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**MCILS FINANCIAL STATUS**

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**TO:** REPRESENTATIVE BARBARA CARDONE

**FROM:** JUSTIN W. ANDRUS

**SUBJECT:** MCILS FINANCIAL STATUS

**DATE:** MAY 21, 2021

**CC:**

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This memorandum was prepared in this form at the request of Representative Barbara Cardone. It will be provided in substantially similar form as part of the MCILS quarterly report to the Government Oversight Committee, though it may be updated to reflect changes in the balances and expectations before that report.

1. Introduction

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.

This analysis of the amount of the available surplus and the scale of anticipated needs must begin with an analysis of historical spending and appropriations. Between FY16 and FY20, the Commission's payments for rostered attorneys and non-attorney expenses have averaged \$18,203,621 per fiscal year. Between FY16 and FY19, the Legislature appropriated an average of \$19,814,823 per year in All Other funds, which the Commission used almost exclusively to pay rostered attorneys and non-attorney expenses such as expert witnesses and investigators. In the FY20 biennial budget, however, the Legislature appropriated \$15,521,725 per year for the Commission's All Other expenses. Until COVID closed down the courts, the Commission was on a path to again spend about \$18 million to pay rostered attorneys and non-attorney expenses. As we will discuss below, we consider the lower payments during the pandemic to be delayed payments, rather than savings. As a result, this analysis begins with a \$8,586,196 shortfall, when compared what the Commission's historical costs, as captured by the pre-FY20 All Other baseline.

In producing this analysis, actual historic expenditure levels have been used to project expected future costs. This permits a direct comparison between current resources

and projected needs. Although MCILS continues to work with the Judiciary and AFA Committees to promote more robust funding, this analysis assumes that MCILS does not receive funding beyond that currently supported by the Governor's proposed change package and her agreement to issue financial orders to use existing resources to fund four limited period positions to support and enhance Commission operations, as discussed below.

In using the historic expenses incurred by MCILS to project future baseline expenses, it is important to note that due to the effect the pandemic has had on the courts, expenses in FY20 and FY21 were substantially less than they would have otherwise been. The reduction in cost was the result of the suspension of many types of judicial proceedings. It is useful to consider both historic averages that include those years, and averages that exclude them. MCILS projects that its baseline needs will be more in line with averages through FY19 rather than with FY20 or FY21.

It is also essential to consider the very significant backlog of cases that has accumulated in the courts during the pandemic. MCILS anticipates a surge in work performed by appointed attorneys as the courts work to clear that backlog. This surge will result in an increase in costs to MCILS.

This analysis excludes the effect that the initiatives advanced by the Judiciary Committee and adopted by MCILS would have if ratified.

## 2. Expenses and Funding

MCILS pays private contract attorneys to provide legal services to indigent legal consumers. Paying those attorneys consumes most of the MCILS budget. MCILS also pays non-counsel providers to support those legal services. Non-counsel providers include translators, investigators, transcriptionists, and expert witnesses, among others. MCILS expenses for both counsel and non-counsel services scale with both the number of cases in which MCILS contract counsel are appointed, and with the rate at which those cases are being processed by the courts. When more cases are pulled into the courts for action during any period, the expenses for that period increase accordingly. A period in which there are both more cases pending, and in which the courts are calling more cases forward for action, will be a period in which expenses will be substantially more than average.

MCILS also pays payroll and benefits for its employees, and operating expenses. These expenses are relatively consistent, and do not scale directly with caseload or case activity. The overall budget is more substantially impacted by changes in case costs than it is by fixed employee and operating costs.

MCILS maintains four primary accounts through the budget office. They are a Personal Services account, from which MCILS pays payroll and benefits to its employees; an All Other account, from which MCILS pays counsel and non-counsel expenses, as well as its operating expenses; a Revenue account, which provides a secondary source of

payments when an allotment in the All Other account is threatened or exceeded; and, a Conference account, which pays for expenses associated with training attorneys.

The Personal Services and All Other accounts are funded through by the State through the budget process. The Revenue account is funded through payments received through the Judicial Branch. Those payments in turn are collected from clients who have had legal services paid for by MCILS. (One time only, in the FY21 Supplemental Budget, the Legislature ordered that money that MCILS saved in FY20 shall be moved from an MCILS reserve account to its Revenue Account. Although that money has not landed, this memorandum assumes that it will be deposited to that account. This funding will not recur.) The Conference account was funded from payments lawyers made to MCILS to attend trainings.

As of May 21, 2021, the balances in the MCILS accounts (including the expected carry-forward from FY20) are:

Personal Services	\$ 70,984.00
All Other	\$ 2,701,284.00
Revenue	\$ 3,186,396.00
Conference	\$ 16,232.00
<b>Total</b>	<b>\$ 5,974,896.00</b>

MCILS projects the following expenses through the close of FY21 on June 30, 2021:

Payroll	\$ (144,209.16)
Non-Counsel / Operations	\$ (76,000.00)
Attorney Fees	\$ (1,500,000.00)
<b>Total</b>	<b>\$ (1,720,209.16)</b>

From this information, MCILS expects to carry \$4,254,687 forward into FY22.

### 3. Baseline funding and shortfall.

MCILS has been provided with funding for FY22 and FY23 in both its Personal Services and All Other accounts. Personal Services funding is \$954,855 and \$977,284 in FY22 and FY23, respectively. All Other funding is \$15,521,725 in each year.

Between FY16 and FY20, MCILS spent an average of \$18,203,621 per year, excluding personal services expenses. Excluding FY20 to account for the unusual pandemic-related decrease in expenses results in a slightly higher average of \$18,524,743. Non-counsel payments have averaged \$970,035 per year. Operations expenses have averaged \$169,393 per year. Together, those costs average \$1,139,428 per year.

MCILS is presently averaging approximately \$1.5 million per month in attorney payments, suggesting an annualized cost at the traditional operational tempo of \$18 million per year. If non-counsel and operations costs remain consistent, MCILS would require approximately \$19.2 million per year to meet its outside expenses.

Assuming that MCILS expenses were consistent with historic averages, in FY22 the Commission could meet its obligations. In FY23, however, there will be no available carry-forward. MCILS would be \$3,675,000 short of the funding necessary to meet its obligations. At the current rate of expenditure MCILS would be unable to pay its contract attorneys, non-counsel providers, and operating costs in or about the second week of April 2023.

It bears note that in addition to its baseline operational costs, MCILS anticipates that it will hire four limited duration employees as supported by the Governor. Expenses associated with those employees would be paid from the carry-forward. Human Resources is presently reviewing the proposed jobs to classify them, and so precise costs are not now available. MCILS anticipates that those four employees and their associated operational costs will total approximately \$500,000 in each of FY22 and 23. That expense could result in a period of approximately one month at the end of FY22 in which MCILS could not pay its expenses, and would likely move the date on which MCILS was forced to stop making payments in 2023 into mid-March.

### 4. Case backlog, analyzed with historical spending

The foregoing analysis projects the MCILS budget under historic conditions. MCILS does not expect case volume to remain constant, however. There is a serious backlog of cases in the Courts. Addressing those cases will mean adding volume on top of the ordinary case volume in each of the coming two fiscal years. The Courts do not have unlimited capacity, however. As a result, it is not possible to determine over precisely what period the case volume will need to be made up. The cases exist, however, and the cost of servicing those cases should be considered a booked liability.

The latest information that MCILS has shows pre-trial cases in the Unified Criminal Docket (“UCD”) were up 53% year over year, as of February 2021, according to the Courts. In FY20, those cases carried a total cost of \$7,973,500, suggesting a minimum of \$4,225,955 in increase. The increase in criminal case cost could be as much as \$5,019,908 if the comparison were made to FY2019 as more typical than FY20. Non-counsel case costs should be expected to increase proportionately by \$514,118.

In addition, cases aged six months or older have increased from 2,600 to 9,300 year over year, an increase of 358%. Not all of these cases will progress to jury selection and trial, but those cases that will reach at least jury selection typically come from within this pool. The MCILS billing system does not have a time entry selection for “jury trial.” As a result, we do not have available data on the number of cases that go to jury trial. The system does have a selection for “court/jury selection,” however. That selection is a good indicator of the high cost cases MCILS addresses.

The following table shows the count for cases that reached jury selection in the specified fiscal year:

FY21 (YTD)	131
FY20	475
FY19	494
FY18	663
FY17	517

The average cost for each of these cases was \$3,233.

These numbers suggest that as the Court comes fully back online it will have a surplus of between 1425 and 1773 high-cost cases. At the average cost of those cases, this represents a prospective cost to MCILS of between \$4,697,025 and \$5,732,109, or between 30% and 37% of its budget from which to pay attorneys.

##### 5. Possible effects of COVID-19 protocol on court practices and Commission costs

The foregoing assumes a neutral case cost. At this time the cost for cases going to jury trial is substantially enhanced, however. Jury selection is frequently taking as much as three times as long as in the past. Over 2,657 entries for jury selection between July 1, 2016 and the present, the average jury selection time entry was \$197.26. Were jury selection to continue to occur over three days, rather than one, that per-case cost would increase to \$591, representing a potential additional cost to MCILS of \$1,049,207.

The instances in which a case went to jury selection would come from the same set of cases driving the overall increase in case count. The cases that went to jury selection are a small subset of the total number of cases, however. The total number of cases that went to jury selection during the period FY17 through FY21 was 2,280 from a total criminal case count of 73,239. In other words, 3% of the criminal case volume went to jury selection, and the total cost of increased case volume should be discounted accordingly.

We also expect trials, themselves, to cost more due to COVID protocols. For example, we expect trials to be delayed just before or during trial because a Defendant, attorney, courtroom personnel, or juror becomes sick or is required to quarantine. Additionally, as we all know, complying with COVID protocols sometimes simply takes longer than before. We have no data to quantify this but would estimate the additional average cost of a trial/case to be between 5% and 25%. In total, MCILS anticipates an increase in its costs over the period it takes for the courts to become current of between \$4,225,955 and \$12,164,744. At the low end, this would result in the suspension of payments to counsel in mid-April 2022 at the latest. We expect that the experience will be closer to the higher end. Counsel could be paid on July 1<sup>st</sup> from the new allotment available at that time, but approximately \$4.25 million would be spent from the FY23 budget to bring counsel current. Payments would be suspended again in December 2022 or January 2023. At the high end, MCILS could exhaust its ability to pay counsel in late 2022.