

TESTIMONY OF MEAGAN SWAY, ESQ.

**LD 2219 - In Support of Parts 12 through 21 and in
Opposition to Sections 4 and 6**

**An Act to Implement the Recommendations of the Maine
Commission on Indigent Legal Services**

Joint Standing Committee on Judiciary

February 27, 2024

Senator Carney, Representative Moonen and members of the Joint Standing Committee on Judiciary, greetings. My name is Meagan Sway, and I am Policy Director for the American Civil Liberties Union of Maine, a statewide organization committed to advancing and preserving civil liberties guaranteed by the Maine and U.S. Constitutions. On behalf of our members, we urge you to vote for sections 12 through 21 and against sections 4 and 6 of LD 2219. We take no position on the remaining parts of the bill.

Access to effective counsel is among the most important of the rights guaranteed to citizens by the Sixth Amendment to the United States Constitution. *See Gideon v. Wainwright*, 372 U.S. 335 (1963). But as Chief Justice Stanfill underscored in her State of the Judiciary Report last week, Maine is failing to fulfill *Gideon's* promise: "We are in a constitutional crisis.... We have people sitting in jail every day—frequently a dozen or more in Aroostook County alone—without an attorney because there is no one to take their cases."¹ The constitutional right to counsel requires the state to ensure not only that indigent defendants *have* attorneys, but also that those attorneys are adequately evaluated, supervised, and supported so they can provide constitutionally *effective* assistance of counsel.

Sections 12 through 21 will support MCILS's ability to provide much-needed evaluation and supervision of defense counsel.

We support sections 12 through 21, which would enhance MCILS's ability to provide much-needed evaluation and supervision of indigent defense attorneys, particularly in juvenile and child-protective cases. Section 13 would require juveniles to be considered indigent and appointed counsel if they request an attorney, and sections 12 and 14 would require juvenile court records and juvenile

history records to be available to MCILS so it can fulfill its obligation evaluate and supervise defense counsel. These provisions will expedite assignment of counsel for juveniles and provide MCILS with access to records it needs to properly evaluate juvenile defense attorneys and ensure they are providing effective assistance.

Sections 15 through 21 would make similar improvements to MCILS's oversight of counsel in child-protective proceedings. Sections 15 and 17 would provide for new counsel to be assigned in appeals of child-protection proceedings, so that Sixth Amendment ineffective assistance claims concerning trial counsel can be properly evaluated on appeal. And sections 16 and 18 through 21 would require that MCILS have access to child-protective court proceedings and court records (which are otherwise generally closed to the public), so that MCILS carry out its important duties to evaluate and supervise counsel.

Section 4 would inappropriately reduce MCILS's statutory duties to provide evaluation standards and training programs for defense counsel.

We oppose portions of section 4, which would reduce MCILS's responsibilities to provide evaluation standards and training and evaluation programs for defense counsel throughout the state. To comply with the Sixth Amendment, we need more training and evaluation for the attorneys providing indigent defense, not less. Section 4 would amend section 1804(2)(D) to relieve the Commission of its statutory responsibility to adopt rules setting "standards for evaluation of assigned counsel, contract counsel and public defenders." MCILS's responsibility to set evaluation standards for indigent defense attorneys is critical to the state's fulfillment of the Sixth Amendment guarantee to provide effective assistance of counsel. In addition, section 4 would amend section 1804(3)(D) to relieve the Commission of its statutory duty to "develop criminal defense...training and evaluation programs for attorneys throughout the State to ensure an adequate pool of qualified attorneys." The bill would then add a watered-down version of this requirement in a new section 1804(3)(Q), but this provision drops the important existing language that MCILS's training and evaluation programs are "to ensure an adequate pool of qualified attorneys." With our indigent defense system in crisis, this is not the time to reduce MCILS's statutory duties to evaluate and train attorneys across the state.

Section 6 would provide employed defense counsel with overbroad immunity under the Maine Tort Claims Act.

We oppose section 6, which would provide broad absolute immunity for the Commission and its employees performing indigent legal services. Employed defense counsel--like other government employees--already have immunity from suit for a broad range of actions under the Maine Tort Claims Act. For example, the MTCA provides absolute immunity for performing any discretionary functions (even if that discretion is abused), and for any intentional acts within the scope of employment unless in bad faith. 14 MRS 8111(1)(C), (E); see also 14 MRS 8104-B. But section 6 would go further and grant MCILS and its employed counsel absolute immunity from suit for all acts of "performing or failing to perform any indigent legal services." This immunity would, for example, absolutely bar an indigent client from seeking a remedy for legal malpractice by his employed defense counsel--even if his counsel engaged in intentional bad faith conduct. Although the MTCA does provide absolute immunity for employees performing prosecutorial enforcement functions, prosecutors are not performing a role analogous to defense attorneys: the absolute immunity afforded to prosecutors for their enforcement decisions is rooted in an understanding that they are officers of the state, rather than advocates for an individual client. Employed defense counsel should be governed by the same (already broad) immunity afforded by the Maine Tort Claims Act to government employees generally.

For these reasons, we urge you to vote for sections 12 through 21 and against sections 4 and 6 of LD 2219.