EXHIBIT 1

STATE OF MAINE
KENNEBEC, SS.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO.

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

Plaintiffs,

v.

MAINE COMMISSION ON INDIGENT LEGAL SERVICES; JUSTIN ANDRUS, 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; and DONALD ALEXANDER, MEEGAN BURBANK, MICHAEL CAREY, ROBERT CUMMINS, ROGER KATZ, MATTHEW MORGAN, and RONALD SCHNEIDER, in their official capacities as Commissioners of the Maine Commission on Indigent Legal Services,

Defendants.

CLASS ACTION COMPLAINT FOR INJUNCTIVE AND DECLARATORY 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 appointment of an attorney for trial. The government must provide *effective* counsel to indigent defendants under circumstances that allow for competent and meaningful representation. *See United States v. Cronic*, 466 U.S. 648, 659–60 (1984). Moreover, the right to assistance of counsel attaches well before trial begins, because "certain pretrial events may so prejudice the outcome of the defendant's prosecution that, as a practical matter, the defendant must be represented at those events in order to enjoy genuinely effective assistance at trial." *Rothgery v. Gillespie Cty.*, 554 U.S. 191, 217 (2008) (Alito, J., concurring).

3. This lawsuit challenges the failure of the Maine Commission on Indigent Legal Services ("MCILS" or "the Commission") to adequately supervise, administer, and fund an indigent defense system, in violation of state statute and the state and federal constitutions. While there are many skilled and committed defense attorneys in Maine, MCILS has failed in its constitutional and statutory obligation to supervise, administer, and fund a system that provides effective representation to indigent defendants throughout the entire criminal legal process.

4. Indigent defense is the responsibility of MCILS. By law, MCILS is responsible for "[d]evelop[ing] and maintain[ing] a system that uses appointed private attorneys ... to provide quality and efficient indigent legal services." 4 M.R.S. § 1804(3)(A). Maine is unique in the country as the only state where appointed private attorneys provide *all* indigent defense.

5. To carry out its mandate, MCILS must, among other duties, "develop standards governing the delivery of indigent legal services," 4 M.R.S. § 1804(2); "[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); "[e]stablish rates of compensation for assigned counsel," *id.* § 1804(3)(F); and "[e]stablish a method for accurately tracking and monitoring case loads of assigned counsel and contract counsel," *id.* § 1803(G).

6. The statutory scheme likewise sets forth specific responsibilities for the Executive Director of the Commission. *See* 4 M.R.S. § 1805. In particular, the Executive Director must "[e]nsure that the provision of indigent legal services complies with all constitutional, statutory and ethical standards," *id.* § 1805(1); provide "regular" training, *id.* § 1805(5); and "[a]dminister and coordinate delivery of indigent legal services and supervise compliance with commission standards" *id.* § 1805(3).

7. MCILS and its Executive Director have failed to fulfill their statutory duties—resulting in a system that routinely and systematically denies indigent criminal defendants their constitutional right to representation. Specifically, MCILS and its Executive Director have not fulfilled their statutory obligations 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. These failings not only subvert the Legislature's command in sections 1804 and 1805, they also create an unconstitutional risk that indigent criminal defendants will be denied their right to counsel.

8. Furthermore, MCILS employs a "lawyer of the day" program to provide representation at the 48-hour hearing for in-custody defendants and at the initial appearance for out-of-custody defendants. At these hearings, defendants are required to enter an initial plea. In-custody defendants are also given the opportunity to advocate for release from custody, including the granting of bail and the nature and extent of any conditions of release. There is nothing *per se* unconstitutional about a lawyer-of-the-day program, but as implemented by MCILS the 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 violates the Sixth Amendment because it does not come close to providing an adequate number of lawyers to even meet with—let alone provide competent representation to—defendants in need of counsel concerning the implications of potential pleas or advocacy on bail and conditions of release.

9. The system for providing indigent legal defense in Maine is broken. Dozens of attorneys have stopped accepting cases from the MCILS roster, and the crisis is set to worsen with the anticipated spike in trials as courts begin the process of working through the enormous backlog of cases the pandemic has created. 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.

10. Plaintiffs are five indigent defendants currently being represented in criminal proceedings by appointed counsel. They sue on their own behalf, and on behalf of all similarly situated individuals, to vindicate indigent defendants' 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 MCILS system create an unconstitutional risk that indigent criminal defendants will be denied the benefit of effective assistance of counsel at critical stages of their cases in violation of the Sixth Amendment of the United States Constitution and Article I, § 6 of the Maine Constitution. Plaintiffs also seek a judgment that the Commission's specific failure to promulgate statutorily required standards violates the Maine Administrative Procedure Act, 5 M.R.S. § 11001, and Article I, § 6 of the Maine Constitution. Plaintiffs respectfully request appropriate declaratory and injunctive relief.

THE PARTIES

11. Plaintiff Andrew Robbins is a Maine resident who is currently incarcerated at Cumberland County Jail awaiting trial following an arrest in the summer of 2021 on weapons charges. He was initially released on bail, but he has been in custody since 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. Since that point, Mr. Robbins has met his attorney only once, in the summer of 2021 while he was released, for an approximately 30-second conversation at his door. Mr. Robbins has never had a follow-up visit from his lawyer, nor has 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 his attorney 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 has refused to ask for a bail hearing following his October 30, 2021, arrest.

12. Plaintiff Brandy Grover is a Maine resident currently incarcerated in Somerset County Jail awaiting sentencing following a July 9, 2021, arrest 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. Ms. Grover has otherwise been unable to get in touch with her lawyer, who does not take her calls or the calls of family members, leaving Ms. Grover to resort to writing letters; however, she has also not yet received any responses, either by phone or by letter, to her letters. Ms. Grover eventually pled to Class B trafficking and awaits sentencing, but she is concerned that her attorney will not adequately advocate on her behalf at her sentencing. Her attorney has never advanced any mitigating circumstances, such as Ms. Grover's family status or her disability.

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 spoke with the court, but not with Mr. Mack, and Mr. Mack was not able to participate in the proceedings. Since that point, Mr. Mack has had only minimal contact with his attorney.

Although Mr. Mack is currently set to go to trial in March, his attorney has never taken the time to go through his discovery with him or discuss the trial in any detail.

14. Plaintiff Malcolm Peirce is a Maine resident who is currently incarcerated at the Piscataquis County Jail awaiting trial following his December 12, 2019, arrest on 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 current state-appointed attorney. Their last phone call left Mr. Peirce with the impression that his attorney did not want Mr. Peirce to contact him, and Mr. Peirce has not heard from his attorney since. Mr. Peirce's attorney has likewise not responded to a request to provide copies of discovery, and Mr. Peirce believes his attorney has not reviewed his discovery.

15. Plaintiff Lanh Danh Huynh is a Maine resident who is currently incarcerated at Cumberland County Jail awaiting trial following a June 1, 2021, arrest 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. Despite having been charged over eight months ago, he has had minimal contact with his state-appointed attorney. He has yet to see or review any of the discovery materials in his case and has had significant difficulty contacting his attorney, who does 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 has 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 has otherwise had no engagement with his case; he has not filed any motions on his behalf, including any motions for Mr. Huynh to be released on bail, and Mr.

Huynh does not know when his next court date is. His family has been attempting to put together enough money for him to hire a lawyer in an effort to find someone who would take a more active role in his case.

16. 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.

17. Defendant Justin Andrus 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).

18. Defendant Joshua Tardy is a MCILS Commissioner and Chair of the Commission.

19. Defendant Donald Alexander is a MCILS Commissioner.

20. Defendant Meegan Burbank is a MCILS Commissioner.

21. Defendant Michael Carey is a MCILS Commissioner.

22. Defendant Robert Cummins is a MCILS Commissioner.

23. Defendant Roger Katz is a MCILS Commissioner.

24. Defendant Matthew Morgan is a MCILS Commissioner

25. Defendant Ronald Schneider is a MCILS Commissioner.

JURISDICTION AND VENUE

26. 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).

27. This Court has personal jurisdiction over the defendants pursuant to 14 M.R.S. § 704-A(2).

28. Venue is proper in Kennebec County pursuant to 14 M.R.S. § 501.

BACKGROUND

I. The Right to Counsel.

29. 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.

30. In the landmark decision *Gideon v. Wainwright*, 372 U.S. 355, 345–46 (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").[1]

31. 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

[1] The Maine Constitution affords a right to counsel that is coextensive with the federal Sixth Amendment. *State v. Watson*, 2006 ME 80, ¶ 14, 900 A.2d 702. As with the federal Constitution, "the constitutional right imposes an affirmative obligation on the State to provide court-appointed counsel if the defendant faces incarceration." *Id.*

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).

32. 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.

33. 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).

34. 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").[2] These standards are:

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

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.

[2] *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).

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 the MCILS.

35. State law provides:

> Before arraignment, competent defense counsel shall be assigned by the Superior or District Court, unless waived by the accused after being fully advised of his rights by the court, in all criminal cases charging a felony, when it appears to the court that the accused has not sufficient means to employ counsel. The Superior or District Court may in any criminal case appoint counsel when it appears to the court that the accused has not sufficient means to employ counsel. The District Court shall order reasonable

> compensation to be paid to counsel by the District Court for such services in the District Court. The Superior Court shall order reasonable compensation to be paid to counsel out of the state appropriation for such services in the Superior Court.

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). The rule specifies that a defendant has a right to be represented by counsel at every stage of the proceeding "unless 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).

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

37. 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 ("the Clifford Commission Report")[3] 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."

38. 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

[3] 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).

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.*

39. As described in detail below, *see infra*, ¶¶ 46–71, MCILS has failed to fulfill these duties, leaving Maine with a system that creates an unconstitutional risk that defendants will be denied effective assistance of counsel in their criminal proceedings.

40. 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) ("*Sixth Amendment Center Report*"), excerpts of which are attached hereto as Exhibit 1.[4] 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.

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

[4] *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).

42. 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.[5] 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 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.

43. MCILS's Executive Director subsequently wrote a series of three memoranda in December 2021 and January 2022[6] 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).

44. 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.

[5] 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).

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

45. While these documents reveal extensive failings in multiple areas of MCILS's operations, two particular failures stand out with respect to this litigation: MCILS's failure to fulfill its statutory obligations, and its implementation of the "lawyer of the day" system.

(1) Failure to Fulfill Statutory Obligations

46. 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.

(a) Development of Standards

47. 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;
>
> B. Standards prescribing minimum experience, training and other qualifications for contract counsel and assigned counsel;
>
> C. Standards for assigned counsel and contract counsel case loads;
>
> 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;
>
> 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 and contract counsel; and
>
> G. Other standards considered necessary and appropriate to ensure the delivery of adequate indigent legal services.

4 M.R.S. § 1804(2).

48. 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).

49. 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.

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

51. 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.

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

53. 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).

54. MCILS itself has affirmed the accuracy of OPEGA's findings on statutory noncompliance. A December 28, 2021, MCILS memorandum on statutory compliance acknowledges that the "Commission has not yet promulgated case load standards," noting only that "Commission staff anticipates that case load standards will be part of the updated performance standards under development," while "[c]ase load tracking and management" will be "part of the system design for the next case management system." Ex. 3, at 102. Similar comments are made about evaluation standards and conflicts of interest. *Id.* at 102–103.

55. Moreover, this failure makes it impossible for MCILS to fulfill its overarching 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. Without a standard for the number of cases an attorney should be handling, MCILS has no way of "ensur[ing] the delivery of indigent legal services ... in a manner that is fair and consistent throughout the State." *Id.* Likewise, 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. *Id.*

(b) Attorney Qualification, Training, and Compensation

56. 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.

57. 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).

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

59. 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).

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

61. 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).

62. 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*, ¶ 50.

63. 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.

64. 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."[7]

65. 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

[7] 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.

cooperate with this program, nor does it have any sort of planning for helping resource counsel attorneys identify performance problems or training needs.

66. Compounding these failings, MCILS has failed to ensure that attorneys are compensated in a manner commensurate with "quality and efficient indigent legal services." 4 M.R.S. § 1804(3)(A), (F). As MCILS itself acknowledges, its current rate of $80 per hour is inadequate, particularly because it does not incorporate overhead and administrative costs, such as the costs of support staff. *See, e.g.*, *Jewell v. Maynard*, 181 W. Va. 571, 578–579 (1989) (recognizing that states must account for overhead costs and expenses when evaluating adequate compensation for appointed attorneys). MCILS has conceded that the current rate "does not allow defense counsel to practice with the same resources as attorneys for [the] state," and that "the gulf between the practice conditions of assigned counsel and their state-employed peers is stark." Ex. 5 at 6. Such "[i]nadequate compensation 'leads to a decrease in the overall number of attorneys willing to accept court appointments' and can 'encourage some attorneys to accept more clients than they can effectively represent in order to make ends meet.'" Ex. 1 at 77. In MCILS's own words, "there is no parity between assigned counsel and the state, nor [is] the defense function an equal partner" in the criminal justice system. Ex. 5 at 6.

(c) Monitoring The Indigent Defense System

67. 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 and monitoring caseloads of assigned counsel and contract counsel." 4 M.R.S. § 1804(3)(G).

68. 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.

69. 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.*

70. 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.

71. 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.

(d) MCILS's Executive Director

72. 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).

73. As detailed above, *see supra*, ¶¶ 46–71, 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).

74. Moreover, given that the Commission has no way of tracking active MCILS cases, *see supra*, ¶¶ 68–69, 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).

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

* * *

76. In addition to violating the statute, MCILS's lax approach to its statutory obligations creates an unconstitutional risk that indigent defendants will be assigned an attorney who is ill-prepared and incapable of providing effective representation under the federal and state constitutions.

77. As discussed above, the constitutional right to counsel is not fulfilled by the mere appointment of counsel. *See supra*, ¶¶ 31–32; *Cronic*, 466 U.S. at 654. But the mere appointment of counsel is all that MCILS's system provides. Without any standards for evaluating caseloads, 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*, ¶¶ 58–63.

78. As a result, MCILS's failure is not just a statutory violation, but a constitutional violation as well.

79. 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.

80. 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 Plaintiffs, and those similarly situated, with 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).

(2) The Lawyer of the Day System

81. 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 and at the initial appearance.

82. 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.

83. First, it is critical that a defendant receive effective representation "at the earlier stages of a criminal case." *Kuren v. Luzerne Cty.*, 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.

84. 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).

85. 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.

86. 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,[8] 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.

87. 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).

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

89. Even for defendants who did 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.

90. 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

[8] 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.

91. 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

92. 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 correction facility (regardless of whether actually imposed) and who qualify for representation through Maine's indigent-defense system.

93. There are important questions of law and fact raised in this case that are common to the Class, including:

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

ii. Whether Defendants' 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;

iii. Whether Defendants' 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

iv. Whether Defendants failure to implement, administer, and oversee an adequate public-defense system results in a violation of the state and federal constitutions.

94. The claims of the Plaintiffs as Class representatives are typical of the claims of the Class as a whole. Like all of 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, § 6 of the Maine Constitution as a result of MCILS's ongoing failure to adequately supervise, administer, and fund indigent-defense services.

95. 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.

96. 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*, ¶¶ 46–71.

97. Without a limit on the number of cases each attorney should handle, attorneys can take on far more defendants than they are able to competently represent. Attorneys who do are then unable to communicate with defendants, promptly return their calls, review their discovery, and generally ensure that they can devote the level of attention needed for efficient representation—all problems experienced by Plaintiffs here. *See supra*, ¶¶ 11–15.

98. Similarly, 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.

99. 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.

100. Even where 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.

101. 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.

102. MCILS has failed to adequately 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.

103. 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.

104. 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 (42 U.S.C. § 1983)
Plaintiffs v. All Defendants

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

106. 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."

107. 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."

108. 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), and are not seeking (through this suit) release from prison. Rather, 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.*

109. Applying these principles, the State's indigent defense system violates the Sixth Amendment in two ways.

110. First, MCILS has 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 caseloads, 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. These violations unconstitutionally infringe or imminently threaten to infringe Plaintiffs' rights under the Sixth Amendment to the U.S. Constitution.

111. Second, MCILS's implementation of its lawyer-of-the-day program to provide representation at criminal defendants' 48-hour hearings and initial appearances 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.

112. 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 stage 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]

113. 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.

114. 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).

115. 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:
FAILURE TO PROMULGATE RULES (5 M.R.S. § 8058)
Plaintiffs v. MCILS and the Director

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

117. Under the Maine Administrative Procedure Act, "[a]ny person aggrieved by the failure or refusal of an agency to act shall be entitled to judicial review thereof in the Superior Court. The relief available in the Superior Court shall include an order requiring the agency to make a decision within a time certain." 5 M.R.S. § 11001.

118. Likewise, "[j]udicial review . . . of an agency's refusal or failure to adopt a rule where the adoption of a rule is required by law, may be had by any person who is aggrieved in an action for declaratory judgment in the Superior Court conducted pursuant to Title 14, section 5951, et seq." 5 M.R.S. § 8058(1); *see also id.* ("[I]n the event that the court finds that an agency has failed to adopt a rule as required by law, the court may issue such orders as are necessary and appropriate to remedy such failure.").

119. Here, MCILS has failed to adopt rules required by two separate sources of law.

120. First, MCILS is statutorily mandated to promulgate standards governing the delivery of legal services—including standards for minimum qualifications of counsel, maximum caseloads, evaluation of counsel, and conflicts of interest. 4 M.R.S. § 1801(1); *see supra*, ¶¶ 47–52. Yet in the decade since its creation, the agency has not promulgated the required standards. *See supra*, ¶¶ 53–54.

121. The Commission's and Executive Director's failures to comply with these statutory directives violate the Maine Administrative Procedure Act.

122. Second, MCILS is constitutionally required under the federal and state constitutions to provide effective representation to indigent defendants. To fulfill this constitutional requirement, MCILS must adopt rules to ensure that the provision of representation complies with constitutional standards. MCILS has failed to do so here. *See supra*, ¶¶ 46–71.

123. The Commission's and Executive Director's failures to comply with these constitutional directives likewise violates the Maine Administrative Procedure Act.

124. These violations can be remedied through the Declaratory Judgments Act, 5 M.R.S. §§ 5951–5963.

125. There is an actual controversy between the parties over the agency's failure to promulgate these statutorily required standards.

126. Pursuant to section 8508, Plaintiffs seek a declaration that the MCILS has failed to adopt a rule where the adoption of a rule is required by law, and the entry of an appropriate order to remedy that failure.

* * * * *

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request the following relief:

I. A declaratory judgment that Defendants' have denied the guarantee of the assistance of counsel to Plaintiffs and those similarly situated through their failure to ensure adequate gatekeeping, supervision, and training of state-appointed counsel violates the Sixth Amendment to the United States Constitution;

II. 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;

III. A declaratory judgment holding that MCILS has failed to adhere to statutorily required rules for gatekeeping, supervision, and training of state-appointed counsel;

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;

VI. Injunctive relief requiring MCILS to ensure adequate representation of indigent defendants at their 48-hour hearings, consistent with the Sixth Amendment to the United States 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 1, 2022

Respectfully submitted.

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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]

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[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

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[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.,

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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

November

2020

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

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OPEGA is an independent staff unit overseen by the bipartisan joint legislative Government Oversight Committee (GOC). OPEGA's reviews are performed at the direction of the GOC. Independence, sufficient resources and the authorities granted to OPEGA and the GOC by the enacting statute are critical to OPEGA's ability to fully evaluate the efficiency and effectiveness of Maine government.

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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 and partially indigent clients.

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.

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 <u>total</u> 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:
    - large time entries being the aggregate time for several attorneys;
    - 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

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:

§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 implemcnt 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]

[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 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." This remains true today.

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 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.

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 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 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 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.

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 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

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.

___
Justin W. Andrus
Executive Director
Maine Commission on Indigent Legal Services
(207) 287-3254
Justin.andrus@maine.gov

EXHIBIT 2

STATE OF MAINE
KENNEBEC, ss

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

ANDREW ROBBINS, et al.,

Plaintiffs,

v.

MAINE COMMISSION ON INDIGENT LEGAL SERVICES, et al.

Defendants

ORDER ON MOTION FOR CLASS CERTIFICATION

Before the Court is Plaintiffs' Motion for Class Certification filed 3/1/22. Oral argument was held 6/22/22. Plaintiffs move for certification of this case as a class action, arguing under Rule 23 that they meet the requirements for class certification, and that their counsel should be appointed as class counsel as they are able to provide capable representation to the class. The proposed class consists of:

> [a]ll 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 in the State Prison and they lack sufficient means to retain counsel.

Legal Standard

> Pursuant to M.R. Civ. P. 23(a), a class may be certified if:
>
> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

M.R. Civ. P. 23(a). The State does not contest the Plaintiffs' claim of numerosity in subparagraph 1, nor does it contest their claim that the class will adequately represented as required by subparagraph 4.

In addition to satisfying the requirements of Rule 23(a) one of several additional requirements listed in M.R. Civ. P. 23(b) must also be met. One of those requirements, Rule 23(b)(2), states that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

Importantly, at the class certification stage, inquiry into the merits of a claim is limited to the Rule 23 criteria. *Campbell v. First Am. Title Ins. Co.*, 269 F.R.D. 68, 71 (D. Me. 2010).

Discussion

Plaintiffs define their proposed class as containing as many as 7,269 members, and likely contains at least 5,815 members.[1] They argue that the large number of individuals along with the everchanging composition of the class makes joinder impracticable. Plaintiffs also contend that the case depends on resolution of questions common to the proposed class members, including for example, whether MCILS has violated the Constitution in failing to provide adequate counsel to indigent defendants under Sixth Amendment standards. They argue that typicality is met because the named indigent Plaintiffs and every indigent member of the proposed class, who they claim receive inadequate representation, must receive these services through MCILS. Finally, Plaintiffs argue that the interests of the class will be fairly and adequately protected

[1] Plaintiffs acknowledge that some portion of the approximately 7,269 potential class members have hired their own attorneys but estimate that portion constitutes less than 20% of the pending felony cases in Maine. The second figure (5,815) represents Plaintiffs' highest estimation (7,269 potential class members) minus 20% of those potential class members who retain private counsel.

because the Plaintiffs have no conflicting interests and aim to vindicate their own rights as well as the rights of the other proposed class members, who are similarly situated.

For their part, Defendants begin by arguing that Plaintiffs' claim deserves extra scrutiny because it is a novel cause of action. They cite *In re New Motor Vehicles Canadian Export Antitrust Litigation* for the proposition that "when a Rule 23 requirement relies on a novel or complex theory as to injury, [the court] must engage in a searching inquiry into the viability of that theory and the existence of facts necessary for the theory to succeed." 522 F.3d 6, 26 (1st Cir. 2008). Maine courts have routinely ruled upon 42 U.S.C. § 1983 claims based on various Constitutional Amendments. *E.g. Creamer v. Sceviour*, 652 A.2d 110 (Me. 1995) (First Amendment); *Cayer v. Town of Madawaska*, 2016 ME 143, 148 A.3d 707 (First Amendment); *Struck v. Hackett*, 668 A.2d 411 (Me. 1995) (Fourth Amendment); *Richards v. Town of Eliot*, 2001 ME 132, 780 A.2d 281 (Fourth Amendment); *Miller v. Szeleni*, 546 A.2d 1013 (Me. 1988) (Fourteenth Amendment). Therefore, the fact that this claim is brought pursuant to the Sixth Amendment does not by itself make the claim novel. The Court declines to subject this claim, at this stage, to "extra scrutiny" as this is not the time for the Court to engage in a weighing of the merits of any claim made. Neither party has conducted discovery or had an opportunity to develop a factual record. The Court would finally note that the 2008 First Circuit case cited by Defendant bears no factual similarity to the constitutional claim raised here.

Defendants also directly challenge the commonality and typicality requirements of Rule 23(a) by arguing that Plaintiffs have not shown causation. They allege that the link between MCILS's alleged failures and actual injuries to the Plaintiffs have not been adequately established or described. The Court believes that the Defendants once again misconstrue the nature of Plaintiffs' remaining claim. The claim is that MCILS has failed to provide adequate

defense services causing an unconstitutional risk of deprivation of counsel - a claim that has been recognized in other jurisdictions, as the Court found in its June 2, 2022 Order on Defendants' Motion to dismiss. The Court concludes that Plaintiffs have sufficiently asserted facts on the issue of causation to satisfy the commonality and typicality requirements of Rule 23. *See Campbell*, 269 F.R.D. at 71.

Plaintiffs originally contended that their claim also satisfies Rule 23(b)(2) because they seek declaratory and injunctive relief to address Defendants' "failure to adopt rules and standards and to otherwise ensure that Plaintiffs and those similarly situated are given adequate assistance of counsel." Motion at 12. Defendants appropriately note that the Court has dismissed the Rule 80C claim brought by the Plaintiffs. They also argue that Plaintiffs' Motion fails to establish that injunctive relief is appropriate for the proposed class as a whole because the proposed class members differ in circumstance such that no determination of general applicability would be appropriate.

The Court concludes that Plaintiffs' claim satisfies Rule 23(b)(2). While the rule-making claim brought pursuant to the Maine Administrative Procedures Act is out of the case, the core of the Plaintiffs' case now is that MCILS has failed to carry out its constitutional obligations to the proposed class, creating an unconstitutional risk that all members of the proposed class will be denied effective assistance of counsel.[2] Plaintiffs adequately assert facts that the failures affect the class as a whole, and they seek relief that would direct MCILS to provide indigent defense services that could avoid unconstitutional harm to all proposed class members. Thus, the Court finds Plaintiffs have met the requirements of Rule 23(b)(2) as well.

[2] "MCILS's deficient policies and practices ... are systemic, statewide failures that expose every indigent defendant to a common harm: the unconstitutional risk that they will be deprived of effective assistance of counsel." Reply at 1. *See also, Tucker v. State*, 484 P.3d 851, 859-62, 865-6 (Idaho 2021).

In sum, the Court does not here make any finding with respect to the merits of the constitutional claim being made. It has concluded, however, that Plaintiffs have met the requirements of both Rule 23(a) and Rule 23(b)(2).

The entry is:

Plaintiffs' Motion for Class Certification is GRANTED.

The Court certifies this case as a class action with the 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.

The Court further appoints the following individuals as class counsel:

> Zachary L. Heiden and Anahita Sotoohi of the American Civil Liberties Union of Maine Foundation; Matt Warner and Anne Sedlack of Preti Flaherty; and Kevin P. Martin, Gerard J. Cedrone, and Jordan Bock of Goodwin Procter.

The clerk may incorporate this Order in the docket by reference. M.R. Civ. P. 79(a).

Date: July 13, 2022 **Signed:** _____

M. Michaela Murphy
Justice, Superior Court

EXHIBIT 3

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

AFFIDAVIT OF JUSTIN W. ANDRUS, EXECUTIVE DIRECTOR, MAINE COMMISSION ON INDIGENT LEGAL SERVICES

I, Justin W. Andrus, in my capacity as Executive Director, having been sworn, hereby depose and state as follows:

1. I am the Executive Director of the Maine Commission on Indigent Legal Services ("MCILS").

2. I have been the Executive Director of MCILS since January 19, 2021.

3. In that capacity, as part of my responsibilities as Executive Director of MCILS, I have knowledge regarding the staffing, operations, and e-mail system used by MCILS staff.

4. The operations staff of MCILS consists of nine (9) people, an Executive Director, a Deputy Executive Director, a Training and Supervision Director, a Training and Supervision Counsel, an Audit Director, an Audit Counsel, all attorneys, and two paralegals, and a Staff Accountant.

5. In addition, MCILS employs financial screeners with respect to indigency determinations. MCILS currently employs nine (9) financial screeners.

6. This staff oversees a system through which MCILS provides the courts with rosters of those private attorneys willing to serve consumers of indigent legal services, from which the courts make assignments pursuant to Maine Rule of Criminal Procedure 44.

JWA: jwa

7. Since about December 19, 2022, MCILS also provides counsel directly to some consumers of indigent legal services through five employed defenders.

8. In fiscal year 2022, court-assigned counsel provided representation in approximately 31,600 assignments, including matters in which counsel provided representation to resolution, lawyer of the day, specialty court, and resource counsel programs.

9. Descriptions of the job responsibilities of each of the operations staff are attached hereto as Exhibit A.

10. Over the past five (5) years, the following MCILS employees have maintained State of Maine ("@maine.gov") e-mail accounts in connection with their work for MCILS:

    a. Justin Andrus, Executive Director
    b. Eleanor Maciag, Deputy Executive Director
    c. Lynne Nash, Staff Accountant
    d. Jennifer Breau, Paralegal
    e. Rachel Gariepy, Paralegal
    f. Arthur Washer, Audit Counsel
    g. Stephen Brochu, Audit Director
    h. Darcy Fisher, Training and Supervision Counsel
    i. Christopher Guillory, Training and Supervision Director
    j. Christina Tripp-Maynard, Screener
    k. Paula Hebert, Screener
    l. Benjamin Sawyer, Screener
    m. Kelly Pelletier, Screener
    n. Jeffrey McClellan, Screener
    o. Gail Bowman, Screener
    p. Alfred Moore, Screener
    q. Sergius Santillanes, Screener
    r. Kara Sheldon, Screener
    s. John Pelletier, Executive Director (former)
    t. Laurie Wing, Office Associate (former)
    u. Tiffany Smeltzer, Office Associate (former)
    v. Nicholas Moffo, Screener (former)
    w. Jeffrey Neal, Screener (former)
    x. Katherine Breton, Screener (former)
    y. Moira Paddock, Screener (former)
    z. Michelle Weirich, Screener (former)
    aa. John Craig, Screener (former)

JWA: jwa

11. Based on my information and belief, after reviewing information received from the State of Maine Office of Information Technology, the total number of e-mails and data (both e-mails and attachments) associated with each MCILS staff e-mail account for the five (5) year period of July 1, 2017 – July 1, 2022 is as follows:

	Name	**Position**	**E-mails**	**Data**
1	Justin Andrus	Executive Director	99,035	23.82 GB
2	Eleanor Maciag	Deputy Executive Director	323,839	79.38 GB
3	Christopher Guillory	Training and Supervision Director	11,943	2.02 GB
4	Darcy Fisher	Training and Supervision Counsel	12,543	2.42 GB
5	Stephen Brochu	Audit Director	9,002	1.54 GB
6	Arthur Washer	Audit Counsel	8,103	1.04 GB
7	Lynne Nash	Staff Accountant	110,202	36.79 GB
8	Rachel Gariepy	Paralegal	1,379	266.83 MB
9	Jennifer Breau	Paralegal	967	126.14 MB
13	Christina Tripp-Maynard	Screener	8,484	2.64 GB
14	Paula Hebert	Screener	41,866	15.68 GB
16	Benjamin Sawyer	Screener	1,210	324.41 MB
18	Kelly Pelletier	Screener	535	171.95 MB
19	Jeffrey McClellan	Screener	4,354	864.21 MB
23	Gail Bowman	Screener	1,152	385.32 MB
24	Alfred Moore	Screener	9,157	6.94 GB
21	Sergius Santillanes	Screener	295	48.76 MB
27	Kara Sheldon	Screener	2	144.32 KB
10	John Pelletier	Executive Director (former)	92,459	22.88 GB
11	Laurie Wing	Office Associate (former)	47,096	14.49 GB
12	Tiffany Smeltzer	Office Associate (former)	11,568	7.85 GB
15	Nicholas Moffo	Screener (former)	11,136	3.27 GB
26	Jeffrey Neal	Screener (former)	5,370	1001.76 MB
17	Katherine Breton	Screener (former)	17,796	5.56 GB
20	Moira Paddock	Screener (former)	28,457	3.29 GB
22	Michelle Weirich	Screener (former)	35,069	5.81 GB
25	John Craig	Screener (former)	9,419	473.82 MB
	TOTAL		**902,438**	**239.23 GB**

JWA: JWA

12. Based on my knowledge of the e-mails which I have received and/or reviewed during my time as Executive Director, upon information and belief, the job responsibilities and work typically performed by the operations staff of MCILS includes access to:

    a. Individual client information submitted by a commission-rostered attorney;
    b. Information subject to the lawyer-client privilege or constituting a confidence or secret, including communications relating to the retention of experts, information included in bills or vouchers for reimbursement, and written correspondence with individual counsel regarding the defense of criminal cases brought against indigent defendants whom they have been appointed to represent;
    c. Personal contact information for commission-rostered attorneys;
    d. Requests for funds for expert or investigative assistance submitted by appointed counsel for indigent defendants or by indigent parties, including responses and additional correspondence regarding those requests from MCILS;
    e. Information obtained or gathered by MCILS when evaluating or investigating rostered attorneys;
    f. Information from the Judicial Branch, including case information and individual client information which is designated as confidential, non-public, or otherwise restricted by statute or court rule;
    g. The names, addresses, date(s) of birth, and social security numbers of people ordered to reimburse the State for the costs of assigned counsel;
    h. Information which is defined as "Confidential criminal history record information" as defined in 16 M.R.S.A. § 703(2); and
    i. "Human resources" information relating to individuals employed by MCILS, including but not limited to personally identifying information and "Personnel Records" as defined in 5 M.R.S.A. § 7070, et seq.

JWA: JWA

13. Consistent with prior, pre-suit communications with counsel for Plaintiffs, the conditional confidentiality of certain types of records or information, including information identified in 4 M.R.S.A. § 1806(2), requires confirmation of the status of cases. That process, which requires individually identifying and accessing the Maine Judicial Branch Information System ("MEJIS") records for individual cases / dockets, is time consuming. As stated in that 2021 correspondence, specific to records defined in 4 M.R.S.A. § 1806(2)(E):

> The issue is that pursuant to 4 M.R.S.A. §1806(2)(E), "A request for funds for expert or investigative assistance that is submitted by an indigent party or by an attorney on behalf of an indigent client is confidential. The decision of the executive director of the commission hired pursuant to section 1804, subsection 1, or the executive director's designee, to grant or deny such a request is not confidential after a case has been completed. A case is completed when the judgment is affirmed on appeal or the period for appeal has expired." The spreadsheets constitute a compilation of decisions that may, after case becomes final, be disclosed.
>
> The hitch is the process of clearing each case through the Court's case management system to determine whether that case has become final as defined by the statute. Deputy Director Maciag has performed this function twice previously, but for much more limited data sets. She found that those cases that are in pre-judgment status, take approximately one minute per case to process. Those cases that cannot be eliminated immediately, however, require either research to identify any appellate decision, or communication with the Clerk of Law Court, or both. Those cases take approximately 10 minutes per case to process. We found that between 18% and 65% of cases require follow up.

Correspondence from Justin Andrus, Esq. to Zachary Heiden, Esq. (Mar. 3, 2021) (attached hereto as Exhibit Bp).

Further the affiant saith naught.

12/29/2022

Justin W. Andrus,
in his capacity as Executive Director,
Maine Commission on Indigent Legal Services

JWA: jwa

STATE OF MAINE
COUNTY OF KENNEBEC, ss

December 29, 2022

Personally appeared before me, the above-named Justin W. Andrus, in his aforesaid capacity, and gave oath that the foregoing statements are true upon his/her knowledge, information, and belief, or where based on his information and belief that he believes them to be true.

Before me,

Stephen M. Bochu #8466

~~Notary Public~~ Attorney-At-Law

Stephen M. Bochu

Typed or Printed Name

My Commission Expires:

JWA:

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

Exhibit A to Affidavit of December 29, 2022

The following descriptions of work performed by operations staff were provided by staff members, except as to the functions of the Executive Director, which were provided by the Executive Director. The descriptions as to the Training and Supervision staff and the Audit staff are current as of December 28, 2022. The descriptions as to the Deputy Executive Director and the Staff Accountant are drawn from their descriptions of the Spring of 2021 as updated by the Executive Director, because both staff members are out of the office on leave as of the time of the affidavit. To the best of my knowledge, information, and belief, these descriptions accurately describe tasks performed by the staff specified, though these descriptions may not be exhaustive due to the breadth of the task, projects, and needs that may arise.

As to the paralegal staff, activity is based on direction from attorney operations staff. Paralegal staff provide direct support to the attorney staff on an ongoing but ad hoc basis, except that paralegal staff are responsible daily for publishing the rosters of those private attorneys willing to accept assignments from the Court to serve consumers of indigent legal services. Effective January 1, 2023, paralegal staff will also be providing direct litigation support services to MCILS employed attorneys serving consumers of indigent legal services.

Justin Andrus / Executive Director

Front line: Review and respond to emails from attorneys, courts, clerks, and other participants in the MCILS system. (99,035 emails sent or received from January 19, 2021 to July 1, 2022, averaging 264 emails per work day.) Represent MCILS at Commission meetings; subcommittee meetings; meetings with stakeholders and vendors; legislative committees. Respond to calls from stakeholders (estimated 2 – 3 hours per day of telephone time). Interface with press. Meet with Judicial branch representatives. Participate in Children's Task Force.

Operations: Review and assess attorney applications for rostering on specialized panel rostering with waivers. Review and assess requests for non-standard case appointments. Communicate with Judges and Clerks re specific requests for attorney assignment assistance. Communicate with attorneys to cause uncertified attorneys to withdraw from improper assignments, and with courts to facilitate replacement counsel. Review requests for non-counsel funds authority (investigators, experts, etc.) for compliance with the rules and for need and reasonability. Review draft authorizations for non-counsel funds. Provide input and assistance on request from assigned counsel, including case and practice management guidance for compliance with our rules and to promote effective counsel. Review and process vouchers for payment. Follow up with counsel where required.

Quality Assurance: Provide currently limited oversight and review of attorney performance. Provide limited attorney training directly. Review and investigate complaints about attorney performance. Review and investigate complaints related to attorney billing practices.

Compliance: Review and assess with counsel, and prepare responses to FOAA requests.

Financial: Perform banking functions when Staff Accountant is working away from the office. Manage attorney over-payment issues, including those identified through high-hour trigger events.. Participate in budget development, presentation and advocacy activities.

Structural: Evaluate adequacy of enabling statutes and Commission rules. Develop proposed modifications to each. Develop proposed Commission policy changes under existing statutes and rules. Develop and implement practice and protocol changes to implement existing rules and enhance Commission operations. Work with OIT and outside vendors (Justice Works, e.g.) to implement structures to enhance Commission operations. Develop contracts and contract modifications with vendors to permit implementation of changes.

Ellie Maciag / Deputy Director

Monthly meeting packet preparation – operation reports (run 9 different Defender Data reports and compile 3 different excel spreadsheets with the data), operations memo, charts, meeting minutes, email to interested parties Attend monthly commission meetings and subcommittee meetings Attend legislative hearings Email correspondence and phone calls from attorneys/support staff (approx. 13,700 sent emails in the prior 12 months, about 50 emails sent a day); receive about 5 phone calls a day from attorneys Email correspondence from court clerks (rostering questions, seeking counsel for specific cases) Email correspondence from financial screeners (answering questions, ordering supplies, monthly screening statistics) Budget document preparation (research costs for new positions and prepare documents for budget submissions) Mass emails to attorneys about issues, CLE opportunities, helpful materials, court PMOs, etc Rulemaking – maintain redline drafts, prepare submissions for SOS Website updates (rosters, training, sending meeting notices to Lynne) Training (all aspects when we do have trainings – speaker recruitment, materials, logistics, cle approval/reporting) Review conflict vouchers FOAA (tracking and document preparation) HR tasks (timesheet approvals, approving/tracking screener time off, dealing with personnel issues, performance reviews) RFP drafting/publication and all submissions to purchasing for contract approvals Review and approve the annual renewal applications Approve credit card purchases Approve cases in defenderdata. Review requests for counsel fee reimbursements Prepare voucher documents for PCR counsel. OIT contact person for budget planning and in charge of adding/removing users. Update indigency income table each year Field phone calls from defendants who get bail/taxes taken for counsel fees and have questions (court gives out my phone number) Respond to inquiries from Office of Marijuana Policy about whether an applicant owes counsel fees (about 8 so far in 2021)

Performs all functions of the Executive Director pursuant to written authority during periods of the ED's absence.

Lynne Nash / Staff Accountant

View answer and save 50-100 emails daily. Assist vendors with establishing and modifying vendor codes, and establishing direct deposit. Monitor advantage system for internal billings. Submit voucher batches in advantage through a BIE batch file, monitor for receipt and approval, and for rejected payments. Perform necessary actions to get the payment fixed and processed. Enter and modify contracts and purchase orders in advantage, track encumbrances. Enter JVs and ABSJs in advantage with supporting documents for the transfers. Enter cash receipts, print appropriate documents, and go to TD Bank for check deposit. Complete annual stale dated check process. Tend to lost/returned checks, have treasurer's office conduct traces, draft and provide all required forms for a stop payment/reissue. Determine the correct procedures as there are many variables that can be applied to a lost/returned check. Record invoices and payments in appropriate authorization spreadsheets, monitoring overages that require nunc pro tunc funds. Communicate with vendors for discrepancies on invoices to assure payments in a timely manner. Currently responsible for copying payments, sending appropriate documents to MRS for scanning into the FORTIS system, maintaining all vendor files. Access the database to retrieve financial data and break down the data for every account to produce monthly, quarterly, and annual financial reports. Access the OIT user portal to retrieve billing details for the OIT/TELCO billings. Access the database to order PPE supplies for staff. Access the W.B. Mason and Amazon websites to order supplies for staff. Access the system to post commission meetings and supporting documents to the commission website. Order supplies for the copier/fax/scanner and keeps supplies stocked from Ikon for the central office. Track commission meetings and expenses for entry in the Secretary of State database to record annual costs. Assist end users in defender data with expedited approval of case entries, fixing recorded data such as a wrong date and adding a receipt or document required to support the voucher(s). Assist court clerks with attorney, roster, case, and voucher inquiries. Maintain a vendor code list for experts, and a private investigator master list that records licenses and their expirations, counties the investigator is/was authorized to perform services in. Provide backup assistance to perform office assistant duties during absences. Do mandated annual SANS training. Transfer emails to archive folders, as newest version of outlook retains emails for a year, had over 13,000 emails in my inbox and it was slow running.

Christopher Guillory / Darcy Fisher: Training and Supervision Director and Counsel

1. Attend Commission meetings.
2. Review Commission packets.
3. Delegate and supervise completion of tasks to other staff/paralegals.
4. Review case entries in defenderData for eligibility, proper formatting, and compliance with Commission rules and/or policies.
5. Distribute case entry guidance to counsel to correct improperly formatted case entries.
6. Log and address entries for ineligible case assignments.
7. Process initial applications for indigent case assignments and specialty panels. Document and save applications.
8. Send initial onboarding emails.
9. Send initial resource counsel advisement emails.
10. Track progress of new counsel meeting with resource counsel.
11. Process changes in defenderData relating to new firms or attorneys moving between firms.
12. Process designation of payee forms.
13. Aggregate waiver application materials and forward to Executive Director with T&S recommendation as to waiver.
14. Revise application forms.
15. Draft new proposed policies and rules and edits to existing rules.
16. Assist attorneys in managing roster status.
17. Maintain and update rosters as part of the annual renewal process.
18. Document and process complaints received by MCILS. This includes requesting documents, reviewing materials, corresponding with relevant parties, drafting assessment intake forms, and submitting assessment packages to the Executive Director for review.
19. Receive, document, and return calls made the Duty Lawyer of the Day (DLOD) phone line and web submission form. This typically involves: contacting defense counsel (if any), prosecutors, and courts; providing procedural information to the caller; documenting and processing attorney complaints according to protocol; and effectuating internal assignment of counsel where appropriate.
20. Execute documentation for internal assignments of counsel when needed.
21. Document requests for counsel from courts, attempt to locate counsel, and notify courts of the same.
22. Provide current rosters to courts, counsel, or others upon request.
23. Conduct legal research, analyze data, and draft memoranda.
24. Review requests for approval of third-party CLEs for MCILS credit
25. Plan and host various trainings. This includes: developing content and materials, creating an agenda, finding a location, locating speakers, meeting with speakers, applying for CLE credit, advertising the trainings, presenting content, and tracking and reporting CLE credits.
26. Collaborate with local and national partners in sponsoring CLEs.
27. Assist and support third parties in developing and presenting CLE programs.
28. Proctor CLE replays when required.
29. Interact with members of the bar in furtherance of training and supervision objectives.

30. Observe court proceedings in furtherance of training and supervision objectives.
31. Attend staff meetings.
32. Assist other staff with projects when requested.
33. Identify emerging issues when presented with information by counsel.
34. Respond to communication from counsel regarding training or supervision issues.
35. Engage with members of the bar to develop ideas of how we can support them.
36. Engage with members of the bar to develop future programs or rules.
37. Conceptualize structural framework for future rules structures, or foundational predicates necessary to administer current or future rules.
38. Review and plan amendments to the standards of practice.
39. Forward training opportunities and other important information to rostered counsel.
40. Read, respond to, and file emails.

Stephen Brochu / Arthur Washer - Audit Director and Counsel

The Audit Division is responsible for providing reasonable assurance as to the accuracy of agency data and for improving the accuracy and reliability of that data as may be necessary and feasible given current and anticipated operational need and capacity respectively. Audit Division staff primarily accomplish this goal by reviewing, tracking, and interrogating assigned counsel billing data through records review, data analysis, and informal written inquiry. Audit Division staff are also responsible for conducting, as well as producing the raw data used to conduct, operationally necessary data analyses. Audit Division staff also engage in internal process building and proposed rule drafting where appropriate. Finally, Audit Division staff provide further operational support as necessary including without limitation by: maintaining the agency website, opening and distributing physical agency mail, responding to attorney inquiries, providing miscellaneous technical support where requested, and providing information updates to other agency staff.

Responsibilities

Voucher Review and Records Management

- Ensure timely processing of vouchers submitted to the agency to facilitate continued operations and minimize payment interruptions experienced by assigned counsel.
- Conduct billing inquiries on vouchers submitted for payment by assigned counsel to ensure assigned counsel are:
    - complying with established billing rules under Chapters 301 and 302;
    - billing only for time actually worked by assigned counsel;
    - entering information correctly on vouchers and case files generally; and
    - submitting vouchers that are reasonably free from misstatements.
- Conduct checks on case file information to provide greater assurance regarding the accuracy of caseload calculations.
- Respond to attorney inquiries regarding billing best practices, rules compliance, data entry, agency processes, and expedited review requests.
- Review and record automated alerts generated by the agency's case management software along with the relevant information associated with those alerts.
- Prioritize and follow-up on automated alerts generated by the agency's case management software.
- Track billing errors identified by Audit Division staff and confirmed by assigned counsel during voucher review.
- Record case results that are desirable from defense counsel's perspective for inclusion in Commission packets.

Rule and Policy Development and Enforcement

- Assist in developing agency rules and policies regarding contract counsel time keeping, billing, and record-keeping.
- Draft proposed rules for review and revision among Audit Division staff before submission to agency executive staff.
- Review and suggest edits on proposed rules drafted by other agency staff as requested.
- Coordinate among Audit Division staff in interpreting agency billing rules when addressing novel rules compliance or billing issues and/or discrepancies to ensure consistent rules interpretation among Audit Division staff.
- Propose and coordinate internal agency policies and processes to ensure rules compliance and consistent rules enforcement regarding agency billing rules.
- Draft and propose audit policy, processes, and controls.
- Assist in managing the assigned counsel annual renewal/registration process.
- Provide technical and administrative assistance as an Agency Advisor to the Commission member serving as the Presiding Officer during the Chapter 201 appeal process including by:
    - Developing agency policy and processes for managing the administrative aspects of assigned counsel appeals of agency actions in response to novel issues encountered during those appeals;
    - Developing and maintaining a complete record of proceedings held in accordance with the provisions of Chapter 201;
    - Communicating and coordinating with Agency counsel and the Presiding Officer to determine the agency's obligations and to ensure the appropriate obligations are met;
    - Organizing, assembling, and distributing evidence, pleadings, and other appeals documents and materials at the request of the parties or the Presiding Officer to facilitate the orderly administration of the applicable appeal;
    - Attending all relevant proceedings including pre-hearing conferences, evidentiary hearings, and Commission meetings concerning final agency action;
    - Drafting orders concerning the final agency action following the conclusion of the Chapter 201 appeals process; and
    - Compiling and certifying the record of the proceedings as required for any further appeals to the Maine Superior Court.

Information Assurance and Data Hygiene

- Review agency records to provide reasonable assurance that the data maintained by the agency is reasonably free from misstatements resulting from mistakes or fraud.
- Conduct risk assessments on agency information controls to identify areas of weakness in agency data assurance policies and processes.
- Coordinate among Audit Division staff to ensure the audit division consistently applies rules and policies in its assurance efforts.
- Enumerate and record database architecture for future reference in query development and data analysis.
- Provide Training and Supervision staff with regular caseload calculation updates for budgeting, record keeping, and rule proposal needs.
- Conduct billing inquiries responsive to reports from other agency staff identifying anomalous billing in the assigned counsel system.
- Investigate allegations or suspicions of fraudulent billing activity in the assigned counsel billing system.

Information Analysis and Data Science

- Respond to attorney inquiries regarding their own billing data by developing unique SQL queries for those requests and providing a formatted response with the permission of agency executive staff.
- Design, develop, and test SQL queries responsive to proposed rules in preparation for implementation by conducting database enumeration and iterative testing.
- Plan and conduct data analysis procedures on agency data to support agency operations as requested by agency staff, executive, or otherwise.
- Perform verification procedures on analyses conducted pursuant to operational need to provide reasonable assurance that the analysis conducted is complete and accurate within an acceptable tolerance of error where appropriate.

Technological Infrastructure Development and Maintenance

- Develop SQL queries to provide audit division staff and the executive director with new perspectives with which agency data may be reviewed and analyzed in response to inquiries made by the Commission, State Legislature, or the Executive Office.
- Develop technical "tools" for use by Audit Division in conducting billing inquiries or records reviews.
- Maintain the maine.gov/mcils public website by creating new content and editing existing content as required by agency operational needs.
- Develop and implement new functionality for the maine.gov/mcils public site including by designing web forms responsive to new and existing agency rules (Chapter 2, Chapter 303) and conducting iterative testing to ensure proper functionality.
- Coordinate with Justice Works web development staff to expand the database infrastructure available to agency staff for use in addressing current and future data analysis projects and requests.

Misc. Administrative Support and Other

- Review, process, and distribute mail as needed while physically present in the agency headquarters office.
- Assist other agency staff in properly mailing material, both externally and among other State agencies, using the State's mail system.
- Participate in continuing legal education to maintain good standing with the Bar.
- Research fraud investigation and data analysis techniques to expand operational capacity and improve institutional knowledge.
- Attend Commission meetings, public hearings regarding proposed rules and rulemaking, and review supplemental meeting materials as appropriate.
- Occasionally propose CLEs to Training and Supervision Division staff for agency approval.

Exhibit B to Affidavit of 12/29/2022

MAINE COMMISSION ON INDIGENT LEGAL SERVICES

March 26, 2021

Zachary L. Heiden, Chief Counsel
ACLU Maine
121 Middle Street, Suite 200
Portland, ME 04101

Via email to: heiden@aclumaine.org

Re: **Follow up to FOAA request of February 10, 2021**

Dear Attorney Heiden:

I write in continuing follow up to your FOAA request, and to our dialogue about how to satisfy your need for information. This letter is intended to provide you with an update on our process, and to identify issues so that we may work to overcome them. Our goal is to offer the ACLU transparency to the maximum extent permitted.

Database pull:

Many of your specifications call for the production of information from the database Justice Works maintains of information received through the Defender Data case management system. Some of the information contained in the database is protected under 4 M.R.S.A. §1806, or by Maine Rule of Professional Conduct 1.6, or other statute. MCILS has developed a set of Data Retrieval Criteria that permits the retrieval and production of information that is not confidential, while otherwise conforming to the Commission's obligations. I have attached a list of all the event types Defender Data recognizes, together with a copy of the Data Retrieval Criteria. Because these criteria will determine what data we produce to you, I invite your review and comment before you approve an updated cost estimate for the data pull.

Non-counsel costs spreadsheet:

As I explained in our conversation yesterday, MCILS maintains spreadsheets of requests for funds for private investigators, expert witnesses, and other miscellaneous costs.[1] I had hoped to turn those over to you but have hit a confidentiality snag. I may be able to provide you with the information you seek from the spreadsheets without violating confidentiality, however.

The issue is that pursuant to 4 M.R.S.A. §1806(2)(E), "A request for funds for expert or investigative assistance that is submitted by an indigent party or by an attorney on behalf of an indigent client is confidential. The decision of the executive director of the commission hired pursuant to section 1804, subsection 1, or the executive director's designee, to grant or deny such a request is not confidential after a case has been completed. A case is completed when the judgment is affirmed on appeal or the period for appeal has expired." The spreadsheets constitute a compilation of decisions that may, after case becomes final, be disclosed.

The hitch is the process of clearing each case through the Court's case management system to determine whether that case has become final as defined by the statute. Deputy Director Maciag has performed this function twice previously, but for much more limited data sets. She found that those cases that are in pre-judgment status, take approximately one minute per case to process. Those cases that cannot be eliminated immediately, however, require either research to identify any appellate decision, or communication with the Clerk of Law Court, or both. Those cases take approximately 10 minutes per case to process. We found that between 18% and 65% of cases require follow up.

The following table shows the number of requests for approval of costs contained in each of the three spreadsheets for each fiscal year from 2017 through March 23, 2021, together with the time and cost associated with the necessary review at follow-up rates of 0%, 18% and 65%.

	PI	Expert	Misc			
FY'2017	880	373	154			
FY'2018	921	371	130			
FY'2019	957	419	156			
FY'2020	755	384	144			
FY'2021*	470	199	85			
Total	3983	1746	669			
				Hours	Cost	
0%	3983	1746	669	106.63	$	1,599.50
18%	11152.4	4888.8	1873.2	298.57	$	4,478.60
65%	83643	36666	14049	2239.3	$	33,589.50

* as of March 23, 2021

[1] These might include, without limitation, fees for interpreters, transcriptionists, medical records, filing fees, witness travel costs, depositions, drug testing, interns and paralegals.

Specifications:

1. All requests for payment submitted to MCILS;

This specification encompasses both attorney requests for payment for services rendered to clients, and requests for payment of non-counsel invoices. Data related to attorney requests for payment for services rendered to clients will be part of the database pull.

Request for payment of a non-counsel invoice is usually made by email, though sometimes a request is received by fax or mail. The attorney requesting payment of a non-counsel invoice must provide a copy of the authorization for the expenditure, the invoice itself, and a statement that the services were provided and acceptable.

The spreadsheets reflect at total of 4,538 requests for payment of non-counsel invoices for the period July 1, 2016 through March 23, 2021. Production of each request for payment requires a search of our accounting system and email. Those directed to Deputy Director Maciag are segregated. Those directed to former Executive Director Pelletier are not segregated. Identifying those emails would require a manual search of his email archives. For each email located, it will be necessary to review the attached documents and redact any confidential information. After discussion with Deputy Director Maciag, I anticipate that it would take between one and five minutes to locate, isolate, review, redact, and re-save each communication requesting payment of a non-counsel invoice. This would require, at minimum, 75 hours of work at a minimum cost of $1,100, exclusive of the time for the complete manual search of Mr. Pelletier's email; and, exclusive of the time described above to determine whether a case is final.

An alternative form of production that may produce substantially similar information would be through the spreadsheets we discussed. They would still be subject to the need to establish that each case listed is closed finally but would not require the search and redaction described here. As a further alternative, I could redact the spreadsheets to produce information that would allow you to determine which attorneys requested funds but do not identify the client or case.

2. All documents indicating the decision to either grant or deny a request for funds for expert or investigative assistance;

Documents indicating the decision to grant funds for expert or investigative assistance are subject to disclosure once the case to which each relates is closed finally. The process of determination of case status is described above, except that there are 6,398 approvals. (Not all approvals generated a request for payment.) Documents indicating the decision to deny a request for funds because a client is not indigent are similarly organized and subject to disclosure.

Documents indicating the decision to deny a request for funds on substantive grounds, to the extent that there may be any, would be contained in Mr. Pelletier's email. Locating those emails would require a manual review of his email. I have not denied any requests for funds on substantive grounds.

3. All responses to requests for payment asking for clarification or additional information sent by MCILS;

Responses to this specification would include communications from MCILS to attorneys through Defender Data and emails from MCILS to attorneys asking for information related to non-counsel vouchers. Our questions to attorneys through Defender Data would be redacted to exclude any substantive content but might contain requests for explanations of time entries. I will provide you with a quote from Justice Works for that pull, and you can tell me whether you wish to proceed.

Requests for information about non-counsel invoices would require a manual search of email.

4. All documents authorizing payment made by MCILS;

Responses to this specification would again include both payments to attorneys and payment of non-counsel invoices. Information related to attorneys would be included in the database pull contemplated above.

Authorizations for payment of non-counsel invoices is made through the State's accounting system. The Executive Director or Deputy reviews and signs the invoice. The accounting technician enters information related to the invoice into the system. The Executive Director or Deputy reviews that information in the system and approves payment. The signed invoice is then uploaded and saved in the accounting system and stored in paper form in the office. These signed invoices would need to be pulled from the paper storage or the online storage, checked for case finality, and redacted before production. Again, there are 4,538 invoices.

5. Documents reflecting the number and percentage of cases in which there is no motion filed;

MCILS does not maintain a document that contains this information directly. It would be possible to compare the number of cases in which an attorney billed for drafting a motion as reflected in the database pull to the total number of cases in the pull.

6. Documents reflecting the number and percentage of cases in which no investigator is hired;

MCILS does not maintain a document that contains this information directly. It would be possible to compare the number of cases in which an attorney hired an investigator as reflected on the spreadsheet or through the invoices described above to the total number of cases in the database pull.

7. Documents reflecting the number and percentage of cases in which no expert is retained;

MCILS does not maintain a document that contains this information directly. It would be possible to compare the number of cases in which an attorney hired an expert as reflected on the spreadsheet or through the invoices described above to the total number of cases in the database pull.

8. Documents reflecting the number and percentage of cases in which no evaluation of the client is performed;

MCILS does not maintain a document that contains this information directly. Instances in which an attorney requested funds for a client evaluation are redacted under the MCILS Data Retrieval Criteria as confidential.

9. Documents reflecting the number and percentage of cases in which less than an hour is spent in client meetings;

MCILS does not maintain a document that contains this information directly. It may be possible to calculate these numbers from the information that would result from the database pull.

10. Documents reflecting the number of waivers granted for attorneys handling specialized cases, including waivers for practice experience or trial experience;

Responding to this specification would require manual review of 823 paper files containing applications submitted by presently or formerly rostered counsel. As we discussed, I reviewed ten files to try to determine how long it would take to produce these documents. I averaged two minutes per file, with a lot of variation between specific files. I anticipate that responding to this request would require approximately 25 hours.

11. Copies of all responses to FOAA requests that have been produced by the Commission and/or Commission staff.

We continue to work to satisfy this this request.

Sincerely,

/s/ Justin W. Andrus

Justin W. Andrus
Justin.andrus@maine.gov

Data Retrieval Criteria

There are 3 data retrieval requests. Please produce all of the data in **comma-separated value (.csv) or tab delimited (.tab) format.** For all 3 retrievals, please provide data from June 1, 2016 until the present. Do not include any: text in the time event comments, text in the expense comments, voucher notes, or voucher attachments.

1. Criminal data and Juvenile case class A, B, C and murder data

For the following file types:

- Drug Court
- Emancipation
- Felony
- Juvenile, only if one of the following offenses are charged
  - Class A, B, and C or murder
    - If offenses other than those listed above are also charged, replace data with "CONFIDENTIAL"
- Lawyer of the Day – Custody
- Lawyer of the Day – Walk-In
- Misdemeanor
- Petition for Release or Discharge
- Petition for Modified Release Treatment
- Post-Conviction Review
- Probation Violation
- Revocation of Administrative Release
- Resource Counsel Criminal
- Resource Counsel Juvenile
- Represent Witness on Fifth Amendment Issue

Retrieve the following data:

- **Client First Name**
- **Client Middle Name**
- **Client Last Name**
- Docket Number
- Court Location
- Date Assigned
- Date of Disposition
- Assigned Attorney Name
- Attorney Bar Number
- Offenses Charged
- Disposition
- Sentence
- File/Case type

- Event type. Replace the following event types with "CONFIDENTIAL"
  - Attend Family Team Meeting
  - Court/Cease Reunification
  - Court/Involuntary Commitment
  - Court/Jeopardy
  - Court/Judicial Review
  - Court/Prelim Protect Order
  - Court/TPR Hearing
  - Meet at DHHS
  - Meet with Examiner
  - Meet with Expert
  - Meet with G.A.L.
  - Meet with Investigator
  - Phone Conf/DHHS
  - Phone Conf/Examiner
  - Phone Conf/Expert
  - Phone Conf/G.A.L.
  - Phone Conf/Investigator
  - Prep Corresp/Expert
  - Prep Corresp/G.A.L.
  - Prep Corresp/Investigator
  - Prep Motion/Acces DHS Recs
  - Prep Motion/Exp. Review
  - Prep Motion/Forensic Eval
  - Prep Motion/Cease Reun.
  - Review App/Commitment
  - Review Expert Report
  - Review G.A.L. Report
  - Review Investigator Report
  - Team Meeting with DHHS
- Name of attorney who performed the work associated with each event entry
- **Bar number of attorney who performed work**
- Date of event
- Hours for each event
- Amount (of voucher?)
- Expenses by type
- Date voucher submitted
- Voucher status
- Hourly rate of compensation

2. Docket/Offenses Charged Data

Please produce a separate table that lists all docket numbers and the offenses charged for each docket number for the following file types:

- Drug Court
- Emancipation
- Felony
- Juvenile, only if one of the following offenses are charged:
    - Class A, B, and C offenses or murder
        - If offenses other than those listed above are also charged, replace all data with "CONFIDENTIAL"
- Lawyer of the Day – Custody
- Lawyer of the Day – Walk-In
- Misdemeanor
- Petition for Release or Discharge
- Petition for Modified Release Treatment
- Post-Conviction Review
- Probation Violation
- Revocation of Administrative Release
- Resource Counsel Criminal
- Resource Counsel Juvenile
- Represent Witness on Fifth Amendment Issue

3. Confidential Case Types

For the following file types:

- Mental Health (MH)
- Child Protection Petition (CPP)
- Review Child Protection Petition (RCP)
- Termination of Parental Rights (TPR)
- Probate (PRO)
- Juvenile cases (JUV) with class D, Class E, and civil violation sequence numbers
- Lawyer of the Day – Juvenile
- Probation Violation (PV) that lists a JV docket number
- Misdemeanor (MIS) that lists a JV docket number
- Juvenile Appeal with class D, class E, and civil violation sequence numbers
- Appeals (APP) with the following charge sequence numbers:
  - 100001, Child Protection Petition
  - 100002, Review of Child Protection Order
  - 100003, Petition for Termination of Parental Rights
  - 100004, Application for Involuntary Commitment
  - 100018, Guardianship – Parent/Legal Custodian/Guardian/Petit
  - 100019, Guardianship – Minor
  - 100020, Adoption – Adult Parent
  - 100021, Adoption – Minor Parent

Retrieve the following data:

- Assigned attorney name
- Attorney bar number
- Attorney who did the work on each event
- Bar number of attorney who did work on each event
- Date of event hours worked
- Hours
- Dummy docket number – **one dummy docket number per actual docket number.**

Exhibit B to Affidavit of 12/29/2022

Defender data events types March 23, 2021

Admin Hearing
Attend Family Team Meeting
Amount Charged by DA or Law Enforcement to Tapes/DVD's, etc.
Bond Hearing
Client Appointment
Close File
Collect calls
Court Date
Attend Court for Motion Hearing - Bail
Attend Court for Motion Hearing - Bail Revocation
Attend Court for Case Management Conference
Attend court for Hearing - Cease Reunification
Attend Court for Motion Hearing - Discovery
Attend Court for Dispositional Conference
Attend Court for Docket Call
Attend Court for Hearing - Emancipation
Attend Court for Hearing Other (Please Explain)
Attend Court for Initial Appearance/Arraignment
Attend Court for Hearing - Involuntary Commitment
Attend Court for Hearing - Jeopardy
Attend court for Hearing - Judicial Review
Attend Court for Jury Selection
Attend Court for Motion Hearing - Juvenile Detention
Attend court for JV Adjudicatory Hearing
Attend Court for JV Dispositional Hearing
Attend Court - LOD In Custody
Attend Court - LOD Juvenile
Attend Court - LOD Walk-In
Attend Court for Hearing - Modified Release
Attend Court for Motion Hearing (Please Explain)
Attend Court for Motion Hearing - New Trial
Other In Court Time
Attend Court for Entry of Guilty/Nolo Plea
Attend court for Hearing - Preliminary Protection Order
Attend Court for Motion Hearing - Probation Pevocation
Attend Court for Hearing - Release or Discharge
Attend Court for Hearing - Rule 11
Attend Court for Sentencing
Attend Court for Settlement Conference
Attend Court for Status Conference
Attend Court for Motion Hearing - Suppress
Attend Court Hearing for Termination of Parental Rights
Attend Court for Trial

Exhibit B to Affidavit of 12/29/2022

Amount Charged by DA for Discovery
Guilty Plea
Initial Appearance
Jail Video Conference
Juvenile Hearing
Legal Research (Please Explain)
Cost of Necessary Long Distance Telphone Calls
Meet at DHHS
Meet with A.A.G.
Meet with Client
Meet with Client at Hospital
Meet with Client at Jail
Meet with Client at Prison
Meeting with Client's Parents
Meet with DHHS
Meet with District Attorney
Meet with Examiner
Meet with Expert
Meet with Guardian ad Litem
Meet with Investigator
Meet with Juvenile Community Corrections Officer
Meet with Other Counsel
Meet with Probation Officer
Meet with Witness
Meet with Other (Please Explain)
Meet with Client at Juvenile Detention Facility
Qualified mileage
Minimum Fee Adjustment to raise voucher to 2.5 hrs.
Motion Hearing
Open File
Extraordinary Expense (Requires Documentation)
Other Out of Court Time
Personal/Business
Telephone Conference with A.A.G.
Telephone Conference with Clerk
Telephone Conference with Client
Phone Conference with Client's Parent(s)
Telephone Conference with Client's Sibling
Telepone Conference with Client's Spouse
Telephone Conference with District Attorney
Phone Conference with DHHS
Telephone Conference with Examiner
Telephone Conference with Expert
Telephone Conference with G.A.L.

Telephone Conference with Investigator
Telephone Conference with JCCO
Telephone Conference Counsel for Other Party
Telephone Conference with Probation Officer
Telephone Conference with Witness
Telephone Conference
Photocopies - over 100 copies
Polygraph
Preliminary Hearing
Prepare Brief
Prepare Correspondence
Prepare Correspondence to A.A.G.
Prepare Correspondence to Clerk
Prepare Correspondence to Clerk - Filing
Prepare Correspondence to Client
Prepare Correspondence to District Attorney
Prepare Correspondence to Expert
Prepare Correspondence to G.A.L.
Prepare Correspondence to Investigator
Prepare Correspondence Requesting Discovery
Prepare Memorandum of Law
Prepare Memorandum of Law - Sentencing
Prepare Memorandum of Law - Suppression
Prepare Motion for Access to DHS Records
Prepare Motion for Bill of Particulars
Prepare Motion for Continuance
Prepare Motion for Discovery
Prepare Motion to Dismiss
Prepare Motion for Expedited Review
Prepare Motion for Extension of Time
Prepare Motion for Forensic Evaluation
Prepare Motion for New Trial
Prepare Motion for Review/Amendment of Bail
Prepare Motion to Suppress
Prepare Objection to Cease Reunification
Prepare Petition for Emancipation
Prepare Petition for Modified Release Treatment
Prepare Petition for Post Conviction Review
Prepare Petition for Release or Discharge
Prepare Brief
Prepare Correspondence
Prepare Email
Prepare for Hearing
Prepare for Trial

Prepare Motion
Prepare Petition
Prepare Other
Pretrial Conference
Probation Revocation
Review
Review Application for Commitment
Review Charging Instrument
Review Correspondence
Review Discovery
Review Electronic Discovery
Review Email
Review Expert Report
Review File
Review Guardian Ad Litem Report
Review Investigator Report
Review Motion
Review Order
Review Petition
Review Proposed Plea Agreement
Review Proposed Order
Review Proposed Stipulation
Review Transcript
Review and Revise . . .
Review and Revise Draft ...
Roll Call
Roster Meeting
Second Appearance
Team Meeting with DHHS
Text message with...
Travel
Trial
View Scene of Alleged Crime

EXHIBIT 4

STATE OF MAINE
KENNEBEC, ss.

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

ANDREW ROBBINS, et al.,

Plaintiffs,

v.

MAINE COMMISSION ON INDIGENT LEGAL SERVICES, et al.,

Defendants.

ORDER ON JOINT MOTION FOR PRELIMINARY SETTLEMENT APPROVAL

BACKGROUND

In a Joint Motion dated August 21, 2023, Counsel for the parties ask the Court to preliminarily approve a proposed class action settlement, direct notice of the proposed settlement to the class, and schedule a final fairness hearing. Oral argument on the Joint Motion was conducted on August 29, 2023.

Plaintiffs brought a two-count Class Action Complaint for Injunctive and Declaratory Relief on March 1, 2022. A Scheduling Order was issued, and motion practice began almost immediately. On June 2, 2022, the Court granted in part the Defendants' Motion to Dismiss. A Rule 80C claim was dismissed, as the Court found that under Maine law in effect at the time, the Maine Commission on Indigent Legal Services (hereinafter "MCILS") could but was not required to undertake rulemaking. However, the Court held that same date that the 42 U.S.C. § 1983 claim brought by Plaintiffs had sufficiently pled a cause of action, in the light most favorable to them, that the proposed Class Members had been denied counsel, both actually and constructively, because Maine's system is inadequate under Sixth Amendment standards.

The Class was certified on July 13, 2022. Discovery commenced as described in the Joint Motion, but in September 2022, the parties took the Court up on its offer to arrange for a Judicial Settlement Conference. Active Retired Justice Thomas Warren conducted four in-person settlement conferences beginning in December of 2022, and the parties afterward engaged in dozens of negotiation sessions on their own, according to the Joint Motion. The case was temporarily stayed by the Court at the request of the parties in March of 2023 so the parties could focus on the proposed Settlement Agreement (hereinafter, "Agreement") they now wish the Court to preliminarily approve.

STANDARD OF REVIEW

Rule 23(e) of the Maine Rules of Civil Procedure states that "[a] class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." M.R. Civ. P. 23(e). The parties appear to agree that the Law Court has not had the occasion to interpret the procedures and standards for approving a class action settlement under this rule. The Court's own research confirms the same. Given the apparent dearth of Law Court case law interpreting this rule, the parties turn to M.R. Civ. P. 23(e)'s federal counterpart and the federal decisions interpreting it. The Court agrees that the federal standard provides useful guidance and thus, federal law informs the Court's analysis under M.R. Civ. P. 23(e). *See McKeeman v. Duchaine*, 2022 ME 23, ¶ 8 n. 2, 272 A.3d 300 ("As we have previously noted, it is appropriate for us to consider case law and commentaries on federal rules of civil procedure that are functionally equivalent to Maine's rules of civil procedure."); *accord Clark v. Goodridge*, 632 A.2d 125, 127 & n.2 (Me. 1993); *Smith v. Tonge*, 377 A.2d 109, 112 (Me. 1977).

At this stage—where the parties request that the Court preliminarily approve the proposed settlement—the Court is asked to decide whether "'it is likely that the court will be able to approve the proposal after notice to the class and a final approval hearing.'" *Anderson v. Team Prior, Inc.*, Docket No. 2:19-cv-00452-NT, 2021 WL 3852720, at *5 (D. Me. Aug. 27, 2021); Fed. R. Civ. P. 23(e)(1)(B). This is an important litigation event and "requires courts to conduct a 'searching,' 'careful,' and 'rigorous' inquiry before preliminarily approving a settlement." *Grenier v. Granite State Credit Union*, No. 21-cv-534-LM, 2023 WL 4931857, at *2 (D.N.H. Aug. 2, 2023); *Rapuano v. Trs. of Dartmouth Coll.*, 334 F.R.D. 637, 642 (D.N.H. Jan. 29, 2020). The decision to preliminarily approve a settlement and direct notice to the class "'should be based on a solid record supporting the conclusion that the proposed settlement will likely earn final approval.'" *Anderson*, 2021 WL 3852720, at *5.

The federal standard for final settlement approval—set forth in Rule 23(e)(2) of the Federal Rules of Civil Procedure—requires a finding that the proposed settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). Such an inquiry is necessary to "protect unnamed class members from unjust or unfair settlements affecting their rights when the representatives become fainthearted before the action is adjudicated or are able to secure satisfaction of their individual claims by a compromise." *Products, Inc. v. Windsor*, 521 U.S. 591, 623 (1997) (quotation marks omitted). To that end, the Court plays an important role in the approval of a class action settlement, serving as a "protector of the absentees' interests." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Products Liab. Litig.*, 55 F.3d 768, 784-85, 791 (3d Cir. 1995).

Indeed, a majority of circuits "have gone so far as to term the district judge in the settlement phase of a class action suit a fiduciary of the class, who is subject therefore to the high duty of care that the law requires of fiduciaries." *Reynolds v. Beneficial Nat. Bank*, 288 F.3d 277,

280 (7th Cir. 2002); *see also, e.g., Grant v. Bethlehem Steel Corp.*, 823 F.2d 20, 22 (2d Cir. 1987) ("In approving a proposed class action settlement, the district court has a fiduciary responsibility to ensure that 'the settlement is fair and not a product of collusion, and that the class members' interests were represented adequately.'"); *In re Cendant Corp. Litigation,* 264 F.3d 201, 231 (3d Cir.2001) ("Under Rule 23(e), the District Court acts as a fiduciary guarding the rights of absent class members and must determine that the proffered settlement is 'fair, reasonable, and adequate.'"); *1988 Tr. for Allen Children Dated 8/8/88 v. Banner Life Ins. Co.*, 28 F.4th 513, 521 (4th Cir. 2022) ("the district court, at all times, remains a fiduciary of the class"); *In re BankAmerica Corp. Sec. Litig.*, 350 F.3d 747, 751 (8th Cir. 2003) ("'Under Rule 23(e) the district court acts as a fiduciary who must serve as guardian of the rights of absent class members.'"); *Allen v. Bedolla*, 787 F.3d 1218, 1223 (9th Cir. 2015) ("the district court has a fiduciary duty to look after the interests of those absent class members").

While the First Circuit Court of Appeals has yet to hold that a judge's responsibility is that of a fiduciary, the Federal District Court for the District of Maine has described its role as such. *E.g., Sparks v. Mills*, 626 F. Supp. 3d 131, 136 (D. Me. 2022) ("'The court's role in reviewing a proposed settlement agreement is effectively that of a fiduciary for the class members, a duty which obtains whether or not there are objectors or opponents to the proposed settlement.'").

The principles outlined above are not at odds with Law Court precedent. In *Pike Indus., Inc. v. City of Westbrook*, the Law Court endorsed the use of a "fair, reasonable, and adequate" standard in the analogous context of approving consent decrees that affect public rights. 2012 ME 78, ¶¶ 20-24, 45 A.3d 707.[1] Moreover, the *Pike* Court was mindful of the public policy

[1] Moreover, on a number of occasions, the Maine Superior Court has applied the "fair, reasonable, and adequate" standard in the class action settlement context. *E.g., Stout v. Anthem Health Plans of Maine*, No. BCD-WB-CV-07-27 (Me. Super. April 3, 2009); *Frank v. PEC*

favoring settlement, but recognized the need for a heightened settlement approval standard in cases where public rights are at stake and where the rights of nonparties are otherwise implicated. *Id.* ¶¶ 22-24. Specifically, the Law Court highlighted the "self-evident proposition," that "consent decrees that affect public rights should be subject to closer scrutiny than those that resolve purely private disputes." *Id.* ¶ 23.

Based on the authorities above, the Court concludes that its obligations in the class action settlement context are heightened and unique: The Court must decide whether the proposed settlement is fair, reasonable, and adequate, and in doing so, acts as a fiduciary for the class. The Court's fiduciary responsibilities extend to the preliminary approval stage,[2] where the Court is tasked with deciding whether it is "likely" that the proposed settlement will earn final approval—i.e., whether it is likely that the settlement will pass the "fair, reasonable, and adequate" test. The "'court enjoys considerable range in approving or disapproving a class action settlement, given the generality of the standard and the need to balance [the settlement's] benefits and costs.'" *Robinson v. Nat'l Student Clearinghouse*, 14 F.4th 56, 59 (1st Cir. 2021).

To guide its preliminary approval decision, the Court again looks to Fed. R. Civ. P. 23(e)(2), which contains four factors that federal courts must consider when weighing a proposed settlement's fairness, reasonableness, and adequacy. Fed. R. Civ. P. 23(e)(2). Although the factors apply to final approval, the Court similarly "looks to them to determine whether it will likely grant final approval based on the information currently before the Court." *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 28 (E.D.N.Y. Jan. 28, 2019). The factors identified in Fed. R. Civ. P. 23(e)(2) include "procedural checks: that 'the

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Israel Econ. Corp., No. CV-99-261, 2000 WL 33675376, at *2 (Me. Super. May 12, 2000); *Am. Trucking Associations, Inc. v. Diamond*, No. CV-89-410, 1990 WL 10067329, at *1 (Me. Super. July 17, 1990).

[2] *E.g., Grenier*, 2023 WL 4931857, at *6 (recognizing the court's fiduciary role at the preliminary approval stage).

class representatives and class counsel have adequately represented the class' and that 'the proposal was negotiated at arm's length.'" *Murray v. Grocery Delivery E-Services USA Inc.*, 55 F.4th 340, 345 (1st Cir. 2022). "They also include substantive checks: that 'the relief provided for the class is adequate' and that 'the proposal treats class members equitably relative to each other.'" *Id.* The Court addresses these factors in greater detail below.[3]

Procedural Factors

Generally, the procedural factors (adequate representation and arm's-length negotiations) "provide assurance that the settlement resulted from a process likely to achieve a fair outcome, thereby providing 'an important foundation for scrutinizing the substance of the proposed settlement.'" *Id.*

Adequate Representation. The adequate representation requirement "'serves to uncover conflicts of interest between named parties and the class they seek to represent.'" *Cohen v. Brown Univ.*, 16 F.4th 935, 945 (1st Cir. 2021). Such an inquiry largely overlaps with the adequacy requirement in the class certification context (*see* M.R. Civ. P. 23(a)(4)) —a standard the Court already determined was satisfied in this case. *Cohen,* 16 F.4th 935 at 945. Recognizing the potential for redundant inquiries, the advisory committee's note to Fed. R. Civ. P. 23(e)(2)

[3] The parties' motion cites First Circuit case law for the proposition that "[i]f the parties negotiated at arm's length and conducted sufficient discovery, the district court must presume the settlement is reasonable." *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 32-33 (1st Cir. 2009). Some courts have questioned the propriety of similar presumptions in light of the recent changes to Fed. R. Civ. P. 23(e), which was amended in 2018 to include the four factors identified in the text above. *See Roes, 1-2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1049 n. 12 (9th Cir. 2019) (noting that Fed. R. Civ. 23(e)(2) "now identifies 'whether ... the proposal was negotiated at arm's length' as one of four factors that courts must consider and does not suggest that an affirmative answer to that one question creates a favorable presumption on review of the other three"). In any event, the Court does not understand such a presumption to relieve the Court of its obligation to closely review the substance of the proposed settlement for adequacy and fairness. *See Murray*, 55 F.4th at 345 (procedural considerations like arm's length negotiations "provide assurance that the settlement resulted from a process likely to achieve a fair outcome, thereby providing 'an important foundation for scrutinizing the substance of the proposed settlement'").

instructs courts to "focus . . . on the actual performance of counsel acting on behalf of the class." Fed. R. Civ. P. 23(e)(2) advisory committee's note to 2018 amendment. Relevant considerations at this stage include "the nature and amount of discovery" performed by counsel as well as "actual outcomes of other cases." *Id.*

Arm's-Length Negotiations: At this step, the Court considers any signs of collusion that would undermine the settlement's fairness. *Noll v. Flowers Foods Inc.*, 1:15-cv-00493-LEW, 2022 WL 1438606, at *6 (D. Me. May 3, 2022). As with the "adequate representation" prong, the extent of discovery is relevant to the Court's analysis: "[F]ull discovery demonstrates that the parties have litigated the case in an adversarial manner and is, therefore, an indirect indicator that a settlement is not collusive but arms-length." 4 Newberg and Rubenstein on Class Actions § 13:49 (6th ed.). Moreover, the involvement of a neutral third party in the settlement negotiation process weighs in favor of a finding that the settlement was negotiated at arm's length. *Noll*, 2022 WL 1438606, at *6 (highlighting that "the parties arrived at the Settlement after nearly two years of repeated mediation sessions"); *see also Gallucci v. Gonzales*, 603 Fed. Appx. 533, 534 (9th Cir. 2015).

Substantive Factors

Adequacy of Relief. In assessing whether the relief provided for the class is adequate, the Court examines, *inter alia*, the costs, risks, and delay of trial and appeal.[4] *Noll*, 2022 WL 1438606, at *6; Fed. R. Civ. P. 23(e)(2)(C)(i). The "fundamental question is how the value of the settlement compares to the relief the plaintiffs might recover after a successful trial and appeal, discounted for risk, delay and expense." *In re Compact Disc Minimum Advertised Price Antitrust*

[4] Additional considerations include: The effectiveness of the proposed means of distributing relief to the class, including the processing of claims; the terms of any award of attorneys' fees, including the timing; and any agreement identified in connection with settlement. Fed. R. Civ. P. 23(e)(2)(C)(ii)-(iv).

Litig., 216 F.R.D. 197, 207 (D. Me. 2003). The Court must be satisfied that the settlement secures adequate recovery for the class in exchange for class members' release of valuable claims against the defendant. *See 1988 Tr. for Allen Children Dated 8/8/88 v. Banner Life Ins. Co.*, 28 F.4th 513, 526-27 (4th Cir. 2022) ("As a general matter, a settlement agreement may be inadequate if it forces class members to release valuable claims for nothing in return."); 4 Newberg and Rubenstein on Class Actions § 13:51 (6th ed.) ("The court must be assured that the settlement secures an adequate recovery for the class in return for the surrender of the class members' rights to litigate against the defendants").

Intra-class Equity. The final Rule 23(e) factor requires the Court to consider whether the proposed settlement treats class members equitably relative to each other. Fed. R. Civ. P. 23(e)(2)(D). As part of its analysis, the Court examines whether "relief is apportioned between class members in a way that takes appropriate account of differences among their claims." *Noll*, 2022 WL 1438606, at *7 (quotation marks and citations omitted). The Court likewise considers "whether the scope of the release may affect class members in different ways that bear on the apportionment of relief." Fed. R. Civ. P. 23(e)(2)(D) advisory committee's note to 2018 amendment. With respect to releases, the court must use "special care . . . to ensure that the release of a claim . . . not shared alike by all class members does not represent an advantage to the class . . . [bought] by the uncompensated sacrifice of claims of members, whether few or many." *TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456, 461 (2d Cir. 1982) (quotation marks omitted). At bottom, "the court's goal is to ensure that similarly situated class members are treated similarly and that dissimilarly situated class members are not arbitrarily treated as if they were similarly situated." 4 Newberg and Rubenstein on Class Actions § 13:56 (6th ed.)

FINDINGS AND CONCLUSIONS

The Court's analysis is divided into four sections: the nature and characteristics of the class; the nature of the agreement itself; procedural factors; and substantive factors.

The Nature and Characteristics of the Class

In certifying the class, the Court described its members as requested by Counsel for the Plaintiffs. In its role as fiduciary of the Class Members, the Court believes it is important to make further findings as to who these individuals are, and what is at stake for them in this litigation.

The individual persons that make up this class have been charged with serious offenses, and their constitutional rights, once attached under the Maine and federal constitutions, remain intact regardless of what stage of the criminal process they are in.

Some of the Class Members will be convicted of these charges after entering guilty pleas or after a jury or bench trial. Some of them will be acquitted after trial, and some will have a number of their charges dismissed through plea negotiations. Many of them present significant threats to public safety, while others do not.

Some Class Members will spend significant time in pre-trial custody unable to make bail, and some will be held without bail. It should be obvious that it is often difficult for incarcerated individuals to stay in regular contact with appointed counsel, particularly if their attorney does not live or practice near a particular jail. Many Class Members are released with bail conditions imposed at their first appearance which restrict liberties most Mainers take for granted. Many are subject to searches of their person, vehicle, and residence. While Class Members are expected to stay in touch with counsel, some are transient and some are homeless.

Many of them are addicted to substances and/or suffer from serious mental illness. Some of them do not speak English or have limited English proficiency. Some of them are not

American citizens. Some of them are so compromised by mental illness or developmental disabilities at the time they are arrested or charged that they will be deemed not competent to stand trial; some will be found incapable of having competence restored, and their charges will eventually have to be dismissed. All of them are presumed to be innocent and some of them did not actually commit the crimes with which they are charged.

All of these individuals are entitled to effective, court-appointed counsel under the Maine and United States Constitutions. *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963); *State v. Watson*, 2006 ME 80, ¶ 14, 900 A.2d 702. Importantly, this right attaches as soon as the prosecution commences, meaning at "the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty." *Rothgery v. Texas,* 554 U.S. 191, 194, 198 (2008). Due process prohibits the State from physically detaining citizens prior to trial unless certain procedural safeguards are met—such as providing counsel at any adversarial hearing. *United States v. Salerno,* 481 U.S. 739, 755 (1987); *see also State v. Babb*, 2014 ME 129, ¶ 10, 104 A.3d 878 ("Once the State has initiated adversary judicial proceedings, the Sixth Amendment guarantees the defendant the right to counsel at 'critical stages' of the criminal process"). And due process prohibits the government from discriminating against the poor in providing access to fundamental rights, including the freedom from physical restraints on individual liberty. *See Griffin v. Illinois*, 351 U.S. 12, 16-18 (1956).

Maine's system, with the exception of five or six attorneys who were hired as "rural public defenders," relies exclusively on private attorneys who are independent contractors. The attorneys, if deemed qualified by MCILS, are entitled to come on and off rosters maintained by MCILS as they wish. It is MCILS's obligation to maintain sufficient numbers of attorneys on their rosters, by case type, and the Judicial Branch is charged with appointing attorneys from

these rosters. This means that the system is entirely dependent on the willingness of the MCILS-qualified, independent contractor attorneys to accept or not accept certain kinds of cases. And as noted, the attorneys always have the ability to simply come off the rosters and decline to accept any new cases.

With respect to the first appearance of a Class Member before a jurist, the State provides a "Lawyer of the Day" ("LOD") from rosters that are also maintained by MCILS. The LOD's contact with the Class Member is very short-term, as the LOD's representation of him or her, will in almost every instance, last for only a day or so. After that appearance, Maine jurists can only hope that there will be a MCILS-qualified and rostered attorney to accept appointment depending on the charge or charges brought against a Class Member.

There is no legal standard in place in Maine for how long it is acceptable for an individual to be without counsel after the LOD's representation ends or, for that matter, whenever a court-appointed attorney withdraws from representation for any number of reasons approved by a court. The goal has always been, however, that counsel would be assigned during the initial proceeding where the LOD provides limited representation. It has been widely reported that this is no longer the case, and the reality is that MCILS and Maine courts are simply doing the best they can to find an attorney willing to accept full appointment. And as the number of independent contractor attorneys on the rosters waxes and wanes, courts have no choice but to appoint any qualified, available attorney from off the roster, even if the attorney lives and practices a considerable distance from where the Class Member lives or is incarcerated.

The Nature of the Settlement Agreement

As noted above, the case was temporarily stayed in March of 2023 as the parties worked diligently up until August 21, 2023 to finalize the Settlement Agreement now before the Court. The parties are now asking the Court to extend the stay currently in place for another four years,

during which time the parties agree to jointly undertake best efforts to achieve what they describe as structural changes. Noting that there is no "quick fix or single solution to current and future challenges to Maine's indigent criminal defense system," counsel for the parties assert that the Settlement Agreement "provides meaningful short and long-term reforms in the State's provision of legal services." The Agreement provides a ten-page list of the reforms they have agreed to advocate for over the next four years: (1) advocacy regarding funding; (2) advocacy regarding statutory initiatives; (3) "best efforts" on legislative measures and appropriations; (4) rulemaking; (5) metrics regarding caseloads/workloads; (6) metrics regarding minimum qualifications and conflicts of interest; (7) metrics regarding performance standards and evaluation; (8) metrics regarding training; (9) metrics regarding Lawyers of the Day; and (10) metrics regarding data and reporting.

The Court finds that the Settlement Agreement proposed here is highly unusual for class action litigation. It is not a Judgment that can be entered on the docket or appealed. It is not a judicially enforceable Consent Decree. It is a four-year stay—or continuance—of the litigation which was intended to decide if the State of Maine has systematically violated Class Members' Sixth Amendment rights and their rights under the Maine Constitution. And while the Court could under this Agreement find at some juncture that "the Defendants have materially breached [the Proposed Settlement] and failed to remediate the breach," the remedy proffered to the Class Members is this: a resumption of this litigation. *See* Settlement Agreement, § II(I). Depending on whether such a breach is found, and when it is found, this litigation could resume roughly four years from now. Truly, the only concrete judicial enforcement mechanism would be for the Court to issue a new Scheduling Order.

The Court has concluded that the four-year stay does not, by itself, justify a denial of the motion. As a fiduciary for the Class Members, however, the Court has an obligation to ensure

that procedural and substantive safeguards have been met before it can decide if this Agreement will likely be approved as fair, adequate, and reasonable.

Procedural Factors

As noted above, the Court is required to decide first, if the Class Members have received adequate representation and the Agreement was negotiated at arm's length. Adequate representation generally means the Court must focus on the actual performance of counsel (*see* Fed. R. Civ. P. 23(e)(2) advisory committee's note to 2018 amendment), while arm's length negotiations means that the parties have behaved as adversaries during litigation, conducted adequate discovery, and negotiated the proffered settlement with no signs of collusion. *See supra* pgs. 6-7. Class Counsel in this case are highly qualified, and the Court has no concerns at all about their sincere commitment to the necessity for systemic reform of Maine's indigent defense system. Given the number of settlement conferences and negotiation sessions, it appears likely that this Agreement was the best settlement they could obtain from Defendants at the present time.

The Court concludes that adequate "procedural" safeguards exist here as defined by federal case law. There is no evidence of collusion. Appropriate adversarial motion practice occurred, and discovery was aggressively pursued—at least up until the parties requested a stay in March of 2023 so they could focus on reaching this Agreement.

Substantive Factors

In assessing whether substantive safeguards exist to permit the Court to preliminarily approve the Agreement, the Court acting as fiduciary must be satisfied that the proposed relief is adequate and relatedly, whether the proposed Agreement treats Class Members equitably relative to each other. Fed. R. Civ. P. 23(e)(2)(C)-(D). As noted just above, it appears to the Court that Class Counsel concluded this was the best settlement they could obtain from Defendants as of

August 21, 2023. That does not of course mean the proposed Agreement contains sufficient substantive safeguards, or is otherwise in the best interest of Class Members.

As Counsel for the parties know from oral argument, the Court is—and remains—extremely concerned about the substantive rights the Class Members are giving up over the next four years in exchange for the benefits described in the Joint Motion. The Agreement, with its four-year stay of litigation, means that no individual Class Member may seek as part of these proceedings any emergency relief should further diminution of the number of rostered attorneys result in longer wait times for appointment of counsel.[5] The Agreement does not acknowledge, much less address, current conditions in the system in this regard. Counsel for the parties, on the other hand, seem to acknowledge that things are dire and deteriorating, but Agreement itself does not acknowledge anything of the kind, much less provide any path within its terms where a Class Member, represented by highly competent Class Counsel, could come to Court to obtain meaningful emergency relief. Instead, Counsel for both parties seem to expect Class Members to wait patiently for incremental changes the parties hope will come to pass during the four-year stay of litigation—even if the number of attorneys willing and able to accept appointment continue to diminish such that significant delays occur in appointment of counsel to represent Class Members at adversarial hearings. The Agreement does not adequately provide for the types

[5] The Court recognizes that the term "actual deprivation" of counsel is a legal term that may mean more than simply no attorney at all. On the one hand, there are instances of complete denial of counsel at a critical stage, and on the other hand, there are instances where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 659 (1984); *In re Children of Kacee S.*, 2021 ME 36, ¶ 30 n. 7, 253 A.3d 1063. "A constructive denial of counsel occurs when 'although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.'" *Tucker v. State*, 394 P.3d 54, 63 (Idaho 2017); *In re Children of Kacee S.*, 2021 ME 36, ¶ 30 n.7, 253 A.3d 1063. The Court will endeavor to clearly distinguish between these meanings.

of remedies that might be available to Class Members if Maine's system evolves from "constructive" deprivations of counsel (as Class counsel claim) to a situation where Class Members are simply unrepresented. The current agreement closes the courthouse doors to Class Members to even attempt to prove such a claim.

It is worth remembering that Counsel for the Plaintiffs have claimed from the beginning of this case, and throughout the arguments on the Motions to Dismiss and for Class Certification, that "the system for providing indigent legal defense in Maine is broken." Pls.' Compl. ¶ 9. That paragraph goes on to allege as follows: "Dozens of attorneys have stopped accepting cases from the MCILS roster, and the crisis is set to worsen with the anticipated spike in trials as courts begin the process of working through the enormous backlog of cases the pandemic has created." *Id.*

As it turned out, it was not just the restoration or acceleration of criminal dockets that has affected the number of available attorneys. While there may be differences of opinion as to why it happened, the parties agree that shortly after attorneys began making $150 per hour, the numbers plummeted again. At the same time, the number of attorneys accepting LOD-only cases has increased across the State, leaving the number of attorneys able and willing to go the distance with an indigent client shrinking still.

In fairness to Counsel for the parties, it appears that what occurred chronologically was that they—with the permission of the Court—ceased working on discovery and turned their focus instead to settlement, at the same time that the number of attorneys continued to shrink. This means, of course, that no one in this case really knows how bad the problem is. It is possible that the problem has been overstated. Perhaps it has been ameliorated somewhat by steps taken by a number of jurists to maintain so-called "limited rosters," apparently with the assent of MCILS. Judges use these rosters because the rosters they receive from MCILS are simply

inadequate to enable judges to meet their constitutional obligations. In order to keep the system functioning, judges are appointing attorneys who may be qualified for a case type but who have taken themselves off the MCILS rosters for that case type. This means that individual attorneys are making arrangements with individual judges to take a few cases for case types they were not permitted under the Rules to take just a few months ago as they had chosen, as is their right, to come off the official MCILS roster. Judges and Clerks continue to make calls pleading with lawyers to take cases. This arrangement may work for the attorneys and for the courts, at least temporarily, but no one is monitoring how this improvising by jurists and the ongoing instability affects Class Members in terms of delay or adequacy of representation.

And a provision in the Agreement could easily make things worse in terms of MCILS's capacity to maintain sufficient numbers of attorneys on their rosters. The Agreement calls for caseload standards—which many agree will be beneficial, and long overdue—but the timing could not be worse. Meanwhile, the Agreement talks about one "brick and mortar" public defender office opening somewhere sometime in the next four years. The Agreement refers to the goal of obtaining approval and financing to open others, but otherwise there is no plan to address the problem. Class Members just have to be patient and wait.

If it can be proven that indigent defendants are in fact going without representation because courts no longer have a sufficient number of attorneys to represent these Class Members, and if the situation is not promptly remedied, this would constitute a violation of the Class Members' constitutional rights. This is more than just some technical violation. Some courts, including the court in *Betschart v. Garrett*, have started to understand that these delays in appointing counsel significantly disadvantage indigent defendants. No. 3:23-cv-01097-CL, 2023 WL 5288098 (D. Or. Aug. 17, 2023). For instance, unrepresented pre-trial defendants "are unable to adequately argue for conditional release, secure witnesses, review discovery, challenge

the charging instrument, intervene in the Grand Jury process, negotiate with the prosecution in an arms-length fashion, request the preservation of evidence, or challenge the length of their confinement through speedy trial statutes." *Id.* at *6. [6]

Then there is the matter of Paragraph F of Section II. While the Agreement in Section II states that no releases are being provided to the Defendants, Paragraph F nevertheless closes the courthouse doors to Class Members who wish to make any systemic claims against the Defendants for a period of four years. Despite Counsel's best efforts to persuade the Court otherwise, the broad language in this paragraph does little to alleviate the Court's concerns about the ability of Class Members to reasonably comprehend what they have given up. Paragraph F of Section II reads as follows:

> Nothing in this Section precludes Plaintiffs, including all members of the Settlement Class, from asserting claims against Defendants alleging a particularized injury arising from their individual circumstances and seeking individual, as opposed to systemic, relief. *However, Plaintiffs, including all members of the Settlement Class, may not allege, as the basis for any such claims against Defendants, systemic failures or deficiencies in Maine's indigent defense system occurring within the four (4)-year settlement period following the Effective Date.*

Settlement Agreement, § II(F) (emphasis added).

Counsel for the parties stated during oral argument that the Court should not worry as the release would still permit any Class Member from making a claim against the State of Maine in a different criminal or civil case because the State of Maine is not named as a Defendant in this

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[6] *Betschart* could serve as a cautionary tale. No. 3:23-cv-01097-CL, 2023 WL 5288098 (D. Or. Aug. 17, 2023). There, the plaintiffs—a group of indigent pre-trial defendants without access to an attorney—filed a habeas corpus class action in federal court against a county sheriff and certain state circuit court judges. The United States District Court for the District of Oregon granted the plaintiffs' motion for a temporary restraining order, concluding that the class of unrepresented, in-custody defendants were likely to prevail on the merits of their Sixth and Fourteenth Amendment claims. For relief, the court ordered that the class members be released (with any appropriate conditions) if counsel was not secured within ten days of their initial appearance.

litigation. The Court as a fiduciary is not so sanguine. At the hearing on the Defendants' Motion to Dismiss, the Court asked Assistant Attorney General Magenis whether he was representing the "State as well as the Commission." Mot. Tr. 17 (May 26, 2022). He explained that if the Plaintiffs prevailed, any injunctive relief would be aimed at mandating the Commission to take certain actions. "However, the—ultimate party in interest, again, is the State of Maine. And the—the party with—who the attorney general is representing is the State of Maine." *Id.*

This exchange mirrors remarks made by MCILS's former Executive Director, who advised the Court that he had sought permission pursuant to 5 M.R.S. § 191(3)(B) to obtain separate representation on behalf of the Commission and its members, but the request was denied. He went on to agree with the Assistant Attorney General that the "State is, from the Office of Attorney General's perspective, the proper party in interest, but that that office represents the State of Maine." Mot. Tr. 20 (May 26, 2022).

This is more than an interesting legal or academic issue as to what it means to be a "real party in interest" or "the proper party in interest" under Maine law. Under Section II(F), an individual Class Member under this agreement could be barred from bringing a claim based on "particularized injury" in a civil case, or a claim of deprivation of counsel in a criminal case, if in fact the State of Maine is considered or found by a different court to have been a Defendant in this litigation. This is made even more complex given AAG Magenis's position that even if the State is not specifically named in the caption, he represented not just the named Defendants but also the State of Maine. *See Superintendent of Ins. v. Attorney Gen.*, 558 A.2d 1197 (Me. 1989). No Class Member should have to parse this language to figure out if it is even worth his or her while to mount a claim based on a particularized injury, especially if the State attorneys or State actors in any future case take an aggressive approach in representing the State's interests.

In addition, the same section bars individual Class Members for the next four years from making claims in any court alleging "systemic failures or deficiencies in Maine's indigent defense system." Settlement Agreement, § II(F). It is difficult to envision any individual claim alleging actual deprivation, constructive deprivation, or non-representation of counsel where the allegations did not touch upon alleged "systemic failures" of Maine's statewide indigent defense system. In other words, it would be difficult if not impossible to disentangle claims of deprivation of counsel from claims of systemic failures.

If conditions continue to deteriorate, it is unrealistic to expect that over the next four years an individual Class Member—who may not even have an attorney, but who would certainly be proceeding without current Class counsel—would be able to proceed with an individual claim without having to litigate what "Defendants" and a "systemic" means.

This language, at a minimum, needs to be clarified so that a Class Member could understand what they would be up against if they brought a separate claim in a different Court alleging non-representation or any other grounds for emergency relief. Burdening an individual Class Member with having to litigate these issues—whether in state or federal court, in a criminal or individual civil claim, is problematic—to say the very least.

In addition to being overbroad, this language requires all Class Members to give up their ability to demand systemic changes for the next four years while waiting for incremental change, and it does so without regard to the relative strengths of their claims. That is, the Agreement treats all Class Members the same, both in what they must sacrifice and the relief afforded, but it does so inequitably without regard to the relative strengths of the Class Members' claims. The Agreement is also unacceptable to the Court for this reason.

If proven, the claims of individual Class Members who face non-representation might be in a far better position to prevail if they were able to litigate those claims in the instant litigation, as opposed to other Class Members who currently have counsel or are closer to resolving their cases either through trial or plea negotiations. Again, based on the record before the Court, it is not possible to know with any certainty how many Class Members are currently without counsel, and for how long. It is conceivable that the number of individual Class Members who have been unrepresented in the recent past or over the next four years is or will be relatively small. And to some, requiring a small number of Class Members to sacrifice any "systemic" claim against the Defendants might not seem to be a significant concern. However, the Court is simply not willing to subject Class Members to the risk of losing the right to pursue those important constitutional claims in this action, or in another forum. What is at stake, depending on the evidence presented, could be the deprivation of the fundamental rights to due process and to liberty, and the failure on the part of the State of Maine to fulfill a core function of government.

In sum, in order to approve this release and this Agreement as a whole, the provisions would have to provide a clear path permitting individual Class Members during a stay - of any length- to seek emergency relief if evidence supports the claim. The characteristics of the Class Members described above, and the fundamental rights at stake, demand no less from the parties. Certainly, no individual Class Member should have to wait four years to seek this kind of relief in this or any other forum.

The Court therefore concludes that the parties have failed to demonstrate that the Proposed Agreement will likely be approved as fair, reasonable, adequate and in the best interest of Class Members.

CONCLUSION

For the reasons stated above, the Court denies the Joint Motion. Counsel and the Court will meet in person at the Capital Judicial Center on September 15, 2023 at 10:00 AM. The purpose of the conference will be to either enter a Scheduling Order and proceed to resolution by trial, or for the parties to return to settlement discussions. The temporary stay ordered in March of 2023 will remain in place until further Order of the Court. The clerk is directed to incorporate this order on the docket by reference pursuant to M.R. Civ. P. 79(a).

Date: September 13, 2023

Michaela Murphy
Justice, Maine Superior Court

Entered on the Docket: 09/13/2023

EXHIBIT 5

STATE OF MAINE

KENNEBEC COUNTY SUPERIOR COURT

ANDREW ROBBINS, ET AL.,	)	
	)	
Plaintiff	)	
v.	)	
	)	AUGSC-CV-2022-00054
MAINE COMMISSION ON INDIGENT LEGAL SERVICES, ET AL.,	)	
	)	
Defendant/Petitioner	)	

TRANSCRIPT OF ORAL ARGUMENT
before Hon. Michaela M. Murphy

December 15, 2023

APPEARANCES:

For the Plaintiffs: Zachary J. Heiden

For the Defendants: Sean D. Magenis

ALSO PRESENT:

Eleanor Maciag, Deputy Director, Maine Commission on Indigent Legal Services

(Beginning of recorded material.)

THE COURT: All right, this is Andrew Robbins v MCILS, CV-2254. The parties have filed a supplemental joint motion to conduct preliminary review of amended class action settlement, direct notice to class members of amended proposed settlement, and make further orders as part of the settlement approval process.

The Court has reviewed everything that was filed by the parties. The parties did request a hearing on the supplemental joint motion and, counsel, this will be your opportunity to be heard in support of this joint motion.

I do have some questions for both of you, but I want to hear your remarks before we get to that. Who is going to speaking for Plaintiffs? Mr. Heiden?

MR. HEIDEN: Zachary Heiden for the Plaintiffs, Your Honor.

THE COURT: All right, good morning.

MR. MAGENIS: Good morning. Sean Magenis on behalf of the Defendants.

THE COURT: Okay. All right, go right ahead, Mr. Heiden.

MR. HEIDEN: Good morning, Justice Murphy, thank you. Zachary Heiden on behalf of the Plaintiff's class. This is a case, as you well know, about the screening, training, evaluation, supervision, and support of lawyers

provided to people who are entitled by the Sixth Amendment to representation.

In a previous hearing, the Court has expressed concern about the plight of people awaiting the appointment of counsel and the parties worked over the last number of months, with the aid of a judicial settlement officer, to address those concerns. And we believe that we have addressed them in three important ways.

First, the Court noted in page 15 of your order denying approval in September, on September 15th, that, quote, nobody knows how bad the problem really is. Now, thanks to --

THE COURT: Yeah, we have some information on that.

MR. HEIDEN: Yes. The Defendants' and the Plaintiffs' Counsel are regularly tracking the problem based on reports generated by the administrative office of the courts that tells us who is awaiting appointment of counsel, where they are, how long they've been waiting.

THE COURT: So how bad is the problem? What I have received, we get these printouts several times a week.

MR. HEIDEN: Yes.

THE COURT: Currently, it seems to be the case that there are approximately 200 people across the state who are eligible for court-appointed counsel that we have not

been able to appoint because the MCILS rosters are empty, in many respects, and 50 of them are locked up.

MR. HEIDEN: Yes, Your Honor.

THE COURT: And the names repeat week after week. So, I guess -- it appears to me this is not just an Aroostook County problem, it is -- it seems to be in various places across the state. So, from the Plaintiffs' Counsel point of view, class counsel's point of view, how bad do you think the problem is?

MR. HEIDEN: The problem is quite bad, Your Honor, and I agree with your assessment that this is not localized in any particular county.

THE COURT: It's systemic, is it not?

MR. HEIDEN: It is systemic, and the problem is certainly worse in certain counties than in other places.

THE COURT: Agreed.

MR. HEIDEN: But, you know, we thought it was important and the reason I started with this point is there's no way to solve a problem if you don't know the problem.

THE COURT: I agree.

MR. HEIDEN: And we are in a better position than we were on September 15th in terms of knowing the scope of the problem. We are tracking this data and charting the data. It seems that the numbers have gone down over the

last two months, so the number of people in custody without counsel, though certainly not as much as we would like and that number should be zero, right? There should be nobody waiting criminal charges who's entitled to counsel who doesn't have counsel.

THE COURT: And we're still waiting to see if Justice Douglas is going to announce or suggest, however we want to phrase it, a standard for how long it is acceptable for someone who is entitled to counsel to sit either in the community with liberty restrictions or in jail without counsel. Whether it's 48 hours, which is what we all thought for decades in the State of Maine, that that is the time when counsel had to be appointed if somebody was indigent and was facing jail. That seems to have vanished from the standards that we apply in courtrooms across the state every day. And so if there is no standard -- well, we're waiting to see if Justice Douglas is going to adopt a standard, maybe he's going to suggest one, maybe he's going to say it's a fact-intensive inquiry that 59 separate jurists are going to have to determine, I don't know. But why should I do anything until we know what the standard is? Which is, of course, something that may or may not happen in that other case but as far as I know, no decision has been issued yet, Mr. Magenis?

MR. MAGENIS: That's correct.

THE COURT: Okay. But you expect it any time?

MR. MAGENIS: There's no schedule, so it could be at any -- at any point.

THE COURT: Right, understood, okay. So why should I do anything unless we know if that standard is being announced? Because wouldn't that give us guidance as to what possible remedies might be out there for class members that might make the problems in this case better or worse? So why should I do anything until we know that?

MR. HEIDEN: Well, it does go back to actually the second point I was hoping to make about what we've been able to achieve with the revised proposed settlement agreement, which is making clear that there's nothing in this settlement agreement that precludes parties, including all class members, from pursuing other forms of relief such as habeas relief, and that's the case before Justice Douglas is a habeas case, and we fully expect that Justice Douglas will either issue an order in -- sounding in habeas about peoples' -- whether people are entitled to release from jail or dismissal of their charges because of the lack of counsel, and it's --

THE COURT: And does -- do the Plaintiffs consider that a remedy for people who are locked up that may be released but that might be rearrested? Because these dismissals, which is what Defense Counsel will be seeking,

will be without prejudice. And it just delays, perhaps, the inevitable and kicks the can down the road because that's the most relief I think a court could -- you know, whether it's an individual jurist or whether it's a more systemic -- I don't know what he's going to order. But how does that solve the problem? I just don't see how it does. But shouldn't we know if that is going to be an avenue and what the standard is? Because if the standard is 48 hours and if these regulations kick in in January, where caseload standards are being required of, you know, contract counsel, I don't know anyone who thinks these numbers are going to improve. If anything, they're going to get worse because people are going to have to adhere to the standards or they're going to have to get some kind of a waiver, which I don't know how long that takes, the Commission may not be willing to waive that, depending on how bad a person's caseload is, we have one public defender office that's not yet fully staffed, so how do we know that the numbers are not going to get much worse in January, February, March, or April? If the standard is 48 hours.

MR. HEIDEN: It's hard to predict what's going to happen in the spring and it's impossible for any of us here to predict what's going to happen in Justice Douglas's case and if that case is then appealed to the

Law Court and what their decision will be. But one thing I feel like we can say with some degree of certainty is that this problem is not going to be addressed by the current model of indigent defense delivery that the State of Maine has been using for decades. And I want to just take --

THE COURT: Do the Defendants actually agree with that, in your view? I can't really tell from what's been filed if they actually -- if this is a reluctant agreement to this. They're certainly not admitting that there's a systemic constitutional problem, they're admitting that they're going to -- that they think it's important to advocate for the changes that the Plaintiffs have proposed, but do you think that the Defendants agree that what is being proposed in their legislative proposals is moving things in the right direction? Do you think they believe that?

MR. HEIDEN: I have no reason to think that they don't believe it, and I'm basing that understanding on the actions that they have taken, and two in particular, the MCILS Commission voted to endorse the establishment of public defenders offices throughout the state. That was a very important change, and they have --

THE COURT: Yeah, since the beginning of the case, that's a major shift.

MR. HEIDEN: Since the beginning of criminal process in Maine, that's a major shift.

THE COURT: It is.

MR. HEIDEN: And that, they have backed up that vote with enthusiastic legislative advocacy.

THE COURT: Can you give me the timeline again? Because it was -- wasn't -- I had a hard time tracking the dates that are in this -- in what you filed, Mr. Heiden and Mr. Magenis, can you -- just so it's clear for me what the time -- the rollout timeline looks like?

MR. HEIDEN: I think my friend, Mr. Magenis, is probably in a better situation to talk about that, but the plan as I understand it is for an Aroostook County based public defender's office. This is still working its way through the legislative approval process and the budget process, but to try to get an office opened in Aroostook County, another office opened in Penobscot County, and then sooner -- much sooner than any of us had really reason to hope, offices throughout the state because, as you noted as you began, this is a statewide problem.

THE COURT: So is Aroostook and Penobscot, would they be rolled out at the same time or are they on different timetables? Do you know?

MR. HEIDEN: I mean, I'd defer to my friend --

THE COURT: It's a little ambiguous in --

MS. MACIAG: So the plan is for Aroostook County in fiscal year '24 using existing resources in the budget and for fiscal year '25, which starts July 1st, would be rolling out the other offices except for Portland and Cumberland, and the --

THE COURT: So in fiscal year '25, it would be --

MS. MACIAG: So it would be --

THE COURT: -- Penobscot --

MS. MACIAG: -- Penobscot, Piscataquis --

THE COURT: -- Piscataquis --

MS. MACIAG: -- Androscoggin, Franklin, Oxford, Midcoast, the four counties on the coast --

THE COURT: So Regions 6 and 7?

MS. MACIAG: Region 6, for District 6.

THE COURT: Six? Okay, thank you, yeah.

MS. MACIAG: And then Hancock, Washington --

THE COURT: All in fiscal year '25.

MS. MACIAG: Twenty-five. And the start dates would be staggered, the funding would be staggered so we could spend time getting those offices --

THE COURT: Right, and then in 2026 would be Cumberland/York --

MS. MACIAG: Cumberland slash --

THE COURT: -- and that would be a combined office --

MS. MACIAG: -- combined office.

THE COURT: All right. But it was my understanding from what was filed that -- that the Commission did not want to ask for all of this to happen at the same time because you didn't think you could get approval for that or because you didn't think you needed that?

MS. MACIAG: We just don't have the manhours in the central office to -- to do all of the HR hiring all at one time.

THE COURT: Okay. All right. So -- and Mr. Magenis, obviously, I appreciate very much you giving me this information, but I'm going to let you be fully heard about this, but I just wanted to make sure I understood. So, fiscal year for 2024 would be the date that we're talking about is what, exactly?

MS. MACIAG: So between -- between now and June 30th would be fiscal year '24.

THE COURT: Right.

MS. MACIAG: So as long as we get legislative approval for hiring, so we would need the Legislature to authorize the headcount of the --

THE COURT: For Aroostook.

MS. MACIAG: For Aroostook.

THE COURT: Right.

MS. MACIAG: But we would use our current personal services or all other funds to fund those positions, so

we're not asking for additional --

THE COURT: But you have positions in Aroostook, you have four RDUs -- or four, sorry, Rural Public Defenders, do you not?

MS. MACIAG: We have five -- we have six positions but they're not all based in Aroostook County.

THE COURT: Okay, all right, so that's just a misunderstanding on my part. So there are -- so this would be five extra people that would be hired and they would have a brick and mortar, they wouldn't be meeting with clients in the courthouse, they wouldn't be doing remote representation, they would have an office in Presque Isle?

MS. MACIAG: We're currently looking in Caribou for --

THE COURT: Caribou, okay.

MS. MACIAG: -- for office space and we're trying to secure that. We have Commission authorization to get an office --

THE COURT: And would the -- would the Rural Public Defenders be able to use that office?

MS. MACIAG: Yes.

THE COURT: Okay. So it would be Rural Public Defenders plus Aroostook Public Defenders.

MS. MACIAG: Correct.

THE COURT: Okay, all right, that's helpful. Right. And then in fiscal year '25, which starts July 1 '24 --

MS. MACIAG: Correct.

THE COURT: -- then it would be Penobscot, Piscataquis, Andro, Franklin, Oxford, Region 6 staggered.

MS. MACIAG: Yes.

THE COURT: Throughout those two years?

MS. MACIAG: Throughout that one fiscal year.

THE COURT: Just that one year. And there's a request in the budget to be able to do that.

MS. MACIAG: Yes, in our supplemental budget request.

THE COURT: And then fiscal year 2026, which begins July 1, 2025, would be Portland -- Cumberland -- Regions 1 and 2.

MS. MACIAG: Correct.

THE COURT: Okay.

MS. MACIAG: And that would be part of the next biennial budget ask.

THE COURT: Okay.

MS. MACIAG: So that we don't have a current ask for the Portland (INAUDIBLE).

THE COURT: But you do have a pending ask for these other --

MS. MACIAG: Yes.

THE COURT: -- brick and mortar facilities and the

personnel -- the personnel to staff these offices.

MS. MACIAG: Correct.

THE COURT: Okay, all right, all right, thank you, that's helpful. It's hard to interpret that from what's actually in front of (INAUDIBLE) go ahead.

MR. HEIDEN: Apologize if we -- if we could've made that clearer, but --

THE COURT: That's all right. That's all right.

MR. HEIDEN: -- I'm glad that we were able to get that information to you.

THE COURT: Okay.

MR. HEIDEN: I think just the last point in response to your order of September 15th on the issue of nonrepresentation, having public defenders offices and lawyers who are available at all times to take all the cases that are necessary has generated -- the demand that's generated by prosecutors is obviously the -- the ultimate solution. In the meantime, the Judicial Branch has set up status review hearings each month in response to advocacy by MCILS and --

THE COURT: That actually, Mr. Heiden, to be fair, is a result of the habeas case. I mean, I think, realistically, it truly was a reaction to the habeas case and the fact that there's a nonrepresentation problem and some courts had already started to set up a review process

because we wanted to keep track, ultimately, of where these folks were and who was going without counsel and for how long. But I understand as part of this filing that you are -- you believe that this has something to do with this case, but I just feel obligated to say that may have something to do with the other case.

MR. HEIDEN: Whatever the source, whatever gave birth to it, what has undoubtedly been a part of this case and a part of the additional settlement negotiations that we've been engaged in is MCILS is going to not only make sure that there are lawyers available for those hearings --

THE COURT: They're going to pay for them.

MR. HEIDEN: -- (INAUDIBLE) lawyers are paid, but they're going to provide guidance. And this goes back to where I started about that the essence of this case about lawyers being not supervised, not provided by -- with guidance, that guidance is going to, you know, direct the lawyers that they should be reviewing discovery, that they should be pursuing motions for all available relief, including release, as you referenced earlier.

THE COURT: Or, you know, exoneration of bail, other things that are available, but --

MR. HEIDEN: Recognizing that if -- if prosecutors are willing to offer time served sentences, that that should be brought to the attention of a court because if

the prosecutor is willing to let somebody out of jail, then there's probably no good reason for continuing to hold them in jail.

THE COURT: And these folks are going to be appointed as LODs to make these arguments --

MR. HEIDEN: That's correct, Your Honor.

THE COURT: -- at the review hearings.

MR. HEIDEN: Yes, Your Honor.

THE COURT: And how long would they -- are they going to stay on the case? Just that one day? Are they staying -- are they staying -- if, for example, there's a motion filed to dismiss or to exonerate bail, a judge issues a ruling, the defense counsel doesn't like the ruling or the judge says I'm going to put this off for another two weeks, is that same LOD going to come back or is it going to be a completely different person?

MR. HEIDEN: I don't --

THE COURT: Because LODs, my definition, is a 24-hour assignment.

MR. HEIDEN: I don't know the answer to that, Your Honor. Perhaps my colleagues from MCILS can better answer that.

THE COURT: Okay, right.

MR. HEIDEN: I know in many parts of the state, there aren't that many lawyers working as the lawyer of the day,

so --

THE COURT: We have more LODs than we have anybody else right now.

MR. HEIDEN: Anybody -- right, I take your point.

THE COURT: Okay, right, go ahead.

MR. HEIDEN: You know, just to finish, that I think the process of renegotiating, reengaging in negotiations with the aid of Justice Billings was incredibly productive and we did our best to try to address the Court's concerns. And to build those upon the foundation of the incredibly important relief that we were able to negotiate in the original settlement agreement and I just want to -- I know the Court is aware of that, I know you've heard me talk about it, but I don't want to - while I'm standing here at the microphone - let the moment pass to -- to emphasize how important it is for people in Maine who are accused of crimes to be able to have confidence that their lawyers have received all the appropriate training. That there's going to be a whole review of the training modules by MCILS as part of this settlement.

THE COURT: Including within the Public Defender Offices or are you just talking about the hybrid model where you're talking about contract counsel would receive the training, because --

MR. HEIDEN: It will include everybody, but I think

we all agree that it's going to be much easier to train lawyers in a public defender system than it is to train independent contractors. It's going to be easier to mentor them, it's going to be easier to supervise and evaluate their performance.

THE COURT: And to hold them accountable.

MR. HEIDEN: And to hold them accountable and to get them training for -- to make up for shortcomings because many of us lawyers, there's things that we're better at and things that we're not good at and within the public defender system, it's going to be easier to do that, to address those shortcomings, but the obligations that are embodied in the settlement agreement that we're hoping will go forward will apply to all lawyers, whether they're public defenders or private attorneys. They'll apply to everybody who is providing this important, constitutionally required service.

In addition, for the first time in the state's history, the settlement agreement includes that there will be an evaluation process. First, a systemic evaluation process to see if across the state whether there are things that lawyers are consistently doing particularly well or particularly not as well, whether they're making -- their motion practice, their jury selection, their use of experts and investigators, all that will be evaluated

at a systemic level and that will be followed by individual evaluations so that lawyers who are underperforming in particular areas can get the attention and support that they need so that they can perform at a high level. These are critically important issues, they're -- there were hard negotiations over them, over each of them, by the parties, and we're confident that if this settlement goes forward and these -- and the Defendants begin implementing these steps, it's going to make a real difference in the lives of people who are entitled to counsel.

Alternatively, you know, the parties are able and willing to try this case, but it will be months before that happens and then potentially at least a year before any appeals are resolved.

THE COURT: I agree with all that.

MR. HEIDEN: Thank you, Your Honor.

THE COURT: I guess what I'm trying to figure out is if the case does have to be tried, what happens to what -- it sounds like you folks have agreed to, it seems to me the legislation is going to go forward, there's a regulation in place now that's going to require caseload and practice load, if that's the right --

UNIDENTIFIED SPEAKER: Caseload standards.

THE COURT: Caseload standards but also folks are

going to have -- and that's going to be based upon whether they have a 50% criminal defense practice or a 100% or a 20%, whatever it is, but the point system will apply to all contract counsel. And that's going to happen -- it's self-effectuating, it has nothing to do with this case. So there's a regulation in place, it's going to happen. The legislation is self-effectuating, you're going to advocate for that no matter what happens. But this gets to the other issue which was not addressed, frankly, that I'm going to have to hear from you both on. I mean, there are -- you identified four of the Court -- four areas of the Court's concern but what is not mentioned in the filings, and I understand perhaps why it wasn't mentioned, because it may be the most difficult and vexing legal issue, which is the remedy and the enforceability of this agreement and that is what still gives me pause and I'm just going to be candid about that.

I fully understand how hard you have all worked to get to where you are and the good faith that has been displayed on both sides in negotiating these very difficult systemic problems. But you still are asking this Court to provide a remedy that is highly unusual and may be, ultimately, unenforceable and illegal. And the reason I say that, Mr. Heiden, is that what you are all asking me to do is to require a state agency, a separate

branch of government, to commit to advocate for a certain policy position. And I'm not criticizing the policy position, it's not my place to do that, but you're also asking me to bind a future administration, four years from now, if I stay this. How can this MCILS agency as currently constituted with its current directors, its current executive director and staff, all of whom seem to be working in good faith and dealing with very difficult problems, how can the Court order another Governor, another agency four years from now, because it will be a different Governor, it could be a completely different board of directors. How can I order that future agency, not -- I mean, setting aside whether I can order another branch of government to advocate for any particular policy position, but how can I bind a future administration, because that's essentially what you're asking me to do. And I am not aware of any court case anywhere in the State of Maine or anywhere else where a court has ordered another branch of government to take a policy position. That's not something judges or the Judicial Branch is comfortable doing and may not have the authority to do.

There's a First Amendment issue embedded in that, in my concern as well. Government speech, government policy, that is a separate branch of government. And, again, it's not a criticism of the policy but it has to do with the

authority anyone sitting in my chair has to order that. And there's also a metrics issue. You want me to only have -- or any judge who approves this or tries the case, to -- to measure what it means to exercise best efforts to advocate for a certain policy position. I don't know how that's measured, I don't know what's required of defendants who are ordered to exercise best efforts, but -- and I keep hearing about the Bates case, which I don't think has anything to do with what you're asking me to order in terms of enforcement, but -- and I recognize the separation of powers issue, but I see a different one than has been discussed and is not addressed here, which is whether or not any court can order a state agency to advocate a particular policy position. And I don't know if MCILS and the Defendants are waiving their rights to object to that, I don't know if it's been discussed, I would have no way of knowing that, but that certainly gives me pause as to whether I have the authority to do that. Do you have any thoughts on that?

MR. HEIDEN: I do. I have three thoughts, Your Honor. The first is we did give this matter some thought and the whole settlement negotiation process was premised on things that the parties could within their authority agree to.

THE COURT: Okay. Advocacy.

MR. HEIDEN: Advocacy was something that MCILS felt like it could agree to and it's premised on -- maybe it's a fiction, but the idea that government bodies serve continuously, right? We don't get rid of government every time there's a new election and reconstitute it, the Maine Commission on Indigent Legal Services continues to serve through legislative --

THE COURT: But they -- but they -- that's true, but there are rolling openings for appointments by a different Governor -- and they could take a completely different policy position than the current agency does and this four-year number has always been a mystery to me, what's the magic about the four years, but now that we are where we are on the calendar, we are now talking about a different administration would still be under this agreement to advocate for a particular policy position. So my question is; is there something magic about the four years? Are the Defendants waiving their right to object to a court ordering them to take a particular policy position? I'm very reluctant to get into that. There are certainly, you know, separation of powers issues in any case that is brought where state actors are involved, but to me, that is one that has not been particular flushed out in any of our discussions or briefing. And it actually didn't really emerge in my thinking until I

noticed that there was no mention of enforcement or remedies in this supplemental proposal. And so I had to think about well, there's number five here that I think I pretty clearly said was a problem, and in my thinking about that, it became clear that this is not a separation of powers problem in terms of Bates because Bates and Burr v Bouffard, which more recently discussed Bates, made it clear that the courts do retain injunct -- the authority to issue injunctive relief in cases where there are constitutional violations. Everybody in this case seems to think oh, well, you know, the judge can't order MCILS to do anything because of Bates. That's not what Bates says. Bates doesn't come close to saying that. And Burr v Bouffard, Justice Horton's decision in 2020, makes it clear that that is a misreading of Bates. So I don't -- so I'm not sure that that's the separation of powers problem, but I think there is another one that I would like you folks to think about and provide some guidance to the Court before I can decide if I can go along with what you've proposed.

MR. HEIDEN: So let me try and answer those questions in turn. First, there's nothing magical about the number four years. As we discussed and as you agreed, there's a lot here that the Defendants are agreeing to undertake regarding the supervision and training and evaluation of

counsel throughout the state while they're setting up Public Defenders Offices. There's a recognition on our part that that's going to take time. And we negotiated about, you know, all of us would probably like that to happen tomorrow or next week, but we spent a lot of time negotiating about how long each of these things are going to take. And you'll note in the settlement agreement that Plaintiffs' Counsel are taking on some of that labor. For example, drafting standards. And that's not because, you know, we have nothing else to do, it's being a matter of it's going to be faster if we take on some of that responsibility of helping get this process going. So four years was struck as that's the soonest that the Defendants could agree to do all the things that they're agreeing to do and it seemed like a reasonable amount of time to give them to that.

I don't think there's been a disagreement about whether Your Honor could order MCILS or any Executive Branch agency to do anything.

THE COURT: If there's a constitutional violation.

MR. HEIDEN: If there's a constitutional violation.

THE COURT: Proven in court, after hearing evidence and argument and all of that, right.

MR. HEIDEN: I think instead there has been the view that this Court cannot order the Legislature to do things

and cannot order the Judicial Branch to do things, and having --

THE COURT: But a court -- if a court finds a constitutional violation, it can order compliance and adherence to the constitutional standard and to tell the parties come up with a remedy and come back and talk to me about what you think the remedy should be and if the parties cannot agree, the Court can order a remedy. That's very clear from Bates, that's very clear from Burr v Bouffard. I understand nobody wants to be saddled with a consent decree similar to what occurred in Bates that resulted in that case. However, it's a mistake to think that the Court has no role in deciding if there is a systemic constitutional problem if the situation does not remedy within a reasonable time. And I don't know that I have the authority to order advocacy, or if I am convinced I can order it, how I measure failure to advocate sufficiently. Does that mean you have to bring sleeping bags to the appropriation table? I don't mean to make light of it, but I just don't know what that means.

MR. HEIDEN: Yeah.

THE COURT: Because you've recognized you can advocate till the cows come home and the Legislature can tell you no.

MR. HEIDEN: Right. No, we're going to have a panel

of people who are going to evaluate whether it was vigorous advocacy and (INAUDIBLE) --

THE COURT: Right, enough, so (INAUDIBLE) you're asking me to -- and then the remedy that you want me to issue is to sign a standard scheduling order. I mean, that is not something -- you're not even asking for a judgment, you're asking for a four-year continuance of litigation.

MR. HEIDEN: If the parties -- it's within the power of any party to a settlement agreement, which is a contract to decide that they're going to breach the agreement, and if MCILS, as you -- as you contemplated, the hypothetical, they have new staff or new commissioners and they decide we don't like what we had agreed to previously and we're willing to breach it. Obviously, breaches of contracts happen all the time and we'll be back in front of Your Honor.

THE COURT: And so part of that litigation would be Justice Murphy didn't have the authority to order that in the first place because it was a violation of separation of powers to order it -- for the Judicial Branch to order another branch of government to take a particular policy position. To advocate for a certain policy. Not just to implement a policy, but to advocate for that.

MR. HEIDEN: I would frame it a little bit

differently. I think it might be a different case if that was part of the remedy sought as a part of -- as different from that's part of the settlement negotiation that the parties have entered into voluntarily after arm's length negotiations that went on for some time. So I don't think it's a matter of you're ordering them to engage in advocacy, they are promising to engage in advocacy as part of resolving this case.

THE COURT: But I would -- if there was a motion to enforce the settlement agreement, I would have to decide if the advocacy was sufficient and I would fully expect the Attorney General's Office to come in and say well, you know, actually, by the way, I'm not sure you had the authority to do that in the first place.

MR. HEIDEN: Well, it was --

THE COURT: Shouldn't we know that now, before -- before we find that out three years down the road if things don't go well?

MR. HEIDEN: If I'm understanding your hypothetical correctly, I think what they would have to say is we the Attorney General's Office and we MCILS didn't have the authority to do that. Because they're the ones promising to engage in that advocacy. Yours simply would be holding them to their promise and, you know, evaluating whether they breached that promise in the way that you do, I'm

sure, in breach of contract cases all the time. This isn't some separate ruler that you're entering as a remedy in a contested case, this is a negotiated settlement agreement (INAUDIBLE) --

THE COURT: It is, but it implicates First Amendment rights on the part of government agencies and it implicates concerns, it seems to me, about whether the Judicial Branch has the authority to order an agency to advocate a particular policy. And that is -- and that is how I'm seeing it and I guess I need to be convinced it's not a problem.

MR. HEIDEN: Yeah, and Maine's separation of powers jurisprudence is not the same as everybody else's, but we modeled this idea on the Hurrell-Harring settlement agreement, which also included the state government agreeing to advocate for things because --

THE COURT: And was that -- was that a consent judgment?

MR. HEIDEN: It was a consent judgment.

THE COURT: Correct, which is what we're here for as a branch of government, not to leverage agreements for agencies to take particular policy positions. We're here to adjudicate claims that are brought --

MR. HEIDEN: I'm sorry if I misspoke, it wasn't adjudicated, it was settled.

THE COURT: It was settled, but it was a judgment, it was reduced to a judgment. You're not asking me to issue a judgment, which is what courts do and what courts try to -- you're talking about a judgement being entered four years after the stay. That's what this calls for, a dismissal four years down the road. But you're not asking me to order a judgment that is enforceable in any traditional sense. That's -- that's the difference between the case you referred to and what you're asking me to do.

MR. HEIDEN: I don't think that was the difference, maybe I have just a different interpretation of it. I think that the parties negotiated in Hurrell-Harring as we did here to agree to do things that the agencies had the authority to do themselves and to engage in advocacy with other branches of government that they couldn't bind, right? The Legislature is not a party here and there's a separation of powers --

THE COURT: Right, but courts everyday order -- issue orders that have -- that have financial consequences.

MR. HEIDEN: Yes.

THE COURT: And that's different than ordering the Legislature to do something, which I agree I cannot do, but why is it any different for me to order an agency to take a policy, a particular policy position, even if you

all agree to it? I'm not sure that that's ever been done before in Maine. Especially given what everybody calls our more robust separation of powers doctrine. I'm not -- I'm seriously not trying to come up with problems, but it -- because this was isolated in my thinking as the remaining concern I had about the initial settlement, I thought a little bit more directly about what you were asking me to order, and you're asking me to order advocacy.

MR. HEIDEN: I'm asking you to approve their promise to engage in advocacy.

THE COURT: But before I could have any enforcement authority at all, you would have to come before me and prove that there was insufficient advocacy, and then an order would issue requiring the defendants to continue to advocate and take certain policy positions, and I just don't want to have problems for myself or someone down the road if that is a -- if that's a separation of powers issue.

MR. HEIDEN: We don't want you to have those problems, either, or anybody down the road to have those problems, and we've tried as best we can to police this within -- to sort of wall this off within the things that MCILS has the authority to do. They have the authority to engage in advocacy, they don't have the authority to

appropriate to money. They don't have the authority to release people from jail, but they have the authority to tell lawyers you should advocate for people to be released from jail. And all -- the whole scope of the settlement agreement is premised on enforceable, redressable remedies that MCILS can engage in.

THE COURT: But don't I only have authority to adjudicate whether there have been violations of rules, statutes, or the Constitution, and not whether there has been violation of an agency's prerogative to take certain policy positions, and that's -- that's the crux of the concern.

MR. HEIDEN: I think you have more authority than that. I think if an agency -- if they had not paid their rent and, you know, some landlord says --

THE COURT: But that's not -- that's not taking a policy position, which that branch of government, accountable to the voters, by design, is empowered to do. We are not, as judges, empowered to promote policies.

MR. HEIDEN: What I mean analogously is that you have the authority to enforce contracts, and that's what the parties are here engaging in. Because it's a class action, we need your approval for that contract --

THE COURT: Correct.

MR. HEIDEN: -- but it's a settlement agreement and

it's a contract between the parties in which they're each agreeing to do different things in response for putting the litigation on hold for four years.

THE COURT: Unless by ordering enforcement of the contract, I am ordering an agency to do something that I don't have the authority to order. And I'm not trying to create a circular problem here. I don't think this is a trivial concern, I think it's something that none of us have thought through and I certainly want to hear from Mr. Magenis on this and I know I'm throwing this at you, but it seems to me that it's a legitimate thing to consider.

MR. HEIDEN: I want to hear from Mr. Magenis about it, but I want to just finish by saying that, you know, the remedy -- it would not be ordering them necessarily to do anything that would violate the Constitution, their rights as an independent branch of government or an agency or to exercise their First Amendment rights. The remedy would be that we're back on the trial calendar. The case is -- the settlement is dissolved and if you find that they've breached it and they are not willing to address that breach, that we would -- we would go to trial at that point. I don't think that's going to happen. I believe they're going to live up to every part of this agreement. We went over every letter of it, every period, every comma, very carefully and, you know, fully believe that

it's within their authority and also their policy -- the policy of the State of Maine that they are going to fulfill this agreement.

THE COURT: You also suggest in your filings, Mr. Heiden, that if, for example, during the four years things deteriorate, there could be another class action filed.

MR. HEIDEN: Indeed.

THE COURT: Which certainly gave me pause.

MR. HEIDEN: Right.

THE COURT: Why would -- why would the Court, any court, any state court, given the existence of this class action, contemplate as a positive result of this litigation a second class action when competent class counsel has been assigned in this case that's very well versed in the complicated issues this case presents. To me, that did not seem reassuring at all, and which brings me back to the question of if, for example, the Court said I'm going to stay this litigation, I'm going to agree to this stay, but it's not going to be for four years. Let's see what happens at the end of the legislative session. Is MCILS then going to say well, we don't have an agreement? They're not going to do that. They're -- I believe they're, as you do, Mr. Heiden, they faced these issues head on and they've taken votes and they've decided this is what we're going to pursue. I know that can

change. The Legislature could say no, we have other competing interests and we're not interested in funding this, but why shouldn't I wait only that long and not say hands off for four years unless advocacy is insufficient? They're still going to keep doing what they say they're going to do, don't you think?

MR. HEIDEN: I wouldn't want to speculate, you're going to have to ask my friend, Mr. Magenis, about what they will do or won't do if the settlement agreement doesn't go through. But what I meant -- what we meant when we said that there could be other class actions is that the problem of people having lawyers who are not adequately trained and supervised and evaluated and supported is a critically important problem, and it's the one that we --

THE COURT: But that's part of this case. That's this --

MR. HEIDEN: Exactly.

THE COURT: That is this case, for sure.

MR. HEIDEN: That's exactly right. And that is not the only problem that the members of the class suffer from.

THE COURT: Right. But non-representation is also in this case, it's -- it was certainly argued in the motions to dismiss that maybe it hasn't been made as explicit as

possible, but non-representation is something you talked about in your earliest filings, Mr. Heiden, so I'm not sure that that is really the subject of another class action. You would have to convince me it's not part of this case.

MR. HEIDEN: It might have to be a subject of a --

THE COURT: Amendment.

MR. HEIDEN: -- of claims against a different set of defendants because MCILS is going to agree to do what is within their statutory authority to do.

THE COURT: Okay, understood. All right, I know I hit you with a lot of questions you may not have been thinking about, but I appreciate your candid responses and the hard work that obviously Plaintiffs' Counsel have put into this along with Defense Counsel and everybody at MCILS. So I don't want there to be any confusion about that, but the fifth issue, the enforceability, the unique remedy or the unique enforcement mechanism that you are proposing continues to give me concern.

MR. HEIDEN: Thank you, Your Honor.

THE COURT: All right, thank you. Mr. Magenis?

MR. MAGENIS: Good morning.

THE COURT: Good morning.

MR. MAGENIS: I will try not to restate what I heard from Plaintiffs' Counsel and what was in our briefing.

I'd like to start by addressing the last concern the Court raised. The parties relying on the Court's order of September 15th addressed the issues raised in that order. The issue of First Amendment violation was not clearly --

THE COURT: Well, the issue of enforceability and the unique enforcement mechanism and the fact that this -- you're not asking the Court to issue a judgment, you're asking, essentially, for a four-year continuance, with the remedy being the issuance of the scheduling order in a trial. That is -- that was certainly front and center of the initial order denying the first proposal.

MR. MAGENIS: It was referenced and I believe it was referenced as not being something that would on its own prevent this Court from approving settlement. But to the substance of the Court's concern, the - and I believe nothing I'm saying is any -- in any way different from what Plaintiffs' Counsel has addressed, which is the Court cannot enjoin MCILS to go to the Legislature and ask for something specific. You are correct. And the issue here is addressed by a contractual agreement to do that and the remedy here is not to find MCILS in contempt in the event that someone judges they didn't do that, the remedy is we restart the litigation. That entire process was designed in order to avoid any of these separation of powers issues. The Court --

THE COURT: Why do you keep citing Bates? Because Bates doesn't apply to what -- this case at all. Bates dealt with a consent decree that was in the form of a judgment where there were specific things ordered - hearings, multiple hearings about compliance with the terms of that agreement - and the law court, even in Bates, made it clear that the Court had an important role to play in enforcing judgments. And -- but you're not asking for an agreement that's being reduced to a judgment because it appears that MCILS does not want the Court to order it to roll out public defender offices. It does not want the Court to order or to even find a constitutional violation, although MCILS does repeatedly say we are in a constitutional crisis. So there is a bit of a disconnect between MCILS taking that position and yet saying we don't want the Court to make a finding that there's a constitutional violation, even though the recent standing order made it clear that MCILS was not complying with its statutory obligation and that people were going without counsel, hence the Court had to set up a mechanism on its own to review what was actually happening on the ground because MCILS could not fulfill their obligations under the statutes.

So, it's -- it is a different kind of a contract that you're proposing than what was in Bates, for sure. Is it

not?

MR. MAGENIS: I understand the Court's reference to Bates. I'm not clear on exactly where in the most recent motion we cited Bates.

THE COURT: It's towards the end of what was filed in terms of the reason that you've fashioned this particular remedy is a separation of powers and Bates is cited, but if you look at Bates and if -- more importantly, if you look at Burr v Bouffard, the Law Court more recently said there is a role for the courts in enforcing the Constitution and if there is a violation of the Constitution, the Court can absolutely order injunctive relief against state actors to remedy a constitutional violation. And so if and truly there is a constitutional crisis, why aren't we litigating that in some form now instead of four years from now or until there's been a failure of advocacy?

MR. MAGENIS: What I think is very important to ground the discussions on this motion is exactly what is at issue in this case, and that is defined by plaintiff's complaint as well as by the party in the plaintiff's name. The plaintiffs have asserted that MCILS under its statutory duties failed to enact standards, including caseload standards, supervision standards, and training standards, creating an unconstitutional risk of a Sixth

Amendment violation. We have opposed that claim and we deny liability because that is not a claim that is, A, well defined or, B, has been recognized in this state, and there are also significant factual issues which the parties have explored in discovery.

The issue with respect to MCILS and the naming of MCILS by plaintiffs also defines the scope of their claim.

THE COURT: Right, I agree.

MR. MAGENIS: That's been recognized by the Law Court as well as by this Court in the July opinion reflecting the fact that in a suit against the State, the appropriate defendant is the defendant -- or the appropriate named agency is the agency which can provide the relief requested. The relief requested is to establish regulations and to establish standards and enforce them --

THE COURT: And to rule 80C, which I understand that, I mean, that claim was dismissed, but that's how it was originally brought, also allows courts to find, if it's proven, that agencies have violated the Constitution. So agencies can be compelled to comply with constitutional standards as well as comply with regulations and statutes. That's in the -- that's in the Maine Administrative Procedure Act. Courts do it all the time, have done it for decades. So it's not just -- it's not a simple matter of well, you know, if an agency is on -- is named as a

defendant, the Court can't even talk about the Constitution. That's just not true.

MR. MAGENIS: No, and that's not the point I was trying to make, Your Honor, and I apologize for being unclear. My point was that the scope of the claims is defined by the party that's named. And here, the party that's named is MCILS, meaning any relief that's going to be available is going to be cabined in by the powers available to MCILS, and that the relief requested in this case is on all fours with what MCILS can do. The claims are - and the Court has referred to and the parties have addressed as part of their settlement negotiations - the broader issues with respect to Maine's Indigent Defense System. The non-representation of criminal defendants awaiting trial is not part of this case. This case is about regulations and standards. While the collateral effects of the settlement in this case, as the Court pointed out, with respect to potentially barring other claims in other cases, is relevant. That situation is not part of this case. The plaintiffs haven't made that claim and it's not something that MCILS can directly address. So the fact that plaintiffs haven't made that claim and the fact that they named the parties that they named, establishes that. This is not --

THE COURT: Hasn't MCILS taken the position vis-a-vis

the courts that MCILS has sole authority to create rosters and to put attorneys on the rosters and MCILS has not been able to do it, it's not intentional but they have not been able to comply with their obligation, and MCILS has taken the position with the courts that the court's authority to appoint counsel has been removed from the courts. So the question becomes who has authority to remedy the constitutional violation. MCILS on the one hand says there's a constitutional crisis, on the other hand says to the court, you can't -- you have no authority to appoint counsel, we alone have that authority. So it's a little bit confusing for those of us who work in the system day to day to figure out what exactly MCILS has the authority to do or not do, by your own positions that you've taken publicly and vis-a-vis the courts. If in fact you are charged with supplying lawyers to ensure the capacity to have representation for every person in the state of Maine who is entitled to counsel, and if you can't do that or if you fail to do that, isn't that a constitutional violation?

MR. MAGENIS: That's not part of this case. It is not part of the claims in this case. I think that, again, to be clear, with respect to what has been addressed as part of the negotiations and as part of a response to this Court's order, and as part of the response to this Court's

concerns about --

THE COURT: At what point does it become a systemic problem if there are 200 now and the regulations come into effect and if the Legislature decides that it has other priorities, which it certainly does, and all the incredible efforts you've made to try to increase capacity and instill stability into the system fail because of lack of funding? So at what point does it become -- is 200 okay? Is -- does it have to be 500? Does it have to be a thousand? Is 100 okay? At what point does it become a constitutional problem that the court -- a court might have to grapple with?

MR. MAGENIS: Continuing the litigation in this case does not solve that problem, nor does it address it. In fact, continued litigation in this case removes resources from MCILS and their staff of nine to roll out the public defenders offices that Deputy Director Maciag just described. In other words, this is an extremely ambitious move and plan, but --

THE COURT: It is. I want to be clear, I'm not questioning or faulting that part of the proposal. All I'm wondering is what you're asking the Court approve, is it really enforceable in a meaningful way, and that was the language I think I used in the first order. You're asking for the Court to order some -- a kind of remedy or

relief that does not fit with what courts usually do, and it may not be meaningful for the class members. Because, again, it cannot be forgotten that at this stage, the Court - and I don't know that anybody's arguing about this - the Court is required under the law to act as a fiduciary for the class.

MR. MAGENIS: The Court is required to act as a fiduciary but it's limited to the issues in the case.

THE COURT: Okay.

MR. MAGENIS: In other words, it's not -- it's not issues that go beyond that that might affect the class, that are not at issue in this case. The question under the fiduciary case law that the Court is citing is with respect to the fairness and adequacy of a settlement, which must be measured against the claims that are --

THE COURT: I agree.

MR. MAGENIS: -- actually asserted and, in fact --

THE COURT: But in fairness to your client and in fairness to the plaintiffs, hasn't this case been taken over by events that nobody understood at the time it was filed? Things have changed so dramatically on the ground, in every courtroom where criminal matters are going forward. No one expected that there would be this -- I mean, everybody thought at $150 an hour, people would come streaming back to the rosters, and that has not come to

pass. So isn't it fair to say that, to some extent, this case has been trying to keep up with events but may not be adequately addressing the actual crisis that's occurring?

MR. MAGENIS: No, I don't think that's the case, Your Honor, and the reasoning is because this case established a very clear set of claims against MCILS, those claims have been resolved by the settlement, the parties have addressed the four or five issues that the Court has raised with respect to what was preventing settlement when we came here in September, and that is what should guide the Court's analysis. I mean, there is -- in the Court's order on the last joint motion, the Court quoted District of Maine case law saying the fundamental question is how the value of the settlement compares to the relief the plaintiffs might recover after a successful trial and appeal, discounted for risk, delay, and expense. Again, that was obviously monetary relief, but the principle remains that same.

THE COURT: It does.

MR. MAGENIS: The relief available is defined by the claims and the party. The party is MCILS. MCILS can do all the things it has committed to doing in the settlement agreement. As Plaintiffs' Counsel has stated, this is a contract, and so --

THE COURT: This is or is not --

MR. MAGENIS: Is a contract.

THE COURT: Okay.

MR. MAGENIS: Yes, this is the settlement agreement, and we are here in the Court to seek approval because this has been brought as a class action. In a two-party case, this would be a settlement agreement and the parties would move for dismissal and that would -- that would be it. As the Court points out, there is a fiduciary obligation for the Court to review the settlement agreement via this fair, reasonable, and adequate standard against the standard, again, that I just read from the Court's prior order on the joint motion. And what the measuring stick must be is what the claims are in this case. The claims are that the operation of MCILS in its enforcement of its -- or, as alleged, failure to enforce its standards, creates a risk of unconstitutional deprivation of counsel based upon the lack of -- alleged lack of training, supervision, and evaluation, and among the relief requested is, for example, caseload standards and clear regulation and enforcement with respect to the performance of counsel, all of which is addressed in the settlement agreement. And with respect to the issues that have been raised in the Court's prior order earlier this year, again, these are issues with respect to the limitation of -- one of the Court's concerns was to ensure that the

potential future claims of class members on other issues, perhaps being, for example, non-representation, right, folks who are --

THE COURT: Right, without.

MR. MAGENIS: Right. The Court didn't instruct but the Court indicated that the parties should --

THE COURT: Ensure that there's no bar to those folks receiving relief either in this case or in another forum. I included this case or another forum.

MR. MAGENIS: Make room for those claims and --

THE COURT: Right.

MR. MAGENIS: -- we have. We've been very clear that the only claims that are released here, and this is -- the Court has referenced unusual aspects of this agreement, the only claim that's released here is this claim. The only thing that plaintiffs can't come back and sue MCILS for is exactly what they've sued MCILS for in this case. It is the most narrow possible reading without saying plaintiffs can come back and sue MCILS tomorrow, which is not any reasonable basis for a settlement in terms of on this claim. In other words, plaintiffs could reassert the same claim even though there is -- there's been a settlement. This is the least possible carveout for any future claims by plaintiffs. It is literally saying don't file exactly the same suit tomorrow. And so what was

confusing in terms of my understanding of the Court's concerns as heard today is the point of that limitation was to ensure that the Court's concerns about this agreement being used potentially to bar, for example --

THE COURT: That -- that was one of the five concerns.

MR. MAGENIS: Habeas relief or other emergency relief has been in the judgment of the parties eliminated. And so how that would somehow counsel against accepting this settlement agreement, it just didn't (INAUDIBLE).

THE COURT: I'm not saying that part does. I want to be clear, the four -- four out of the five areas of concern have been addressed adequately, and I think it's been done in good faith, after a lot of hard work, concessions likely on both sides, I would have no way to really know much about that other than what I read in the filings, but the fifth concern remains. And have you -- have you found in your research, Mr. Magenis, I know you have -- you're involved in the habeas case and this is something I'm sure this whole subject matter takes a fair amount of your time, have you come across a case that was settled in this way anywhere in the state of -- any state or any federal court, where what the agreement was was a four-year continuance or stay of the litigation? The remedy being the issuance of a scheduling order and no

order requiring the defendants to actually -- well, no judgment, no consent order that was reduced to a court order that could be enforced in the conventional sense. Have you come across anything like this case or this proposed settlement in your travels?

MR. MAGENIS: With respect to the limited -- I'm thinking of the Tucker case in Idaho, the Currin case in Pennsylvania (INAUDIBLE) --

THE COURT: Is the Tucker case over?

MR. MAGENIS: I have not checked on it this morning, I don't know. It's -- again, I think as Plaintiffs' Counsel indicated, a lot of the kind of resolutions of these cases are not as cut and dry as one might hope for in the reported opinion in terms of how exactly --

THE COURT: I agree. That's been my experience as well. But have you -- have you seen anything that -- where the parties have agreed and the Court has approved a four-year continuance of the litigation?

MR. MAGENIS: The only settlement agreement that was available in that subject matter was the Hurrell-Harring settlement agreement, and I cannot, frankly, recall what that -- what the relief was in that case. But the point of what the parties --

THE COURT: But it wasn't a four-year stay, it was a consent agreement that was -- where there were things that

were required and the Court issued an order or a judgment incorporating the agreement, and that is -- under Maine law, that is sort of a complicated area. I mean, sometimes people come in in a regular civil case and say we have an agreement and then somebody doesn't follow the agreement and then the Court has to bring people in and say there's been a violation of the agreement, now this becomes a judgment that requires you to do this. And you're not even asking me to do that, you're not even asking me to take this agreement and incorporate it into a judgment. If you did that, then that would be something a court would know how to enforce. But what you're doing is something short of that. You're asking me to issue essentially a procedural order and not a judgment, and that's very unusual. I don't even think it's a final -- it's not a final judgment of anything.

MR. MAGENIS: It's not a final judgment, it's a stay.

THE COURT: Four years stay. I know it's a contract but it would still have to come back to court and be incorporated into some kind of an order before I would -- any court would have any authority.

MR. MAGENIS: The order wouldn't -- there wouldn't be an order compelling a settlement agreement in the event of a breach. There would be an order that we'd go to trial and exactly the claims that were brought in this case.

The claims that were brought in this case are significantly narrower than what's been addressed in the settlement agreement.

THE COURT: Okay, all right, I understand. I understand. But you have not -- so the answer is no, you have not found a case like this involving the Sixth Amendment or perhaps another constitutional provision where a judge has accepted a settlement, a class action approved a settlement where there was no court order, there was simply a continuance of the case for four years, or for a period of time.

MR. MAGENIS: The issue of a stay --

THE COURT: It's a procedural order, it's not a -- it's not a judgment.

MR. MAGENIS: The issue of a stay potentially preventing this Court from providing initial approval of this settlement was not clear to counsel prior to this hearing.

THE COURT: I'm sorry, I apologize, I didn't hear everything you said. Go ahead. It's my ears, it's not you, I just --

MR. MAGENIS: No, no, it's probably the microphone as well.

THE COURT: Okay.

MR. MAGENIS: The issue -- among the issues raised by

this Court in its September 15th order, the issue of --

THE COURT: The stay as opposed to --

MR. MAGENIS: -- the stay was -- was going -- was part of the remedy and concerns about the Court's ability to later enforce that was not among the issues that were first and foremost in the parties' mind or even, again, really identified in terms of something that would prevent this Court's addressing or approval of settlement. To the extent that is - and I understand what the Court's saying - we'd request an opportunity to brief that because that has not been --

THE COURT: And that's certainly -- I mean, I actually thought about getting you folks on the phone and saying this is now -- now that this issue is -- because I'm fine with four out of five, but I said they didn't even address number five. So I started thinking about number five, and I -- the separation of powers issue, I think, is not a minor concern. It's something that I think has to be thought through. Maybe you folks are willing to waive objection down the road to that, I don't know. Or maybe it doesn't have to be something you waive, maybe you can convince me I have the authority and my concerns are not well founded. And so I thought about getting you on the phone and saying you want to brief this, you want to talk about it, you want to think about

it, talk to your clients about this, and I'm certainly willing to give you that opportunity, and that's why I said I'm hitting you with something that was not discussed, but certainly my concern about the unusual remedy and the unusual nature of what you're asking for, you're not asking for a traditional order, you're not asking for a traditional judgment, you're asking me to keep a case on the docket for four years, where events keep turning and changing, and important constitutional rights are in jeopardy. So, it -- and I know you have all taken this very seriously, as have I, and I just want to make sure that if the Court is involved, the Court is involved in a meaningful way. Whether that means we're setting up a hearing or -- we're going to adjudicate these issues or the Court has some obligation to keep maybe a closer watch on this other than saying hands off for four years. There's a lot happening, January is upon us, I wish it wasn't this summer, but it is now, the Legislature is coming into town, they have a lot of very important, compelling, competing interests. Nobody knows what they're going to do. So this is something else to think about. I want to be clear, four out of the five of the Court's concerns are -- have been resolved.

MR. MAGENIS: And with respect to the fifth, I think, again, not to echo or repeat, rather, unnecessarily,

statements that were already made by Plaintiffs' Counsel, but the Court is not -- as it's established in this settlement agreement, the Court is not compelling MCILS to do anything. The Court -- and that's part of the reason why it's a settlement agreement and not a consent agreement.

THE COURT: Yeah, it's possible, right.

MR. MAGENIS: I'm sorry?

THE COURT: I'm sure that was one of the reasons it was possible.

MR. MAGENIS: Right, so --

THE COURT: Because I'm not ordering you to do anything.

MR. MAGENIS: But the point is if -- so what -- in terms of the issue that the Court has identified with the advocacy, right, so MCILS can't fund additional public defenders offices, they can't do it, they don't have the constitutional power. So how do we solve that problem? Well, we address what's been happening and point out what MCILS has been doing --

THE COURT: Well, they can do what other defendants have done in similar situations. They could say we can't do it, we don't have the funds, we are failing in our obligations, not because we're not trying our damnedest, but we are failing. They could consent to that finding.

But for some reasons, which I don't need to know about, that have to do with negotiations, they have not been willing to do that. Your clients have not been -- if they were willing to do that, that might allow the Court to do something in a more conventional way, in a way that would be meaningful in terms of enforcement. And this layer, this extra layer of advocacy and the Court requiring a separate branch of government to take a policy provision certainly was not something I put in the order, it was not on anyone's radar, but I just don't want anyone down the road to have to grapple with that. If that's a problem, we should deal with that now because of Maine's unique separation of powers and because of case law that's emerging in other contexts about government speech, government right -- the right of the government to take different policy position, and courts not binding governments to take certain policy positions, particularly as an unelected branch of government not accounted to the people -- not accountable to the people, where you folks are. You are the -- you are the political branches of government, you and the Legislature.

MR. MAGENIS: And that is exactly why -- excuse me -- that there is no compulsion to MCILS to advocate in this agreement. In other words, the Court in no situation would be called upon to tell MCILS to advocate for

something. The Court would be potentially in a situation where if a breach is alleged of the settlement agreement --

THE COURT: And the breach would be whether they issued -- whether they exercised best efforts to advocate for what they agreed to. That's the standard that I read in this agreement, that my job on a motion to enforce or a motion to reinstate the litigation, would be for me to decide and measure whether MCILS exercised best efforts, whatever that means, whatever metrics I would have to come up with, to advocate for what they are agreeing to advocate for in this agreement. That's -- I'm not sure that that has been addressed or thought about by the parties. So -- and maybe it's not a problem, but I think you ought to think about it, and I think I ought to consider your positions on that so that there's not -- I mean, who knows who's going to be the Attorney General, who knows who's going -- what would happen three years from now as far as the position MCILS might take. And if there's a constitutional bar to the Court getting involved three years from now, I think we ought to know that now. That's all I'm saying. Convince me otherwise.

MR. MAGENIS: What I will say on that, Your Honor, is that there's no point at which the Court would be called upon to compel any of that. What the Court would be

called upon is to judge whether or not what MCILS did, among the many other obligations in this agreement, met that standard. Any contract is going to have terminology that might not be as precisely defined as a person might otherwise want later on, but this is a contracting issue as opposed to a constitutional issue because that's the way we set up the settlement and the Court has referenced the unusual nature of this settlement, that's part of the reason, because we don't want to step on issues such as the one the Court's raised today about First Amendment or compelling or get into Bates.

I did look at, while we were having this conversation, our brief and agree that we did cite Bates. We cited Bates as a third rail, essentially. Let's stay away from getting into issues that involve that in any way. Let's not get into issues that address separation of powers and here's how we've done it. We've done it by coming up with a settlement agreement whereby if plaintiffs were to say in two years MCILS, we don't think that you've used your best efforts to advocate for the very specific issues that are addressed in the settlement agreement, they can then move this Court to determine whether or not MCILS has failed to comply with their settlement agreement, and that is the end of it. And that -- and then the relief comes back to re -- essentially,

litigating the issues that have been raised in this case. But one thing I don't want to get lost, which I think is crucial and was addressed in our briefing, is continued litigation of this case now that the fundamental issues underlying it have been settled would be extremely harmful to the future efforts by MCILS to address the very concerns this Court has raised, and primarily being --

THE COURT: I'm not talking about litigating the case tomorrow. What I'm thinking about is saying let's stay this case and see what you folks can do between now and June or something like that to see if all of these things come to pass, but not a four-year stay. I'm not talking about -- because I agree with you, I understand the limitations on what MCILS has for staff, for money, and I'm sure they are working day and night to just comply with their basic obligations given the limited resources. I'm not talking about you've -- I'm not talking about issuing a scheduling order today for March. I'm talking about let's see what happens with the legislative session, let's see if things do start to improve or if things stabilize, maybe it's going to take -- I understand it's going to take time, all of these things take time, but one of my thoughts is let's see what happens in the next six months.

MR. MAGENIS: Nothing that's going to happen in the

next six months is going to affect the underlying claims in this case because the underlying claims in this case are against MCILS.

THE COURT: I agree.

MR. MAGENIS: And the relief that could be compelled is against MCILS. So what the Legislature does or doesn't do is entirely irrelevant to the claims in this case.

THE COURT: It might make -- it might make it possible to dismiss the case. It might make it possible for you folks to leave court and to just pursue your advocacy and do the job that the Legislature charged you with, and I have concerns about keeping a case on the docket of this complexity, with the expense involved, the monitoring involved, for four years when we may know in six months which way things are going. With the implementation of the caseload standards, things could get worse, I hope -- I hope I'm wrong about that, but we've all tried to sort of come up with ideas and everything that has been tried, nothing has really worked to provide capacity and stability. So let's see -- why don't we just see what happens in the next 90 days, 120 days. I know you'd like to get this case resolved, and I'm not faulting any of your efforts, but I'm just wary about saying let's wait four years.

MR. MAGENIS: In the Court's prior order, the Court

specifically said that the four-year period did not prevent settlement, that that issue did not prevent settlement.

THE COURT: That it -- that's correct, I did. I did say that. But I also said what you're asking for is very unusual and perhaps what we need to do is to treat this case like other cases that are filed in court, which is to adjudicate whether or not the plaintiffs are right. I have no idea if they're right because you folks don't even agree on what the standard is, but there have been a lot of things that have changed in reality during the pendency of this litigation and it -- everybody's been trying to keep up. But if things deteriorate even more and MCILS does not get what it needs to address the problems, maybe that would provide us some -- a different way of looking at the settlement. It might mean -- if things go well, the case could be dismissed in six months, and no one would be in telling MCILS they have to do anything because the problem has been resolved or is on its way to being resolved. I don't know what's going to happen and nobody else does. This case could be dismissed if things get better, which I'm sure would make every -- which would certainly make MCILS happy.

So that's -- if you want an opportunity to brief the First Amendment concerns, the remedy, the -- what we've

talked about today, I certainly am going to give you that opportunity. Is 14 days enough or -- I know it's the holidays are coming, if you want more time, that's fine, Mr. Magenis.

MR. MAGENIS: We can get it done by --

THE COURT: Give me a date. It doesn't matter. You could both file something simultaneously, it doesn't have to be -- and I actually would like to wait until we see what Justice Douglas does. It may not matter, it may not affect anything at all, but I don't think it hurts to get the benefit of his thinking on the current situation.

MR. MAGENIS: I --

THE COURT: I know you don't think that bears on what is before me, but it might.

MR. MAGENIS: I guess --

THE COURT: Especially if he sets a standard, then that makes the review system that MCILS is getting geared up for, it might simplify that tremendously. I don't know. It might complicate it. But perhaps we should all know what that's going to be. And none of us expected that litigation when this was filed. Again, events have taken over -- have overcome a lot of the efforts that you have admirably pursued.

MR. MAGENIS: That litigation is an entirely separate issue. It's an entirely separate claim. It does not

affect this litigation --

THE COURT: It is, I agree, I agree.

MR. MAGENIS: -- other than it does affect, and the Court has raised and the parties have addressed, the scope of the claim preclusion, ensuring that nothing that we do in this case would stand in the way of the other case and --

THE COURT: If you can find another court somewhere that has approved a settlement in this way, that would give me something to rely upon and some confidence that I am acting appropriately as a fiduciary for this class and appropriately in my role as a judicial officer and not as a policymaker. So if you can find something where advocacy was required and a court was required to measure the adequacy of advocacy and perhaps binding another agency in the future to take a particular policy position or just any case where the court has said we're going to stay this litigation for four years and then we might litigate it four years from now, I would love to see somebody else who's been presented with this structure and that might go a long way to me saying okay, I'm convinced, this is -- this is something that I can do, I have the authority to do, and is appropriate for a judge to do.

So if you can find something like that, that would help.

MR. MAGENIS: Just one more point of clarification, Your Honor.

THE COURT: Yeah.

MR. MAGENIS: And I just want to be clear on what was said. The alternative to that is admitting liability?

THE COURT: No. No, the alternative is that -- nothing -- no, I mean, that is something -- that's what happened in Bates. I was just saying that's what -- and that's what happened, I think, not in Oregon, but in Idaho, that's what happened, and I don't expect MCILS, as I understand what's going on, which is from a big distance, I don't -- there's nothing that's happened so far that makes me think that that is going to happen in this case.

So the other -- the other -- there are two alternatives I see. One is let's wait and see what happens with this session. The other is I'll approve it, but maybe not the length of the stay. I can approve four out of five and say I'm going to stay it for six months, or I could say I'm going to stay it for a year. I'm sure it would be good for everybody if this case was resolved either through litigation or through dismissal. If you guys can -- if MCILS can get to a point where it could consent to something other than what you have consented to, that's completely up to you and that's not my function

and I'm not going to get into that at all, but a four-year stay of litigation with the remedy being the issuance of a scheduling order is not something I've ever heard a court do, ever. And it's not a meaningful remedy. It's not an order, it's not a judgment. I don't even know that that's appealable, frankly. I mean, I don't know that anybody could review that because it's a simple -- it's a procedural order, it's not a judgment or even an order, it's just we're going to sit on this for four years. It's a vexing legal problem.

MR. MAGENIS: We can address that and I can check in with Plaintiffs' Counsel --

THE COURT: If you guys want to talk about how much time you need given the holidays and other things and other obligations of -- and if you could file things simultaneously, if you want to file something jointly, that's fine. I know I've hit you with an issue that was not part of my order, but certainly the order that was issued in September expressed concerns about a fifth issue that was not addressed, and that is the enforceability or the nature of the remedy that is being proposed, which is highly unusual, to say the least.

Right. I think that's all we can do today. If anybody here is -- I assume Justice Douglas's opinion will be published somewhere. I would love to read it when it

comes.

All right, thank you very much. I do really want to emphasize I understand how hard you've all worked on this and I am not faulting anyone for any -- doing anything inadequate or inappropriate, but this is a pretty important crossroads that we're at in this litigation and I want to make sure we get it right.

MR. HEIDEN: Thank you, Your Honor. I appreciate that. And just a few brief points of clarification while we're all here.

THE COURT: Yeah, okay, yeah.

MR. HEIDEN: If we could push off till January 15th to file supplemental briefing, that would be helpful.

THE COURT: That's fine.

MR. HEIDEN: We're more than happy to provide supplemental briefing. Want to make sure that we understand that we're clear about what -- the questions that we're briefing on. It seems like there's two intertwined issues about the -- one is within the terms of the agreement, the use of the term best efforts, that that was giving the Court pause, particularly best efforts as applied to a government agency. So that's --

THE COURT: Best efforts to advocate.

MR. HEIDEN: Best efforts to advocate --

THE COURT: Right.

MR. HEIDEN: -- by a government agency, and that --

THE COURT: Correct.

MR. HEIDEN: So that's one question?

THE COURT: That's the separation of powers issue, perhaps.

MR. HEIDEN: And you want some --

THE COURT: I do.

MR. HEIDEN: -- discussion, some legal authority on that.

THE COURT: I do.

MR. HEIDEN: The second, I think related but distinct issue is the stay --

THE COURT: Correct.

MR. HEIDEN: -- enforcement versus the consent decree.

THE COURT: Which I certainly, I think, broached in the other order but the primary concern at that point was the looming emergency of nobody on the rosters. But -- and I didn't number the concerns, but it certainly was in there, but not the First Amendment, not the separation of powers concern, it was not fleshed out by me or by anybody.

MR. HEIDEN: So you want some --

THE COURT: The stay.

MR. HEIDEN: -- examples about the stay as opposed to

consent decree as a mechanism for --

THE COURT: And is it truly just a procedural order? Is that all it is? Because that's how I understand it. It's not a judgment, it's not an order, and I don't know that it's -- there is a contract, but the contract would have to be -- someone would've had to file a contract -- I mean a breach of contract or it would be within the ambit of this case, but I would have to issue an order requiring compliance before anything would be enforceable in the traditional sense.

MR. HEIDEN: There's a -- right, there's a whole enforcement --

THE COURT: Correct.

MR. HEIDEN: -- provision in there --

THE COURT: Process.

MR. HEIDEN: -- and but we can talk about that in light of other --

THE COURT: Yeah, that'd be fine.

MR. HEIDEN: -- cases. Okay. And there was something else I wanted to say. Oh, you discussed this with my colleague, Mr. Magenis, about the admission of guilt issue. Obviously, as a personal matter, I think everybody should admit guilt any time that I sue them, but I realize that's not always a possibility. And in reality, we've all reached settlements that are not

premised on an admission of guilt.

THE COURT: But you reach settlements that are reduced to a judgment.

MR. HEIDEN: Sometimes, sometimes they're --

THE COURT: A consent judgment or something that is enforceable by a court in a way that a court knows how to enforce something. Because what you're asking me to do is not something that courts are familiar with.

MR. HEIDEN: Somewhere they're a private contract in an agreement that eventually (INAUDIBLE) --

THE COURT: And the case is dismissed, it's not on the docket for years.

MR. HEIDEN: Eventually, right.

THE COURT: It's dismissed and let MCILS go and do their hard work.

MR. HEIDEN: Right. And then the other issue I wanted to make sure, that's sort of come up a number of times today, and it's in your September 15th order, is about the remedies in the case and the standard -- not the standard of enforcement of this agreement, but the standard for unrepresented individuals, and I just wanted to -- is that something you want -- because --

THE COURT: It may or may not affect what MCILS is -- has to do. If Justice Douglas and/or the law court says it's 48 hours, folks, and everyone who is without an

attorney after 48 hours has a constitutional claim. And one of the suggestions was well, they can file another class action, and I'm a little baffled by that proposal, but in any event, the standard could make a huge difference on what you're going to be spending your time doing and what the courts are going to be spending their time doing, but that is something that could've been a part of this case, I understand it is not, in fairness to Mr. Magenis, it has not been pled, but that might make a huge difference. And Justice Douglas could also just say I'm denying habeas, it's moot, or whatever, or this is reasonable, what the courts are doing and hands off. I don't know what he's going to do. But things continue to surprise all of us in this case.

MR. HEIDEN: And that might end up, you know, there might be different habeas cases to address those issues, there might be federal habeas cases --

THE COURT: Correct.

MR. HEIDEN: -- to address those issues. I don't -- we don't want to prejudice --

THE COURT: So I don't think I need to hear from you about Justice -- the standard. I'm just saying that it occurred to me perhaps because we've all been so poor at predicting unintended -- I mean, things that have occurred that perhaps it would not be imprudent for me to say let

me just see what Justice Douglas has to say on this issue because he may also have some things to say about the proper forum for deciding that standard. I have no idea.

MR. HEIDEN: Yeah.

THE COURT: He might say it's this case, he might say it's a class action. Did they ask for class action in that case? They did not ask for class -- they did in Oregon, though, correct?

MR. MAGENIS: I think that's correct.

THE COURT: Yeah, but they did not --

MR. HEIDEN: Well, there's a class and a subclass in Oregon.

THE COURT: Right.

MR. HEIDEN: Class of unrepresented and a class of in custody.

THE COURT: Right, understood, okay.

MR. HEIDEN: Okay, I think we're --

THE COURT: So I don't need to hear anything about Justice Douglas, we're just waiting to see whatever light he can shine on this problem.

MR. HEIDEN: We share your strong interest in --

THE COURT: Okay.

MR. HEIDEN: -- seeing that light. Thank you so much.

THE COURT: Thank you. Mr. Magenis, anything else?

MR. MAGENIS: No, Your Honor.

THE COURT: All right, January 15th. Thank you very much. And please -- please send it electronically as well as hardcopies.

(End of recorded material.)

C E R T I F I C A T E

I hereby certify that this is a true and accurate transcript of the proceedings, which have been electronically recorded in this matter on the aforementioned hearing date.

Jenny L. Knowles, Transcriber

EXHIBIT 6

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' FIRST SET OF REQUESTS FOR PRODUCTION TO DEFENDANTS (PHASE 1)**

Under Rules 26 and 34 of the Maine Rules of Civil Procedure, Plaintiffs request that Defendants answer under oath the requests for production below within thirty (30) days of service upon you.

DEFINITIONS

1. *Defendant, defendants, you, and yours*: The terms "defendant," "defendants," "you," and "yours" refer to Defendants Maine Commission on Indigent Legal Services ("MCILS"), James Billings, Joshua Tardy, Donald Alexander, Randall Bates, Meegan Burbank, Michael Cantara, Michael Carey, Roger Katz, Kimberly Monaghan, David Soucy; as well as any individual later substituted for any of the foregoing individuals, or for former MCILS Commissioner Robert Cummins, former MCILS Commissioner Matthew Morgan, and former MCILS Executive Director Justin Andrus by operation of M.R. Civ. P. 25(d); as well as any employee, agent, representative, investigator, consultant, attorney, or any other person acting or purporting to act on the Defendants' behalf.

2. The term "documents" means all written, graphic, or electronic material or data,

however produced or reproduced, in your actual or constructive possession, custody or control, including documents accessible at your request.

INSTRUCTIONS

1. Documents should be produced in a manner that clearly indicates the document request(s) to which each document responds. Plaintiff requests production of the original of each document requested below, if available, and legible duplicates where originals are unavailable. Photocopies that differ in any respect from an original, because of, by way of example only, handwritten or typed notations, should be considered original documents and produced separately.

2. If any portion of any document is responsive to any document request, you are requested to produce the entire document. Documents attached to each other should not be separated. A request for a document must be deemed to include a request for any and all file folders within which the document was contained, as well as transmittal sheets, cover letters, exhibits, enclosures, or attachments to the document in addition to the document itself.

3. You must produce all responsive documents in your possession, custody, or control, regardless of whether such documents are possessed directly by you, your agents, employees, representatives, or investigators, or by your attorneys, their agents, employees, representatives, or investigators. Without limiting the term "control" as used in the preceding sentence, a person is deemed to be in control of a document if the person has the right to secure the document or a copy from another person having actual possession of the document.

4. If a responsive document contains material that you contend is privileged, protected as trial preparation material, or otherwise protected from discovery, please provide a list of all such documents that contains a complete description of each document, including the date of the

document, identification of each person to whom it is addressed, identification of each person who received a copy thereof, identification of each person who prepared each such document, and the ground or grounds upon which it is being withheld from production.

5. Electronically stored documents, which originally existed in an electronic format (such as e-mails), must be produced in their native format, without having been "scrubbed" of any metadata, including, but not limited to, web-based e-mail and Instant Messenger messages.

6. These requests are continuing in nature and require Defendants to timely file supplemental responses under Rule 26(e).

7. Unless otherwise indicated, these requests ask for documents created or in effect from March 1, 2023 to present.

REQUESTS FOR PRODUCTION

1. All plans or proposals created or implemented by Defendants since March 1, 2023 for recruiting and/or retaining attorneys for inclusion on MCILS rosters.

2. All communications since November 1, 2023 regarding either Subclass members or the spreadsheets of unrepresented criminal defendants (*see* exhibit to the Court's February 27, 2024 Combined Order), whether among Defendants or between Defendants and any third parties, including the judicial branch or any members of the judicial branch.

3. All documents created by Defendants concerning the nature and length of delays in appointment of counsel to Subclass members, including any analyses of the reasons for such delays.

4. All performance standards, guidance, training, evaluation, or support provided to Lawyers of the Day concerning their appearances on behalf of Subclass Members at hearings set

pursuant to the November 3, 2023 Standing Order on Initial Assignment of Counsel, including any documents concerning the outcomes of those hearings.

5. All bi-monthly reports of the county and regional jail pre-trial detention populations from November 1, 2023 to present. *See* 30-A M.R.S. § 1662(3).

March 18, 2024

Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that on March 18, 2024, I served the foregoing document, Plaintiffs' Phase 1 First Set of Interrogatories, upon counsel for Defendants by electronically transmitting a copy of the document to Assistant Attorney General Sean D. Magenis at sean.d.magenis@maine.gov.

/s/ Zachary L. Heiden
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EXHIBIT 7

STATE OF MAINE
KENNEBEC, SS.

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

ANDREW ROBBINS, ET AL.,

Plaintiffs,

v.

MAINE COMMISSION ON INDIGENT LEGAL SERVICES, ET AL.,

Defendants.

NOTICE OF RULE 30(b)(6) DEPOSITION TO DEFENDANT MAINE COMMISSION ON INDIGENT LEGAL SERVICES

PLEASE TAKE NOTICE that under Maine Rule of Civil Procedure 30(b)(6), on April 22, 2024, at 9:00 a.m., counsel for Plaintiffs will take the deposition upon oral examination of the Maine Commission on Indigent Legal Services through one or more officers, directors, agents, or other representatives who shall be designated to testify on MCILS's behalf regarding all information known or reasonably available to MCILS on each of the subject matters identified below. Plaintiffs request that Defendants provide written notice at least five business days before the deposition of the name(s) and position(s) of the individual(s) designated to testify on MCILS's behalf and the matters on which each individual will testify.

The deposition will take place at the offices of Preti Flaherty, 1 City Center, Portland, Maine, or at such other time and location as agreed upon by the parties, and shall be taken before a duly certified court reporter or other individual authorized by law to administer oaths and will

be recorded by audio, video, and stenographic means. If necessary, the deposition will be adjourned until completed.

Instructions

To meet its obligations under Rule 30(b)(6), Defendant MCILS is required to make a "conscientious, good-faith effort . . . to prepare [designees] to fully and unevasively answer questions about the designated subject matter." *Bd. of Tr. of the Leland Stanford Junior Univ. v. Tyco Int'l Ltd*., 253 F.R.D. 524, 526 (C.D. Cal. 2008) (interpreting analogous federal rule). Rule 30(b)(6) requires Defendant to designate witnesses who will testify not only to information that is "known" to MCILS, but also to information that is "reasonably available." Me. R. Civ. P. 30(b)(6), If MCILS's designee(s) do not have personal knowledge of a topic identified in the Rule 30(b)(6) notice, Defendant has an obligation to educate their designees on the identified topic, including by reviewing documents, seeking out additional information, or confirming the accuracy of information from others. *See, e.g., Elan Microelectronics Corp. v. Pixcir Microelectronics Co., Ltd*., 2013 WL 4101811, *6-8 (D. Nev. Aug. 13, 2013).

Definitions

1. *Concerning*: The term "concerning" means referring to, describing, evidencing, or constituting.

2. *Defendant, defendants, you, and yours*: The terms "defendant," "defendants," "you," and "yours" refer to Defendants Maine Commission on Indigent Legal Services ("MCILS"), James Billings, Joshua Tardy, Donald Alexander, Randall Bates, Meegan Burbank, Michael Cantara, Michael Carey, Roger Katz, Kimberly Monaghan, David Soucy; as well as any individual later substituted for any of the foregoing individuals, or for former MCILS Commissioner Robert Cummins, former MCILS Commissioner Matthew Morgan, and former

MCILS Executive Director Justin Andrus by operation of M.R. Civ. P. 25(d); as well as any employee, agent, representative, investigator, consultant, attorney, or any other person acting or purporting to act on the Defendants' behalf.

3. *Criminal Defendants*: The term "criminal defendants" refers to people arrested for, or charged with, a crime defined by Maine statute.

4. *Policies*: The term "policies" means, without limitation, any policy, procedure, standard, system, or practice of Maine Commission on Indigent Legal Services or any of its subdivisions, whether formal or informal, in effect at any time from January 1, 2012, to the present.

5. *Adult Criminal Roster*: The term "Adult Criminal Roster" means the list of attorneys approved by MCILS to provide representation to adults charged with crimes who are financially unable to retain defense counsel and who are entitled to representation under the United States and Maine Constitutions.

6. *Class Members:* The term "Class Members" is as defined by the Court, *i.e.*, "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." *See* Order on Motion for Class Certification at 5.

7. *Subclass Members*: The term "Subclass Members" is as defined by the Court, *i.e.*, "Class Members who remain unrepresented after initial appearance or arraignment, unless the right to counsel has been waived by an individual Class Member." *See* Combined Order at 16.

8. Unless otherwise stated, all terms defined in the regulations and statutory provisions governing MCILS have the definitions set forth in those regulations and statutory

provisions. For example, “Court Assigned Counsel” and “Commission Assigned Counsel” have the definitions set forth in 94-649 C.M.R. ch. 301, Section 1.

Topics for Rule 30(b)(6) Deposition

1. The factual and legal allegations of the Amended Complaint.

2. MCILS’s efforts to appoint attorneys to represent the Subclass Members, including the length and nature of delays in the appointment of counsel to Subclass Members; the number of attorneys on the Adult Criminal Roster accepting new cases; and the ability of those attorneys to meet the demand for Court- or Commission-Assigned counsel.

3. Communications between MCILS and the judicial branch regarding Subclass Members.

4. The day-to-day functioning of the Lawyer of the Day program, including how many attorneys are rostered to take Lawyer of the Day appointments; how Lawyer of the Day attorney(s) are appointed in each court; how many clients Lawyer of the Day attorneys are responsible for; how Lawyer of the Day attorneys handle appearances on behalf of Subclass Members at hearings set pursuant to the November 3, 2023 Standing Order on Initial Assignment of Counsel and the outcomes of those hearings; and how Lawyer of the Day attorneys handle conflict checks, investigate cases or review discovery, advise or interview clients, and make bail arguments.

5. MCILS policies and practices concerning the monitoring and evaluation of Lawyer of the Day attorneys, including performance in conducting conflict-of-interest checks, meeting and communicating with clients, advising defendants on plea offers, conducting factual investigations, hiring experts, engaging in motion practice, and appearing on behalf of Subclass Members at hearings set pursuant to the November 3, 2023 Standing Order on Initial Assignment of Counsel.

6. MCILS standards for the performance of attorneys on the Adult Criminal Roster, including performance in conducting conflict-of-interest checks, meeting and communicating with clients, advising defendants on plea offers, conducting factual investigations, hiring experts, making bail arguments, and engaging in motion practice.

7. Any evaluations or investigations commissioned or conducted by MCILS concerning its role in providing publicly funded legal representation to indigent defendants, including the findings of such evaluations or investigations and any actions that MCILS considered or took in response thereto.

8. Any external evaluations or investigations of MCILS concerning its role in providing publicly funded legal representation to indigent defendants—such as the April 2019 report of the Sixth Amendment Center and the January 2020 report of the Office of Program Evaluation & Government Accountability of the Maine State Legislature—including the findings of such evaluations or investigations and any actions that MCILS considered or took in response thereto.

9. The staffing and structure of MCILS.

10. Communications between MCILS and other government bodies or officials (including, but not limited to, the governor's office or officials in the governor's office and the Legislature or legislative officials) concerning MCILS's policies and practices, MCILS's resources, the ability of the Adult Criminal Roster to meet the demand for Court- and Commission-appointed counsel, and proposals to create public-defender positions or a public-defender office.

11. How the spreadsheets of unrepresented criminal defendants are generated (*see* exhibit to the Court's February 27, 2024 Combined Order), including the underlying sources of data and how that data is collected and compiled to create the spreadsheets.

12. How the "Attorney Roster Reports" are generated, including the underlying sources of data and how that data is collected and compiled to create the reports.

13. What steps MCILS has taken to increase the number of attorneys on the "Attorney Roster Reports" who are available to be assigned to cases.

March 18, 2024

Respectfully submitted.

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

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CERTIFICATE OF SERVICE

I certify that on March 18, 2024, I served the foregoing document, Plaintiffs' Notice of Rule 30(b)(6) Deposition to Defendant Maine Commission on Indigent Legal Services, upon counsel for Defendants by electronically transmitting a copy of the document to Assistant Attorney General Sean D. Magenis at sean.d.magenis@maine.gov.

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