Testimony by Donald G. Alexander, Hallowell, Maine.
In Opposition to Amendments Proposed in §§ 1, 4, 15, & 16 of LD 2219.
Joint Standing Committee on the Judiciary

February 27, 2024

To: Chair Sen. Anne Carney,
Chair Rep. Matt Moonen,
Members of the Committee on the Judiciary

Thank you for allowing me to appear and present testimony today. When MCILS was created in 2010, PL 2009, c. 419, with most recent amendments in 2023, PL 2023, c. 344, its statutory standards for quality and efficiency of MCILS indigent defense representation, rulemaking, and supervision were developed consistent with (i) court rules governing criminal and civil practice,[1] (ii) Maine and Federal Court precedent requiring that indigent representation be provided by reasonably competent counsel[2], and (iii) recognition that the vast majority of Maine attorneys seeking to represent indigent individuals to improve access to justice were and are providing competent, ethical representation to their clients.

Invoking its current statutory standards for representation and supervision, MCILS adopted attorney caseload limits, effective and enforced January 1, that has limited attorneys to doing 1/3 to 1/2 of the work that MCILS own data shows that the average Maine attorney is capable of doing in any particular time period. The next page is a comparison chart with the bottom line the Maine actual average time per case, and the third line from the bottom the MCILS caseload limit.

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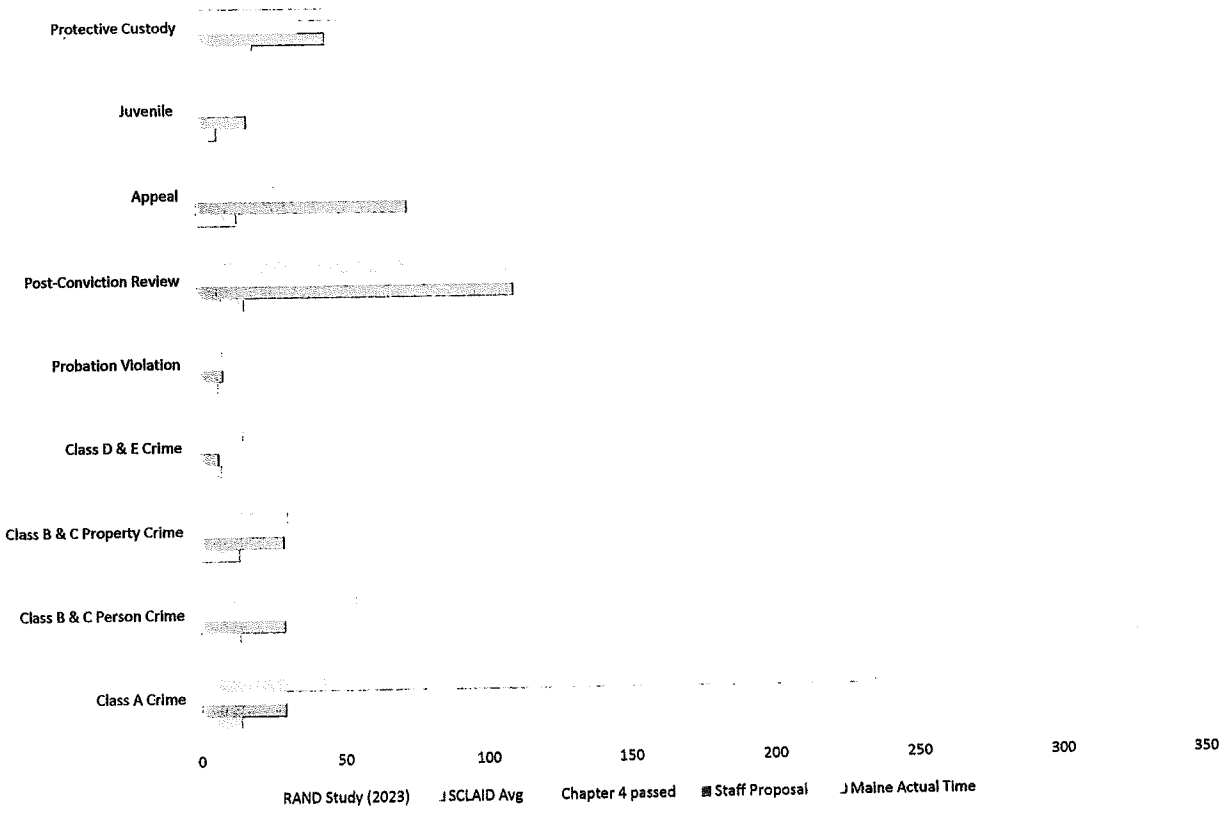
[1] The Criminal Rules state: "These Rules are intended to provide for the just determination of every proceeding governed by them. They shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay." M.R.U. Crim. P. 2. The Civil Rules state: "They shall be construed to secure the just, speedy and inexpensive determination of every action." M.R. Civ. P. 1.

[2] Upon review, appointed counsel's performance, to be constitutionally sufficient, must be deemed to meet a "reasonably proficient" or "reasonably competent" counsel standard. *United States v, Dunfee*, 821 F.3d 120, 128 (1st Cir. 2016). In *Strickland v. Washington*, 466 U.S. 668, 669 (1984), the Court suggested the standard for evaluating counsel's performance is whether counsel's challenged conduct "falls within the wide range of reasonable professional assistance."

Expected hours to be spent on cases by type



The data that MCILS used to impose the caseload limits came from subjective evaluations done by national criminal defense advocacy groups, who, in setting their caseload limit models, call for attorneys to refuse to participate in early diversion programs, alternative disposition efforts, and large docket calls aimed at efficiently resolving the vast majority of cases that will conclude by plea or dismissal. These early case resolution approaches, approved by the Legislature and regularly employed by Maine Courts, successfully reduce backlogs so that courts and counsel can more promptly focus effort on the 10 to 15% of the criminal cases that must be more fully evaluated and litigated before final resolution by trial or plea.

An edited version of a Memo sent to MCILS on October 9, 2023 explains my opposition to the adopted caseload limits in much greater detail and with citations. It is Attachment # 1 following this testimony.

Separately, at its January 8 meeting, MCILS adopted rostering and experience standards for specific case categories that greatly increased barriers to attorneys, particularly recently admitted attorneys, becoming rostered and joining MCILS indigent defense efforts. A couple of examples of these increased barriers:

1. Only criminal defense experience counts as experience. Experience as a prosecutor or a civil litigator counts for nothing, whether that experience is two years or twenty years. The MCILS rejected a suggestion by Chief Justice Stanfill that rostering standards should encourage experienced civil litigators and former prosecutors to join MCILS efforts. Just last week, a judge advised me of a situation where a law firm headed by a very experienced criminal defense attorney had hired a former prosecutor with several years' experience to join the firm. The firm wanted to have the former prosecutor represent an indigent defendant in relatively routine pre-trial proceedings, but was advised by MCILS that because the attorney's experience was limited to prosecution work, the head of the firm had to accompany the former prosecutor to court hearings.

2. No attorney can represent a MCILS client on appeal until the attorney has already briefed five appeals and orally argued one appeal. This experience has been very difficult to get from 2020 on. This standard rejected a suggestion by Chief Justice Stanfill that recently admitted attorneys, with their legal writing and clinic advocacy experience, be encouraged and invited to do appeals with relatively simple procedural, legal, or factual issues.

For child protective appeals, an attorney must have briefed at least five prior child protective appeals – experience that will be almost impossible to get, since virtually all child protective appeals are MCILS cases. To further aggravate the shortage of child protective attorneys, MCILS is proposing by rule and statutory changes that an attorney who litigates a child protective case be barred from taking any appeal of the result of that litigation and that

a new attorney (or two if each parent was separately represented)[3] must be substituted to establish a relationship with the parents and bring the appeal.

An unedited Memo sent to MCILS on December 17, 2023 explains my opposition to the adopted rostering standards in much greater detail and with citations. It is Attachment # 2 following this testimony.

While there are severe shortages of attorneys to take MCILS cases – a shortage the Chief Justice in her State of the Judiciary address called a "constitutional crisis" – MCILS actions, relying on its current statutory authority, are aggravating that crisis. In discussions with MCILS, I and a couple other attorneys have suggested that harsh enforcement of the caseload limits and new rostering standards may not be supported by the current statutory standards that call for MCILS to "provide efficient, high-quality representation," 4 M.R.S. § 1801; have standards for "independent, high-quality and efficient" representation of clients, § 1804(2)(E); ensure the delivery of "adequate indigent legal services," § 1804(2)(G); and "provide quality and efficient indigent legal services."

The proposed amendments before you suggest MCILS need only "promote" not "provide" representation suggest MCILS is backing away from its statutory obligation to provide counsel. The amendments would, in several instances, eliminate or heavily qualify references to "efficient" and add words like "high-quality" and "effective." These words may sound fine; most representation now provided by Maine attorneys in MCILS cases is high-quality and effective. But if MCILS proposed amendments are adopted, those changes may be used to suggest that the Legislature has approved the harsh caseload limits and rostering requirements that are deterring attorneys from joining MCILS representation efforts; and the proposed amendments may be used to promote even more difficult limits on attorney participation, including draft attorney qualification or eligibility standards currently set for public hearing at the MCILS March 11 meeting.

In early February, I asked MCILS staff to show the changes in availability of attorneys that occurred as the caseload limits and more difficult rostering standards were being enforced. The staff information indicated that (i) attorneys available for child protective cases dropped from 52 on Dec. 29, to 18 on Jan. 5, coming back to 27 on Feb. 5.; (ii) attorneys available for drug cases dropped from 35 on Dec. 29, to 23 on Jan. 5, and 22 on Feb. 5; and (iii) attorneys available for domestic violence cases dropped from 23 on Dec. 29, to 16 on Jan. 5, and 12 on Feb. 5. The chart documenting these changes for 11 case types is Attachment # 3 following this testimony.

As MCILS has become increasingly unable or unwilling to assign attorneys to represent indigent individuals needing counsel, a number of trial courts have had to turn to seeking attorneys not currently on MCILS active rosters to assign to a case where, from

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[3] In child protective cases, it is not unusual to see two different parents (usually two fathers, occasionally two mothers) involved on the same child protective case – each requiring separate representation. The MCILS proposal, if adopted, will require six different attorneys – not counting a GAL – for such cases.

knowledge of the attorney, the judge deems the attorney competent to provide representation for the particular case. That judicial outreach has resulted in many indigent individuals having competent representation they would not have had relying only on MCILS to appoint an attorney.

MCILS is now planning to restrict that judicial outreach with a regulation specifying that an attorney who accepts a new case assignment from a judge when the attorney is not on the active roster for that type of case, will not be paid by the Commission for any time spent on the case. There must be an exception to this proposed rule and to some MCILS current practice for cases where (1) MCILS has advised a court that it does not have an attorney available to take an assignment, and (2) the court then assigns to the case a consenting attorney whom the court has deemed competent and available to represent the client.

As a matter of constitutional law and legal ethics, when MCILS is unable or unwilling to provide counsel to an individual qualifying for MCILS representation, it cannot also prevent the court from assuring that the individual's constitutional right to the assistance of competent counsel is met. The court may, in fact must, assign the individual competent counsel who will receive appropriate compensation to assure that the individual receives constitutionally required representation. No amendment to the MCILS statutes should be adopted that could be construed to allow MCILS to veto a court's effort to meet its constitutional duty to timely appoint competent counsel to represent an indigent individual.

Conclusion

For the reasons discussed above, I urge the Committee to reject the MCILS proposals to amend 4 M.R.S. §§ 1801 and 1804 to add new statutory standards that may support the current restrictive caseload limits and rostering standards, and may encourage even more restrictive measures to be considered

I also urge the Committee to reject the proposal in Sec. 15 of LD 2219 to amend 22 M.R.S. § 4005(2) to bar trial counsel from continuing to represent a parent in a child protective case on appeal. And I urge the Committee to reject the proposal in Sec. 16 of LD 2219 to amend 22 M.R.S. § 4005-D(3-A) to allow MCILS staff to invade the privacy of sensitive child protective proceedings for the purpose of evaluating, supervising, or training one or more of the MCILS appointed counsel engaged in the proceedings.

Proposed Amendments to Encourage More Attorney Participation

Following are proposed amendments to 4 M.R.S. § 1804(2), the MCILS Rulemaking authorization designed to change direction and (i) make the MCILS Rostering Rules more welcoming to attorneys – both recent admissions and experienced attorneys – interested in joining MCILS rosters, and (ii) assure caseload limits are based on Maine practice and experience, rather than subjective standards of national advocacy groups unrelated to actual numbers from Maine practice experience.

§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.

[PL 2009, c. 419, §2 (NEW).]

2. Rulemaking. The commission shall adopt rules governing the delivery of **efficient, high-quality** indigent legal services by assigned counsel, contract counsel and public defenders. The rules adopted by the commission must include:

A. Standards governing eligibility for indigent legal services. The eligibility standards must take into account the possibility of a defendant's or civil party's ability to make periodic installment payments toward counsel fees and the cost of private legal services in the relevant geographic area; [PL 2023, c. 344, §1 (AMD).]

B. Standards prescribing minimum experience, training and other qualifications for contract counsel, assigned counsel and public defenders; **The qualification standards must recognize and be consistent with Maine based experience and practice that assure competent, ethical representation, while inviting recently admitted attorneys and experienced attorneys to join or rejoin the commission's mission to provide efficient, high-quality representation.** [PL 2023, c. 344, §1 (AMD).]

C. Standards for assigned counsel, contract counsel and public defender case loads; **The case load standards shall be based on Maine specific data for average hours spent per case in identified case categories and Maine practice experience for relative numbers of cases (i) resolved by early dismissal, diversion, or disposition, (ii) resolved in the course of proceedings without a contested evidentiary hearing, or (iii) resolved only after a contested evidentiary hearing or trial.** [PL 2023, c. 344, §1 (AMD).]

D. Standards for the evaluation of assigned counsel, contract counsel and public defenders. The commission shall review the standards developed pursuant to this paragraph at least every 5 years, or earlier upon the recommendation of the executive director; [PL 2023, c. 344, §1 (AMD).]

E. Standards for independent, high-quality and efficient representation of clients whose cases present conflicts of interest; [PL 2023, c. 344, §1 (AMD).]

F. Standards for the reimbursement of expenses incurred by assigned counsel, contract counsel and public defenders, including attendance at training events provided by the commission; and [PL 2023, c. 344, §1 (AMD).]

G. Other standards considered necessary and appropriate to ensure **engaged participation by the diverse attorneys admitted to Maine practice in** the delivery of adequate indigent legal services. [PL 2009, c. 419, §2 (NEW).]

[PL 2023, c. 344, §1 (AMD).]

Thank you for your consideration, I will be glad to try to answer any questions you may have.

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Attachment # 1

MEMORANDUM: CURRENT ISSUES TO ADDRESS

[Edited 02-26-24, to remove references to issues other than caseload limits and rostering standards.]

October 9, 2023

To: Maine Commission on Indigent Legal Services
From: Donald G. Alexander DGA

Because of the current challenges to staffing cases, I think, in addition to the other issues to be addressed at our meeting on October 11, the following three matters need to be addressed with some urgency at our meeting. My concerns are based on discussions I had at a Law School forum on indigent legal defense on October 3, 2023 and other discussions I have had over the past couple weeks with attorneys and judges regarding the current state of our indigent defense efforts.

These concerns are in addition to my view that we need to make indigent defense efforts more open and welcoming to competent, ethical attorneys interested in joining or rejoining our case rosters to help with our current challenging caseloads. In addition to this memo, my views on these issues are articulated in my memos of September 10, 2023 and May 23, 2023 which you have previously received.

1. Respecting and accepting judges' appointments of counsel, whom the judge deems competent, to represent indigent defendants in criminal cases.

As of Tuesday, October 3, at the Law School forum on indigent defense, there were only 51 rostered attorneys available statewide willing to do general pre-trial and trial work defending criminal cases. Some of these attorneys could only accept a limited number of appointments.

Because of this limited number of available attorneys, about a month ago MCILS staff advised judges and court staff that MCILS staff could not aid the courts in identifying rostered attorneys to take cases needing court appointed counsel. This caused some gaps in getting necessary counsel appointed. It has also caused some judges who know their local bar to assign cases to local attorneys who the judge deemed competent to take the particular assignment, even if the attorney was not rostered, or, if rostered, was not otherwise accepting assignments.

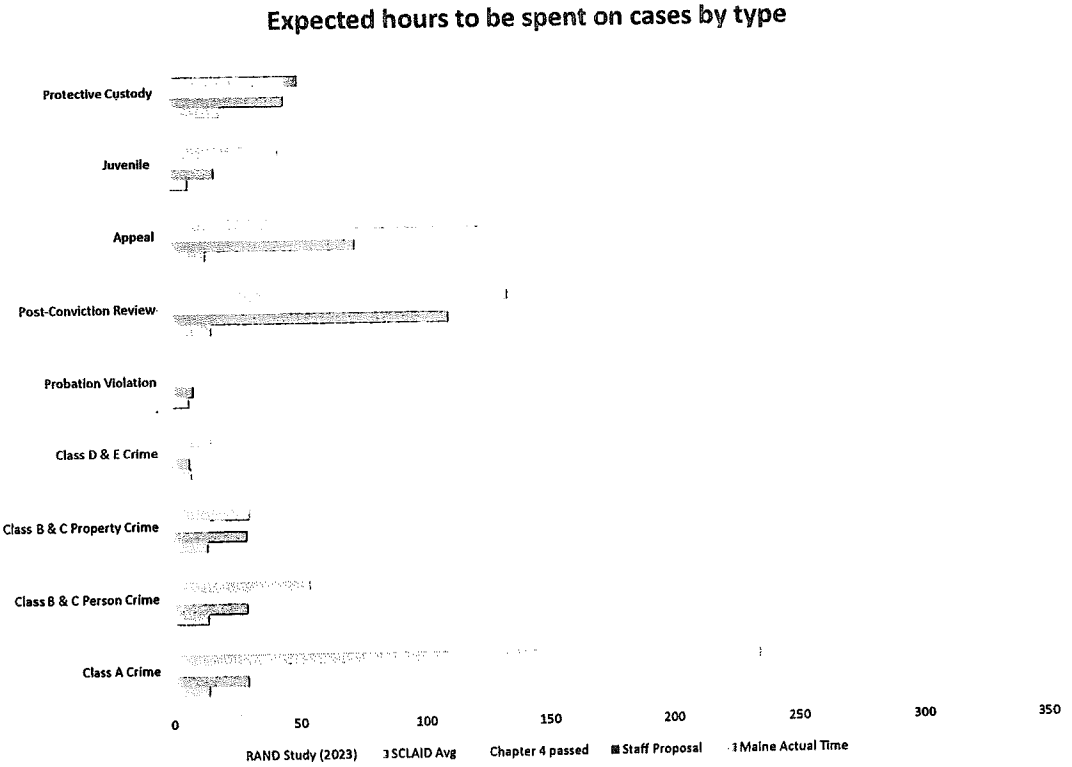
The practice of judges appointing attorneys who the judge deemed competent for the particular appointment, without regard to whether the attorney was rostered for the particular case, applied from the time the rosters were created in 2010 – 2011 until about 2021, when MCILS began discouraging appointments of attorneys not rostered for the case for which they were appointed.

In light of the current emergency created by the shortage of rostered attorneys accepting appointments, particularly attorneys who could provide indigent clients in person service, ***I propose that the rostering precondition for attorneys to be appointed to criminal cases be suspended for attorneys deemed competent by a judge and appointed to a particular case.***

~~**2. Lawyer of the Day discussion removed.**~~

3. Reconsideration of Caseload Standards.

On September 12, MCILS circulated the following chart comparing the actual hours attorneys spent, on average, on MCILS cases of various case-types (in blue) with (i) the hours expected in MCILS caseload limits adopted to take effect January 1 (in green), (ii) the average of other interest group supported caseload limits (in purple), (iii) the expected hours set in the new Rand Study caseload limits (in yellow), and (iv) the expected hours originally recommended by MCILS staff for the caseload limits (in red).



Review of the chart demonstrates that the actual hours Maine attorneys spend on the various categories of MCILS cases is ½ to 1/3 to ¼ of the time set in the MCILS caseload limits. [Except for Class D&E misdemeanors, Class B&C property crimes, and probation

violations where actual hours are similar to caseload limit hours.] Thus, the already adopted caseload limits will restrict Maine attorneys to handling 1/4 to 1/3 to 1/2 of the cases they are actually capable of accepting and competently representing clients in during any particular time period.

The reasons for the tremendous gap between attorneys' actual hours spent representing clients on particular case-types and the hours recommended in particular caseload limit studies become readily apparent in reviewing the recently published Rand *National Public Defense Workload Study*. Reading the Rand Study and my participating in a 4 and ½ hour Zoom program addressing the Rand Study presented by the National Association for Public Defense on September 29 supports the following comments.

The caseload limits are not based on studies of averages of actual hours spent, but on time estimates developed in discussions by a panel of 33 criminal defense attorneys coming to a consensus "on the average amount of time needed to provide reasonably effective assistance of counsel in an array of adult criminal cases." Rand Study, vii. To reach these numbers the panel applied the "Delphi method," "a quantitative research technique used for the evaluation of expert opinion." *Id.* Thus, the Delphi method evaluates experts' opinions, not actual case numbers.

The average amount of time needed to provide reasonably effective assistance of counsel includes an ethical requirement that at least the attorney for every case complete a through review of all discovery and anticipated evidence, and review for potential evidence problems before deciding whether a case should be resolved by plea or taken to trial. Rand Study, 7-8, 53-58. Though 90% of cases are expected to be resolved prior to trial. *Id.*, 57.

In addition to general sessions at the start and finish, the September 29 program included two breakout session where participants joined panels of their choice among a total of 14 panels. The text of the Rand Study and the panels included a great volume of useful information, not only about caseload limits, but also about changes in law practice, recruiting and practice challenges for public defender and contract counsel, particularly in rural areas, dealing with policymakers and the budgeting process, staff support for attorneys, etc. I joined two panels: "Data Obstacles and Future Obligations," and "NAC Standards and the Laugh Test."

Comments in the general sessions and the panels provided the following insights on the caseload limits calculation issue.

A. The caseload and time data in which people have some confidence relate to employed public defenders and their proper workloads – though there are significant variances even for employed public defenders depending on how robust – or limited – is staff support by paralegals, social workers, investigators, time sheet data entry, etc.

Time and caseload data for contract counsel is much more difficult to evaluate, particularly in comparison to similar work in different states, or even different counties in the same state where county PD offices are separate entities. Problems exist with varying

accuracy, skill and interest in time recording, billing, and compatibility or difference of computer and data programs. States or counties with better data on contract counsel time performance tend to have a central staff to enter the data from contact attorneys to produce the time and billing report, rather than have counsel do the billing themselves.

B. The Rand Study caseload limits indicate that public defender workloads in most of the 17 states that were the focus of the Study are 3 to 4 times higher than they should be to meet what the study described as necessary to meet the constitutional standards of competent, ethical representation.[4] Meaning that 3 to 4 times more public defenders above present staffing levels should be hired to provide constitutionally adequate public defense. Several different speakers indicated this. This is perhaps why one of the panels I attended addressed the caseload standards in relation to the "laugh test." The speakers acknowledged this is an advocacy document to use to support hiring more staff. In reality the caseload limits proposed are grossly below (or the recommended hours per case are grossly above) what is necessary and appropriate to provide competent, ethical, and proper representation.

C. Speakers indicated that competent counsel should go through "the entirety of the case" – all discovery, etc. and take the time to do it, before considering resolution of the case. It is not Ok to resolve cases without an investigation of the case. Another said there should be no pleas without first investigating and litigating. "Rocket dockets" and early diversion programs before investigation is completed should be opposed, speakers said.

The philosophy of the Rand study recommended caseload limits is absolutely opposed to Maine practice which, by legislation and court rules, indicates that for the great majority of criminal cases that are not seriously contested, early diversion, alternative resolutions, and prompt dispositions are favored for those charged who do not have significant prior records.

The Maine caseload limits should be substantially revised to reflect the actual reality of Maine practice as reflected in the actual case time data, rather than advocates' consensus estimates, unconnected to reality, that are used to support increased staffing levels.

Atachment # 2

MEMORANDUM: MCILS ROSTERING STANDARDS

[Not edited]

December 17, 2023

To: MCILS
From: Donald G. Alexander
Re: Problems With the Proposed Rostering Standards

[4] A couple speakers said the caseload limits indicated caseloads of staff were 3 to 7 times higher than what the study says is appropriate.

On December 18, the MCILS is anticipating final consideration and adoption of the rules governing rostering of attorneys and attorney eligibility to be appointed to indigent defense cases by MCILS or by the courts in consultation with MCILS. The rostering rules, updating rostering rules originally adopted in 2011, have been under discussion by MCILS for more than two years.

Over these two years, there has been an increasingly severe shortage of attorneys available to accept appointment to MCILS cases. Despite these shortages, the draft rostering rules, as they have been revised, have become increasingly complex, and requiring more prior experience than the original rostering rules. The revised rules, if adopted, will discourage or prevent attorneys, particularly newer attorneys, interested in doing MCILS work, from accepting appointments to indigent defense cases.

My concerns about making the rostering rules increasingly complex, and thereby deterring attorney participation in MCILS work have been regularly expressed in MCILS discussions over the past two years. Rather than reiterate those points again during MCILS discussion, I am submitting this memo to outline my principal concerns and indicate why I will be voting against adoption of the revised rostering rules unless there are substantial changes to simplify the rules and make them more welcoming to competent attorneys who we need to join or rejoin MCILS indigent defense efforts.

Initial Premise

These comments begin with an initial premise that, I believe, is shared by many Maine judges and many experienced practicing attorneys. That premise is that the great majority of Maine lawyers – those practicing generally and those doing or interested in doing indigent defense work - are competent, ethical, hard-working professionals, willing to go the extra mile, when needed, to achieve a good result for their clients. Even attorneys recently admitted to practice, with their courses in criminal law, constitutional law, evidence, moot courts, and other courses, and their legal writing, clinical, and extern work experience, can take some indigent case assignments – as recently admitted attorneys have done for the last 50 years – if they have (i) training provided by MCILS and other bar groups, (ii) available mentoring, and (iii) access to the important practice books providing guidance on the finer points of the law.

In a recent initiative, Chief Justice Valerie Stanfill reached out to the leaders of large law firms, recognizing the important contributions recent law graduates can make representing indigent individuals in trial and appellate work. Contributions to representing indigent individuals can be similar to the excellent indigent defense work the Chief Justice herself did when she was a recent law graduate. In my experience, I saw many other recent law graduates provide dedicated, high-quality representation to indigent clients.

In her letter, the Chief Justice stated that: "A talented trial attorney can try any kind of case." The Chief Justice also noted that many appeals involve "largely procedural" issues or review of fact-finding and that: "Even if [recent law graduates] have never tried these cases, I believe they can more than competently handle appeals in these cases." The Chief Justice

recognized that in the law firms she was writing to, mentors could be available to advise recent law graduates in their indigent defense work. Further, law school preparation, legal writing courses, moot courts, and clinical or intern experience, all provide a good background for quality brief writing for many appeals.

Issues of Concern

1. Unnecessary Complexity

The proposed rule requires attorneys to prequalify and demonstrate varying levels of experience to be rostered to receive appointments for 15 different specialized panels that cover most serious criminal cases and all child protective cases and all appeals in both criminal and child protective cases. Tracking all 15 panels to see if an attorney a court wishes to appoint to a case is presently qualified on the necessary specialized panel or panels will require a considerable bureaucracy to support the system. This complex process will also present considerable challenges and perhaps cause delay for courts to determine that each attorney a court wishes to appoint to a specific case on a busy first appearance list is qualified for appointment for all pending charges alleged in the complaint or indictment.

Particular problems may arise when, as often occurs, the charges a defendant initially faces change as a result of prosecutor review, indictment, or commission of a new crime. When the pending charges change after an attorney's appointment, the proposed rules appear to require that if the attorney is not rostered for each of the new charges, the attorney must be removed from the case and new counsel appointed.

2. The Jury Trial Experience Requirement

Many of the specialized panels for criminal cases require that, before an attorney can be appointed that attorney must have tried, individually or as co-counsel, between one and five criminal jury trials in the last 10 years. The 10 year lookback for jury trial experience appears unchanged from the 2011 rostering rule and ignores the reality that in the past four years, since the COVID shutdown, jury trial experience has been very difficult to obtain. As a result, most attorneys admitted from in the past five years have had little opportunity to gain the jury trial experience necessary to qualify for specialized panels.

Because, except for homicides and domestic violence cases, only about one in one hundred charged criminal cases has tended to go to a jury trial, it was suggested that the jury trial experience requirement not be applied to bar assignment of counsel in most cases other than homicides. If, as the case proceeded, it appeared that the case might proceed to jury trial, it was suggested that, at that point, co-counsel with requisite jury trial experience be appointed. MCILS rejected that suggestion.

3. The Criminal Defense Experience Requirement

The existing rule requires prior criminal case experience to qualify for criminal specialized rosters. A similar requirement is applied in the Federal Defender system, where

a recent add for the Federal Defender position requires prior criminal trial experience. MCILS draft has been amended to now require that the prior experience be limited to criminal *defense* experience. That requirement ignores long history of Maine practice that has seen many attorneys begin their career as prosecutors or attorneys representing government agencies, then switch to doing respected, high-quality work representing criminal defendants.

In her letter to law firm leaders, Chief Justice Stanfill stated, correctly, that: "A talented trial attorney can try any kind of case." The Chief Justice's statement reflects a view widely held by experienced judges and trial lawyers. Despite the Chief Justice's view of attorney trial skills, MCILS draft changes the rostering requirements so that litigation experience as a prosecutor or civil trial lawyer counts for nothing - only criminal defense experience counts. Not very welcoming to former prosecutors and current, experienced civil trial lawyers, who can provide high quality representation to indigent individuals needing assistance at a time when MCILS is advising that its rostered attorneys are not able to accept additional cases.

4. Barring Trial Counsel From Representing Their Client On Appeal

The November 2023 Report of the Maine Advisory Committee to the U.S. Commission on Civil Rights, at p. 22, emphasized the importance of trusting relationships between an attorney and a client to help the client make well informed decisions and avoid client confusion. One professor had testified to "the importance of a trusting relationship between an attorney and client throughout the court process." *Id.* To create this trusting relationship, the professor "advocated for vertical representation, where the same lawyer would represent the client from start to finish." *Id.*

Rather than have counsel represent the client "from start to finish," the MCILS draft proposes to bar trial counsel in child protective cases from representing their client on appeal. Such cases often involve circumstances where a client may have a difficult time establishing a trusting relationship with counsel. When a trusting relationship is established, as trial counsel often strive to do, trial counsel should not be forced by MCILS to break that relationship and require the client to face the difficulty of establishing trust with a new attorney. That new attorney will necessarily lack the background of the extensive communications that have occurred between trial counsel and client to aid in deciding what may be best for the client and the children going forward.

5. Excessive Prior Experience Requirements to Bring Appeals

For both child protective and criminal cases, the MCILS draft would bar trial counsel from representing the client on any appeal – perhaps even interlocutory appeals – if trial counsel did not meet the excessive appellate experience prerequisites to qualify counsel to bring an appeal.

In her call for assistance in getting more attorneys to do MCILS work, the Chief Justice noted, correctly, that many appeals involve "largely procedural" issues or review of fact-finding and that: "Even if [recent law graduates] have never tried these cases, I believe they

can more than competently handle appeals in these cases." For recent law graduates, appeals of MCILS cases are the most likely avenue to gain appellate experience.

The MCILS proposed appeal rostering rule requires that, before being qualified to be assigned appeals, an attorney must demonstrate that the attorney has previously briefed five appeals and had at least one oral argument before an attorney can be assigned MCILS appeals. In effect, to qualify to take appeals, and attorney must already have had substantial experience before he or she can get experience. And in the last four years of the pandemic and its aftermath, oral argument experience has been difficult to get.

If new attorneys cannot accept MCILS appeals – appeals that the Chief Justice states those attorneys may be qualified to take – they may not reach the five appeals briefed and one orally argued for a very long time. Newly admitted attorneys may not be qualified right out of the gate to bring an appeal of a Homicide conviction following a week long jury trial. But, with law school training and experience, they could certainly bring an appeal from denial of a motion to suppress over whether police had reasonable articulable suspicion to stop a vehicle, or whether there was sufficient evidence to support the trial court's finding of jeopardy in a child protective case.

The problem of gaining sufficient experience to qualify for the proposed MCILS experience standard is particularly acute in child protective cases. There, virtually all cases are MCILS cases, making it impossible for an attorney to brief five appeals that are not MCILS cases in order to qualify to represent a party in a child protective appeal.

The experience requirements for child protective cases also suggest that in some circumstances attorneys might gain experience by serving as second counsel or observing child protective proceedings. Considering the often difficult relationship between parents and their primary counsel in child protective cases, and the strict privacy and confidentiality requirements applied to such proceedings, having a second counsel or observer in such proceedings is not a realistic option.

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Attachment # 3

From: Donald Alexander
To: Billings, Jim; Maciag, Eleanor
Subject: Roster Availability Numbers
Date: Friday, February 2, 2024 12:15:30 PM

Jim; Ellie:

Good morning. For the meeting on the 12th, I would appreciate it if you could prepared a chart, showing, for child protective, and each of the principal criminal rostering categories,

1. The number of attorneys available to take cases on December 1, 2023;
2. The number of attorneys available to take cases on January 2, 2024;
3. The number of attorneys who removed themselves or were removed from rosters by MCILS between December 22, 2023 and January 5, 2024; and
4. The number of attorneys available to take cases on February 1, 2024. The February 1 date can be a later date if you are using that later date to prepare your general report to MCILS for its Feb. 12 meeting.

These numbers will be important for discussion of how our caseload limit and rostering rules are working. Thank you in advance for organizing these numbers. Best. DGA

Case Type	12/1/2023	12/22/2023	12/29/2023	1/2/2024	1/5/2024	2/5/2024
Cases with Drug Offense	30	34	35	19	23	22
Child Protective Cases	56	53	52	21	18	27
Domestic Violence Cases	22	24	23	12	16	12
Homicide Cases	12	12	12	4	5	10
Lawyer of the Day - Arraignment	78	80	82	48	51	66
Lawyer of the Day - Custody	74	75	75	39	42	60
Operating Under the Influence Cases	21	25	24	11	16	14
Other Felony Cases	32	39	39	22	27	24
Other Misdemeanor Cases	34	39	41	23	29	27
Serious Violent Felony Cases	18	19	18	7	10	10
Sexual Offense Cases	10	9	9	2	3	5
total participants	181	182	182	108	112	146

Case Type	12/1/2023	1/2/2024	2/5/2024
Cases with Drug Offense	30	19	22
Child Protective Cases	56	21	27
Domestic Violence Cases	22	12	12
Homicide Cases	12	4	10
Lawyer of the Day - Arraignment	78	48	66
Lawyer of the Day - Custody	74	39	60
Operating Under the Influence Cases	21	11	14
Other Felony Cases	32	22	24
Other Misdemeanor Cases	34	23	27
Serious Violent Felony Cases	18	7	10
Sexual Offense Cases	10	2	5
total participants	181	108	146