

**MCILS**

**January 4, 2021  
Commissioner's Meeting  
Packet**

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**MAINE COMMISSION ON INDIGENT LEGAL SERVICES**

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**JANUARY 4, 2021**  
**ZOOM COMMISSION MEETING**  
**AGENDA**

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- 1) Approval of December 21, 2020 Commission Meeting Minutes
- 2) Rulemaking Discussion
- 3) Rule Enforcement Update
- 4) Budget Update
- 5) Executive Director Search Update
- 6) Financial Subcommittee Next Steps
- 7) Proposal for Subcommittee on Retention/Recruitment
- 8) New Attorney Rostering Discussion
- 9) Annual Report Discussion
- 10) Set Date, Time and Location of Next Regular Meeting of the Commission
- 11) Public Comment
- 12) Executive Session, if needed (Closed to Public)

**(1.)**

**December 21, 2020  
Commission meeting  
minutes**

**Maine Commission on Indigent Legal Services – Commissioners Meeting  
December 21, 2020**

**Minutes**

**Commissioners Present by Zoom:** Michael Carey, Sarah Churchill, Robert Cummins, Robert LeBrasseur, Ronald Schneider, Joshua Tardy, Mary Zmigrodski

**MCILS Staff Present:** Ellie Maciag

<b>Agenda Item</b>	<b>Discussion</b>	<b>Outcome/Action Item/Responsible Party</b>
Public Hearing on Proposed Rule Amendments	The Commission heard comments from eight members of the public on the proposed rule amendments. The comments covered topics including: (1) practicality of the mentor requirement for new attorneys in rural areas; (2) concerns about the jury trial experience requirements in the specialized panel rule when jury trials will not be resuming in the near future; (3) concerns about the exemption of the presumptive waiver denial for geographic areas that are in need of lawyers; (4) increased standards for lawyer of the day; (5) concerns about the rules being too onerous on attorneys if the funding for additional staff, mentor attorneys and training is not appropriated; (6) the sex offense jury trial requirement being too lenient; and (7) that the Commissioners should have additional powers delegated to them that currently rest solely with the Executive Director.	
Approval of the November 2, 2020 November 17, 2020 December 7, 2020	The Commissioners voted unanimously to approve all three sets of meeting minutes.	
Operations Reports	No discussion on the operations reports. Commissioner Carey noted he finds the year to year comparisons helpful and would like to see that continue.	

<b>Agenda Item</b>	<b>Discussion</b>	<b>Outcome/Action Item/Responsible Party</b>
Executive Director Search	Deputy Director Maciag relayed which organizations she asked to post the Executive Director position and outlined the next steps of the hiring process. Chair Tardy suggested having a subcommittee meeting next week to get an update on progress of the interim and permanent search.	
Budget Discussion	Deputy Director Maciag reviewed what initiatives were included in the budget and relayed that the budget office requested feedback on the Commission's priorities for the unincluded initiatives. Chair Tardy and Commissioner Carey clarified that the budget office was looking for what the Commission's priorities were in terms of the replacing the included initiative with one of the unincluded initiatives. The Commissioners advised staff that there is no feedback to give the Budget Office about the unincluded initiatives. Commissioner Cummins asked for the Commission to rank the priorities of the unincluded initiatives. Chair Tardy said increasing the central office staffing is the most critical, especially to be able to implement the other initiatives except the hourly rate. Commissioner Cummins believes that the Kennebec County public defender pilot project needs to be the first priority and does not see what 10 new staff members would be doing. Commissioner Cummins suggested Commissioners take on a more active role and take away some functions that currently rest with the Executive Director, arguing that would obviate the need for additional staff. Commissioner Schneider believes that some additional staff in the central office is needed and shares Commissioner Cummins' view that a Kennebec County public defender office needs to be started, which was a compromise in the first place instead of starting with Cumberland County. Commissioner Schneider contended that where the Commission is failing since the Commission's inception is in oversight and ensuring quality representation. Because one cannot tell quality by looking at a voucher, the Commission not able to ensure quality and moving forward this must be a priority. Commissioner Schneider argued that a public defender would ensure quality and that the appellate office and the hourly rate should be a lower priority. Commissioner LeBrasseur urged the Commission to focus on the looming parents	

<b>Agenda Item</b>	<b>Discussion</b>	<b>Outcome/Action Item/Responsible Party</b>
	<p>attorney crisis that a public defender office would not address. Commissioner LeBrasseur believes that an increase in the central office staff would have the most impact and provide more oversight as to the quality of attorney work and that a public defender office would only benefit Kennebec County for the next two years.</p>	
<p>New Attorney Rostering/Parents Attorney Shortage</p>	<p>A discussion ensued about what training will be required for new attorneys seeking to join the rosters while the Commission readies its 5-day new attorney training scheduled for Fall 2021. Commissioner Carey suggested using the existing minimum standards training or find other CLE options so people can join the roster now and that it is critical that we do not wait until the fall training is ready. Commissioner Schneider does not see putting new attorneys on the roster as a way to address our attorney shortage problem. Commissioner Cummins believes that a one-day training is insufficient and stated that the proposed rules are misplaced in many ways. He believes that the system isn't working and that the Commission needs to discuss how to get it working. Chair Tardy asked the practice standards subcommittee to look at courses to bring back for Commission consideration at the next meeting. Commissioner LeBrasseur urged the Commissioners to act now to address the PC attorney crisis. Commissioner Churchill agrees with Commissioner Schneider that we should not just allow people to get on the rosters just to have a warm body but agrees that if we can provide quality training that we should allow people to get on the rosters now. Commissioner Schneider believes that the one-day training is not the right solution and suggested seeking emergency funding to pay attorneys \$100/hr to come back on the rosters to do PC work and that would be more desirable than waiving the requirements to allow brand new lawyers to get on the rosters. Commissioner Schneider questioned Deputy Director Maciag about the PC specialized panel rule and she informed the Commissioners that the PC specialized panel rule was never implemented. Commissioner Zmigrodski relayed that PC caseloads are increasing and we need to figure out what would entice people to do this work. Commissioner Zmigrodski noted that the burnout factor is</p>	

<b>Agenda Item</b>	<b>Discussion</b>	<b>Outcome/Action Item/Responsible Party</b>
	huge, that PC attorneys feel unappreciated by the hourly rate, and unappreciated by the PC bar.	
Complaint Process Discussion	Commissioner Cummins believes that the rules authorizing the executive director to have sole discretion in decision making are mistaken and the Commission must reconsider. Chair Tardy noted that there has been one bill submitted to address this issue in the upcoming legislative session.	
Annual Report	Chair Tardy requested the annual report include information about the Commission's budget proposal, state of our affairs, how the Commission functioned in the pandemic, and cost trends.	
Public Comment	<p><u>Attorney Zachary Heiden</u>: Urge the Commission to follow the lead of Commissioner Carey and to tell the Executive Branch that these requests are all necessities and that a Commission has a statutory and Constitutional mandate and that these requests are merely to begin the process to satisfy those requirements.</p> <p><u>Attorney Cory McKenna</u>: In terms of prioritizing the budget, Attorney McKenna agrees that all of them are of equal importance and are all necessary to get the system up to the level where it needs to be. Attorney funding during the pandemic is a looming concern due to lack of court action. Questioned how attorneys are going to be able to stay in business and requested this issue should be placed on the next meeting agenda to discuss. PC attorney work is the most difficulty case types he handles and issues with moral and training need to be worked on.</p> <p><u>Representative Thom Harnett</u>: Thanked the Commissioners for a thoughtful meeting today. Relayed that he is looking forward to working with the Commission and the Chief Executive to work through the issues raised in the Sixth Amendment Center report to work on creating a better system.</p>	

<b>Agenda Item</b>	<b>Discussion</b>	<b>Outcome/Action Item/Responsible Party</b>
	<p><u>Attorney Tina Nadeau</u>: Thanked Deputy Maciag for taking on extra work during the search for a new executive director. Attorney Nadeau contrasted the Commissions budget of \$18.3 million to fund all indigent legal services to the \$18.2 million budget to operate Longcreek Detention Center. Attorney Nadeau faulted the Administration for its lack of funding support for any of the Commission’s reform initiatives. Attorney Nadeau stressed that there cannot be more accountability without more funding and urged the Commission to prioritize more central office staff and an hourly rate increase for attorneys.</p> <p><u>Attorney Robert Ruffner</u>: Attorney shortage in area or practice type is the product of an hourly rate that does keep attorneys on the rosters. The remedy is for the State of Maine to pay the market rate to get attorneys to do the work. An hourly rate increase is in line with the advice that the Legislature sought out and received from the Sixth Amendment Center.</p> <p><u>Representative Jeffrey Evangelos</u>: Rep. Evangelos believes that the Commission is already in the accountability phase and now the Commission need the funds and the support from the Administration to pursue reforms. Otherwise, Maine will face class action lawsuit from the ACLU like other states have for systemic failures. Rep. Evangelos believes that the Commission’s complaint process is nonexistent and needs to be overhauled to give the Commissioners increased oversight authority.</p>	
Adjournment of meeting	The next meeting will be held by Zoom on January 4, 2021 at 1:00 pm.	



**(3.)**

## **Rule Enforcement Update**

## MAINE COMMISSION ON INDIGENT LEGAL SERVICES

**TO:** MCILS COMMISSIONERS

**FROM:** ELLIE MACIAG, DEPUTY EXECUTIVE DIRECTOR

**SUBJECT:** RULE ENFORCEMENT

**DATE:** DECEMBER 30, 2020

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The following are the current specialized case types included in Chapter 3:

1. Homicide, including OUI manslaughter
2. Sex offenses
3. Serious violent felonies
4. Operating under the influence
5. Domestic violence
6. Juvenile defense
7. Protective custody matters
8. Law Court Appeals
9. Post-Conviction Review

I can confirm that the Commission has applications for all the specialized case types except protective custody matters. The Commission will need to give me some guidance about whether to move forward with implementing this specialized panel and whether the application requirement would only apply to new attorneys applying to join the rosters.

Over the years there has been an issue with the courts not always assigning attorneys according to our roster categories. If a case is created in our system and is matched up to an approved docket number, and if the attorney is not rostered for that case type, the case is flagged for staff as being in “pre-loaded unapproved exception” status. The previous executive director reviewed this category of cases and would generally only disturb the court’s assignment if an inexperienced attorney received such an appointment. In April 2020, the executive director sent the attached email to all attorneys reminding them of their obligation to only accept case types they are rostered for.

On December 18, 2020, I had a zoom call with the Manager of Clerk of Courts and requested that the court refrain from assigning an attorney to a case type that the attorney is not eligible for.

There is one other rule enforcement issue that staff seeks guidance on going forward. Chapter 301 provides that vouchers submitted more than 90 days after final disposition, or completion of a stage of a child protection case, shall not be paid. Because he believed attorneys should be paid for their work, the previous executive director did not enforce this rule.

## **Maciag, Eleanor**

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**From:** mcils@maine.gov  
**Sent:** Thursday, April 30, 2020 9:20 AM  
**To:** Maciag, Eleanor  
**Subject:** Important Email about Case Assignments

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.

Attorneys:

As you know, the Commission has created a number of specialized case types, and our rosters list the various case-type eligibilities for each lawyer. Unfortunately, judges and clerks do not always adhere to our case-type eligibilities in making assignments, resulting in attorneys being assigned to cases for which they are not eligible.

It is the attorney's responsibility to be aware of their case-type eligibilities and to identify cases assigned to them for which they are not eligible. When such an assignment occurs, an attorney lacking qualifications for the assigned case should immediately file a motion to withdraw and substitute qualified counsel and inform the Commission that the attorney is doing so.

If the attorney believes that the attorney meets our standards for the type of case at hand, the attorney may request that the Commission approve the assignment conditioned on the prompt filing of an application for the relevant case type.

Again, it is the attorney's responsibility to be aware of their roster eligibilities and to act when the attorney receives an assignment for which they are not eligible.

For criminal cases, the specialized case types are Homicide, Sex Offenses, Serious Violent Felonies, Domestic Violence cases, and OUI cases. For Juvenile cases, felony cases and cases involving bind-over are specialized case types.

The scope of the specialized panels and the eligibility requirements for each panel can be found in our specialized panel rule at:

<https://nam03.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww.maine.gov%2Fmcils%2Frules%2Frules%2FChapter%25203%2520Eligibility%2520Requirements%2520for%2520Specialized%2520Case%2520Types.pdf&data=02%7C01%7CEleanor.Maciag%40maine.gov%7Cbf04d5567f342b4385e08d7ed093b3a%7C413fa8ab207d4b629bcdea1a8f2f864e%7C0%7C0%7C637238496912542826&sd=1bneWgeLeg7sMb%2BDLUMH7F5AzQNoBsIrlQYTK0a4ImU%3D&reserved=0>

The various specialized panel applications can be found at:

<https://nam03.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww.maine.gov%2Fmcils%2Fprocedures%2Findex.html&data=02%7C01%7CEleanor.Maciag%40maine.gov%7Cbf04d5567f342b4385e08d7ed093b3a%7C413fa8ab207d4b629bcdea1a8f2f864e%7C0%7C0%7C637238496912542826&sd=yhdaSiy0yu7YgvxNS0wuf%2BX8YIH4Tq01m%2Bvde3VSJGY%3D&reserved=0>

To check your roster eligibility, consult the rosters posted on our website at:

<https://nam03.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww.maine.gov%2Fmcils%2Frosters%2Findex.html&data=02%7C01%7CEleanor.Maciag%40maine.gov%7Cbf04d5567f342b4385e08d7ed093b3a%7C413fa8ab207d4b629bcdea1a8f2f864e%7C0%7C0%7C637238496912542826&sd=V2KPIVQ3hkLG8htj8i832rsyjG6SwYIwKfM2t9qJyd4%3D&reserved=0>

Thank you for your cooperation.

John

**(4.)**

# **Budget Update**

## MAINE COMMISSION ON INDIGENT LEGAL SERVICES

**TO:** MCILS COMMISSIONERS

**FROM:** ELLIE MACIAG, DEPUTY EXECUTIVE DIRECTOR

**SUBJECT:** BUDGET UPDATE

**DATE:** DECEMBER 30, 2020

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The Commission's budget analyst informed staff on December 30 that the attached budget initiative that had been previously included is now unincorporated in the latest working version of the budget.

**Changes - All Budget Items**

Change Group: C    Change Type:A    Change Number:All    Include:No    One Time:Included

	Include	Part A Initiatives & Other FY 22	Part A Initiatives & Other FY 23
IND00 MAINE COMMISSION ON INDIGENT LEGAL SERVICES			
Change Package: C-A-4	Priority:	Include: Yes	
<b>Description:</b> Provides additional funding for Indigent Legal Services.			
<b>Justification:</b> This initiative provides funding necessary to cover the cost of Commission operations at their current level during the 22-23 Biennium. Since fiscal year 2016-2017, the Commission has routinely received All Other funding of \$18.3 million. This amount has been sufficient to cover the cost of Indigent Legal Services, and the Commission has operated with this flat-funding amount for a number of years now. The Commission continues to project that it will require \$18.3 million per year to fund current operations. Because of one-time funding in fiscal year 2019-2020, the All Other baseline budget for each year of the current biennium equals \$15.5 million per fiscal year. This initiative is necessary to meet the State's Constitutional obligation to provide representation at State expense to indigent clients.			
<b>01095FZ11201 MAINE COMMISSION - INDIGENT LEGAL SVCS</b>			
All Other	Yes	2,804,980	2,804,980
Total Appropriations and Allocations		2,804,980	2,804,980
All Other	Yes	2,804,980	2,804,980
Total Expenditures		2,804,980	2,804,980

**(7.)**

**Proposal for  
Subcommittee on Roster  
Retention/Recruitment**



## MAINE COMMISSION ON INDIGENT LEGAL SERVICES

**TO:** MCILS COMMISSIONERS

**FROM:** ELLIE MACIAG, DEPUTY EXECUTIVE DIRECTOR

**SUBJECT:** SUBCOMMITTEE PROPOSAL – RETENTION/RECRUITMENT

**DATE:** DECEMBER 30, 2020

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Commissioner Zmigrodski would like to discuss the creation of a new subcommittee to address roster retention and recruitment. Staff believes that a subcommittee consisting of a diverse geographic cross section of rostered attorneys would help expand staff's capacity to work on tackling these issues.

**(8.)**

## **Annual Report Discussion**

## MAINE COMMISSION ON INDIGENT LEGAL SERVICES

**TO:** MCILS COMMISSIONERS

**FROM:** ELLIE MACIAG, DEPUTY EXECUTIVE DIRECTOR

**SUBJECT:** ANNUAL REPORT

**DATE:** DECEMBER 30, 2020

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Our statute requires the filing of an annual report to the Legislature, Chief Justice of the Supreme Judicial Court, and the Governor on the operation, needs and costs of the Commission by January 15. A draft report is attached for Commission consideration and discussion. Note that there are a few places highlighted in yellow where data is still needed.

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**MAINE COMMISSION ON INDIGENT LEGAL SERVICES**

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**TO:** JOINT STANDING COMMITTEE ON JUDICIARY  
ACTING CHIEF JUSTICE, MAINE SUPREME JUDICIAL COURT  
GOVERNOR, STATE OF MAINE

**FROM:** MAINE COMMISSION ON INDIGENT LEGAL SERVICES

**SUBJECT:** ANNUAL REPORT

**DATE:** JANUARY 15, 2021

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Established by the Legislature in 2009, the Maine Commission on Indigent Legal Services is an independent commission whose purpose is to provide efficient, high-quality representation to indigent criminal defendants, juveniles charged with juvenile crimes and parents in child protective cases, among others, consistent with federal and state constitutional and statutory obligations to provide counsel. From its inception until July 1, 2018, the Commission was made up five Commissioners appointed by the Governor and confirmed by the Senate. Pursuant to legislation passed during the second session of the 128<sup>th</sup> Legislature, effective July 1, 2018, the Commission now consists of nine members, two of whom are non-voting members, also appointed by the Governor and confirmed by the Senate. P.L. 2017, c. 430. During 2019, the Governor made eight nominations for Commissioners, seven voting members and one non-voting member. All nominations were approved by the Legislature, and the newly constituted Commission held its first meeting on August 13, 2019.

The Commission provides indigent legal services through a system of private assigned counsel representing indigent people facing a loss of liberty in cases brought by the State of Maine. The Commission sets standards for attorneys providing indigent legal services, and attorneys are assigned to individual cases by the court from rosters created and maintained by the

Commission. The Commission also provides funds for investigative and expert services necessary for the representation of indigent clients. The work of the Commission is funded by an annual appropriation from the Legislature.

This report is submitted pursuant to 4 M.R.S.A. § 1804(3)(H).

## **COST TRENDS AND BUDGET POSTURE**

Overall, during calendar year 2020, the cost of providing indigent legal services has decreased due to the court closures caused by the pandemic. The pandemic-related closures have created a backlog of approximately 8,800 felony criminal cases. Although the Commission has seen a moderate increase in the number of new cases, the average cost per voucher has declined, resulting in fewer costs incurred during 2020. In November 2020, the average voucher cost fiscal year to date was \$451.27. As more cases are placed on trial list due to the pandemic closure, it is anticipated the average cost per voucher will increase as more cases are prepared for trial. Collections from counsel fee reimbursements<sup>1</sup> remain strong but have declined since last year. Nevertheless, the Commission enters 2021 facing a significant budget challenge outlined below.

## **SUPPLEMENTAL BUDGET REQUEST**

In November 2020, the Commission submitted a supplemental budget request to the Governor's office seeking two new positions, one additional staff attorney and one field auditor position, and a one-time additional allotment to cover the costs of indigent legal services. This personal services request reflects the Commission's desire to immediately expand its capacity to oversee attorney performance, enhance attorney training, and impose greater financial oversight.

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<sup>1</sup> During 2020, the Commission, with the assistance of the Judicial Branch, collected \$971,269 (need to add Dec totals) in counsel fee reimbursements, slightly less than it collected in 2019.

With current staffing levels, the Commission lacks resources needed to provide adequate training, evaluation, and supervision of assigned counsel to ensure the provision of high quality indigent legal services.

The staff attorney position would enhance capacity for training and supervision of attorneys. The Commission also lacks resources to ensure effective financial oversight of attorney billing and internal Commission operations. These deficiencies were recently highlighted in report by OPEGA that attributed them, in part, to understaffing. The field auditor position would develop a program for detailed review of individual attorney billing, as well as to provide financial analysis with respect to ongoing Commission operations. These positions will allow the Commission to immediately begin addressing the identified deficiencies by expanding the Commission's ability to provide necessary training, evaluation and supervision of attorney performance and to provide needed financial oversight.

The one-time allotment will allow the unencumbered balance forward to cover the expected cost of indigent legal services in fiscal year 2020-21. The unencumbered balance forward arises from the reduction in court activity due to the pandemic in the last four months of fiscal year 2019-2020. Allotment of these funds is necessary because for fiscal year 2020-21, the Legislature appropriated substantially less than amount required to cover the cost of indigent legal services. Allotment of the balance forward will eliminate that shortfall, and hence, eliminate the need for supplemental funding to fully cover the cost of indigent legal services in fiscal year 2020-21. Failure to allot these funds will leave the Commission unable to cover the cost of indigent legal services in fiscal year 2020-21.

## **BIENNIAL BUDGET REQUEST**

The Commission budget is devoted exclusively<sup>2</sup> to providing constitutionally required indigent legal services. The Commission's biennial budget request seeks to embrace and implement the recommendations from the Sixth Amendment Center report and address issues raised in the recent OPEGA report. The Commission believes that these reforms are essential to improve the quality of indigent legal services in Maine and to meet the State's Constitutional obligation to provide effective assistance of counsel in indigent cases. Moreover, the Commission's staff is small<sup>3</sup> and broadly acknowledged to be insufficient to meet the Commission's current needs.

### Additional Funding for Indigent Legal Services

This \$5.6 million request provides the funding necessary to maintain the Commission's operations at their current level of \$18.3 million. Since fiscal year 2016-2017, the Commission has routinely received All Other funding of \$18.3 million. The Commission has operated with this flat-funding amount for many years and continues to project that it will require \$18.3 million per year to fund current operations. Because of one-time funding in fiscal year 2019-2020, the All Other baseline budget for each year of the current biennium equals \$15.5 million. The cases opened in the Commission's billing system have steadily increased while the funding has remained flat. During FY 2015, 6,934 misdemeanor and felony criminal cases and 955 Child

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<sup>2</sup>The Commission's All Other budget is used to pay attorneys for services provided to people who are entitled to representation as State expense, as well as to pay for experts, investigators, and other services necessary to the provision of adequate representation. The budget also pays for operational costs such as office supplies and equipment and information technology, including a customized attorney voucher system. Operational costs constitute just under 1.1% of the Commission's All Other expenditures.

<sup>3</sup> The Commission has 10 full-time and 3 part-time staff. Of these, only four are devoted to managing Commission operations. Six full-time and 3 part-time financial screeners assist the courts with determining an applicant's entitlement to representation at state expense and collect reimbursement for counsel costs expended from those who are adjudged able to pay. These positions generate revenues that are then applied to the cost of indigent legal services.

Protection Petition cases were opened. During FY 2020, 8,342 misdemeanor and felony criminal cases and 1,390 Child Protection Petition cases were opened. This is an increase of 1,408 misdemeanor and felony criminal cases and 435 Child Protection Petition cases. The Commission's funding request is necessary to meet the State's constitutional obligation to provide representation at State expense to indigent individuals.

#### Increase in Central Office Staff

This \$2.2 million request for 10 new staff members implements the recommendation of the Sixth Amendment Center and OPEGA to expand Commission staff. The positions will provide for one attorney to observe attorney evaluation and performance, one attorney to oversee training of attorneys, one non-attorney training staff supervised by the attorney, one attorney to oversee the Commission's internal financial operations and payment of attorney vouchers, one Auditor I position focused on financial operations and voucher payment supervised by the attorney, one Audit Director position and two Field Examiner II positions focused on reviewing the billing practices of attorneys in the field, one trial resource attorney position and one resource attorney for sentencing issues including mental health and substance abuse.

#### Kennebec County Public Defender Office

This \$4.2 million request seeks to establish 17 positions to create a Public Defender Office pilot project in Kennebec County. The positions will provide for a District Defender, A Deputy District Defender, two Homicide and Serious Felony Defenders, two Senior Assistant Public Defenders, three Assistant Public Defenders, three Paralegals, two Investigators, two Social Workers, and one Office Manager. This pilot project is necessary to implement the recommendation of the Sixth Amendment Center to explore a transition to a Public Defender system through a pilot project in a single county.



### Statewide Appellate Public Defender Office

This \$5 million request establishes 20 positions to create a statewide Public Defender Office to handle Appeals and Post-Conviction Review Cases. The positions will provide for a Director of Appeals and Post-Conviction Review, a Deputy Director of Appeals, a Deputy Director for Post-Conviction Review, three Senior Assistant Appellate Defenders, five Assistant Appellate Defenders, one Senior Post-Conviction Defender, two Assistant Post-Conviction Defenders, four Paralegals, one Post-Conviction Mitigation Specialist, and one Post-Conviction Investigator. This request is necessary to implement the recommendation of the Sixth Amendment Center to create a statewide Appellate Defender Office.

### Attorney Hourly Rate Increase

This \$23 million request provides funding to raise the hourly rate paid to attorneys representing indigent clients who are entitled to representation at State expense from \$60 per hour to \$100 per hour.<sup>4</sup> This request implements the recommendation of the Sixth Amendment Center and would ensure that the Commission can retain qualified attorneys to provide indigent legal services. The number of rostered attorneys has slowly been declining. This is in part due to the inadequate hourly rate as stated in the Sixth Amendment Center report. The hourly rate was last raised in July 2015 from \$55 per hour to \$60 per hour.

## **RESPONSE TO SIXTH AMENDMENT CENTER REPORT**

During 2018, the Legislature contracted with the Sixth Amendment Center to study the delivery of indigent legal services in Maine. On April 4, 2019, the Center issued its report and briefed the Judiciary Committee on its findings. Since the Sixth Amendment Center issued its

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<sup>4</sup> The Sixth Amendment Center recommended additional compensation of \$25 per hour for designated case types such as murder, sexual assaults, and postconviction review.

report, the report's findings and recommendations have been the focus of Commission deliberations. In December 2019, the Commission created subcommittees to work on responses to the Sixth Amendment Center report in four key areas: (1) financial oversight; (2) consideration of implementing a Public Defender office; (3) attorney training; and (4) attorney practice standards, including the Lawyer of the Day process. Subcommittee work continued thorough out 2020, leading to the following proposals:

- A statewide appellate public defender office and a trial level public defender office in Kennebec County, both included in the biennial budget request.
- Substantial changes to the attorney eligibility and specialized panel rules, including more rigorous attorney qualifications and training.
- A new five-day new attorney training program scheduled to begin in Fall 2021 covering adult criminal, juvenile, and child protection.
- Several recommendations for improvement to the Commission's financial controls, including investing resources in both billing software upgrades and staffing to fully implement the warning flag system, draft rules and guidance to incorporate billing standards and provide attorney training on billing and record-keeping.

## **OPEGA REPORT**

On December 10, 2019, the Government Oversight Committee (GOC) voted for a detailed review of the Commission by the Office of Program Evaluation and Government Accountability (OPEGA) and approved the following scope of work:

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.

On January 10, 2020, the GOC voted to expedite two elements of the scope of work, items 1 and 5 above. OPEGA published its first report on items 1 and 5 in November 2020 and concluded the following:

- 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.
- 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.

The OPEGA report concluded with a recommendation that the Commission should begin work on the development of a formal, strategic plan with a framework driven by and addressing each of the elements contained within Commission'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. Part 2 of OPEGA's report on items 2, 3, 4 is expected in the first half of 2021.

The Commission now has the benefit of both the Sixth Amendment report and the OPEGA report and feels well positioned to make the kinds of significant changes needed to accomplish its statutory mission. The Commission will, however, need the support of both the Administration and the Legislature to be able to enact its proposed reforms.

### **LEGISLATION AFFECTING THE COST AND QUALITY OF INDIGENT LEGAL SERVICES**

On March 10, 2020, the Judiciary Committee held a work session for LD 1067, An Act To Promote Fairness and Efficiency in the Delivery of Indigent Legal Services, the concept bill that was carried over from last session as a vehicle to implement recommended changes from the Sixth Amendment Center report. The Committee decided to use LD 1067 as a proposal to fund a working group consisting of 12 members from the Commission, the Judiciary, and the Legislature to design and propose a plan for Maine to adopt a public defender system. The Committee voted unanimously that LD 1067 ought to pass. The Committee also unanimously voted for a joint order on a sunset provision for 4 MRS 1804 § 4 which would allow for the standards under subsection 2, paragraph B to become routine technical instead of major substantive for a period of time, most likely until spring or summer of 2021. The Legislature did not have a final vote on either bill prior to adjournment due to the pandemic. The Commission supports both bills.

### **ASSIGNED COUNSEL FOR COMMITTED YOUTH**

The Commission, in collaboration with the Department of Corrections and the Judicial Branch, implemented a new program which provides post-adjudication representation for juveniles, under juvenile court jurisdiction, who have been committed to a juvenile detention

facility. The Judicial Branch agreed to assign an attorney to each juvenile at the time that the juvenile is committed to the juvenile detention facility and the Commission has created a list of experienced juvenile defense attorneys to participate in the program. These attorneys will:

- Provide representation at the juvenile’s annual judicial reviews in court;
- Provide representation at the juvenile’s classification meetings and quarterly review meetings at the juvenile detention facility;
- Provide advocacy and support as the juvenile progresses through the commitment program at the juvenile detention facility;
- Communicate with the professional and treatment team working with the juvenile; and
- Assist and advocate for a juvenile’s needs in transition planning to help ensure successful community reintegration.

## **RESPONSE TO COVID-19 PANDEMIC**

The Commission has undertaken the following actions since the beginning of the pandemic in March 2020:

- Provided attorneys on the criminal roster with a sample motion for reduction of jail sentences in light of the COVID-19 outbreak and provided juvenile attorneys with links to national guidance and pleadings for use in obtaining release of juveniles from detention.
- Urged all counsel to seek release for clients held in lieu of bail and worked to identify certain jails where populations were not dropping as quickly as others and reach out to local counsel urging them to actively seek releases.
- Worked with the court on using technology to connect attorneys and clients to avoid the need for in-person visits at jails.
- Worked with the court to create a pilot program in Region 3 for the assignment of counsel for defendants who were waiting for initial appearance due to the postponement of most court proceedings. The goal of the program was to provide early, effective representation to people awaiting a court date on a summons.
- Facilitated discussions between the Office of Child and Family Services and parents’ attorneys about department policies on in-person visitation.

## COMMISSION STAFF OPERATIONS

In November 2020, John Pelletier resigned his position as Executive Director, a position he held since the Commission's inception. The Commission's central office staff currently consists of the Deputy Executive Director, an Accounting Technician, and an Office Assistant I. In addition to the central office staff, the Commission has 9 financial screener positions, 6 full-time and 3 part-time.

During 2020, the Executive Director and Deputy Director reviewed over 28,600 attorney vouchers for payment. Each voucher contains specific information about the attorney's activity on a case, as well as the case's outcome. The system also allows staff to question the attorney about issues identified in a voucher prior to its approval.

Financial screeners interview applicants for assigned counsel and assist applicants to complete the financial application submitted to the court. During 2020, Commission staff screened XX applicants for counsel. For each applicant, the financial screener made a recommendation to the court, based on Commission indigency guidelines, as to whether the person qualified 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. In most, but not all cases, the court followed the recommendation of the financial screener. Statewide, XX% of applicants were found fully indigent, XX% were found partially indigent, and XX% were denied counsel.