not clear as to who is responsible for identifying issues and determining what information should be distributed, or the type and level of information that should be routinely provided, to the Commission to ensure effective oversight.

- **Financial information:** A primary feature of each Commission meeting agenda is the monthly Operations Report from the Executive Director. This includes summary data, including the number of new cases opened, number and value of vouchers submitted and paid, average price per voucher, number of paid vouchers exceeding $5,000 (accompanied by a case summary), number of complaints about attorneys and a very brief summary, number of requests for co-counsel with a very brief summary, and budget account balances. Some of this information is specified by statute to be provided to the Commission and other information was requested by the Commission in previous years - such as vouchers exceeding $5,000 and information about complaints.

  Having reviewed a selection of Operations Reports and conducting interviews with the current and former Commission Chairs, OPEGA observed that what is typically provided in these reports does not appear to furnish the Commission with useful material to provide meaningful oversight or to make decisions based on the information given. Our review of Commission meeting minutes showed no evidence of decision-making as a result of the monthly

Operations Report data. The summary-level data in the reports, while providing an overview, does not appear to assist in identifying issues or concerns for the Commission.

- **12-hour daily billing flags:** Following the release of the 6AC report and the agency's internal investigation on potential attorney overbilling, MCILS implemented an alert system that is triggered if an attorney enters daily billing that exceeds 12 hours for the day, as described on page 12. This was implemented towards the end of the tenure of the last cohort of Commissioners, at a period of transition. OPEGA notes from the Commission meeting minutes in May 2019, that the Executive Director updated the Commission to note that the Commission's request to reduce the daily hours alert to be triggered at 12 hours (rather than 16 hours) per day. Thereafter, as of the time of OPEGA's review of meeting minutes through January 2020, it does not appear as though the Commission was given any formal briefings, or feedback, on how the system was working and what MCILS staff were learning about attorney billing. As this was a new system put in place to address a highly publicized concern around attorney over-billing, OPEGA would expect to see some mechanism to provide information to the Commission allowing it to provide oversight and assess whether the system is working as intended. OPEGA does note, however, that despite no formal information being presented to the Commission, the Commission's financial responsibility sub-committee, established in December 2019, began looking into the detail of this alert system.

- **Resource Counsel program:** The Resource Counsel program provides another example of an area where there is a lack of clarity about the role and responsibilities for identifying issues, documents and information that should be considered by the Commission – and where the information provided to the Commission may not be adequate for the Commission to execute proper oversight of the program.

  The Resource Counsel program was established by the Commission in June 2018 for the purpose of (according to the enacting document) providing *"mentoring, supervision and evaluation of private assigned counsel providing indigent legal services."* The enacting document noted that as the program was launched, mentoring would be the primary focus and, as the Commission gains experience with the program, it may be expanded to provide periodic supervision and evaluation of attorneys.

  It appears that as a mentoring program, it has the effect of being optional, as MCILS does not undertake any monitoring, or enforcement of new attorneys, to meet with Resource Counsel. The enacting document notes that the mentoring component requires Resource Counsel to meet with newly rostered attorneys three times within their first 6 months. OPEGA did not conduct a comprehensive evaluation of this program; however, we did hear some participant perspectives. An attorney assigned as Resource Counsel reported to OPEGA that although newly licensed attorneys on the MCILS roster are required to meet with Resource Counsel three times during the early period of their practice, the program had yet to have a new attorney follow through with these requirements. This Resource Counsel attorney added that

newly-licensed attorneys were being added to rosters and appointed to cases before the first required meeting had taken place.

This accords with what the Executive Director described to OPEGA - although new attorneys are informed by email that they are expected to meet with the Resource Counsel, there is no systematic follow-up of whether the requirement is met. The Executive Director noted that he hoped that the mechanism for the Resource Counsel to bill for their hours (capped at 10 hours per month) would provide MCILS with this information, but they found that not all Resource Counsel attorneys were billing for all their work, so it was not an effective feedback loop. It does not appear as though any action was taken to resolve this information gap.

The Commission has received no substantive information about the Resource Counsel program established in 2018 to provide mentoring, supervision and evaluation of rostered attorneys, or an assessment of the program as required by its implementing document.

The Resource Counsel policy notes that six months after the adoption of the policy, *"Commission Staff will report to the Commission on the operation of the Resource Counsel system."* As the document was adopted in June 2018, the program would have been due for review in December 2018. OPEGA is aware that there was a brief note submitted to the Commission at their October 2018 meeting in which MCILS noted that it had started receiving and paying Resource Counsel vouchers and that several Resource Counsel attorneys had brought issues related to attorney performance to the staff's attention seeking guidance. There did not appear to be any more detailed or comprehensive report or review of the system at subsequent meetings. The Executive Director acknowledged to OPEGA that, other than discussion in passing, there is no formal information that goes to the Commission about the program and there has not been a review of the system as required in the implementing document. OPEGA understands that the Resource Counsel policy document has not been provided to the current Commission, as of the time of OPEGA's review of meeting minutes through January 2020.

MCILS does not appear to have taken steps to gather adequate information to assess the program. In turn, no information has been provided to the Commission to allow it to assess whether the program is meeting its intended purpose.

Issue 9. A weak oversight structure impacts the ability of MCILS to adequately meet its statutory purpose.

The lack of a strong oversight structure and insufficient staffing has resulted in impacts to MCILS's statutory purpose. Statute provides that MCILS is "an independent commission whose purpose is 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" (4 MRSA §1801). OPEGA finds that the oversight of the operations in place for MCILS is inadequate to meet this stated purpose. OPEGA finds that the same is true for

other separately listed statutory requirements, beyond MCILS's stated purpose, which we also discuss in this section.

Quality Representation

It is central to the purpose of MCILS that "high-quality representation" is provided to indigent (and partially indigent) clients in the State. However, MCILS 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. OPEGA notes that we did not assess the extent to which attorneys are providing high quality representation – we looked at the extent to which the Commission and the Executive Director provide oversight of quality representation.

Despite identification by external evaluations as early as 2017 that MCILS does not provide systemic oversight and evaluation of attorneys, effective mechanisms to do so have not been implemented.

Issues related to a lack of oversight of quality representation were raised by both the 2017 Working Group and the 6AC. The 2017 Working Group noted that "the current program does not have systematic oversight and evaluation of attorneys[10]". The 6AC report noted that as there are no systems or capacity to provide oversight, it is difficult to know the extent of any potential problems with the quality of representation[11]. Despite these issues having been identified by external bodies, no formal evaluation mechanism has been put in place. The Executive Director described not having the staff available to monitor lawyers or review files. However, as noted above, prior to the most recent supplemental budget request, no requests have been made for additional staff.

MCILS described some informal mechanisms it uses to attempt to monitor quality. However, OPEGA sees these as insufficient to ensure high-quality representation. The mechanisms primarily included the Resource Counsel program and what might potentially be gleaned by the Executive Director and Deputy Executive Director as they conduct voucher reviews.

- **Resource Counsel:** MCILS described the Resource Counsel program, which was implemented in June 2018, as an attempt to monitor and evaluate quality. However, as we have noted, the program has not been reviewed as required by the implementing document, actions have not been taken to seek to extend it to supervision and monitoring of attorneys, and there is currently no monitoring or enforcement of the mentoring meeting requirements on new attorneys. Additionally, there has been no systematic collection feedback on issues raised through this system communicated up to the Commission for it to provide oversight.
- **Voucher review as a quality review:** The MCILS Executive Director described getting an impression of attorney quality by reviewing individual attorney vouchers for payment, because the reviewer is able to see actions taken (such as client meetings) and the case outcome. The Executive Director described attorney voucher review as a useful and

[10] 2017 Working Group report, page 1.
[11] Sixth Amendment Center report, pages 57-62.

meaningful quality review procedure. Though vouchers provide some level of review, OPEGA does not consider this to be an adequate measure of attorney quality. The review involves reviewing the time and activities billed, but as discussed on pages 10-11, there is no mechanism to confirm whether the activities billed in fact took place. Additionally, the process of voucher review does not include a systematic evaluation against the standards, nor is any information related to quality as gleaned from voucher review communicated up to the Commission for it to provide oversight.

- **Additional area of risk:** OPEGA also noted other areas of risk, including that MCILS does not have any formal mechanism to consider availability and quality of attorneys on a regional basis (other than a general awareness by Commission staff of the number and identity of attorneys in each region and thus there is no Commission oversight, or systematic consideration, of potential regional availability or quality issues. OPEGA did not conduct any regional quality assessment of attorney availability or distribution, but did hear anecdotal evidence from multiple sources raising concerns around availability of a sufficient number of quality attorneys in a number of rural counties. OPEGA notes that regional availability issues can impact cost effectiveness, as it requires engaging attorneys out of the area and paying increased travel costs.

The absence of formal, systematic mechanisms to monitor or evaluate attorney performance (and therefore no mechanism for the Commission to provide oversight) creates a risk that at least one primary purpose of MCILS as prescribed by statute - providing high quality representation - is not being met.

Screening for Indigence

MCILS's statutory purpose refers to the provision of legal services to indigent individuals. Different states have different policies, or mechanisms, to assess indigence. Maine has elected to use financial screeners, who are present in some (but not all) courts to interview individuals and gather information about income, assets and expenditures and to prepare a recommendation for judicial determination.

Where there is a financial screener, the screener meets with a client to collect information that is used to prepare a recommendation to the judge based on the client's reported income, assets and expenses, taking account of the MCILS Indigence Guidelines, which are a component of the MCILS rules. The judge is responsible for determining whether a defendant has sufficient means to employ counsel, based on listed factors, including income, credit, assets, living expenses, dependents, outstanding obligations and the cost of retaining services of competent counsel. If the judge determines that the defendant has sufficient means to pay a portion of the cost, counsel is assigned, but that assignment would be accompanied by an order to pay a portion of the costs.

For the purposes of this phase of the report, OPEGA only considered the financial screening function to the extent to which it is relevant to evaluating the overall oversight structure. Further examination of the screening function may be explored in the next phase of OPEGA's work for the

subsequent report. We note that a proposed amendment to LD 182 would, if passed, transfer the financial screening function from MCILS to the Judicial Branch. At the time of publication of this report, LD 182 was carried over to any Special Session of the 129th Legislature. Regardless of where the financial screening function resides, OPEGA would expect to see oversight of screening, including a shared understanding of the purpose, effectiveness and cost-effectiveness, and consistency of guidance and approach throughout the state. Although OPEGA did not, in this phase, conduct a full review of the screening function, we can make some observations based on our review of the relevant rules and guidelines, and based on interviews with MCILS stakeholders, including screeners, lawyers, and judges. These observations indicate a general lack of oversight attention paid to this function.

- **Inconsistent understanding of role:** OPEGA noted that there was an inconsistent perspective among those we interviewed about the purpose of the financial screening function – some considered that the purpose was to provide information to assist the judiciary in making its determination of indigence, but others considered that the primary purpose of the role is to collect as much money as possible from partially indigent clients.
- **Indigence Guidelines should be reviewed:** OPEGA notes that the Indigence Guidelines do not take into account the judicial requirement to consider the cost of retaining the services of competent counsel. Although the detailed work around consistency of indigence determination is part of the second phase of this evaluation, OPEGA did hear about inconsistencies in practice between screeners. OPEGA notes that the guidelines do not include any practical guidance on recommendations of partial indigence and that there is no current plan to review the guidelines.
- **Location and number of screeners:** OPEGA notes that screeners do not appear in every court, and this can have wider impacts. OPEGA heard that this may increase the time spent by judges in assessing screening information, and/or may impact the likely accuracy of the information provided directly by defendants, and/or may result in the Lawyer of the Day spending some time assisting clients completing screening forms.
- **Collections:** Collections from those determined partially indigent happen either by way of periodic payments directly from the client, by allocation of bail money, or by tax offsets (whereby the Maine Revenue Service withholds funds from tax returns if there are missed scheduled payments). OPEGA notes that there are no rules, or written guidance, that sets out information about collection mechanisms. The Commission does receive monthly totals of the amounts collected, but there is no information on regional variations to assess potential consistency issues. The Executive Director noted that MCILS may not have accurate regional collection information available, which raises questions about the mechanism to monitor and track relevant information. MCILS informed OPEGA that in courts where there is no screener, MCILS takes no action to follow-up on orders of partial indigence by tracking

monthly payments or tax-offsets, and this potentially creates regional inconsistency about how orders for partial indigence are enforced.

According to the Executive Director, MCILS processes about 2-6 overpayments by clients per month. As explained in more detail on page 6, issues around amounts that a client is due to pay may be impacted if attorney voucher amounts are inaccurate.

Increasing the number of screeners to provide them at each court location and adding a requirement that indigent or partially indigent clients be re-screened throughout the course of a case would require further analysis of staffing needs and cost effectiveness, as well as consultation with the Judicial Branch. OPEGA notes that the concerns we've raised here related to the screening function as part of the overall program of providing legal representation to indigent and partially indigent clients warrant further consideration and consultation. The absence of oversight of the screening function creates a risk of inefficiency, ineffectiveness and inconsistency potentially impacting indigent and partially indigent clients.

Meeting Statutory Obligations

Although required by statute since 2009, MCILS has not established standards for conflict of interest and counsel caseloads.

OPEGA observed that there has been insufficient oversight by MCILS to ensure that all statutory requirements are met. Maine statute requires the Commission to develop standards governing the delivery of legal services to indigent clients, to include specified matters listed below. These standards have not been developed and it does not appear to OPEGA that there are imminent plans to resolve non-compliance with these statutory requirements (either by meeting the requirements or advancing a proposal to amend statute):

- standards for counsel caseloads (4 MRSA §1804(2)(C));
- standards for the evaluation of counsel (4 MRSA §1804(2)(D));
- standards for independent, quality and efficient representation of clients whose cases present conflicts of interest (4 MRSA §1804(2)(E)); and
- procedures for handling complaints about the performance of counsel providing indigent legal services (4 MRSA §1804(3)(M)).

The requirements for case load and conflicts of interest standards were enacted by PL 2009, c. 419 and therefore have been in place for over a decade. The requirements for standards for the evaluation of counsel and requiring a complaint procedure were enacted more recently by PL 2017, c. 284. OPEGA acknowledges that there appears to be an unwritten, informal procedure in place where complaints are investigated and outcomes determined by the Executive Director. However, there is no written policy, procedure or criteria in place that sets out how complaints should be investigated or determined. Presumably, the establishment of such standards is intended not only to guide the agency (and the Commission) in processing and resolving complaints in a fair

and consistent manner, but also to inform the person making the complaint and the subject of the complaint about what to expect from the process.

Although the Commission is directed by statute to develop these standards and procedures, as staff, the Executive Director is required by statute to:

- ensure that the provision of indigent legal services complies with all constitutional, statutory and ethical standards (4 MRSA §1805(1));
- assist the Commission in developing standards for the delivery of adequate indigent legal services (4 MRSA §1805(2)); and
- coordinate the development and implementation of rules, policies, procedures, regulations and standards adopted by the Commission (4 MRSA §1805(8)).

OPEGA has noted multiple times in this report that, overall, we found MCILS lacks adequate standard operating procedures and formal written policies to govern its primary functions. Similarly, OPEGA has found that even when standards are required to be established specifically in statute, MCILS relies on informal methods or does not address the standard at all.

Effectiveness and Efficiency of Financial Procedures

The lack of a robust oversight structure contributes to inadequate monitoring of the effectiveness and efficiency of financial procedures used by the agency. As described in pages 9-17, the procedures used by MCILS staff to monitor payments and expenditures associated with providing legal representation to indigent and partially indigent clients are inadequate. A robust oversight structure would be guided by a plan that clearly defines prioritized functions designed to meet MCILS's statutory purposes and obligations effectively and efficiently. As noted in this review, the agency operates without written job descriptions, only informal guidelines and with a lack of clarity regarding the roles and responsibilities of staff as well as those of the Commission.

Reports of summary data regarding expenditures provides no information about financial processes and systems used by the agency and does not appear to inform decisions or actions of the Commission.

Summary data regarding expenditures provided at monthly meetings does not provide the Commission with an understanding of the financial processes employed by the agency the Commission is charged to oversee and how those processes are working. Additionally, this summary data does not appear to be used to inform decisions or actions of the Commission. An understanding of the policies and procedures governing the agency's financial operations could serve as a framework for Commission oversight of these functions – but as noted in this report, such written policies and procedures do not exist. Adequate oversight goes beyond simply having knowledge of the number of vouchers submitted and the amounts paid - it requires an understanding of the processes used to administer those payments and the specific controls in place to ensure they are made appropriately. Although the process used to review expenditures and submit payment for vouchers comprises a majority of the agency's working hours, the Commission

appears to have dedicated little time to understand those processes and evaluate their effectiveness and efficiency.

- **Addressing the interrelated issues contributing to MCILS weak oversight structure will require a holistic approach.**

This report identifies several issues which are interrelated in their contribution to MCILS's inadequate structure for oversight of its operations and statutory purpose. The establishment of a robust oversight structure for MCILS should begin with the development of a formal, strategic plan with a framework driven by and addressing each of the elements contained within MCILS'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. A focus on this purpose should result in a plan which would include clearly expressed priorities, articulated objectives for all of the processes and systems established to achieve those priorities, and well-defined roles and responsibilities for MCILS staff and the Commission itself. Adherence to a well-designed strategic plan could facilitate a structure for MCILS oversight and operations that is proactive in addressing issues of efficiency, effectiveness and potential misconduct—as opposed to the current posture of the structure, which is more reactive and shortsighted. Existence of this formal guiding document would provide the necessary foundation upon which the operations of the agency are designed, as well as, the benchmarks against which those operations can be measured and monitored by the Commission – and ultimately support effective oversight to ensure that MCILS's obligation to the People of the State of Maine is being met.

Appendix A

Project Direction Statement

Project direction statement: Maine Commission on Indigent Legal Services

Presented by OPEGA to the Government Oversight Committee - 129th Maine Legislature

December 10, 2019

Purpose of a project direction statement in the course of a full review

After the Government Oversight Committee (GOC) added a review of financial oversight and economic use of resources related to the Maine Commission on Indigent Legal Services (MCILS) to the Approved Project List, OPEGA assigned a team of Analysts to conduct preliminary research. The preliminary research stage of the evaluation process provides the team with a broad, but comprehensive understanding of the program. Once preliminary research is complete, the team reviews themes that have emerged and identifies areas that may be of future concern to the program. This work results in a proposed project direction statement for the GOC to consider. The statement suggests a framework that will guide OPEGA in the next phase of the evaluation process, fieldwork. This document represents that work and is respectfully presented for the GOC's consideration.

OPEGA recommends that the GOC direct a full evaluation of MCILS specifically related to financial oversight and the economic use of resources, and within the scope described in this statement.

Overview of MCILS

Establishment of MCILS and Organizational Structure

MCILS is a Commission that was established in 2009. The Commission is currently made up of nine members and is supported by an office staff of 4 who conduct the day-to-day operations. Its statutory purpose is to provide efficient, high-quality representation to indigent criminal defendants, juvenile defendants, and children and families in child protective cases. This representation is provided in accordance with requirements established in statute and both the federal and state constitutions. Maine statute specifies that the Commission shall work to ensure the delivery of indigent legal services by qualified and competent counsel in a manner that is fair and consistent throughout the state and to ensure adequate funding of a statewide system of indigent legal services, which must be provided and managed in a fiscally responsible manner. MCILS assumed responsibility for providing indigent legal services on July 1, 2010. Prior to MCILS, indigent legal services were arranged and funded by the Judicial Branch.

An amendment to statute in 2018 increased the number of members appointed to serve on the Commission from five to nine. The membership must include one member with experience in administration and finance, one member with experience in child protection proceedings, and two members (non-voting) who are attorneys providing indigent legal services.

MCILS staff includes an Executive Director, Deputy Executive Director, Accounting Technician, and an Office Associate, working in an office in Augusta; eight financial screening staff, who work at various courthouses across the state; and one investigator, who works part-time remotely.

Determination as indigent or partially indigent

In Maine, services for those who have been determined indigent, or partially indigent, are provided by attorneys in private practice. The Court assigns representation to a person by selecting an attorney from a roster maintained by MCILS. In order to be listed on the roster, attorneys must meet certain requirements. If they provide specific types of services, or have a defense specialty, they are listed on specific rosters accordingly.

A client's status as indigent or partially indigent is determined by a judge based on financial information provided by the person requiring representation. In some courts, a financial screener may be available. The screener interviews the client, gathers financial information, including the client's assets, income and expenses and makes a recommendation to the judge based on this information. The judge can deny representation at the public expense or make a determination that the person is indigent or partially indigent. A person determined partially indigent is ordered to make payments toward the assigned attorney's fees.

Attorney payments

MCILS is responsible for paying counsel fees and expenses to attorneys who have been assigned to indigent or partially indigent clients. Attorneys submit a voucher to MCILS through the electronic case management program, Defender Data. The MCILS Director and Deputy Executive Director review vouchers and approve attorney payments. Services provided by vendors hired by the attorney such as investigators, interpreters, and medical and psychological experts require advance notice and approval by MCILS. The vendor sends an invoice for the services provided to the attorney which is then submitted to and processed by MCILS who makes payment to the vendor.

Until June 30, 2019, one fixed fee contract existed to facilitate providing representation in Somerset County. MCILS contracted with three private attorneys to provide indigent legal services, paying the attorneys a fixed monthly rate. Additionally, the attorneys were reimbursed for case related expenses, such as investigators and expert witnesses. At this time, MCILS has no contracted attorney services.

MCILS General Fund budget

The Legislature appropriated approximately $17.7 million for MCILS in FY20, and $17.6 for FY21.

GOC decision to consider review of MCILS

During the 128th legislative session, OPEGA received a request for a review of MCILS from a GOC member with concerns related to the application of financial eligibility requirements for Court-appointed counsel, attorney billing practices, and billing and collection efforts for clients who are required to pay a

portion of counsel fees. On February 17, 2017, the GOC voted unanimously to place the MCILS review request on OPEGA's Standby List.

The 2017 Working Group

While this topic was on the Standby List, the 128th Legislature created the Working Group to Improve the Provision of Indigent Legal Services (the Working Group) as part of the biennial budget. The purpose of the Working Group was to develop recommendations to improve the delivery of indigent legal services to eligible people by focusing on:

- ensuring adequate representation;
- increasing the efficiency in delivering legal services;
- verifying eligibility throughout representation; and
- reducing costs while still fully honoring the constitutional and statutory obligations to provide representation.

In December 2017, the Working Group issued its report containing nine recommendations— the following four are related to the current scope of this request.

- Recommendation 2: Enhance the MCILS staff to provide better financial accountability and quality assurance by establishing specific responsibilities for a Chief Financial Officer and a Training and Quality Control Director.
- Recommendation 4: Strengthen the financial eligibility screening procedure.
- Recommendation 5: Remove the collections function from the MCILS and have the Judiciary Committee explore alternative methods of collecting from those recipients of legal services who have been ordered by the Court to contribute to the costs of those services.
- Recommendation 7: Commission an outside, independent, nonpartisan study of Maine's current system of providing indigent legal services and whether alternative methods of delivery would increase quality and efficiency.

Sixth Amendment Center report

Recommendation 7 directly led to a report from the Sixth Amendment Center evaluating the services provided by MCILS. Issued April 2019, this report contained eight findings and seven recommendations— the following, from that report, relate to the current scope of this request.

- Finding 8: A significant number of attorneys bill in excess of eight hours per day, five days per week, for 52 weeks per year. MCILS does not exert adequate financial oversight of private attorneys.
- Recommendation 4: MCILS should use its current statutory power to promulgate more rigorous attorney qualification, recertification, training, supervision, and workload standards. The State of Maine should statutorily require financial oversight by requiring that MCILS limit the number of permissible billable hours, subject to waiver only upon a finding of need for additional capacity. The State of Maine should fund MCILS at a level to ensure rigorous training and effective substantive and financial oversight of attorneys.

While the Sixth Amendment Center report was being finalized, a GOC member brought forward a request for a review of MCILS noting concerns with the administration of the program, its efficiency, and its oversight of the quality and effectiveness of representation, and the screening procedure used to determine eligibility for legal services.

On April 12, 2019, the GOC voted to move a review of MCILS to OPEGA's Approved Projects List, with the scope limited to financial oversight and economic use of resources.

Preliminary research conducted by OPEGA

During the preliminary research phase OPEGA:

- sought input from GOC members and Judiciary Committee members and staff on their questions and concerns regarding MCILS;
- reviewed statute, legislative history, rules and guidance related to MCILS;
- interviewed the State Auditor to understand any identified areas of concern;
- interviewed the MCILS Executive Director, Deputy Executive Director, Accounting Technician, a selection of screeners, and the screener/investigator;
- interviewed the Chief Justice and a selection of Judges;
- interviewed a selection of MCILS rostered attorneys working in different areas of law;
- reviewed the data provided to the Sixth Amendment Center on voucher payments based on assigned attorney;
- reviewed data on work performed over three years by nine attorneys and considered correspondence related to MCILS's investigation into high earning attorneys;
- considered the Sixth Amendment Center report "The Right to Counsel in Maine" (April 2019) and interviewed the Executive Director;
- considered the report of the Legislative Working Group to Improve the Provision of Indigent Legal Services (December 2017);
- reviewed a State Controller's report on MCILS's case management system; and
- reviewed reports regarding the provision of indigent legal services in other states.

Evaluation scope

OPEGA examined the various themes that emerged from preliminary research and identified the following areas which potentially pose future risks to the elements of the program that are associated with financial oversight and economic use of resources.

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.

If the GOC wishes to direct OPEGA to begin fieldwork for the purpose of conducting a full evaluation of, and report on, the financial oversight of MCILS, OPEGA proposes the areas listed above for the scope of that work. If approved, OPEGA Analysts will examine the effectiveness of MCILS's financial controls in the prevention, detection and correction of inappropriate or unnecessary expenditures and if those controls are adequate to guard against fraud, waste and abuse. Analysts will evaluate if the practices employed by MCILS staff (including screeners) relative to financial operations are being conducted in accordance with statute, rule and best practices, as well as whether they are effective, applied consistently, and when an appropriate standard, with efficiency. Generally, fieldwork will also evaluate the structure and management of the financial elements of the program and if the structure and management are appropriate and in alignment with the organization's purpose(s).

Although some of the areas noted in this statement have been examined to some degree by the Sixth Amendment Center Report and the 2017 Working Group, OPEGA's review will add to that work. With access to additional data, OPEGA will perform a more detailed analysis of attorney billing and expenditures made by MCILS for legal services. It is possible that this comprehensive analysis might allow for us to separate potential actual overbilling from outliers that may have been due to error or that just appear to be instances of overbilling. This work may also allow for a closer examination of the current systems employed to review billing and make expenditures to identify where such systems may not be adequate for an appropriate level of scrutiny and oversight.

In consideration of the parameters cited when the GOC voted to include a review of the financial operation and oversight of MCILS onto the Approved Projects List, it is important to be clear about what this review will not evaluate. The proposed scope does not include an evaluation of:

- standards for attorneys to be on the MCILS rosters;
- quality of representation provided;
- attorney rates of pay; or
- whether or not a public defender office should be introduced.

OPEGA thanks the Committee for their consideration of this project direction statement for a full review of the financial oversight and economic use of resources by the Maine Commission on Indigent Legal Services.

Appendix B

GOC decision to consider review of MCILS

MCILS has previously been the subject of review by the Legislature and outside entities over the last three years. The GOC had also been asked to consider directing OPEGA to conduct a review of MCILS prior to the request that resulted in this review. In 2017, during the 128th legislative session, the GOC received a request for a review from a GOC member citing concerns related to the application of financial eligibility requirements for Court-appointed counsel, attorney billing practices, and billing and collection efforts for clients who are required to pay a portion of counsel fees. A full review was not approved by the committee at that time, but the request was added to GOC Stand-by List (pending a future vote to be added to the approved projects list/workplan) by a unanimous vote of the Committee.

A few weeks before completion of the 6AC report, a GOC member brought forward a request for the Committee to direct OPEGA to conduct a review of MCILS noting concerns with the administration of the program, its efficiency, and its oversight of the quality and effectiveness of representation, and the screening procedure used to determine eligibility for legal services. On April 12, 2019, the GOC voted to move a review of MCILS to OPEGA's Approved Projects List, with the scope limited to financial oversight and economic use of resources.

OPEGA presented a project direction recommendation which examined the various themes that emerged from preliminary research and identified several areas which potentially pose future risks to the elements of the program that are associated with financial oversight and economic use of resources.[12] On December 10, 2019, the GOC unanimously voted to direct OPEGA to conduct a full review of MCILS with the scope outlined in the project direction statement.

The GOC later moved to expedite some elements of the review after receiving communication from the Chairs of the Joint Standing Committee on Judiciary requesting prioritization of the MCILS review. On January 10, 2020, the GOC directed OPEGA to expedite review of the following evaluation scope items:

- 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.
- Adequacy of the oversight structure of MCILS in ensuring that operations align with and accomplish the organization's purpose.

OPEGA conducted field work from January through March, 2020 using extensive quantitative analysis as well as more qualitative types of review. Some of that work included conducting interviews of MCILS staff and the current and former Commission Chairs, reviewing Commission meeting minutes, relevant statute and rules, and other relevant documents. OPEGA analyzed attorney billing data used by the agency, and data provided to 6AC, as well as our own data set obtained directly from the billing system proprietor. We also selected a sample of invoices from non-attorney service providers (i.e. private investigators, expert witnesses, interpreters, etc.) to test agency invoice review, approval, and audit practices.

[12] See Appendix A Project Direction Statement for full list of themes.

Appendix C

Comparison of Sixth Amendment Center and OPEGA review of attorney billing

One of the primary drivers for this review were the issues noted in the 6AC report—particularly the number of annual hours billed by rostered attorneys—that were later reported by the media as potential examples of overbilling and/or fraud. With access to additional data directly from the billing service provider, OPEGA was able to perform a more detailed analysis of attorney billing and payments made by MCILS for legal services. The intention of this comprehensive analysis was to identify and separate instances in which outlying values resulting from data input errors or inconsistencies that otherwise—and incorrectly—appear to be instances of overbilling from true, potential instances of overbilling within the dataset. This work allowed for the closer examination of the current systems employed by the agency to review billing and make expenditures, and to identify where such systems may not be adequate for an appropriate level of scrutiny and oversight.

Sixth Amendment Center figures

In light of the published figures, the MCILS Executive Director worked with Justice Works (proprietor of Defender Data) to pull actual billing hour entries for the highest billing attorneys and undertook his own investigation in late August and early September of 2018. The Executive Director's analysis and correspondence with the attorneys in question led to the agency's conclusion that the figures reported in the 6AC report did not reflect hours worked by those attorneys. As part of our initial work, OPEGA sought to verify the figures in the 6AC report to identify whether there were any underlying issues that fully, or partially, explained the magnitude of the figures in the report.

We obtained and reviewed the data provided to the 6AC and found it captured annual (fiscal year) billings by the attorney originally assigned to the case by the Court, which the 6AC then used to calculate the average number of hours worked per week for that assigned attorney by using the appropriate attorney rate for each fiscal year and 52 weeks per year. We found those calculations to be mathematically correct.

We also obtained and reviewed the data later obtained by MCILS staff from Justice Works for its investigation, the agency's analysis related to that investigation, and resulting correspondence between MCILS staff and selected attorneys. Issues with the scope and depth of this investigation are noted in Issue 5 on page 18.

Lastly, we worked directly with Justice Works to obtain our own dataset. That data contained, not only payments to assigned counsel, but also the actual work events (standardized entries that describe the work performed such as preparing an email, file review, phone conference with client, etc.), the durations of those events (in tenths of an hour), the attorney who performed the work—regardless of assignment—and all associated payments for that work. After performing our own analysis and comparing the three sets of data, we were able to conclude that the data provided to the 6AC should not be used to calculate an attorney's hours worked. When that data is used, the calculation can drastically overstate an attorney's hours—particularly if that attorney works in a firm with other attorneys.

Upon further inspection, the data provided to the 6AC reflected all of the annual billings for attorneys listed as the court-assigned counsel. This was problematic for two reasons:

1. Not all billings are time events. Other billing categories, such as mileage and some copy expenses, may be reimbursed through vouchers via Defender Data. These types of expenses increase annual billing totals—and subsequent calculations of weekly hours worked using those annual totals—to whatever extent they occur and are then included in the data.
2. Of significantly greater importance is that while an attorney may be the Court-assigned counsel and always recorded as such in Defender Data, the reality is that the assigned counsel is not always the attorney actually performing the work and entering and billing for that work via Defender Data. It is unclear to OPEGA how or why the data provided to the 6AC was aggregated by annual billing dollars and attorneys listed as assigned counsel, but we note that using this data instead of timed events by work attorney to calculate attorneys' average weekly hours, inaccurately includes non-time expenses and potentially misattributes the work hour of several attorneys to only one attorney.

To illustrate the effect of misattributing the work hours of multiple attorneys working on a case to only the assigned attorney, we selected the most prominent example of high weekly hours cited in the 6AC report—Attorney 2 receiving $307,381 in annual pay from MCILS in FY16 representing 98.52 hours worked per week. Using the data provided to 6AC, we identified Attorney 2 and then queried the OPEGA-obtained data set to identify total FY16 payments for time events on cases in which that attorney was the assigned counsel and any other attorneys whose work or payments would be captured in that total (but misattributed to Attorney 2). The results of that query are presented in Table 1.

Table 1: Comparison of 6AC and OPEGA Example FY16 Attorney Billing Attributions

6AC		OPEGA		
Attorney	FY16 Annual Pay	Assigned Attorney	Work Attorney	FY16 Amount
Attorney 2	$ 307,381.00	Attorney 2	Attorney 2	$ 152,329.25
		Attorney 2	Attorney H	$ 41,381.25
		Attorney 2	Attorney I	$ 31,909.00
		Attorney 2	Attorney J	$ 18,688.25
		Attorney 2	Attorney K	$ 15,399.50
		Attorney 2	Attorney L	$ 12,674.00
		Attorney 2	Attorney M	$ 11,715.50
		Attorney 2	Attorney N	$ 10,676.75
		Attorney 2	Attorney O	$ 10,625.25
		Attorney 2	Attorney P	$ 3,382.25
		Attorney 2	Attorney Q	$ 240.00
		Attorney 2	Attorney R	$ 155.50
		Attorney 2	Attorney S	$ 137.50
		Total Paid on Vouchers In Which Attorney 2 Was The Assigned Attorney		$ 309,314.00

Source: FY16 Table on Page 81 of 6AC report "The Right to Counsel in Maine" and OPEGA analysis of MCILS voucher data obtained from Justice Works.

In this case, analyzing FY16 payments by the assigned counsel and the attorney actually performing work on those cases, paints a very different picture of Attorney 2's actual hours worked. Over half of the payments—and hours calculated by the 6AC—were for work performed by other attorneys.

Overall, we observed that misattributed earnings impacted many of the attorneys listed in the 6AC report, which included a table showing the top ten earners over the period as calculated from the data they obtained. Using our data, we were able to remove payments for attorneys other than the assigned counsel working on those cases. The 6AC's five-year totals for their top ten earners, as well as our five-year totals for those same ten attorneys, are presented in Table 2.

Table 2: Comparison of 6AC and OPEGA FY14-FY18 Total Attorney Billing Attributions By Attorney

Attorney	6AC FY14 - FY18 Totals	OPEGA FY14 - FY18 Totals	Difference
Attorney 2	$ 1,189,361.37	$ 687,487.75	$ 501,873.62
Attorney 8	$ 793,967.06	$ 678,928.00	$ 115,039.06
Attorney 13	$ 745,311.76	$ 591,918.00	$ 153,393.76
Attorney 5	$ 665,058.50	$ 653,566.50	$ 11,492.00
Attorney 11	$ 662,753.12	$ 565,939.85	$ 96,813.27
Attorney 7	$ 658,486.60	$ 654,886.55	$ 3,600.05
Attorney 9	$ 657,896.39	$ 646,919.50	$ 10,976.89
Attorney 3	$ 621,673.26	$ 403,545.00	$ 218,128.26
Attorney 4	$ 618,086.99	$ 497,726.30	$ 120,360.69
Attorney 10	$ 610,092.76	$ 593,382.50	$ 16,710.26

Source: Five Year Summary Table on Page 83 of 6AC Report "The Right to Counsel in Maine" and OPEGA analysis of MCILS voucher data obtained from Justice Works.

Because misattributed earnings were used to calculate hours per week, some of those figures—particularly among the highest reported—were also overestimated. Using a similar methodology as the 6AC to calculate average hours worked per week, we calculated figures based on work attorney earnings. Table 3 shows the number of instances in which an attorney was calculated to have worked more than 40 hours per week as calculated by 6AC compared to those instances we calculated using the OPEGA obtained data and stratified by ranges of hours.

Table 3: Comparison of 6AC and OPEGA Distributions of Attorney Average Hours Worked Per Week By FY

Average Hours Worked Per Week	FY14		FY15		FY16		FY17		FY18		5 YEAR TOTAL	
	6AC	OPEGA	6AC	OPEGA	6AC	OPEGA	6AC	OPEGA	6AC	OPEGA	6AC	OPEGA
40-45	5	6	6	7	7	6	4	6	14	11	36	36
45-50	2	0	3	3	1	1	4		5	6	15	10
50-55	1	2	2	1		2	1	2		2	4	9
55-60				1	2		1	1	1	2	4	4
60-65	1				1	1			1	2	3	3
65-70	1	1							1	1	2	2
70-75	1			1			1		1		3	1
75-80											0	0
80-85										1	0	1
85-90									2		2	0
90-95			1								1	0
95-100					1						1	0
Total	11	9	12	13	12	10	11	9	25	25	71	66

Source: Annual Tables on Pages 80 - 82 of 6AC report "The Right to Counsel in Maine" and OPEGA analysis of MCILS voucher data obtained from Justice Works.

Appendix D

Additional results of OPEGA's review of non-counsel invoices

OPEGA also identified one instance in which an invoice for private investigation services was paid twice. Private investigation services, like other non-counsel services (expert witnesses, interpreters, etc.), are to be preapproved by either MCILS staff or the Court. The agency records these preapprovals in a series of spreadsheets with the court of record, docket number, attorney, defendant, vendor, and approved amount. These spreadsheets are intended to serve as a control as paid amounts and remaining balances are tracked and recorded. OPEGA reviewed 13 invoices comprising six different instances of potential duplicate (5 occurrences) or triplicate (1 occurrence) payments. Within these six instances, we identified the following scenario in which a (partial) invoice was paid more than once:

- 12/29/10: Court authorizes $1,000 for defendant to employ a private investigator.
- 3/16/11: The defendant's attorney submits the private investigator's invoice. The invoice total is $1,411,32.
- 4/5/11: MCILS Executive Director authorizes payment of $1,000 (presumably based on the 12/29/10 order).
- 4/12/11: MCILS Deputy Executive Director reviews the defendant's request for funds and authorizes the expenditure of up to $411.32 nunc pro tunc[13].
- 4/14/11: MCILS Executive Director authorizes payment of $411.32.
- 5/13/11: The defendant's attorney submits the private investigator's invoice with a note that the attached bill is for $411.32, as it is the remainder of the original invoice that had not been paid in full. The line item descriptions (people, places, dates, and services) referenced on the invoice are the same as those cited on the 3/16/11 invoice.
- 6/1/11: MCILS Executive Director authorizes payment of $411.32.

The preapproval spreadsheets have two entries for these services for this defendant and docket number: one for $1,000 and one for $411.32. For these transactions, the control (the spreadsheet and its review) did not appear to catch the duplicate payment of $411.32.

[13] This term is commonly used in the legal system to indicate a ruling or order applies retroactively to an earlier decision.

MAINE COMMISSION ON INDIGENT LEGAL SERVICES
John D. Pelletier, Esquire
Executive Director

October 15, 2020

Senator Justin Chenette, Senate Chair
Representative Anne-Marie Mastraccio, House Chair
Government Oversight Committee

Dear Senator Chenette and Representative Mastraccio:

As chair of the Maine Commission on Indigent Legal Services (MCILS), I write to acknowledge receipt of OPEGA's Confidential Draft Report, pursuant to Title 3 §997(1) of OPEGA statute. I am pleased to offer this formal agency comment in advance of the report's submission to the Government Oversight Committee and subsequent public hearings.

The eight current members of MCILS, all appointed by the Chief Executive, have been in place since the fall of 2019. As we have undertaken to more fully understand the landscape of how indigent legal services are provided in the State of Maine, a consensus has developed within the Board that is largely consistent with the conclusions outlined by OPEGA staff. We wish to make the following summary reply:

1. The Commission has no disagreement with any of the actual facts stated in the report.
2. There is gross underfunding for appropriate agency staffing.
3. The significant inadequacies OPEGA has identified with respect to financial procedures and oversight structure cannot solely be attributed to inadequate funding.
4. More broadly, the five specific conclusions reached by OPEGA in Part II of its report are serious and require more urgent action by the Commission than that undertaken to date.
5. The Commission largely agrees with the conclusions of OPEGA in Part III of its report addressing structure and oversight.

As further background, I note that the "new" Commission has set up a number of Subcommittees tasked with particular areas of system operation. These include:

a. Subcommittee on Financial Oversight
b. Subcommittee on Practice Standards
c. Subcommittee on Training
d. Subcommittee on Public Defender

Before implementing any specific changes to current operations, the Commission wanted to have the benefit of this OPEGA report. Armed with this review, as well as the thoughtful analysis of the Sixth Amendment Center, the Commission feels well positioned to make the kinds of significant changes needed to accomplish its statutory mission.

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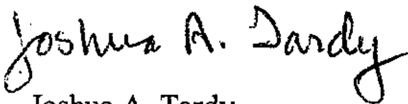
With specific reference to staffing, last October the Commission submitted its Supplemental Budget request to the Chief Executive to hire an additional attorney to enhance capacity for training and supervision of attorneys and a person with financial and audit skills to improve oversight of attorney billing. Further, a couple weeks ago, the Commission made a request to the Chief Executive for the upcoming biennial budget for additional staffing needed to fulfill our statutory mission. We are also looking at issues related to our current staffing.

The Government Oversight Committee should also understand that, consistent with key recommendations in the Sixth Amendment Center Report, the Commission has recommended establishing a Public Defender Office in one Maine county on a pilot basis. As Committee members may know, Maine is the only state in the country that does not provide indigent legal services through a public defender's office in at least a portion of the state.

Finally, we want to highlight that the current report addresses only two issues from OPEGA's work plan. The Commission's budget request addresses these issues, as well as the need to better ensure the quality of representation to meet the statutory obligation to provide efficient, high-quality representation to indigent criminal defendants, juvenile defendants and children and parents in child protective cases. We welcome the office's final report.

We thank you for your diligent interest in indigent legal services and look forward to participating in the public hearings around this report.

Respectfully submitted,



Joshua A. Tardy
Chair, Maine Commission on Indigent Legal Services

EXHIBIT 3

§1804 UPDATE

TO: COMMISSION

FROM: JUTIN ANDRUS, EXECUTIVE DIRECTOR, MCILS

SUBJECT: §1804 COMPLIANCE UPDATE

DATE: 12/23/2021

CC:

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§1804. Commission responsibilities

1. Executive director. The commission shall hire an executive director. The executive director must have experience in the legal field, including, but not limited to, the provision of indigent legal services.

The Commission has hired an Executive Director with the requisite experience.

2. Standards. The commission shall develop standards governing the delivery of indigent legal services, including:

A. Standards governing eligibility for indigent legal services. The eligibility standards must take into account the possibility of a defendant's or civil party's ability to make periodic installment payments toward counsel fees;

The Commission has promulgated Chapter 401 addressing eligibility.

The Commission may want to reevaluate its standards and should reevaluate its processes for eligibility screening and collection.

B. Standards prescribing minimum experience, training and other qualifications for contract counsel and assigned counsel;

The Commission has promulgated Chapter 2 addressing these standards.

Commission staff will suggest updated and modified standards for consideration in the second half of FY22. These standards will integrate with updated training and mentorship standards.

C. Standards for assigned counsel and contract counsel case loads;

The Commission has not yet promulgated case load standards.

Commission staff anticipates that case load standards will be part of the updated performance standards under development. Case load tracking and management is part of the system design for the next case management system.

D. Standards for the evaluation of assigned counsel and contract counsel. The commission shall review the standards developed pursuant to this paragraph every 5 years or upon the earlier recommendation of the executive director;

The Commission has not yet promulgated evaluation standards.

Commission staff anticipates that evaluation standards will be part of the performance standards under development.

E. Standards for independent, quality and efficient representation of clients whose cases present conflicts of interest;

The Commission has not yet promulgated a formal standard for addressing conflicts of interest, however staff operational practices address the issue of conflicts by identifying and assigning counsel who are not conflicted as substitutes for those who are.

F. Standards for the reimbursement of expenses incurred by assigned counsel and contract counsel; and

The Commission has promulgated Chapters 301 and 302 to address these requirements.

G. Other standards considered necessary and appropriate to ensure the delivery of adequate indigent legal services.

The Commission has promulgated Chapters 101, 102, and 103, to address the adequate delivery of indigent legal services.

Commission staff are working to update these rules.

3. Duties. The commission shall:

A. Develop and maintain a system that may employ attorneys, use appointed private attorneys and contract with individual attorneys or groups of attorneys. The commission shall consider other programs necessary to provide quality and efficient indigent legal services;

The Commission has developed and is operating a system that complies with this requirement.

Commission staff are developing other programs necessary to promote its goals, including, without limitation, appellate, PCR, diversion and mitigation, and child protective specialist programs.

B. Develop and maintain an assigned counsel voucher review and payment authorization system that includes disposition information;

The Commission developed and is operating a system that complies with this requirement.

Commission staff are working with Maine IT to develop and implement an updated system to better serve this function.

C. Establish processes and procedures consistent with commission standards to ensure that office and contract personnel use information technology and case load management systems so that detailed expenditure and case load data are accurately collected, recorded and reported;

The Commission does not yet have processes and procedures that track caseloads in real time.

Commission staff are working with Maine IT to develop and implement an updated system to serve this function. Staff anticipates that implementation of this system will coincide with the implementation of working rules, policies and practices to support the function.

D. Develop criminal defense, child protective and involuntary commitment representation training and evaluation programs for attorneys throughout the State to ensure an adequate pool of qualified attorneys;

The Commission has existing training programs to promote the availability of adequate counsel as defined by existing rules.

Commission staff are working to develop additional in-house and external trainings, and to obtain access to existing external training resources. The Training and Supervision division is working to develop a formalized evaluation process.

E. Establish minimum qualifications to ensure that attorneys are qualified and capable of providing quality representation in the case types to which they are assigned, recognizing that quality representation in each of these types of cases requires counsel with experience and specialized training in that field;

The Commission has promulgated Chapters 2 and 3 to meet this requirement.

Commission staff are working to revise the minimum qualifications, and to establish training and development paths to meet those qualifications.

F. Establish rates of compensation for assigned counsel;

Commission Chapter 301, currently under amendment, addresses this requirement.

G. Establish a method for accurately tracking and monitoring caseloads of assigned counsel and contract counsel;

The Commission does not yet have processes and procedures that track caseloads in real time.

Commission staff are working with Maine IT to develop and implement an updated system to serve this function. Staff anticipates that implementation of this system will coincide with the implementation of working rules, policies and practices to support the function.

H. By January 15th of each year, 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.

The joint standing committee of the Legislature having jurisdiction over judiciary matters may report out legislation on matters related to the report;

Commission staff prepare this document annually.

I. Approve and submit a biennial budget request to the Department of Administrative and Financial Services, Bureau of the Budget, including supplemental budget requests as necessary;

The Commission will begin this process at the December 28, 2021 meeting.

J. Develop an administrative review and appeal process for attorneys who are aggrieved by a decision of the executive director, or the executive director's designee, determining:

(1) Whether an attorney meets the minimum eligibility requirements to receive assignments or to receive assignments in specialized case types pursuant to any commission rule setting forth eligibility requirements;

(2) Whether an attorney previously found eligible is no longer eligible to receive assignments or to receive assignments in specialized case types pursuant to any commission rule setting forth eligibility requirements; and

(3) Whether to grant or withhold a waiver of the eligibility requirements set forth in any commission rule.

All decisions of the commission, including decisions on appeals under subparagraphs (1), (2) and (3), constitute final agency action. All decisions of the executive director, or the executive director's designee, other than decisions appealable under subparagraphs (1), (2) and (3), constitute final agency action;

The Commission has promulgated Chapter 201 to address this requirement.

Commission staff is developing an updated rule to provide additional clarity in the appellate process.

K. Pay appellate counsel;

Commission Chapter 301 includes appellate counsel within its scope.

L. Establish processes and procedures to acquire investigative and expert services that may be necessary for a case, including contracting for such services;

Chapter 302 addresses this requirement.

M. Establish procedures for handling complaints about the performance of counsel providing indigent legal services;

The Commission does not yet have a documented process for addressing complaints.

Commission staff has developed a protocol and anticipates presenting it in written form for Commission consideration in the near future.

N. Develop a procedure for approving requests by counsel for authorization to file a petition as described in section 1802, subsection 4, paragraph D; and

The Commission does not yet have a documented process for requesting authorization to file a Cert Petition.

Commission staff has developed a protocol and anticipates presenting it in written form for Commission consideration in the near future.

O. Establish a system to audit financial requests and payments that includes the authority to recoup payments when necessary. The commission may summon persons and subpoena witnesses and compel their attendance, require production of evidence, administer oaths and examine any person under oath as part of an audit. Any summons or subpoena may be served by registered mail with return receipt. Subpoenas issued under this paragraph may be enforced by the Superior Court.

Commission staff have developed an audit program, and anticipate deploying that program in March 2022.

The Commission should develop a policy for the use of summonses and subpoenas, and for recoupment.

EXHIBIT 4

MCILS -RESPONSES TO OPEGA AND 6AC REPORTS

TO: COMMISSION

FROM: JUSTIN W. ANDRUS, EXECUTIVE DIRECTOR, MCILS

SUBJECT: MCILS RESPONSES TO THE OPEGA AND 6AC REPORTS

DATE: 12/23/2021

CC: GOVERNOR; CHIEF JUSTICE; JUDICIARY CHAIRS; GOC CHAIRS; OPEGA

MCILS began the year subject to oversight and interest related, in large measure, to reports published by OPEGA and by the Sixth Amendment Center. While those reports do not necessarily encompass every change that MCILS can make to improve the provisions of indigent legal services, the reports do serve as a useful guide to some of those improvements.

Throughout 2021, MCILS has worked to address as many of the shortcomings identified in the two reports as possible. Most have been addressed, as follows:

I. OPEGA Issues and Recommendations

Issue 1. There are no established policies and procedures governing expenditures and payments and MCILS's expectations for billing practices may not be effectively communicated to attorneys.

Recommendation: Formal policies and procedures should be established by MCILS management to better define allowable and covered expenses. These policies and procedures would clarify expectations for billing and invoicing practices that if proactively communicated, would improve the effectiveness of the system to approve expenditures and process payments to rostered attorneys and non- counsel service providers.

MCILS has updated its Chapter 301 to make changes to, and to provide clarity about, the rules, practices, and expectations for billing attorney time and certain non-counsel expenses.[1] MCILS anticipates adopting amended Chapter 301 on December 28th, excepting the attorney rate change. That change is subject to legislative review, and adoption on December 28th will be provisional.

In the meantime, MCILS has published Defender Data usages standards[2] and guidance on the nature and expectations of the relationship between MCILS and counsel.[3]

MCILS updated its Chapter 302 governing non-counsel service providers in August 2021. A revised process for requesting non-counsel funds is in development.

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[1] See attachment A.

[2] See attachment B.

[3] See attachment C.

Issue 2. Data available to MCILS staff via Defender Data is unreliable and potentially misleading

Recommendation: The quality of available data in terms of consistency, accuracy, and reliability could be improved in several ways if the agency undertakes the following interrelated initiatives:

- **Establish and communicate expectations and guidance outlining how time events are to be recorded in Defender Data to improve the consistency of the data;**

MCILS has published its expectations to eligible counsel.

- **work with Justice Works to develop data-entry controls that reflect newly-established expectations and provide guidance to correct potential data issues, or errors, when they occur; and correct data errors within Defender Data at the time they are identified...**

The MCILS contract with Justice Works for the current implementation of Defender Data is in its final extension. That implementation is of a legacy version of the software that will be deprecated shortly. MCILS is working to develop updated data-entry control concepts for implementation in the new case management and billing system. MCILS is actively working with Maine IT to finalize the RFP for the new system. The current specification document is attached. [4]

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[4] See attachment D.

Issue 3. Current efforts to monitor attorney vouchers are inefficient and of limited effectiveness.

Recommendation: Assuming improvements are made to the overall quality of MCILS's attorney voucher data, the agency should reevaluate its process for reviewing attorney vouchers with the objective of improving both effectiveness and efficiency. At a minimum, the following process attributes should be considered by MCILS in reevaluating and potentially redesigning its attorney voucher review process.

- **The process should identify, investigate and, as necessary, address the types of instances with the greatest potential impacts to financial stewardship and the quality of representation— high daily and annual hours worked by attorney.**

The next MCILS case management system, expected in FY23, will report on both high and low periodic attorney-hours.

- **The process should utilize technology to identify and correct potential data entry errors when they occur, such as flagging the input of values in excess of established limits, instead of relying on manual review of vouchers to identify potential errors.**

The MCILS system design calls for these flags. MCILS expects this function to be part of the next MCILS case management system, expected in FY23.

- **The process should incorporate data and risk-based audit techniques to the greatest extent possible to potentially reduce the burden placed on the Executive Director and Deputy Executive Director by the manual review of vouchers—allowing them to focus on other important, but neglected, aspects of MCILS's purpose as discussed in Part III.**

MCILS, through its Audit Counsel, is developing a data and risk-based audit system, to permit meaningful sampling of voucher data. The audit system is more fully described in the documents attached as E - H.

- **Additionally, we note that transitioning from a voucher-based payment system to a timecard-based payment system may address issues related to the timeliness and accuracy of daily hours worked.**

MCILS agrees with OPEGA that a timecard-based periodic billing system would bring benefits to the system from both an accuracy-oversight perspective, and from an attorney satisfaction perspective. Moving to that system would require a substantial additional appropriation for the year of the transition, however.

MCILS currently has an arrears-billed relationship with assigned counsel. Counsel bill at the end of a case, or at an intermediate trigger point. Time accrues in each case. Implementation of a timecard-based payment system would requirement payment of all the accrued time during the first payment cycle. MCILS would be able to make those payments. Doing so would exhaust its payment budget, however. Additional payments would require an additional appropriation.

Issue 4. Invoice-level review of non-counsel invoices may be of limited effectiveness in identifying certain types of noncompliance.

Recommendation: Development of a broader audit/review procedure for non-counsel invoices and periodic use of a risk-based method to select and review invoices would allow the agency to identify and correct instances of inappropriate high daily billings, duplicate charges, duplicate payments, and potentially, other instances of noncompliance.

MCILS expects to produce and implement an audit and review procedure for non-counsel invoices in or about April 2022, after implementation of the counsel-fee audit structure is accomplished. As it stands, MCILS accounting staff review every non-counsel invoice. Staff identifies errors and requires correction by non-counsel providers before payment.

Issue 5. Defined policies and procedures for audit and investigation have not been established. Current methods used by MCILS are limited, inconsistent, and of limited scope, depth and effectiveness.

Recommendation: Establishment of a formal audit process would serve as a more effective control than the current methods used by the agency and would provide for consistency in enforcement efforts. A more effective process could include policies and procedures that would guide the agency regarding:

- **how and when audits are to be conducted;**
- **the records to be maintained by attorneys (and other non-counsel service providers) for potential MCILS review;**
- **a means of determining, confirming, and/or settling disputed overpayment amounts;**
- **a mechanism to recoup overpayments;**
- **penalties (including dismissal from the MCILS roster) for noncompliance; and**
- **consistent enforcement of all MCILS rules.**

MCILS has developed and is implementing a formal audit process for attorney fees. Full implementation is expected by March 31, 2022. A formal process for non-counsel requests and invoices will follow. Documentation of a formal investigative process will be presented to the Commission at or before its January 2022 meeting, together with a proposed updated appellate review structure. Work is ongoing on the question of administrative recoupment. For the moment, MCILS would rely on the Court to provide the venue for a recoupment action. MCILS is enforcing its rules, including through dismissal from the MCILS rosters for noncompliance.

Issue 6. The agency charged with administering MCILS purpose is under-staffed.

It remains the case that MCILS is under-staffed. Of the six positions authorized by the legislature, MCILS has filled four. Even when all six positions are filled, however, MCILS will remain understaffed to provide adequate supervision. National standards support a supervisory ratio of 10:1 and assume that supervisors are working in the same offices as the defenders being supervised. To provide proper field oversight, MCILS would require significant additional staffing. That staffing level should reflect both the number of attorneys in need of supervision, and their geographic dispersal.

Issue 7. MCILS staff operates without clearly defined roles and uses current staff inefficiently.

Currently, MCILS staff have clearly defined roles, with limited overlap.

Issue 8. The Commission receives insufficient support for necessary operations.

MCILS expects to be able to meet its current and projected operational expenses for the FY22-23 biennium with current funding. To meet some of goals set for MCILS, however, additional funding and headcount will be necessary.

Issue 9. A weak oversight structure impacts the ability of MCILS to adequately meet its statutory purpose.

MCILS is improving its oversight structure, primarily through the installation of four new attorney-administrators. Indigent defense would benefit from the addition of field trainers and supervisors under the next budget, however.

II. Recommendations of the Sixth Amendment Center:

RECOMMENDATION 1: The State of Maine should remove the authority to conduct financial eligibility screenings from the Maine Commission for Indigent Legal Services. The reconstituted Task Force on Pretrial Justice Reform should determine the appropriate agency to conduct indigency screenings.

MCILS supported legislation that would have removed its authority to conduct financial eligibility screenings. LD 1685 as drafted contained proposed 4 MRSA §8-D.[5] The bill would have transferred the financial screening function from MCILS to the Judicial Branch and would have eliminated MCILS involvement in collection actions against indigent clients. This section was deleted before other provisions of LD 1685 were enacted.

Resolution of this recommendation requires legislative action and cannot be accomplished by MCILS without that support.

RECOMMENDATION 2: The State of Maine should statutorily bar communication between prosecutors and unrepresented defendants, unless and until defendants have been informed of their right to appointed counsel, a judge has conducted the legally required colloquy, and a defendant has executed a written waiver of the right to counsel in each case to ensure that all waivers of the right to counsel are made knowingly and voluntarily.

The legislature enacted 15 MRSA §815, prohibiting most communication between prosecutors and unrepresented defendants, absent a knowing waiver. Most or all prosecution offices now refer unrepresented defendants to MCILS for information. MCILS has been able to provide basic legal information to callers, without providing legal advice, and to facilitate early assignment of counsel in partial resolution of recommendation 3, below. MCILS is actively working on a program that will allow those unrepresented defendants who make contact to receive the benefit of early advice and assignment of counsel.

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[5] See attachment I.

MCILS was recently asked by CLAC for its opinion on proposed amendments to §815. MCILS supports the amendments proposed on the attached draft.[6]

[6] See attachment J.

RECOMMENDATION 3: Except for ministerial, non-substantive tasks, the State of Maine and the Maine Commission on Indigent Legal Services should require that the same properly qualified defense counsel continuously represents the client in each case, from appointment through disposition, and personally appears at every court appearance throughout the pendency of an assigned case.

MCILS implemented a continuous representation policy requiring informed client consent before counsel may delegate representation to another person and prohibiting delegation of enumerated dispositive appearances.[7]

RECOMMENDATION 4: MCILS should use its current statutory power to promulgate more rigorous attorney qualification, recertification, training, supervision, and workload standards. The State of Maine should statutorily require financial oversight by requiring that MCILS limit the number of permissible billable hours, subject to waiver only upon a finding of need for additional capacity. The State of Maine should fund MCILS at a level to ensure rigorous training and effective substantive and financial oversight of attorneys.

MCILS was unable to made effective progress on redrafting its standards until additional staff came on-board. Four new staff are now on-board and have begun a comprehensive review of existing MCILS rules and standards. We anticipate updating the rules to implement standards that will begin to address this recommendation by July 1, 2022.

RECOMMENDATION 5: The State of Maine should statutorily ban all public defense contracts that provide financial disincentives to or that otherwise interfere with zealously advocating on behalf of the defendants' stated interests, including the use of fixed fee contracts. Maine should require that any public defense contract include reasonable caseload limits, reporting requirements on any private legal work permitted, and substantial performance oversight, among other protections.

Public defense contracts of the type specified in recommendation 5 have not yet been statutorily banned, however, MCILS does not now make use of any such contracts.

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[7] See attachment K.

RECOMMENDATION 6: The State of Maine should fund MCILS at a level that allows private attorneys to be compensated for overhead expenses plus a reasonable fee (i.e., $100 per hour). MCILS should be authorized to provide additional compensation of $25 per hour for designated case types such as murder, sexual assaults, and postconviction review.

The Legislature approved funding to increase the attorney compensation rate to $80 per hour under the current budget. MCILS continues to support increasing the compensation rate to at least $100 per hour and supports authorization to provide additional compensation for designated case types.

RECOMMENDATION 7: The State of Maine should authorize and fund MCILS at an appropriate level to employ state government attorneys and support staff to operate a statewide appellate defender office and a Cumberland County trial level public defender office.

The Legislature did not fund the initiation of any statewide or local public defender offices. A hybrid model using both contracted and employed counsel would permit the most flexibility in staffing cases and promote the most effective representation for indigent clients. MCILS expects to renew its request for employed counsel for the next biennial budget.

EXHIBIT 5

TO: COMMISSION

FROM: JUSTIN ANDRUS, EXECUTIVE DIRECTOR

SUBJECT: ABA TEN PRINCIPLES

DATE: 1/7/2021

CC:

Assessment of MCILS adherence to the American Bar Association's Ten Principles of a Public Defense Delivery

In assessing its own performance, MCILS turns to the American Bar Association's Ten Principles of a Public Defense Delivery system for guidance. The Sixth Amendment Center's April 2019 report on The Right to Counsel in Maine, providing useful insight into the then-current state of indigent defense in Maine, casts much of its comment in the light of those principles. In February 2020 the MCILS Subcommittee on Public Defender Program promulgated its memorandum reporting its findings (the "Subcommittee Report"). That report was also framed by the ABA principles. MCILS continues to use the principles to frame this discussion:

1. The public defense function, including the selection, funding, and payment of defense counsel, is independent.

The ABA comment to Principle 1 states in part that the public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel.

The Subcommittee Report recognized that the through the creation of MCILS, independence from direct judicial control of indigent defense through the judicial budget was accomplished but noted that there were outstanding issue impacting independence. In particular, the Subcommittee noted that the judiciary still controlled the assignment of lawyers; and, that MCILS spent what the report characterized as, "an inordinate amount of time" diverting its collective attention to funding.

These issues remain outstanding. MCILS has made some progress on the issue of independence in the assignment of counsel by implementing a process permitting internal assignments in appropriate cases. That internal process is effective in those cases to which

it is applied but is only applied infrequently because most cases in which assignment is appropriate remain subject to judicial selection of counsel.

MCILS should transition to a properly funded and supported model in which potential consumers of indigent legal services are advised of the opportunity to apply for assigned counsel, and then screened for eligibility by an external screening process. Matters in which a consumer has been deemed eligible for assigned counsel should then be communicated from the Court's electronic case management system directly to the MCILS electronic case management system. MCILS would then assign the case. This would be consistent with the comment to Principle 2, that, "[t]he appointment process should never be *ad hoc*, but should be according to a coordinated plan directed by a full-time administrator who is also an attorney familiar with the varied requirements of practice in the jurisdiction." This change in process would be agnostic as to whether fulfillment of the assignment was performed by contracted or employed attorneys.

The issue of funding remains as well. MCILS appreciates the support of the Legislature last session, and the ongoing interest of many legislators. Still, MCILS staff spends a lot of time working to foster support. More problematic, MCILS must make operational decisions that impact the quality and availability of client services based on present and anticipated political environments.

To solve these issues, MCILS funding should be statutorily defined based on a state-wide per-capita funding level consistent with an adequate defense function and revised based on changes to the state-wide cost of business. MCILS should maintain a non-lapsing account with trust-like rules to address fluctuations in costs. The account could be initially funded with a small fraction of the current surplus. Operational savings would be deposited to the account, and unusual operating costs could be debited from the account.

2. **Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.**

The availability of counsel to provide services to consumers of indigent legal services has been a recurrent theme for MCILS in both its internal and external communications this year. The number of attorneys eligible and willing to receive assignments has fluctuated, reaching a low over the summer and rebounding this fall and early winter. The MCILS bar has worked diligently to serve indigent clients. Every case has been staffed successfully.

Still, there have been times identifying counsel who are both eligible and willing has required a search, and others when local counsel have been unavailable and thus distant counsel has been assigned. MCILS would be best able to provide efficient, high-quality representation to consumers if it had the ability to allocate cases between both the existing private bar and employee attorneys.

Through its initiatives request in late 2020, and through testimony to legislatives committees in early 2021, MCILS asked that it be funded for "pilot" defender programs. These programs might be better characterized as "start-up" programs. They are intended to be permanent, rather than experimental in nature. MCILS should be permitted to pursue these programs.

The availability of both private and employed counsel should permit MCILS operational flexibility in staffing cases. The option of becoming employed counsel should promote retention in the defense bar by making the benefits of State employment available to those defense counsel who elect to that employment (See Principle 8), while also promoting retention of skilled and experience counsel who prefer to remain independent.

While under the MCILS initiative the first defender office would be in Augusta, that office should have the option of hiring, training, and supervising a set of defenders available to travel to staff cases if necessary.

3. Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel.

The Subcommittee Report commented that MCILS failed with respect to this principle, in part, because of the delay in assignments through judicial action. A recommendation for addressing that issue is set out above. There is an additional issue, however, in that there are often long delays between when a consumer is arrested or charged, and the initial appearance.

MCILS should be resourced and authorized to oversee a process whereby consumers are advised early of the right to counsel, including by law enforcement, and referred to a centralized MCILS attorney. That attorney should be able to provide baseline legal information and, where possible, to facilitate the early assignment of counsel.

4. Defense counsel is provided sufficient time and a confidential space within which to meet with the client.

The comment to Principle 4 states that:

> Counsel should interview the client as soon as practicable before the preliminary examination or the trial date. Counsel should have confidential access to the client for the full exchange of legal, procedural, and factual information between counsel and client. To ensure confidential communications, private meeting space should be available in jails, prisons, courthouses, and other places where defendants must confer with counsel.

The Subcommittee Report noted that MCILS did not provide sufficient oversight to ensure that this principle was met, and noted concern with attorney communications in courthouses, particularly for lawyers of the day.

LR #2256 is currently pending before the legislature. Proposed 15 MRSA §458(1) provides a person summonsed, arrested, charged, or indicted the opportunity for confidential communications with counsel in preparation for and during appearances, in a manner that cannot be overheard of monitored by another person. MCILS supports LR #2256. Passage would ameliorate the conditions that contribute to issues of confidentiality in jails and courthouses.

MCILS still needs further support for its supervision mission to be able to ensure that assigned counsel can provide both time and confidential space for client communications outside of the jails and courthouses.

5. Defense counsel's workload is controlled to permit the rendering of quality representation.

At the time of the Subcommittee Report, the MCILS case and workloads were uncontrolled. The Subcommittee noted that MCILS could not control work that assigned counsel might perform outside of the MCILS program.

Since the Report was issued, MCILS has implemented program changes to permit attorneys to control their individual caseloads. MCILS has shifted from the historical monthly roster concept to a near real-time system in which attorney eligibility and availability update daily. Under this system, counsel are able to indicate to the Courts that they should not be assigned cases during periods in which counsel are either unable or unwilling to accept new work.

MCILS is in the process of updating or replacing its case management system. With the new system, and appropriate instructions and requirements around its use, MCILS will be able to determine on a timely and ongoing basis whether an attorney has the bandwidth to accept additional assigned cases. As part of that process, MCILS should promulgate rules that required attorneys with practices divided between indigent legal services and private practice to specify the proportion of each type of work. The MCILS caseload standards should then be adjusted proportionately to ensure that counsel workloads are appropriate.

The ability of MCILS to manage meet this principle is dependent on a functional, real-time interface with the Court's electronic case management system.

6. **Defense counsel's ability, training, and experience match the complexity of the case.**

The ABA comment to Principle 6 holds that, "Counsel should never be assigned a case that counsel lacks the experience or training to handle competently, and counsel is obligated to refuse appointment if unable to provide ethical, high quality representation." The Subcommittee Report held that MCILS was not upholding Principle 6 in 2020.

Today, MCILS is meeting its duties under statute and its rules to ensure that indigent consumers are served by qualified counsel in every case, while working to develop and promote higher standards. During the 2021 session, the legislature granted MCILS the authority to implement revised standards for attorney qualification. MCILS expects to exercise that authority through an updated ruleset in 2022.

In the meantime, MCILS continues to operate under the legislatively approved set of attorney qualifications. The MCILS case management system prevents automatic approval of any instance in which counsel has not been designated eligible for provide service. MCILS staff then follow up with counsel to determine whether an actual eligibility conflict exists, and to resolve that conflict in a manner that ensures each client receives eligible counsel.

7. **The same attorney continuously represents the client until completion of the case.**

The Sixth Amendment Center report recommended that MCILS improve the quality of service to its consumers by requiring that except for ministerial, non-substantive tasks, the same properly qualified defense counsel continuously represent the client in each case, from appointment through disposition, and personally appear at every court appearance throughout the pendency of an assigned case.

MCILS promulgated a policy in 2021 to ensure vertical representation, while providing a mechanism for obtaining informed client consent for the delegation of non-substantive appearances in appropriate instances. The policy requires that eligible, properly assigned counsel represent each client at substantive appearances. This policy implements the recommendation of the Sixth Amendment Center and approximates adherence to the ABA Principle.

The MCILS lawyer of the day program remains in effect at this time. The Subcommittee Report found that the lawyer of the day program was problematic because counsel for a client's initial appearance would not necessarily serve the client throughout the case. MCILS is working to address this issue. The lawyer of the day program will be modified to permit the early assignment of permanent counsel where possible, including in as many instances as possible prior to the initial appearance.

To accomplish the goal of providing vertical representation, MCILS will need the assistance of the Courts to fully integrate each respective case management system. This would permit MCILS to become aware of cases in need of assignment earlier, and in a form that would permit matching with eligible counsel.

8. There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.

The ABA Comment to Principle 8 states that:

> There should be parity of workload, salaries, and other resources (such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts) between prosecution and public defense. Assigned counsel should be paid a reasonable fee in addition to actual overhead and expenses. Contracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should specify performance requirements and the anticipated workload, provide an overflow or funding mechanism for excess, unusual, or complex cases, and separately fund expert, investigative, and other litigation support services. No part of the justice system should be expanded, or the workload increased without consideration of the impact that expansion will have on the balance and on the other components of the justice system. Public defense should participate as an equal partner in improving the justice system. This principle assumes that the prosecutor is adequately funded and supported in all respects, so that securing parity will mean that defense counsel is able to provide quality legal representation.

In 2020 the Subcommittee Report noted that there is no parity between assigned counsel and the state, nor was the defense function an equal partner in the system. The Subcommittee wrote that, "In short, the Commission is at present not representative of an essential third leg of the three-legged stool that is the criminal justice system."

In 2021 MCILS made strides toward accomplishing parity, but there is still a long way to go. Legislative support for MCILS and assigned counsel permitted a radical improvement in quality assurance and oversight but fell short of providing MCILS with the resources it and assigned counsel need to achieve genuine parity.

For example, the payment rate for assigned counsel was increased from $60 to $80 per hour this year. This increase alleviated some burden for counsel. It is universally appreciated. That increase, however, does not allow defense counsel to practice with the same resources as attorneys for state. MCILS is seeking data from assigned counsel to quantify the expenses state-wide and expects to publish a report on that data in early 2022.

Even without that data, however, the gulf between the practice conditions of assigned counsel and their state-employed peers is stark. In 2020, the legislature gave MCILS permission to hire two paralegals to support its operations. Those paralegals would be paid $40,463, with fringe benefits costs of $38,500, for a total of $78,963 per position, excluding equipment costs. That is an effective hourly cost of $39 per hour, of effectively half of the $80 gross payment assigned counsel receive per hour. At that rate MCILS has been unable to attract appropriate candidates to its positions, and they remain unfilled, suggesting that those rates are low for the labor market. Even if assigned counsel could hire staff at that rate, however, only $41 per hour would remain for counsel to operate law firm, obtain benefits, and earn take-home pay. Defenders thus cannot hire staff but must litigate cases against District Attorney offices equipped with up to three support staff per attorney.

MCILS asked to hire employee-defenders in the last session. The junior defenders were intended to bring parity with assistant district attorneys. Those defenders would have been paid $70,720, with fringe costs of $49,907, totaling $120, 627 each – an effective only rate of $60 per hour.

In other words, defender parity requires an hourly rate of $100 per hour simply to make payroll. Rent, equipment, insurance, legal research software, books, communications, internet access, and other expenses would still not be accounted for at that rate.

MCILS should be funded to permit true parity between prosecution and defense offices. In addition, MCILS must increase the rate of pay for investigators to a rate that allows functional equivalence to law enforcement, on at least a per-case basis.

Eliminating the resource disparity between the defense and prosecution functions is only part of the solution, however. Unlike the prosecution, MCILS has not been treated a full partner in the justice system. That must change. MCILS should be designated by statute as the core of the defense function, and should be included at every level of dialogue, planning, and policy making. MCILS has appreciated the access the Court have provided, particularly at the leadership level, but that access must of right, and carry the same force as the prosecution.

This parity in the power structure is essential in any function defense system but is especially vital in Maine. Much is made of the fact that Maine is the only state that relies on private attorneys for all of it defense function. Much of the discussion around that fact carries a negative connotation. The reality, however, is that Maine is fortunate to have a legal culture in which private attorneys are willing to invest their time and energy in providing what is ultimately the State's obligation. MCILS attorneys are diligent, conscientious, believers in justice. They are, however, not adequately recognized and represented in government. MCILS must be funded and authorized to fulfill that function.

9. Defense counsel is provided with and required to attend continuing legal education.

MCILS has historically been inconsistent in the training opportunities it can afford counsel. In 2021, MCILS was granted authority to hire two attorney staff members to begin a true oversight and training function. Those staff members joined MCILS at the end of October, and have since then been presenting legal education programs, and identifying outside programs for counsel. In 2022, MCILS expects to obtain access to an outside library of national level programming, and to integrate that material into its systems.

10. Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.

The Subcommittee Report noted that in 2020 MCILS was unable to provide meaningful supervision and systematic review of the services performed by MCILS assigned counsel. In 2021, MCILS added the two staff position noted above. Those staff members have made significant progress toward ensuring that counsel meet eligibility standards to support quality representation. It has not yet been possible to develop a systematic process, however. MCILS anticipates developing that process in 2022.

Implementation of that process will require additional resources, however. It will not be possible for the central office staff to perform a meaningful number of field evaluation, or to provide direct support to attorneys.

National standards require one supervising attorney for every ten attorneys practicing with a full caseload. As of January 7, 2022, MCILS had approximately 300 attorneys representing indigent clients (of which approximately 280 were actively seeking additional case). Compliance with a constitutionally sound supervision structure will require the addition of many field training and supervision staff. MCILS should be authorized and funded to employ that staff.

In addition, MCILS must have better access to information other participants in the process may hold regarding attorney performance. To ensure quality, MCILS must receive information from prosecutors, clerks, and judges when MCILS assigned counsel do not perform adequately.

EXHIBIT 6

TO: COMMISSION

FROM: JUSTIN ANDRUS, EXECUTIVE DIRECTOR

SUBJECT: ABA TEN PRINCIPLES

DATE: 1/7/2021

CC:

Assessment of MCILS adherence to the American Bar Association's Ten Principles of a Public Defense Delivery

In assessing its own performance, MCILS turns to the American Bar Association's Ten Principles of a Public Defense Delivery system for guidance. The Sixth Amendment Center's April 2019 report on The Right to Counsel in Maine, providing useful insight into the then-current state of indigent defense in Maine, casts much of its comment in the light of those principles. In February 2020 the MCILS Subcommittee on Public Defender Program promulgated its memorandum reporting its findings (the "Subcommittee Report"). That report was also framed by the ABA principles. MCILS continues to use the principles to frame this discussion:

1. **The public defense function, including the selection, funding, and payment of defense counsel, is independent.**

MCILS fails substantially with respect to this principle. The ABA comment to Principle 1 states in part that the public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel.

The Subcommittee Report recognized that the through the creation of MCILS, independence from direct judicial control of indigent defense through the judicial budget was accomplished but noted that there were outstanding issue impacting independence. In particular, the Subcommittee noted that the judiciary still controlled the assignment of lawyers; and, that MCILS spent what the report characterized as, "an inordinate amount of time" diverting its collective attention to funding.

These issues remain outstanding. MCILS has made some progress on the issue of independence in the assignment of counsel by implementing a process permitting internal assignments in appropriate cases. That internal process is effective in those cases to which

it is applied but is only applied infrequently because most cases in which assignment is appropriate remain subject to judicial selection of counsel.

MCILS should transition to a properly funded and supported model in which potential consumers of indigent legal services are advised of the opportunity to apply for assigned counsel, and then screened for eligibility by an external screening process. Matters in which a consumer has been deemed eligible for assigned counsel should then be communicated from the Court's electronic case management system directly to the MCILS electronic case management system. MCILS would then assign the case. This would be consistent with the comment to Principle 2, that, "[t]he appointment process should never be *ad hoc*, but should be according to a coordinated plan directed by a full-time administrator who is also an attorney familiar with the varied requirements of practice in the jurisdiction." This change in process would be agnostic as to whether fulfillment of the assignment was performed by contracted or employed attorneys.

The issue of funding remains as well. MCILS appreciates the support of the Legislature last session, and the ongoing interest of many legislators. Still, MCILS staff spends a lot of time working to foster support. More problematic, MCILS must make operational decisions that impact the quality and availability of client services based on present and anticipated political environments.

To solve these issues, MCILS funding should be statutorily defined based on a state-wide per-capita funding level consistent with an adequate defense function and revised based on changes to the state-wide cost of business. MCILS should maintain a non-lapsing account with trust-like rules to address fluctuations in costs. The account could be initially funded with a small fraction of the current surplus. Operational savings would be deposited to the account, and unusual operating costs could be debited from the account.

2. **Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.**

The State of Maine fails with respect to this principle as Maine remains the only state in the United States without a defender office within its public defense delivery system. There can be no genuine dispute that Cumberland, Kennebec and Penobscot Counties do have a sufficiently high caseload to justify the implementation of a public defender program in one or all of those counties. The availability of counsel to provide services to consumers of indigent legal services has been a recurrent theme for MCILS in both its internal and external communications this year. The number of attorneys eligible and willing to receive assignments has fluctuated, reaching a low over the summer and rebounding this fall and early winter. The MCILS bar has worked diligently to serve indigent clients. Every case has been staffed successfully.

Still, there have been times identifying counsel who are both eligible and willing has required a search, and others when local counsel have been unavailable and thus distant counsel has been assigned. MCILS would be best able to provide efficient, high-quality

representation to consumers if it had the ability to allocate cases between both the existing private bar and employee attorneys.

Through its initiatives request in late 2020, and through testimony to legislatives committees in early 2021, MCILS asked that it be funded for "pilot" defender programs. These programs might be better characterized as "start-up" programs. They are intended to be permanent, rather than experimental in nature. MCILS should be permitted to pursue these programs.

The availability of both private and employed counsel should permit MCILS operational flexibility in staffing cases. The option of becoming employed counsel should promote retention in the defense bar by making the benefits of State employment available to those defense counsel who elect to that employment (See Principle 8), while also promoting retention of skilled and experience counsel who prefer to remain independent.

While under the MCILS initiative the first defender office would be in Augusta, that office should have the option of hiring, training, and supervising a set of defenders available to travel to staff cases if necessary.

3. **Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel.**

The Subcommittee Report commented that MCILS failed with respect to this principle, in part, because of the delay in assignments through judicial action. The Subcommittee's assessment remains accurate today. A recommendation for addressing that issue is set out above. There is an additional issue, however, in that there are often long delays between when a consumer is arrested or charged, and the initial appearance.

MCILS should be resourced and authorized to oversee a process whereby consumers are advised early of the right to counsel, including by law enforcement, and referred to a centralized MCILS attorney. That attorney should be able to provide baseline legal information and, where possible, to facilitate the early assignment of counsel.

4. **Defense counsel is provided sufficient time and a confidential space within which to meet with the client.**

The comment to Principle 4 states that:

> Counsel should interview the client as soon as practicable before the preliminary examination or the trial date. Counsel should have confidential access to the client for the full exchange of legal, procedural, and factual information between counsel and client. To ensure confidential communications, private meeting space should be available in jails, prisons, courthouses, and other places where defendants must confer with counsel.

The Subcommittee Report noted that MCILS did not provide sufficient oversight to ensure that this principle was met, and noted concern with attorney communications in courthouses, particularly for lawyers of the day.

At the present time, MCILS continues to fail with respect to Principle 4, but LR #2256 is currently pending before the legislature to remedy the deficiency, at least in part Proposed 15 MRSA §458(1) provides a person summonsed, arrested, charged, or indicted the opportunity for confidential communications with counsel in preparation for and during appearances, in a manner that cannot be overheard of monitored by another person. MCILS supports LR #2256. Passage would ameliorate the conditions that contribute to issues of confidentialityin jails and courthouses.

MCILS still needs further support for its supervision mission to be able to ensure that assigned counsel can provide both time and confidential space for client communications outside of the jails and courthouses.

5. Defense counsel's workload is controlled to permit the rendering of quality representation.

At the time of the Subcommittee Report, the MCILS case and workloads were uncontrolled. The Subcommittee noted that MCILS could not control work that assigned counsel might perform outside of the MCILS program. While MCILS remains unable to control assigned counsel's workload, MCILS is actively working on remedying that deficiency.

Since the Report was issued, MCILS has implemented program changes to permit attorneys to control their individual caseloads. MCILS has shifted from the historical monthly roster concept to a near real-time system in which attorney eligibility and availability update daily. Under this system, counsel are able to indicate to the Courts that they should not be assigned cases during periods in which counsel are either unable or unwilling to accept new work.

MCILS is in the process of updating or replacing its case management system. With the new system, and appropriate instructions and requirements around its use, MCILS will be able to determine on a timely and ongoing basis whether an attorney has the bandwidth to accept additional assigned cases. As part of that process, MCILS should promulgate rules that required attorneys with practices divided between indigent legal services and private practice to specify the proportion of each type of work. The MCILS caseload standards should then be adjusted proportionately to ensure that counsel workloads are appropriate.

The ability of MCILS to manage meet this principle is dependent on a functional, real-time interface with the Court's electronic case management system.

6. **Defense counsel's ability, training, and experience match the complexity of the case.**

The ABA comment to Principle 6 holds that, "Counsel should never be assigned a case that counsel lacks the experience or training to handle competently, and counsel is obligated to refuse appointment if unable to provide ethical, high quality representation." The Subcommittee Report held that MCILS was not upholding Principle 6 in 2020. The same remains true today.

Today, MCILS is ensuring that lawyers considered "qualified" under MCILS rules are assigned to cases for which they are rostered and deemed qualified. But, what remains true at the current time is that the current MCILS rules for attorney qualification for appointments establishes a low barrier to entry. As the 6th Amendment found in its report:

> Under MCILS' qualification requirements, an attorney who graduated from law school two years ago and hung out their shingle in a private practice, with no supervision or training, can have two jury trials and two judge trials and then be appointed to represent indigent defendants in every type of criminal case other than a homicide or sex offense. More worrisome is that indigent defendants charged with Class E crimes, carrying up to six months in jail, can be represented by an attorney who just received their bar card and completed a single training course in criminal law, as long as the lawyer has an email address, telephone number, and a confidential space to meet with clients.

(6th Amendment Center report on The Right to Counsel in Maine, at page IV of the Executive Summary). In short, MCILS still does not ensure that every assigned lawyer has the necessary ability, training and experience necessary to handle the case assigned to them as MCILS still permits lawyers just out of law school with a one day Commission-sponsored or Commission-Approved training course to represent a person, who, by definition, faces jail, involuntary confinement in a hospital, or the loss of custody of a child.

During the 2021 session, the legislature granted MCILS the authority to implement revised standards for attorney qualification. MCILS expects to exercise that authority through an updated ruleset in 2022.

In the meantime, MCILS continues to operate under the legislatively approved set of attorney qualifications. The MCILS case management system prevents automatic approval of any instance in which counsel has not been designated eligible for provide service. MCILS staff then follow up with counsel to determine whether an actual eligibility conflict exists, and to resolve that conflict in a manner that ensures each client receives eligible counsel.

7. **The same attorney continuously represents the client until completion of the case.**

The Sixth Amendment Center report recommended that MCILS improve the quality of service to its consumers by requiring that except for ministerial, non-substantive tasks, the same properly qualified defense counsel continuously represent the client in each case, from appointment through disposition, and personally appear at every court appearance throughout the pendency of an assigned case.

MCILS promulgated a policy in 2021 to ensure vertical representation, while providing a mechanism for obtaining informed client consent for the delegation of non-substantive appearances in appropriate instances. The policy requires that eligible, properly assigned counsel represent each client at substantive appearances. This policy implements the recommendation of the Sixth Amendment Center and approximates adherence to the ABA Principle.

The MCILS lawyer of the day program remains in effect at this time. The Subcommittee Report found that the lawyer of the day program was problematic because counsel for a client's initial appearance would not necessarily serve the client throughout the case. MCILS is working to address this issue. The lawyer of the day program will be modified to permit the early assignment of permanent counsel where possible, including in as many instances as possible prior to the initialappearance.

To accomplish the goal of providing vertical representation, MCILS will need the assistance of the Courts to fully integrate each respective case management system. This would permit MCILS to become aware of cases in need of assignment earlier, and in a form that would permit matching with eligible counsel.

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In 2021 MCILS made strides toward accomplishing parity, but there is still a long way to go. Legislative support for MCILS and assigned counsel permitted a radical improvement in quality assurance and oversight but fell short of providing MCILS with the resources it and assigned counsel need to achieve genuine parity.

For example, the payment rate for assigned counsel was increased from $60 to $80 per hour this year. This increase alleviated some burden for counsel. It is universally appreciated. That increase, however, does not allow defense counsel to practice with the same resources as attorneys for state. MCILS is seeking data from assigned counsel to quantify the expenses state- wide and expects to publish a report on that data in early 2022.

Even without that data, however, the gulf between the practice conditions of assigned counsel and their state-employed peers is stark. In 2020, the legislature gave MCILS permission to hire two paralegals to support its operations. Those paralegals would be paid $40,463, with fringe benefits costs of $38,500, for a total of $78,963 per position, excluding equipment costs. That is an effective hourly cost of $39 per hour, of effectively half of the $80 gross payment assigned counsel receive per hour. At that rate MCILS has been unable to attract appropriate candidates to its positions, and they remain unfilled, suggesting that those rates are low for the labor market. Even if assigned counsel could hire staff at that rate, however, only $41 per hour would remain for counsel to operate law firm, obtain benefits, and earn take-home pay. Defenders thus cannot hire staff but must litigate cases against District Attorney offices equipped with up to three support staff per attorney.

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$70,720, with fringe costs of $49,907, totaling $120, 627 each – an effective only rate of $60 perhour.

In other words, defender parity requires an hourly rate of $100 per hour simply to make payroll. Rent, equipment, insurance, legal research software, books, communications, internet access, and other expenses would still not be accounted for at that rate.

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This parity in the power structure is essential in any function defense system but is especially vital in Maine. Much is made of the fact that Maine is the only state that relies on private attorneys for all of it defense function. Much of the discussion around that fact carries a negative connotation. The reality, however, is that Maine is fortunate to have a legal culture in which private attorneys are willing to invest their time and energy in providing what is ultimately the State's obligation. MCILS attorneys are diligent, conscientious, believers in justice. They are, however, not adequately recognized and represented in government. MCILS must be funded and authorizedto fulfill that function.

9. Defense counsel is provided with and required to attend continuing legaleducation.

MCILS has historically been inconsistent in the training opportunities it can afford counsel. In 2021, MCILS was granted authority to hire two attorney staff members to begin a true oversight and training function. Those staff members joined MCILS at the end of October, and have since then been presenting legal education programs, and identifying outside programs for counsel. In 2022, MCILS expects to obtain access to an outside library of national level programming, and to integrate that material into its systems. It remains true, however, that MCILS will most likely never be able to require attendance and adherence to a comprehensive multi-week orientation and training and ongoing training and mentorship to assigned counsel as it would be able to provide to employed public defenders.

10. Defense counsel is supervised and systematically reviewed for quality andefficiency according to nationally and locally adopted standards.

The Subcommittee Report noted that in 2020 MCILS was unable to provide meaningful supervision and systematic review of the services performed by MCILS assigned counsel. In 2021, MCILS added the two staff position noted above. Those staff members have made significant progress toward ensuring that counsel meet eligibility standards to support quality representation. It has not yet been possible to develop a systematic process, however. MCILS continues to fail with respect to Principle 10, but MCILS anticipates working to remedying the deficiency in 2022.

Implementation of that process will require additional resources, however. It will not be possible for the central office staff to perform a meaningful number of field evaluation, or to provide direct support to attorneys.

National standards require one supervising attorney for every ten attorneys practicing with a full caseload. As of January 7, 2022, MCILS had approximately 300 attorneys representing indigent clients (of which approximately 280 were actively seeking additional case). Compliance with a constitutionally sound supervision structure will require the addition of many field training and supervision staff. MCILS should be authorized and funded to employ that staff.

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EXHIBIT 7

Subject: FW: Additional document for Commission Meeting
Date: Monday, January 10, 2022 at 8:05:16 AM Eastern Standard Time
From: Maciag, Eleanor
To: MCILS
Attachments: 10 principles with revisions by RWS.docx, 6th Amendment Center May 2015 report on Actual Denial of Counsel in Misdemeanor Courts.pdf

EXTERNAL MESSAGE:
Good morning,

Please see additional materials below for today's MCILS Commission meeting.

Ellie

From: Andrus, Justin <Justin.Andrus@maine.gov>
Sent: Monday, January 10, 2022 7:59 AM
To: Maciag, Eleanor <Eleanor.Maciag@maine.gov>
Subject: FW: Additional document for Commission Meeting

From: Ron Schneider <rschneider@bernsteinshur.com>
Sent: Monday, January 10, 2022 7:03 AM
To: Andrus, Justin <Justin.Andrus@maine.gov>
Subject: re: Additional document for Commission Meeting

EXTERNAL: This email originated from outside of the State of Maine Mail System. Do not click links or open attachments unless you recognize the sender and know the content is safe.
Good morning Justin,

I am sorry for the last minute email but I feel that it is probably important to put my thoughts about your memo and the issues it addresses in a redline version. I appreciate your memo and truly appreciate the steps you have taken and is taking to improve the broken system that you inherited. It is with regret that I feel it is necessary to redline your memo in some places because I do not intend my comments to be taken as a criticism of your or your burgeoning team's excellent work.

When I worked on the Subcommittee memo, I felt it was —- and still feel that it is — very important to say whether we were not living up to particular principles. The memo lacks such a statement for each principle. I contend that we are failing to satisfy at least 7or 8 of the 10 principles. You and your team are working hard on them, but if we are going to present an honest assessment of where we are now, I think we have to admit and declare to those in government who receive the message that right now we still are not living up to the principles.

Talking about this issue remains a dicey proposition because any criticism of the "system" is portrayed as criticism of the lawyers within the system. Similarly, any criticism of any lawyers in the system is characterized as criticism of all lawyers in the system. It is simply not accurate to suggest that a criticism of our system or some of the lawyers in it is an indictment of every lawyer in the system. It should rather be accepted as a call to action to better the system and better support those who excel despite it. (When Rob Ruffner said that our system cannot take credit for the good work done by lawyers, he was right.)

We do not want to admit that there are lawyers receiving assignments who should not be receiving them or are not really ready to receive them, even though full-time defense lawyers and judges could name them. In Maine, it remains true that a poor person can be assigned one of the best Maine has to offer and also a seriously substandard lawyer, and we still do not do what we must to ensure that the poor person does not fall victim to the latter. The 6AC report was accurate when it declared that we have a low barrier to entry. Our basic eligibility requirements remain too low.

We are doing better than before MCILS was created. As early as 1974, it was recognized that Maine's standards for criminal justice did not comply with those of the American Bar Association and the National Advisory Commission on Criminal Justice. Before 2010, Maine had no application process for attorneys, no eligibility requirements for lawyers seeking appointment, no training for new court-appointed lawyers, no performance standards, no mandatory vehicle for defense-specific continuing legal education, no administrator to ensure professional independence, and no other checks on attorneys that the State appointed to represent the poor. But, we are not doing enough. Being qualified by MCILS does not mean that a lawyer is truly competent to provide the high quality representation that we are charged with ensuring.

With respect to the discussion we will have today, I do think it is important to commit to writing a clarification about the 2015 6AC report that has been mentioned in our meetings. That report is attached. The report listed Maine's system as one of 15 states that was "most likely" not *actively*, actually denying counsel in misdemeanor courts, and only that. The report does not list Maine as one of 15 states viewed as among the best organized systems for misdemeanor defendants.

On page 10, the report provides, "Table II (next page) indicates the likelihood of which statewide systems experience denial of counsel issues in misdemeanor cases. The first column shows those states with statewide indigent defense systems and where local courts (if existent) are not allowed to prosecute misdemeanor cases carrying jail time. These 15 states are the states that most likely do not have regularized actual denial of counsel issues in its lower courts….. To be clear, inclusion on either of the first two columns does not mean that actual denial of counsel never happens in these jurisdictions – just that it is not likely to happen. Also, ***the first two columns in no way suggest that there are not issues with constructive denial of counsel issues in these jurisdictions, associated with excessive caseloads, undue judicial interference, and financial conflicts of interests, among others***."

The 2015 report was a result of a Congressional inquiry about the problem of actual denial of counsel across the country. When the report was submitted to Congress, the 6AC had not studied Maine specifically. The 6AC intentionally used "most likely" or "most likely does not" because they had not studied all states in depth.

When the 6AC did study Maine at the request of the Maine Legislature, they did find that actual and constructive denial of counsel occurred frequently throughout Maine. The 6AC spent considerable time at tax-payers' expense and made conclusive findings that the system is structurally deficient. We cannot ignore the 6AC Report and Recommendations.

I have tremendous respect for lawyers who dedicate their considerable talents to represent the poor against the State, and I have tremendous respect for how difficult the work is. I believe we all share in that respect. But, our respect for them cannot go so far as to cause us to ignore the deficiencies in the "system" within which they work or of some of the other lawyers with whom they work.

Regards,

Ron

Ron Schneider
Shareholder
207 228-7267 direct
207 774-1200 main
207 774-1127 fax
My Bio | LinkedIn | Twitter

BERNSTEINSHUR
Portland, ME | Manchester, NH | Augusta, ME | bernsteinshur.com

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From: Andrus, Justin <Justin.Andrus@maine.gov>
Sent: Friday, January 7, 2022 8:27 PM
To: MCILS <MCILS@maine.gov>
Cc: Hudson, Megan <Megan.Hudson@maine.gov>; Meegan J. Burbank <meegan@berryandburbank.com>; mmorgan <mmorgan@mckeelawmaine.com>; 'Roger Katz' <rkatz@lkblawmaine.com>; Josh Tardy (jtardy@rudmanwinchell.com) <jtardy@rudmanwinchell.com>; Michael Carey <MCarey@brannlaw.com>; Robert P. Cummins <rcummins@nhdlaw.com>; Ron Schneider <rschneider@bernsteinshur.com>; Nash, Lynne <Lynne.Nash@maine.gov>; Guillory, Christopher <Christopher.Guillory@maine.gov>; Fisher, Darcy <Darcy.Fisher@maine.gov>; Brochu, Stephen <Stephen.Brochu@maine.gov>; Washer, Arthur <Arthur.Washer@maine.gov>
Subject: Additional document for Commission Meeting

EXTERNAL EMAIL

Attached is one additional document for the Commission Meeting on Monday.

___
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STATE OF MAINE
KENNEBEC, ss.

SUPERIOR COURT
Docket No. KENSC-CV-22-54

ANDREW ROBBINS, et al.,

Plaintiffs,

v.

MAINE COMMISSION ON INDIGENT LEGAL SERVICES, et al.,

Defendants.

REQUEST FOR TRIAL PROTECTION

REQUEST FOR TRIAL PROTECTION

Plaintiffs request that the Court not schedule the Phase 1 trial in this matter for the last week in June or the first week in July (June 24 - July 5, 2024). Defendants do not object to this request for protection. A key member of Plaintiffs' litigation team, as well as a key expert witness for Plaintiffs, will both be out of the country during those weeks, and their presence is necessary for the successful litigation of this matter. In its February 27, 2024 Combined Order, the Court set the Phase 1 trial for the last week of June and held that adjustments to the trial schedule would be considered "so long as they do not result in a delay of the trial of Phase 1." In accord with that directive, Plaintiffs propose that the trial be rescheduled for the third week in June, a week earlier than the current date set by the Court, which will not result in any delay of the Phase 1 trial.

March 8, 2024

Respectfully submitted.

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