# MCILS

# November 10, 2015 Commissioner's Meeting Packet

# MAINE COMMISSION ON INDIGENT LEGAL SERVICES

**NOVEMBER 10, 2015**

**COMMISSION MEETING**

**JUDICIARY COMMITTEE ROOM, STATEHOUSE, AUGUSTA**

**AGENDA**

1) Approval of October 13, 2015 Commission Meeting Minutes
2) Operations Reports Review
3) Discussion of LD 1433
4) Appellate Contracts
5) Public Comment
6) Set Date, Time and Location of Next Regular Meeting of the Commission
7) Executive Session, if needed (Closed to Public)

# (1.)
# October 13, 2015
# Commission Meeting
# Minutes

**Maine Commission on Indigent Legal Services – Commissioners Meeting**
**October 13, 2015**

**Minutes**

**Commissioners Present:** Steven Carey, Marvin Glazier, William Logan, Kenneth Spirer
**MCILS Staff Present:** John Pelletier, Ellie Maciag

| Agenda Item | Discussion | Outcome/Action Item/Responsible Party |
|---|---|---|
| Approval of the September 16, 2015 Commission Meeting Minutes | No discussion of meeting minutes. | Commissioner Glazier moved for approval, Commissioner Logan seconded. All in favor. Approved. |
| Operations Reports Review | Director Pelletier presented the September 2015 Operations Reports. 2,097 new cases were opened in the DefenderData system in September. This was a 199 case decrease from August, which had been a high month for new cases. The number of submitted vouchers in September was 2,446, a 17 voucher increase from September, totaling $1,280,884, an increase of $26,000 from August. In September, the Commission paid 3,381 vouchers totaling $1,669,545, an increase of 902 vouchers and $401,000 from August. All but one day's worth of vouchers were paid in the first quarter, accounting for the high voucher totals for September. Director Pelletier has noticed that over the last several months, voucher submissions have been moderating, leaving the Commission with a cash surplus at the end of the first quarter of $221,000.00. He indicated that a budget order would allow for any surplus to be moved into future quarters should the funds be needed to cover costs arising later in the year. The average price per voucher in September was $493.80, down $17.79 per voucher from August. The yearly voucher average continues to remain roughly 7% higher than this time last year. Director Pelletier noted that the most recent hourly rate increase is working its way into the system. Appeal and Post-Conviction Review cases had the highest average vouchers in September. There were 8 vouchers exceeding $5,000 paid in September. The | |

| Agenda Item | Discussion | Outcome/Action Item/Responsible Party |
|---|---|---|
| | monthly transfer from the Judicial Branch for counsel fees for September, which reflects August's collections, totaled $48,847, down approximately $10,000 from the previous month. | |
| DHHS/TANF MOE | Director Pelletier was contacted by DHHS to explore whether any Commission expenditures on assigned counsel could be counted towards the State's maintenance of effort (MOE) requirement with respect to the award of federal TANF funds. Director Pelletier met with DHHS officials and relayed that he believed expenditures for counsel in Child Protective cases satisfy the goal of "provid[ing] assistance to needy family so that children may be cared for in their own home or in the home of relatives." While Director Pelletier believes all attorney vouchers satisfy this goal, DHHS requested that only cases that ended in dismissal be included in the calculation. Last fiscal year, the Commission spent $1,272,255 on vouchers that met the given criteria. Commissioner Spirer questioned whether any personal information would have to be disclosed. Director Pelletier's understanding was that only statistical information was being sought, but that if any personal information was required he would alert the Commissioners to revisit the issue. The Commissioners raised a concern that obligating the funds could limit the Commission's ability to secure any grant that might require similar expenditures to be used as an MOE. Director Pelletier explained the agreement with DHHS was only for one year ending October 31, 2015 and need not be renewed next year should the funds be need for Commission purposes. The Commissioners voted to allow Director Pelletier to enter into the agreement with DHHS. | Commissioner Glazier moved to allow Director Pelletier to enter into an agreement with DHHS to apply Commission expenditures for the State's TANF MOE. Commissioner Spirer seconded. Commissioner Logan abstained from the vote. The remaining Commissioners in attendance voted in favor. |
| Regulatory Agenda | Director Pelletier sought guidance from the Commissioners about what items to include on the regulatory agenda for the upcoming year. The Commissioners agreed that the rules concerning attorney evaluations and standards for attorney qualifications should be included. | |

| Agenda Item | Discussion | Outcome/Action Item/Responsible Party |
|---|---|---|
| Discussion of LD 1433 | Director Pelletier provided the Commissioners with the comments received from rostered attorneys in response to the Commission's request for input on LD 1433. He also provided a copy of LD 1433 with staff comments highlighting issues raised by the provisions in the proposed legislation. Director Pelletier noted that the scheme of the bill undercuts the authority of the Commission since the authority to provide indigent legal services would shift from the Commissioners to a Chief Public Defender. Under the bill, that position would also report to two masters, the Commissioners and the Governor. Director Pelletier also pointed out that the bill is silent on the staff needed to operate the system, other than the two deputy positions. These deputy positions would serve at the pleasure of the Chief and would receive no civil service protections. Director Pelletier noted that the weighted caseload provision would help guard against bidders bidding for cases that they could not adequately handle and that weighed caseloads might be something for the Commission to explore. He also noted that the bill adds the Commission to the list of agencies who have access to Maine Revenue Service confidential information. This access would be helpful with verifying information contained on financial affidavits. Chair Carey asked whether there were other state agencies where access would be helpful. Director Pelletier thought that Maine Revenue is the most important one, but that the Department of Labor could also provide useful information. However, Director Pelletier learned that the Department of Labor could not provide electronic access since only paper records are available. He thought sifting through voluminous paper records would not be an efficient use of screener time. As a work around to the current lack of access to other state agencies confidential information, Director Pelletier has instructed the financial screeners to utilize a release form and have each applicant sign and submit with the affidavit.<br><br>A discussion ensued about LD 1433. Commissioner Glazier felt validated by the attorney responses, but was disappointed that more attorneys had not submitted comments. Commissioner Spirer agreed with Director Pelletier's assessment of the bill that the Commission would lose its authority as an independent commission | |

| Agenda Item | Discussion | Outcome/Action Item/Responsible Party |
|---|---|---|
| | and the power would be given to the Executive Branch. Commissioner Spirer also expressed uncertainty why the provision requiring one Commissioner to have an accounting or business background was included in the bill. Commissioner Logan believes that the requirement of an accounting or business background makes some sense and would be helpful. Commissioner Spirer agreed that it would be helpful, but questioned why it would have to be a qualification for appointment. Commissioner Logan noted that any employment protections would only apply to the Chief position, who could only be removed for cause. The deputy positions and any staff would be at-will employees not covered by the civil service law. The Commissioners agreed that more attorney feedback would be helpful before making any decisions about the bill. Commissioner Logan also suggested any Commission vote on the bill should wait until all five Commissioners are present, mostly likely at the December meeting. Director Pelletier will email all rostered attorneys to solicit additional feedback before the next meeting. | |
| Miscellaneous business | Director Pelletier informed the Commissioners about some miscellaneous items:<br>• The central office financial screener investigator position became vacant over the summer and staff will be working to fill it soon.<br>• The staff had provided guidance to screeners about some of the issues raised during the public comment.<br>• Alerted the Commissioners about a problem with the State Crime Lab's DNA reports during a 10 year period. Director Pelletier is working to notify all attorneys and all defendants in custody and on probation about the issue. Director Pelletier was uncertain how this issue will impact the budget. | |
| Public Comment | Rob Ruffner, Esq. submitted a public comment:<br>• LD 1433, there are some bad aspects of the bill, including application fees for poor clients and the appointment of the Chief by the Governor, but there are some good aspects of the bill, including an increase in staff size and more protection for the Chief position to resist pressure from the Executive Branch or others since he or she could only be fired for cause. | . |

| Agenda Item | Discussion | Outcome/Action Item/Responsible Party |
|---|---|---|
| | • Another good aspect of the bill includes weighted caseload standards and established guidelines for contracts and the review of contracts. The bill provides good parts for the Commission to adopt going forward.<br>• Suggested that in order to receive more useful comments, send attorneys a copy of the current statute along with a copy of LD1433. Current comments reflect a misunderstanding about the proposed bill. MACDL received 70 responses from its members.<br>• Asked what the purpose would be for sharing information from Maine Revenue – whether it would be to take punitive action or whether it would help determine whether an individual qualifies; believes the screening process should squarely be focused on getting it correct.<br>• Presented issues that occurred with two of his clients during recent screenings; asked that screeners do not use income from any other source except from the person applying for counsel.<br>• Suggested that the indigency guidelines be added to the regulatory agenda. | |
| Executive Session | None | |
| Adjournment of meeting | The Commission voted to adjourn with the next meeting to be on November 10, 2015 at 9:30 a.m. | Commissioner Logan moved to adjourn. Commissioner Spirer seconded. All in favor. |

# (2.)
# Operations Reports Review

# MAINE COMMISSION ON INDIGENT LEGAL SERVICES

**TO:** MCILS COMMISSIONERS

**FROM:** JOHN D. PELLETIER, EXECUTIVE DIRECTOR

**SUBJECT:** OCTOBER 2015 OPERATIONS REPORTS

**DATE:** NOVEMBER 4, 2015

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Attached you will find the October, 2015 Operations Reports for your review and our discussion at the upcoming Commission meeting on November 10, 2015. A summary of the operations reports follows:

- 2,375 new cases were opened in the DefenderData system in October. This was a 278 case increase over September.

- The number of vouchers submitted electronically in October was 2,637, an increase of 191 vouchers over September, totaling $1,361,120.50, an increase of $80,000 over September. In October, we paid 2,101 electronic vouchers totaling $1,071,118.51, representing a decrease of 1,280 vouchers and $600,000 from September.

- There were no paper vouchers submitted and paid in October.

- The average price per voucher in October was $509.81, up $16.01 per voucher over September.

- Appeal and Post-Conviction Review cases had the highest average vouchers in October. There were 6 vouchers exceeding $5,000 paid in October. One case involved an 8-day Gross Sexual Assault trial with a not guilty verdict. Two cases involved interim vouchers – one on a post-conviction review of a murder case that resulted in a life sentence and the other on a reckless driving case that has been pending for two years and has required complex pre-trial litigation regarding the admissibility of "hate crime" evidence. The other three cases involved complicated sentencing issues after guilty pleas.

In our All Other Account, the total expenses for the month of October were $1,209,786.02. Of the amount, just under $11,000 was devoted to the Commission's operating expenses.

In the Personal Services Account, we had $51,930.26 in expenses for the month of October.

In the Revenue Account, our monthly transfer from the Judicial Branch for counsel fees for the month of October, which reflects September's collections, totaled $46,384.74 up approximately $2,500 from the previous month. Collections continue to run below the monthly amount projected for the year.

In our Conference Account, we collected $1,400 in registration fees for upcoming trainings, leaving the account balance at $13,362.93.

MAINE COMMISSION ON INDIGENT LEGAL SERVICES

Activity Report by Case Type

10/31/2015

| | Oct-15 | | | | | | Fiscal Year 2016 | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| DefenderData Case Type | New Cases | Vouchers Submitted | Submitted Amount | Vouchers Paid | Approved Amount | Average Amount | Cases Opened | Vouchers Paid | Amount Paid | Average Amount |
| Appeal | 16 | 32 | $ 33,821.00 | 25 | $ 24,334.90 | $ 973.40 | 46 | 83 | $ 93,505.59 | $ 1,126.57 |
| Child Protection Petition | 185 | 328 | $ 207,187.50 | 273 | $ 160,257.38 | $ 587.02 | 580 | 1,391 | $ 846,157.69 | $ 608.31 |
| Drug Court | 1 | 5 | $ 4,774.00 | 5 | $ 4,774.00 | $ 954.80 | 2 | 27 | $ 16,750.50 | $ 620.39 |
| Emancipation | 5 | 11 | $ 2,467.90 | 8 | $ 1,583.40 | $ 197.93 | 27 | 40 | $ 11,415.44 | $ 285.39 |
| Felony | 582 | 677 | $ 508,425.89 | 549 | $ 412,407.96 | $ 751.20 | 2,269 | 2,238 | $ 1,756,263.34 | $ 784.75 |
| Involuntary Civil Commitment | 56 | 56 | $ 14,778.56 | 37 | $ 9,888.50 | $ 267.26 | 257 | 253 | $ 59,773.32 | $ 236.26 |
| Juvenile | 115 | 88 | $ 42,490.63 | 69 | $ 32,748.73 | $ 474.62 | 384 | 372 | $ 158,987.49 | $ 427.39 |
| Lawyer of the Day - Custody | 193 | 207 | $ 52,496.20 | 146 | $ 37,782.38 | $ 258.78 | 870 | 786 | $ 187,337.43 | $ 238.34 |
| Lawyer of the Day - Juvenile | 44 | 33 | $ 6,246.08 | 22 | $ 4,006.40 | $ 182.11 | 176 | 149 | $ 30,420.58 | $ 204.16 |
| Lawyer of the Day - Walk-in | 107 | 96 | $ 24,856.06 | 77 | $ 19,909.34 | $ 258.56 | 452 | 413 | $ 100,748.88 | $ 243.94 |
| Misdemeanor | 837 | 734 | $ 275,313.07 | 606 | $ 223,839.44 | $ 369.37 | 2,858 | 2,571 | $ 980,355.15 | $ 381.31 |
| Petition, Modified Release Treatment | 1 | 1 | $ 549.02 | 0 | | | 4 | 19 | $ 6,999.43 | $ 368.39 |
| Petition, Release or Discharge | 0 | 0 | | 0 | | | 1 | 2 | $ 466.75 | $ 233.38 |
| Petition,Termination of Parental Rights | 14 | 43 | $ 35,109.23 | 35 | $ 21,793.44 | $ 622.67 | 55 | 171 | $ 118,913.68 | $ 695.40 |
| Post Conviction Review | 7 | 6 | $ 13,528.60 | 3 | $ 11,942.03 | $ 3,980.68 | 33 | 20 | $ 36,608.78 | $ 1,830.44 |
| Probation Violation | 178 | 159 | $ 66,892.29 | 122 | $ 52,825.05 | $ 432.99 | 703 | 645 | $ 251,840.89 | $ 390.45 |
| Represent Witness on 5th Amendment | 0 | 3 | $ 438.00 | 0 | | | 8 | 6 | $ 1,294.42 | $ 215.74 |
| Review of Child Protection Order | 30 | 157 | $ 71,686.47 | 123 | $ 52,965.56 | $ 430.61 | 100 | 627 | $ 293,489.57 | $ 468.09 |
| Revocation of Administrative Release | 4 | 1 | $ 60.00 | 1 | $ 60.00 | $ 60.00 | 13 | 5 | $ 729.50 | $ 145.90 |
| **DefenderData Sub-Total** | **2,375** | **2,637** | **$ 1,361,120.50** | **2,101** | **$ 1,071,118.51** | **$ 509.81** | **8,838** | **9,818** | **$ 4,952,058.43** | **$ 504.39** |
| | | | | | | | | | | |
| **Paper Voucher Sub-Total** | **0** | **0** | **$ -** | **0** | **$ -** | **#DIV/0!** | **2** | **2** | **$ 400.50** | **$ 200.25** |
| **TOTAL** | **2,375** | **2,637** | **$1,361,120.50** | **2,101** | **$1,071,118.51** | **$ 509.81** | **8,840** | **9,820** | **$ 4,952,458.93** | **$ 504.32** |

**MAINE COMMISSION ON INDIGENT LEGAL SERVICES**
**FY16 FUND ACCOUNTING**
AS OF 10/31/2015

| Account 010 95F Z112 01 (All Other) | Mo. | Q1 | Mo. | Q2 | Mo. | Q3 | Mo. | Q4 | FY16 Total |
|---|---|---|---|---|---|---|---|---|---|
| FY15 Professional Services Allotment | | $ 4,428,945.00 | | $ 4,364,292.00 | | $ 4,515,272.00 | | $ 4,873,093.00 | |
| FY15 General Operations Allotment | | $ 34,560.00 | | $ 34,560.00 | | $ 34,560.00 | | $ 34,560.00 | |
| Financial Order Adjustment | | $ - | | $ 8,633.00 | | $ 8,633.00 | | $ 8,634.00 | |
| Financial Order Adjustment | | $ - | | $ - | | $ - | | $ - | |
| **Total Budget Allotments** | | **$ 4,463,505.00** | | **$ 4,407,485.00** | | **$ 4,558,465.00** | | **$ 4,916,287.00** | **$ 18,345,742.00** |
| Total Expenses | 1 | $ (1,034,674.33) | 4 | $ (1,209,786.02) | 7 | $ - | 10 | $ - | $ (2,244,460.35) |
| | 2 | $ (1,384,090.42) | 5 | $ - | 8 | $ - | 11 | $ - | $ (1,384,090.42) |
| | 3 | $ (1,609,871.30) | 6 | $ - | 9 | $ - | 12 | $ - | $ (1,609,871.30) |
| Encumbrances | | $ (213,187.50) | | $ 23,395.85 | | $ - | | $ - | $ (189,791.65) |
| TOTAL REMAINING | | $ 221,681.45 | | $ 3,221,094.83 | | $ 4,558,465.00 | | $ 4,916,287.00 | $ 12,917,528.28 |

| Q2 Month 4 (as of 10/31/15) | |
|---|---|
| **INDIGENT LEGAL SERVICES** | |
| Counsel Payments | $ (1,071,118.51) |
| Somerset County | $ (23,536.73) |
| Subpoena Witness Fees | $ (717.38) |
| Private Investigators | $ (24,562.87) |
| Mental Health Expert | $ (28,789.25) |
| Transcripts | $ (24,721.08) |
| Other Expert | $ (21,030.94) |
| Air fare-out of state witness | $ - |
| Process Servers | $ (1,238.57) |
| Interpreters | $ (2,610.99) |
| Misc Prof Fees & Serv | $ (513.84) |
| **SUB-TOTAL ILS** | **$ (1,198,840.16)** |
| **OPERATING EXPENSES** | |
| Service Center | $ (794.50) |
| DefenderData | $ (4,652.25) |
| Trainer Fees (in error) | $ (70.00) |
| Mileage/Tolls/Parking | $ (1,336.15) |
| Mailing/Postage/Freight | $ (405.08) |
| Bar Dues - John & Ellie | $ (320.00) |
| VDT reimbursement | $ (150.00) |
| Office Supplies/Eqp. | $ (375.32) |
| Cellular Phones | $ (129.55) |
| Subscriptions | $ (192.75) |
| Office Equipment Rental | $ (136.78) |
| Notary Fees | $ (50.00) |
| OIT/TELCO | $ (2,333.48) |
| **SUB-TOTAL OE** | **$ (10,945.86)** |
| TOTAL | $ (1,209,786.02) |

| **INDIGENT LEGAL SERVICES** | |
|---|---|
| Q2 Allotment | $ 4,407,485.00 |
| Q2 Encumbrances for Somerset cty PDP & Justice Works contracts | $ 23,395.85 |
| Q2 Expenses as of 10/31/15 | $ (1,209,786.02) |
| Remaining Q2 Allotment as of 10/31/15 | **$ 3,221,094.83** |

**MAINE COMMISSION ON INDIGENT LEGAL SERVICES**
**FY16 FUND ACCOUNTING**
As of 10/31/15

| Account 014 95F Z112 01 (Revenue) | Mo. | Q1 | Mo. | Q2 | Mo. | Q3 | Mo. | Q4 | FY16 Total |
|---|---|---|---|---|---|---|---|---|---|
| **Total Budget Allotments** | | **$ 180,124.00** | | **$ 180,124.00** | | **$ 180,124.00** | | **$ 180,125.00** | **$ 720,497.00** |
| Financial Order Adjustment | 1 | $ - | 4 | $ - | 7 | $ - | 10 | $ - | |
| Financial Order Adjustment | 2 | $ - | 5 | $ - | 8 | $ - | 11 | $ - | |
| Budget Order Adjustment | 3 | $ - | 6 | $ - | 9 | $ - | 12 | $ - | |
| Financial Order Adjustment | 3 | $ 14,106.00 | 4 | $ 15,000.00 | 9 | $ 15,000.00 | 12 | $ 15,000.00 | $ 59,106.00 |
| **Total Budget Allotments** | | **$ 194,230.00** | | **$ 195,124.00** | | **$ 195,124.00** | | **$ 195,125.00** | **$ 779,603.00** |
| Cash Carryover from Prior Quarter | | $ 59,106.00 | | $ 16,758.55 | | $ - | | $ - | |
| Collected Revenue from JB | 1 | $ 54,101.64 | 4 | $ 46,384.74 | 7 | $ - | 10 | $ - | |
| Promissory Note Payments | | $ 50.00 | | $ - | | $ - | | $ - | |
| Collected Revenue from JB | 2 | $ 44,316.49 | 5 | $ - | 8 | $ - | 11 | $ - | |
| Promissory Note Payments | | $ 50.00 | | $ - | | $ - | | $ - | |
| Discovery sanction payment | | $ - | | $ - | | $ - | | $ - | |
| Collected Revenue from JB | 3 | $ 43,704.16 | 6 | $ - | 9 | $ - | 12 | $ - | |
| Promissory Note Payments | | $ 50.00 | | $ - | | $ - | | $ - | |
| **TOTAL CASH PLUS REVENUE COLLECTED** | | **$ 201,378.29** | | **$ 63,143.29** | | **$ -** | | **$ -** | **$ 188,657.03** |
| Counsel Payments | 1 | $ - | 4 | $ - | 7 | $ - | 10 | $ - | |
| Other Expenses | | $ (90.50) | | $ - | | | | | |
| Counsel Payments | 2 | $ - | 5 | $ - | 8 | $ - | 11 | $ - | |
| Other Expenses | | $ (1.93) | | | | | | | |
| Counsel Payments | 3 | $ (178,086.96) | 6 | $ - | 9 | $ - | 12 | $ - | |
| Other Expenses | ** | **$ (3,802.16)** | | | | | | | |
| REMAINING ALLOTMENT | | $ 12,248.45 | | $ 195,124.00 | | $ 195,124.00 | | $ 195,125.00 | $ 597,621.45 |
| Overpayment Reimbursements | 1 | $ (2,394.19) | | $ (295.00) | 7 | $ - | 10 | $ - | |
| | 2 | $ (244.00) | | | 8 | $ - | 11 | $ - | |
| | 3 | $ - | 6 | $ - | 9 | $ - | 12 | $ - | |
| REMAINING CASH Year to Date | | $ 16,758.55 | | $ 62,848.29 | | $ - | | $ - | |

| Q2 Month 4 (as of 10/31/15) | |
|---|---|
| **DEFENDER DATA COUNSEL PAYMENTS** | |
| | $ - |
| **SUB-TOTAL ILS** | |
| **OVERPAYMENT REIMBURSEMENTS** | $ (295.00) |
| **Paper Voucher** | $ - |
| **Somerset County CDs** | $ - |
| **Private Investigators** | $ - |
| **Mental Health Expert** | $ - |
| **Transcripts** | $ - |
| **Other Expert** | $ - |
| **StaCap Expense** | $ (3,802.16) |
| **SUB-TOTAL OE** | **$ (4,097.16)** |
| TOTAL | $ (4,097.16) |

**** StaCap pulled in October but charged against Q1 expenses**

**MAINE COMMISSION ON INDIGENT LEGAL SERVICES**
**FY16 FUND ACCOUNTING**
As of 10/31/15

| Account 014 95F Z112 02 (Conference) | Mo. | Q1 | Mo. | Q2 | Mo. | Q3 | Mo. | Q4 | FY16 Total |
|---|---|---|---|---|---|---|---|---|---|
| **Total Budget Allotments** | | $ 10,385.00 | | $ 15,000.00 | | $ 15,000.00 | | $ 20,000.00 | $ 60,385.00 |
| Financial Order Adjustment | 1 | $ - | 4 | $ - | 7 | $ - | 10 | $ - | |
| Financial Order Adjustment | 2 | $ - | 5 | $ - | 8 | $ - | 11 | $ - | |
| Financial Order Adjustment | 3 | $ 1,196.00 | 6 | $ 3,000.00 | 9 | $ 3,000.00 | 12 | $ 2,000.00 | $ 9,196.00 |
| **Total Budget Allotments** | | $ 11,581.00 | | $ 18,000.00 | | $ 18,000.00 | | $ 22,000.00 | $ 69,581.00 |
| Cash Carryover from Prior Quarter | | $ 12,581.00 | | $ 11,962.93 | | $ - | | $ - | |
| Collected Revenue | 1 | $ - | 4 | $ 1,400.00 | 7 | $ - | 10 | $ - | |
| Collected Revenue | 2 | $ 22.50 | 5 | $ - | 8 | $ - | 11 | $ - | |
| Collected Revenue | 3 | $ - | 6 | $ - | 9 | $ - | 12 | $ - | |
| **TOTAL CASH PLUS REVENUE COLLECTED** | | $ 12,603.50 | | $ 13,362.93 | | $ - | | $ - | $ 1,422.50 |
| Total Expenses | 1 | $ (99.00) | 4 | $ - | 7 | $ - | 10 | $ - | |
| | 2 | $ (530.29) | 5 | $ - | 8 | $ - | 11 | $ - | |
| | 3 | $ (11.28) | 6 | $ - | 9 | $ - | 12 | $ - | |
| Encumbrances | | $ (3,385.00) | | | | | | | |
| REMAINING ALLOTMENT | | $ 7,555.43 | | $ 18,000.00 | | $ 18,000.00 | | $ 22,000.00 | $ 65,555.43 |
| | | | | | | | | | |
| REMAINING CASH Year to Date | | $ 11,962.93 | | $ 13,362.93 | | $ - | | $ - | |

| Q2 Month 4 (as of 10/31/15) | |
|---|---|
| **Training Manuals Printing** | $ - |
| **Training Refreshments/Meals** | $ - |
| **Speaker Hotel Room & Lodging** | $ - |
| **Refund(s) for non-attendance** | $ - |
| **Office Supplies** | $ - |
| **CLE App to the Bar** | $ - |
| **State Cap Expense** | $ - |
| **SUB-TOTAL OE** | $ - |
| TOTAL | $ - |

**MAINE COMMISSION ON INDIGENT LEGAL SERVICES**
**FY16 FUND ACCOUNTING**
AS OF 10/31/2015

| Account 010 95F Z112 01 (Personal Services) | Mo. | Q1 | Mo. | Q2 | Mo. | Q3 | Mo. | Q4 | FY16 Total |
|---|---|---|---|---|---|---|---|---|---|
| FY16 Allotment | | $ 197,643.00 | | $ 197,641.00 | | $ 174,658.00 | | $ 181,575.00 | $ - |
| Financial Order Adjustments | | $ - | | $ - | | $ - | | $ - | |
| Financial Order Adjustments | | $ - | | $ - | | $ - | | $ - | |
| Budget Order Adjustments | | | | $ - | | $ - | | $ - | |
| **Total Budget Allotments** | | **$ 197,643.00** | | **$ 197,641.00** | | **$ 174,658.00** | | **$ 181,575.00** | **$ 751,517.00** |
| Total Expenses | 1 | $ (73,500.45) | 4 | $ (51,930.26) | 7 | $ - | 10 | $ - | |
| | 2 | $ (49,758.60) | 5 | $ - | 8 | $ - | 11 | $ - | |
| | 3 | $ (48,847.23) | 6 | $ - | 9 | $ - | 12 | $ - | |
| TOTAL REMAINING | | $ 25,536.72 | | $ 145,710.74 | | $ 174,658.00 | | $ 181,575.00 | $ 527,480.46 |

| Q2 Month 4 (as of 10/31/15) | | |
|---|---|---|
| Per Diem Payments | $ | (220.00) |
| Salary | $ | (26,935.84) |
| Vacation Pay | $ | (501.74) |
| Holiday Pay | $ | - |
| Sick Pay | $ | (1,030.72) |
| Employee Hlth Svs/Workers Comp | $ | (74.00) |
| Health Insurance | $ | (9,993.46) |
| Dental Insurance | $ | (275.74) |
| Employer Retiree Health | $ | (3,034.69) |
| Employer Retirement | $ | (2,156.50) |
| Employer Group Life | $ | (218.24) |
| Employer Medicare | $ | (398.08) |
| Retiree Unfunded Liability | $ | (5,182.36) |
| Retro Pymt | $ | - |
| Perm Part Time Full Ben | $ | (1,908.89) |
| TOTAL | $ | (51,930.26) |

**MAINE COMMISSION ON INDIGENT LEGAL SERVICES**

**Activity Report by Court**

10/31/2015

| | Oct-15 | | | | | | Fiscal Year 2016 | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| Court | New Cases | Vouchers Submitted | Submitted Amount | Vouchers Paid | Approved Amount | Average Amount | Cases Opened | Vouchers Paid | Amount Paid | Average Amount |
| ALFSC | 72 | 200 | $ 161,370.62 | 185 | $ 144,793.22 | $ 782.67 | 370 | 712 | $ 536,786.82 | $ 753.91 |
| AUBSC | 23 | 93 | $ 67,113.72 | 65 | $ 50,385.61 | $ 775.16 | 151 | 334 | $ 236,270.46 | $ 707.40 |
| AUGDC | 36 | 68 | $ 24,369.63 | 52 | $ 16,905.62 | $ 325.11 | 167 | 276 | $ 121,997.25 | $ 442.02 |
| AUGSC | 55 | 58 | $ 54,020.74 | 46 | $ 44,902.93 | $ 976.15 | 209 | 301 | $ 208,217.12 | $ 691.75 |
| BANDC | 49 | 98 | $ 36,320.85 | 84 | $ 32,219.25 | $ 383.56 | 220 | 370 | $ 135,345.90 | $ 365.80 |
| BANSC | 0 | 1 | $ 30.00 | 1 | $ 30.00 | $ 30.00 | 6 | 10 | $ 2,286.15 | $ 228.62 |
| BATSC | 0 | 1 | $ 437.58 | 1 | $ 437.58 | $ 437.58 | 4 | 7 | $ 2,889.58 | $ 412.80 |
| BELDC | 10 | 41 | $ 24,224.31 | 33 | $ 18,000.81 | $ 545.48 | 30 | 121 | $ 54,395.01 | $ 449.55 |
| BELSC | 2 | 20 | $ 14,655.35 | 13 | $ 10,160.97 | $ 781.61 | 13 | 55 | $ 30,966.73 | $ 563.03 |
| BIDDC | 62 | 84 | $ 45,445.43 | 64 | $ 33,552.08 | $ 524.25 | 272 | 394 | $ 205,062.07 | $ 520.46 |
| BRIDC | 20 | 16 | $ 13,725.23 | 14 | $ 11,736.71 | $ 838.34 | 51 | 79 | $ 48,805.96 | $ 617.80 |
| CALDC | 6 | 3 | $ 912.10 | 3 | $ 912.10 | $ 304.03 | 21 | 49 | $ 30,141.67 | $ 615.14 |
| CARDC | 26 | 27 | $ 15,492.29 | 20 | $ 10,098.45 | $ 504.92 | 70 | 104 | $ 49,904.28 | $ 479.85 |
| CARSC | 7 | 16 | $ 15,663.84 | 21 | $ 18,633.12 | $ 887.29 | 73 | 146 | $ 85,527.20 | $ 585.80 |
| DOVDC | 2 | 4 | $ 1,740.34 | 8 | $ 2,495.44 | $ 311.93 | 8 | 59 | $ 16,911.80 | $ 286.64 |
| DOVSC | 0 | 0 | | 0 | | | 1 | 0 | | |
| ELLDC | 7 | 23 | $ 12,127.15 | 23 | $ 10,492.86 | $ 456.21 | 50 | 172 | $ 80,963.22 | $ 470.72 |
| ELLSC | 0 | 3 | $ 693.50 | 4 | $ 969.50 | $ 242.38 | 4 | 23 | $ 5,537.18 | $ 240.75 |
| FARDC | 12 | 9 | $ 3,107.28 | 5 | $ 990.78 | $ 198.16 | 34 | 41 | $ 29,846.41 | $ 727.96 |
| FARSC | 2 | 0 | | 0 | | | 6 | 4 | $ 2,260.72 | $ 565.18 |
| FORDC | 6 | 10 | $ 5,462.71 | 10 | $ 5,462.71 | $ 546.27 | 28 | 50 | $ 20,916.04 | $ 418.32 |
| HOUDC | 45 | 53 | $ 18,709.81 | 42 | $ 14,646.60 | $ 348.73 | 167 | 192 | $ 73,324.15 | $ 381.90 |
| HOUSC | 7 | 9 | $ 10,734.05 | 7 | $ 10,234.55 | $ 1,462.08 | 39 | 53 | $ 35,257.05 | $ 665.23 |
| LEWDC | 101 | 161 | $ 70,290.22 | 126 | $ 57,895.29 | $ 459.49 | 395 | 557 | $ 250,461.34 | $ 449.66 |
| LINDC | 13 | 13 | $ 5,620.86 | 7 | $ 2,676.38 | $ 382.34 | 42 | 49 | $ 27,922.60 | $ 569.85 |
| MACDC | 10 | 21 | $ 9,319.59 | 15 | $ 4,837.00 | $ 322.47 | 52 | 97 | $ 33,123.66 | $ 341.48 |
| MACSC | 0 | 14 | $ 6,752.30 | 11 | $ 5,255.30 | $ 477.75 | 17 | 40 | $ 17,928.60 | $ 448.22 |
| MADDC | 3 | 3 | $ 943.40 | 3 | $ 943.40 | $ 314.47 | 14 | 12 | $ 3,342.98 | $ 278.58 |
| MILDC | 4 | 4 | $ 1,007.55 | 1 | $ 336.59 | $ 336.59 | 13 | 5 | $ 1,358.73 | $ 271.75 |
| NEWDC | 21 | 22 | $ 9,207.21 | 16 | $ 6,746.67 | $ 421.67 | 68 | 93 | $ 35,745.75 | $ 384.36 |
| PORDC | 80 | 108 | $ 63,707.55 | 73 | $ 38,057.77 | $ 521.34 | 324 | 466 | $ 228,838.38 | $ 491.07 |
| PORSC | 11 | 3 | $ 1,369.00 | 3 | $ 1,369.00 | $ 456.33 | 21 | 9 | $ 8,198.55 | $ 910.95 |
| PREDC | 24 | 30 | $ 13,091.69 | 23 | $ 9,318.00 | $ 405.13 | 99 | 186 | $ 64,370.88 | $ 346.08 |
| ROCDC | 29 | 22 | $ 7,198.30 | 14 | $ 5,260.30 | $ 375.74 | 80 | 115 | $ 42,191.63 | $ 366.88 |
| ROCSC | 22 | 11 | $ 4,909.06 | 9 | $ 4,456.36 | $ 495.15 | 45 | 59 | $ 48,478.05 | $ 821.66 |
| RUMDC | 9 | 5 | $ 3,147.18 | 2 | $ 2,129.06 | $ 1,064.53 | 59 | 55 | $ 23,534.18 | $ 427.89 |
| SKODC | 14 | 32 | $ 16,708.76 | 24 | $ 11,134.92 | $ 463.96 | 40 | 160 | $ 80,162.91 | $ 501.02 |
| SKOSC | 0 | 0 | | 0 | | | 2 | 2 | $ 734.00 | $ 367.00 |
| SOUDC | 11 | 17 | $ 9,459.53 | 14 | $ 8,037.18 | $ 574.08 | 63 | 88 | $ 31,872.73 | $ 362.19 |
| SOUSC | 7 | 39 | $ 22,580.37 | 20 | $ 11,070.85 | $ 553.54 | 66 | 123 | $ 69,480.14 | $ 564.88 |
| SPRDC | 47 | 65 | $ 36,144.21 | 51 | $ 24,189.08 | $ 474.30 | 221 | 276 | $ 136,910.05 | $ 496.05 |
| Law Ct | 12 | 23 | $ 23,564.98 | 18 | $ 15,764.88 | $ 875.83 | 34 | 56 | $ 62,039.62 | $ 1,107.85 |
| YORCD | 168 | 64 | $ 31,441.64 | 57 | $ 26,918.98 | $ 472.26 | 479 | 96 | $ 41,724.56 | $ 434.63 |
| AROCD | 11 | 15 | $ 4,359.88 | 13 | $ 3,144.88 | $ 241.91 | 71 | 32 | $ 9,578.23 | $ 299.32 |
| ANDCD | 81 | 38 | $ 16,524.04 | 22 | $ 7,516.34 | $ 341.65 | 334 | 52 | $ 16,080.24 | $ 309.24 |
| KENCD | 137 | 115 | $ 38,391.82 | 89 | $ 31,699.79 | $ 356.18 | 463 | 280 | $ 88,258.54 | $ 315.21 |
| PENCD | 276 | 210 | $ 95,902.64 | 194 | $ 86,714.56 | $ 446.98 | 847 | 834 | $ 392,547.12 | $ 470.68 |
| SAGCD | 49 | 47 | $ 29,104.24 | 35 | $ 23,121.26 | $ 660.61 | 132 | 111 | $ 67,530.23 | $ 608.38 |
| WALCD | 32 | 28 | $ 11,648.66 | 23 | $ 9,361.22 | $ 407.01 | 126 | 68 | $ 22,685.70 | $ 333.61 |
| PISCD | 9 | 9 | $ 1,243.50 | 8 | $ 1,631.50 | $ 203.94 | 52 | 52 | $ 20,096.30 | $ 386.47 |
| HANCD | 68 | 51 | $ 17,928.39 | 43 | $ 12,919.75 | $ 300.46 | 245 | 217 | $ 81,803.48 | $ 376.97 |
| FRACD | 51 | 102 | $ 38,185.29 | 89 | $ 34,046.59 | $ 382.55 | 227 | 222 | $ 81,704.42 | $ 368.04 |
| WASCD | 48 | 23 | $ 6,740.65 | 8 | $ 2,363.65 | $ 295.46 | 136 | 36 | $ 8,343.25 | $ 231.76 |
| CUMCD | 339 | 303 | $ 150,635.35 | 224 | $ 112,872.92 | $ 503.90 | 1,256 | 1,113 | $ 611,823.31 | $ 549.71 |
| KNOCD | 54 | 33 | $ 16,833.38 | 22 | $ 10,152.58 | $ 461.48 | 202 | 117 | $ 46,115.53 | $ 394.15 |
| SOMCD | 1 | 1 | $ 192.00 | 1 | $ 192.00 | $ 192.00 | 4 | 5 | $ 3,113.30 | $ 622.66 |
| OXFCD | 54 | 32 | $ 9,427.40 | 24 | $ 7,635.00 | $ 318.13 | 169 | 50 | $ 13,371.00 | $ 267.42 |
| LINCD | 41 | 26 | $ 12,748.74 | 18 | $ 8,092.26 | $ 449.57 | 142 | 66 | $ 30,835.38 | $ 467.20 |
| WATDC | 22 | 35 | $ 12,974.94 | 37 | $ 15,213.42 | $ 411.17 | 80 | 155 | $ 72,603.75 | $ 468.41 |
| WESDC | 27 | 26 | $ 11,220.60 | 26 | $ 11,112.60 | $ 427.41 | 102 | 138 | $ 63,831.67 | $ 462.55 |
| WISDC | 23 | 22 | $ 11,953.21 | 18 | $ 10,985.23 | $ 610.29 | 48 | 68 | $ 33,920.55 | $ 498.83 |
| WISSC | 6 | 17 | $ 9,020.09 | 11 | $ 5,285.31 | $ 480.48 | 21 | 52 | $ 42,550.99 | $ 818.29 |
| YORDC | 11 | 10 | $ 3,265.75 | 8 | $ 2,599.75 | $ 324.97 | 53 | 54 | $ 23,233.33 | $ 430.25 |
| TOTAL | 2,375 | 2,637 | $ 1,361,120.50 | 2,101 | $ 1,071,118.51 | $ 509.81 | 8,838 | 9,818 | $ 4,952,058.43 | $ 504.39 |

# MAINE COMMISSION ON INDIGENT LEGAL SERVICES

## Number of Attorneys Rostered by Court

## 10/31/2015

| Court | Rostered Attorneys |
|---|---|
| Augusta District Court | 100 |
| Bangor District Court | 53 |
| Belfast District Court | 52 |
| Biddeford District Court | 134 |
| Bridgton District Court | 100 |
| Calais District Court | 13 |
| Caribou District Court | 18 |
| Dover-Foxcroft District Court | 25 |
| Ellsworth District Court | 42 |
| Farmington District Court | 27 |
| Fort Kent District Court | 11 |
| Houlton District Court | 16 |
| Lewiston District Court | 131 |
| Lincoln District Court | 28 |
| Machias District Court | 20 |
| Madawaska District Court | 12 |
| Millinocket District Court | 20 |
| Newport District Court | 37 |
| Portland District Court | 158 |
| Presque Isle District Court | 14 |
| Rockland District Court | 49 |
| Rumford District Court | 27 |
| Skowhegan District Court | 30 |

| Court | Rostered Attorneys |
|---|---|
| South Paris District Court | 63 |
| Springvale District Court | 120 |
| Unified Criminal Docket Alfred | 108 |
| Unified Criminal Docket Aroostook | 22 |
| Unified Criminal Docket Auburn | 106 |
| Unified Criminal Docket Augusta | 94 |
| Unified Criminal Docket Bangor | 54 |
| Unified Criminal Docket Bath | 92 |
| Unified Criminal Docket Belfast | 47 |
| Unified Criminal DocketDover Foxcroft | 22 |
| Unified Criminal Docket Ellsworth | 39 |
| Unified Criminal Docket Farmington | 29 |
| Inified Criminal Docket Machias | 18 |
| Unified Criminal Docket Portland | 143 |
| Unified Criminal Docket Rockland | 41 |
| Unified Criminal Docket Skowhegan | 20 |
| Unified Criminal docket Soputh Paris | 103 |
| Unified Criminal Docket Wiscassett | 70 |
| Waterville District Court | 57 |
| West Bath District Court | 110 |
| Wiscasset District Court | 77 |
| York District Court | 106 |

# (3.)
# Discussion of LD 1433

# Maine Association of Criminal Defense Lawyers

P.O. Box 434, Freeport, Maine 04032
(207) 865-1457 FAX (888) 474-7198
info@mainemacdl.org




November 9, 2015

Steven Carey
Chair, Maine Commission on Indigent Legal Services
Carey Law Firm
75 Pearl St #430
Portland, ME 04101

Re: LD 1433 Opposition

Dear Steve:

I write to formally state the Maine Association of Criminal Defense Lawyers' (MACDL) opposition to the Governor's Bill, LD 1433-An Act To Create the Office of the Public Defender and Amend the Duties of the Commission on Indigent Legal Services. For the reasons that follow, please vote against passage of LD 1433.

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." See also Article 1, Section 6 of the Maine Constitution. Federal Courts have ruled that Public Defender systems have deprived defendants of the assistance of counsel at critical stages over the course of a criminal process when deliberate choices have been made regarding the funding, contracting and monitoring of the public defender system that directly and predictably caused the deprivation of this important constitutional right. Regrettably, LD 1433 seriously degrades, and likely violates, Maine citizens' 6th Amendment and Article 1 rights.

First, the Commission on Indigent Legal Services has only been in existence for slightly more than 5 years. It took over the provision of indigent legal services from the Judicial Branch effective July 1, 2010. The Judicial Branch believed that independence over the management of indigent defense afforded the best oversight and eliminated inherent conflicts of interest. LD 1433 effectively replaces this system, without any indication that the current system is flawed in its primary purpose: the provision of constitutionally mandated, competent, quality legal services for indigent people in Maine courts. Maine has a long, proud, independent history of local lawyers providing indigent legal services at either volunteer or steeply discounted hourly rates that pre-dates the existence of the Commission by decades. As a result, Maine has enjoyed one of the most cost efficient systems for the provision of indigent legal representations. This bill is the proverbial equivalent of throwing out the baby with the bath water.

Second, LD 1433 seems entirely aimed at cost containment, and it relies almost entirely for effectuating this purpose by replacing the current system of paying attorneys an hourly rate for time spent on a matter with a contract based system. Instead of a real office of the public defender on an equal footing with prosecutorial offices, staffed with employee attorneys and support staff, the bill seeks to dole out contracts for services to the low bidder—who may not always be the most experienced, best trained, or properly equipped or motivated for this important, constitutionally mandated task. This is seriously flawed for several reasons. A system that depends on one, or several, people handing out contracts to the lowest bidder to assume responsibility for all, or nearly all, the indigent criminal defense work in a geographic area incentivizes a factory mentality to handling cases. Instead of recognizing the vital constitutionally mandated role of indigent

defense, the bill's primary purpose seems to be to cap the cost of providing indigent defense in Maine. A similar system in Washington has recently been ruled to be unconstitutional by a federal court. Other states with contract based systems have also had legal challenges brought in federal court. A system like this builds in an ethical conflict for attorneys: the attorney's financial interest is to resolve cases quickly and cheaply, whereas the client's interest is to fully investigate and contest cases—yes, even insist on a jury trial where desirable. Instead of spreading the financial risk of rising costs in providing constitutionally mandated indigent defense work to the State as a whole, the bill seeks to transfer the risk to the lawyers bidding on the contracts and to the indigent themselves by instituting constitutionally suspect fees, including a provision that requires parents of juveniles accused of a juvenile offense to pay the application fee for their accused children. There is nothing in the bill that calls for or requires that the public defender office or the Commission be funded at levels adequate for the constitutionally mandated task of providing indigent defense.

Third, the bill just adds another layer of government bureaucracy by adding a Chief Public Defender to the Commission system. The CPD is appointed by the Governor, and only answers to the Governor, and becomes an ex-officio member of the Commission. This seems to carry with it a real chance of politicizing the CPD office and reintroduces an inherent conflict of interest that the Judicial Branch sought to eliminate. It is not clear why the Commission itself could not be tasked with many of the worthwhile features of the bill, such as providing training, setting up a complaint system, monitoring case loads, and providing the Legislature with various reports.

Fourth, because the Chief Public Defender's duties include verifying and reassessing whether someone is indigent, and then seeking financial repayment from the very people the CPD is charged to provide representation for, a new conflict of interest arises. The bill allows the CPD to reassess a court ruling that a person is indigent for up to seven years after the court's indigence determination. Thus, an indigent person could be chased down by the very office he thought was providing his defense many years after his case ended—whether he was found guilty and served jail or prison time, paid a fine or restitution, or was acquitted!

As US District Judge Lasnick stated in 2013 finding western Washington State's system unconstitutional: "The notes of freedom and liberty that emerged from Gideon's trumpet a half a century ago cannot survive if that trumpet is muted and dented by harsh fiscal measures that reduce the promise to a hollow shell of a hallowed right."

For all of these reasons, as well as several others which we anticipate discussing at hearings or work sessions, MACDL respectfully requests that you reject passage LD 1433.

Thank you for your consideration,

pp James Billings

James A. Billings
President MACDL

LAW OFFICE OF
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LEWISTON, MAINE 04243-0376

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Maine Commission on Indigent Legal Services
ATTN: Executive Director, John Pelletier, Esq.
ATTN: MCILS Commissioners: Steven Carey, Esq., Marvin Glazier, Esq., William Logan, Esq., Susan Roy, Kenneth Spires, Esq.
154 State House Station
Augusta, ME 04333

RE: LD 1433

Dear John and MCILS Commission members,

I am writing to you all pursuant to Executive Director, John Pelletier's invitation to the Maine Bar to offer the Commissioners perspective on the proposed Public Defender legislation, as contained in LD 1433.

Since 1991, I have practiced as an attorney in central and southern Maine in the areas of criminal, domestic, civil, and child protective law. During this time period, I have represented just about every type of retained and indigent defendant accused of committing felony, misdemeanor and juvenile crimes, and I have seen and experienced many major changes affecting the representation of such clients.

The most disturbing development in the criminal justice system that I have noticed since becoming an attorney is the severe rise of mentally ill and drug addicted defendants who have been detained, convicted, and imprisoned, while their short and long term treatment options have drastically diminished.

The consequence of this for our criminal practices is that more defendants have been accused of more crimes that implicate serious public safety concerns and, often times, near ruin for these accused clients. Accordingly, adequate representation of such clients has become a complex endeavor, requiring thorough knowledge of these defendants' needs and circumstances, and expertise in negotiating, litigating, and trying these clients' cases.

To my mind, as Executive Director of MCILS, John Pelletier has done an effective job in providing for and ensuring the competence and training of able court appointed attorneys in these criminal matters, while providing access to timely funds to investigate these cases and, where appropriate, to enlist

qualified experts. Of particular importance for the commission in assessing in the costs of these services, it is also important for you to know that John Pelletier has on a regular basis, 1) insisted on substantiation and explanation of vouchers and expenses submitted by attorneys, and 2) been open to changes and reform that has increased the efficiency and productivity of the representation of indigent defendants.

The commission is no doubt aware of some of these quality controls and changes in the form of computerized billing, billing prompts that promote and itemize speedy billing (such as telephone conference with client, DA, probation, client parent, etc.), increased use of scheduled Lawyer of the Day appointments, and clear requirements regarding granting of investigators and experts. The commission may not be aware however that even before this proposed legislation, many lawyers of the Maine Bar representing indigent defendants have assumed a central role in recommending changes to the voucher system and criminal justice system to increase productivity, efficiency and reduce costs.

That is, as should be evident from many of the insightful letters you have already received from the Maine Bar, the lawyers representing the poor and indigent clients are committed to improving the implementation and quality control of the MCILS voucher/payment system. Such improvements might include: standardizing some billing entries (i.e. recommended time entries for opening and closing files, writing and receiving correspondence and emails, and so on); limiting travel expenses paid to investigators and/or limiting investigators to the jurisdiction of the case; limiting appointment of attorneys to the jurisdiction of their practice; setting tiers for payment of investigations tied to the severity of offenses.

Further, at least where my county bar is concerned, you should also know that several local attorneys working with the court and the District Attorney's office have been instrumental in promoting recent reforms/ changes that will increase the productivity and efficiency of the criminal justice system independent of the MCILS. They have done this by such measures as: negotiating an arrangement with the District Attorney whereby this office will provide criminal histories possessed by the State without necessitating the costly purchase of SBI reports; working with our Justice to establish a Lawyer of the Day Protocol that will protect the rights of individuals appearing at court for the first time, while promoting resolution of appropriate cases with the assistance of informed counsel; informally assisting and mentoring younger attorneys; assisting the court in the formulation and promulgation of new unified court rules.

In light of the foregoing, and thinking about what I want to say the most, I really want the commission to realize that the system is not broken and that the leading and experienced attorneys who have already committed to serving the poor, the mentally ill, the hopelessly addicted will work with the same amount of dedication with John Pelletier and the commission to improve and reform this system that serves these clients so well.

Moreover, as has been aptly illustrated in the correspondence the commission has received, I hope that the commission understands that the change to a contract system based on costs would risk jettisoning from the system the respected and experienced attorneys who are at the heart of maintaining a just, efficient, and in the end, less costly defense for their clients.

This danger really hit home the other day when I learned that James Howaniec had negotiated after trial with a motion for a new trial pending a 25 year sentence for his twenty- something client who was convicted of playing some role with other co-defendants in a murder. In the usual course of events, this young man would have been sentenced to a forty-five to fifty year sentence that would have

functionally ended his life and permanently severed his family and friend relationships, while the State paid enormous amounts of money every year to jail, feed, and treat this young man. In that thought, I realized that maintaining a system where such experienced attorneys as James Howaniec leads the way while mentoring and training younger colleagues, not only promotes justice: it reduces costs to the State by fairly reducing the number of clients pleading guilty to serious crimes, reducing the length and incidences of jail and prison sentences, and maintaining whole families where parent-defendants are available to raise their children and maintain jobs that support their families.

As a member of the Drug Court for our county, I am acutely aware of the cost savings and life and family savings– which benefits ripple out into our communities - from a wise and thoughtful system of criminal justice. From this lesson, I hope and trust that thoughtful reflection of our current MCILS system leads the commission to maintain this wise and thoughtful system, which as one judge told me when thinking about LD 1433, "isn't broken".

Sincerely yours,

Donald S. Hornblower, Esq.

DSH/lgc

THE HESS LAW FIRM
Specializing in Criminal Law

George A. Hess, Esq.
Attorney
Celeste Daly, MBA
Consultant

November 9, 2015

John Pelletier, Esq.
MCILS
154 State House Station
Augusta, ME 04333

Dear John:

I am writing to state my opposition to LD 1433. The reasons I oppose the bill are because I am concerned that it will result in substandard legal services for the indigent, while increasing costs for the Maine taxpayers.

As you know, I have specialized in criminal defense for the last 20 years. During that time, I have seen the hourly rate for court appointed attorneys rise from $40 to $60. The hourly rate has not kept pace with inflation during that time and the current hourly rate is barely adequate since it does not go directly into my pocket, but must first pay my business expenses, including rent, insurance, supplies, etc. For that $60 per hour, the Maine taxpayer gets an attorney who practices only criminal defense, can take any case from murder and serious violent felonies on down, is efficient, has a strong Maine work ethic, and is dedicated to the best interests of his clients. In short, the Maine taxpayer gets significant value for his or her tax dollars in providing constitutionally mandated legal representation for indigent defendants.

If the State of Maine goes to a public defender system with contracted private attorneys, there will be pressure to keep costs unsustainably low, most likely by awarding contracts to the lowest bidders. There is no slack in the system now, and if someone is willing to bid at an effective rate lower than $60, that person cannot possibly deliver adequate legal services. If costs savings becomes the dominant reason for moving towards a public defender system, there will, over time, be a significant decline in quality representation for the indigent defendant.

The costs for the Maine taxpayer will simultaneously increase with a public defender system. This is because that system will add a layer of bureaucracy and costs that are not currently there. Per the proposed bill, the Public Defender's office will include the salaries and benefits for a Chief Public Defender and two deputies, along with staff and other counsel. In addition to

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salaries and benefits, there will be normal administrative costs such as supplies and equipment. Under the current system, the private court appointed attorneys have assumed all these costs for the Maine taxpayers.

In conclusion, I oppose LD 1433 because I think it will result in a lowering of the quality of the constitutionally mandated legal services for indigent defendants, and increase the tax burden to Maine citizens.

Sincerely,

George A. Hess

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Norway, ME 04268
p: (207) 805-8810
f: (207) 805-8809
jeff@wilsonlawme.com

11/5/14

*Commissioners*

Dear Commissioners:

Please accept this letter as my comment and response to LD1433 and the Public Defender Office and contact counsel proposal for indigent defense. I discuss two primary reasons this bill should not pass: 1) zealous representation for defendants and 2) the nature of rural practice and the need for representation in rural Maine.

**I. QUALITY OF REPRESENTATION**:

First, it is of the utmost importance that defendants receive zealous representation. I have been practicing indigent criminal defense of and on for several years, both in a contract counsel setting and in the current assignment setting. I can attest that both from my personal experience and from a reality standpoint that the assignment setting forces better representation and attracts attorneys that are more willing to work, over the course of a case, to better fight for clients rights.

LD1433 proposes to create a contract counsel system whereby the Public Defender system enters into contracts with attorneys to handle the indigent criminal caseloads. It can be assumed that this will ultimately result in only one or two firms/attorneys obtaining full contracts while the other firms get smaller conflict contracts. It can also be assumed that the contract will set an annual "salary" for that contract firm to handle all the cases.

This is a horrible policy and one that will not promote zealous representation. Every defendant should know that his attorney is willing to take a charge to trial, even if only because the proposed sentence is unjust. In a contract or salary situation there is *no* incentive for the defense counsel to be willing to do so. While there obviously ethical rules overseeing attorneys, there is also the reality of heavy caseloads and time pressure. If one or two firms handle the bulk of a county's caseload the contract attorneys will be under huge pressure from within the firm, from the Court, from the State, and within their own financial and psychological constraints to resolve cases as soon as possible, as doing so doesn't affect their bottom line. Everyone involved, including the DA, will know that and can use it as leverage to argue for a plea bargain.

The system now rewards attorneys who are more willing to fight for their clients. Although not a general rule, it is historical practice that plea deals tend to improve over time and certainly improve if counsel is willing to pressure and threaten a jury trial. The current system allows attorneys to freely do that. While some may argue such a practice encourages needless trials. I certainly don't think that is the case here in Oxford County where I believe a large majority of cases still resolve by way of plea

bargain. Moreover, this system attracts attorneys who want to better their skills and practice, as they are only going to get paid if they file motions, research the law, and practice trials. Attorneys that just want to take deals at arraignment or resolve cases at the first appearance will not be able to practice in this system – and rightfully so for the clients.

I know in terms of my own experience, I started out in a contract based system as a new associate at the primary firm holding the contract for a county. The caseload was extremely heavy. I can remember going to some conference call days where I would have up to thirty claimants on the schedule. Sometimes it was impossible to spend more than a couple minutes with each person that day. That, in turn, caused for fewer cases to resolve at court so that I could take time to review offers with my clients at a later time. Moreover, the system did not encourage new attorneys to experiment and practice their trial skills. In fact, just the opposite, there was no incentive to push cases, as the contract made it so the assigned associate resolved cases with neither lessening their salary or the income for the contract firm.

Now, having been in the assigned counsel system, I feel so much more confident that I can control my caseload at a very manageable level. Within that caseload, I have the ability to more freely decide when cases need to be pushed, do the appropriate amount of legal research, meet with my clients, and truly represent my indigent clients like I would any private client, as my level of work will reflect my level of income. That's the way any job should work – especially one where the client has little control over who they choose for representation and places the ultimate level of trust in that person. This current system promotes several policy goals: better representation; fewer post-conviction relief awards/malpractice claims; more resolution on the day of Court given the ability to consult with clients; and a more reflective system of the client/attorney relationship than a salary method.

**II: RURAL PRACTICE:**

My wife and I have wanted to live rurally for some time. We felt that with her skills as a doctor and mine as an attorney we could bring some much needed professional help to the underserved areas of Maine. There are countless articles in the papers and even a Maine Bar of Board Overseers study (June of 2014)[1] that rural practice in Maine is dying and the legal professional that exists now in rural Maine are elderly. So, my wife and I decided to bring that youth to Oxford County. She took a job at Stephens Memorial Hospital and I decided to open a solo law firm.

My law firm simply cannot support the contract for Oxford County indigent defense. In fact, I think the largest firm in Oxford County has 3 or 4 attorneys, so I'm not sure any single firm can support such a contract. But, even if a *few* contracts are awarded it will doubtfully be given to a solo law firm without an assistant or paralegal. In fact, this bill may be a huge incentive for the large firms in larger cities to create small satellite offices in rural counties solely to get awarded these contracts and then handle the cases from afar. Thus, sucking more professional representation out of the rural areas.

This bill will effectively close my office. I rely on assigned cases to cover the overhead costs of my firm (office rent, phone, insurance, etc..) while I wait on the very few contingent fee and private cases I have to pay. While doing so, I feel I provide effective counsel to several criminal defendants in the area. This law will take that source of income from me and end up with my firm getting the few conflict cases that arise and get spread across the carious conflict counsel.

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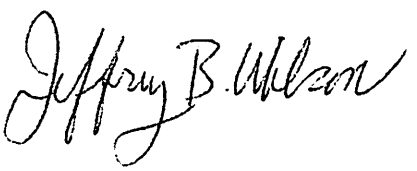
[1] http://www.mebaroverseers.org/DemographicsTaskForce/Docs/Task%20Force%20Report%20-%206.6.14.pdf

Without that steady source of income, I won't be able to support my firm, and without hyperbole, I'm not sure I will be able to continue my endeavor to start my own firm. In this first year of practice, at this point, I'm barely breaking over even and it has been my assigned cases that have supported my ability to prove legal services to this area with the hope that I grow over time. This bill will seriously make me re-consider whether I can afford to practice here.

This bill is flying in the face of the studies and concerns of even the Maine's ability to attract and keep younger professionals to rural areas. I know other attorneys in Maine have said that historically the State has been a great place to start your own practice in no small part to the ability to take on assigned cases. This bill will reverse that historic idea. I know this bill will devastate my practice if not effectively end it.

I beg that this bill be seriously considered, discussed, and denied.

Sincerely,



Jeffrey B. Wilson
ME Bar No. 004812

**Maciag, Eleanor**

**From:** Randy Day <randy.g.day@hotmail.com>
**Sent:** Saturday, October 24, 2015 10:53 PM
**To:** MCILS; Wallace, Raymond; Scott Houde; Burns, David; Hobbins, Barry; Hill, Dawn; Katz, Roger; Dion, Mark; Guerin, Stacey; tom.winsor@maine.legislature.maine.gov
**Subject:** Proposed Public Defender Bill, LD 1433

Hello,

I am writing this letter as an interested party to express my concerns over L.D. 1433, a bill which would change the way indigent individuals are provided with legal counsel in criminal prosecutions where a risk of incarceration exists, or civil cases in which the Maine Department of Health and Human Services (Child Protective Services) has petitioned the court seeking custody of a child here in Maine.

I would like to start by telling you a little about myself. I am a resident of Garland, Maine and have been accepting court appointments in criminal and child protective proceedings since receiving my Maine Bar license in 1996. This has been a second career for me which has provided me with a level of job satisfaction not previously experienced. Previously, after receiving a Bachelor of Science degree in Electrical Engineering from the University of Maine in 1982, I was employed as a civilian working for the Department of Defense at the Naval Weapons Center in China Lake California. This work led to my subsequent employment with Litton Guidance and Control Systems Division in Woodland Hills, California as a reliability engineer for the Tomahawk Cruise Missile program and later as a Software Systems Specification author for a subsystem of the Sea Wolf submarine program at General Electric Aerospace division in Syracuse, New York. While at GE, I was able to obtain a Master's of Business Administration degree through Chapman University's extension program. Wanting to move back to Maine and to work for myself, I applied to, and was accepted by Syracuse University's College of Law from which I graduated in May of 1996. As stated, my work as court appointed counsel since returning home to Maine has provided me with a great deal of personal satisfaction. I see this work as the materialization of rights guaranteed by the United States Constitution dictating that when fundamental rights ,such as the right to parent is at risk, or the risk of loss of liberty through incarceration is at stake, citizens must be given access to legal representation, regardless of their ability to pay. I am very proud of the work that I, and other court appointed counsel perform and grateful for the opportunity to do so.

A review of the proposed legislation appears to emphasize a need for cost containment in the providing of court appointed counsel (for instance, the bill would require that at least one M.C.I.L.S board member have a finance/accounting background, establish an application fee to be paid by "indigent" recipients of legal services and establish of a cost containment unit in the proposed Public Defender's office). As a taxpayer, I can respect and appreciate concern for the efficient delivery of any government provided service. It is my opinion however that the creation of another layer of bureaucracy between those providing services, and the entity paying the cost will not increase efficiency and will have a negative impact on the quality of indigent representation as compared with the present system. I believe the current system offers benefits that will be lost under a public defender system. The large number of lawyers participating in the current system offers a diversity that cannot be replicated under the L.D. 1433. Appointed attorneys are currently allowed to specialize in case types which suits their demeanor and interests by the use of "specialized panels" whereby attorney's must affirmatively seek specialized training to accept certain case types. This eliminates or minimizes the likelihood of an attorney having difficulty providing zealous representation to clients whose alleged activities are offensive to the attorney for whatever reason. Furthermore, attorneys with decades of experience participate in the current system. It is likely that most or all of this experience pool will be lost

with the system proposed by this bill. The current system also allows new attorneys to participate in a system whereby they can gain the training necessary to be effective advocates in a supportive and monitored environment. It is my experience that very few attorneys who participated in the current system as new attorneys leave Maine after gaining experience. Some move on to positions in the office of the Attorney General, DHHS, District Attorney's offices and other state agencies. The effects of a change to this system will have effects that are not immediately quantifiable, but will have long term effects on the State's ability to fill legal vacancies with qualified persons dedicated to not only the profession, but this geographic location.

## Potential Areas of Cost Savings That Could be Addressed Under the Present System

To the extent that the motivation for L.D. 1433 is an effort at cost containment, I offer the following thoughts. Since 1996, I have seen the accumulation of inefficiencies in the system which have resulted in an increase in the amount of time court appointed counsel expend with no "value added" for clients. These inefficiencies are for reasons beyond attorney control, and seem be caused primarily by other organizations trying to cut their costs at the expense of court appointed counsel. These changes may be cost effective from the organization's point of view, or possibly even from an overall state budget point of view, but nonetheless, have had a negative effect on court appointed counsel costs. In either case, some of these costs might be able to be minimized with a collaborative effort between stakeholders in the system. I believe that a mechanism to facilitate such an effort could be created within existing organizational frameworks.

### The Child Protection trailing docket.

Child protective proceedings are initiated by the filing of a child protection petition with the Maine District Court by the Department of Health and Human Services (DHHS). Counsel for parents of the protected child(ren) is immediately appointed upon the filing by the court clerk. A petition may be accompanied by a request for a preliminary protection order granting immediate custody of the child(ren) to DHHS. If such a request is made, and granted, a summary hearing is to be held within 14 days. The hearing may be waived by the client (parent). The next court date is a case management conference date where if there is an agreement on a child protective order, it can be placed upon the record (very rare at this stage) or the matter may be scheduled for a settlement conference with DHHS and the Assistant Attorney General representing DHHS and ultimately put on a "trailing docket" for a "jeopardy hearing" or to put an agreement on the record. These cases then come back for "judicial review"or case management conference, generally after 5 months. On this date, if there is an agreement, then the judicial review order will be put on the record, if not, a contested judicial review will be placed on the next trailing docket.

The trailing docket begins with a "docket call" where all cases on the list are "called". If there is an agreement, then the agreement is put on the record. When all agreements are put on the record, then the remaining cases are prioritized and scheduled for hearing during the trailing docket period (typically one week) and any cases which cannot be reached are rescheduled for the next trailing docket. When I first began doing this work, there was no trailing docket, contested matters would be set for hearing on a date certain with perhaps one other case as backup should a matter "settle" (i.e. an agreement reached negating the need for a hearing). This is a very efficient use of court appointed counsel time. If the case settled, parties put the agreement on the record at the appointed time and were done. If the matter did not settle, the attorney could subpoena witnesses for a date certain, insure he had no scheduling conflicts on the appointed date and

could prepare for trial once. The problem with the trailing docket from a court appointed counsel point of view is that it leads to much more time per case. In the event that counsel needs only to put his or her agreement on the record (something that would take maybe 15 minutes under the old system) counsel now may need to wait for several hours while other cases are called and agreements put on the record. Likewise, if a matter is to be contested, counsel needs to prepare for the potential of a contested hearing prior to docket call as the hearing might be the next day or any day that week. Witnesses need to be subpoenaed, files need to be reviewed, etc. If the case is reached, counsel may need to file motions to continue for his other cases which would conflict schedule wise with the child protective hearing. Similarly if the case is not reached, counsel must do the same thing again in advance of the next trailing docket when the case is next liable for hearing. As of late in Penobscot, and I suspect in other courts as well, a shortage of court time has led to a higher percentage of cases not being reached thus needing to be continued.

As I recall, the child protective trailing docket was established shortly before court appointed counsel costs were removed from the judicial branch budget via establishment of MCILS. The trailing docket is not without benefits, but in my opinion, none of the benefits accrue to counsel time/costs. The trailing docket assures that "judge time" is maximized and is prudent from the standpoint of efficiency relative to valuable court time. The inherent inefficiencies of the trailing docket relative to appointed counsel costs would not be solved by the establishment of a public defender's office. It is my opinion that due to the efficiencies of the trailing docket relative to the judicial branch, it is a system that is here to stay. There are however, ways that a collaborative approach might lead to a minimization of court appointed counsel costs, while retaining the benefits of the trailing docket. One way might be to have the "docket call" the week before the actual trailing docket week, thus allowing counsel to use that time between docket call and his/her court date to subpoena witnesses and otherwise prepare for trial only when it was certain that the case would be heard. This approach is currently used in District Court in Newport and seems to work well. It could provide substantial savings in Bangor, where the docket is much busier. Another method might be to set aside time for agreements to be put on the record an hour or so before the call of the remaining cases. This would allow counsel who knew they had a contested case, to not have to wait while agreements were put on the record and just appear to get his/her trial date. These types of solutions would require some coordination between the court, office of the Attorney General and counsel but I believe could result in substantial saving of counsel time and thus counsel costs.

One remaining issue I mention only in passing is that not all courts place the same emphasis on determining financial eligibility for appointed counsel in child protective cases. Oftentimes, no financial affidavit is ever filed, potentially burdening the state with the cost of providing counsel to non-indigent individuals who could afford to retain private counsel. It might prove prudent to utilize the financial screeners that we use in criminal cases to also screen ALL parents in child protective cases.

Use of Court appointed Counsel in Family orders

In 2013, 22 M.R.S.A. §4036 1-A was enacted which allowed the court, as part of a child protective case disposition, to enter a parental rights and responsibilities order pursuant to title 19 if it determines that the order will protect the child(ren) from jeopardy and in in the child's best interest. This section is usually utilized when one parent has alleviated jeopardy and can safely parent the child(ren) and the other parent has not. In my experience, prior to the enactment of this section, when only one parent posed a risk of jeopardy to a child, a judicial review order was simply issued giving custody to the non-jeopardous parent and generally without a hearing and with no further review mandated. (thus requiring very little court appointed *counsel* time) Now, when the parental rights order disposition occurs, Judges look to court appointed counsel to prepare the parental rights order (which may require negotiation with the other parent's counsel and the

AAG), the child support worksheet, child support order, SSN disclosure form and sometimes the dispositional order. This is a new burden on court appointed counsel which I doubt was contemplated when MCILS was established.

Court Appointed Criminal Cases

Recently there has been a move to the "unified criminal docket" which is a system where misdemeanors and felonies are treated the same procedurely (generally) whereby after an initial court date and appointment of counsel, a dispositional conference date is set and a subsequent jury session. This too has led to an increase in the amount of time that appointed counsel spends waiting at court, which when combined with overloaded dockets (i.e. cases not being reached and counsel needing to return for a later court date to do what could have been done before) results in more unproductive use of court appointed counsel time. Again there may well be benefits to the unified criminal docket, but minimizing appointed counsel time is not one of them.

The general process is as follows. A criminal defendant is brought before the court for an initial appearance either in response to a summons or arrest. At that initial appearance, an indigent defendant completes a financial affidavit and counsel appointed. The next court date is a dispositional conference where counsel meets with the district attorney and/or judge. If the matter can be resolved at that time by way of plea it can be done on that date. If additional discovery or other good cause exists, a subsequent dispositional conference may be scheduled or if not, the matter set for a motion hearing date and/or put a the jury trial list (also a "trailing docket"). The major inefficiency I see in this system seems to occur at the dispositional conferences and motion days.

In Bangor, on a dispositional conference day, there are usually multiple judges and multiple district attorneys along with the multiple defense attorneys. This is a plus as it allows multiple activities such as negotiations, pleas, meeting with a judge..., to occur simultaneously. Contrast this with a smaller court like Newport however. The unified criminal docket has only recently been imposed at Newport District Court which is a much lower volume court. Generally, there is one assistant district attorney and one judge, and multiple attorneys waiting to meet with the district attorney and/or judge. This causes a "bottle neck" and results in appointed attorney wait time. It might make sense to move the such lower volume court dispositional conferences to nearby larger courts to minimize this issue when possible.

Another inefficiency I see at the Bangor Dispositional Conferences (and I suspect at other courts as well in counties with overcrowded jails) has to do with clients who are "in custody". Prisoners are brought across town from the Penobscot County Jail to the Penobscot Judicial Center. (Previously the Penobscot Superior Court/Bangor District Court were immediately adjacent to the county jail). There are only two interview rooms in the Penobscot Judicial Center where Prisoners can meet with counsel. Given the number of in custody criminal defendants, attorney's often have to wait quite some time to meet with prisoners before proceeding to the dispositional conference. I, like most of my fellow court appointed attorney's make every effort to meet with clients before the dispositional conference date. This is however complicated by a few factors. Perhaps the major factor is the large number of clients who are "in custody" and are boarded out at jails across the state. A recent article in the Bangor Daily News highlights the problem faced by the Penobscot County Jail.

http://bangordailynews.com/2015/10/01/news/bangor/bangor-jail-asks-for-help-to-ease-overcrowding

As a result of having a client who is in custody of the Penobscot County Jail but boarded in Calais, Houlton, Portland, etc. , meeting with a client before the dispositional conference date when he/she is brought to the

courthouse becomes inefficient. Counsel is faced with billing MCILS substantial travel time and mileage or not meeting face to face with the client until the dispositional conference date which causes a bottle neck at the interview rooms and slows down the process. Often a judge is ready and able to accept a plea to a case, or have a conference, but none are ready because counsel is still talking to their clients or waiting to do so. I can think of two possible ways to minimize this problem. Prisoners at the county jails generally fall into two categories, those that are in execution of a sentence, and those who are held without bail or a bail they cannot post and are awaiting trial. One possible solution would be for the county jails to only "board out" those prisoners who have already been sentenced thus making clients (i.e. those awaiting trial/disposition) available to appointed counsel at the jail ahead of the dispositional conference date. I did mention this suggestion to cognizant personnel at the county jail and was told that there is a preference to not board out the sentenced prisoners because they form the population from which "trustees" are selected. Trustees work for the jail and have their sentences reduced by half by performing work in the kitchen, laundry, etc. This makes good economic sense for the county jail, but no sense from the standpoint of appointed counsel efficiency or the rights of the defendant. One other possible solution would be for all county jails to have a computer with internet access dedicated to the use of "Skype" (which is a free video conferencing application) whereby attorneys could video conference with their clients no matter which jail they are at. The technology is not complicated and costs are minimal. My 8 year old son has friends all over the world which he talks to and sees regularly on his $200 laptop via Skype.

Other causes of excessive attorney wait time during the dispositional conference dates and motion hearing dates are not so easily solved. In Penobscot I see hard working judges and clerks who just have too many cases scheduled. As a result, attorneys sometimes wait all morning or afternoon only to be told to come back on a latter date because there just isn't enough time to address a motion or do a felony plea (which requires a lengthy colloquy per M.R.Crim.Pro Rule 11) even if the judge stays on the bench to 4:30 or later (officially state courts close at 4:00). The only solution that I can think of for this problem is more judges and more court time.

## Establishment of working groups

If there is a real interest in trying to control cost of court appointed counsel, rather than establish another bureaucratic entity, I would suggest that each court establish a multi disciplinary working group aimed at reducing inefficient counsel time/ costs. I see much of the increase in time spent by attorneys on cases the direct result of other agencies trying to minimize their costs without consideration for how it might impact court appointed counsel. I offered a few suggestions in this letter mostly as "food for thought", but I'm sure a group working on the problem could come up with real solutions and monitor their implementation.

## Closing thought on a Public Defender system

I do not believe that the establishment of a Public Defender's office will favorably impact the cost of indigent defense and is more likely to have the opposite effect on state expenditures. Maine is one of the few states left that does not have a public defender system. Maybe, just maybe, we are doing it the right way by putting quality representation of indigents first. As an attorney, I would urge that the current court appointed counsel system remain for the sake of future indigent clients and as a taxpayer, I would urge that efforts be made for a collaborative review of inefficiencies that have caused attorney time in some cases to increase without corresponding benefit.

Sincerely,

Randy G. Day, Attorney at law
Maine Bar #8339
P.O. Box 58
Garland, Maine 04939
(207) 924-7948

## Maciag, Eleanor

**From:** randy.g.day@hotmail.com
**Sent:** Tuesday, October 27, 2015 11:41 AM
**To:** MCILS
**Cc:** Scott Houde
**Subject:** Re: LD 1433 – Request for Additional Comments

John,

I offer the following concerns specific to an increase in the use of contracted services to provide indgent legal services in conjunction with my earlier submission.

These concerns include

1) the likely reduction in the number and diversity of attorneys participating in court appointed work

2) the potential for inefficiencies to continue to creep into the system thus making contract "winners" chose between "eating" the cost of unforeseen decisions of others or taking shortcuts.

3) The potential for #2 to cause a disparity in the quality of representation of co-defendants when an overtaxed contractor needs to refer out a co-defendant due to a conflict of interest.

4) the potental loss/reduction of opportunity for new attorneys to gain real experience in a system which starts them out with less complex misdemeanors and a path to handling more serious cases.

-Randy Day

Sent from my Verizon Wireless 4G LTE Smartphone.

------ Original Message ------
From :
Subject : LD 1433 – Request for Additional Comments

Attorneys:

Thank you to those of you who responded to our original request for comments on this proposed legislation. The Commissioners have reviewed the comments received to date, but note that relatively few comments were submitted.

The Commissioners also noted that some of the comments reflected a misunderstanding of the bill, perhaps caused by the reference to a public defender office in the title of the bill. Despite the title, the bill does not call for creation of a public defender office employing paid attorneys. Rather, the bill calls for the use of contracts with private attorneys "to the maximum extent possible" to provide indigent legal services. Both the proposed bill and the current Commission statute are posted on our website at the following link: http://www.maine.gov/mcils/document_library/index.html.

The Commissioners invite additional comments from people who have not yet submitted comments and revised comments from anyone whose original submission may have misapprehended the nature of the

## Maciag, Eleanor

**From:** Randy Robinson <jurdoc35@hotmail.com>
**Sent:** Tuesday, October 27, 2015 10:04 AM
**To:** MCILS
**Subject:** RE: LD 1433 – Request for Additional Comments

I remain opposed. However the details are written down, the proposal will still create more red tape, cut into the income of attorneys who are willing to do this kind of work, and do nothing to improve the quality of representation for the indigent. I see no real benefit to this idea, and I believe I speak for most people taking court appointments.

Randy L. Robinson, Esq.

> From: mcils@maine.gov
> To: jurdoc35@hotmail.com
> Subject: LD 1433 – Request for Additional Comments
> Date: Tue, 27 Oct 2015 10:01:23 -0400
>
> Attorneys:
>
> Thank you to those of you who responded to our original request for comments on this proposed legislation. The Commissioners have reviewed the comments received to date, but note that relatively few comments were submitted.
>
> The Commissioners also noted that some of the comments reflected a misunderstanding of the bill, perhaps caused by the reference to a public defender office in the title of the bill. Despite the title, the bill does not call for creation of a public defender office employing paid attorneys. Rather, the bill calls for the use of contracts with private attorneys "to the maximum extent possible" to provide indigent legal services. Both the proposed bill and the current Commission statute are posted on our website at the following link: http://www.maine.gov/mcils/document_library/index.html.
>
> The Commissioners invite additional comments from people who have not yet submitted comments and revised comments from anyone whose original submission may have misapprehended the nature of the proposal. Thank you for your interest in this matter.
>
> John
>

## Maciag, Eleanor

**From:** Doug Jennings <dfjlaw@live.com>
**Sent:** Tuesday, October 27, 2015 10:14 AM
**To:** MCILS
**Subject:** RE: LD 1433 – Request for Additional Comments
**Attachments:** Randy Day Article to members of the Judicial Committee.docx

Dear John:

I am going to assume that Attorney Randy Day's letter to the Judiciary has found it's way to the Commission. I support Attorney Day's letter in every respect. I have advised Charlotte Warren, Hallowell's Representative who also sits on the Judiciary Committee of that as well.

Best Doug

Sent from Mail for Windows 10

**From:** mcils@maine.gov
**Sent:** Tuesday, October 27, 2015 10:02 AM
**To:** dfjlaw@live.com
**Subject:** LD 1433 – Request for Additional Comments

Attorneys:

Thank you to those of you who responded to our original request for comments on this proposed legislation. The Commissioners have reviewed the comments received to date, but note that relatively few comments were submitted.

The Commissioners also noted that some of the comments reflected a misunderstanding of the bill, perhaps caused by the reference to a public defender office in the title of the bill. Despite the title, the bill does not call for creation of a public defender office employing paid attorneys. Rather, the bill calls for the use of contracts with private attorneys "to the maximum extent possible" to provide indigent legal services. Both the proposed bill and the current Commission statute are posted on our website at the following link: http://www.maine.gov/mcils/document_library/index.html.

The Commissioners invite additional comments from people who have not yet submitted comments and revised comments from anyone whose original submission may have misapprehended the nature of the proposal. Thank you for your interest in this matter.

John

## Maciag, Eleanor

**From:** maurice <bestdefense@mac.com>
**Sent:** Tuesday, October 27, 2015 10:36 AM
**To:** MCILS
**Subject:** Re: LD 1433 Request for Additional Comments

There are two reasons given for the proposed LD 1433: 1) spend less, and 2) improve quality of representation. I'd like to address the first, the cost of defending the indigent, especially since there is no hue and cry that the current representation provided by MCILS' rostered attorneys is sub-standard.

These 3 links below are pretty revealing in regard to the expense of defending the indigent, and how each state provides & funds it. None are complete, they all use different methods of collecting and calculating data, but taken together, I don't know how one could conclude anything other than Maine's spending on indigent defense is already as lean and spare as one could accept. It's worth the 20 minutes to look at some actual data.

The third link has a very easy state-by-state, per capita cost comparison for this work; Maine is 48th, behind only Texas, Mississippi, and Missouri. (Yes, that's 51, but the data included Wash. DC.) The other NE states all spend at least twice per capita than Maine, many other states spend 3 - 4 times as much. Again, one can argue the merits of any statistical data, but it's better than no data at all, which is what is being offered by those supporting LD 1433.

What evidence-based support is there for the idea that there's a cheaper, Constitutionally compliant way of providing this service than what Maine currently employs? Especially with three new management level Executive Directors are created by LD 1433.

http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_expenditures_fy08.authcheckdam.pdf

http://www.bjs.gov/content/pub/pdf/sgide0812.pdf

http://gideonat50.org/in-your-state/

Finally, take a look at Idaho. After being successfully sued repeatedly for their county-by-county "contract" system for the defense of the indigent, last year they finally adopted what we in Maine currently employ through MCILS. To suggest that we in Maine now adopt a "contract" system that has been found to be Constitutionally wanting elsewhere would not only be a waste of money, but devalue and decrease the quality of representation for those most in need.

Maurice

Maurice Porter
bestdefense@mac.com
207-671-3755

## Maciag, Eleanor

**From:** Ed Folsom <edfolsomlaw@gmail.com>
**Sent:** Tuesday, October 27, 2015 11:52 AM
**To:** MCILS
**Subject:** Re: LD 1433 • Request for Additional Comments

Perhaps the confusion also stems from the bill's reference to the Chief Public Defender's power to "contract for or hire staff, including counsel who serve at the pleasure of the Chief Public Defender, necessary to perform the functions of the Office of the Public Defender and to implement the provisions of this chapter." The bill speaks with forked tongue.

On 10/27/2015 10:00 AM, mcils@maine.gov wrote:
> Attorneys:
>
> Thank you to those of you who responded to our original request for comments on this proposed legislation. The Commissioners have reviewed the comments received to date, but note that relatively few comments were submitted.
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>
> John
>

--
EDMUND R. FOLSOM, ESQ.
Attorney At Law
25 Pool Street
P.O. Box 2100
Biddeford, ME 04005
(207)710-2070

## Maciag, Eleanor

**From:** Jeff Silverstein <silversteinlaw.jms@gmail.com>
**Sent:** Tuesday, October 27, 2015 12:00 PM
**To:** MCILS
**Subject:** RE: LD 1433 - Request for Additional Comments

Comments on Public Defender Bill --

(1) The benefits of the present system as currently constituted include that:

(A) It allows new attorneys and attorneys with limited administrative support (office & staff) to gain experience and earn funds engaging in indigent representation. It allows for entre into the system involving an entry-level workable business model for those not currently capable;

(B) It provides an atmosphere in which less experience counsel can gain valuable experience dealing with the myriad of tasks and skills necessary to process indigent defense cases;

(2) Adoption of a PD system as contemplated assumes the availability of contract attorneys capable of covering all necessary courts. While I suspect there to be ample contract counsel available in the larger areas, it could be that there are less, or none, available in the smaller satellite court areas. Indeed, those currently handling some cases in such areas may opt out of the commitment necessary to work within this newly designed PD system. The end resu7lt may be less, as opposed to more, available services in the less populated areas;

(3) Until contracting attorneys get a handle on the finances involved, the contract proposals will be subject to a steep learning curve - and will likely vary greatly until the process smooths out over a few years time;

(4) The contract system may promote a reduction in the quality of services where counsel, again not savvy with the finances, may underestimate workloads and costs, leading to an underfunded contract generating overworked and underfunded defense counsel;

(5) The quality of indigent services may otherwise be comprom8ised by a perceived need to process the volume of cases as cost effectively as possible. A contract for X dollars to handle all non-conflict indigent defense may promote a tendency to get cases resolved "on the cheap," where the name of the game could become, how many cases can get processed for a cheaply as possible. Whereas the present system does not impose such financial pressures upon the practitioner;

(6) I believe a partial PD type of system could be implemented whereby the more significant indigent cases (Class A felonies, murder, etc. . . .) are handled by a qualified centralized or regionalized group of attorneys working on a contract basis. This would preserve for those lesser experienced attorneys the ability to gain experience and assist indigents but those more expensive and serious cases are handled by a more select group. Given that the AG is solely responsible for murders and are well funded and trained, it seems sensible that indigent defense of murder (or formerly capital offenses) would operate on a level playing field.

(7) A Chief Public Defender situated in one location within Maine will struggle to serve the state geographically. Some though should be given to multiple office locations so as to avoid the notion that even as a practical matter one part of the state is served more so than are other parts.
Perhaps a North/South office split . . . .

(8) As new or revised courthouses have constructed and renovated, certain accommodations were made for DA's. The PD should be entitled to the same considerations/accommodations as no less necessary.

(9) Along with the need for a PD and contract attorney is a need for available defense investigators. The budget for such a system should incorporate this concern;

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-----Original Message-----
From: mcils@maine.gov [mailto:mcils@maine.gov]
Sent: Tuesday, October 27, 2015 10:02 AM
To: silversteinlaw.jms@gmail.com
Subject: LD 1433 - Request for Additional Comments

Attorneys:

Thank you to those of you who responded to our original request for comments on this proposed legislation. The Commissioners have reviewed the comments received to date, but note that relatively few comments were submitted.

The Commissioners also noted that some of the comments reflected a misunderstanding of the bill, perhaps caused by the reference to a public defender office in the title of the bill. Despite the title, the bill does not call for creation of a public defender office employing paid attorneys.
Rather, the bill calls for the use of contracts with private attorneys "to the maximum extent possible" to provide indigent legal services. Both the proposed bill and the current Commission statute are posted on our website at the following link:
http://www.maine.gov/mcils/document_library/index.html.

The Commissioners invite additional comments from people who have not yet submitted comments and revised comments from anyone whose original submission may have misapprehended the nature of the proposal. Thank you for your interest in this matter.

John

## Maciag, Eleanor

**From:** Matt Morgan <mmorgan@mckeebillings.com>
**Sent:** Wednesday, October 28, 2015 7:51 AM
**To:** MCILS
**Subject:** RE: LD 1433 – Request for Additional Comments

John,

I apologize for not commenting on the first go-round.

I've taken some time to review the bill and will try to focus on my major concern: the use of contracts in conjunction with an hourly rate of compensation for the contacted counsel seems inherently and purposefully vague. I sit on a board of directors that has recently gone through some flat rate contracting with the state for transportation services and that organization's experiences as well as mental health agencies (e.g., Crisis and Counseling) that have similar capped contract state funding are useful metaphors because transportation and legal services both tend to ebb and flow.

Heroin, for example, has caused a flow of crime and a need for representation (not just for dealers, but for an influx in users who are often times prosecuted far too harshly for their addictions). More prosecutors and judges have been the State's response on the prosecution side. LD 1433 seems to be the State's response on the defense side.

My biggest fear in looking at this bill is that there can be no question it is intended as a cost-saving measure and I suspect that the cost-savings are built into the concept of maximizing the "use of contracts." There is nothing wrong with cost savings measures, but it has to be clear that they will in fact reduce costs and not shift costs. I fear the use of capped contracts with the lowest bidders will simply shift costs to a later point in the process and do so at the expense of peoples' most valuable constitutional rights. If these end up being capped contracts that seek the lowest bidder for ebb and flow services like legal defense (and which are reviewable every 3 years), then instead of responding to the flow of the next crime epidemic as it happens, contract counsel is going to be spending its time lobbying the Office of the Public Defender for further funding and early review of its unrealistically low contracts. Such a situation could cause delays and poor representation of defendants. Furthermore, if contract counsel is a private firm that relies entirely on appointed work and it no longer has coordinated backing from a group like MACDL, then there is nothing to say that such a firm might not breach its contractual obligations with the Office of the Public Defender. I cannot imagine what such a situation would look like, but I suspect it would be a public relations disaster for the state and cause some serious delays and people to sit in custody longer than necessary.

Thanks,

Matt
-----Original Message-----
From: mcils@maine.gov [mailto:mcils@maine.gov]
Sent: Tuesday, October 27, 2015 10:01 AM
To: Matt Morgan <mmorgan@mckeebillings.com>
Subject: LD 1433 – Request for Additional Comments

Attorneys:

Thank you to those of you who responded to our original request for comments on this proposed legislation. The Commissioners have reviewed the comments received to date, but note that relatively few comments were submitted.

The Commissioners also noted that some of the comments reflected a misunderstanding of the bill, perhaps caused by the reference to a public defender office in the title of the bill. Despite the title, the bill does not call for creation of a

To: MCILS Commissioners
From: Jeffrey W. Langholtz, Esq.
Re: LD 1433

Gentlemen,

I am disappointed that LD 1433 is currently being considered as an option to address indigent defense. The current system has created a cadre of experienced and sophisticated legal practitioners. The attorneys that have participated in legal defense have a wide and varied background. Their skills have been honed by the hands-on experience afforded from dealing with high need clients and litigating simple and complex issues before judges and juries. The important skills that were developed by attorneys providing these services to the state are readily transferable to the clients they represent on a private pay basis.

The current system, thus, has increased the level of competency throughout the bar. Centralizing indigent services through the use of an exclusive contract system will degrade the quality of the bar as a whole and will affect those seeking legal services in a variety of venues. It is ironic that the legislature is attempting to move towards a restrictive centralized bureaucratic structure and away from the flexible and resilient model we now have. Many are beginning to realize the power and benefits of decentralized organizational models. Let Maine lead. Enhance the current model and allow it to be an example of excellence other jurisdictions may follow.

Sincerely,

Jeffrey W. Langholtz, Esq.
260 Main Street
Biddeford, ME 04005
(207) 283-4744

## Maciag, Eleanor

**From:** Pelletier, John
**Sent:** Thursday, October 29, 2015 11:55 AM
**To:** Maciag, Eleanor
**Subject:** FW: LD 1433

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**From:** Clifford B. Strike [mailto:cstrike@sgolawyers.com]
**Sent:** Thursday, October 29, 2015 10:48 AM
**To:** Pelletier, John
**Subject:** LD 1433

Dear John,

I just wanted you and the commissions know my feelings regarding LD 1433. The commission has spent a considerable amount of time revamping the current system of court appointed attorneys for indigent clients with quite frankly a large amount of success. With the graduated experience levels now in effect the overall quality of representation, particularly for individuals charged with very serious offenses, has markedly improved. Further, with the gradual increases in our pay scale, there becomes more incentive for those who truly enjoy this work to practice without going directly into the poor house, along with their clients. I find it unfortunate that the executive branch has seen fit to interfere with a system that has worked for so long with so many dedicated people and at a significant fraction of the cost that our neighboring states pay.

What really concerns me is the following, if this is going to evolve into a contract system of some type and if people are contracting for cases at a cost that is lower than the current rate (i.e. a bidding war) then what does that do to the quality of the representation for the indigent client. It would seem that there would be significant pressure to quickly resolve cases without the time and energy employed to fully investigate a case, much to the detriment of the defendant and to the judicial system. Additionally, I found it interesting that the proposed legislation is designed to make the system "non-political" yet the Chief Public Defender is to be appointed by and serves at the pleasure of the executive branch. How does that not politicize a system that currently seems pretty clear of politics (outside the constant battles to get the parsimonious pay scale reviewed and increased).

If the Legislature is looking to improve the legal assistance provided to indigent clients I would propose the following, simple and straight forward solution to the same. Let the market decide. What I mean is this. Most of our clients are repeat offenders. Due to the own experiences and watching the experiences of others, indigent clients/defendants have a pretty good idea as to who are the really good attorneys and who they would prefer to avoid. This is generally the result of positive past performance with a client or a reputation for going to the mat for your clients.

Attorneys who are held in high regard will get requested, those who are not as invested will likely get fewer requests. Clients are more at ease with counsel, there will be less MTW's filed because of unhappy clients and the process of resolving cases becomes that much easier and less expensive without sacrificing the client's interest in order to reach a fast resolution.

I know that I was one of the more vocal critics of MCILS when this system changed but quite frankly it has improved the system in some important areas and MCILS should get credit for the same. This proposed legislation does not appear to advance the cause of the indigent client, creates (possibly) and unfortunate bidding war between attorneys and appears to begin to politicize a system that is not currently affect by politics.

Just some of my thoughts, thanks for reading the same.

Cliff Strike

John Pelletier, Esq

MCILS

154 State House Station

Augusta, Me. 04333

OCTOBER 30, 2015

In Re: LD 1433

Dear John:

I had a jury trial this week, State v Matthew Grenier, Agg. Assault Class B, in which the prosecutor claimed my client assaulted another inmate at the county jail. In preparation, last Friday I drove up personally to Norway, Maine, to subpoena a witness who worked for Norway PD. I also spent hours calling courts and picking up certified copies of criminal convictions as they related to state witnesses. There were also weekend hours at the Little Dog coffee shop in Brunswick reviewing police reports and preparing cross examinations, openings etc.... The trial started Monday, and ended Tuesday. The case was court-appointed and I ended up billing 26 hours, at $60/hour, for a total of $1,536. Like all trials, it was stressful, the defendant was on edge, and I lost sleep. In short, it was all consuming. When he was found Not Guilty, it was a huge relief for me, and him, and I was walking on air for a couple hours. Then I went back to my office, and started returning phone calls. However, I also took the time to begin seriously thinking about LD 1433, and how it will effect criminal defense work in Maine. I am forced to ask myself the question, would I have provided the same defense to Matthew Grenier under the new system? Would I have cared as much under a system where I had "won" the low bid to represent criminal defendants in my area?

Here's my take, all in the context of the case I tried this week. Under the current system, the lawyers who do indigent work are the sinew of the bar. There are higher paid lawyers, there are bigger offices, and there are lawyers who spend millions on television ads, but the typical "public defender" in Maine tends to be efficient, scrappy and hard working. Efficient because at $60/hour you must be efficient, scrappy because the odds are usually stacked against us, and hard working because our reputations depend on results. Why would we replace this model with one that creates an additional lawyer of bureaucracy? Why would we displace a system that is decentralized with no single lawyer or group of lawyers controlling the quality of defense in any given county, with a system that threatens to be top heavy?

Putting due process out to bid is a risky proposition, but that is what LD 1433 would do. Who is going to be the "low bidder", and what will be the pressures on the winning firm? Let's say I win the contract, what is my incentive for winning the next case? I've got the contract, where does the client then fall in my list of priorities? In my jury trial this week, in addition to professional pride, I knew that my reputation on the street depended on the outcome. If, under the proposed new system, I know that I have successfully underbid my brethren of the bar for 100 cases out of Androscoggin County, doesn't that change the dynamic of my preparation to defend Matt Grenier? Maybe I don't drive up to Norway on a Friday afternoon, perhaps I don't ferret out impeachment evidence of convictions, or maybe I enjoy a late-season golf round on the weekend rather than agonize over an opening argument. There are, after all, 99 other clients for whom I've already secured a contract of representation.

As we put downward pressure on compensation, we put downward pressure on performance. The Commission, the Legislature, and the Governor have done a commendable job working to raise pay to $60 (still less than one-half of the federal rate, but nevertheless an improvement). Obviously the proposed system is designed to cut costs by reducing pay. It will necessarily have the effect of also causing professionals to cut corners. There is no "fat" in the current system. There are really no costs that can be cut without compromising the defense. But that is what will happen. Referring back to my jury trial this week, if I am low bidder, under the proposed system, I am likely in the office on the weekend filing paperwork and licking envelopes instead of preparing my cross examination because I can't afford even part time secretarial help. In an effort to win the contract, I've effectively turned myself into a clerical worker because I can't afford a clerk. To some extent, this has already happened under the current pay scale. But it will just get worse if this bill becomes law and the winning bid translates into working at a rate of well below the $60/hr currently paid.

The current system applies performance pressure. We are all small businesses as well as professionals. The client is better off for it. In my recent jury trial, it took me two phone calls to track down and contact a potential state witness who told me he saw the assault in question and would have provided the state with critical evidence. He had never been contacted by the state. In the crush of a volume business, the prosecutor failed to follow through with basic investigation. If we move towards "contracts" and "case bundles" and bureaucracy within the defense bar, we create the same outright volume crush on the defense side of the trial equation. The motivation, the compensation, the *time*, to make the calls, to do the investigation, *to do the work of lawyers*, simply isn't there. Constitutional guarantees, trial rights, and basic due process will be the victims, along with a local bar that will be seriously undermined, in both form and substance.

Sincerely,

Allan Lobozzo, Bar # 3893.

To whom it may concern,

As a practicing defense attorney in Cumberland, York, Sagadahoc, and Lincoln Counties I am greatly concerned by the proposed legislation of LD 1433. In particular, it seems that this bill would increase barriers to indigent legal services and provide a set of perverse incentives that would encourage attorney's to resolve cases as quickly and with as little effort expended as possible. In particular I am concerned about the following:

1. Requirement that applicants for indigent legal services to pay a $5 application fee. This bill would create an added barrier to service for some of our state's most vulnerable citizens at a moment of crisis in their lives. Not only is it an unnecessary barrier, but the current system provides for significant financial screening. Under the current system an applicant must fill out a financial affidavit that inquiries into expenses as well as income. In many instances this form is filled out with a court appointed "screener" who is trained for this specific purpose. After this form is filled out, it must then go before a judge. Once the judge has it, they review the affidavit and have the option to appoint an attorney at the state's expense, appoint an attorney at a reduced rate that the applicant is then responsible to pay for, or deny a court appointed attorney all together. This three tier system works well, it is not at all uncommon for applicants for court-appointed lawyers to be denied or ordered to pay a set rate for this legal counsel. Creating additional costs and barriers to this system is a disservice to the citizens of Maine and only serves to make obtaining legal assistance more difficult.
2. Invading the "attorney-client" relationship with constant financial screening. One of the most concerning aspects of this is the bill is its provision tasking the chief Public Defender with creating a system of repeated re-evaluation of a client's indigency and financial resource throughout the period of representation. The bill is vague on exactly what will be required, but is quite clear that the Chief Public Defender must create a system to re-evaluate people who have already gone through the initial evaluation for court appointed counsel. Who will do this? The attorney, would this not negatively impact their relationship with their client? A new state agency, would this not add additional costs for the state? Either way, it is unnecessary and would serve to harass and create additional hurdles for those receiving or seeking indigent legal services.
3. Political interference with the provision of indigent legal services. Under LD 1433 the chief Public Defender would be appointed by the governor and could be removed "for cause" by the governor. This would leave the entire delivery system in the state of Maine subservient to the personal objectives and political whims of the governor. This is particularly concerning as the governor is also charged with enforcing the laws of the state of Maine. In short, it seems to me a direct conflict of interest.
4. Batch contracts for legal services. Under the proposed bill the chief Public Defender would seek to provide indigent legal services by contracts. Under this scenario, lawyers would be forced to underbid each other in order to be able to take on "Public Defender" work. This would create a system where defense attorney's entire incentive would be to dispose of cases as quickly and

with as little work as possible. This is an uncomfortable topic for a practicing defense attorney to bring up, but the incentives to "cut corners" under this proposed bill are clear. Considering all the "collateral consequences" a criminal conviction can have in today's world (on jobs, on licenses, on financial aid, on the availability of housing, on family and parental issues, on immigrations status, on gun ownership, etc.) it seems irresponsible to create a system where any legal service but the absolute best is encouraged.

A final thought; what is the issue, problem, or inefficiency that this proposed bill is trying to correct? The current system caps how much a participating attorney can make per hour at $60 from which that attorney must pay for all of their own business costs for insurance, office supplies, rent, utilities, staff, and attendance at legal conferences to obtain the necessary "minimum qualifications" to continue receiving work. Additionally, the current system that controls the court-appointed system in the form of MCILS (Maine Commission on Indigent Legal Services) provides "caps" as to how much an attorney working on a court-appointed case can charge for certain types of cases. This provides oversight and cost control. Any attorney who wants to go over that cap MUST account for why they are requesting an exception and it is up to the discretion of MCILS to grant the exception or not. On top of all of this, Maine currently spends amongst the least total and the least per capita on indigent legal services. This bill seems the definition of a solution in search of a problem.

Andrew S. Edwards, Esq.
Portland, ME

**Jeffrey Pickering, Esq.**
**57 North Street, Houlton, Maine 04730**
**(207) 532-9988**
**Fax (207) 538-3009**

*Attorney*
Jeffrey Pickering, Esq.

*Paralegals*
Steven Sanders & Frank Dorr

November 1, 2015

John Pelletier, Esq.

Dear John:

As you requested, I will share my thoughts regarding the proposed Public Defender bill. I have reviewed the many letters sent in by fellow rostered defense attorneys and I am proud to belong to such a talented and dedicated group of lawyers.

My first question about the bill is motivation. As it has developed under MCILS, the current system is both efficient and effective. The current roster of attorneys includes a huge diversity of experience and talent. Those of us with considerable defense experience provide service to indigent clients for approximately one third of our usual billing rate. The clients are receiving constitutionally mandated representation subsidized by both the state and the attorneys providing the service. There is no fat in the system. It works well.

The only reason to change the system is the Governor's ideological belief that anything the state does, the private sector could do better and cheaper. He apparently doesn't realize that the current system is already a private sector venture. The only public employees involved are those on the staff of MCILS. I am frankly amazed that MCILS does the job it does as well as it does with so few people and at such low cost. The rest of us, the lawyers doing the work are in the private sector.

As for the bidding process, the possibilities for trouble are many. Here in Aroostook County, where none of the "one size fits all" plans that billow up from the south (unified criminal docket for example) actually fit all that well, we have Courts in Houlton, Presque Isle, Caribou, Fort Kent and Madawaska. These five Courts share 3 judges and a fairly small cadre of rostered defense lawyers. A successful bidder would have to maintain at least three offices to be geographically available to clients. On a given Wednesday when Caribou Superior Court is handling docket call for jury matters, and Child Protective cases are being heard in Presque Isle, and defendants held at the jail in Houlton

are scheduled for in custody arraignments, there are frequently a dozen or more attorneys simultaneously appearing for indigent clients under the current system. I doubt the winning bid to replace the current system contemplates hiring 12 lawyers for Aroostook County. It simply won't work. Another issue that would be difficult to deal with would be conflicts of interest. If the attorneys under the new system are all part of a firm established by the winning bidder, the current Bar Rules would prohibit members of that firm representing co-defendants in criminal cases, or both parents in Child Protective cases. If the new attorneys are not part of a firm, then we have our current system with an extra layer of administration and less money to pay for the work to be done.

I don't know whether the bill's sponsors have done any investigation prior to introducing the bill. I can't imagine the work can be done competently for substantially less money than we now spend. If I hadn't observed over the years how frequently our legislature passes laws of colossal stupidity, I would be confident that this proposal would collapse under its own weight. Unfortunately, I suspect this bill is more likely to become law than not. A flawed and ineffective solution to a problem that does not exist. So, what else is new?

Best regards,

Jeff Pickering

October 27, 2015

Maine Commission on Indigent Legal Services
154 State House Station
Augusta, ME 04333

In re: L.D. 1433

To the Commissioners:

I write today in response to the recent request for comments on the legislature's bill proposing the creation of a public defender system in Maine. In brief, I oppose the bill. I have read letters and e-mails from several other attorneys, and they all oppose it as well. Of course, one should expect cynics to react with great skepticism to such opposition, considering that these attorneys may fear a loss of income. That is why I would not express my opposition in terms of the bill's potential effect on court-appointed attorneys' livelihood, because I do not think the legislature or the public will care about that.

However, I would like to point out that the bill's expected savings to the public fisc, even if they are achieved, will likely come at the expense of indigent defendants' due process rights. I think that would be wrong as a matter of ethics and public policy—many defendants are indigent for reasons beyond their control, such as disabilities. If Maine elects to provide for court-appointed counsel by way of bulk contracts with lawyers, it stands to reason that low bidders will get those contracts. The contractors will then be incentivized by financial considerations, if not compelled by scheduling constraints, to give their caseload far less time than they should. This will lead to the distinct possibility of ineffective assistance of counsel on a large scale. (Comedian John Oliver recently skewered public defenders' offices in other states on his television show for just this reason.)

Moreover, setting aside, *arguendo*, concerns about ethics and public policy, any fiscal savings could prove illusory. First, it is absurd and probably unconstitutional to compel defendants to pay for the privilege of proving their poverty. It is easy to foresee that, if this provision is installed, defendants who cannot afford to pay the proposed application fee will proceed without counsel. Some of these defendants will be convicted and challenge their convictions on Sixth Amendment grounds, leading the state to incur greater legal costs than it would have if it had simply paid for court-appointed lawyers in the first place. The proposed fee-waiver provision lacks any information about what a court could, should, or must consider when hearing a motion to waive the application fee.

Second, if the contracted lawyers do not devote sufficient time to their cases or are perceived that way by their clients, then defendants who do get court-appointed lawyers and feel dissatisfied will be far more likely to challenge their convictions on Sixth Amendment grounds. Again, this scenario will involve significant expenditures by the state for legal costs. It may also lead to a large increase in grievances filed by clients with the Board of Overseers of the Bar.

Third, unless I am misreading the bill, reduced costs from the use of contracts will have to, at least, offset the additional costs of paying for a chief public defender, two deputy public defenders, staffers, and offices.

I hope that the Commissioners share my doubts about the wisdom of the bill thank you for your time and consideration.

Sincerely,

Zachary J. Smith, Esq.
zacharysmith@mccuelawoffice.com
P.O. Box 655
Hampden, ME 04444

c: file

# WOODMAN EDMANDS DANYLIK AUSTIN SMITH & JACQUES, P.A.

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October 30, 2015

**BY E-MAIL AND REGULAR MAIL**

Maine Commission on Indigent Services
154 State House Station
Augusta, ME 04333

Re: LD1433, An Act to Create the Office of Public Defender

Dear Members of the Commission:

I am writing to express my adamant opposition to LD1433. I have thirty years experience relating to criminal court appointed cases. I graduated from the University Of Maine School Of Law in 1987. In 1986 I served as a Law School Student Intern in the York County District Attorney's Office. During my third year of law, I handed cases independently in the Superior Court including grand jury and a jury trial. Following graduation and passing the Bar in July of 1987, I began private practice with Attorney Barry Hobbins in Saco, Maine, handling all criminal matters including court appointments.

My experience as an intern in the York County District Attorney's office was invaluable for trial experience, practical experience in the court system and learning how to handle cases on a real life basis. The newer attorneys handled court appointed cases and attorneys with modest experience would frequently comment to me how they were pleased to no longer accept court appointments. The acceptance of court appointed cases at that time was viewed as an obligation of the bar to assist the indigent defendants in obtaining their constitutionally protected right to counsel.

Entering into private practice with Attorney Hobbins, I requested that the local judges in York County appoint me to court appointed cases in an effort to establish a defense practice and gain experience. I attach a copy of the voucher from the first court appointed felony jury trial I defended. You will note that Justice Broderick paid Attorney Hobbins $1,000.00 for my efforts

in that case. I reported thirty-three hours of time billed. That was an invaluable professional experience.

In 1989 I joined a large York County trial firm. I was anxious to remove my name from the roster of attorneys who would take court appointed cases. A superior court justice (who is still sitting on the superior court) refused to take my name off the list and admonished me of my duty as a member of the Bar to provide services to indigent defendants. Therefore, through most of my career I have remained as a rostered attorney available for court appointed cases.

I have observed first-hand how criminal matters are handled in Maine, the amount of cooperation and effort necessary to process the thousands of criminal cases, and the fact that the current Maine Commission on Indigent Legal Services performs extremely well. The participants in Maine's Criminal Justice System did not request this Bill. There is no hue and cry from the Judiciary to change the Commission. The Clerk's office is not complaining. The attorneys themselves, other than requesting a reasonable hourly rate for handling these matters, have never been vocal in trying to change the manner in which court appointed cases are assigned. The sole purpose of this Bill is an attempt by the Governor to privatize or send out to bid, court appointed work. The thought of having members of the bar bid against each other for this type of work will create an unnecessary and convoluted process. I believe this will result in a lack of attorneys willing to handle indigent cases rather than bidding against each other for the lowest price. The Bill itself is vague about that process. The Governor intends to have court appointed work go to bid like the liquor distribution or lottery.

The Bill summary states a purpose to provide effective assistance of counsel of indigent defendants and others entitled under the constitution. This is already occurring and has since the United States Supreme Court Decision requiring counsel for criminal defendants. The alleged purpose to ensure the system is free from undue political interference is unfounded. I have never in thirty years ever seen political interference involving court appointed cases. New attorneys request to be rostered to be court appointed cases to gain experience; other attorneys remain on the roster because of economic factors or an obligation to provide these services. Experienced attorneys who handle the high profile murder cases do so at an extraordinary financial loss and fulfil an obligation to the Maine Bar. There is absolutely no political interference involved in the Court appointed system.

The alleged purpose of providing public defender services by qualified and competent counsel is not an issue. The Commission on Indigent Services provides requirements, minimum standards, and monitors continuing legal education so that all represented individuals receive qualified and competent services.

I am extremely concerned that this Bill will not be understood by many of the Legislators who have no idea how criminal cases are handled in Maine. I cannot imagine bidding competitively against fellow members of the Bar to work for $60.00 per hour or less to handle what is many times very difficult individuals who generally have little or no defense and are facing serious criminal consequences. The attorneys who handle these cases are providing a service to the public, the Bar and the law enforcement community. I expect that should this Bill be passed, there will be hundreds (if not thousands) of pro se individuals, entitled to counsel, but unable to obtain counsel because I cannot imagine why anyone would want to compete or bid on this work.

Sincerely,

Harry B. Center, II, Esq.

HBC/mab
Enclosures

## Maciag, Eleanor

**From:** Jon C. Gale <jgale@gale-law.com>
**Sent:** Tuesday, October 27, 2015 10:03 AM
**To:** MCILS
**Subject:** Re: LD 1433 – Request for Additional Comments

John, thank you for your work on this.

The "maximum extent possible" is so ambiguous that it renders the result (were the bill passed) impossible to predict, it seems to me.

Before I comment, would you let me know if I understand the proposal? I have read it through, and I think but am not certain I understand how it is intended, at least, to play out.

Let's take Cumberland and York County as examples. We can imagine a firm of 10 attorneys winning a bid to represent indigent clients in these two counties at a flat cost to the state of $500,000 a year, paying the lawyers after expenses significantly less than a first-year teacher. How many clients does each defense attorney handle over the course of the year? What percentage of indigent clients in the two counties are represented by this firm? Who represents the rest?

If I am accurate in this understanding, my concerns are as follows:

-While we can imagine that there are cost savings to the state on those cases handled by the firm, we can also imagine the quality of representation being compromised if the firm, who makes the lowest bid, is then required to handle volume that is unrealistic.
-Some very good lawyers who are pretty passionate about the portion of their practice that is indigent defense will be minimized in representation of people in need. (Most seasoned lawyers have a blend of private and indigent clients. To dedicate a practice to indigent clients only by engaging in this bidding process, at age 48 with two kids in college, at an enormous pay cut, is completely unrealistic.)
-If, on the other hand, there is a firm or two who contract and the rest is picked up by attorneys in the same way they are now, there will be some savings but a large disparity between the real income between attorneys who work privately with some court appointed work and those who are contracted at a flat rate. I have to think that it would be very difficult to retain the latter for any significant time, unless the pay is comparable.

Either I am reading the proposal wrong or it seems fraught with bad consequences, largely unintended.

The people who should weigh in on this, more than anyone else, are the judges, by the way.

If you get a chance, let me know whether I am way off on this, or t least in the ballpark.

Thank you again.

Jon

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P. O. BOX 297
EAST WATERBORO, MAINE 04030-0297

TELEPHONE
(207) 247-8514



October 28, 2015

MCILS
ATTN: John Pelletier, Esq.
154 State House Station
Augusta, ME 04333

RE: LD 1433

Dear Attorney Pelletier:

Per the request of the Commission, I write to share my thoughts about the above-referenced bill that would create a contract system under the auspices of a Public Defender.

It strikes me, upon reading the bill, that the proposal is far from what any attorney and most lay persons would consider a "public defender's office." Such a public defender's office would be funded by the state, and include offices, staff, investigators, health insurance, retirement plans, and paid vacations.

LD 1433 creates a titular "Public Defender" who would be the arbiter, with the assistance of a couple deputies, of private law firms that would bid for a contract to provide a certain level of bulk indigent defense services. This is much the same as pavers bidding on who gets to pave the parking lots at the new Walmart stores. Naturally, the contract tends to go to the lowest bidder.

That is all fine and good if the result of a low bid consists of a few more potholes than there *might* have been, but in out business we deal with people's liberty.

Since I started practicing law in 2001, I have met quite a few attorneys, especially defense attorneys and prosecutors. The prosecutors all have one thing in common. . . . . . they are the biggest bad-asses on the block. They have police forces at their beck and call and the whole power of The State behind them. They are seen by the public as protectors of society.

Defense attorneys. . . . not so much.

I typically see three kinds of defense attorneys. There are sole practitioners like myself, there are those that associate with one or two other attorneys in a small office, and there are some that build larger, 4 + attorney firms.

I have always been amazed by the relationship between the sole practitioners and their clientele. When you are not passing files from associate to associate, you get to know your clients, their loved ones, and even the names of their pets. You care about what happens to them and you do your best to help them.

If LD 1433 passes, I would expect to see most sole practitioners ride off into the sunset (as far as appointed work goes), while the smaller firms group together and compete against the larger firms for contracts.

I would question what would happen if, for example, there was a heroin trafficking case which involved several defendants. There would be a conflict of interests at some point and, like the federal CJA system, private practitioners would have to be appointed to the co-defendants.

Imagine further that some private practitioner mounted a vigorous defense that resulted in an acquittal of the client. Suppose further that the co-defendant represented by the contracted office had been advised to plead out.

It is not difficult to see the spectre of a lawsuit in such an event, and it would occur. It is simply human nature. If law firm X is getting paid Y amount of dollars to handle, say, 500 cases a year, the only incentive is to do as little work as possible. In other words, the temptation to simply "mail it in" would be too hard to resist. Think about it.

After all. . . . .they're just criminals. . . . .probably guilty anyway. . . . . who cares?

In short, we have a current system that works. It may not be perfect, but it does work and the dedicated attorneys are compensated adequately for their diligent defense of the accused, as is constitutionally mandated. Creation of another government entity and a "race to the bottom" to low-bid indigent defense contracts will only lead to lawsuits against the state, as has happened in several other states that have tried to implement such a program.

Sincerely,

Darren J. Locke

DJL/

# (4.)
# Appellate Contracts

**MAINE COMMISSION ON INDIGENT LEGAL SERVICES**

| | |
|---|---|
| **TO:** | MCILS COMMISSIONERS |
| **FROM:** | JOHN D. PELLETIER, EXECUTIVE DIRECTOR |
| **CC:** | ELLIE MACIAG, DEPUTY EXECUTIVE DIRECTOR |
| **SUBJECT:** | APPELLATE CONTRACTS DISCUSSION |
| **DATE:** | NOVEMBER 5, 2015 |

On October 29, 2015, the Law Court issued an important decision regarding appeals in termination of parental rights cases. In Re: M.P., 2015 ME 138. In that case, the court identified two methods for challenging the effectiveness of counsel representing parents in termination cases. Unlike in criminal cases, challenges to the effectiveness of counsel can now be part of the appeal from an order terminating parental rights.

The new procedure raises the question whether parents who have had their parental rights terminated should automatically get a new lawyer on appeal because the trial lawyer is unlikely to include a challenge to the quality of their own representation. If so, the question also arises whether the appellate work generated by such a change should be done pursuant to a contract.

I have attached a copy of the Law Court's opinion for your review to aid any discussion on the issues raised by the decision at the upcoming meeting.

MAINE SUPREME JUDICIAL COURT
Decision: 2015 ME 138
Docket: Cum-14-131
Submitted
On Briefs: June 2, 2015
Decided: October 29, 2015

Reporter of Decisions

Panel: SAUFLEY, C.J., and ALEXANDER, MEAD, GORMAN, and JABAR, JJ.

# IN RE M.P.

SAUFLEY, C.J.

[¶1] This appeal requires us to identify a process by which a parent may challenge a judgment terminating parental rights based on ineffective assistance of counsel. The mother of M.P. appeals from a judgment entered in the District Court (Portland, *Powers, J.*) terminating her parental rights pursuant to 22 M.R.S. § 4055(1) (2014) and denying her motion for relief from judgment pursuant to M.R. Civ. P. 60(b)(6) based on her claim of ineffective assistance of counsel. In addition to challenging the judgment terminating her parental rights, the mother argues that she was denied due process because she was not provided with the effective assistance of counsel and was not allowed to present witnesses' testimony at the hearing on the Rule 60(b)(6) motion. We now address the process to be employed for raising ineffective assistance claims in termination of parental rights matters, adopt a standard modeled after *Strickland v. Washington*, 466 U.S. 668 (1984), and affirm the judgment.

## I. BACKGROUND

### A. Factual Findings

[¶2] Following a hearing on a petition filed by the Department of Health and Human Services to terminate the mother's parental rights to her daughter, the court found the following facts by clear and convincing evidence, and the findings are supported by competent evidence in the record.[1] *See In re Thomas D.*, 2004 ME 104, ¶ 21, 854 A.2d 195. When M.P. was born in December 2011, personnel at Maine Medical Center contacted the Department regarding the mother's inability to meet the child's basic needs and to remember instructions that were given to her. In January 2012, the Department filed a petition for a child protection order, and M.P. was placed with her mother's aunt.

[¶3] The mother has cognitive limitations and has suffered from anxiety and depression. From March 2012 to October 2012, the mother had visits with M.P. twice a week. During the visits, the mother needed a lot of reminding about how to care for M.P., and she was not consistent in her care.

[¶4] In October 2012, the mother and M.P. entered the Mary's Place residential parenting program. While at Mary's Place from October 2012 to June

[1] In April 2012, the mother agreed to an order finding jeopardy based on the "significant domestic violence in her relationship with the father, [her] inability to protect the child, . . . need of parenting education, and concerns about cognitive limitations that compromise the ability to safely care for the very young and vulnerable child." The jeopardy order required the mother to participate in the Child Abuse and Neglect Evaluation Program, individual therapy, parenting education, and a domestic violence group.

2013, the mother struggled to understand M.P.'s developmental needs and to apply the advice that she was given to different situations. The mother had difficultly multi-tasking and there continued to be safety concerns; sometimes the mother would confine M.P. too long in her crib or highchair as a way of accomplishing other tasks without having to worry about her.

[¶5] When the mother left Mary's Place with M.P. after seven months of residential on-site parenting training and treatment, she still needed regular repetition and continued in-home support. Once back in her home, the mother was involved in the Spurwink Family Reunification Program for four to ten hours weekly, and she received ten to twenty hours per week of independent living skills services through Merrymeeting Behavioral Health.

[¶6] During the several months that the mother was involved in the Program, staff had to repeatedly address safety issues with the mother; she needed regular prompting and had trouble supervising M.P., who was by then an active toddler. After a team meeting in August 2013, the Program's staff decided to end its services for the mother and M.P. The team agreed that the mother needed support in a residential care program, which was no longer available. The mother was unable to progress to the parent education part of the Program because of ongoing safety concerns.

[¶7] After the Program ended, M.P. returned to living with her mother's aunt, and biweekly visits resumed with the mother. The mother was still not consistent in her care during visits.

B. Termination Hearing

[¶8] After a year of intensive services, including the residential parenting program at Mary's Place, the Department filed a petition for termination of the mother's parental rights on October 30, 2013.[2] The termination petition asserted that, although the mother had consistently participated in all reunification services, "[h]er intellectual limitations are preventing [her] from having the ability to comprehend, understand and consistently implement the parenting skills, to be pro-active in anticipating safety issues and to manage the ongoing changes related to her child's overall development." The termination hearing was held in February 2014. The Department presented testimony from six witnesses: a psychologist who conducted an evaluation for the Child Abuse and Neglect Evaluation Program,[3] a social worker from Mary's Place, a case management worker from Mary's Place, a visit supervisor, a case management supervisor with Spurwink's Family Reunification Program, and M.P.'s caseworker from the Department. The

[2] The Department also petitioned for termination of M.P.'s father's parental rights. The father did not attend the termination hearing, and the court terminated the father's parental rights on March 13, 2014. *See* 22 M.R.S. § 4055(1)(A)(1)(a), (B)(2) (2014). The father did not appeal from that judgment.

[3] At the time of the hearing, the Child Abuse and Neglect Evaluation Program had been dissolved and was replaced by the Court Ordered Diagnostic Evaluation (CODE) program.

mother testified, but her attorney presented no other witnesses on her behalf. The guardian ad litem (GAL) also testified, and the court took judicial notice of all GAL reports.

[¶9] The mother was twenty-five years old at the time of the termination hearing and had recently obtained her high school diploma. She was residing in Portland in an apartment and regularly engaging in services. She was seeing a therapist weekly and taking anxiety medication; she was having panic attacks at times. The mother admitted that it takes her longer than normal to "get it," but she feels that she can care for M.P. with support from daycare and friends.

[¶10] At the hearing, the GAL opined that, although the mother had made a good faith effort to reunify, she still lacked the ability to meet the safety and developmental needs of M.P., she could not seem to apply the skills she had been taught to different circumstances, and she needed regular repetition of model parenting skills. The court found the GAL's opinion credible.

[¶11] The District Court terminated the mother's parental rights in a judgment entered on March 13, 2014. The court found that, though not unwilling, the mother is unable to protect the child from jeopardy or take responsibility for the child in a time reasonably calculated to meet the child's needs. *See* 22 M.R.S. § 4055(1)(B)(2)(b)(i), (ii). The court also found that termination is in M.P.'s best

interest. *See* 22 M.R.S. § 4055(1)(B)(2)(a). The mother timely appealed from the termination judgment.

C. Motion for Relief from Judgment Pursuant to M.R. Civ. P. 60(b)(6)

[¶12] While the appeal was pending, on June 17, 2014, the mother filed a motion for remand claiming that she had been denied her right to due process at the termination hearing based on ineffective assistance of counsel. By order dated June 18, we granted the mother's motion, stayed her pending appeal, and remanded the matter to the District Court to permit the mother to file, and the District Court to act on, a motion for relief from judgment. On June 25, 2014, the mother moved for relief from judgment pursuant to M.R. Civ. P. 60(b)(6). In her motion, the mother asserted, among other things, that her attorney had failed to call or subpoena witnesses who would have offered favorable testimony regarding the mother's strengths and ability to parent M.P., and had neglected to prepare her to testify on her own behalf. Attached to the motion were affidavits from the mother, the mother's counselor, the mother's teacher at Portland Adult Education, and a close friend. The mother requested an evidentiary hearing to call witnesses on her behalf and present her own prepared testimony.

[¶13] At a trial management conference, the court made it clear that the hearing on the motion would not be an opportunity to relitigate the termination case. Instead, the court indicated that it would allow the mother and the mother's

former attorney to testify and would also consider the affidavits submitted with the motion.

[¶14] The hearing on the motion for relief from judgment was held on August 13, 2014. Because the process employed and the evidence presented to the court at the hearing are relevant to our due process analysis on appeal, we describe the proceedings in further detail: The mother testified at the hearing and described her relationship with her former attorney. She also testified that her counselor, her teacher, and her friend would have testified that she was a hard-working student, loved her daughter very much, and was dedicated to bettering herself. The mother's former attorney testified that she had represented parents in child protection matters for five years, but she had never prevailed on behalf of a parent in a termination proceeding. She testified that she had attended monthly team meetings, met separately with the mother multiple times in person, and made phone calls to the mother and to service providers before the termination hearing. She described her trial strategy as "pok[ing] holes in the State's case." Further, she testified that she had spoken to some of the witnesses the mother was now claiming should have been called at the termination hearing and decided that their testimony could not address the Department's continuing safety concerns. The attorney testified that she was not told about the mother's teacher and that she had

only met the mother's friend a week before the trial and did not want to risk putting someone she had just met on the stand.

[¶15] After hearing from the mother and the mother's former attorney, and considering affidavits from other potential witnesses, the court denied the mother's motion for relief from judgment on August 20, 2014. Guided by the method by which ineffective assistance of counsel claims are dealt with in the criminal context, the court found that the mother had failed to prove that her former attorney's performance was "outside the normal or typical range of trial work in termination cases." The court also found that, "despite the mother's desires and affection for [her daughter]," there was "considerable and persuasive" evidence supporting termination and that the other witnesses would not have made any appreciable difference in the evidence: "It is highly unlikely that additional testimony about [the mother's] educational achievement, love for her child, or condition of her home would affect the court's conclusions that supported termination." The court further found that, although the mother's attorney could have approached preparing for the termination hearing differently, she was not required to do so and did not fail in her obligations to competently represent the mother before or during trial. Ultimately, the court found that the attorney's "performance did not cause actual prejudice to [the mother]." The mother appealed. *See* 22 M.R.S. § 4006 (2014); M.R. App. P. 2.

## II. DISCUSSION

[¶16] We now review both the mother's original appeal from the judgment terminating her parental rights and the court's ruling on the Rule 60(b) motion. Regarding the initial judgment, there is competent evidence in the record to support the court's finding, by clear and convincing evidence, of at least one ground of parental unfitness. *See In re Thomas D.*, 2004 ME 104, ¶ 21, 854 A.2d 195. Moreover, the court did not commit clear error or abuse its discretion in determining that termination of the mother's parental rights was in the child's best interest. *See In re Thomas H.*, 2005 ME 123, ¶¶ 16-17, 889 A.2d 297.

[¶17] Regarding the court's judgment denying her motion for relief based on ineffective assistance of counsel pursuant to M.R. Civ. P. 60(b)(6), the mother argues that the court denied her due process by not allowing her to call witnesses to testify at the hearing. There exists no statute or rule explicitly addressing the process by which a parent may raise a claim of ineffective assistance of counsel in a termination of parental rights proceeding or the standard that a court should apply when making such a determination. Accordingly, we address the applicable standard and the mother's due process argument.

### A. Process to Raise a Claim of Ineffective Assistance of Counsel

[¶18] We have not yet had the opportunity to opine on the best procedural vehicle for raising a claim of ineffective assistance of counsel in a termination of

parental rights proceeding. To ensure the prompt and final determination of petitions to terminate parental rights, many jurisdictions require that these claims be raised on direct appeal. *See* Susan Calkins, *Ineffective Assistance of Counsel in Parental-Rights Termination Cases: The Challenge for Appellate Courts*, 6 J. App. Prac. & Process 179, 200 (2004) ("The most common vehicle for raising an ineffectiveness claim in a parental-termination case is the direct appeal of the termination order."); *see also State ex rel. Juvenile Dep't of Multnomah Cty. v. Geist*, 796 P.2d 1193, 1201 (Or. 1990) ("Because of the importance of expeditious resolution of termination proceedings, and absent statutes providing otherwise, we hold that any challenges to the adequacy of appointed trial counsel in such proceedings must be reviewed on direct appeal."); *In re RGB*, 229 P.3d 1066, 1085-86 (Haw. 2010) (collecting cases). Other state courts allow parents to raise ineffective assistance of counsel in a petition for a writ of habeas corpus, *see In re Paul W.*, 60 Cal. Rptr. 3d 329, 333 (Ct. App. 2007), or by a motion made under rules similar to M.R. Civ. P. 60(b), *see Ex parte E.D.*, 777 So. 2d 113, 116 (Ala. 2000).

[¶19] To promote the swift resolution of ineffectiveness claims, and in the absence of a statutorily created process, we now hold that a parent may raise an ineffective assistance of counsel claim in a direct appeal from an order terminating his or her parental rights if there are no new facts that the parent seeks to offer in

support of the claim. That is, a direct appeal from an order terminating a parent's parental rights may include a claim that the parent's attorney provided ineffective assistance when the record is sufficiently well developed to permit a fair evaluation of a parent's claim.

[¶20] We anticipate, however, that there may be circumstances in which the record does not illuminate the basis for the challenged acts or omissions of the parent's counsel. In that event, the parent must *promptly* move for relief from a judgment terminating his or her parental rights pursuant to M.R. Civ. P. 60(b)(6) to raise a claim of ineffective assistance of counsel. The motion for relief from judgment should be filed no later than twenty-one days after the expiration of the period for appealing the underlying judgment.[4] After a hearing before the trial court, if the parent's Rule 60(b)(6) motion is denied, the trial court's findings will amplify the record and provide the necessary context should the parent decide to pursue an appeal of that decision along with the appeal of the underlying judgment terminating parental rights—as has occurred here.

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[4] In order to ensure that this time frame works, the District Court must ensure that parents appealing from a termination order who need new counsel on appeal are assigned new counsel immediately. With that process, this time frame should, in most circumstances, allow for new counsel to meet with the parent and obtain the information necessary to raise the claim in the rare instances where it is appropriate. We need not now determine whether, in exceptional and unusual circumstances, a parent may move for relief pursuant to M.R. Civ. P. 60(b)(6) outside of this period. In the absence of statutory guidance, we leave to future development the potential that, after balancing the children's interests with the parent's interests, a trial court may act on such a motion.

[¶21] To bring a claim of ineffective assistance of counsel, either on direct appeal or by way of a Rule 60(b)(6) motion, the parent making the claim must submit a signed and sworn affidavit stating, with specificity, the basis for the claim.[5] In addition, the parent's affidavit accompanying a Rule 60(b)(6) motion must also be accompanied by affidavits from any individuals the parent asserts should have been called as witnesses during the termination hearing, and from any individuals who have evidence that would bolster the parent's claim that the performance of his or her attorney was deficient and that the deficiency affected the fairness of the proceeding. Because of the counter-balancing interests of the State in ensuring stability and prompt finality for the child, if the parent fails to comply with this procedure, the parent's motion asserting the ineffective assistance of counsel must be denied.

B. The Applicable Standard on an Ineffective Assistance of Counsel Claim

[¶22] As the trial court correctly noted, we have not yet addressed the standard that will apply in assessing a parent's claim of ineffective assistance of counsel in termination of parental rights proceedings. *See In re S.P.*, 2013 ME 81, ¶ 10 n.4, 76 A.3d 390. Courts in other jurisdictions that recognize a parent's right

[5] When the claim of ineffective assistance of counsel is made on direct appeal, the affidavit of the parent will not assert facts outside the trial record but will affirmatively state the parent's intention to claim that trial counsel was ineffective as demonstrated by that record.

to the effective assistance of counsel in termination proceedings have generally applied one of two very similar standards.

[¶23] The first is the same standard used in criminal cases, which was first announced in *Strickland v. Washington*, 466 U.S. 668. The *Strickland* standard is a two-part test for determining ineffectiveness in the criminal context:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

*Id.* at 687. "[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Id.* at 688. "Because of the difficulties inherent in making [such an] evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." *Id.* at 689.

[¶24] The other standard used to address ineffectiveness claims is the "fundamental fairness" standard announced in *Geist*, 796 P.2d at 1203. The fundamental fairness standard is similar to the *Strickland* standard; it requires, for a parent's challenge to succeed, that a parent demonstrate that appointed counsel failed to "exercise professional skill and judgment" and that the attorney's

"inadequacy prejudiced [the parent's] cause to the extent that [the parent] was denied a fair trial." *Id.* at 1203-04.

[¶25] Both the *Strickland* standard and the fundamental fairness standard require that a parent demonstrate an attorney's inadequate performance and some form of prejudice. The majority of state courts confronting this issue have adopted the *Strickland* standard. *See, e.g., Jones v. Ark. Dep't of Human Servs.*, 205 S.W.3d 778, 794 (Ark. 2005); *People ex rel. C.H.*, 166 P.3d 288, 290-91 (Colo. App. 2007); *In re R.E.S.*, 978 A.2d 182, 191 (D.C. 2009); *In re S.N.H.*, 685 S.E.2d 290, 298 (Ga. Ct. App. 2009); *In re M.S.*, 115 S.W.3d 534, 545 (Tex. 2003); *In re J.R.G.F.*, 250 P.3d 1016, 1018 (Utah Ct. App. 2011); *see also* Calkins at 214-15 & nn.180-188 (collecting cases). *But see In re RGB*, 229 P.3d at 1090; *Baker v. Marion Cty. Office of Family & Children*, 810 N.E.2d 1035, 1039-41 (Ind. 2004).

[¶26] We now adopt the *Strickland* standard to govern ineffective assistance of counsel claims in termination of parental rights proceedings. Although we recognize that this standard—developed through criminal law proceedings—may have to be tailored to termination of parental rights proceedings in some respects, the deprivation of parental rights is in many ways similar to the deprivation of liberty interests at stake in criminal cases.[6] The *Strickland* standard is known to

[6] Although *Strickland* was a death penalty case, the standard announced therein has been applied in cases that involve only incarceration. *See Strickland*, 466 U.S. at 687; *see, e.g., Manley v. State*, 2015 ME 117, ¶¶ 3, 11-18, --- A.3d ---.

the bar and the bench, and *Strickland* carries with it a developing body of case law, which will aid courts in the efficient and timely resolution of such claims.[7] Moreover, the importance of finality in termination proceedings supports the use of the *Strickland* standard. A more "intrusive post-trial inquiry" could "encourage the proliferation of ineffectiveness challenges," *Strickland*, 466 U.S. at 690, and possibly delay the permanency that is necessary to stabilize a child's placement in a safe environment.

[¶27] Thus, a parent claiming ineffective assistance of counsel in a termination proceeding may directly appeal from the judgment terminating her parental rights if the record does not need to be supplemented to support her claim. Otherwise, the parent must move promptly—ordinarily, within twenty-one days after the expiration of the appeal period—for relief from judgment pursuant to M.R. Civ. P. 60(b)(6). Regardless of which procedural route a parent takes to raise an ineffective assistance of counsel claim, it is the parent's burden to demonstrate that (1) counsel's performance was deficient, i.e., that "there has been serious incompetency, inefficiency, or inattention of counsel amounting to performance . . . below what might be expected from an ordinary fallible attorney,"

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[7] For clarification of the components of the *Strickland* standard, see *Theriault v. State*, 2015 ME 137, --- A.3d ---, certified on this date. Here, the court found both that the mother had failed to demonstrate inadequate performance by counsel and that she had failed to prove prejudice. Thus, no remand for the court to clarify its analysis of the prejudice prong is required. *See id.* ¶ 30.

*Aldus v. State*, 2000 ME 47, ¶ 12, 748 A.2d 463 (quotation marks omitted), and (2) the parent was prejudiced by the attorney's deficient performance in that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result," *Strickland*, 466 U.S. at 686.

C. The Due Process Analysis

[¶28] In the matter before us, although the mother did not move for relief from judgment pursuant to Rule 60(b)(6) within twenty-one days after the expiration of the appeal period, we nonetheless allowed a hearing on the motion because we had not previously opined on this issue.

[¶29] The trial court held the Rule 60(b)(6) hearing, the mother received court-appointed counsel, and the mother had the opportunity to present evidence. The mother now argues that the court denied her due process in that proceeding when it declined to allow her to call additional witnesses at the hearing and instead accepted testimony from the mother regarding what she believed the witnesses would have testified to and considered the witnesses' sworn affidavits.

[¶30] "When due process is implicated, we review such procedural rulings to determine whether the process struck a balance between competing concerns that was fundamentally fair." *In re A.M.*, 2012 ME 118, ¶ 14, 55 A.3d 463 (quotation marks omitted). "'The fundamental requirement of due process is the

opportunity to be heard at a meaningful time and in a meaningful manner.'" *Id.* ¶ 15 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quotation marks omitted)). "It is a flexible concept that calls for such procedural protections as the particular situation demands." *Id.* (quotation marks omitted).

[¶31] When analyzing whether a party was afforded the process that is due, we balance the three factors articulated by the Supreme Court of the United States in *Mathews v. Eldridge*, 424 U.S. 319:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Id.* at 335.

[¶32] The first and third *Mathews* factors—the parent's interest and the government's interest—are well established and need little explication. The parent's interest is significant because a parent has a statutory right to legal counsel in child protection proceedings given the important liberty interests at stake, *see* 22 M.R.S. § 4005(2) (2014), and, at a termination hearing, the ineffective assistance of counsel could significantly interfere with a parent's "fundamental right to parent [a] child and to maintain a parental relationship free from state interference," *In re Cody T.*, 2009 ME 95, ¶ 25, 979 A.2d 81. As to the third

factor, the State has a significant interest in obtaining stability and permanency for children within a reasonable time. *See* 22 M.R.S. §§ 4003(4), 4050(2) (2014).

[¶33] We focus on the second *Mathews* factor, which requires us to consider whether the procedures used by the court—and the court-imposed limitation on the mother's ability to call witnesses at the Rule 60(b)(6) hearing—posed a significant risk that the mother would not be able to demonstrate her trial counsel's deficiency and resulting prejudice, which, pursuant to *Strickland*, is the necessary test for proving that she was denied her right to effective counsel.

[¶34] The process employed by the court at the Rule 60(b)(6) hearing was thoughtful and well balanced. Through the evidence presented by the live testimony of the mother and her former attorney, and the affidavits of other potential witnesses, the court was able to assess the quality of the evidence that the mother claimed should have been offered at the termination hearing. In this regard, the court was able to determine both whether the mother's former attorney's decision not to call these witnesses was outside what might be expected "of an ordinary fallible attorney," *Aldus*, 2000 ME 47, ¶ 16, 748 A.2d 463, and whether the witnesses' averments, together with the mother's testimony about what she believed those witnesses would have testified to, demonstrated that "counsel's errors were so serious as to deprive" the mother of "a fair trial, a trial whose result is reliable," *Strickland*, 466 U.S. at 687. Thus, the process employed by the court

created a low risk of an erroneous deprivation of the right to effective assistance of counsel to protect the mother's private liberty interest.

[¶35] We do not suggest that a court should never allow sworn testimony in addition to the affidavits. In some cases, it may be necessary to assess the credibility of the witnesses from whom the court receives affidavits to resolve disputes of fact that would establish whether counsel was ineffective. In this case, however, the affidavits were sufficient to demonstrate the quality of the mother's additional evidence so that the court could assess both the attorney's judgment in not calling the witnesses and whether the absence of that evidence prejudiced the mother. *See Strickland*, 466 U.S. at 687; *Aldus*, 2000 ME 47, ¶¶ 16, 20, 748 A.2d 463.

[¶36] Thus, when a parent promptly moves for relief from judgment pursuant to M.R. Civ. P. 60(b)(6) based on ineffective assistance of counsel, it is for the trial court to determine what process is necessary to meaningfully assess a parent's claim while balancing the State's important interest in expeditiously establishing permanent plans for children. *See Mathews*, 424 U.S. at 333-35. Such a determination will necessarily call upon a trial court to tailor the process to the facts and circumstances of each case.

[¶37] After reviewing the *Mathews v. Eldridge* considerations, we conclude that the procedures followed by the District Court on the mother's motion for relief

from judgment were adequate to protect her liberty interest, while at the same time protecting the State's interest in promoting the child's stability and permanency without undue delay. No due process violation has been demonstrated on this record.

## III. CONCLUSION

[¶38] Due process requires "the opportunity to be heard at a meaningful time and in a meaningful manner." *Id.* at 333 (quotation marks omitted). To successfully and efficiently process a parent's ineffective assistance of counsel claim without undermining the Legislature's stated purpose of "[p]romot[ing] the early establishment of permanent plans for the care and custody of children who cannot be returned to their family," 22 M.R.S. § 4003(4), a parent may, when appropriate, directly appeal from the judgment terminating her or his parental rights asserting ineffective assistance of counsel. If it is necessary to supplement the record before appealing from the judgment, a parent must move for relief from judgment pursuant to M.R. Civ. P. 60(b)(6) within twenty-one days after the time frame authorized for taking an appeal. Whether by commencing an appeal or by filing a motion, the parent must support his or her claim of ineffective assistance with one or more affidavits. When addressing a parent's claim, courts will apply the *Strickland* standard—modified as necessary to account for the differences between criminal law and termination of parental rights proceedings—to determine

whether a parent's counsel's performance at the termination proceeding was deficient and whether such deficiency prejudiced the parent.

[¶39] On the adequate record before us, the court did not violate due process by declining to allow the mother to call other witnesses at the Rule 60(b)(6) hearing, *see Mathews*, 424 U.S. at 333-35, or abuse its discretion in denying the mother's motion for relief from judgment, *see In re David H.*, 2009 ME 131, ¶ 41, 985 A.2d 490.

The entry is:

Judgment affirmed.

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**On the briefs:**

Henry I. Shanoski, Esq., Portland, for appellant mother

Janet T. Mills, Attorney General, and Meghan Szylvian, Asst. Atty. Gen., Office of the Attorney General, Augusta, for appellee Department of Health and Human Services

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