



MAINE COMMISSION ON INDIGENT LEGAL SERVICES

May 28, 2021

Nathan L. Libby, Senate Chair
Genevieve McDonald, House Chair
Government Oversight Committee
c/o Lucia A. Nixon, OPEGA Director
82 State House Station
Room 104 Cross Building
Augusta, ME 04333-0082

Via e-mail only to: lucia.nixon@legislature.maine.gov

Re: **Maine Commission on Indigent Legal Services**
First Quarterly Report

Dear Senator Libby and Representative McDonald:

On behalf of the Maine Commission on Indigent Legal Services, (“MCILS”), I respectfully submit the following in preparation for our first quarterly report to the Government Oversight Committee on Friday, June 4, 2021. In framing this report, I have been guided by your letter of March 10, 2021, directing that each report address the following four areas:

- I. Budget and Finances
- II. Auditing and Accountability
- III. Quality Control; and,
- IV. Determination of Indigency

In addition, I have provided information regarding the status of funding for MCILS in the FY2022-23 biennial budget, including funding for new positions and the pilot project (public defender) budget request, and estimated carry forward balances from FY2021, all as requested.

I. Budget and Finances

a. Budget Requests and FY22-23 Biennial Budget

The current and expected financial health of MCILS is set out below in several stages. These include explanations of MCILS historical funding levels and operating costs; currently available resources, including the expected carry-forward balance at the end of FY21; a projection of MCILS financial performance based on historic trends; and, the expected impact of the existing backlog of cases now pending in the courts.

MCILS funding in the FY2022-23 biennial budget excluded any of the initiatives proposed by the agency in its original budget proposal, and excluded the initiatives supported by the Judiciary Committee, as later adopted by the agency. One of the initiatives proposed by both MCILS and the Judiciary Committee would have restored agency funding to its historic baseline. Because that initiative did not pass, MCILS is underfunded in each of the next two fiscal years, before considering the expenses associated with improving quality and oversight or addressing an expected surge in work as the courts address the backlog caused by COVID.

In October 2020, MCILS proposed five initiatives for inclusion in the FY22-23 biennial budget. Those initiatives proposed adding ten staff to the MCILS office; founding a trial level public defender office in Kennebec County; founding an appellate and post-conviction public defender office; increasing the rate of attorney compensation; and, restoring historic baseline funding. On March 1, 2021, MCILS updated some of the costs associated with its initiatives and presented that information to the Joint Standing Committee on Appropriations and Financial Affairs and to the Joint Standing Committee on Judiciary.

On March 16, 2021, the Executive Director participated in a work session with the Judiciary Committee. That committee then addressed eight initiatives related to MCILS. Five of those eight initiatives correlated to the five original MCILS initiatives, with certain modifications.

On March 18, 2021, the Commission met and adopted the recommendations of the Judiciary Committee for inclusion in a request for consideration by the Governor in a then-expected change package. The FY22-23 Biennial Budget then passed without the inclusion of any initiatives related to MCILS, except for an increase in the salary of the Executive Director.

On April 26, 2021, the Commission again adopted the recommendations of the Judiciary Committee, this time for inclusion in the anticipated supplemental budget.

On May 26, 2021, the Judiciary Committee conducted a work session that included the MCILS budget. During that session, that Committee voted ought to pass on two bills that included funding for MCILS.

As of the date of this letter, the supplemental budget has not passed. MCILS has not received any indication that it may reasonably anticipate any increase in funding in the supplemental budget other than with respect to the Executive Director's salary.

b. Funding for New Positions

While the budget process has been ongoing, MCILS has sought alternative mechanisms to obtain additional staff support. Most recently, MCILS was advised that the Governor would approve the addition of four limited-duration positions, to be paid from the carry-forward funds currently available as the result of COVID. MCILS is working through that process now. The four positions will consist of two attorneys and two staff and will be divided into two sections of one attorney and one staff person each. One division will be tasked with training and quality oversight. The other division will be tasked with financial oversight.

These positions will permit an incremental improvement in the degree of oversight MCILS can exercise; however, four additional staff will not permit adequate oversight. Furthermore, even under a best-case forecast for MCILS costs in FY22, the carry-forward will be eliminated in that year. There will not be carry-forward funds to pay for staff in FY23.

c. Funding for the Public Defender Offices

Funding for the Public Defender offices was not included in the biennial budget. The bills supported by the Judiciary Committee included funding for the Kennebec County trial-level defender office to begin January 1, 2022, and funding for a reduced version of the Appellate Defender office.

d. Carry-forward / Deficit

Please see my attached memorandum of May 21, 2021, to Representative Cardone, which explains the expected carry-forward and deficit issues for MCILS.

II. Auditing and Accountability

MCILS has continued to work to improve its ability to provide accountability but remains hampered in that work due to under-staffing. Agency operations consume most staff time each week, leaving limited time to consider changes to its oversight processes. If MCILS is successful in adding the four staff members authorized by the Governor, then it will be possible to further design changes that promote accountability. Those four people will not provide enough staff hours to perform a true audit function more than occasionally, however. (See my memorandum of March 5, 2021, for more detail.)

Since last appearing before this Committee, MCILS has begun to recoup some modest overpayments from attorneys. Through the existing alert system identifying days on which an attorney billed 12 or more hours in one day, attorneys have identified occasional errors in billing. Those attorneys then send repayment to MCILS. There have been only a handful of these payments to date, but they represent a change in the relationship between MCILS and counsel, and successful shift toward attorney accountability. MCILS also expects to recover a significant payment through a judicial lien on a litigation settlement obtained by a former MCILS client.

MCILS has promulgated billing practice standards to its attorneys since last appearing before this Committee. The standards specify that information entered in Defender Data and submitted to MCILS constitutes the good faith representation of counsel that the information is accurate, and that the attorney to whom a case is assigned is responsible for the time entered and/or vouchers submitted during the period that person is assigned to that case irrespective of who does the data entry. An attorney who allows another person to enter time and/or submit a voucher is nevertheless responsible for the entries of that person. Time must be recorded accurately and must always accurately specify the attorney who performed the service being billed.

Aggregation of time entries has been eliminated to provide more reliable information for review by MCILS staff.

MCILS is again reviewing all vouchers. Previously, certainly low-value vouchers were not subject to review in recognition of the limited effectiveness of that review. Because the MCILS rule requiring the submission of vouchers within 90-days of triggering events is now enforced, however, review of every voucher is necessary to determine whether each is timely. This voucher review requires substantial executive staff time. Voucher review remains of limited effectiveness in identifying possible fraud.

To assist with more effective review of attorney data entry, MCILS requested that Justice Works make changes to its system. These would include automatic error checks based on MCILS established setpoints for data values and changes to the set of risk triggers would alert attorneys and MCILS to potentially problematic billing patterns. One significant change would allow both attorneys and MCILS staff to review attorney billing by period across cases. Justice Works has not yet completed these changes. One additional request has been completed. MCILS can now query the Justice Works database directly to obtain information.

At this point, MCILS has not developed formal auditing procedures. The Office of the State Auditor has offered to work directly with MCILS to produce an audit protocol. MCILS looks forward to working with that office. The first meeting will likely have occurred before Friday, June 4th. A bill is currently pending before the legislature to grant MCILS subpoena power to gather information related to the audit process.

MCILS is also studying the audit system used by the Committee for Public Counsel Services in Massachusetts as the foundation for an effective attorney-payment management and oversight system. Further redevelopment of that system into a form that will work for Maine could be completed once additional staff hours are available.

III. Quality Control

MCILS continues to work toward improving its ability to ensure that its attorneys are well trained; that each is qualified to perform client services; and, that client services meet or exceed requirements. MCILS has been successful in ensuring that cases are assigned only to those

attorneys that meet its requirements. Development of a renewed overall structure has been impaired by under-staffing.

MCILS continues to study systems that provide the requisite constitutional guarantees, with particular focus on the Massachusetts [Committee for Public Counsel Services](#) system, as well as alternatives from other states. The CPCS model as an overarching structure provides for attorney-employees of MCILS; contracts with groups of attorneys; and, contracts with individual assignments. This structure provides a full range of options for further development, while supporting near-term implementation of training, performance, and financial controls.

MCILS Deputy Director Maciag applied for and received the promise of services through the National Association of Criminal Defense Attorneys (NACDL) to provide training and technical assistance. That program is funded through a Department of Justice grant and presents no meaningful cost to MCILS outside of some staff work. NACDL has recently begun its work. They are canvassing stakeholders and will then work directly with MCILS to develop the structures necessary to ensure and document the performance of the attorneys serving indigent clients.

Further system-level development is contingent on assistance from NACDL and additional staff-hours.

In the meantime, MCILS continues to investigate instances in which attorneys may not have performed to an adequate standard. Since February 1, 2021, there have been 21 investigations. Several remain open. One has resulted in the suspension of counsel from the MCILS program.

Attorney Attrition

The most serious issue impacting the Commission's ability to provide appropriate representation to its indigent client base is attorney attrition. As of May 24, 2021, there were 322 attorneys serving clients through the MCILS process. Attorneys continue to leave our rosters, either permanently or indefinitely. This has resulted in inadequate attorney reserves in many counties. For example, there are no attorneys accepting child protective clients in the St. John River Valley at this time.

Attorneys continue to report that the MCILS compensation rate does not present a reasonable business case once the costs of benefits and overhead are considered.

Specialized Case Type Control

MCILS faced criticism related to the assignment of cases to attorneys who had not yet been certified as qualified to receive those cases. Attached is my memorandum to the Commission dated May 21, 2021, explaining the steps MCILS now takes to ensure that issue does not arise.

IV. Determination of Indigency

There are 6 full-time and 2 part-time financial screeners who work in courthouses throughout the state (York, Cumberland, Androscoggin, Kennebec, Sagadahoc, Lincoln, Knox, Waldo, Penobscot, Hancock, and Aroostook). There is also one part-time investigative financial screener who investigates cases passed along by screeners in the field who have identified the need for further investigation.

When on boarding a new financial screener, the person will spend the first three days shadowing three different financial screeners (York, Kennebec, and Mid-coast screeners) to see first-hand how an experienced financial screener does the job. The new hire will also receive training through the Judicial Branch on use of the court's MEJIS court management system.

The financial screeners assist the court in identifying and processing applicants eligible for no cost or low-cost legal services. The financial screeners screen applicants at court and at the jail using a Judicial Branch motion and affidavit for appointment of counsel form. For each applicant, the financial screener makes a recommendation to the court, based on Commission indigency guidelines, as to whether the person qualifies for counsel, and if so, whether the person should be deemed partially indigent and required to make periodic payments toward the cost of their representation, or whether the person did not qualify.

The financial screeners relay monthly screening statistics to the central office, including how many applicants were found indigent, partially indigent, or were denied, as well as whether the court followed their screening recommendation. The financial screeners facilitate the collection of partially indigent reimbursement through written correspondence to each person found partially indigent. The financial screener mails out an introductory letter to the person explaining their obligation to pay, the frequency and amount of the payments, and how they can make payments. The financial screeners track the payment of reimbursement amounts for those found to be partially indigent through the Judicial Branch's computer system, MEJIS.

Clerks at the courthouse accept and process counsel fee payments and log that information into MEJIS. Before disbursing bail, pursuant to 15 MRS §1074(3)(c), the clerks check the Commission's defenderData database to determine whether a voucher has ever been paid on the bail holder's behalf, and if so, reserve that amount of bail up to the amount of the voucher. This bail setoff provision applies to both indigent and partially indigent individuals. Each month the Judicial Branch transfers those collected funds into the Commission's Revenue account and the Commission in turn uses those funds to pay for counsel and non-counsel indigent legal services.

If the partially indigent person fails to start making payments, a series of three follow-up letters are mailed reminding them of their obligation to pay and how they can make payments. Once a financial screener determines that a person is delinquent on their court ordered obligation, the screener will add that person's case information and outstanding payment obligation to the tax offset spreadsheet that gets sent to the Maine Revenue Service (via the Judicial Branch) each December. A person's Maine state tax return will be intercepted, and the amount owed in counsel fees will be taken out before the funds are released to the person.

I am looking forward to addressing the Committee on June 4th, and to providing details where requested.

Sincerely,

/s/ Justin W. Andrus

Justin W. Andrus
(Interim) Executive Director

cc: etta.connors@legislature.maine.gov

Enc:

MCILS Initiatives Memorandum (3/5/2021)

MCILS Finances Memorandum (5/21/2021)

MCILS Specialized Case Control Memorandum (5/21/2021)