

THE RIGHT TO COUNSEL IN MAINE

EVALUATION OF SERVICES PROVIDED
BY THE MAINE COMMISSION
ON INDIGENT LEGAL SERVICES



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SIXTH
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CENTER

The Right to Counsel in Maine: Evaluation of Services Provided by the Maine
Commission on Indigent Legal Services
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PREPARED BY

The Sixth Amendment Center is a non-partisan, non-profit organization providing technical assistance and evaluation services to policymakers and criminal justice stakeholders. Its services focus on the constitutional requirement to provide effective assistance of counsel at all critical stages of a case to the indigent accused facing a potential loss of liberty in a criminal or delinquency proceeding.

PREPARED FOR

The Maine Legislative Council is a ten-member body consisting of five members from each legislative chamber, including: the President of the Senate, Speaker of the House, bi-cameral Republican and Democratic Floor Leaders and their Assistant Floor Leaders. The Legislative Council governs the administration of the Maine Legislature.

EXECUTIVE SUMMARY

In 1963, the U.S. Supreme Court declared in *Gideon v. Wainwright* that it is an “obvious truth” that anyone who is accused of a crime and who cannot afford the cost of a lawyer “cannot be assured a fair trial unless counsel is provided for him.” In the intervening 56 years, the U.S. Supreme Court has clarified that the Sixth Amendment right to counsel means every person who is accused of a crime is entitled to have an attorney provided at government expense to defend him whenever that person is facing the potential loss of his liberty and is unable to afford his own attorney. Moreover, the appointed lawyer needs to be more than merely a warm body with a bar card. The attorney must also be effective, the U.S. Supreme Court said again in *United States v. Cronin* in 1984, subjecting the prosecution’s case to “the crucible of meaningful adversarial testing.” Under *Gideon*, the Sixth Amendment right to effective counsel is an obligation of the states under the due process clause of the Fourteenth Amendment.

Through legislation enacted in 2009, the legislature created the Maine Commission on Indigent Legal Services (MCILS) and commanded that it: “provide efficient, high-quality representation to indigent criminal defendants, juvenile defendants and children and parents in child protective cases, consistent with federal and state constitutional and statutory obligations”; “ensure the delivery of indigent legal services by qualified and competent counsel in a manner that is fair and consistent throughout the State”; and “ensure adequate funding of a statewide system of indigent legal services, which must be provided and managed in a fiscally responsible manner, free from undue political interference and conflicts of interest.” ME. REV. STAT. ANN. tit. 4, § 1801 (2018).

Since its inception, MCILS has never used governmentally employed attorneys to provide representation. Instead, MCILS either pays attorneys \$60 per hour or, in Somerset County, pays a consortia of attorneys a fixed fee under contract. Maine is the only state in the country that provides all indigent defense services through private attorneys.

There are two principal reasons that other states have moved away from using only private attorneys to provide all indigent defense services, and Maine has struggled with both since the creation of MCILS. First, it is difficult to predict and contain costs in a private attorney system. A system can estimate future caseloads based on prior year trends and apply average estimated costs per case, by case type, to calculate what funding will be required to deliver its mandated services, but there is no guarantee that past averages will continue to apply to future years. Second, it is difficult to

supervise private attorneys to ensure they can and do provide effective representation. For example, despite the statutory command for MCILS to provide “high-quality” representation, the State of Maine expects MCILS to maintain oversight of nearly 600 attorneys, handling cases in 47 courthouses presided over by approximately 90 justices, judges, and magistrates, with a staff of just three people (excluding financial screeners that perform no oversight functions).

In 2017, the Maine legislature created the Working Group to Improve the Provision of Indigent Legal Services that determined that MCILS does not have systemic oversight and evaluation of attorneys and is in need of stronger fiscal management and recommended an independent assessment. In March 2018, the Maine Legislative Council contracted the Sixth Amendment Center (6AC) to evaluate right to counsel services provided by MCILS and to recommend any needed changes. Limitations of time and resources prevent most indigent defense evaluations from considering every court, public defense system, and service provider in a given state, and so this study looks closely at five counties: Androscoggin, Aroostook, Cumberland, Somerset, and York.

Chapter 1 (p. 5 to 23) provides introductory information on the history of the right to counsel in Maine, an explanation of Maine’s justice systems, and the study methodology. Chapter II (p. 24 to 35) begins the assessment by evaluating Maine’s attorney qualification, training and supervision and makes the following finding:

FINDING 1: MCILS attorney qualification standards are too lenient, resulting in an excessive number of attorneys on panels, and there are no attorney recertification requirements. MCILS has only limited new attorney training and lacks requirements that ongoing attorney training relate to defense-specific subject areas. MCILS lacks appropriate supervision of attorneys.

Under MCILS’ qualification requirements, an attorney who graduated from law school two years ago and hung out their shingle in a private practice, with no supervision or training, can have two jury trials and two judge trials and then be appointed to represent indigent defendants in every type of criminal case other than a homicide or sex offense. More worrisome perhaps is that indigent defendants charged with Class E crimes, carrying up to six months in jail, can be represented by an attorney who just received their bar card and completed a single training course in criminal law, as long as the lawyer has an email address, telephone number, and a confidential space to meet with clients.

MCILS does not require attorneys appointed to represent the indigent to obtain training in the fields in which they provide indigent legal representation (beyond that required to first be placed on the roster for appointments in operating under the influence or domestic violence cases). Similarly, MCILS has not established any requirements for

supervision of attorneys appointed to provide indigent legal representation. After the start of the assessment, MCILS identified 25 attorneys statewide to serve as resource counsel and provide mentoring to less experienced attorneys. However, these attorneys are each capped at providing only 10 hours of mentoring per month, and the resource counsel attorneys do not have authority to require any mentee to cooperate.

Chapter III (p. 36 to 62) assesses how and when in the criminal justice process defendants are informed about their right to counsel, how they are approved or denied for MCILS services, and when attorneys are appointed to represent indigent defendants. After a description of the criminal process in Maine, Chapter III makes four findings:

Finding 2: Although the courts' advice of rights video has many admirable qualities, few courts follow up with a colloquy to ensure that indigent defendants saw the video and comprehend their rights before waiving counsel. Some prosecutors in some jurisdictions engage in plea discussions with uncounseled defendants, and some courts actively encourage such negotiations. These practices result in actual denial of counsel.

In every courtroom observed in all of the sample counties, the same video is played before the judge is on bench enumerating defendants' rights. No one ensures that defendants have watched the video, understand the language spoken in the video, or have the mental capacity to understand the video, and it is often the case that tardy defendants enter without ever seeing the video at all.

Moreover, under U.S. Supreme Court case law a plea negotiation is a critical stage of the case, meaning the negotiation cannot happen unless counsel is present or the defendant's right to counsel has been knowingly, voluntarily, and intelligently waived. Despite this, throughout the sample counties, prosecutors talk to uncounseled defendants to negotiate guilty pleas. This was most prevalent in the south where larger court populations, and not enough lawyers of the day, exacerbate the problems.

Finding 3: Oversight of financial screeners by MCILS creates the appearance of a conflict of interest with its duty to provide zealous representation to indigent defendants.

MCILS employs eight people to conduct financial screening of defendants who request appointment of counsel. Indigent defense systems must require their participating attorneys to adhere to their ethical duty to zealously defend in the stated interests of the client, including advocating against the imposition of fines, fees, and other assessments. MCILS cannot assure that appointed attorneys fight against the imposition on indigent defendants of fees related to the cost of the defense, while

MCILS is simultaneously tasked with trying to collect fees assessed for the cost of representation.

A situation in Cumberland County transformed this appearance of a conflict of interest by MCILS into an actual conflict of interest. A statewide hiring freeze left vacant the MCILS financial screener position that covered Cumberland County. At the time of our site visit, the MCILS lawyers for the day were signing as notaries the financial affidavits of the defendants they advise and represent, which are then submitted to the court. This process places the lawyer in the position of a potential witness against the client, in the event the affidavit is challenged. Finally, conflict of interest concerns aside, having lawyers perform at \$60/hour a service that is normally performed by a financial screener paid \$12.75/hour is simply not cost efficient governance.

Finding 4: MCILS’ “lawyer of the day” system primarily serves the need to move court dockets, while resulting in a lack of continuous representation to the detriment of defendants. There is often a critical gap in representation while a substantive lawyer is identified and appointed. Additionally, the lawyer of the day practices under the Somerset contract result in a direct conflict of interest.

MCILS provides for a “lawyer of the day” to appear at 48-hour hearings for in custody defendants and at initial appearance for out of custody defendants. The number of lawyers serving as lawyer for the day is generally insufficient to even meet with, much less actually provide representation to, the number of defendants scheduled on each day’s docket. For example, on an average day in Cumberland County’s Portland District Court there are two lawyers for the day to handle 80 defendants.

The lawyer for the day system provides limited representation because it is only “for the day,” not for the case. In most instances the “lawyer of the day” does not continue with the case. Instead, courts make a formal appointment off of a roster of MCILS approved lawyers. Some judges like to select the individual attorney to appoint in a given case, some leave it to their clerks to do after the hearing, and some use a rotational system where the next attorney on the list is appointed. However, a gap in representation occurs when those appointments are delayed.

The lawyer of the day program in Somerset County produces a direct conflict of interest. The contract attorneys can be hired by non-indigent defendant who appear in court while the contract attorneys are serving as lawyer for the day. That is, the attorney could reject a defendant for appointed counsel and then accept the case as a private retainer. This central role of the contract attorneys in meeting as lawyer for the day every person who is hailed into court creates a monopoly of sorts, as attorneys outside of Somerset County said they are effectively prevented from establishing a practice in Somerset County. That is, the contract attorneys keep not only all the

assigned work but also most of the private work, since the contract has provided them a personal introduction to all defendants.

Finding 5: Despite there being many excellent assigned lawyers providing representation to the indigent accused throughout Maine, there are also too many attorneys throughout the state who do not perform adequately.

In one of the studied counties, the Sheriff estimated, due to the volume of prisoner complaints, that about 25% of assigned attorneys do not visit their clients in jail to prepare their cases. He was also concerned about attorneys not accepting calls from the jail. He said prisoners stop calling when their calls are not accepted. Consistent with that report, one judge estimated that 25% of assigned counsel have not met with their clients before the first dispositional conference date. She reported that up to 10% of attorneys withdraw or become a second chair if the case goes to trial.

MCILS data tends to confirm these observations of the sheriffs. For example, the 6AC requested three years of data on jail visits on cases billed out of Cumberland County. The data reveal a number of attorneys that often visit clients, but a concerning number of folks that do not. For example, in 2017, one attorney billed MCILS \$111,771 for cases arising in Cumberland County, including \$3,024 for 96 jail visits. By contrast, another attorney billed MCILS \$171,880, but did not bill any time for even a single jail visit. Certainly it is possible, though unlikely, that the attorney simply decided it was not worth the time to bill jail visits, but the point is that MCILS and the State of Maine do not know because of a lack of oversight.

The final substantive chapter, Chapter IV (p. 63-70), assesses the extent to which MCILS ensures that lawyers have sufficient time to work on cases, especially in relation to attorneys being assigned too many cases. This Chapter makes one finding:

Finding 6: Despite the lack of MCILS workload limits, excessive caseloads may not be an issue in most counties in Maine. However, insufficient time is an issue in Somerset County, where the combination of high caseloads and the fixed fee contract system produce financial incentives to dispose of cases without adequate preparation.

Even factoring in “lawyer of the day” duties in most jurisdictions, the attorneys with the most cases handled in Aroostook, Androscoggin, Cumberland, and York Counties do not appear to have excessive appointed caseloads. The one place where there are definitely time sufficiency issues is in Somerset County. Over the past six years, the average number of hours spent per indigent defense case has declined. For example, in FY 2013, on average the lawyers spent 6.78 hours per adult case in FY 2013. By FY 2018, the number dropped to 2.99 hours on average per adult criminal case (a decrease of approximately 56%). Importantly, MCILS does not require from the Somerset

County Project reporting of adult criminal cases to be distinguished by severity, which would allow MCILS to more accurately track attorney workloads. That said, 2.99 hours per adult criminal case is extremely and unreasonably low, even if every case was a class D or E charge.

Chapter V (p. 71-85) discusses attorney compensation and evaluates MCILS ability to provide fiscal oversight of state resources. The Chapter makes two findings:

Finding 7: MCILS’ fixed fee contract causes a financial conflict of interest. MCILS’ hourly rate is inadequate to both cover overhead and provide lawyers an adequate fee.

Fixed fee contracts, in which a lawyer earns the same pay no matter how many cases he is required to handle, create financial incentives for a lawyer to dispose of cases as quickly as possible, rather than as effectively as possible for the client. In FY 2017, the average fee per case under the Somerset contract was \$573.16, slightly higher than the average billed by the assigned counsel elsewhere (statewide \$554.80). The average hours per case spent in Somerset, at 3.27, was *much lower* than the statewide average of 9.25 (assuming the 2017 rate was \$60/hour), resulting in the Somerset hourly rate paid for counsel being \$174.97. So, in Somerset County, the State of Maine is paying attorneys three times the rate it pays everyone else and getting approximately one third less work.

The hourly compensation rate in Maine (\$60/hour) is not enough to cover overhead and ensure a reasonable fee. As a comparison, the South Dakota Supreme Court set public counsel compensation hourly rates at \$67 per hour in 2000. To ensure that attorneys are perpetually paid both a reasonable fee and overhead, the court also mandated that “court-appointed attorney fees will increase annually in an amount equal to the cost of living increase that state employees receive each year from the legislature.” Assigned counsel compensation in South Dakota now stands at \$95 per hour. For comparison purposes, a \$95 hourly fee in South Dakota in 2019 is equivalent to a \$114.95 hourly fee in Maine in 2019.

Finding 8: A significant number of attorneys bill in excess of eight hours per day, five days per week, for 52 weeks per year. MCILS does not exert adequate financial oversight of private attorneys.

“Over-billing” was a topic raised frequently throughout the state. In Maine, attorneys do not submit vouchers under penalty of perjury. No statutes or MCILS rules limit attorney hours by day or by year. MCILS conducts no audits. Not surprisingly, a review of MCILS vouchers over the past five years generated serious concerns in some instances about whether limited taxpayer resources are being used effectively.

If an attorney works eight hours per day, five days per week, for 52 weeks a year, that attorney should make no more than \$124,800 at the current \$60 per hour MCILS rate. In FY 2018, 25 attorneys billed MCILS in excess of 40 hours per week. The top biller in FY2018 billed more than 88 hours per week. As part of this review, the 6AC reached out to the Federal Defender Services Division of the Administrative Office of the United States Courts. Although they are not allowed to confirm the number of cases appointed, the Federal Defender Services, Legal and Policy Division, confirmed that eight of these 25 lawyers received federal court appointments during this same time period.

To remedy these issues, Chapter VI (P. 86-96) sets out a series of recommendations:

RECOMMENDATION 1: The State of Maine should remove the authority to conduct financial eligibility screenings from the Maine Commission for Indigent Legal Services. The reconstituted Task Force on Pretrial Justice Reform should determine the appropriate agency to conduct indigency screenings.

RECOMMENDATION 2: The State of Maine should statutorily bar communication between prosecutors and unrepresented defendants, unless and until defendants have been informed of their right to appointed counsel, a judge has conducted the legally required colloquy, and a defendant has executed a written waiver of the right to counsel in each case to ensure that all waivers of the right to counsel are made knowingly and voluntarily.

RECOMMENDATION 3: Except for ministerial, non-substantive tasks, the State of Maine and the Maine Commission on Indigent Legal Services should require that the same properly qualified defense counsel continuously represents the client in each case, from appointment through disposition, and personally appears at every court appearance throughout the pendency of an assigned case.

RECOMMENDATION 4: MCILS should use its current statutory power to promulgate more rigorous attorney qualification, recertification, training, supervision, and workload standards. The State of Maine should statutorily require financial oversight by requiring that MCILS limit the number of permissible billable hours, subject to waiver only upon a finding of need for additional capacity. The State of Maine should fund MCILS at a level to ensure rigorous training and effective substantive and financial oversight of attorneys.

RECOMMENDATION 5: The State of Maine should statutorily ban all public defense contracts that provide financial disincentives to or that otherwise interfere with zealously advocating on behalf of the defendants' stated interests, including the use of fixed fee contracts. Maine should require that any public defense contract include reasonable caseload limits, reporting requirements on

any private legal work permitted, and substantial performance oversight, among other protections.

RECOMMENDATION 6: The State of Maine should fund MCILS at a level that allows private attorneys to be compensated for overhead expenses plus a reasonable fee (i.e., \$100 per hour). MCILS should be authorized to provide additional compensation of \$25 per hour for designated case types such as murder, sexual assaults, and postconviction review.

RECOMMENDATION 7: The State of Maine should authorize and fund MCILS at an appropriate level to employ state government attorneys and support staff to operate a statewide appellate defender office and a Cumberland County trial level public defender office.