

# THE RIGHT TO COUNSEL IN MAINE

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



APRIL 2019



SIXTH  
AMENDMENT  
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.**

# **THE RIGHT TO COUNSEL IN MAINE**

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# CHAPTER I

## INTRODUCTION

### THE BIRTH OF THE RIGHT TO COUNSEL

The adversarial system of justice is rooted in the very fabric of our nation.<sup>1</sup> Many of the people who arrived on the shores of our continent had been subject to persecution in their native courts, so they were not content to adopt the justice systems of their mother countries. Having experienced tyranny first hand, the people of America's colonies were suspicious of concentrated power in the hands of a few.

The English justice system was transitioning during the colonial era from what today would be called the “inquisitorial model” of criminal justice. The presumption of innocence does not exist in the inquisitorial system. Instead, because the judge makes a final verdict based on the evidence that he himself has collected, there is a presumption of guilt inherent in the trial proceedings. In the inquisitorial system of justice, the burden of proof rests with the defendant accused of a crime to establish his own innocence. Until the 1800s in England, the accused in most felony cases were prohibited from having an attorney represent them other than to argue legal points to the judge – a defendant was own their own in proving the facts of a case to show their innocence.

An individual's right to liberty in the American colonies came to be recognized as self-evident, and there therefore needed to be a high threshold to allow government to take away the liberty endowed in each and every individual. With the introduction of defense lawyers in colonial America,<sup>2</sup> criminal trials started to become actual *trials*. Procedural rules started to be written down and codified. Evidence, including hearsay, could no longer be introduced without restraint. Allegations of criminality were increasingly contested.

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<sup>1</sup> See generally Randolph Jonakait, *The Rise of the American Adversary System: America Before England*, 14 WIDENER L. REV. 323 (2009), available at <http://widenerlawreview.org/files/2009/06/01-jonakait-final-323-356.pdf>.

<sup>2</sup> As an example of the degree to which the new world Americans were committed to the right to counsel, the following preamble accompanied the right to counsel law passed on March 11, 1660 in the colony of Rhode Island and Providence Plantations:

Whereas it doth appeare that any person . . . may on good grounds, or through mallice or envie be indicted and accused for matters criminal, wherein the person is so [accused] may be innocent, and yett, may not be accomplished with soe much wisdom and knowl-edge of the law to plead his own innocencye, &c. Be it therefore inacted . . . that it shall be accounted and owned from henceforth the lawful privilege of any man that is indicted, to procure an attorney to plead any point of law that make for clearing of his innocencye.

This was the birth of the adversarial system<sup>3</sup> – a system based on the simple notion that the truth is best made clear through the back and forth debate of opposing perspectives. When the north American colonies revolted against the British crown, the right to counsel was quickly enshrined in all but one of the original 13 state constitutions.<sup>4</sup> Having thrown off the shackles of a tyrannical monarchy, the patriots were not about to create a new tyranny through the federal government that could infringe on the rights of individuals. Thus, the framers of the U.S. Constitution created a Bill of Rights to specifically protect personal liberty from the tyranny of big government. All people, they guaranteed, are free to express unpopular opinions, or choose one’s own religion, or take up arms to protect one’s home and family, without fear of retaliation from the government.

Preeminent in the Bill of Rights is the idea that no one’s liberty can ever be taken away without the process being fair. A jury made up of everyday citizens, protections against self-incrimination, and the right to have a lawyer advocating on one’s behalf<sup>5</sup> are all American ideals of justice enshrined in the first ten amendments to the United States Constitution and ratified by the states in 1791.

## THE RIGHT TO COUNSEL IN MAINE

Although the 1963 U.S. Supreme Court case *Gideon v. Wainwright*<sup>6</sup> is often hailed as the point in time when states began to appoint counsel to represent indigent defendants, the simple truth is that most of the states were already providing counsel in felony cases before the landmark case was handed down.<sup>7</sup>

<sup>3</sup> Randolph Jonakait, *The Rise of the American Adversary System: America Before England*, 14 WIDENER L. REV. 323, 353 (2008) (“[A]n adversary system was widely in operation before the nineteenth century began. Attorneys for the prosecution and defense presented and challenged evidence. The judges did not dominate or orchestrate factual presentations, but acted as arbiters between the two sides and gave instructions to the juries. Defense lawyers were not limited to only one part of the trial, but participated at every stage, from jury selection, opening statements, and the presentation and challenging of evidence to summations. Perhaps most important, the attorneys acted as advocates. Evidence was marshaled to support theories of the cases. Juries were not just left on their own to contemplate the meanings of and inferences to be drawn from the evidence, but rather lawyers’ arguments on both sides were directed to the juries to support advocates’ theories of the case. These are examples of a full adversary system, and the number of examples and the lawyers’ skilled performances at least indicate that a full adversarial process was not a rare aberration but an accepted way of trying American cases even at the end of the eighteenth century.”).

<sup>4</sup> Virginia was the lone state without the right to counsel in its constitution. See WILLIAM BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* 17-1, n.47 (U. Mich. Press 1955).

<sup>5</sup> U.S. CONST. amend. VI (stating that in “all criminal prosecutions” the accused shall enjoy the right, among others, to “have the Assistance of Counsel for his defence”).

<sup>6</sup> 372 U.S. 335 (1963).

<sup>7</sup> Only thirteen states did not provide counsel in all felony cases at the time of the *Gideon* decision. Among the states that provided the full right to counsel is Nevada - the first state to require not only the appointment of counsel in all cases (including misdemeanors) but also the payment of counsel for services rendered (1877). For a fuller understanding of the events leading up to the institutionalization of the right to counsel in Nevada, see the Sixth Amendment Center report *Reclaiming Justice*, available at



The geographic territory that is today Maine was part of Massachusetts at the time the United States Constitution was adopted and followed the custom of appointing counsel in serious cases. With statehood in 1820, Maine adopted its own constitution, stating that “[i]n all criminal prosecutions, the accused shall have a right to be heard by the accused and counsel to the accused.”<sup>8</sup> The Maine legislature codified the right to appointed counsel in capital cases in 1870.<sup>9</sup> In the 20th century, “in spite of the absence of statutory or decisional fiat, individual Justices . . . almost uniformly felt a moral and social obligation to furnish counsel to indigent persons charged with felonies in the Superior Courts. Their practice of making informal appointments, and the willingness of members of the bar to perform such unpaid public service, long preceded *Gideon v. Wainwright* and doubtless explain the absence of this issue before the Courts of Maine.”<sup>10</sup>

Maine’s commitment to the right to counsel and its general practice of appointing counsel to the indigent accused of felony charges is perhaps best demonstrated in 1962 when Maine’s then-Attorney General Frank E. Hancock joined an amicus curiae brief in support of Clarence Earl Gideon’s right to an attorney.<sup>11</sup> At the time, Maine was among the 15 states that did not *require* counsel in all felony cases. Nonetheless, Maine advocated for the Supreme Court to determine that the Fourteenth Amendment requires states to provide Sixth Amendment lawyers to the indigent accused in all felonies. The United States Supreme Court agreed, announcing it to be 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.”<sup>12</sup>

The Maine legislature responded to the *Gideon* decision promptly by enacting P.L.1963, Chap. 273, “which *required* both the Justices of the Superior Court and Judges of the new District Court system to assign counsel for indigents charged with felonies and *permitted* it (without compensation) in cases of misdemeanors.”<sup>13</sup> Four years later, the Maine Supreme Judicial Court ended the practice of distinguishing between felony and misdemeanors cases, declaring in *Newell v. State*:

We are convinced that the time has come when due process demands that we abandon the felony-misdemeanor distinction as a basis for appointment of counsel and construe our own constitution to require appointment of counsel for needy persons charged with serious misdemeanors, unless waived. . . . Therefore, we hold that all indigent

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<http://sixthamendment.org/reclaiming-justice/>.

<sup>8</sup> U.S. Const. amend. VI.

<sup>9</sup> See *Newell v. State*, 277 A.2d 731, 734 (Me. 1971).

<sup>10</sup> *Newell v. State*, 277 A.2d 731, 735 (Me. 1971).

<sup>11</sup> See Brief for the State Government Amici Curiae, *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>12</sup> *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

<sup>13</sup> *Newell v. State*, 277 A.2d 731, 735-36 (Me. 1971) (emphasis added).

persons who are without attorneys and who are facing criminal charges which might result in the imposition of a penalty of imprisonment for a period of more than six months or a fine of more than \$500 or both . . . must be informed by the Court of their right to appointed counsel and must have such counsel appointed unless they waive this right.<sup>14</sup>

The next year, the U.S. Supreme Court extended the right to counsel to all misdemeanors with a potential jail sentence regardless of duration.<sup>15</sup>

The Fourteenth Amendment requires Maine, as it does all states, to enforce Sixth Amendment case law. Since *Gideon*, the U.S. Supreme Court has expressly clarified that the Sixth Amendment requires the appointment of counsel for the poor threatened with jail time in misdemeanors,<sup>16</sup> misdemeanors with suspended sentences,<sup>17</sup> direct appeals,<sup>18</sup> and appeals challenging a sentence imposed following a guilty plea where the sentence was not agreed to in advance.<sup>19</sup> Children in delinquency proceedings, no less than adults in criminal courts, are entitled by the Fourteenth Amendment due process clause to appointed counsel when facing the loss of liberty.<sup>20</sup> Moreover, the appointed lawyer needs to be more than merely a warm body with a bar card.<sup>21</sup> The attorney must also be effective,<sup>22</sup> subjecting the prosecution's case to "the crucible of meaningful adversarial testing."<sup>23</sup>

<sup>14</sup> *Newell v. State*, 277 A.2d 731, 737-38 (Me. 1971).

<sup>15</sup> *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

<sup>16</sup> *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

<sup>17</sup> *Alabama v. Shelton*, 505 U.S. 654 (2002).

<sup>18</sup> *Douglas v. California*, 372 U.S. 353 (1963).

<sup>19</sup> *Halbert v. Michigan*, 545 U.S. 605 (2005).

<sup>20</sup> *In re Gault*, 387 U.S. 1 (1967). "[I]t would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase 'due process.' Under our Constitution, the condition of being a boy does not justify a kangaroo court." *Id.* at 27-28. "A proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution. The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child 'requires the guiding hand of counsel at every step in the proceedings against him.' . . . [T]he assistance of counsel is essential for purposes of waiver proceedings, [and] we hold now that it is equally essential for the determination of delinquency, carrying with it the awesome prospect of incarceration in a state institution until the juvenile reaches the age of 21." *Id.* at 36.

<sup>21</sup> As the Court noted in *Strickland v. Washington*, 466 U.S. 668, 685 (1984), "[t]hat a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command."

<sup>22</sup> *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) ("It has long been recognized that the right to counsel is the right to the effective assistance of counsel."). To be effective, an attorney must be reasonably competent, providing to the particular defendant in the particular case the assistance demanded of attorneys in criminal cases under prevailing professional norms, such as those "reflected in American Bar Association standards and the like." *Strickland v. Washington*, 466 U.S. 668, 688-89 (1984).

<sup>23</sup> *United States v. Cronin*, 466 U.S. 648, 656 (1984).

“States are free to provide greater protections in their criminal justice system than the Federal Constitution requires,”<sup>24</sup> but they cannot provide less. Though the federal Constitution does not require it,<sup>25</sup> Maine statutorily guarantees appointed counsel to indigent defendants in post-conviction review proceedings from a criminal conviction, a judgment of not criminally responsible by reason of insanity, or a delinquency adjudication.<sup>26</sup> The U.S. Supreme Court has yet to expand *Gideon*’s promise to civil matters, but Maine provides a right to counsel to indigent parents/custodians in child protection proceedings and to individuals in hearings for their involuntary commitment to a psychiatric hospital or involuntary treatment therein.<sup>27</sup>

Today in Maine, all indigent legal services in every type of case are provided under the auspices of the Maine Commission on Indigent Legal Services.<sup>28</sup>

## MAINE COMMISSION ON INDIGENT LEGAL SERVICES

Historically, Maine’s counties were responsible for funding all indigent defense services, except the state paid for public defense in post-conviction proceedings, and individual justices and judges appointed attorneys on a case-by-case basis.<sup>29</sup>

Within two years of the *Gideon* decision, the manner in which Maine funded and administered its Fourteenth Amendment obligation to provide the Sixth Amendment right to counsel was questioned. In 1965, the Maine Judicial Council expressed “dissatisfaction” with the “functioning of the assigned counsel system,” noting the lack

<sup>24</sup> *California v. Ramos*, 463 U.S. 992, 1014 (1983). See, e.g., *Oregon v. Hass*, 420 U.S. 714, 719 (1975); *Cooper v. California*, 386 U.S. 58, 62 (1967); *O’Connor v. Johnson*, 287 N.W.2d 400, 405 (Minn. 1979) (“The states may, as the United States Supreme Court has often recognized, afford their citizens greater protection than the safeguards guaranteed in the Federal Constitution. Indeed, the states are ‘independently responsible for safeguarding the rights of their citizens.’”); *South Dakota v. Opperman*, 247 N.W.2d 673, 674 (S.D. 1976) (“There can be no doubt that this court has the power to provide an individual with greater protection under the state constitution than does the United States Supreme Court under the federal constitution.”).

<sup>25</sup> *Murray v. Giarratano*, 492 U.S. 1, 10 (1989); *Pennsylvania v. Finley*, 481 U.S. 551, 555-57 (1987); *Ross v. Moffitt*, 417 U.S. 600, 610-12, 617-18 (1974).

<sup>26</sup> ME. REV. STAT. ANN. tit. 15, § 2129 (2018); ME. R. UNIFIED CRIM. PROC. 69.

<sup>27</sup> ME. REV. STAT. ANN. tit. 22, §§ 4005(2), 4052(3)(H) (2018) (child protection proceedings); ME. REV. STAT. ANN. tit. 34-B, § 3864(1)(D),(5)(D) (2018) (involuntary commitment/treatment hearings). There are a number of other civil proceedings in which Maine allows, but does not require, courts to appoint counsel at public expense. See, e.g., ME. REV. STAT. ANN. tit. 15, § 2138(3) (2018) (indigent petitioners in post-judgment of conviction motions for DNA testing); ME. REV. STAT. ANN. tit. 15, § 2183(2) (2018) (indigent victims of identity theft seeking a factual determination of innocence and to correct court records); ME. REV. STAT. ANN. tit. 22, § 4005(1)(F) (2018) (children in child protection proceedings); ME. REV. STAT. ANN. tit. 15, § 3506-A(3) (2018) (children in petitions for emancipation).

<sup>28</sup> ME. REV. STAT. ANN. tit. 4, §§ 1801, 1804(3)(A) (2018).

<sup>29</sup> JUDICIAL COUNCIL OF MAINE, THE REPORT OF THE JUDICIAL COUNCIL TO THE 103RD LEGISLATURE ON THE SUBJECT OF DEFENSE SYSTEMS FOR INDIGENT PERSONS ACCUSED OF CRIMINAL OFFENSES 3-6 (1967), available at [http://lldc.mainelegislature.org/Open/Rpts/kf9646\\_z99m22\\_1967.pdf](http://lldc.mainelegislature.org/Open/Rpts/kf9646_z99m22_1967.pdf).

of uniformity between counties based on disparate funding levels,<sup>30</sup> and in 1967, the council recommended to the legislature that all indigent defense funding should come from the state.<sup>31</sup> In 1971, the Institute of Judicial Administration reviewed limited court data and concluded that, although the data could not determine conclusively that the assigned counsel system was defective, “neither do they justify much confidence that the assigned counsel system is working well.”<sup>32</sup> Study after study questioned the manner in which Maine administered the right to counsel.<sup>33</sup> Despite these concerns, the State of Maine did not take over 100% responsibility for funding indigent legal services until 1976.<sup>34</sup> Even then, the provision of attorneys to represent the indigent remained a court function, with judges maintaining lists of private attorneys willing to take cases and individually appointing lawyers to cases.

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.”<sup>35</sup> MCILS is required to promulgate standards for: eligibility for indigent legal services; attorney qualifications, experience, and training; attorney caseloads; attorney evaluations; conflicts of interests;

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<sup>30</sup> See INSTITUTE OF JUDICIAL ADMINISTRATION, THE SUPREME JUDICIAL COURT AND THE SUPERIOR COURT OF THE STATE OF MAINE 57-58 (1971).

<sup>31</sup> JUDICIAL COUNCIL OF MAINE, THE REPORT OF THE JUDICIAL COUNCIL TO THE 103RD LEGISLATURE ON THE SUBJECT OF DEFENSE SYSTEMS FOR INDIGENT PERSONS ACCUSED OF CRIMINAL OFFENSES 15 (1967).

<sup>32</sup> INSTITUTE OF JUDICIAL ADMINISTRATION, THE SUPREME JUDICIAL COURT AND THE SUPERIOR COURT OF THE STATE OF MAINE 57-58 (1971).

<sup>33</sup> See, e.g., INDIGENT LEGAL SERVICES COMM’N, REPORT OF THE INDIGENT LEGAL SERVICES COMMISSION 4 & n.5 (2009), available at [https://www.courts.maine.gov/reports\\_pubs/reports/pdf/Report%20of%20ILSC%202009%20\(2-13-09\).pdf](https://www.courts.maine.gov/reports_pubs/reports/pdf/Report%20of%20ILSC%202009%20(2-13-09).pdf).

<sup>34</sup> ME. REV. STAT. ANN. tit. 4, § 22 (2018) (“Beginning with the fiscal year commencing July 1, 1976, the Legislature shall appropriate funds for the expenses of the Judicial Department.”); ME. REV. STAT. ANN. tit. 15, § 810 (2018) (courts to compensate appointed defense counsel).

State funding of indigent defense services has proven, across the nation, to be the most stable for two principle reasons. First, local governments have significant revenue-raising restrictions placed on them by the state while generally being statutorily prohibited from deficit spending. Second, the jurisdictions that are often most in need of indigent defense services are the ones that are least likely to be able to afford it. That is, the factors that cause property values to be low and limit a local government’s revenues – such as high unemployment, high poverty rates, limited household incomes, and limited education, etc. – are often the exact same circumstances that lead to an increased need for right to counsel services. In high poverty areas, a larger percentage of people accused of crime will be indigent and qualify for public defense services. Further, the counties with high levels of poverty have to spend more on other social services, such as uninsured medical treatment or housing assistance, leaving less money available for protecting people’s rights under the Sixth Amendment.

<sup>35</sup> ME. REV. STAT. ANN. tit. 4, § 1801 (2018).

reimbursement of expenses; and all “[o]ther standards considered necessary and appropriate to ensure the delivery of adequate indigent legal services.”<sup>36</sup>

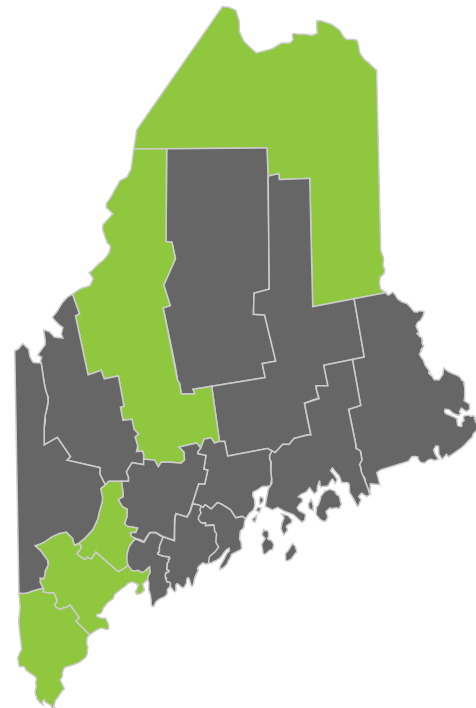
## THE CURRENT STUDY

In 2017, the Maine legislature created the Working Group to Improve the Provision of Indigent Legal Services and charged it to “develop recommendations to improve the delivery of indigent legal services to those eligible to receive such services.”<sup>37</sup>

In December 2017, the Working Group final report found, among other items, that MCILS “does not have systemic oversight and evaluation of attorneys” and is in need of stronger fiscal management.<sup>38</sup> Among its recommendations, the Working Group advocated for “an outside, independent, nonpartisan study of Maine’s current system of providing indigent legal services” to determine if alternative methods of delivery would “increase quality and efficiency.”<sup>39</sup> In March 2018, the Maine Legislative Council contracted the Sixth Amendment Center (6AC)<sup>40</sup> 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 a representative segment of services throughout Maine. On June 19, 2018, the Joint Legislative Judiciary Committee selected the following counties as a representative sample of Maine’s diversity in population size, geographic location, and methods of providing indigent legal representation: Androscoggin, Aroostook, Cumberland, Somerset, and York. The

Sample counties selected for statewide study



<sup>36</sup> ME. REV. STAT. ANN. tit. 4, § 1804 (2018).

<sup>37</sup> An Act Making Unified Appropriations, 2017 Me. Acts ch. 284 at 701-03, § UUUU-17, available at <https://mainelegislature.org/legis/bills/getPDF.asp?paper=HP0281&item=57&snum=128>.

<sup>38</sup> STATE OF MAINE, 128TH LEGISLATURE, WORKING GROUP TO IMPROVE THE PROVISION OF INDIGENT LEGAL SERVICES, REPORT 1 (2017), available at <http://legislature.maine.gov/doc/2013>.

<sup>39</sup> STATE OF MAINE, 128TH LEGISLATURE, WORKING GROUP TO IMPROVE THE PROVISION OF INDIGENT LEGAL SERVICES, REPORT 14 (2017), available at <http://legislature.maine.gov/doc/2013>.

<sup>40</sup> The 6AC is a non-partisan, non-profit organization that objectively evaluates public defense systems using Sixth Amendment case law and national standards for right to counsel services as the uniform baseline measure for providing attorneys to indigent people, along with the requirements of local and federal laws. See *6AC & Our Work*, SIXTH AMENDMENT CENTER, <http://sixthamendment.org/about-us/>.

6AC's work on site in these sample counties began in August 2018 and concluded in January 2019.

## Methodology

The 6AC's assessment of public defense services in Maine has been carried out through three basic components.

*Data collection.* Information about how a jurisdiction provides right to counsel services exists in a variety of forms, from statistical information to policies and procedures. 6AC obtained and analyzed relevant hard copy and electronic information at both the local and state levels.

*Court observations.* Right to counsel services in each jurisdiction involve interactions among at least three critical processes: (1) the process individual defendants experience as their cases advance from arrest or summons through disposition; (ii) the process the defense attorney experiences while representing each individual at the various stages of a case; and (iii) the substantive laws and procedural rules that govern the justice system in which public representation is provided. Throughout the sample counties, the 6AC conducted courtroom observations in the trial courts to clarify these processes.<sup>41</sup>

*Interviews.* No individual component of the criminal justice system operates in a vacuum. Rather, the policy decisions of one component necessarily affect another. Because of this, the 6AC conducted interviews with a broad cross-section of stakeholder groups before, during, and after site visits to the various counties.<sup>42</sup> In addition to speaking with public defense attorneys, the 6AC interviewed judges, prosecutors, court clerks & administrators, and law enforcement & jail administrators, among others, and also interviewed members of the MCILS and staff.

## Assessment criteria

The criteria used to assess the effectiveness of Maine's indigent legal services system and attorneys come principally from two U.S. Supreme Court cases, decided on the same day: *United States v. Cronin*<sup>43</sup> and *Strickland v. Washington*.<sup>44</sup> *Strickland* is used after a criminal case is final to determine retrospectively whether the lawyer provided effective assistance of counsel; it sets out the two-pronged test of whether the appointed lawyer's actions were unreasonable and prejudiced the outcome of the case. *Cronin* explains that, if certain systemic factors are present (or necessary factors are absent) at the outset of the case, then a court should presume that ineffective assistance of counsel will occur.

<sup>41</sup> The 6AC conducted observations in ten courtrooms across the five sample counties.

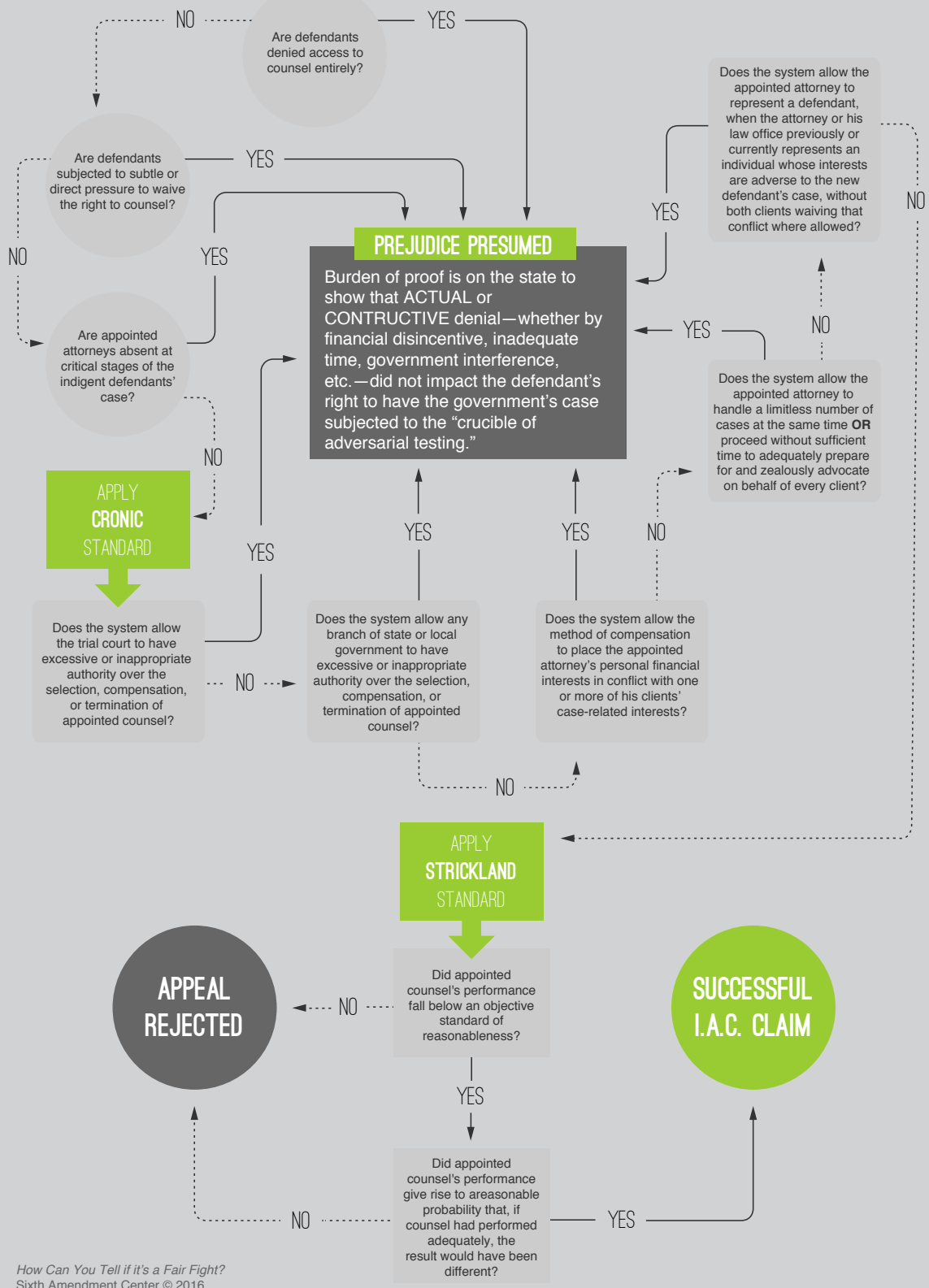
<sup>42</sup> The 6AC interviewed 83 individuals, many on more than one occasion. Some interviews were conducted in person and others by telephone before or after the site visit.

<sup>43</sup> 466 U.S. 648 (1984).

<sup>44</sup> 466 U.S. 668 (1984).

# HOW CAN YOU TELL IF IT'S A FAIR FIGHT?

The U.S. Supreme Court says: "While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators." Unfortunately, where systems fail, it leaves the fundamental fairness of criminal and delinquency court proceedings in doubt.



## Understanding *Cronic* through the American Bar Association's *Ten Principles of a Public Defense Delivery System*

Adopted by the ABA House of Delegates in 2002, the ABA *Ten Principles*<sup>a</sup> are self-described as constituting “the fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney.” The *Ten Principles* include the markers of a *Cronic* analysis: independence of the defense function (Principle 1); effective representation by counsel at all critical stages (Principles 3 and 7); sufficiency of time and resources (Principles 4, 5, and 8); and qualifications, supervision, and training of attorneys (Principles 6, 9, and 10).

<sup>a</sup> AMERICAN BAR ASS'N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (2002), available at [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_tenprinciplesbooklet.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf).

Hallmarks of a structurally sound indigent defense system under *Cronic* – as will be discussed in subsequent chapters – include the early appointment of qualified and trained attorneys with sufficient time to provide effective representation under independent supervision. The absence of any of these factors can show that a system is presumptively providing ineffective assistance of counsel.

### U.S. Department of Justice application of assessment criteria

The United States Department of Justice (DOJ) urges this application of *Cronic*. On September 25, 2014, the DOJ filed a Statement of Interest<sup>45</sup> in a class action lawsuit, *Hurrell-Harring v. New York*, brought by the New York Civil Liberties Union alleging a systemic denial of counsel in five upstate New York counties.<sup>46</sup> The Statement of Interest provides DOJ's expertise to the court on what constitutes a “constructive” denial of counsel under the Sixth Amendment. In short, the DOJ statement establishes that a court does not have to wait for a case to be disposed of and then try to unravel retrospectively whether a specific defendant's representation met the aims of *Gideon* and its progeny. If it is shown at the outset of a case that state or local governments create structural impediments that make the appointment of counsel “superficial” to the point of “non-representation,” a court can step in and presume prospectively that

<sup>45</sup> Statement of Interest of the United States, *Hurrell-Harring v. New York*, No. 8866-07 (N.Y. Sup. Ct., filed Sept. 1, 2014), available at <https://www.clearinghouse.net/chDocs/public/PD-NY-0002-0010.pdf>.

<sup>46</sup> In March 2015, the case settled on the eve of trial with the State of New York agreeing to pay 100% of all indigent defense costs in the counties that were named defendants. Stipulation and Order of Settlement, *Hurrell-Harring v. New York*, No. 8866-07 (N.Y. Sup. Ct., filed Oct. 21, 2014). The state agreed to pay \$5.5 million in attorneys' fees and costs to the NYCLU and the law firm representing the plaintiffs. The lawsuit settlement has sparked greater advocacy for the state to pick up 100% of all indigent defense costs in the remaining upstate counties.



the representation is ineffective. The types of government interference enunciated in the DOJ Statement of Interest include (but most assuredly are not limited to): “a severe lack of resources,” “unreasonably high caseloads,” “critical understaffing of public defender offices,” and/or anything else making the “traditional markers of representation” go unmet (i.e., “timely and confidential consultation with clients,” “appropriate investigations,” and adversarial representation, among others).<sup>47</sup>

In another Statement of Interest<sup>48</sup> filed August 14, 2013, in *Wilbur v. City of Mount Vernon*, the DOJ comments specifically on the issue of public defense attorneys having sufficient time to provide adequate representation. At the heart of the *Wilbur* case was the issue of how excessive caseloads of public defense attorneys resulted in deficient representation under the Sixth Amendment to the U.S. Constitution.<sup>49</sup> At the

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<sup>47</sup> A trial court denied a motion to dismiss the lawsuit, but an intermediate court granted the dismissal. In 2010, the New York Court of Appeals reinstated the lawsuit. (*Hurrell-Harring v. New York*, 930 N.E.2d 217 (N.Y. 2010)). The court found that the complaint alleged claims of both outright denial of the right to counsel and constructive denial of counsel where attorneys were appointed in name only but were unavailable to assist their clients, thus “stat[ing] cognizable Sixth Amendment claims.” “These allegations state a claim, not for ineffective assistance under *Strickland*, but for basic denial of the right to counsel under *Gideon*.”

Quoting *Strickland*, the Court went on to note that “[i]n certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice.” The Court held that the allegations contained in the class action lawsuit “state claims falling precisely within this described category. . . . Given the simplicity and autonomy of a claim for non-representation, as opposed to one truly involving the adequacy of an attorney’s performance, there is no reason . . . why such a claim cannot or should not be brought without the context of a completed prosecution.” Further, the court observed: “the right that plaintiffs would enforce – that of a poor person accused of a crime to have counsel provided for his or her defense – is the very same right that *Gideon* has already commanded the States to honor as a matter of fundamental constitutional necessity. There is no argument that what was justiciable in *Gideon* is now beyond the power of a court to decide.” *Hurrell-Harring*, 930 N.E.2d, at 227.

After seven years of litigation, the lawsuit settled by agreement in October 2014 and was approved by the trial court on March 11, 2015 (Stipulation and Order of Settlement, *Hurrell-Harring v. New York*, 930 N.E.2d 217 (N.Y. Ct. App. 2010) (No 8866-07)). Under the settlement, the state was required to: (1) pay 100% of the cost in the five named counties; (2) ensure that all indigent defendants are represented by counsel at their arraignment; (3) establish and implement caseload standards for all attorneys; and (4) assure the availability of adequate support services and resources.

<sup>48</sup> Statement of Interest of the United States, *Wilbur v. City of Mount Vernon*, No. C11-1100RSL (W.D. Wash., filed Aug. 14, 2013), available at <http://www.justice.gov/crt/about/spl/documents/wilbursoi8-14-13.pdf>.

<sup>49</sup> “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.” *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122 (W.D. Wash. 2013). Thus concluded U.S. District Judge Robert Lasnik in the court’s decision granting injunctive relief against the Washington cities of Mount Vernon and Burlington for “regularly and systematically” providing deficient right to counsel services to the indigent accused. Announcing that “adversarial testing of the government’s case” was so infrequent as to be a “non-factor in the functioning of the Cities’ criminal justice system,” the court found the appointment of counsel in Mount Vernon and Burlington to be “little more than a formality,” resulting in plea bargains having almost nothing to do with the individualized nature of each case. Importantly, the court found the cities culpable because this

time the original complaint was filed in 2011, the cities of Mt. Vernon and Burlington, Washington, jointly contracted with two private attorneys to represent indigent defendants in their municipal courts, as they had done “for nearly a decade.” Under the contract, the two attorneys served together as “the public defender” and were paid a flat annual fee out of which they had to provide all “investigative, paralegal, and clerical services” without any additional compensation. In other words, the more work and non-attorney support they dedicated to their clients’ cases, the less each attorney’s take-home pay. And each contracting attorney handled between 950 and 1,150 appointed cases each year, in addition to maintaining a healthy private practice on the side. With such heavy caseloads, the contract defenders were alleged to “regularly fail to return calls” or “meet with” or “interview” their clients and “rarely, if ever, investigate the charges made against” their clients. And the cities’ failure to adequately “monitor and oversee” the system they operated by way of the contract amounted to a “construct[ive] denial of the right to counsel” as guaranteed under *Gideon*.<sup>50</sup>

The DOJ has twice filed amicus briefs furthering their position on constructive denial of counsel. Most recently, on May 12, 2016, DOJ filed an amicus brief<sup>51</sup> in the Supreme Court of Idaho in *Tucker v. Idaho*, in which the ACLU of Idaho alleges systemic denial of counsel for the indigent accused. As in *Hurrell-Harring*, the DOJ states in *Tucker* that a “constructive denial of counsel violating *Gideon* occurs where the traditional markers of representation are frequently absent or significantly compromised as a result of systemic, structural limitations.”<sup>52</sup> On September 11,

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lack of adversarial testing of the prosecution’s cases was “natural, foreseeable, and expected,” given the deficient structure of indigent defense services.

<sup>50</sup> Pointing to the *ABA Ten Principles of a Public Defense Delivery System*, the DOJ urged the court to consider that every jurisdiction should have caseload controls, but that:

caseload limits alone cannot keep public defenders from being overworked into ineffectiveness; two additional protections are required. First, a public defender must have the authority to decline appointments over the caseload limit. Second, caseload limits are no replacement of a careful analysis of a public defender’s *workload*, a concept that takes into account all of the factors affecting a public defender’s ability to adequately represent clients, such as the complexity of cases on a defender’s docket, the defender’s skill and experience, the support services available to the defender, and the defender’s other duties.

Statement of Interest of the United States at 9, *Wilbur v. City of Mount Vernon*, No. C11-1100RSL (W.D. Wash., filed Aug. 14, 2013).

<sup>51</sup> Brief for the United States as Amicus Curiae Supporting Plaintiffs-Appellants, *Tucker v. Idaho*, No. 43922-2016 (Idaho, filed May 11, 2016), *available at* <https://www.justice.gov/crt/file/851311/download>.

<sup>52</sup> On April 28, 2017, the Idaho Supreme Court found that indigent defendants “suffered ascertainable injuries by being actually and constructively denied counsel at critical stages of the prosecution, which they allege are the result of deficiencies in Idaho’s public defense system.” (*Tucker v. Idaho*, No. 43922 at 18.) The alleged injuries are “fairly traceable” to the state and the public defense commission, since the state “has ultimate responsibility to ensure that the public defense system passes constitutional muster.” (*Tucker v. Idaho*, No. 43922 at 9.) Importantly, the court explained that the two-pronged ineffective assistance of counsel test of *Strickland* “is inapplicable when systemic deficiencies in the provision of public defense are at issue. The issues raised in this case do not implicate *Strickland*.” (*Tucker v. Idaho*, No. 43922. at 7.) Instead, the court held the appropriate standard is that of *United States v. Cronin*: “[a] criminal defendant who is entitled to counsel but goes unrepresented at a critical

2015, the DOJ filed an amicus brief<sup>53</sup> in *Kuren v. Luzerne County* at the Pennsylvania Supreme Court. The Kuren class action lawsuit alleges that the county so poorly funded right to counsel services as to constructively deny counsel to the indigent accused. The DOJ amicus brief makes clear that a civil constructive denial of counsel claim is an “effective way for litigants to seek to effectuate the promise of *Gideon*,” and “[p]ost-conviction claims cannot provide systemic structural relief that will help fix the problem of under-funded and under-resourced public defenders.”<sup>54</sup>

The DOJ has also made clear that its *Cronic* analysis applies equally to juvenile delinquency proceedings, through its Statement of Interest<sup>55</sup> in *N.P. v. Georgia*, filed March 13, 2015. The Southern Center for Human Rights filed the class action lawsuit alleging that children were regularly denied their right to counsel and instead treated to “assembly-line justice” in the Cordele Judicial Circuit. According to lawsuit’s allegations, children regularly appeared in court without lawyers, and those who did receive representation were assigned lawyers who did not have time to talk with them before court. The suit claimed that the Cordele Circuit Public Defender Office was structurally unable to provide meaningful representation due to chronic underfunding and understaffing. The DOJ statement provides the trial court with a *Cronic* framework to evaluate the claims.<sup>56</sup>

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stage of prosecution suffers an actual denial of counsel and is entitled to a presumption of prejudice.” Tucker v. Idaho, No. 43922, at 7).

<sup>53</sup> Brief for the United States as Amicus Curiae in Support of Appellants, *Kuren v. Luzerne County*, Nos. 57 MAP 2015 (Pa., filed Sept. 10, 2015), available at <https://www.justice.gov/opa/file/769806/download>.

<sup>54</sup> In 2016, Pennsylvania’s high court ruled that indigent defendants have the right to prospectively challenge “systemic violations of the right to counsel due to underfunding, and to seek and obtain an injunction forcing a county to provide adequate funding to a public defender’s office,” at the outset of a case before having to suffer from denial of counsel. (*Kuren v. Luzerne County*, 146 A.3d 715, at 718.) The court said it was “obvious” that “the mere existence of a public defender’s office and the assignment of attorneys by that office” was not sufficient to satisfy the right to counsel, because “[i]t is the defense itself, not the lawyers as such, that animates *Gideon*’s mandate.” *Kuren v. Luzerne County*, 146 A.3d 715, at 735.) If the appointed lawyers cannot provide a defense, “the promise of the Sixth Amendment is broken.” The court observed that “*Strickland* does not limit claims asserting Sixth Amendment violations to the post-conviction context,” and it found that the *Strickland* test of ineffective assistance of counsel should be used by courts in evaluating post-conviction claims, but that “[a]pplying the *Strickland* test to the category of claims at bar would be illogical.” (*Kuren v. Luzerne County*, 146 A.3d 715, at 746).

<sup>55</sup> Statement of Interest of the United States, *N.P. v. Georgia*, No. 2014-CV-241025 (Ga. Super. Ct., filed Mar. 13, 2015), available at [http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/13/np\\_v\\_state\\_of\\_georgia\\_usa\\_statement\\_of\\_interest.pdf](http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/13/np_v_state_of_georgia_usa_statement_of_interest.pdf).

<sup>56</sup> A month after the DOJ filed its statement of interest, on April 20, 2015 the defendants in the class action lawsuit – the Georgia Public Defender Standards Council, the Cordele Circuit Public Defender, and the four counties in the circuit – agreed to settle the matter. Consent Decree, *N.P. v. Georgia*, No. 2014-CV-241025 (Ga. Super. Ct., filed Apr. 20, 2015). The approved consent decree seeks to address a number of structural flaws. Specifically, it will: increase the size of the public defender’s office staff; require public defenders to meet with clients (a) within three days of their detainment to determine indigency, and (b) within three days of assignment to their case; and require defenders to receive training, including specific training for juvenile defenders. The consent decree requires public defenders

Finally, the DOJ has taken action to enforce the four main principles enumerated in *Cronic*. On April 26, 2012, the DOJ Civil Rights Division delivered a report, *Investigation of the Shelby County Juvenile Court*,<sup>57</sup> to officials in Shelby County (Memphis), Tennessee, stating that the juvenile court of Memphis and Shelby County (JCMSC) “fails to ensure due process for all children appearing for delinquency proceedings” in direct violation of the U.S. Supreme Court’s ruling in *In re Gault*.<sup>58</sup> An agreement was reached requiring the county and JCMSC to ensure, among other things, that “juvenile defenders have appropriate administrative support, reasonable workloads, and sufficient resources to provide independent, ethical, and zealous representation to children in delinquency matters” at “all stages of the juvenile delinquency case, including pre-adjudicatory investigation, litigation, dispositional advocacy, and post-dispositional advocacy,” for as long as a case is active.<sup>59</sup> The agreement additionally requires “the promulgation and adoption of attorney practice standards” and the “supervision and evaluation” of defense attorneys “against such practice standards.”

## MAINE'S CRIMINAL JUSTICE SYSTEM

Indigent legal services are one component of the broader justice system. The system that provides representation to the indigent has no control over the number or type of cases it is required to handle each year; those decisions are made by law enforcement officers as they make arrests and by prosecutors as they institute cases. The right to counsel is carried out most visibly in the courts. Because the indigent legal system is intertwined with these other components of the criminal justice system, this section describes Maine’s law enforcement, prosecution, and trial courts.

Throughout the balance of this report, a detailed description of Aroostook County serves as an example of how criminal justice is administered locally throughout Maine. These bulleted sections are set apart from the body of the report. Aroostook County is chosen as the example because its dispersed population across a larger geographic area relative to other Maine counties and its unique court structure present some issues not present in the other sample counties.<sup>60</sup>

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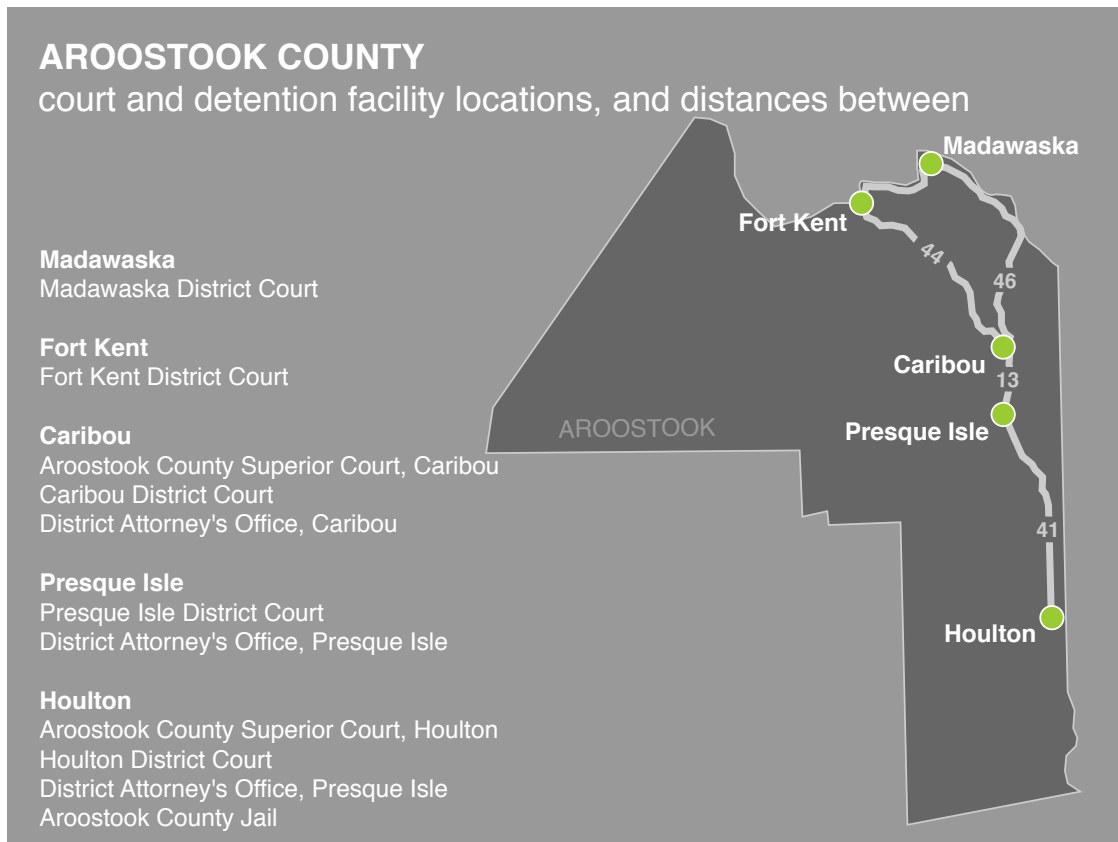
to advise juvenile defendants seeking to waive their right to counsel what a lawyer could do for them and also requires the public defender office to comply with the terms of the Georgia Indigent Defense Act of 2003 including by creating a specialized juvenile division.

<sup>57</sup> UNITED STATES DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, INVESTIGATION OF SHELBY COUNTY JUVENILE COURT (Apr. 26, 2012), available at [http://www.justice.gov/sites/default/files/crt/legacy/2012/04/26/shelbycountyjuv\\_findingsrpt\\_4-26-12.pdf](http://www.justice.gov/sites/default/files/crt/legacy/2012/04/26/shelbycountyjuv_findingsrpt_4-26-12.pdf).

<sup>58</sup> 387 U.S. 1 (1967).

<sup>59</sup> UNITED STATES DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, MEMORANDUM OF AGREEMENT REGARDING THE JUVENILE COURT OF MEMPHIS AND SHELBY COUNTY (Dec. 17, 2012), available at <http://sixthamendment.org/wp-content/uploads/2012/12/DOJ-ShelbyAgreement.pdf>.

<sup>60</sup> *Quick Facts: Aroostook County, Maine*, U.S. Census Bureau (July 1, 2017). Aroostook County is the geographically largest county east of the Mississippi, covering more square miles than Connecticut



## Law enforcement

Various law enforcement organizations and state agencies<sup>61</sup> may refer criminal cases to district attorneys for prosecution across the state. Generally, state police, county sheriff departments, and municipal police departments<sup>62</sup> are the primary law enforcement

and Rhode Island combined. It has 6,671 square miles with a population of 67,653; approximately 10.8 people per square mile. The county seat is Houlton, where only approximately 8.59% of the population lives (pop. 5,813). A greater percentage of the county's population lives in two other municipalities: Caribou (pop. 7,684) and Presque Isle (pop. 9,078). There are two other less populated centers in the far north: Madawaska (pop. 4,035) and Fort Kent (pop. 4,097). Aroostook County's population is 94.1% white and 2% Native American. Only 18.1% of the population has a college degree or higher. The median household income is \$38,087, with 16.3% of the population living in poverty.

<sup>61</sup> The following state agencies may refer criminal cases: Maine Department of Corrections, Maine Department of Inland Fisheries and Wildlife, Maine Marine Patrol, Maine State Police, Maine Bureau of Capitol Police, Maine Drug Enforcement Agency, Maine Forest Services, Office of the Maine Attorney General Investigations Division, and Maine Campus Police (University of Maine – Orono; University of Southern Maine; University of Maine – Farmington). 2008 *Census of State and Local Law Enforcement Agencies*, U.S. BUREAU OF JUSTICE STATISTICS, available at <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=2216> (last visited Nov. 13, 2018).

<sup>62</sup> There are 112 municipalities that fund local police departments in Maine. 2008 *Census of State and Local Law Enforcement Agencies*, U.S. BUREAU OF JUSTICE STATISTICS, available at <https://www.bjs.gov/>

agencies in Maine. Each county has a sheriff's office that carries out both a police function and a detention function.<sup>63</sup> The counties pay for the sheriff's police function, and the state pays for the sheriff's detention function.

- In Aroostook County, nine towns have local police departments that may refer cases to the district attorney.<sup>64</sup> The Aroostook County Sheriff polices everywhere outside of these municipalities,<sup>65</sup> except the State Police oversee state highways. Arrests in Aroostook County can also be made by the Maine Warden Services (fisheries and wildlife offenses) and the Maine Forest Rangers (offenses within Maine State Parks).<sup>66</sup>

### Prosecution

Maine has eight elected district attorneys,<sup>67</sup> each elected to a four-year term of office. Three are elected from single county districts (Aroostook, Cumberland, and York), and five are elected from multi-county districts (District 3: Androscoggin, Franklin, and Oxford; District 4: Kennebec and Somerset; District 5: Penobscot and Piscataquis; District 6: Know, Lincoln, Sagadahoc, and Waldo; and District 7: Hancock and Washington).<sup>68</sup> The state funds salaries of district attorneys and assistant district attorneys,<sup>69</sup> and the counties pay for support staff and overhead (office space, utilities, etc.).<sup>70</sup> District attorneys and assistant district attorneys may not engage in private practice.<sup>71</sup>

- The Aroostook County District Attorney has offices in three locations (Caribou, Houlton, and Presque Isle), with the principal office in Caribou.<sup>72</sup> There are

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[index.cfm?ty=pbdetail&iid=2216](#) (last visited Nov. 13, 2018).

<sup>63</sup> The sheriff in each county is elected to a four-year term. Me. Const. art IX, § 10.

<sup>64</sup> These towns are Ashland, Caribou, Fort Fairfield, Fort Kent, Houlton, Limestone, Presque Isle, Van Buren, and Washburn.

<sup>65</sup> The law enforcement budget for the Aroostook County Sheriff in FY 2017 was \$1,530,034. See COUNTY OF AROOSTOOK, 2018 COUNTY BUDGET at 25, available at [https://www.arostook.me.us/images/2018\\_County\\_Budget.pdf](https://www.arostook.me.us/images/2018_County_Budget.pdf).

<sup>66</sup> Although the Warden Services and Forest Rangers have the authority to arrest, it is rare for them to do so and most offenses are dealt with through a summons.

<sup>67</sup> ME. REV. STAT. ANN. tit. 30-A, § 254 (2018).

<sup>68</sup> ME. REV. STAT. ANN. tit. 30-A, § 254 (2018).

<sup>69</sup> ME. REV. STAT. ANN. tit. 30-A, § 256 (2018).

<sup>70</sup> ME. REV. STAT. ANN. tit. 30-A, § 281 (2018).

<sup>71</sup> ME. REV. STAT. ANN. tit. 30-A, § 256(2) (2018).

<sup>72</sup> The Caribou office also oversees prosecutions in Fort Kent and Madawaska. The county's costs for the Aroostook County district attorney in FY 2017 were \$470,796. County of Aroostook 2018 County Budget at 7 (2018), available at [https://www.arostook.me.us/images/2018\\_County\\_Budget.pdf](https://www.arostook.me.us/images/2018_County_Budget.pdf). State costs for the Aroostook County district attorney office in FY 2017 were \$776,917.50. Email from Mark A. Toulouse, Division Chief – Finance & Administrative Services Office of the Attorney General State of Maine, to David Carroll, Executive Director of Sixth Amendment Center (Mar. 12, 2019). Therefore, in FY 2017 the combined state and local budget for the

two assistant district attorneys in each office, and the assistant district attorneys reportedly have “significant discretion” in the handling of their cases.

### Trial courts

Maine has two types of trial courts with criminal jurisdiction: superior court and district court.<sup>73</sup> The *Maine Rules of Unified Criminal Procedure* implement a “unified criminal docket,”<sup>74</sup> allowing all criminal proceedings to be heard by any superior court justice or district court judge at a courthouse located in the county where the criminal conduct occurred,<sup>75</sup> maximizing access to courts to speed the resolution of cases. Justices and judges of each court can sit on the other court as assigned by the chief justice.<sup>76</sup> The unified court docket for criminal proceedings was implemented in all counties as of July 1, 2015.<sup>77</sup> Jurisdiction over and responsibility for civil proceedings continues to be divided between the superior court and the district court.<sup>78</sup>

Maine has a single superior court made up of 17 justices (plus seven active retired justices) who each have exactly the same authority and can sit anywhere in the state.<sup>79</sup> There is one superior court courthouse in each county, except for in Aroostook County which has two (in Houlton and in Caribou), for a total of 17 superior court courthouses.<sup>80</sup> The chief justice of the superior court determines when the grand jury is convened.<sup>81</sup>

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Aroostook County District Attorney office was \$1,247,713.50.

<sup>73</sup> Probate courts are not addressed in this report because they do not have criminal jurisdiction. ME. REV. STAT. ANN. tit. 4, § 251 (2018); ME. REV. STAT. ANN. tit. 18-C, §§ 1-201(8), 1-302 (eff. July 1, 2019); ME. REV. STAT. ANN. tit. 18-A, §§ 1-2-1(5), 1-302 in effect until July 1, 2019).

<sup>74</sup> ME. R. UNIFIED CRIM. PROC. 57(i).

<sup>75</sup> ME. R. UNIFIED CRIM. PROC. 57(d); Establishment of Judicial Regions, Me. Admin. Order JB-08-1 (eff. July 1, 2008). This unified procedure eliminated what had been a two-tiered system for criminal cases, with the superior court having in the past handled all felonies & jury trials and the district court having been limited to misdemeanors & non-jury trials. The two trial courts also had separate docketing systems, which had caused some cases to be separately docketed with different numbers in different courts, creating duplication of effort for court clerks.

<sup>76</sup> ME. REV. STAT. ANN. tit. 4, §§ 121, 157-C (2018); Authority of Judges/Justices to Sit in Either District or Superior Court, Me. Admin. Order JB-07-3 (eff. Nov. 1, 2007).

<sup>77</sup> ME. R. UNIFIED CRIM. PROC. 1(e).

<sup>78</sup> ME. R. CIV. PROC. 1; ME. R. UNIFIED CRIM. PROC. 1(B).

<sup>79</sup> ME. REV. STAT. ANN. tit. 4, §§ 101, 148 (2018). An active retired superior court justice may also be assigned to sit in the superior court. ME. REV. STAT. ANN. tit. 4, §§ 101, 104 (2018). *See Superior Court Justices*, STATE OF ME. JUD. BRANCH, [https://www.courts.maine.gov/maine\\_courts/superior/justices.shtml](https://www.courts.maine.gov/maine_courts/superior/justices.shtml).

<sup>80</sup> ME. REV. STAT. ANN. tit. 4, § 115 (2018). *See Superior Courthouse Directory*, STATE OF ME. JUD. BRANCH, [https://www.courts.maine.gov/maine\\_courts/superior/directory.shtml](https://www.courts.maine.gov/maine_courts/superior/directory.shtml).

<sup>81</sup> ME. REV. STAT. ANN. tit. 4, § 110 (2018).

Maine has a single district court made up of 39 judges (plus 11 active retired judges)<sup>82</sup> located in 29 courthouses across the state.<sup>83</sup> District court judges must be lawyers and are appointed by the governor with consent of the joint standing committee of the judiciary.<sup>84</sup> The district court hears juvenile cases, including juvenile crimes.<sup>85</sup> The district court includes a specialized family division, with eight family law magistrates (plus one active retired magistrate),<sup>86</sup> that hears all family law cases including child protection proceedings and termination of parental rights.<sup>87</sup>

- The courts in Aroostook are greater in number and farther apart geographically than in the other sample counties.<sup>88</sup> There are seven courthouses in Aroostook County.<sup>89</sup> One active retired superior court justice and one active retired district

<sup>82</sup> ME. REV. STAT. ANN. tit. 4, § 151 (2018). *See District Court Judges*, STATE OF ME. JUD. BRANCH, [https://www.courts.maine.gov/maine\\_courts/district/judges.shtml](https://www.courts.maine.gov/maine_courts/district/judges.shtml).

<sup>83</sup> ME. REV. STAT. ANN. tit. 4, §§ 115, 153, 154, 162 (2018). *See District Courthouse Directory*, STATE OF ME. JUD. BRANCH, [https://www.courts.maine.gov/maine\\_courts/district/directory.shtml](https://www.courts.maine.gov/maine_courts/district/directory.shtml).

<sup>84</sup> ME. REV. STAT. ANN. tit. 4, § 157 (2018). Any judge who has retired from a district court may be appointed by the governor, with consent of the joint standing committee of the judiciary, to serve as an active retired judge to hear cases as appointed by the chief judge of the district court. ME. REV. STAT. ANN. tit. 4, § 157(b) (2018).

<sup>85</sup> ME. REV. STAT. ANN. tit. 4, § 165(2) (2018); ME. REV. STAT. ANN. tit. 15, § 3101 (2018). A juvenile is any person less than 18 years of age. ME. REV. STAT. ANN. tit. 15, § 3003(14) (2018). A juvenile crime is committed by a person less than 18 years of age, including: conduct that would be a crime if committed by an adult – what other states often call juvenile delinquency; and certain conduct that is generally legal but illegal for persons under a certain age – what other states often call juvenile status offenses. ME. REV. STAT. ANN. tit. 15, §§ 3003(16), 3103, 3103-A (2018); ME. REV. STAT. ANN. tit. 17-A, § 4-A(2-A),(3) (2018).

<sup>86</sup> ME. REV. STAT. ANN. tit. 4, § 183(1) (2018). *See Family Law Magistrates*, STATE OF ME. JUD. BRANCH, [https://www.courts.maine.gov/maine\\_courts/family/magistrates.html](https://www.courts.maine.gov/maine_courts/family/magistrates.html).

<sup>87</sup> ME. REV. STAT. ANN. tit. 4, §§ 152, 183 (2018).

<sup>88</sup> Androscoggin County has one superior court located in Auburn and one district court located in Lewiston. The courts are approximately a three-minute drive apart.

Cumberland County has one superior court located in Portland and two district courts located one each in Portland and Bridgton. The courts in Portland are in the same building, and the court in Bridgton is a 70-minute drive away. The only criminal matters processed in the Bridgton District Court are initial appearances; any case that is not resolved at initial appearance is transferred to the Portland unified criminal docket and all further proceedings take place in the Portland courts.

Somerset County has one superior court and one district court, both located in Skowhegan and within walking distance of each other.

York County has one superior court located in Alfred and three district courts located one each in Biddeford, Springvale, and York. Of the district courts, Biddeford is the busiest and is located about 24 minutes east of Alfred. The Springvale courthouse is about 10 minutes west of Alfred. The York courthouse is a 35 to 40 drive south of Alfred.

<sup>89</sup> Starting from the southernmost courts to those located the furthest north, the seven courts in Aroostook County are:

- two in Houlton (south): Aroostook County Superior Court – Houlton, and Houlton District Court;
- one in Presque Isle (central): Presque Isle District Court;
- two in Caribou (north): Aroostook County Superior Court – Caribou, and Caribou District Court;
- and
- two in Fort Kent and Madawaska (far north): Fort Kent District Court, and Madawaska District



court judge preside as needed to cover vacations and/or active court dockets. Despite the unified criminal docket, the majority of criminal jury trials continue to be held in what traditionally were superior courts because those courthouses and courtrooms were built to accommodate juries and jury pools, while many of the district court buildings do not have the physical capacity.

Effective January 15, 2016, the Supreme Judicial Court authorized the chiefs of the trial courts “to establish and, when approved, operate specialty dockets.”<sup>90</sup> The use of specialty courts is limited in Maine, but there are two types of specialty courts in which indigent legal services are provided: drug courts,<sup>91</sup> and veterans’ courts.<sup>92</sup>

- There are no specialty courts in Aroostook County.

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Court.

<sup>90</sup> Establishment and Administration of Specialty Dockets, Me. Admin. Order JB-16-1 (eff. Jan. 15, 2016).

<sup>91</sup> The Portland District Court in Cumberland County runs the largest drug court in Maine, and there are smaller drug courts in Androscoggin County Superior Court, Hancock County Superior Court, Washington County’s Calais District Court and Machias District Court, and York County Superior Court.

The Family Treatment Drug Court is a specialty docket that works with families whose children have been at risk of abuse or neglect due to parental substance use disorders. These court sessions are operated at the Maine District Courts in Augusta, Lewiston, and Bangor.

<sup>92</sup> The Maine Co-Occurring Disorders and Veterans Court accepts adults with substance abuse disorders, mental illness, and serious criminal charges since 2005. Although located at the capital judicial center in Augusta, the court accepts referrals from throughout the state.

# CHAPTER II

## ATTORNEY QUALIFICATIONS, TRAINING & SUPERVISION

Every state in the nation must have a system for providing an attorney to represent an indigent defendant who is charged with a crime and facing the possible loss of their liberty, and attorneys provide representation to indigent people within the structures of the systems states create. In *United States v. Cronin*,<sup>93</sup> the U.S. Supreme Court explains that deficiencies in these systems can make any lawyer – even the best attorney – perform in a non-adversarial way that results in a “constructive”<sup>94</sup> denial of the right to counsel.

The *Cronin* Court explains further that, when a lawyer provides representation within an indigent defense system that constructively denies the right to counsel, the lawyer is presumptively ineffective.<sup>95</sup> The government bears the burden of overcoming that presumption. The government may argue that the defense lawyer in a specific case will not be ineffective despite the structural impediments in the system, but it is the government’s burden to prove this. As the Seventh Circuit Court of Appeals noted over 30 years ago in *Wahlberg v. Israel*,<sup>96</sup> “if the state is not a passive spectator of an inept defense, but a cause of the inept defense, the burden of showing prejudice [under *Strickland*] is lifted. It is not right that the state should be able to say, ‘sure we impeded your defense – now prove it made a difference.’”<sup>97</sup>

In *Cronin*,<sup>98</sup> the U.S. Supreme Court pointed to the deficient representation received by the defendants known as the “Scottsboro Boys,” in *Powell v. Alabama*,<sup>99</sup> as representative of the constructive denial of the right to counsel.<sup>100</sup> The trial judge

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<sup>93</sup> 466 U.S. 648 (1984).

<sup>94</sup> *Strickland v. Washington*, 466 U.S. 668, 683 (1984) (“The Court has considered Sixth Amendment claims based on actual or constructive denial of the assistance of counsel altogether, as well as claims based on state interference with the ability of counsel to render effective assistance to the accused.”) (citing *United States v. Cronin*, 466 U.S. 648 (1984)).

<sup>95</sup> *United States v. Cronin*, 466 U.S. 648, 657-62 (1984).

<sup>96</sup> 766 F.2d 1071 (7th Cir. 1985).

<sup>97</sup> *Wahlberg v. Israel*, 766 F.2d 1071, 1076 (7th Cir. 1985).

<sup>98</sup> 466 U.S. 648 (1984).

<sup>99</sup> 287 U.S. 45 (1932).

<sup>100</sup> *United States v. Cronin*, 466 U.S. 648, 659-60 (1984) (“[I]f counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. . . . Circumstances of that magnitude may be present on some occasions when, although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial. *Powell v. Alabama*, 287 U.S. 45 (1932), was such a case.”).

overseeing the Scottsboro Boys' Alabama trial appointed a real estate lawyer from Chattanooga, Tennessee, who was not licensed in Alabama and was admittedly unfamiliar with the state's rules of criminal procedure.<sup>101</sup> The *Powell* Court concluded that defendants require the "guiding hand" of counsel;<sup>102</sup> that is, the attorneys a state provides to represent indigent defendants must be qualified and trained to help those defendants advocate for their stated legal interests.

This report is concerned principally with the right to counsel that is mandated by the Sixth Amendment, as it is provided to adults at the trial level in Maine; that is, representation provided to indigent adults who face the possible loss of their liberty as punishment for a crime. Throughout Maine under the indigent legal system administered by the MCILS, many of the same attorneys provide all indigent legal representation – both that required under the federal constitution and that required or allowed under Maine law though not mandated by the Sixth Amendment. This means that attorneys are appointed to represent adults and children in a variety of case types, at both trial and appeal, and must be competent not only in criminal and delinquency law but also in a broad range of civil law areas.

**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.**

The first thing that must occur in a system to provide effective assistance of counsel is to select the attorneys who are available to provide that representation. National standards, as compiled in the *ABA Ten Principles*, require that, "[w]here the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar."<sup>103</sup>

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<sup>101</sup> A retired local attorney who had not practiced in years was also appointed to assist in the representation of all nine co-defendants.

<sup>102</sup> *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932). ("The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.")

<sup>103</sup> AMERICAN BAR ASS'N, *ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM*, Principle 2 (Feb. 2002).

Since its inception, MCILS has never used governmentally employed attorneys to provide representation to the indigent accused, leaving Maine as the only state in the country that provides all indigent defense services through private attorneys.<sup>104</sup> 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. (See Chapter V.). 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, continual changes in technology make digital evidence such as video surveillance, social media posts, and smart phone searches crucial for defense discovery and investigation in many criminal cases. Likewise, the opioid crisis has added layers of complexity to the resolution of many criminal, delinquency, child protection, and mental health cases.

MCILS struggles to oversee the services provided by private lawyers. Indigent legal services in Maine are provided at trial and appeal by nearly 600 private attorneys,<sup>105</sup> handling cases in 47 courthouses presided over by approximately 90 justices, judges, and magistrates.<sup>106</sup> Despite the statutory command for MCILS to provide “high-

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<sup>104</sup> For comparison, 25 states in addition to Maine fund all appellate and trial indigent defense services: Alabama, Alaska, Arkansas (except counties responsible for office facilities, equipment, and supplies), Colorado, Connecticut, Delaware, Florida, Hawaii, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Montana, New Hampshire, New Mexico, North Carolina, North Dakota, Rhode Island, Vermont, Virginia, West Virginia, and Wisconsin. In each of these states, some portion of services are delivered through state government employees. For example, even though Massachusetts primarily uses private counsel, serious felonies and primary juvenile delinquency services are provided by governmentally employed public defenders. Similarly, even though trial services in Oregon are provided by private attorneys under contract, a significant portion of appellate services are provided by state government employed lawyers.

In the other 24 states that require counties to fund some portion of indigent defense services, there is at least one public defender office employing government attorneys (either state- or county-funded) in every state.

<sup>105</sup> Five hundred ninety-three individual attorneys were appointed to one or more cases during fiscal years 2014 to 2018. Attorney billing reflects an extremely wide range in the number of hours each attorney devotes to providing indigent legal services. For example, one attorney billed the state a total of \$1,189,361 over those five years (and average of \$237,872.27 per year); while one attorney billed the state for just \$144.00 in one year (2018).

<sup>106</sup> Maine has one Supreme Judicial Court, 24 superior court justices (including active retired) in 17 different courthouses, 50 district court judges (including active retired) in 29 different courthouses, and nine family law magistrates (including active retired), each of whom can potentially preside over a case in which counsel is appointed to provide indigent legal services. See *Supreme Court*, STATE OF ME. JUD. BRANCH, [https://www.courts.maine.gov/maine\\_courts/supreme/index.shtml](https://www.courts.maine.gov/maine_courts/supreme/index.shtml); *Superior Court Justices*, STATE OF ME. JUD. BRANCH, [https://www.courts.maine.gov/maine\\_courts/superior/justices.shtml](https://www.courts.maine.gov/maine_courts/superior/justices.shtml); *Superior Courthouse Directory*, STATE OF ME. JUD. BRANCH, [https://www.courts.maine.gov/maine\\_courts/superior/directory.shtml](https://www.courts.maine.gov/maine_courts/superior/directory.shtml); *District Court Judges*, STATE OF ME. JUD. BRANCH, [https://www.courts.maine.gov/maine\\_courts/district\\_court\\_judges/index.shtml](https://www.courts.maine.gov/maine_courts/district_court_judges/index.shtml).

quality” and “conflict-free” representation, the State of Maine expects MCILS to maintain oversight of these approximately 600 attorneys with a staff of just three people.<sup>107</sup>

### Attorney qualifications

Although attorneys graduate from law school with a strong understanding of the principles of law, legal theory, and generally how to think like a lawyer, no graduate enters the legal profession automatically knowing how to be an intellectual property lawyer, a consumer protection lawyer, or an attorney specializing in estates and trusts, mergers and acquisitions, or bankruptcy.<sup>108</sup> Specialties must be developed. Just as you would not go to a dermatologist for heart surgery, a real estate or divorce lawyer cannot be expected to handle a complex criminal case competently. As the American Bar Association explained more than 20 years ago, “[c]riminal law is a complex and difficult legal area, and the skills necessary for provision of a full range of services must be carefully developed. Moreover, the consequences of mistakes in defense representation may be substantial, including wrongful conviction and death or the loss of liberty.”<sup>109</sup>

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[courts.maine.gov/maine\\_courts/district/judges.shtml](https://www.courts.maine.gov/maine_courts/district/judges.shtml); District Courthouse Directory, STATE OF ME. JUD. BRANCH, [https://www.courts.maine.gov/maine\\_courts/district/directory.shtml](https://www.courts.maine.gov/maine_courts/district/directory.shtml); *Family Law Magistrates*, STATE OF ME. JUD. BRANCH, [https://www.courts.maine.gov/maine\\_courts/family/magistrates.html](https://www.courts.maine.gov/maine_courts/family/magistrates.html).

<sup>107</sup> MCILS employs an executive director, a deputy executive director, and an accounting technician, who collectively provide the entirety of the oversight of the indigent legal services in Maine. *Staff Directory*, MAINE COMM’N ON INDIGENT LEGAL SERVS., <https://www.maine.gov/mcils/about/staff.html> (last visited Mar. 19, 2019). MCILS also employs eight financial screeners, whose role is limited to interviewing defendants to determine indigency in the courts.

For comparison, there are approximately 600 private attorneys who provide conflict representation in Colorado through the Office of Alternate Defense Counsel, which has a central staff of 14 employees. *See Staff*, OFFICE OF THE ALTERNATE DEFENSE COUNSEL, <https://www.coloradoadc.org/oadccontacts/oadc-staff> (last visited Mar. 19, 2019). This is in addition to the 13 staff in the central administrative office of the Colorado State Public Defender, who administer the public defender offices serving Colorado’s 17 counties. *See Central Administrative Office*, OFFICE OF THE COLORADO STATE PUBLIC DEFENDER, <http://www.coloradodefenders.us/offices/central-administration/> (last visited Mar. 19, 2019).

<sup>108</sup> Christopher Sabis and Daniel Webert, *Understanding the Knowledge Requirement of Attorney Competence: A Roadmap for Novice Attorneys*, 15 GEO. J. LEGAL ETHICS 915, 915 (2001-2002) (“The American Bar Association (ABA) Model Rules of Professional Conduct (Model Rules) provide that an attorney must possess and demonstrate a certain requisite level of legal knowledge in order to be considered competent to handle a given matter. The standards are intended to protect the public as well as the image of the profession. Failure to adhere to them can result in sanctions and even disbarment. However, because legal education has long been criticized as being out of touch with the realities of legal practice and because novice attorneys often lack substantive experience, meeting the knowledge requirements of attorney competence may be particularly difficult for a lawyer who recently graduated from law school or who enters practice as a solo practitioner.”).

<sup>109</sup> AMERICAN BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES, Standard 5-1.5 and commentary (3d ed. 1992).

For these reasons, national standards require that each attorney must have the qualifications, training, and experience necessary for each specific case to which they are appointed.<sup>110</sup> Attorneys must know what legal tasks need to be considered in each and every case they handle, and then how to do them. As national standards explain, an attorney’s ability to provide effective representation depends on his familiarity with the “substantive criminal law and the law of criminal procedure and its application in the particular jurisdiction.”<sup>111</sup> Rule 1.1 of the Maine *Rules of Professional Conduct* requires all lawyers to be “competent” in carrying out their duties to clients.<sup>112</sup> Failure to adhere to the state’s *Rules of Professional Conduct* may result in disciplinary action against the attorney, up to and including the loss of the attorney’s license to practice law.<sup>113</sup>

MCILS is statutorily required to develop standards “prescribing minimum experience, training and other qualifications” for the attorneys who provide indigent legal representation.<sup>114</sup> MCILS also must “establish minimum qualifications to ensure that attorneys are qualified and capable of providing quality representation in the case types to which they are assigned, recognizing that quality representation in each of these types of cases requires counsel with experience and specialized training in that field.”<sup>115</sup>

Attorneys desiring to be appointed to represent indigent people in Maine must apply to MCILS.<sup>116</sup> The minimum requirements for every attorney are that they: must have an office or use of confidential space, a telephone number where messages can be left, and a working email account;<sup>117</sup> and must either demonstrate to MCILS proficiency over the preceding three years in the area of law in which the attorney wants to be appointed or complete an MCILS approved training course for that area of the law (law areas as designated by MCILS are criminal defense, juvenile defense, civil commitment, child protective, or emancipation).<sup>118</sup>

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<sup>110</sup> See, e.g., AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 6 (Feb. 2002) (“Defense counsel’s ability, training, and experience match the complexity of the case.”). The ABA explains further in commentary that: “Counsel should never be assigned a case that counsel lacks the experience or training to handle competently, and counsel is obligated to refuse appointment if unable to provide ethical, high quality representation.” AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, commentary to Principle 6 (Feb. 2002).

<sup>111</sup> NATIONAL LEGAL AID & DEFENDER ASSOCIATION, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 1.2(a) (1995).

<sup>112</sup> ME. R. PROF’L CONDUCT 1.1 (“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”).

<sup>113</sup> ME. R. PROF’L CONDUCT 8.4(a), 8.5(a).

<sup>114</sup> ME. REV. STAT. ANN. tit. 4, § 1804(2)(B) (2018).

<sup>115</sup> ME. REV. STAT. ANN. tit. 4, § 1804(3)(E) (2018).

<sup>116</sup> 94-649 Code Me. R. ch. 2, § 2 (Sept. 17, 2015).

<sup>117</sup> 94-649 Code Me. R. ch. 2, § 3 (Sept. 17, 2015).

<sup>118</sup> 94-649 Code Me. R. ch. 2, § 4 (Sept. 17, 2015).

MCILS has promulgated slightly greater qualification requirements for certain types of cases that MCILS considers to be “complex in nature due to the allegations against the person as well as the severity of the consequences if a conviction occurs.”<sup>119</sup> The cases requiring greater qualifications are homicide, sex offenses,<sup>120</sup> serious violent felonies,<sup>121</sup> operating under the influence, domestic violence,<sup>122</sup> juvenile defense, protective custody matters, Law Court appeals, and post-conviction review.<sup>123</sup> The additional qualifications MCILS requires an attorney to have to be placed on the roster for appointment at the trial level for the designated criminal cases are:<sup>124</sup>

Case-Type	Practice experience	Trial experience	CLE or Knowledge	References
Homicide	5 yrs crim law	First chair 5 fel trials (at least 2 jury; at least 2 homicide, ser viol fel, or sex off) in past 10 yrs; AND First chair homicide trial in past 15 yrs OR second chair homicide trial in past 5 yrs	Knowledge of evidentiary issues in homicide cases, including DNA, fingerprint analysis, mental health, eyewitness ID	3 letters
Sex offenses	3 yrs crim law	First chair 3 fel trials (at least 2 jury) in past 10 yrs		
Serious violent felonies	2 yrs crim law	First chair 4 trials (at least 2 jury; at least 2 crim) in past 10 yrs		
Operating under the influence	1 yr crim law	First chair 2 crim trials and 2 contested hrgs in past 10 yrs	4 hrs OUI defense CLE in past 3 yrs	
Domestic violence	1 yr crim law	First chair 2 crim trials and 2 contested hrgs in past 10 yrs	4 hrs dom viol CLE in past 3 yrs	

In any of these specialized case types, an attorney can request from the MCILS executive director a waiver of either the practice experience or trial experience requirements (but not both).<sup>125</sup>

<sup>119</sup> 94-649 Code Me. R. ch. 3, § 1(5) (June 10, 2016).

<sup>120</sup> Sex offenses are defined by MCILS as being the commission of, conspiracy to commit, attempt to commit, or solicitation of sexual assaults, sexual exploitation of minors, incest, violation of privacy, aggravated sex trafficking, and patronizing prostitution of minor or person with mental disability. 94-649 Code Me. R. ch. 3, § 1(4) (June 10, 2016).

<sup>121</sup> Serious violent felonies are defined by MCILS as being the commission of, conspiracy to commit, attempt to commit, or solicitation of aggravated attempted murder, aggravated assault, elevated aggravated assault, elevated aggravated assault on a pregnant person, kidnapping, burglary with a firearm, burglary with intent to inflict bodily harm, burglary with a dangerous weapon, robbery, arson, causing a catastrophe, aggravated trafficking of scheduled drugs, aggravated trafficking of counterfeit drugs, and aggravated furnishing of scheduled drugs. 94-649 Code Me. R. ch. 3, § 1(3) (June 10, 2016).

<sup>122</sup> Domestic violence cases are defined by MCILS as being the commission of, conspiracy to commit, attempt to commit, or solicitation of domestic violence, any class D or E offense against a family or household member or dating partner, class D stalking, and violation of a protection order. 94-649 Code Me. R. ch. 3, § 1(2) (June 10, 2016).

<sup>123</sup> 94-649 Code Me. R. ch. 3, § 3 (June 10, 2016).

<sup>124</sup> 94-649 Code Me. R. ch. 3, § 3(1)-(5) (June 10, 2016).

<sup>125</sup> 94-649 Code Me. R. ch. 3, § 4 (June 10, 2016).

In short, 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.

### Attorney training & supervision

The Maine *Rules of Professional Conduct* recognize that ongoing training is necessary for attorneys to maintain their familiarity with criminal law and procedure, as well as their competence to provide effective representation.<sup>126</sup> Similarly, all national standards, including those of the National Advisory Commission on Criminal Justice Standards and Goals,<sup>127</sup> require that the indigent defense system provide attorneys with access to a “systematic and comprehensive” training program,<sup>128</sup> at which attorney attendance is compulsory, in order to maintain competence from year to year.<sup>129</sup>

Training must be tailored to the types and levels of cases for which the attorney seeks public appointment. If, for example, the lawyer has not received training on the latest forensic sciences and case law related to drugs, then the government should ensure that lawyer is not assigned to drug-related cases. If a public defense provider does not have the “knowledge and experience to offer quality representation to a defendant in a particular matter,” then the attorney is obligated to move to withdraw from the case,

<sup>126</sup> ME. R. PROF'L CONDUCT 1.1, cmt. [6] (“To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.”).

<sup>127</sup> Building upon the work and findings of the 1967 President's Commission on Law Enforcement and Administration of Justice, the Administrator of the U.S. Department of Justice Law Enforcement Assistance Administration appointed the National Advisory Commission on Criminal Justice Standards and Goals in 1971, with DOJ/LEAA grant funding to develop standards for crime reduction and prevention at the state and local levels. The NAC crafted standards for all criminal justice functions, including law enforcement, corrections, the courts, and the prosecution. Chapter 13 of the NAC's report sets the standards for the defense function. NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON THE COURTS, ch.13 (The Defense) (1973).

<sup>128</sup> NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON THE COURTS, ch. 13 (The Defense), Standard 13.16 (1973) (“The training of public defenders and assigned counsel panel members should be systematic and comprehensive.”).

<sup>129</sup> See AMERICAN BAR ASS'N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 9 (Feb. 2002) (“Defense counsel is provided with and required to attend continuing legal education”). The commentary explains: “Counsel and staff providing defense services should have systematic and comprehensive training appropriate to their areas of practice and at least equal to that received by prosecutors.” AMERICAN BAR ASS'N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, commentary to Principle 9 (Feb. 2002).



or better yet to refuse the appointment at the outset.<sup>130</sup> Ongoing training, therefore, is an active part of the job of being a public defense provider. Finally, public defense attorneys must be supervised and regularly evaluated.<sup>131</sup>

All Maine attorneys are required to complete 12 hours of continuing legal education each year, at least one hour of which must be in professional responsibility,<sup>132</sup> while MCILS only requires that attorneys representing the indigent complete eight hours of continuing legal education each year.<sup>133</sup> Most assigned counsel report meeting their CLE requirements by attending a court-run two-day conference each year. MCILS does not require attorneys appointed to represent the indigent to obtain any CLE or training in any specific area of practice and, in particular, there is no requirement for CLE or 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).

MCILS has not established any requirements for supervision of attorneys appointed to provide indigent legal representation. In June 2018, MCILS began a “Resource Counsel Program” to assist MCILS staff by having experienced assigned counsel eventually provide “mentoring, supervision, and evaluation of private assigned counsel.”<sup>134</sup> In the fall of 2018, MCILS identified 25 attorneys statewide to serve as resource counsel and provide mentoring to less experienced attorneys. That said, the 25 resource counsel attorneys are each capped at providing 10 hours of mentoring per month, and the program is not available in the mental health practice area. The

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<sup>130</sup> NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON THE COURTS, ch. 13 (The Defense), Standard 13.16 (1973); *see also* NATIONAL LEGAL AID & DEFENDER ASSOCIATION, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guidelines 1.2(b), 1.3(a) (1995) (“Prior to handling a criminal matter, counsel should have sufficient experience or training to provide quality representation,” and “[b]efore agreeing to act as counsel or accepting appointment by a court, counsel has an obligation to make sure that counsel has available sufficient time, resources, knowledge and experience to offer quality representation to a defendant in a particular matter. If it later appears that counsel is unable to offer quality representation in the case, counsel should move to withdraw.”).

<sup>131</sup> *See* AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 10 (Feb. 2002) (“Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards”). The commentary adds, “Counsel and staff providing defense services should have systematic and comprehensive training appropriate to their areas of practice and at least equal to that received by prosecutors.”

<sup>132</sup> ME. STATE BAR R. 5 (“Except as otherwise provided in this subdivision, every attorney required to register in accordance with these rules of this state shall complete 12 credit hours of approved continuing legal education in each calendar year. At least one credit hour in each calendar year shall be primarily concerned with professionalism. . . . Qualifying professionalism education topics include professional responsibility, legal ethics, substance abuse and mental health issues, diversity awareness in the legal profession, and malpractice and bar complaint avoidance topics including law office and file management, client relations, and client trust account administration.”).

<sup>133</sup> 94-649 Code Me. R. ch. 2, § 5 (Sept. 17, 2015).

<sup>134</sup> MCILS, June 12, 2018 Commissioner’s Meeting Packet, Agenda item 3, *available at* <https://www.maine.gov/mcils/meetings/minutes/Commission%20Packet%20June%202018.pdf>.

resource counsel attorneys do not have authority to require any mentee to cooperate, and MCILS has no plan to assist the resource counsel attorneys with identifying performance problems or training needs.

A criminal justice representative in Androscoggin County stated that: a handful of attorneys are so obviously disorganized, unreliable, and incompetent that they should not be on the roster at all; another handful are competent only for simple low level cases; another handful are excellent; and the rest are uneven. The deficiencies of the least competent attorneys are obvious to all, so it is troubling that they remain eligible for assignments without accountability.

### Massachusetts Committee for Public Counsel Services example

To best understand the lack of MCILS oversight of attorneys, it is useful to look at another jurisdiction that relies in large part on private attorneys to provide indigent legal services: Massachusetts. The Massachusetts Committee for Public Counsel Services (CPCS) is a judicial branch agency overseeing the delivery of indigent defense services in all courts across the state of Massachusetts.

*Attorney qualifications.* Private attorneys in Massachusetts who desire to be appointed to represent indigent people must apply and be certified. Attorneys are never automatically certified based on attendance at a training program or meeting a certain set of criteria; there is always a role for discretion to serve the client population who cannot choose their lawyers. Attorneys can only be certified to receive appointments in a maximum of two counties, and they must apply separately in each county.

For misdemeanor and lesser felonies, attorneys submit their application to the county assignment program. The leadership of the county assignment program interviews the applicant, checks their references, and determines whether they meet the CPCS criteria demonstrating competence and commitment to the needs of the client population. Attorneys selected by the county assignment program must attend the Zealous Advocacy training program (or obtain a waiver;<sup>135</sup> a waiver is not ordinarily granted to an attorney seeking misdemeanor and lesser felony appointments unless they have tried 5 criminal defense jury trials to verdict within the preceding 5 years.) Zealous Advocacy training is a 7-day program including both lectures and small group skills exercises daily, with substantial reading and presentation preparation every night. An attorney either passes or fails the training program. Once an attorney is selected by the county assignment program and successfully completes the training program,

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<sup>135</sup> A request for a waiver of the Zealous Advocacy training program will be considered only if the applicant has exceptional experience in the practice area in which they seek certification. The applicant requesting a waiver must submit a letter to the director of the appropriate certification panel explaining in detail why the training requirement should be waived. The letter must include descriptions of cases, including docket numbers and issues presented, relied upon by the applicant to demonstrate the requisite experience.

the attorney is provisionally certified to represent indigent adults in misdemeanors and lesser felonies in that county. The attorney can only be fully certified after a performance evaluation conducted within 12 to 24 months of provisional certification.

For major felonies or murder cases, attorneys must apply to CPCS deputy chief counsel. The application must include a list of complex cases the attorney has tried to a jury verdict as lead counsel within the preceding five years; at least six for major felonies certification and at least 10 for murder certification. Additional materials like original memoranda of law may also be required. The applications are circulated to a blue-ribbon panel of leading senior private defense lawyers for confidential input before CPCS makes a certification decision.

CPCS's electronic billing system enforces the certification requirements. The billing system automatically rejects any assignments for which an attorney is not certified and generates a contemporaneous notice to the attorney, the county assignment program, and the court that the case must be reassigned.

*Attorney recertification.* Because attorneys in private practice are free to change the areas of law in which they concentrate based on their own interests or market conditions, their qualifications to handle criminal cases may change over time. To assure that public funds are used efficiently to retain qualified attorneys, all attorneys must apply for recertification every five years.

The criteria for recertification are evidence of substantial recent criminal defense litigation experience, including appropriately vigorous motion and trial practice. Data to support the decision-making process comes from the attorney's recertification application, records maintained by CPCS of performance assessments, complaints, and electronic billing records that show what actions the attorney has taken in assigned cases. The amount of data available from detailed electronic billing records to which the attorney has attested assures that these decisions have a solid basis in facts that the attorney can understand.

CPCS will not recertify attorneys who have not vigorously defended their assigned cases (evidenced by filing original pleadings, using investigators, summoning witnesses, litigating evidentiary motions, and conducting trials) or who have been the subject of substantial true complaints of substandard representation. If an attorney's performance in assigned cases needs improvement, CPCS may conditionally recertify the attorney for one or two years, with conditions, as an opportunity for the attorney to correct identified problems but with appropriate supervision or caseload limitations to protect clients. The Massachusetts experience is that about 20% of applicants for recertification for adult criminal case assignments do not qualify for full recertification, but in almost all instances these attorneys are given a one-year conditional

recertification to correct deficiencies. Of that group, about 80% have corrected the deficiencies when they reapply at the end of the one-year period, while the other 20% tend not to reapply.

*Attorney training.* All CPCS attorneys must annually complete eight hours of continuing legal education approved by CPCS as relevant to the panel on which the attorney receives assignments. An attorney who receives assignments in more than one practice area must satisfy the CLE requirement for each panel.

All attorneys who lack the recent experience required for the certification level they seek may be required to attend the Zealous Advocacy training program, described above.

*Attorney supervision.* The funders of public programs should assure that attorneys paid with public funds are doing a good job. Oversight of private attorneys appointed to represent indigent people in criminal cases presents particular challenges, because the attorney-client privilege requires the attorney to keep confidential many aspects of the representation. Also, private attorneys may resist the implementation of oversight where none previously has been in place.

In Massachusetts, the private attorneys who handle criminal case assignments are organized in every county into groups. These groups contract with CPCS to perform various functions, including calendaring attorneys to cover courts where they receive case assignments.

CPCS selects from the most experienced members of these group the attorneys who are paid by CPCS to be mentors. CPCS assigns a mentor to all attorneys until such time as they obtain certification for major felonies.

Attorneys who are certified for major felonies or murder are eligible to apply to CPCS for a one-year contract position as a county supervising attorney. CPCS vigorously recruits potential supervising attorneys and publicly honors those who serve in the role. Supervising attorneys are selected jointly by CPCS and the county assignment program leadership, and both state and local leaders must support the candidate for a contract to be awarded. Supervising attorney contracts are for relatively few hours per week, so that highly respected successful lawyers can be recruited to take on the role while maintaining their private practices. Supervising attorneys participate in the selection of attorneys who have applied for certification, lead local training events, conduct in-depth performance evaluations of every assigned counsel in their county every two years (or in neighboring counties in case of conflicts due to local relationships), and

investigate complaints by clients or court personnel about the performance of assigned counsel. The supervising attorneys also provide a trusted point of contact for judges and consistent advice to CPCS about the myriad local issues that arise in the courts.

The number of supervising attorneys needed for a county depends on the number of courts and attorneys receiving assignments in the county, as well as the geography of the county. Currently there are about 30 supervising attorneys across Massachusetts, each serving 10 hours per week.

# CHAPTER III

## EARLY APPOINTMENT OF COUNSEL

As the U.S. Supreme Court states in *Cronic*, there are circumstances “that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified. Most obvious, of course, is the complete denial of counsel.”<sup>136</sup> All crimes in Maine are classified as either murder, Class A, Class B, Class C, Class D, or Class E crimes.<sup>137</sup> Conduct that is punishable by a fine only, without the possibility of incarceration, is a civil violation and “expressly declared not to be [a] criminal offense.”<sup>138</sup> All crimes in Maine carry the possible loss of liberty,<sup>139</sup> so every adult and juvenile<sup>140</sup> charged with any crime, and who cannot afford to hire their own attorney, is entitled under the Sixth and Fourteenth Amendments to have counsel provided at public expense at trial and on direct appeal.<sup>141</sup>

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<sup>136</sup> U.S. v. *Cronic*, 466 U.S. 648, 658-59 (1984).

<sup>137</sup> ME. REV. STAT. ANN. tit. 17-A, §§ 4, 4-A (2018). Murder, and Class A, B, and C crimes are akin to what other states usually call a felony; Class D and E crimes are akin to what other states usually call a misdemeanor.

Where a statute outside of the Maine Criminal Code defines a crime but does not designate its class, then the penalty provided in the particular statute determines the classification of the crime: greater than 10 years is Class A; greater than 5 years and up to 10 years is Class B; greater than 3 years and up to 5 years is Class C; greater than 1 year and up to 3 years is Class D; and up to 1 year is Class E. ME. REV. STAT. ANN. tit. 17-A, § 4-A(3) (2018).

<sup>138</sup> ME. REV. STAT. ANN. tit. 17-A, § 4-B (2018).

<sup>139</sup> ME. REV. STAT. ANN. tit. 17-A, §§ 4-A(3), 1251, 1252 (2018). The crimes carry the following possible sentences: murder – 25 years to life; Class A – up to 30 years; Class B – up to 10 years; Class C – up to 5 years; Class D – up to 1 year; in county jail and Class E – up to 6 months in county jail. ME. REV. STAT. ANN. tit. 17-A, §§ 4-A(2-A), 1251, 1252(2) (2018). All Class D and Class E sentences are to be served in county jail. ME. REV. STAT. ANN. tit. 17-A, § 1252(1)(A) (2018). All Class A, B, and C sentences of 9 months or less are to be served in county jail, while sentences of more than 9 months are served in the department of corrections. ME. REV. STAT. ANN. tit. 17-A, § 1252(1)(B) (2018).

<sup>140</sup> A juvenile is any person less than 18 years of age. ME. REV. STAT. ANN. tit. 15, § 3003(14) (2018). A juvenile crime is committed by a person less than 18 years of age, including: conduct that would be a crime if committed by an adult – what other states often call juvenile delinquency; and certain conduct that is generally legal but illegal for persons under a certain age – what other states often call juvenile status offenses. ME. REV. STAT. ANN. tit. 15, §§ 3003(16), 3103, 3103-A (2018); ME. REV. STAT. ANN. tit. 17-A, § 4-A(2-A),(3) (2018). A juvenile convicted of a juvenile crime may be committed to a Department of Corrections juvenile correctional facility. ME. REV. STAT. ANN. tit. 15, §§ 3103(2), 3314(1)(F) (2018). A juvenile who is charged with murder or a class A, B, or C offense may be tried as an adult. ME. REV. STAT. ANN. tit. 15, § 3101(4) (2018).

<sup>141</sup> *Halbert v. Michigan*, 545 U.S. 605 (2005); *Alabama v. Shelton*, 505 U.S. 654 (2002); *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *In re Gault*, 387 U.S. 1 (1967); *Douglas v. California*, 372 U.S. 353 (1963); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

In 2008, the Court reaffirmed in *Rothgery v. Gillespie County* that the right to counsel attaches when “formal judicial proceedings have begun.”<sup>142</sup> For a person who is arrested, the beginning of formal judicial proceedings is at “a criminal defendant’s initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction,”<sup>143</sup> without regard to whether a prosecutor is aware of the arrest.<sup>144</sup> For all defendants, the commencement of prosecution, “whether by way of formal charge, preliminary hearing, indictment, information, or arraignment,” signals the beginning of formal judicial proceedings.<sup>145</sup>

The *Rothgery* Court carefully explained, however, that the question of whether the right to counsel has attached is distinct from the question of whether a particular proceeding is a “critical stage” at which counsel must be present as a participant.<sup>146</sup> “Once attachment occurs, the accused at least is entitled to the presence of appointed counsel during any ‘critical stage’ of the postattachment proceedings . . .”<sup>147</sup> In other words, according to the Court, the Constitution does not necessarily require that defense counsel be present at the moment the right to counsel attaches, but from that moment forward, no critical stage in a criminal or juvenile delinquency case can occur unless the defendant is represented by counsel or has made an informed and intelligent waiver of counsel.

The Court states that “a trial is unfair if the accused is denied counsel at a critical stage of his trial.”<sup>148</sup> Over the decades, the Supreme Court has inch-by-inch delineated many case events as being critical stages, although it has never purported to have capped the list of events that may fall into this category.<sup>149</sup> Events that are definitely critical stages are: custodial interrogations both before and after commencement of prosecution;<sup>150</sup> preliminary hearings prior to commencement of prosecution where “potential

<sup>142</sup> *Rothgery v. Gillespie County*, 554 U.S. 191, 211 (2008). See also *Michigan v. Jackson*, 475 U.S. 625, 629 n.3 (1986); *Brewer v. Williams*, 430 U.S. 387, 388-89 (1977).

<sup>143</sup> *Rothgery v. Gillespie County*, 554 U.S. 191, 213 (2008).

<sup>144</sup> *Rothgery v. Gillespie County*, 554 U.S. 191, 194 (2008).

<sup>145</sup> *Brewer v. Williams*, 430 U.S. 387, 398 (1977) (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972)). See also *Michigan v. Jackson*, 475 U.S. 625, 629 n.3 (1986).

<sup>146</sup> *Rothgery v. Gillespie County*, 554 U.S. 191, 211 (2008).

<sup>147</sup> *Rothgery v. Gillespie County*, 554 U.S. 191, 212 (2008).

<sup>148</sup> *U.S. v. Cronin*, 466 U.S. 648, 659 (1984).

<sup>149</sup> The critical stages in a case are the moments when the defendant has to make choices – when “counsel would help the accused ‘in coping with legal problems or . . . meeting his adversary.’” *Rothgery v. Gillespie County*, 554 U.S. 191, 212 n.16 (2008) (quoting *United States v. Ash*, 413 U.S. 300, 312-13 (1973)). None of these proceedings can occur unless counsel is present or has been waived because, as the Supreme Court has noted, “the right to be represented by counsel is by far the most pervasive for it affects [an accused person’s] ability to assert any other rights he may have.” *United States v. Cronin*, 466 U.S. 648, 654 (1984) (citing Shaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956)).

<sup>150</sup> *Brewer v. Williams*, 430 U.S. 387, 399 (1977); *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966); *Massiah v. United States*, 377 U.S. 201, 205-06 (1964).

substantial prejudice to defendant[s'] rights inheres in the . . . confrontation";<sup>151</sup> lineups and show-ups at or after commencement of prosecution;<sup>152</sup> during plea negotiations and at the entry of a guilty plea;<sup>153</sup> arraignments;<sup>154</sup> during the pre-trial period between arraignment and the beginning of trial;<sup>155</sup> trials;<sup>156</sup> during sentencing;<sup>157</sup> direct appeals as of right;<sup>158</sup> probation revocation proceedings to some extent;<sup>159</sup> and parole revocation proceedings to some extent.<sup>160</sup>

This chapter explains the criminal justice process in Maine, including the events that trigger attachment of the right to counsel and those that are critical stages at which counsel must be present on behalf of an indigent defendant. Throughout this chapter, as elsewhere in this report, a detailed description of Aroostook County serves as an example of how criminal justice is administered locally throughout Maine. These bulleted sections are set apart from the body of the report.

## SUMMONS OR ARREST

When a person is suspected of having committed a crime, they may either be issued a summons<sup>161</sup> or (for most crimes) arrested with or without a warrant.<sup>162</sup>

When issuing a summons, the law enforcement officer provides a court date and location to the defendant directing them to appear in court to answer the allegation.<sup>163</sup> For a defendant who receives a summons, their first appearance before a judge will be at the initial appearance (explained below) held on the date they are told to appear in court.

<sup>151</sup> *Coleman v. Alabama*, 399 U.S. 1, 9-10 (1970).

<sup>152</sup> *Moore v. Illinois*, 434 U.S. 220, 231 (1977); *Kirby v. Illinois*, 406 U.S. 682, 689-90 (1972); *United States v. Wade*, 388 U.S. 218, 236-38 (1967).

<sup>153</sup> *Laffler v. Cooper*, 566 U.S. 156, 132 S. Ct. 1376, 1386 (2012); *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010); *McMann v. Richardson*, 397 U.S. 759, 771, 771 n.14 (1970).

<sup>154</sup> *Hamilton v. Alabama*, 368 U.S. 52, 53-55 (1961).

<sup>155</sup> *Brewer v. Williams*, 430 U.S. 387, 398-99 (1977); *Powell v. Alabama*, 387 U.S. 45, 57 (1932).

<sup>156</sup> *Alabama v. Shelton*, 535 U.S. 654, 662 (2002); *Argersinger v. Hamlin*, 407 U.S. 25, 37, 40 (1972); *In re Gault*, 387 U.S. 1, 36-37 (1967); *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963).

<sup>157</sup> *Laffler v. Cooper*, 566 U.S. 156, 132 S. Ct. 1376, 1386 (2012); *Wiggins v. Smith*, 539 U.S. 510, 538 (2003); *Glover v. United States*, 531 U.S. 198, 203-04 (2001); *Mempa v. Rhay*, 389 U.S. 128, 134, 137 (1967).

<sup>158</sup> *Halbert v. Michigan*, 545 U.S. 605, 621 (2005); *Douglas v. California*, 372 U.S. 353, 357 (1963).

<sup>159</sup> *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973).

<sup>160</sup> *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973); *cf. Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) (leaving open the question "whether the parolee is entitled to the assistance of retained counsel or to appointed counsel if he is indigent").

<sup>161</sup> ME. REV. STAT. ANN. tit. 17-A, § 15-A (2018).

<sup>162</sup> ME. REV. STAT. ANN. tit. 15, § 704 (2018); ME. REV. STAT. ANN. tit. 17-A, § 15 (2018).

<sup>163</sup> ME. REV. STAT. ANN. tit. 17-A, § 15-A(1) (2018).



- When law enforcement issues a summons in Aroostook County, the officer provides a court date to the defendant to appear in the district court assigned to the geographic area where the crime is alleged to have occurred. That is, if the Fort Kent police department issues someone a summons, that person is summoned to the Fort Kent District Court on the next criminal arraignment/initial hearing docket date. Police departments and the county sheriff are provided a calendar of court dates by the court clerks.<sup>164</sup>

If arrested, the defendant is taken to the local police station or the county jail to be processed. The amount of bail and conditions under which a defendant can be released from jail (if pretrial release is available) are set initially by either a court or a bail commissioner. A defendant who was arrested without a warrant is entitled to have a judge consider and determine whether there was probable cause for the arrest. Both the initial bail setting and the probable cause determination can occur outside the presence of the defendant and without the involvement of either a prosecutor or defense attorneys. For a defendant who is arrested, their first appearance before a judge will be at the “48-hour hearing” (explained below).

- Persons who are arrested anywhere in Aroostook County are first taken before a bail commissioner and then, if not released, taken to the Aroostook County jail, located in Houlton and attached to the courthouse. On average, 90% of the jail population is defendants detained pre-trial, while only 10% have been convicted and sentenced.<sup>165</sup>

#### Bail setting (following arrest)

For a person who is arrested, the process of attempting to be released begins with a police department or county sheriff calling a local bail commissioner.<sup>166</sup> Generally, the bail commissioner comes to the police department, although they could be called to the roadside for vehicular crimes.

<sup>164</sup> Court schedules are publicly available on the Maine Courts website. *See Regional Schedules*, STATE OF ME. JUD. BRANCH, [https://www.courts.maine.gov/maine\\_courts/schedules/quarterly\\_schedules.shtml](https://www.courts.maine.gov/maine_courts/schedules/quarterly_schedules.shtml).

<sup>165</sup> The jail has a capacity to house 117 people. The average number of persons in jail is 102, with a low of 95 and a high of 124 during the six months prior to this report’s publication. The annual budget for the jail in FY 2019 is approximately \$3.285 million. County of Aroostook 2019 Jail Budget, available at [https://www.arostook.me.us/images/2019\\_Jail\\_Budget.pdf](https://www.arostook.me.us/images/2019_Jail_Budget.pdf). At the time of the site visit, the jail administrator did not know the average daily bed cost for his jail. Using a rough calculation of multiplying the average jail population (102) by the number of days in a year (365) and then dividing that product by the annual jail budget (\$3.285 million) results in an average daily bed cost of \$88.24.

<sup>166</sup> The chief judge of the district court appoints bail commissioners. ME. REV. STAT. ANN. tit. 15, § 1023 (2018). Although the number fluctuates, as of November 2018 there were 83 bail commissioners across the state. Though all bail commissioners have statewide jurisdiction, most work in the county in which they reside.

The only qualifications required for bail commissioners are Maine residency, completion of a bail training program within one year following appointment, and a term of not more than 5 years. *Id.* ME. REV. STAT. ANN. tit. 15, § 1023 (7) (2018).

If a person was arrested on a warrant, the court that issued the warrant may have set the type and amount of bail and any bail conditions to be imposed.<sup>167</sup> If a person was arrested without a warrant or a court did not set bail terms when issuing an arrest warrant, then the bail commissioner is responsible for setting bail terms for most arrests, although there are a significant number of crimes and circumstances for which a defendant must appear before a judge to have bail set.<sup>168</sup> A bail commissioner may release an arrestee on personal recognizance, an unsecured bail, or a secured bail, and may impose conditions on the defendant while on pretrial release.<sup>169</sup>

If a defendant is unable to meet the bail set by the bail commissioner, or if a bail commissioner is prohibited from setting bail in the defendant's circumstances, bail may be reviewed or set at the 48-hour hearing.<sup>170</sup> Defendants who are released pursuant to this bail setting procedure are given a court date and location directing them to appear in court to answer the allegation; if the defendant is released before the "48-hour hearing," then their first appearance before a judge will be at the initial appearance (explained below) held on the date they are told to appear in court.

- Eleven of the 83 bail commissioners in Maine operate out of Aroostook County (and are generally assigned based on the five population centers in the county). Statewide, bail commissioners tend to be people at the end of their careers who want to stay active, and, in overly general terms, they tend to be people who had a career in criminal justice (e.g., ex-law enforcement, retired judges, and retired court clerks). However, the bail commissioners in Aroostook County do not fit this general background and are generally people looking to supplement their income and/or who want to contribute to the community. For example, three of the bail commissioners in the county are an auto salesman, a pizza shop owner, and a jail booking officer.

#### Probable cause determination (following warrantless arrest)

In *County of Riverside v. McLaughlin*,<sup>171</sup> the United States Supreme Court held that a judge must make a probable cause determination – probable cause that a crime has been committed and that the defendant committed it – within 48 clock hours of a warrantless arrest or the government risks being held responsible for an illegal detention.

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<sup>167</sup> ME. REV. STAT. ANN. tit. 15, §§ 1021, 1022 (2018).

<sup>168</sup> ME. CONST. art. I, § 10; ME. REV. STAT. ANN. tit. 15, §§ 1023(4), 1027 (2018).

<sup>169</sup> ME. REV. STAT. ANN. tit. 15, § 1026 (2018).

<sup>170</sup> ME. REV. STAT. ANN. tit. 15, §§ 1026(1),(6), 1027, 1028 (2018); ME. R. UNIFIED CRIM. PROC. 46.

<sup>171</sup> 500 U.S. 44 (1991).

A judge can make this determination without ever seeing the defendant and based solely on paperwork filed by the officer or prosecutor.<sup>172</sup> If the judge finds that there was not probable cause for the arrest, the person is released from jail; if the judge finds that there was probable cause for the arrest, the person remains in jail.<sup>173</sup>

Because a defendant who has been arrested in Maine is brought before a judge for a 48-hour hearing, the probable cause determination is almost never made in Maine prior to the 48-hour hearing, and it is typically waived as part of the 48-hour hearing.

- Almost universally in Aroostook County, the probable cause determination is waived as part of the 48-hour hearing. Local criminal justice system participants could only remember a single instance in which a defendant refused to waive the probable cause determination at the 48-hour hearing. In that instance, the judge made the probable cause determination from the bench based on the police report.

## 48-HOUR HEARING (IN CUSTODY) OR INITIAL APPEARANCE (OUT OF CUSTODY)

A defendant's first appearance before a judge is the 48-hour hearing for in custody defendants<sup>174</sup> and the initial appearance for out of custody defendants. This is the proceeding at which the right to counsel attaches under *Rothgery* and is when an indigent defendant will have the opportunity to request appointed counsel. (A 48-hour hearing is actually held not later than 48 hours after the arrest, *excluding Saturdays, Sundays, legal holidays, and court holidays*,<sup>175</sup> so in many instances it may be as much as five days after a defendant's arrest.)

Throughout Maine, prosecutors and defense attorneys are always in attendance for these proceedings. 48-hour hearings for in custody defendants are conducted by video conference, with the defendant and the MCILS "lawyer of the day" located at the jail, and the judge and prosecutor located at the courthouse. Out of custody defendants appear in the courtroom for initial appearances, along with the MCILS "lawyer of the day," the prosecutor, and the judge. At 48-hour hearings and initial appearances, the court informs the defendant of the charges against him and his rights,<sup>176</sup> indigency is determined for any defendant requesting appointed counsel,<sup>177</sup> counsel is appointed for any defendant determined to be indigent,<sup>178</sup> and for in custody defendants bail may be

<sup>172</sup> ME. R. UNIFIED CRIM. PROC. 4A.

<sup>173</sup> ME. R. UNIFIED CRIM. PROC. 4A.

<sup>174</sup> ME. R. UNIFIED CRIM. PROC. 5.

<sup>175</sup> ME. R. UNIFIED CRIM. PROC. 5(a).

<sup>176</sup> ME. R. UNIFIED CRIM. PROC. 5(b)-(c).

<sup>177</sup> ME. R. UNIFIED CRIM. PROC. 5(e), 44.

<sup>178</sup> ME. R. UNIFIED CRIM. PROC. 5(e), 44.

reviewed. A defendant charged with a Class D or E crime is also called on to enter a plea.<sup>179</sup>

- Aroostook County defendants not released by a bail commissioner at a local police station are transferred and held in the county jail in Houlton and are to be brought before a judge within 48 hours of arrest. Although any judge in any court in Aroostook County can conduct the 48-hour hearings (for example, depending on trials schedules, vacation, etc.), it is generally true that 48-hour hearings are conducted from the jail to the court via video conference at 11:30 a.m. every Monday in Houlton District Court, Wednesday in Superior Court – Caribou, and Friday in Caribou District Court. This means that in custody defendants who are arrested on a Friday after 11:30 a.m. will not go before a judge until the following Monday.

Initial appearances for out of custody defendants are scheduled only once or twice per month per court. Therefore, it may be up to a month after arrest that the initial appearance occurs.

**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.**

Maine courts are required to advise every defendant (in person or through a video recording) of:

- (1) the substance of the charges against the defendant;
- (2) the defendant’s right to retain counsel, and to request the assignment of counsel and to be allowed a reasonable time and opportunity to consult counsel before entering a plea;
- (3) the right to remain silent and that the defendant is not required to make a statement and that any statement made by the defendant may be used against the defendant;
- (4) the maximum possible sentence, and any applicable mandatory minimum sentence; and
- (5) the defendant’s right to trial by jury.<sup>180</sup>

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<sup>179</sup> ME. R. UNIFIED CRIM. PROC. 5(d).

<sup>180</sup> ME. R. UNIFIED CRIM. PROC. 5(b).

### Advice of rights video

At the beginning of 48-hour hearings and initial appearances, all courts play a 20-minute video explaining due process rights.<sup>181</sup> The video is produced by the Maine Administrative Office of the Courts and is played uniformly in all counties. The video advises defendants that they should consult a lawyer, warns immigrants to get legal advice, and shows people through the use of mock case examples what occurs at an arraignment and the dangers of pleading guilty without a lawyer.

- As is true throughout the state, the advice of rights in Aroostook County is conducted via the Administrative Office of the Courts video.

There are many admirable qualities about the Administrative Office of the Courts' video, including a demonstration of what proceeding without a lawyer may look like. However, the video is definitely not a substitute for a judge speaking directly to a defendant to advise them of their rights personally. In every courtroom observed in all of the sample counties, the video is played before the judge is on bench. 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.

### Denial of counsel to defendants receiving suspended sentences

Despite defendants being advised of the right to request assignment of counsel, throughout the sample counties many courts take the position that a defendant is not entitled to appointed counsel for a crime if prosecutors do not seek jail time. In fact, the *Rules of Unified Criminal Procedure* expressly state that, if a defendant is charged with a Class D or Class E crime and is indigent, “the court shall make an initial assignment of counsel, *unless the court concludes that in the event of conviction a sentence of imprisonment will not be imposed.*”<sup>182</sup>

The U.S. Supreme Court in *Alabama v. Shelton* made clear that the right to counsel attaches to any case involving the potential for jail time, no matter how remote the possibility.<sup>183</sup> The Court held that courts are prohibited from ever sending an indigent defendant to jail following a suspended sentence unless the defendant originally received or waived their right to an attorney, because a “suspended sentence is a

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<sup>181</sup> The video is available publicly. See *Criminal Cases*, STATE OF ME. JUD. BRANCH, [http://www.courts.maine.gov/citizen\\_help/criminal.html](http://www.courts.maine.gov/citizen_help/criminal.html) (last visited Mar. 9, 2019).

<sup>182</sup> ME. R. UNIFIED CRIM. PROC. 44(a)(1) (emphasis added).

<sup>183</sup> 535 U.S. 654 (2002). The potential for time in jail includes misdemeanors with suspended sentences in which the defendant remains at liberty unless the defendant fails the probationary terms.

prison term imposed for the offense of conviction. Once the prison term is triggered, the defendant is incarcerated not for the probation violation, but for the underlying offense.”<sup>184</sup>

Of greater concern, though, is that indigent defendants who are told by the court that they are not entitled to appointed counsel frequently give up and plead guilty because they cannot afford to hire an attorney. In York County, many indigent defendants submitted to guilty pleas after being told they have no right to counsel unless the prosecutor asks for a jail sentence, and they were then convicted and sentenced to fines they cannot afford to pay. When the imposition of a fine is made a condition of probation, revocation of that probation and imposition of the suspended sentence violates the defendant’s Sixth Amendment rights under these circumstances. Throughout the state, the 6AC observed courts imposing fines and fees as a condition of probation on uncounseled indigent defendants.

### Prosecutors negotiating pleas with unrepresented defendants

Systems that encourage or otherwise direct unrepresented defendants to meet with prosecuting attorneys to discuss plea deals, before making appointed counsel available to them, violate a defendant’s right to counsel. The United States Supreme Court confirmed in *Lafler v. Cooper*<sup>185</sup> and in *Missouri v. Frye*<sup>186</sup> that a defendant has the right to “effective assistance of competent counsel” during plea negotiations. The 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.<sup>187</sup> 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.

For example, at the Biddeford District Court in York County, an assistant district attorney addressed the defendants *en masse*, stating that the defendants will receive a police report and an offer sheet so they can decide if they want to resolve their case that day. The district attorney tells all people with court business (including lawyers, represented defendants, and unrepresented defendants) to sign their names on a sheet taped to the door of a conference room in order to be allowed to talk with an assistant district attorney. Although the prosecutor encouraged all defendants to meet with the lawyer of the day, defendants were also told that to resolve the case that day they could not meet with the lawyer of the day until they first saw the judge.

<sup>184</sup> *Alabama v. Shelton*, 535 U.S. 654, 662 (2002).

<sup>185</sup> 132 S. Ct. 1376 (2012).

<sup>186</sup> 132 S. Ct. 1399 (2012).

<sup>187</sup> *Iowa v. Tovar*, 541 U.S. 77, 88 (2004).

### Chilling of the right to counsel

In York County’s Biddeford District Court, the judges address to the crowd overtly discourages requesting appointment of counsel and encourages guilty pleas at initial appearance. The judge says, “I must advise you of your right to trial. Your first option is to accept the state’s offer and I won’t make you pay today but will give you time into the new year in order to pay. We are willing to give you time. All fines include a 20% surcharge to raise revenue for the legislature and another 15% surcharge to pay for the court’s new computer system. The financial screener is not here this week. Typically, people talk to the lawyer for the day and can later today resolve their case.”

In Somerset County, a judge routinely encouraged defendants to talk with the district attorney, and the judge used the possibility of indigent defendant’s being required to pay fees for appointed counsel to discourage defendants from requesting appointment of counsel. For example, in the Skowhegan District Court, a defendant was told he would have to pay \$500 for appointed counsel because he makes \$16 per hour working full time, although he has two children. Believing himself unable to pay the \$500 fee for appointed counsel, the defendant waived his right to counsel, pled guilty, and was sentenced to 30 days in jail.

### **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.**

If a defendant requests that counsel be appointed to represent him in a case carrying the possible loss of liberty, the Maine courts are required to appoint counsel “when it appears to the court that the accused has not sufficient means to employ counsel.”<sup>188</sup> The first step, then, for any defendant requesting appointed counsel is for the court to determine whether the defendant is indigent.<sup>189</sup>

In 2008, the Brennan Center for Justice published a set of guidelines for how to determine whether defendants are financially eligible for appointment of counsel.<sup>190</sup> The guidelines say jurisdictions must ensure that “screening is performed by someone who does not have a conflict of interest”<sup>191</sup> and then announce unequivocally: “Do not allow individual defenders and public defender programs to screen their own clients.”<sup>192</sup> The Brennan Center quotes the American Bar Association *Model Rules*

<sup>188</sup> ME. REV. STAT. ANN. tit. 15, § 810 (2018); *see also* ME. R. UNIFORM CRIM. PROC. 44(a)(1) (“If the defendant is without sufficient means to employ counsel”);

<sup>189</sup> *See* ME. R. UNIFORM CRIM. PROC. 5(e) (“the determination of indigency . . . shall be governed by” Rule 44), 44(a)(1) (“If the defendant is without sufficient means to employ counsel”).

<sup>190</sup> BRENNAN CENTER FOR JUSTICE, *ELIGIBLE FOR JUSTICE: GUIDELINES FOR APPOINTING DEFENSE COUNSEL* (2008).

<sup>191</sup> BRENNAN CENTER FOR JUSTICE, *ELIGIBLE FOR JUSTICE: GUIDELINES FOR APPOINTING DEFENSE COUNSEL* 8 (2008).

<sup>192</sup> BRENNAN CENTER FOR JUSTICE, *ELIGIBLE FOR JUSTICE: GUIDELINES FOR APPOINTING DEFENSE COUNSEL* 10

of *Professional Conduct* in stating that “the lawyer’s own interests should not be permitted to have an adverse effect on representation of a client.”<sup>193</sup> Because an indigent defense system may have conflicting interests – between the rights of the defendants, and the system’s desire to limit the number of cases they must defend and “reject cases that are time-intensive, controversial, or undesirable in some other way” – the screening function should be independent from the defense function.<sup>194</sup>

### Indigency determination

MCILS employs eight people (one position is currently vacant) to conduct financial screening of defendants who request appointment of counsel. MCILS screeners go to the county jails to conduct screening for in custody defendants at 48-hour hearings and to the courthouses to conduct screening for out of custody defendants at initial appearances.

MCILS is statutorily required to develop standards “governing eligibility for indigent legal services.”<sup>195</sup> MCILS has promulgated a form, entitled “Motion and Affidavit for Assignment of Counsel,” that defendants must complete in writing and swear to under penalty of perjury, providing financial information to MCILS and the court. The MCILS-employed financial screeners use the standards MCILS has adopted to gather information from defendants and make a recommendation as to whether they are financially eligible to receive appointed counsel<sup>196</sup> – counsel selected and paid by MCILS. In FY 2018, MCILS financial screeners interviewed 11,031 defendants statewide: 7,704 were found indigent (70%); 2,322 were found partially indigent (21%); and 1,005 were denied (9%).

### *Automatic MCILS denial*

If the cash assets of the defendant and their family are more than a specified amount based on the most serious crime with which the defendant is charged, MCILS automatically recommends the defendant be denied an appointed attorney,<sup>197</sup> without any consideration of the defendant’s expenses, liabilities, or dependents. Cash assets are defined by MCILS as cash on hand, money in deposit accounts, stocks and bonds that can be sold, and cash bail unless posted by someone other than the defendant or

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(2008).

<sup>193</sup> BRENNAN CENTER FOR JUSTICE, *ELIGIBLE FOR JUSTICE: GUIDELINES FOR APPOINTING DEFENSE COUNSEL* 10 (2008) (quoting AMERICAN BAR ASS’N, *MODEL RULES OF PROF’L CONDUCT* 1.7, cmt. 10 (2018)).

<sup>194</sup> BRENNAN CENTER FOR JUSTICE, *ELIGIBLE FOR JUSTICE: GUIDELINES FOR APPOINTING DEFENSE COUNSEL* 10-11 (2008).

<sup>195</sup> ME. REV. STAT. ANN. tit. 4, § 1804(2)(A) (2018).

<sup>196</sup> 94-649 Code Me. R. ch. 401, summary (June 23, 2012) (“These guidelines govern the work of financial screeners employed by the commission and are intended to provide guidance to the courts in their determination of financial eligibility”).

<sup>197</sup> 94-649 Code Me. R. ch. 401, § 1(2)(B) (June 23, 2012).



their family.<sup>198</sup> The amount of cash assets that triggers denial of counsel is: \$1,000 for Class D or E; \$2,000 for Class C; \$3,000 for Class B; and \$4,000 for Class A.<sup>199</sup>

Next, the financial screener considers other assets of the defendant and their family to determine whether they can be converted into cash. If the cash assets and convertible other assets together are more than the specified amount for the most serious crime with which the defendant is charged, MCILS automatically recommends the defendant be denied an appointed attorney,<sup>200</sup> again without any consideration of the defendant’s expenses, liabilities, or dependents. Other assets are defined by MCILS as: equity in real estate sufficient to obtain a home equity loan; cash value of insurance policies, pension, retirement, or profit sharing; equity value of property not needed for work or family transportation; and any personal property, such a jewelry or antiques, that could be sold, exchanged, or used to get a loan.<sup>201</sup>

*Automatic MCILS approval*

Next, the financial screener considers the income of the defendant and their family. If the income of the defendant and their family is less than 110% of the federal poverty guidelines, based on family size, MCILS automatically recommends the defendant be appointed an attorney.<sup>202</sup> Income as defined by MCILS is total before-tax annual receipts of all family members from: wages, self-employment, rents & royalties, child support & alimony, SSI & SSDI & social security & VA and TANF benefits, unemployment & workers comp, insurance & pension & strike benefits, interest & dividends, and military family allotments; and “potential wages from seasonal employment when the applicant has a history of seasonal employment.”<sup>203</sup>

<sup>198</sup> 94-649 Code Me. R. ch. 401, § 1(1)(B) (June 23, 2012).

<sup>199</sup> 94-649 Code Me. R. ch. 401, § 1(2)(B) (June 23, 2012).

<sup>200</sup> 94-649 Code Me. R. ch. 401, § 1(2)(C) (June 23, 2012).

<sup>201</sup> 94-649 Code Me. R. ch. 401, § 1(1)(C) (June 23, 2012).

<sup>202</sup> 94-649 Code Me. R. ch. 401, § 1(2)(C) (June 23, 2012). Income calculated at 110% of the 2018 federal poverty guidelines results in the following amounts based on family size:

Family Size	Poverty Gdln	Gross Income @ 110% of Poverty Gdln		
		Annual	Monthly	Weekly
1	\$12,140	\$13,266	\$1,105.05	\$255.11
2	\$16,460	\$17,864	\$1,488.66	\$343.53
3	\$20,780	\$22,462	\$1,871.83	\$431.96
4	\$25,100	\$27,060	\$2,255.00	\$520.38
5	\$29,420	\$31,658	\$2,638.16	\$608.80
6	\$33,740	\$36,256	\$3,021.33	\$697.23
7	\$38,060	\$40,854	\$3,404.50	\$785.65
8	\$42,380	\$45,452	\$3,787.66	\$874.07

<sup>203</sup> 94-649 Code Me. R. ch. 401, § 1(1)(A) (June 23, 2012).

### *Possible MCILS approval*

It is only when the defendant has not been automatically denied or automatically approved that the financial screener considers the necessary expenses of the defendant and their family: a defendant “may be eligible for assigned counsel if they have extraordinary necessary monthly expenses that render them unable to retain counsel.”<sup>204</sup> MCILS defines necessary monthly expenses *exclusively* as food, shelter (mortgage, rent, utilities), medical care (including insurance premiums and medical debts payments), employment (including payments on vehicle to get to work and required uniforms), and debts (including credit card minimum payments, student loan payments, and long-term personal loan payments).<sup>205</sup>

- The MCILS financial screener for Aroostook County works, on average, a 20-hour week and is paid \$12.75/hour (approximately \$14,000/year). Upon completing the financial review, the MCILS financial screener in Aroostook County goes back to the office to verify social security information and to fill out an affidavit with recommendations to be faxed to the court.<sup>206</sup>

The MCILS financial screener never travels to the two most northern courts (Fort Kent and Madawaska). Only out of custody defendants appear in these courts, and the court clerks do the financial eligibility screening and recommendations. The MCILS financial screener does travel to and perform all eligibility screening in the Houlton, Presque Isle, and Caribou courts.

A situation in Cumberland County transformed the appearance of a conflict of interest by MCILS attorneys 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.<sup>207</sup> This process places the lawyer in the position of a potential witness against the client, in the event the affidavit is challenged. Moreover, the lawyer ethically should not participate in the financial screening that will produce for him a fee generating assignment. 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.

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<sup>204</sup> 94-649 Code Me. R. ch. 401, § 1(2)(F) (June 23, 2012).

<sup>205</sup> 94-649 Code Me. R. ch. 401, § 1(1)(D) (June 23, 2012).

<sup>206</sup> In Aroostook County, the MCILS financial screener’s office is located in a secured area of the Houlton County Superior Court clerk’s office.

<sup>207</sup> Some appointed attorneys reportedly refuse to notarize the affidavit.

### *Court determination of eligibility*

By statute, MCILS is required to “provide the court . . . information used to determine indigency for guidance to the court in determining a defendant’s . . . ability to obtain private counsel.”<sup>208</sup> Upon completing the financial review, the MCILS financial screener goes back to their office to verify social security information and to fill out an affidavit with recommendations to be faxed to the court. The judge ultimately determines the defendant’s eligibility to receive court appointed counsel.

- In FY 2017 and FY 2018, there were no instances in Aroostook County in which a judge did not follow the MCILS financial screener recommendation. In FY 2017 (the last year for which full information is available for Aroostook County), MCILS screened 808 individuals in Aroostook County (approximately 15 people per week). Of those, the screener determined 682 to be indigent (84%), denied counsel to 96 people (12%), and determined that 30 were partially indigent (4%).

### Reimbursements assessed against indigent defendants

MCILS’s eligibility standards are required by statute to “take into account the possibility of a defendant’s . . . ability to make periodic installments payments toward counsel fees.”<sup>209</sup> MCILS must “administer and improvement reimbursement” by indigent defendants, and MCILS is *required* to petition a court to reassess indigency of any defendant if MCILS “determines that indigency should be reassessed.”<sup>210</sup> In addition to gathering financial information and making a recommendation to the court about a defendant’s eligibility for appointed counsel, the MCILS financial screeners make recommendations about whether and to what extent an indigent defendant should be required to make reimbursements for the cost of their indigent legal representation.

For every defendant who received automatic MCILS approval for appointment of counsel based on income less than 110% of the federal poverty guidelines, the financial screener must compare the monthly income of the defendant and their family to their necessary monthly expenses.<sup>211</sup> To whatever extent that income exceeds those expenses, MCILS standards decree that the defendant “should be required to make periodic payments . . . to reimburse the State for the cost of assigned counsel . . . up to an amount equal to the maximum fee” set by MCILS for the type of case to which counsel is assigned to represent that defendant.<sup>212</sup>

<sup>208</sup> ME. REV. STAT. ANN. tit. 4, § 1805-A(2) (2018).

<sup>209</sup> ME. REV. STAT. ANN. tit. 4, § 1804(2)(A) (2018).

<sup>210</sup> ME. REV. STAT. ANN. tit. 4, § 1805-A(1) (2018).

<sup>211</sup> 94-649 Code Me. R. ch. 401, § 1(2)(E) (June 23, 2012).

<sup>212</sup> 94-649 Code Me. R. ch. 401, § 1(2)(E) (June 23, 2012). As of 2018, the maximum fees set by MCILS that indigent defendants may be required to reimburse the State of Maine for the cost of their appointed counsel are:

For every defendant whose combined family income exceeds 110% of the federal poverty guidelines but who received appointed counsel because of “extraordinary necessary monthly expenses,” MCILS requires that “an order for reimbursement should be entered unless the interests of justice demand otherwise.”

The MCILS financial screener makes these reimbursement recommendations to the court. If the court finds that a defendant is “able to contribute,” the court is required to order a defendant represented by appointed counsel to “make installment payments up to the full cost of representation or to pay a fixed contribution.”<sup>213</sup>

The remainder of the MCILS financial screeners’ time is spent on collections.<sup>214</sup> That entails mailing an initial letter to any defendant ordered to make a reimbursement, letting them know of their financial obligation and where to make payments. The screeners track (via a spreadsheet or index file system) whether a defendant is current on making payments. If a defendant is delinquent, the screener will send out a “dunning” letter informing them they are behind in making payments and what the consequences will be (a show cause hearing). Courts schedule a small number of these show cause hearings each month for defendants who are not making payments. The final piece of collections is a yearly submission by each screener of a spreadsheet

Type	Amount
Class A	\$3,000
Class B & C (against person)	\$2,250
Class B & C (against property)	\$1,500
Class D & E (Superior or UCD)	\$750
Class D & E (District Court)	\$540
Post-Conviction Review	\$1,200
Probation Revocation	\$540
Miscellaneous	\$540
Juvenile	\$540
Child Protective	\$900
Termination of Parental Rights (with hearing)	\$1,260
Application for Involuntary Commitment	\$420
Petition for Emancipation	\$420
Petition for Modified Release Treatment	\$420
Petition for Release or Discharge	\$420
Criminal Direct Appeals & Appellate work	\$1,200

<sup>213</sup> ME. REV. STAT. ANN. tit. 4, § 1805-A(3)(A) (2018); ME. R. UNIFIED CRIM. PROC. 44(b).

<sup>214</sup> A few miscellaneous tasks performed by the MCILS financial screeners include reporting the number of screenings done each month with a breakdown of how many were found indigent, partially indigent, or denied (and whether the court followed the screener’s recommendation); doing screening for waiver of fee cases (civil matters); and submitting three financial affidavits each week to the Investigator Financial Screener, for closer scrutiny. The screener gathers data from the Maine Department of Labor and from several other internet resources (Westlaw’s CLEAR service, Facebook, Google, etc.) to determine whether the indigency affidavit was completed accurately.

listing all the defendants who either have never paid or have not made any recent payments. This spreadsheet is called the “tax offset spreadsheet” (lists defendant name, social security number, docket number, and amount owed), and it is submitted to the judicial branch to go along with the courts’ submission to the Maine Revenue Service of defendants who owe fines. The Maine Revenue Service will intercept state tax returns of anyone on this list and will apply the money toward counsel fees owed.

In FY 2017, MCILS collected \$677,735 in partial indigency payments from indigent defendants statewide represented by appointed attorneys.

- In FY 2017, MCILS collected \$1,787 in partial reimbursements by indigent defendants in Aroostook County.

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 trying to collect those fees.

**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.**

If the court appoints a defense lawyer early enough in the process, that lawyer can effectively represent the client if afforded the time, training, and resources to do so. Yet, early appointment of counsel will not result in effective representation if that process is truncated by actual case preparation being delayed for days or weeks. Until the defendant has counsel who is responsible to interview the defendant in depth, investigate defenses, and preserve evidence, the defendant cannot be said to have the effective assistance of counsel.

MCILS provides for a “lawyer of the day.” The lawyer of the day attorneys appear at 48-hour hearings for in custody defendants and at initial appearance for out of custody defendants, and the attorneys are present throughout the court’s docket. Some counties have attorneys who regularly fill the lawyer of the day role, while others do it on a semi-rotational basis.

- In Aroostook County, MCILS has an “in-custody lawyer of the day” available for in-custody defendants at the 48-hour videoconference hearing and the lawyer is with the defendant at the jail while the district attorney is with the

judge in the court. Although any rostered lawyer could sign up for this duty, in Aroostook County two local lawyers predominantly handle this function.<sup>215</sup>

“Lawyer of the day” duties for out of custody defendants are more evenly dispersed among attorneys than the practice of one or two attorneys handling most of the lawyer of the day duties for in custody defendants. This is because it is more likely that an attorney will be appointed to cases for which they appear as the lawyer of the day.<sup>216</sup>

The Cumberland County system relies on group announcements to apprise defendants of legal rights, including an invocation that they may have to wait hours to consult with the lawyer for the day. As elsewhere in the state, 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. On an average day in Cumberland County’s Portland District Court, there are two lawyers for the day to handle 80 defendants; about 12 of the cases are serious crimes and only about half of those defendants have retained counsel.

When the judge takes the bench in Cumberland District Court, the lawyers for the day exit the courtroom carrying stacks of financial affidavit forms. They set up a makeshift office in a conference room where out of custody defendants line up to meet with them. The lawyer for the day tries to describe constitutional rights in the lockup to a whole group of in custody defendants. There is a lack of confidentiality for both of these interviews. One defense lawyer hates to be assigned as lawyer for the day because he believes a group waiver of rights is unconstitutional.

Another defense attorney reports being expected to represent up to 30 people on a single docket as lawyer of the day. The lawyer of the day is required to advise all defendants at court, whether indigent or not. the lawyer is supposed to receive discovery with a written plea offer from the district attorney’s office on the day before court, and is expected to meet the client the next day and advise them. Some attorneys advise defendants without having received discovery. This lawyer believes there should be MCILS standards on follow-through by the lawyer for the day to provide information to successor counsel, because many attorneys do not do so. MCILS did not offer or provide any training for the role as lawyer of the day.

In Androscoggin County, two lawyers of the day are typically expected to represent 200 defendants. One lawyer, who will no longer accept assignment as lawyer for the

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<sup>215</sup> Over the past four years, one attorney handled 617 in-custody lawyer of the day cases (32.25%) and a second attorney handled 11.55%. Twenty-eight other lawyers handled at least one day of in-custody lawyer of the day duties in Aroostook County over the past five years, but each handled less than 5% of the possible in-custody days.

<sup>216</sup> Nineteen lawyers were paid for out of custody lawyer of the day duties in Aroostook County from FY2014 to FY2018. The lawyer serving most frequently staffed 45 dockets (12.20%).

day, estimated having about five minutes to spend with each defendant.

Making the lawyer for the day available to non-indigent litigants exacerbates the denial of counsel to indigent defendants, conflicts with Maine state law on the scope of the right to counsel, and creates an unreasonable risk of solicitation in violation of ethical rules.

#### Appointment of counsel

Once a court determines that a defendant is eligible for appointment of counsel, then the court must appoint an MCILS attorney to represent that defendant.

#### Continuous representation from appointment through disposition

ABA *Principle 7* requires that the same attorney initially appointed to a case continuously represent the defendant through disposition of the case.<sup>217</sup> Commonly referred to as “vertical representation,” the continuous representation by the same attorney is contrasted with “horizontal representation” – a representational scheme whereby one attorney represents the client during one court proceeding before handing off the client’s case to another attorney to cover the next stage.

As the American Bar Association explains, “horizontal representation” is uniformly implemented as a cost-saving measure in the face of excessive workloads and to the detriment of clients. In fact, the ABA rejects the use of horizontal representation in any form, stating specifically that: “[c]ounsel initially provided should continue to represent the defendant throughout the trial court proceedings and should preserve the defendant’s right to appeal, if necessary.”<sup>218</sup>

In explaining why horizontal representation is so harmful to clients, the ABA states:

Defendants are forced to rely on a series of lawyers and, instead of believing they have received fair treatment, may simply feel that they have been “processed by the system.” This form of representation may be inefficient as well, because each new attorney must begin by familiarizing himself or herself with the case and the client must be re-interviewed. Moreover, when a single attorney is not responsible for

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<sup>217</sup> AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 7 (2002).

<sup>218</sup> AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 7 cmt. (2002).

the case, the risk of substandard representation is probably increased. Appellate courts confronted with claims of ineffective assistance of counsel have commented critically on stage representation practices.<sup>219</sup>

The nexus between the requirement that trial counsel be appointed as early as possible and the requirement that the attorney who is appointed initially to represent the client remains with that client's case through to completion is to ensure that the minimum level of advocacy necessary to mount a meaningful defense commences as soon as possible. In defender systems relying on horizontal representation schemes, the delay in appointing the actual trial lawyer has negative consequences for the client, as exculpatory evidence like video tapes are routinely destroyed within days, physical evidence like bruises fade away quickly, and witnesses can become harder and harder to track down.<sup>220</sup>

Early assignment of the lawyer for the day provides limited if any 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,<sup>221</sup> some leave it to their clerks to do after the hearing, and

<sup>219</sup> AMERICAN BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE – PROVIDING DEFENSE SERVICES, Standards 5-6.2 cmt. (3d ed. 1992).

<sup>220</sup> One defense lawyer pointed out the risk of ineffective assistance posed not only to clients but also to lawyers. The Maine Supreme Judicial Court has said that the lawyer for the day has an attorney client relationship for the purpose of whatever she advises the client about, but has not addressed the issue of the responsibility of the lawyer for the day for guilty pleas entered by defendants they have counseled, which often occur when the lawyer is not present in court.

<sup>221</sup> Judicial control of indigent defense representation has been criticized in a number of U.S. Supreme Court cases. In the "Scottsboro Boys" case of *Powell v. Alabama*, the Court observed that the right to counsel rejects the notion that a judge should direct the defense:

[H]ow can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it that, in the proceedings before the court, the accused shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional.

*Powell v. Alabama*, 287 U.S. 45, 61 (1932). Future U.S. Supreme Court cases would make clear the constitutional requirement for independence of the defense function. In the 1979 case of *Ferri v. Ackerman*, the Court states that independence of appointed counsel to act as an adversary is an "indispensable element" of "effective representation." *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979). Two years later, the Court determined in *Polk County v. Dodson* that each state has a "constitutional obligation to respect the professional independence of the public defenders whom it engages." *Polk County v. Dodson*, 454 U.S. 312, 321-22 (1981). Observing that "a defense lawyer best serves the public not by acting on the State's behalf or in concert with it, but rather by advancing 'the undivided interests of the client,'" the Court also noted that "a public defender is not amenable to administrative direction in the same sense as other state employees" because he "works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client." *Polk County v. Dodson*, 454 U.S. 312, 318-19 (quoting *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979)). This is confirmed in *Strickland v. Washington*, where the Court states that "independence of counsel" is "constitutionally



some use a rotational system where the next attorney on the list is appointed. One judge told us, as did almost all defense attorneys, that the reason the lawyer for the day is not assigned the case from that day’s docket is that the judiciary in Cumberland County feared lawyers would encourage client’s to reject prosecution plea offers if the lawyers could keep the cases.

- Appointments in Aroostook County are not rotational. Aroostook County does not generally have a large number of indigent cases,<sup>222</sup> so judges generally know which lawyer is taking cases and what strengths the attorney possesses as far as specialties. Defendants remaining in custody are prioritized for appointments and are told who their lawyer is as soon as possible (generally within 24 hours).

The problem of non-continuous representation also arises with policies that allow for attorneys to “stand in” for one another. MCILS’ fee schedule policy currently *directs* attorneys to stand in for each other:

When doing so will not adversely affect the attorney-client relationship, Commission-assigned counsel are urged to limit travel and waiting time by cooperating with each other to stand in at routine, non-dispositive matters by having one attorney appear at such things as arraignments and routine non-testimonial motions, instead of having all Commission-assigned counsel in an area appear.<sup>223</sup>

In child protection cases in Androscoggin County, one attorney reports that lawyers stand in for each other, but only on court dates of uncontested matters like scheduling.

protected” and that “[g]overnment violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense.” Strickland v. Washington, 466 U.S. 668, 686 (1984).

<sup>222</sup> For example, the following table shows the total numbers of new criminal and family cases over the past five years:

CRIMINAL	2014	2015	2016	2017	2018
New Filings	2934	2585	2483	2299	2695
Probation Violation	210	162	176	188	230
Total	3144	2747	2659	2487	2925
FAMILY	2014	2015	2016	2017	2018
Parental Rights	148	133	154	113	99
Guardianships	0	0	0	5	2
Child Protective	89	69	30	70	61
Protection from Abuse	332	336	367	323	353
Juvenile	92	134	92	2107	92
Total	661	672	643	2618	607

<sup>223</sup> 96-649 Code Me. R. ch. 301, §4(1)(D) (June 10, 2016).

However, a different attorney reports that standing in is very common among child protection attorneys, including for proceedings called judicial review, which are status reports to the court on the client's progress.

“Standing in” is also a problem when larger firms have one attorney covering all of that firm's cases. Larger firms receive additional assignments because the courts assign cases to attorneys or firms who have previously represented the client. In this way, larger firms increase their market share and defeat the concept of rotation.

### Delayed appointment of counsel

In a number of courts, defendants sometimes are not told at their first appearance the name of the attorney who will be assigned to represent them. Even if defendants are given the name of an attorney at court, attorneys report that the notice to the attorney of the assignment often takes several days.

It can take up to ten days for appointed counsel to contact defendants after first appearance. For example, in Aroostook County, judges or their clerks must call around to assigned counsel attorneys to see who is available to take cases. This takes effort and considerable time. Similarly in York County, the assignment of counsel takes weeks, almost always, and lawyers for the day do not communicate with successor counsel.

Some juvenile defendants do not have an attorney even after weeks in detention, because their parents did not request one. The family's wealth is counted against the eligibility of juveniles for assigned counsel unless the juvenile is charged with a family-based offense. Thus, many juveniles may go without counsel altogether.

Juvenile cases may require reassignment after initial appearance due to the lack of a sufficient number of juvenile-qualified attorneys in rural parts of the state. Reportedly, many juveniles are diverted from the court system. When a juvenile is arrested, the police call the juvenile community correction officer who has the authority to divert the case from court. If the case is not diverted, the child may be detained in a local jail or taken to Long Creek detention facility in Portland or Mountain View Youth Development Center which is part of a prison in Bangor. Outside of Cumberland and York counties, where there are fewer specific juvenile court days, a juvenile could be represented by a lawyer for the day who is not on the juvenile roster.

### Conflict of interest in Somerset County

The lawyer of the day program in Somerset County produces a direct conflict of interest. The Project's contract attorneys can be hired by non-indigent defendant who appear in court while the Project attorneys are serving as lawyer for the day. One

Project attorney gives a speech to all the people at the court, explaining his role and inviting them to talk with him whether they are indigent or not. The Project attorney is then free to be hired by people who meet him as lawyer for the day, or he can refer clients he meets at court to other attorneys of his choosing. The Project attorneys also have input on the defendants' eligibility for assigned counsel, creating a direct conflict of financial interest because the Project could reject a defendant for appointed counsel and then accept the case as a private retainer. This central role of the Project 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. In this way, the contract model exacerbates rather than resolves the problem of lack of capacity of legal service providers in this rural county.

No valid purpose is served by the policy that the lawyer for the day is free to accept retainer by non-indigent defendants he meets through this system.

## INSTITUTION OF PROSECUTION & ARRAIGNMENT

For a Class D or E crime, the 48-hour in custody hearing or the out of custody initial appearance also serves as the arraignment. Class D and E crimes are next set for a dispositional conference usually about four to six weeks later.

For crimes of Class C and higher, the next court setting is the arraignment, usually about four to six weeks after the 48-hour in custody hearing or the out of custody initial appearance. After arraignment, the next event in these cases is a pre-trial dispositional conference.

**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.**

### Contact with in custody defendants

During the past year a group of judges and attorneys interviewed juvenile detainees at Long Creek and sent a letter of complaint to MCILS, informing MCILS that detained children had told them their assigned lawyers had not communicated with them enough for them to understand their own cases. MCILS acknowledged receiving similar complaints in the past.

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.

In another studied county, the Sheriff says pretrial detainees there complain about lack of attention from their attorneys. We were informed that that Sheriff called a couple of attorneys over the Christmas holiday to say that their clients felt neglected.

In a third studied county, the Sheriff's staff also acknowledged complaints by prisoners most often involving inability to connect with their attorney. Assigned attorneys visit detainees less frequently than retained counsel, and complaints are relatively common with somewhat over 50% of prisoners stating that there is a lack of pretrial preparation and that they are not able to connect with their attorneys before court hearings. Most attorneys provide telephone numbers but the prisoner usually has to leave a message, which the attorney does not respond to. When the lack of contact is a repeated problem the jail staff allows the prisoners to use a regular phone so they can make a call without it being a collect call. Occasionally prisoners do not know who their attorney is, but this is not common. The jail has private rooms and allows contact visits. Attorneys can bring in a laptop. The jail also has equipment for viewing digital evidence by prisoners alone (without the attorney present) but this facility is not private. Often the assigned attorneys do not have time to view digital evidence with their clients and ask the jail staff to arrange to show the evidence to the client at the jail facility even though it is not private.

MCILS data tends to confirm these observations of the sheriffs. 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.

### Motions practice

Not every MCILS case requires that a motion be filed. Indeed, there may be specific reasons why an attorney may decide not to file a motion. As such, it is difficult to review data on motions practice at a general level. That said, when few motions are ever filed statewide, it points to issues of concern.

In FY 2018, private attorneys billed MCILS for the following types of motion practice:<sup>224</sup>

MOTION TYPE	NUMBER	COST
Bill of Particulars	21	\$948.00
Continuance	2,457	\$55,935.00
Discovery	1,029	\$29,226.00
Dismiss	112	\$8,337.00
Expedited Review	42	\$1,245.00
Forensic evidence	108	\$3,516.00
New Trial	11	\$936.00
Review Bail	1,476	\$41,764.20
Suppress	984	\$41,766.00
<b>Total</b>	<b>6,240</b>	<b>\$183,673.20</b>

Interpretation of this data is difficult at best, because district attorney practices can affect the need to file certain types of motions. For example, even though MCILS' numbers look very low for motions for discovery, such motions might be minimal due to the fact that prosecutors routinely provide "open file" discovery.

Perhaps the most telling category to is suppression motions in criminal and delinquency cases. In any criminal/delinquency case in which arguably illegally-obtained evidence is part of the government's case against the defendant, there should be a billing voucher item for the preparation and filing of a suppression (even if the motion produced a plea bargain and thus was not litigated). Defense counsel should prepare and put forward any non-frivolous suppression argument, which often have the effect of causing the government to make a fairer plea offer. Suppressible evidence could be any statement by the defendant, any tangible evidence found by police and attributed to the defendant, any arguably unfair identification of the defendant, or any evidence obtained through an arguably improper arrest. Motions to suppress should almost always be researched, even if not always filed, in drug cases and DWI cases.

Defendants, especially juveniles, make statements in many cases that warrant suppression motions because the prosecution must prove a voluntary waiver of Fifth Amendment rights. Regardless of how progressive prosecutors are, the variability of police actions in the process of arresting, searching, and interrogating people should make suppression motions commonplace by vigorous defenders anywhere. And since suppression motions are litigated pretrial, the practice does not preclude plea bargaining. Usually, the threat of litigating the motion is a plea bargaining tool.

<sup>224</sup> Email from John Pelletier, Director, Maine Commission on Indigent Legal Services, to David Carroll, Executive Director of Sixth Amendment Center (Mar. 6, 2019).

So, the 5.5% figure here looks unreasonably low (984 bills in 17,701 adult and juvenile criminal cases). Even if this billing category is used by some participating attorneys only when a suppression motion is litigated (as opposed to researched, prepared, and filed), it would still appear too low, since prosecutors can agree to suppression motions that are clearly correct, but they cannot agree to the many suppression motions that rely on the credibility of witnesses challenging police versions of events.

Because MCILS has no systems or capacity to provide oversight, the State of Maine cannot know either way if the low number of motions filed statewide indicates poor performance.

### Use of investigators

The MCILS expenditure on litigation expenses, at \$1M per year, is very low for the annual caseload of approximately 15,000 new adult criminal cases, 2,000 probation surrenders, 1,000 juvenile cases, 2,500 child protection cases, and 1,000 mental health cases. While good practice would indicate use of investigators in most criminal cases, social work or mental health experts in most child protection cases, and independent psychiatric experts in many mental health cases, these litigation supports are used very infrequently throughout Maine.

The U.S. Supreme Court has determined that the failure to conduct adequate investigation can be grounds for a finding of ineffective assistance of counsel.<sup>225</sup> Moreover, it is crucial that an investigator be available to assist the attorney with interviewing witnesses, else “the attorney may be placed in the untenable position of either taking the stand to challenge the witnesses’ credibility if their testimony conflicts with statements previously given or withdrawing from the case.”<sup>226</sup> The U.S. Supreme Court has also held, for example, that an indigent accused is entitled to the assistance of a psychiatrist at public expense to assert an insanity defense.<sup>227</sup>

### Case preparation and zealous advocacy

Assigned counsel representation is quite variable in quality. In observations of Androscoggin County’s Lewiston District Court, lawyers often sought time for their clients to pay the fines and fees being assessed, but never argued that payment would be impossible due to the defendant’s inability to amass funds. A respected defense attorney in Androscoggin County for juvenile delinquency cases reports that most

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<sup>225</sup> *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986) (“[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.”).

<sup>226</sup> AMERICAN BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE – PROVIDING DEFENSE SERVICES, commentary to Standard 5-1.4 (3d ed. 1992).

<sup>227</sup> *Ake v. Oklahoma*, 470 U.S. 68 (1985).

attorneys on the Androscoggin roster have not had a jury trial in over 10 years. He says that typically independent psychiatric experts are not used for necessary evaluations; rather the parties agree upon a state employed expert.

Another defense attorney in Androscoggin County who handles mental health cases explained it is very common for hospital staff to persuade a client to accept a voluntary commitment even after counsel has been assigned, causing many commitment cases to be dismissed. He explained that this may account for the very low average cost per case; a three-hour bill should mean the case was dismissed before hearing. A contested hearing should involve eight to ten hours of legal work, with about one to three hours of that being the actual hearing. This attorney reports that he has never seen an assigned attorney use a psychiatric expert in a mental health case other than the “independent evaluators” chosen and provided by the court. Although most of these independent experts are competent and fair, he notes that some are “terrible.” He had never considered seeking an independent expert through funding from MCILS.

In observations in Somerset County, some defendants did not know the last name of the attorney who had been appointed to represent them and had to ask court officers to identify their attorney. Project attorneys were observed asking people in the courthouse for their names and calling out names of their clients whom they did not recognize. One Project attorney stood in the courthouse lobby calling out, “Does anyone have a case with me?” This occurred on a date when cases were scheduled for disposition conferences, so competent defense counsel should have already met with all clients for in-depth interviews and prepared their cases before that date. Court in Somerset County is often delayed due to lack of pretrial preparation. The court officers say they delay the calling of the list so that the attorneys can prepare by talking with their clients.

A Project attorney interviewed by the 6AC could not recall the last time he conducted a jury trial or an appeal for an assigned client, despite his caseload of over 700 assigned cases per year and his 20 years with the Project. He said he did a jury trial for a retained client the previous year.

A judge reports that “the clerks think the attorneys do not meet with the clients until the disposition conferences.” The judge notes there is less use of private investigators and experts by defense attorneys in Somerset County than in Franklin County. He states it is okay to have more than 60 dispositional conferences with only one judge in Somerset County, but it is not okay in Augusta, because in Somerset there are more agreements between defense and prosecution. He says, “I wouldn’t be surprised if a retained attorney saw the client more than an assigned attorney... If I had a magic wand, I would go to a public defender system in all counties or a contract system in all counties because the courts would run more efficiently, and representation would be better because the attorneys would be focusing on criminal law.”

Another judge estimates that in 90% of Somerset County cases the defense attorney has had no contact with the client before the dispositional conference. He too notes there are fewer trials in Somerset than in Augusta. He believes there were less than seven or eight trials in Somerset last year, compared to seven or eight per month in Augusta. Somerset County's population of 50,000 is less than half of Augusta's population of 130,000. Yet, the judge says that 50% to 60% of defendants plead guilty at arraignment in Somerset, whereas in Kennebec County almost no one does.



# CHAPTER IV

## SUFFICIENT TIME

The U.S. Supreme Court in *Powell v. Alabama* notes that the lack of “sufficient time”<sup>228</sup> to consult with counsel and to prepare an adequate defense was one of the primary reasons for finding that the Scottsboro Boys were constructively denied counsel. Impeding counsel’s time “is not to proceed promptly in the calm spirit of regulated justice, but to go forward with the haste of the mob.”<sup>229</sup> One state supreme court observed over twenty years ago, “as the practice of criminal law has become more specialized and technical, and as the standards for what constitutes reasonably effective assistance of counsel have changed, the time an appointed attorney must devote to an indigent’s defense has increased considerably.”<sup>230</sup> Insufficient time is, therefore, a marker of constructive denial of counsel. The inadequate time may itself be caused by any number of things, including but not limited to excessive workload or contractual arrangements that create fiscal incentives for lawyers to dispose of cases quickly rather than in the best interests of their clients.

No matter how complex or basic a case may seem at the outset, no matter how little or how much time an attorney wants to spend on a case, and no matter how financial matters weigh on an attorney, there are certain fundamental tasks each attorney must do on behalf of every client in every criminal case. Even in the simplest case, the attorney must, among other things:

- meet with and interview the client;
- attempt to secure pretrial release if the client remains in state custody (but, before doing so, learn from the client what conditions of release are most favorable to the client);
- keep the client informed throughout the duration of proceedings;
- request and review discovery from the prosecution;
- independently investigate the facts of the case, which may include learning about the defendant’s background and life, interviewing both lay and expert witness, viewing the crime scene, examining items of physical evidence, and locating and reviewing documentary or video evidence;
- assess each element of the charged crime to determine whether the prosecution can prove facts sufficient to establish guilt and whether there are justification or excuse defenses that should be asserted;
- prepare appropriate pretrial motions and read and respond to the prosecution’s

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<sup>228</sup> *Powell v. Alabama*, 287 U.S. 45, 59 (1932).

<sup>229</sup> *Powell v. Alabama*, 287 U.S. 45, 59 (1932).

<sup>230</sup> *State v. Wigley*, 624 So.2d 425, 428 (La. 1993).

- motions;
- prepare for and appear at necessary pretrial hearings, wherein he must preserve his client's rights;
  - develop and continually reassess the theory of the case;
  - assess all possible sentencing outcomes that could occur if the client is convicted of the charged crime or a lesser offense;
  - negotiate plea options with the prosecution, including sentencing outcomes; and
  - all the while prepare for the case to go to trial (because the decision about whether to plead or go to trial belongs to the client, not to the attorney).<sup>231</sup>

The lawyer owes all of these duties to every client in every case, and so Maine's *Rules of Professional Conduct*<sup>232</sup> and national standards, as summarized by the American Bar Association, agree that "[d]efense counsel's workload [must be] controlled to permit the rendering of quality representation."<sup>233</sup> Workload includes the cases an attorney is appointed to handle within a given system (i.e., caseload), but it also includes the cases an attorney takes on privately, public defense cases to which the attorney is appointed in other jurisdictions, and other professional obligations such as obtaining and providing training and supervision.<sup>234</sup> In addition to considering the raw number of cases of each type that an attorney handles, all national standards agree that the lawyer's workload must take into consideration "all of the factors affecting a public defender's ability to adequately represent clients, such as the complexity of cases on a defender's docket, the defender's skill and experience, the support services available to the defender, and the defender's other duties."<sup>235</sup>

The National Advisory Commission on Criminal Justice Standards and Goals (NAC) created the first national defender caseload standards as part of an initiative funded by the U.S. Department of Justice.<sup>236</sup> It is these NAC caseload maximums to which

<sup>231</sup> See generally NATIONAL LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION (1995).

<sup>232</sup> ME. R. PROF'L CONDUCT 1.3 cmt ("[a] lawyer's workload must be controlled so that each matter can be handled competently").

<sup>233</sup> AMERICAN BAR ASS'N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 5 (Feb. 2002).

<sup>234</sup> AMERICAN BAR ASS'N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, commentary to Principle 5 (Feb. 2002).

<sup>235</sup> Statement of Interest of the United States at 9, *Wilbur v. City of Mount Vernon*, No. C11-1100RSL (W.D. Wash., filed Aug 14, 2013), available at <http://www.justice.gov/crt/about/spl/documents/wilbursoi8-14-13.pdf>. See, e.g., Mary Sue Backus and Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L. J. 1031, 1125 (2006) ("Although national caseload standards are available, states should consider their own circumstances in defining a reasonable defender workload. Factors such as availability of investigators, level of support staff, complexity of cases, and level of attorney experience all might affect a workable definition. Data collection and a consistent method of weighing cases are essential to determining current caseloads and setting reasonable workload standards.").

<sup>236</sup> Building upon the work and findings of the 1967 President's Commission on Law Enforcement

national standards refer when they say that “in no event” should national caseload standards be exceeded. NAC Standard 13.12 prescribes absolute maximum numerical caseload limits of:

- 150 felonies per attorney per year;
- 400 misdemeanors per attorney per year;
- 200 juvenile delinquencies per attorney per year;
- 200 mental health per attorney per year; or
- 25 appeals per attorney per year.<sup>237</sup>

This means a lawyer handling felony cases should not be responsible for more than a total of 150 felony cases in a given year, counting both cases the lawyer had when the year began and cases assigned to the lawyer during that year, and including all of the lawyer’s cases (public, private, and pro bono). The NAC standards can be prorated for mixed caseloads. For example, an attorney could have a mixed caseload over the course of a given year of 75 felonies (50% of a maximum caseload) and 200 misdemeanors (50% of a maximum caseload) and be in compliance with national caseload standards. The caseload limits assume that the lawyer does not have any other duties, such as management or supervisory responsibilities.

The NAC caseload limits were established and remain as absolute maximums. Yet, policymakers in many states have since recognized the need to set localized workload standards. Localized standards are able to consider unique demands made on defense attorneys in each case, such as the travel distance between the court and the local jail, or the prosecution’s charging practices, or increased complexity of forensic sciences and criminal justice technology. Demands of these types increase the amount of time, beyond that contemplated by the NAC standards, that is necessary for the lawyer to provide effective representation. For these reasons, many criminal justice professionals argue that the caseloads permitted by the NAC Standards are far too high and that the maximum caseloads allowed should be much lower.<sup>238</sup>

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and Administration of Justice, the Administrator of the U.S. Department of Justice Law Enforcement Assistance Administration appointed the National Advisory Commission on Criminal Justice Standards and Goals in 1971, with DOJ/LEAA grant funding to develop standards for crime reduction and prevention at the state and local levels. The NAC crafted standards for all criminal justice functions, including law enforcement, corrections, the courts, and the prosecution. Chapter 13 of the NAC’s report sets the standards for the defense function. NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON THE COURTS, ch.13 (The Defense) (1973).

<sup>237</sup> NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON THE COURTS, ch.13 (The Defense), Standard 13.12 (1973).

<sup>238</sup> See, e.g., AMERICAN COUNCIL OF CHIEF DEFENDERS, STATEMENT ON CASELOADS AND WORKLOADS (Aug. 24, 2007), available at [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_train\\_caseloads\\_standards\\_ethics\\_opinions\\_combined\\_authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_train_caseloads_standards_ethics_opinions_combined_authcheckdam.pdf) (“In many jurisdictions, caseload limits should be lower than the NAC standards.”).

## Massachusetts' Committee for Public Counsel services implements caseload controls

To see how the NAC standards can be implemented, we again look to Massachusetts' Committee for Public Counsel Services (CPCS). CPCS uses a weighted system of caseload limits, with a particular weight for each type of case and an absolute limit of 250 weighted cases assigned per year. Misdemeanors and lesser felonies within district court jurisdiction are weighted as "1," while superior court felonies are weighted as "2" for calculating the limit for a mixed caseload. So, if an attorney accepted 100 district court cases in a year, he could also accept no more than 75 superior court cases that year. Attorneys handling only superior court felonies are limited to 100 per year. Murder cases are assigned in the discretion of the Chief Counsel or designee, but no attorney may have more than four open murder cases.

CPCS's electronic billing system enforces the caseload limits by rejecting assignments exceeding the limits. Attorneys are expected to keep track of their own caseloads, and they may seek a waiver of the limit in an unusual situation where a waiver is needed to benefit a client. To assist the county administrators in assigning duty days, CPCS provides them with quarterly reports showing the numbers of cases assigned and the numbers of hours billed so far in the fiscal year by each attorney. The county administrators and supervising attorneys use this data to promote reasonable workloads and to check on the work of any attorney who seems to be taking on too much. Attorneys' workloads are also restrained by fiscal controls, including a presumptive though waivable daily cap and an annual cap on hours billed. Attorneys are deterred from taking on more work than can be performed within these fiscal limits, because they will likely not be paid for it.

**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.**

Maine does not have any statewide limits on the number of cases that an attorney representing indigent clients may handle in a year.

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. That said, MCILS has no way of knowing how many cases each attorney handles in their private practice.

County	Name	2014	2105	2016	2017	2018	Total
Aroostook <sup>239</sup>	Hanson	174	159	135	137	195	800
	Hunter	143	128	128	157	123	679
	Ward	97	143	125	106	156	627
	Kenney	115	115	136	112	144	622
	McIntosh	-	-	127	158	268	553
	Swanson	70	117	118	62	50	417
	Wells-Puckett	137	173	102	-	-	412
	Tebbetts	-	-	13	133	264	410
	Smith	55	131	114	27	49	376
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Androscoggin	Charest	357	330	253	251	296	1,487
	Dolley	179	170	218	189	205	961
	Howaniec	177	121	156	122	173	749
	McMorrان	141	151	148	110	146	696
	Lobozzo	216	175	158	92	46	687
	Ranger	124	135	108	113	151	631
	Fairbanks	65	126	116	118	191	616
	Pushard	96	134	104	127	130	591
	Hornblower	129	125	117	115	84	570
	Hess	134	113	89	86	66	488
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Cumberland	LeBrasseur	146	183	181	157	238	905
	Moynihan	165	169	150	160	180	824
	Chmelecki	145	103	78	77	70	473
	Yamartino	88	80	104	66	116	454
	Peltier	74	108	97	79	92	450
	Hewes	76	105	70	74	104	429
	Gonzales	-	73	111	92	145	421
	Ruffner	67	130	79	100	42	418
	Hanly	51	72	126	93	75	417
	McKenna	20	71	87	113	107	398
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York	Winling	179	213	210	172	188	962
	Ashe	184	207	126	176	129	822
	Fairfield	177	217	226	99	91	810
	Locke	158	178	173	120	148	777
	Champagne	118	169	167	117	176	747
	Houde	154	161	154	103	109	681
	Mekonis	127	111	117	113	130	598
	Strike	132	131	113	58	116	550
	Gordon	-	55	118	145	164	482
	Capponi	39	75	120	106	121	461

<sup>239</sup> 6AC removed one Aroostook County lawyer from this table because he primarily handles all of the in custody lawyer of the day assignments, making his caseload appear excessive when it is not. In the other counties, where lawyer of the day duties are more rotational, the 6AC left those “cases” in the case counts.

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.<sup>240</sup> For example, in FY 2013, on average the lawyers spent 10.11 hours on each adult criminal case. The data indicates that there was one adult criminal case that year in which two Project attorneys worked a combined 1,444.24 hours. Eliminating this one case from the mix results in an average of 6.78 hours spent 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%).

FY 2013		ADULT	
Attorney	Closed	Hours	Hrs/Case
Attorney A	130	1,271.65	9.78
Attorney B	104	1,040.72	10.01
Attorney C	96	976.73	10.17
Attorney D	55	503.70	9.16
Attorney E	46	565.65	12.30
Total	431	4,358.45	10.11

FY 2014		ADULT	
Attorney	Closed	Hours	Hrs/Case
Attorney C	96	331.65	3.45
Attorney A	78	529.40	6.79
Attorney B	61	187.20	3.07
Attorney E	37	211.00	5.70
Attorney D	1	1.00	1.00
Total	273	1,260.25	4.62

FY 2015		ADULT	
Attorney	Closed	Hours	Hrs/Case
Attorney A	102	664.75	6.52
Attorney C	89	515.35	5.79
Attorney E	84	205.16	2.44
Attorney F	1	1.00	1.00
Attorney B	0	-	N/A
Total	276	1,386.26	5.02

<sup>240</sup> Email from John Pelletier, Director, Maine Commission on Indigent Legal Services, to David Carroll, Executive Director of Sixth Amendment Center (Mar. 7, 2019).

FY 2016		ADULT	
Attorney	Closed	Hours	Hrs/Case
Attorney E	136	275.46	2.03
Attorney A	119	584.30	4.91
Attorney C	98	521.70	5.32
Total	353	1,381.46	3.91

FY 2017		ADULT	
Attorney	Closed	Hours	Hrs/Case
Attorney E	110	225.34	2.05
Attorney A	84	387.10	4.61
Attorney C	70	330.20	4.72
Total	264	942.64	3.57

FY 2018		ADULT	
Attorney	Closed	Hours	Hrs/Case
Attorney E	133	295.25	2.22
Attorney A	99	361.90	3.66
Attorney C	98	342.40	3.49
Attorney G	7	8.50	1.21
Total	337	1,008.05	2.99

Importantly, MCILS does not require from the Somerset County Project reporting of adult criminal cases to be distinguished by severity (e.g. felony or misdemeanor), 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.

Using the NAC misdemeanor standard of 400 cases per year, divided into a 2,040-hour year, indicates that attorneys should be spending 5.1 hours per misdemeanor case. As mentioned above, the NAC standards created in the 1970s have been challenged by indigent defense advocates for not providing sufficient time per case. One organization looking to determine more realistic caseload standards is the American Bar Association, which has carried out a series of studies to determine the appropriate amount of time attorneys should spend on the average case, by case type, to effectively bring the case to disposition. Caseload studies in four jurisdictions show that the average number of hours needed to complete a standard misdemeanor case is

significantly higher: Colorado (11.4),<sup>241</sup> Louisiana (12.06),<sup>242</sup> Missouri (11.7),<sup>243</sup> and Rhode Island (12.7).<sup>244</sup>

The issues with time sufficiency in Somerset County carry over to the juvenile delinquency realm. Although the amount of time spent on juvenile delinquency cases has remained more consistent than adult cases – with a high of 5.2 hours spent per delinquency case in FY 2015 and a low of 2.97 hours per delinquency case in FY 2016 – juvenile delinquency matters should require more hours per average case than misdemeanors. Again, using the NAC standard of no more than 200 delinquency cases per attorney per year, when applied against a 2,040-hour work year, means that 10.2 hours should be spent on the average delinquency case. And, since the NAC standards were created in the 1970's, juvenile delinquency representation has become a very specialized practice requiring significant time per case as practitioners have recognized the importance of addressing the factors in the child's life which have contributed to court involvement. For example, looking to a state in the same geographical region, the ABA has determined that in Rhode Island, the average juvenile delinquency case should take 46.1 hours to defend.<sup>245</sup>

These issues extend to the representation of juveniles charged as delinquents at initial appearance. Each year in Somerset County, there are 12 court days requiring lawyer of the day for juvenile delinquency cases. In FY 2014, Project attorneys spent 6.83 hours per lawyer-of-the-day appearance. That number has decreased to 2.29 hours per appearance.

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<sup>241</sup> AMERICAN BAR ASS'N, STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS & RUBIN BROWN, THE COLORADO PROJECT: A STUDY OF THE COLORADO PUBLIC DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS 20 (2017), *available at* [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_co\\_project.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_co_project.pdf).

<sup>242</sup> AMERICAN BAR ASS'N, STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS & POSTLETHWAITE & NETTERVILLE, THE LOUISIANA PROJECT: A STUDY OF THE LOUISIANA PUBLIC DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS 2 (2017), *available at* [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_louisiana\\_project\\_report.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_louisiana_project_report.pdf).

<sup>243</sup> AMERICAN BAR ASS'N, STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS & RUBIN BROWN, THE MISSOURI PROJECT: A STUDY OF THE MISSOURI PUBLIC DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS 6 (2014), *available at* [https://www.americanbar.org/content/dam/aba/events/legal\\_aid\\_indigent\\_defendants/2014/ls\\_sclaid\\_5c\\_the\\_missouri\\_project\\_report.pdf](https://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2014/ls_sclaid_5c_the_missouri_project_report.pdf).

<sup>244</sup> AMERICAN BAR ASS'N, STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, NAT'L ASS'N OF CRIMINAL DEFENSE LAWYERS & BLUM SHAPIRO, THE RHODE ISLAND PROJECT: A STUDY OF THE RHODE ISLAND PUBLIC DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS 6 (2017), *available at* [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_ri\\_project.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_ri_project.pdf).

<sup>245</sup> AMERICAN BAR ASS'N, STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, NAT'L ASS'N OF CRIMINAL DEFENSE LAWYERS & BLUM SHAPIRO, THE RHODE ISLAND PROJECT: A STUDY OF THE RHODE ISLAND PUBLIC DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS 6 (2017), *available at* [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_ri\\_project.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_ri_project.pdf).



# CHAPTER V

## ATTORNEY COMPENSATION & FINANCIAL OVERSIGHT

The U.S. Supreme Court explained in *Cronic* that “[t]he right to the effective assistance of counsel” means that the defense must put the prosecution’s case through the “crucible of meaningful adversarial testing.”<sup>246</sup> For this to occur, states must ensure that both the prosecution and the defense have the resources they need at the level their respective roles demand. “While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators.”<sup>247</sup> If a defense attorney is either incapable of or barred from challenging the state’s case because of a structural impediment – “if the process loses its character as a confrontation between adversaries”<sup>248</sup> – a constructive denial of counsel occurs.

The annual legislative appropriation to MCILS has not kept pace with actual costs. In the eight years since its inception, the MCILS total annual funding has slightly more than doubled (from \$11,085,696 in 2011 to \$22,695,219).<sup>249</sup> The greatest portion of the MCILS budget is dedicated to attorney fees. For example, in FY 2018, 83.62% of the MCILS budget went to attorney fees (\$18,978,078). But in each year, MCILS runs out of funding at some point during the budget cycle and requires supplemental funding to meet that year’s caseload requirements. (*See* table below). During such times, attorneys may go without pay while MCILS secures supplemental appropriations.<sup>250</sup>

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<sup>246</sup> *United States v. Cronic*, 466 U.S. 648, 656-57 (1984) (“The right to the effective assistance of counsel is thus the right of the accused to require the prosecution’s case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted – even if defense counsel may have made demonstrable errors – the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.”).

<sup>247</sup> *United States v. Cronic*, 466 U.S. 648, 657 (1984) (citing *United States ex rel. Williams v. Twomey*, 510 F.2d 634, 640 (7th Cir. 1975)).

<sup>248</sup> *United States v. Cronic*, 466 U.S. 648, 656-57 (1984).

<sup>249</sup> The financial data reflects information obtained from the Maine State Law and Legislative Reference Library. Email from Ryan Jones, Reference Librarian, Maine State Law and Legislative Reference Library, forwarded to David Carroll, Executive Director of Sixth Amendment Center, by Margaret J. Reinsch, Esq., Legislative Analyst, Joint Standing Committee on Judiciary, Maine State Legislature Office of Policy and Legal Analysis (Feb. 15, 2019). Part of the increased funding requirements beginning in 2015 results from MCILS increasing the hourly rate paid to private attorneys from \$50 to \$60, effective July 1, 2015. 94-649 Code Me. R. ch. 301, § 2 (eff. July 1, 2015).

<sup>250</sup> *See, e.g.*, David Carroll, *Maine Commission on Indigent Legal Services to Run Out of Money in April 2013*, SIXTH AMENDMENT CENTER (Feb. 20, 2013) (recounting then-current newspaper and media accounts of the MCILS funding crisis in that year), *available at* <http://sixthamendment.org/maine-commission-on-indigent-legal-services-to-run-out-of-money-in-april-2013/>.

MCILS	2011	2012	2013	2014	2015	2016	2017	2018
Appropriation	\$10,579,199	\$11,140,632	\$11,458,721	\$13,350,710	\$16,325,689	\$19,097,259	\$16,325,676	\$21,901,722
Supplemental	\$506,497	\$596,497	\$596,497	\$628,497	\$628,497	\$777,497	\$793,497	\$793,497
Total	\$11,085,696	\$11,737,129	\$12,055,218	\$13,979,207	\$16,954,186	\$19,874,756	\$17,119,173	\$22,695,219

**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.**

The *Cronic* Court clearly advises that governmental interference that infringes on a lawyer’s independence to act in the stated interests of defendants or places the lawyer in a conflict of interest causes a constructive denial of counsel.<sup>251</sup> Maine’s *Rules of Professional Conduct* require that “a lawyer shall not represent a client if . . . there is a significant risk that the representation . . . will be materially limited by . . . a personal interest of the lawyer.”<sup>252</sup> When the needs of a client’s case require the lawyer to spend money out of his own compensation, there is a conflict between the lawyer’s personal interests and that of the client. In short, any structure of services that places the attorney’s personal financial wellbeing in direct competition with the stated interest of a defendant is a constructive denial of counsel. The State of Maine, therefore, has a constitutional obligation to ensure the system it has established for providing Sixth Amendment services is free from financial conflicts that interfere with counsel’s ability to render effective representation to each defendant.<sup>253</sup>

There are three categories of financial resources that are needed for the defense of every case: law office overhead; case-related expenses; and fair lawyer compensation.<sup>254</sup>

- *Law office overhead.* For an attorney to simply show up and be available to represent clients each day, there are certain expenses that must be paid. These include office rent, furniture and equipment, computers and cellphones, telephone and internet and other utilities, office supplies including stationery,

<sup>251</sup> *United States v. Cronic*, 466 U.S. 648, 658-61 (1984).

<sup>252</sup> ME. R. PROF’L CONDUCT 1.7(a)(2).

<sup>253</sup> *See, e.g., Wood v. Georgia*, 450 U.S. 261, 271 (1981) (“Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest.”); *Cuyler v. Sullivan*, 446 US 335, 346 (1980) (“Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial.”); *Glasser v. United States*, 315 U.S. 60, 70 (1942) (“[A]ssistance of counsel’ guaranteed by the Sixth Amendment contemplates that such assistance be untrammelled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests.”).

<sup>254</sup> *See, e.g., AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM*, commentary to Principle 8 (Feb. 2002) (“Assigned counsel should be paid a reasonable fee in addition to actual overhead and expenses. Contracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should . . . separately fund expert, investigative, and other litigation support services.”).

malpractice insurance, state licensing and bar dues, and legal research materials, plus the cost of staff such as a secretary or legal assistant. All of these expenses, commonly referred to as “overhead,” must be incurred before a lawyer represents a single client.<sup>255</sup>

- *Case-related expenses.* Once an attorney is designated to represent a specific client in a specific case, there are additional expenses that must be paid. These are the expenses that the attorney would not incur but for representing that client, and they include, for example: postage to communicate with the client and witnesses and the court system, long-distance and collect telephone charges, mileage and other travel costs to and from court and to conduct investigations, preparation of copies and exhibits, costs incurred in obtaining discovery, along with the costs of hiring necessary investigators and experts in the case. These costs vary from case to case – some cases requiring very little in the way of expense; other cases costing quite a lot. The individual expenses that are necessary, though, must be paid for in every client’s case.
- *Fair lawyer compensation.* Compensation is the attorney’s take home pay.

All national standards require that: “Assigned counsel should be paid a reasonable fee in addition to actual overhead and expenses. Contracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should specify performance requirements and the anticipated workload, provide an overflow or funding mechanism for excess, unusual or complex cases, and separately fund expert, investigative, and other litigation support services.”<sup>256</sup> The American Bar Association’s *Standards for Criminal Justice* explain that attorneys must have adequate resources and support staff in order to render quality legal representation.

Among these are secretarial, investigative, and expert services, which includes assistance at pre-trial release hearings and sentencing. In addition to personal services, this standard contemplates adequate facilities and equipment, such as computers, telephones, facsimile machines, photocopying, and specialized equipment required to perform necessary investigations.<sup>257</sup>

<sup>255</sup> “The 2012 Survey of Law Firm Economics by ALM Legal Intelligence estimates that over 50 percent of revenue generated by attorneys goes to pay overhead expenses,” NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, RATIONING JUSTICE: THE UNDERFUNDING OF ASSIGNED COUNSEL SYSTEMS 8 (Mar. 2013), and overhead tends to be a higher percentage of gross receipts as a law office gets smaller. See ALM LEGAL INTELLIGENCE, 2012 SURVEY OF LAW FIRM ECONOMICS, Executive Summary at 4 (showing overhead ranging from 38.9 percent of receipts in the largest law firms to 47.2 percent in smaller law offices).

<sup>256</sup> AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, commentary to Principle 8 (Feb. 2002).

<sup>257</sup> AMERICAN BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE – PROVIDING DEFENSE SERVICES, commentary to Standard 5-1.4 (3d ed. 1992).

The government is responsible for providing the resources needed in each defendant's case. It can do so by providing a government paid-for building stocked with all the necessary supplies and equipment and a budget for investigation, experts, and support staff. Or it can do so by paying or repaying the public attorneys for these expenses. What government *cannot do*, as has been held by state supreme courts all across the country, is place the burden of paying for the indigent defense system onto the public attorneys.<sup>258</sup>

MCILS provides all indigent legal representation by paying private lawyers in one of two ways: a fixed fee annual contract amount, or an hourly rate.

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<sup>258</sup> See, e.g., *Wright v. Childree*, 972 So. 2d 771, 780-81 (Ala. 2006) (determining assigned counsel are entitled to a reasonable fee in addition to overhead expenses, in case where state's Attorney General had issued an opinion against paying the overhead rate and the state comptroller subsequently stopped paying); *May v. State*, 672 So. 2d 1307, 1308 (Ala. Crim. App. 1993) (determining indigent defense attorneys were entitled to overhead expenses, presumptively set at \$30 per hour, in addition to a reasonable fee); *DeLisio v. Alaska Superior Court*, 740 P.2d 437, 443 (Alaska 1987) (determining that appointed cases did not simply merit a reasonable fee and overhead, but rather the fair market rate of an average private case. "[R]equiring an attorney to represent an indigent criminal defendant for only nominal compensation unfairly burdens the attorney by disproportionately placing the cost of a program intended to benefit the public upon the attorney rather than upon the citizenry as a whole." Alaska's constitution "does not permit the state to deny reasonable compensation to an attorney who is appointed to assist the state in discharging its constitutional burden," because doing so would be taking "private property for a public purpose without just compensation."); *State ex rel Stephan v. Smith*, 747 P.2d 816, 242 Kan. 336, 383 (Kan. 1987) (the state "has an obligation to pay appointed counsel such sums as will fairly compensate the attorney, not at the top rate an attorney might charge, but at a rate which is not confiscatory, considering overhead and expenses;" testimony showed the average overhead rate of attorneys in Kansas in 1987 was \$30 per hour); *State v. Wigley*, 624 So.2d 425, 429 (La. 1993) (finding that "in order to be reasonable and not oppressive, any assignment of counsel to defend an indigent defendant must provide for reimbursement to the assigned attorney of properly incurred and reasonable out-of-pocket expenses and overhead costs."); *Wilson v. State*, 574 So.2d 1338, 1340 (Miss. 1990) (determining that indigent defense attorneys are entitled to "reimbursement of actual expenses" in addition to a reasonable sum; defining "actual expenses" to include "all actual costs to the lawyer for the purpose of keeping his or her door open to handle this case," and allowing defense attorneys to receive a "pro rata share of actual overhead"); *State v. Lynch*, 796 P.2d 1150, 1161 (Okla. 1990) (finding that state government "has an obligation to pay appointed lawyers sums which will fairly compensate the lawyer, not at the top rate which a lawyer might charge, but at a rate which is not confiscatory, after considering overhead and expenses;" "provision must be made for compensation of defense counsel's reasonable overhead and out of pocket expenses" in order "to place the counsel for the defense on an equal footing with counsel for the prosecution"); *Jewell v. Maynard*, 383 S.E.2d 536, 540 (W. Va. 1989) (raising the hourly rate paid to court appointed attorneys on a finding that they were forced to "involuntarily subsidize the State with out-of-pocket cash," because the then-current rates did not cover attorney overhead shown to be \$35 per hour in West Virginia in 1989. "Perhaps the most serious defect of the present system is that the low hourly fee may prompt an appointed lawyer to advise a client to plead guilty, although the same lawyer would advise a paying client in a similar case to demand a jury trial.").

### Fixed fee contract

In only Somerset County, MCILS has a single contract with three private attorneys<sup>259</sup> to collectively provide all trial level indigent defense services absent a conflict of interest, to carry out any appeals from those cases, and to handle post-conviction review proceedings where they did not represent the petitioner at trial.<sup>260</sup> In exchange for that representation, MCILS pays the three attorneys collectively a fixed monthly compensation of \$22,687.50 (an annual equivalent of \$544,500, then divided among the three attorneys).<sup>261</sup> Additionally, the contract attorneys are reimbursed by MCILS for case related expenses including expert witnesses, investigation, and discovery, but the contract attorneys “shall pay for all costs, fees and expenses incurred in providing the contract services” other than the specific expense types itemized in the contract.<sup>262</sup> The contract currently in force was originally let for the 22-month period of September 1, 2014 to June 30, 2016,<sup>263</sup> and it has been extended three times for one year in each extension,<sup>264</sup> with the current extension expiring on June 30, 2019. The Somerset contract attorneys are referred to colloquially as “The Project.”<sup>265</sup> When a Project attorney has a conflict of interest, the case is reassigned to one of the other Project attorneys. If all Project attorneys have a conflict, the court appoints a private attorney to be paid by MCILS at the hourly rate described below.<sup>266</sup>

<sup>259</sup> State of Maine, Maine Commission on Indigent Legal Services, Agreement to Purchase Services, AdvantageME CT No. 95F 20140826-723 (Aug. 25, 2014).

<sup>260</sup> State of Maine, Maine Commission on Indigent Legal Services, Agreement to Purchase Services, AdvantageME CT No. 95F 20140826-723, Rider A ¶¶ 1, 2, 7 (Aug. 25, 2014).

<sup>261</sup> State of Maine, Maine Commission on Indigent Legal Services, Agreement to Purchase Services, AdvantageME CT No. 95F 20140826-723, Rider A ¶ 9 (Aug. 25, 2014); State of Maine, Maine Commission on Indigent Legal Services, Contract for Special Services - Amendment, AdvantageME CT No. 95F 20140826-723 (Apr. 30, 2018).

<sup>262</sup> State of Maine, Maine Commission on Indigent Legal Services, Agreement to Purchase Services, AdvantageME CT No. 95F 20140826-723, Rider A ¶ 10 (Aug. 25, 2014).

<sup>263</sup> State of Maine, Maine Commission on Indigent Legal Services, Agreement to Purchase Services, AdvantageME CT No. 95F 20140826-723 (Aug. 25, 2014).

<sup>264</sup> State of Maine, Maine Commission on Indigent Legal Services, Contract for Special Services - Amendment, AdvantageME CT No. 95F 20140826-723 (June 17, 2016); State of Maine, Maine Commission on Indigent Legal Services, Contract for Special Services - Amendment, AdvantageME CT No. 95F 20140826-723 (July 11, 2017); State of Maine, Maine Commission on Indigent Legal Services, Contract for Special Services - Amendment, AdvantageME CT No. 95F 20140826-723 (Apr. 30, 2018). The final extension from (July 1, 2018 to June 30, 2019) explicitly notes that no RFP process is being conducted due to the expectation that the 6AC study will make recommendations regarding the provision of indigent legal representation in Somerset County.

<sup>265</sup> This contract system predates the creation of MCILS and was originally a contract between the Maine Judicial Branch and the Somerset County Private Defender Program. At one time, the contract included seven attorneys from five separate law firms. MCILS issued a Request for Proposal for the Somerset contract in 2011 and 2014, and “The Project” was the only respondent each time.

<sup>266</sup> The contract could be read to require the Project to pay for conflict counsel, however, MCILS confirms that MCILS (rather than the Project) pays for attorneys appointed when all Project attorneys have a conflict of interest. Email from John Pelletier, Director, Maine Commission on Indigent Legal Services, to David Carroll, Executive Director of Sixth Amendment Center (Mar. 8, 2019).

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. Even where the defendant has a winnable case, the lawyer's incentive nevertheless is to resolve it by plea. The attorney is not rewarded with additional pay for the additional work involved in zealous advocacy. Instead, the attorney is hurt financially the more he does for his clients.

Moreover, the average fee per case under the Somerset contract for FY 2017 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.

### Hourly rate

Other than the three attorneys under contract in Somerset County as described above, throughout Maine MCILS pays attorneys a set rate of \$60 per hour for all types of work in all types of cases.<sup>267</sup> The maximum compensation an attorney can be paid for each case is capped, based on the type of case, and the maximum can be waived by the MCILS executive director.<sup>268</sup> When an attorney serves as “Lawyer of the Day” (*see*

<sup>267</sup> 94-649 Code Me. R. ch. 301, § 2 (eff. July 1, 2015).

<sup>268</sup> 94-649 Code Me. R. ch. 301, § 4 (eff. July 1, 2015). The presumptive fee caps set by MCILS are:  
trial level – criminal and delinquency:

- murder (set by MCILS executive director on case by case basis);
- class A (\$3,000);
- class B and C, against person (\$2,250);
- class B and C, against property (\$1,500);
- class D and E, in Superior or Unified Criminal Court (\$750);
- class D and E, in District Court (\$540);
- post-conviction review (\$1,200);
- probation revocation (\$540);
- miscellaneous, i.e. witness representation on Fifth Amendment grounds (\$540);
- juvenile (\$540).

trial level – child protection:

- child protective cases (\$900 each stage);
- termination of parental rights with a hearing (\$1,260).

trial level – other civil:

- application for involuntary commitment (\$420);
- petition for modified release treatment (\$420);
- petition for release or discharge (\$420);
- petition for emancipation (\$420);

appeal, following grant of petition for certificate of probable cause (\$1,200). *Id.*

discussion at pages 51 to 57), they are allowed to bill a minimum fee of \$150 even if their time spent is less than 2 ½ hours.<sup>269</sup> Additionally, attorneys are reimbursed by MCILS for case related expenses like collect calls, copying more than 100 pages, and travel other than to and from the attorney’s “home district and superior court.”<sup>270</sup> Attorneys are not reimbursed for their overhead expenses (e.g., rent, office utilities, professional insurance, legal research tools & resources, etc.).<sup>271</sup>

In 2013, the National Association of Criminal Defense Lawyers published a comprehensive study of the rates of compensation paid to private attorneys to provide representation to indigent people, whether under contract or appointed on a case by case basis, in all fifty states<sup>272</sup> and found generally that the low compensation rates provided to lawyers across America are a “serious threat to our criminal justice system.”<sup>273</sup> The requirement that attorneys who represent the poor be adequately compensated does not arise out of concern for the welfare of the attorneys. Rather, adequate compensation for the attorney is required to ensure that the attorney provides effective representation to each client. Inadequate compensation “leads to a decrease in the overall number of attorneys willing to accept court appointments”<sup>274</sup> and can “encourage some attorneys to accept more clients than they can effectively represent in order to make ends meet.”<sup>275</sup>

To underscore just how a \$60 per hour rate does not afford both a reasonable fee *and* coverage of actual overhead expenses, one need only to look at a few other states whose assigned counsel compensation rates were challenged through litigation:

- *West Virginia*: The West Virginia Supreme Court determined in 1989 that court appointed attorneys in that state were forced to “involuntarily subsidize the State with out-of-pocket cash,”<sup>276</sup> because the then-current rates did not cover attorney overhead. “Perhaps the most serious defect of the present system,” the court found, “is that the low hourly fee may prompt an appointed lawyer to advise a client to plead guilty, although the same lawyer would advise a paying client in a similar case to demand a jury trial.”<sup>277</sup> A now 30-year-old survey of more than 250 West Virginia lawyers who were taking appointed cases (i.e.,

<sup>269</sup> 94-649 Code Me. R. ch. 301, § 5 (eff. July 1, 2015).

<sup>270</sup> 94-649 Code Me. R. ch. 301, § 3.2. (eff. July 1, 2015).

<sup>271</sup> 94-649 Code Me. R. ch. 301, § 3.1. (eff. July 1, 2015).

<sup>272</sup> NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, RATIONING JUSTICE: THE UNDERFUNDING OF ASSIGNED COUNSEL SYSTEMS (Mar. 2013).

<sup>273</sup> NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, RATIONING JUSTICE: THE UNDERFUNDING OF ASSIGNED COUNSEL SYSTEMS 12 (Mar. 2013).

<sup>274</sup> NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, RATIONING JUSTICE: THE UNDERFUNDING OF ASSIGNED COUNSEL SYSTEMS 15 (Mar. 2013).

<sup>275</sup> NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, RATIONING JUSTICE: THE UNDERFUNDING OF ASSIGNED COUNSEL SYSTEMS 16 (Mar. 2013).

<sup>276</sup> *Jewell v. Maynard*, 383 S.E.2d 536 (W. Va. 1989).

<sup>277</sup> *Jewell v. Maynard*, 383 S.E.2d 536, 540 (W. Va. 1989).

not a survey of all private attorneys, but of only those accepting public cases) determined that in 1989 the average hourly overhead was \$35 per hour. The cumulative rate of inflation since 1989 is 103%,<sup>278</sup> making the 1989 overhead rate today in West Virginia likely to be \$71.05. And, Maine has 13% a higher cost of living than in West Virginia, suggesting that overhead rates in Maine may be \$80.29.<sup>279</sup>

- *Mississippi*: In 1990, the Mississippi Supreme Court determined that indigent defense attorneys are entitled to “reimbursement of actual expenses” in addition to a reasonable sum, and defined “actual expenses” to include “all actual costs to the lawyer for the purpose of keeping his or her door open to handle this case.”<sup>280</sup> This allows defense attorneys in Mississippi to receive a “pro rata share of actual overhead.”<sup>281</sup> The Mississippi State Bar determined that overhead costs almost 30 years ago in that state were \$34.86, although the court eventually settled on an overhead rate of \$25 per hour.<sup>282</sup> Even using this lower rate, the cumulative rate of inflation since 1990 is 92.6% making the overhead rate in Mississippi likely to be \$48.15.<sup>283</sup> Maine has a cost of living that is 28% greater than Mississippi,<sup>284</sup> meaning the comparative cost of overhead in Maine may be \$61.63.
- *Oklahoma*: In the same year as the Mississippi decision, the Oklahoma Supreme Court found that state government “has an obligation to pay appointed

<sup>278</sup> See *U.S. Inflation Calculator*, <https://www.usinflationcalculator.com> (last visited Mar. 4, 2019).

<sup>279</sup> *Cost of Living Portland, Maine vs. Charles Town, West Virginia*, Payscale, <https://www.payscale.com/cost-of-living-calculator/Maine-Portland/West-Virginia-Charles-Town> (last visited Mar. 4, 2019).

<sup>280</sup> *Wilson v. State*, 574 So.2d 1338 (Miss. 1990).

<sup>281</sup> *Wilson v. State*, 574 So.2d 1338, 1340 (Miss. 1990).

<sup>282</sup> *Wilson v. State*, 574 So.2d 1338, 1340-41 (Miss. 1990). (“Following our rule of statutory construction, we are able to save this statute from unconstitutionality by interpreting this language to include reimbursement for all actual costs to the lawyer for the purpose of keeping his or her door open to handle this case, i.e., the lawyer will receive a pro rata share of actual overhead. The appellant urges us to adopt a figure of \$ 34.86 per hour for overhead. This figure is derived from a survey conducted by the Mississippi State Bar in 1988. See, 35 Mississippi Lawyer, No. 5, at 45 (March-April 1989). However, we choose rather to adopt a \$25.00 per hour figure, which is also based on the survey. For ease of administration and to avoid a lot of satellite litigation, we create a rebuttable presumption that a court appointed attorney’s actual overhead within the statute is \$25.00 per hour. *However, the trial court is bound by this only in the absence of actual proof to the contrary -- proof offered by the lawyer that it is more or by the State that it is less.*”) (emphasis original).

It is important to note that Mississippi sets a statutory cap on the total payments possible to appointed attorneys, for example, \$1000 for a felony case, plus “actual expenses.” MISS. CODE ANN. § 99-15-17 (2017). The Legislature has directed the State Office of the Public Defender to “coordinate the collection and dissemination of statistical data and make such reports as are required of the divisions, develop plans and proposals for further development of a statewide public defender system in coordination with the Mississippi Public Defenders Task Force.” MISS. CODE ANN. § 99-18-1 (2017).

<sup>283</sup> See *US Inflation Calculator*, <https://www.usinflationcalculator.com> (last visited Mar. 4, 2019).

<sup>284</sup> *Cost of Living Portland, Maine vs. Jackson, Mississippi*, Payscale, <https://www.payscale.com/cost-of-living-calculator/Maine-Portland/Mississippi-Jackson> (last visited Mar. 4, 2019).



lawyers sums which will fairly compensate the lawyer, not at the top rate which a lawyer might charge, but at a rate which is not confiscatory, after considering overhead and expenses.”<sup>285</sup> Based on the existing salary structure for Oklahoma district attorneys, the court determined a reasonable appointed counsel fee to be between \$14.63 and \$29.26 (based on experience) and “[a]s a matter of course, when the district attorneys’ ... salaries are raised by the Legislature so, too, would the hourly rate of compensation for defense counsel.”<sup>286</sup> In addition to this reasonable fee, and “to place the counsel for the defense on an equal footing with counsel for the prosecution,” the court also determined that a “provision must be made for compensation of defense counsel’s reasonable overhead and out of pocket expenses.”<sup>287</sup> The court found that the two lawyers involved in the case at dispute should be paid their actual overhead costs. The overhead costs for the Oklahoma attorneys in 1989 were respectively \$50.88 per hour and \$48.00 per hour.<sup>288</sup> Again, taking the lower rate and accounting for inflation, the Oklahoma overhead compensation rate is likely \$92.45.<sup>289</sup>

**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.**

Attorney billing

“Over-billing” was a topic raised frequently throughout the state. A Cumberland County attorney complained that there is currently no limit on the number of cases an attorney can accept, creating the ability to bill for an unlimited number of hours overall, and that a few outlying attorneys bill well over \$200,000 per year at \$60 per hour. One Androscoggin County attorney expressed annoyance that some attorneys bill much more than he does for similar cases, especially cases that he takes over when the case must go to trial. He notes that in one case alleging a gross sexual assault, another attorney had already charged \$14,000 before he took over before trial.

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

<sup>285</sup> State v. Lynch, 796 P.2d 1150 (Okla. 1990).

<sup>286</sup> State v. Lynch, 796 P.2d 1150, 1161 (Okla. 1990).

<sup>287</sup> State v. Lynch, 796 P.2d 1150, 1161 (Okla. 1990).

<sup>288</sup> In 1991, the high attorney compensation rate hastened the creation of the Oklahoma Indigent Defense System – a state-funded agency in the executive branch that provides trial-level, appellate and post-conviction criminal defense representation to the indigent accused in 75 of the state’s 77 counties. Both Tulsa County (Tulsa) and Oklahoma County (Oklahoma City) established public defender offices prior to statewide reform and were allowed to continue to provide services outside of the OIDS system.

<sup>289</sup> See *US Inflation Calculator*, <https://www.usinflationcalculator.com> (last visited Mar. 4, 2019).

effectively. Although the demands of complex cases may require an attorney to work well over eight hours per day for certain periods, such as during trials, average billing that greatly exceeds full time hours over long periods should trigger inquiry.

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. This assumes that the attorney never takes a day off (neither personal, holiday, medical, nor vacation day) and never has a case capped by the MCILS director for fewer hours than billed. For fiscal years 2014 and 2015, when MCILS paid a rate of \$50 per hour, the total compensation an attorney could make under the above scenario would be \$104,000.

Yet, in all five years of data reviewed, a small but significant number of attorneys surpassed those thresholds – with some surpassing the thresholds by a large margin. For example, 11 attorneys billed and were paid more than \$104,000 in FY 2014. This reflects a total of \$336,105.00 more than if each attorney averaged a 40-hour work week.

FY2014	ANNUAL PAY	HOURS/WEEK
ATTORNEY 1	\$ 194,488	74.80
ATTORNEY 2	\$ 180,766	69.53
ATTORNEY 3	\$ 165,313	63.58
ATTORNEY 4	\$ 133,921	51.51
ATTORNEY 5	\$ 129,055	49.64
ATTORNEY 6	\$ 122,736	47.21
ATTORNEY 7	\$ 116,315	44.74
ATTORNEY 8	\$ 111,533	42.90
ATTORNEY 9	\$ 110,515	42.51
ATTORNEY 10	\$ 108,023	41.55
ATTORNEY 11	\$ 107,440	41.32

Fourteen attorneys billed, on average, in excess of 40 hours per week for all 52 weeks in FY 2015. This includes ten of the 11 attorneys that billed in excess of 40 hours per week in FY 2014. This reflects a total of \$321,790.00 more than if each attorney averaged a 40-hour work week. The top biller in FY 2015 billed an average of 91.5 hours per week.

FY2015	ANNUAL PAY	HOURS/WEEK
ATTORNEY 2	\$ 285,491	91.50
ATTORNEY 1	\$ 160,086	51.31
ATTORNEY 4	\$ 159,167	51.02
ATTORNEY 5	\$ 149,361	47.87
ATTORNEY 3	\$ 145,739	46.71
ATTORNEY 15	\$ 141,694	45.41

ATTORNEY 13	\$	138,656	44.44
ATTORNEY 11	\$	135,624	43.47
ATTORNEY 16	\$	131,701	42.21
ATTORNEY 14	\$	131,145	42.03
ATTORNEY 7	\$	127,939	41.01
ATTORNEY 8	\$	125,033	40.07
ATTORNEY 10	\$	119,786	38.39
ATTORNEY 9	\$	117,568	37.68

Thirteen attorneys billed in excess of 40 hours per week in FY 2016. This reflects a total of \$421,487.00 more than if each attorney averaged a 40-hour work week. The top biller in FY 2016 billed over 98.5 hours per week.

FY2016	ANNUAL PAY	HOURS/WEEK
ATTORNEY 2	\$ 307,381	98.52
ATTORNEY 16	\$ 191,122	61.26
ATTORNEY 13	\$ 183,227	58.73
ATTORNEY 8	\$ 174,319	55.87
ATTORNEY 9	\$ 141,961	45.50
ATTORNEY 11	\$ 133,812	42.89
ATTORNEY 7	\$ 132,961	42.62
ATTORNEY 18	\$ 132,719	42.54
ATTORNEY 10	\$ 130,741	41.90
ATTORNEY 4	\$ 130,085	41.69
ATTORNEY 17	\$ 126,163	40.44
ATTORNEY 14	\$ 125,854	40.34
ATTORNEY 19	\$ 124,542	39.92

In FY 2017, eleven attorneys billed in excess of 40 hours per week. This reflects a total of \$307,172.00 more than if each attorney averaged a 40-hour work week. The top biller in FY 2017 billed over 70 hours per week.

FY2017	ANNUAL PAY	HOURS/WEEK
ATTORNEY 13	\$ 218,804	70.13
ATTORNEY 17	\$ 185,185	59.35
ATTORNEY 8	\$ 166,374	53.33
ATTORNEY 15	\$ 155,099	49.71
ATTORNEY 21	\$ 143,790	46.09
ATTORNEY 11	\$ 142,676	45.73
ATTORNEY 23	\$ 141,202	45.26
ATTORNEY 2	\$ 140,111	44.91
ATTORNEY 7	\$ 131,050	42.00
ATTORNEY 22	\$ 130,074	41.69
ATTORNEY 20	\$ 125,606	40.26

Finally, 25 attorneys billed in excess of 40 hours per week in FY 2018. This reflects a total of \$813,531 more than if each attorney averaged a 40-hour work week. The top biller in FY2018 billed more than 88 hours per week. On top of this, these attorneys may also work on private cases. 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.<sup>290</sup>

FY2018	ANNUAL PAY	HOURS/WEEK
ATTORNEY 2	\$ 275,612	88.34
ATTORNEY 21	\$ 263,804	84.55
ATTORNEY 17	\$ 220,804	70.77
ATTORNEY 8	\$ 216,707	69.46
ATTORNEY 22	\$ 200,761	64.35
ATTORNEY 9	\$ 174,890	56.05
ATTORNEY 7	\$ 150,221	48.15
ATTORNEY 14	\$ 148,546	47.61
ATTORNEY 5	\$ 148,298	47.53
ATTORNEY 11	\$ 143,202	45.90
ATTORNEY 23	\$ 140,956	45.18
ATTORNEY 24	\$ 139,287	44.64
ATTORNEY 25	\$ 137,366	44.03
ATTORNEY 10	\$ 136,072	43.61
ATTORNEY 26	\$ 135,321	43.37
ATTORNEY 27	\$ 135,196	43.33
ATTORNEY 20	\$ 134,915	43.24
ATTORNEY 28	\$ 132,025	42.32
ATTORNEY 29	\$ 131,715	42.22
ATTORNEY 30	\$ 131,357	42.10
ATTORNEY 31	\$ 129,725	41.58
ATTORNEY 13	\$ 129,673	41.56
ATTORNEY 32	\$ 126,391	40.51
ATTORNEY 33	\$ 125,643	40.27
ATTORNEY 34	\$ 125,044	40.08

The table below shows the top earners over the five-year period. These top ten earners collectively billed more than 40 hours per week in 78% of the combined 50 billing years (5 years for each of the 10 attorneys). And, three of these top ten earners work at the same law firm (Attorney 2, Attorney 8, and Attorney 11).

<sup>290</sup> Email from Adriane Cleveland, Administrative Assistant to the Chief of Defender Services, to David Carroll, Executive Director of Sixth Amendment Center (Mar. 6, 2019).

	FY2014	FY2015	FY2016	FY2017	FY2018	5-YEAR TOTAL
ATTORNEY 2	\$180,766	\$285,491	\$307,381	\$140,111	\$275,612	\$1,189,361
ATTORNEY 8	\$111,533	\$125,033	\$174,319	\$166,374	\$216,707	\$793,967
ATTORNEY 13	\$74,952	\$138,656	\$183,227	\$218,804	\$129,673	\$745,312
ATTORNEY 5	\$129,055	\$149,361	\$115,545	\$122,801	\$148,298	\$665,059
ATTORNEY 11	\$107,440	\$135,624	\$133,812	\$142,676	\$143,202	\$662,753
ATTORNEY 7	\$116,315	\$127,939	\$132,961	\$131,050	\$150,221	\$658,487
ATTORNEY 9	\$110,515	\$117,568	\$141,961	\$112,963	\$174,890	\$657,896
ATTORNEY 3	\$165,313	\$145,739	\$112,464	\$88,598	\$109,560	\$621,673
ATTORNEY 4	\$133,921	\$159,167	\$130,085	\$99,884	\$95,029	\$618,087
ATTORNEY 10	\$108,023	\$119,786	\$130,741	\$115,471	\$136,072	\$610,093

To be clear, the 6AC staff members are not financial auditors, and we do not take a position on why there are so many billings in excess of 40 hours per week. We simply note that until this study was initiated, MCILS – and therefore the State of Maine – were unaware of the issue because of a lack of financial oversight.<sup>291</sup>

### Financial oversight

As previously stated in Chapter II, to pay and oversee nearly 600 private attorneys handling cases in 47 courthouses before approximately 90 justices, judges, and magistrates, MCILS has a staff of three: an executive director, a deputy executive director, and an accounting technician. The three staff essentially spend the majority of their time approving payments & trial-related expenses and providing a minimal amount of training to appointed attorneys.

To best describe the absence of financial oversight at MCILS, it is again useful to look toward Massachusetts. All attorneys accepting CPCS case assignments

<sup>291</sup> During the drafting of this report, State Senator Lisa Keim sent a letter to the Maine Government Oversight Committee requesting that the committee “take action to direct the Office of Program Evaluation and Government Accountability to conduct a rapid review of the Maine Commission on Indigent Legal Services (MCILS) and the Indigent Legal Services in the State,” because of an alleged lack of accountability on the part of the agency. Letter from Senator Lisa Keim to Maine Government Oversight Committee (Feb. 21, 2019).

Although MCILS states in its own letter to the Government Oversight Committee that internal reviews show, at least in one instance, an attorney “identified the extent of overbilling and has agreed to make substantial reimbursement to the Commission,” MCILS determined that other apparent overbilling was the result of attorneys in larger firms submitting the work of other lawyers in the lawfirms under the name of the lead attorney. Letter from John Pelletier, Director, Maine Commission on Indigent Legal Services, to Maine Government Oversight Committee (Mar. 7, 2019). The 6AC notes that these MCILS efforts at financial oversight do not address the five-years of data reported above and that a comprehensive audit is appropriate.

in Massachusetts do so subject to certain overall fiscal controls as well as audit procedures in particular cases. In all cases assigned by CPCS, private attorneys must maintain contemporaneous time records by tenths of an hour, with sufficient detail to show the need for the task.<sup>292</sup>

Private assigned counsel must use the CPCS electronic billing system (known as “EBill 2.0”) in order to be paid for their work. To be registered by CPCS as a vendor able to access that system, every attorney must sign and submit to CPCS an EBill Access Agreement which includes the following provision: “I certify under pains and penalties of perjury that for all my bills filed with CPCS through the ‘EBill2.0’ system, I have been assigned to each case indicated on my EBill; I have provided the services described on the dates and for the times listed; I have provided representation consistent with CPCS Performance Guidelines and Standards; and all charges for legal services reflected on the EBill are based on my contemporaneous time records maintained in accordance with CPCS Assigned Counsel Manual’s policies and procedures.”<sup>293</sup>

Although Massachusetts does not set caps on the number of hours attorneys may bill for particular case types, CPCS does set a waivable cap on hours which may be billed per day. This presumptive cap is ten hours per day, except on days when actual trial time is billed the cap rises to 12 hours. The electronic billing system enforces the cap, unless a waiver is allowed.

CPCS conducts random prepayment audits requiring attorneys to provide sanitized versions of their contemporaneous time records to support their billing. CPCS also conducts prepayment billing inquiries when interim billing in individual cases reaches certain unpublished thresholds that are unusually high for that type of case. Finally, when indicated, CPCS conducts full audits of the billing practices of individual attorneys, with procedural safeguards including a hearing before a CPCS Committee member.

CPCS is required by statute to enforce other billing controls. CPCS cannot pay a private attorney for more than 1,650 hours in a fiscal year,<sup>294</sup> nor may a private attorney accept any new case assignments (except murder cases) after billing CPCS 1,350 hours in a fiscal year.<sup>295</sup>

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<sup>292</sup> For example, “legal research” would not be sufficiently descriptive, but “legal research on voluntariness of statement for memorandum on suppression motion” would be adequate.

<sup>293</sup> *Private Attorney Ebill 2.0 Access Agreement*, THE COMMITTEE FOR PUBLIC COUNSEL SERVICES, available at [https://www.publiccounsel.net/cfo/wp-content/uploads/sites/8/2016/11/Ebill-2.0-Access-Agreement\\_Final.pdf](https://www.publiccounsel.net/cfo/wp-content/uploads/sites/8/2016/11/Ebill-2.0-Access-Agreement_Final.pdf) (last visited Mar. 9, 2019).

<sup>294</sup> MASS. GEN. LAWS c. 211D § 11(b) (2018).

<sup>295</sup> MASS. GEN. LAWS c. 211D § 11(c) (2018).

CPCS is required to reduce payment for late bills. Pursuant to statute,<sup>296</sup> bills must be submitted within 60 days of the conclusion of the case or 30 days of the end of the fiscal year. Late bills must be reduced by 10%, and the statute provides that bills more than 30 days late shall not be paid unless the chief counsel finds that the delay is due to extraordinary circumstances beyond the attorney's control.

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<sup>296</sup> MASS. GEN. LAWS c. 211D § 12 (2018).

# CHAPTER VI

## RECOMENDATIONS

The recommendations set out below will be greatly aided by important changes to the MCILS made by the Maine legislature and taking effect in 2018.

MCILS is expanded to a nine-person commission, with all members appointed by the Governor and confirmed by the legislature.<sup>297</sup> There are seven voting members – one with administration & finance experience; one with child protection proceeding experience; and five chosen from lists recommended variously by the President of the Senate, the Speaker of the House of Representatives, and the Chief Justice of the Supreme Judicial Court.<sup>298</sup> The two non-voting members are attorneys who provide indigent legal services as a majority of their law practices and are chosen, one each, from lists recommended by the president of the Maine State Bar Association and by the president of another statewide organization representing criminal defense attorneys.<sup>299</sup> All recommendations and appointments must “consider input from individuals and organizations with an interest in the delivery of indigent legal services.”<sup>300</sup>

Sitting judges, prosecutors, and law enforcement officials, and employees of people in those positions, cannot serve on the commission.<sup>301</sup> Any person who is paid by the commission (whether as an employee or otherwise) cannot be a voting member, nor can their immediate household family members.<sup>302</sup> Two of the nine members must be non-attorneys or non-practicing attorneys.<sup>303</sup> Finally, all members of the commission “must have demonstrated a commitment to quality representation for persons who are indigent and have the knowledge required to ensure that quality of representation is provided in each area of law.”<sup>304</sup>

In short, once the new board members are appointed, Maine will have a more professional MCILS to consider implementing the recommendations of this study.

### **RECOMMENDATION 1: The State of Maine should remove the authority to conduct financial eligibility screenings from the Maine Commission for Indigent**

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<sup>297</sup> ME. REV. STAT. ANN. tit. 4, § 1803(1) (2018).

<sup>298</sup> ME. REV. STAT. ANN. tit. 4, § 1803(1) (2018).

<sup>299</sup> ME. REV. STAT. ANN. tit. 4, § 1803(1) (2018).

<sup>300</sup> ME. REV. STAT. ANN. tit. 4, § 1803(1) (2018).

<sup>301</sup> ME. REV. STAT. ANN. tit. 4, § 1803(2) (2018).

<sup>302</sup> ME. REV. STAT. ANN. tit. 4, § 1803(2) (2018). This limitation applies to members commencing their term of appointment on or after April 2, 2018.

<sup>303</sup> ME. REV. STAT. ANN. tit. 4, § 1803(2) (2018).

<sup>304</sup> ME. REV. STAT. ANN. tit. 4, § 1803(2) (2018).



**Legal Services. The reconstituted Task Force on Pretrial Justice Reform should determine the appropriate agency to conduct indigency screenings.**

The State of Maine currently has several agencies involved in critical pretrial functions of bail determination, criminal history check, risk assessment of pretrial release, supervision of defendants released, and indigency screening: Maine Commission on Indigent Legal Services, the bail commissioners of each county, and Maine Pre-Trial Services.<sup>305</sup> The Sixth Amendment Center are not experts on the delivery of pretrial services and thus are not prepared to making sweeping recommendations about agencies outside of the purview of indigent defense services, except to note that indigency screening should not remain a responsibility of MCILS. A conflict exists because 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 fines and fees. MCILS cannot assure that MCILS attorneys fight against the imposition of fees related to the cost of the defense while MCILS simultaneously tries to collect those fees.<sup>306</sup>

On February 6, 2019, Chief Justice Leigh I. Saufley reconstituted the Task Force on Pretrial Services.<sup>307</sup> We respectfully suggest that the Task Force take up the question of the appropriate agency to conduct financial screenings. To assist that effort, we offer the following for informational purposes.

The Brennan Center for Justice notes that a number of entities can appropriately serve as screeners without the conflicts presented by the indigent defense system doing so, including: “1) the committing magistrate, court personnel, or judges other than the presiding judge; 2) the pretrial services branch of the adult probation department; 3) an independent pretrial services division; 4) another government agency; or 5) a non-government (‘third-party’) organization with a government contract.” We note that the financial information needed for a bail/pretrial release decision and the financial information needed to determine indigency are pretty much the same and that it may make sense for the State of Maine to consolidate these practices.

For example, in Massachusetts neither defense counsel nor the indigent defense system is involved in determining eligibility for their services. Rather, statutory language directs the probation department to obtain financial information relevant to indigence

<sup>305</sup> Maine Pretrial Services reports that this agency has about 40 to 50 employees statewide and offices in every county but Aroostook. They supervise defendants pretrial. They also screen people who have been arrested before they appear in court to see if they are eligible for services, and then tell the prosecutor and defense counsel. During this screening they have the defendant sign a release of information.

<sup>306</sup> Data obtained by 6AC shows that in FY 2018, MCILS financial screeners interviewed 11,031 defendants: 7,704 were found indigent (70%), 2,322 were found partially indigent (21%) and 1,005 were denied (9%). MCILS collected \$677,735 in FY2017 in partial indigency payments.

<sup>307</sup> See *Charter*, PRETRIAL JUSTICE REFORM TASK FORCE (Feb. 6, 2019), available at [https://www.courts.maine.gov/maine\\_courts/committees/charter-PJRTF.pdf](https://www.courts.maine.gov/maine_courts/committees/charter-PJRTF.pdf).

determinations from other state agencies, including the departments of revenue, transitional assistance, and the registry of motor vehicles, and to re-evaluate each defendant's indigence every six months to determine if the assignment of counsel should be revoked.<sup>308</sup> Defendants seeking counsel are required to provide financial data under penalty of perjury, however, information provided by defendants in support of their request for counsel may not be used against them in any proceeding except for perjury, and defendants may not be required to provide information regarding their citizenship or immigration status.<sup>309</sup> A finding of indigence is made by the judge at arraignment,<sup>310</sup> in partial reliance on a financial report and recommendation by a probation officer.

**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.**

Prosecutors who speak directly with defendants, on their own volition or at the suggestion of the judge, risk violating their ethical duties. As the report of the National Right to Counsel Committee, *Justice Denied*, notes: "Not only are such practices of doubtful ethical propriety, but they also undermine defendants' right to counsel."<sup>311</sup> The National Right to Counsel Committee report notes further:

Beyond the court's role in making certain that a defendant's waiver of counsel is valid, prosecutors have a professional responsibility duty "not [to] give legal advice to an unrepresented person, other than the advice to secure counsel." Similarly, the ABA has recommended that prosecutors should refrain from negotiating with an accused who is unrepresented without a prior valid waiver of counsel. Prosecutors also are reproached by the ABA to ensure that the accused has been advised of the right to counsel, afforded an opportunity to obtain counsel, and not to seek to secure waivers of important pretrial rights from an accused who is unrepresented.<sup>312</sup>

<sup>308</sup> MASS. GEN. LAWS c. 211D § 2A (2018). Defense counsel's only role in this process is to zealously represent the client in opposing a later unwarranted revocation of the assignment of counsel.

<sup>309</sup> MASS. SUP. JUD. CT. R. 3:10.

<sup>310</sup> MASS. SUP. JUD. CT. R. 3:10. The basic standard used for indigence is 125% of the current federal poverty guideline. People with income between 125% and 250% of that guideline may be deemed indigent but able to contribute and assessed some of the cost of assigned counsel. People with liquid assets beyond 250% of that guideline may be assigned counsel in superior court felony cases if the court determines they cannot pay for counsel. *See id*; *see also* MASS. GEN. LAWS c. 211D §§ 2-2B (2018).

<sup>311</sup> NATIONAL RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 88 (2009).

<sup>312</sup> NATIONAL RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR

The State of Maine should bar communications between prosecutors and unrepresented defendants until such time as a court has conducted the legally required colloquy to determine that the waiver is knowingly and intelligently made.

**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.**

In theory, Maine statutes and court rules already require this. Courts must appoint counsel,<sup>313</sup> and that counsel remains appointed until withdrawn by court order or other counsel files a notice of appearance.<sup>314</sup> However this does not always occur in practice.

The problem is that MCILS' fee schedule policy currently *directs* attorneys to stand in for each other:

When doing so will not adversely affect the attorney-client relationship, Commission-assigned counsel are urged to limit travel and waiting time by cooperating with each other to stand in at routine, non-dispositive matters by having one attorney appear at such things as arraignments and routine non-testimonial motions, instead of having all Commission-assigned counsel in an area appear.<sup>315</sup>

MCILS should repeal this policy, and the legislature should prohibit the practice of attorneys standing in for each other, other than in an emergency or with advance notice to the client and the court. How to best accomplish such a directive will be based, in part, on how indigent defense services are organized in the future (*see* Recommendation 7, page 94). To the extent that Maine remains primarily a private counsel system, MCILS needs to assign an adequate number of lawyers to appear at 48-hour hearings, initial appearances, and arraignments, so that each case on that day's docket is directly assigned to one of the lawyers who is present.

Again, Massachusetts can serve as a model. CPCS provides counsel at initial appearance by calendaring certified attorneys to cover all court days to receive case assignments when the court determines that a defendant is indigent and has a right to

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CONSTITUTIONAL RIGHT TO COUNSEL 88 (2009) (citing AMERICAN BAR ASS'N, MODEL RULES OF PROF. CONDUCT 4.3); AMERICAN BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION 3-4.1(b), 3-3.10(a), 3-3.10(c) (3d ed. 1993). *Contra* ME. R. PROF'L CONDUCT 4.3 (permits attorneys to "negotiate with" unrepresented parties and states they "may" encourage an unrepresented party with adverse interests to secure counsel).

<sup>313</sup> ME. REV. STAT. ANN. tit. 15, § 810 (2018).

<sup>314</sup> ME. R. UNIFIED CRIM. PROC. 44, 44A, 44B.

<sup>315</sup> 96-649 Code Me. R. ch. 301, §4(1)(D) (June 10, 2016).

counsel. The scheduling is done by an administrator in the county who communicates directly with the local attorneys and court personnel, and who constitutes, with a part-time assistant, the staff of the county assignment program. The county administrator is familiar with the usual volume of cases in the local courts and assigns an appropriate number of attorneys to cover each court day, so that each attorney will receive enough cases to make business sense without impairing the quality of representation.

In the unlikely event that an attorney receives no cases on a court duty day, the attorney is to be paid for the time spent in court that day. Attorneys may receive two duty days per month in up to two county programs. Attorneys ordinarily keep the cases they receive from arraignment through disposition, so that clients receive vertical representation.

Some cases inevitably will need to be reassigned. If an attorney certified for superior court felonies is not on duty in a court when such a case is arraigned, the duty attorney who is certified for lesser criminal cases handles the arraignment and non-evidentiary bail hearing and notifies the county administrator. The county administrator contacts superior court certified attorneys and reassigns the case, the same day if possible. If, due to unexpected volume on a court duty day, an attorney receives too many cases (or in any event more than 10), the attorney contacts the county administrator to reassign the excess cases. Thus, attorneys who do not accept duty days may nevertheless receive case assignments.

CPCS is explicitly empowered to assign counsel for a pre-arraignment procedure or in such other proceedings as the chief counsel shall determine necessary.<sup>316</sup> This authority is used to assign counsel prior to arraignment for people arrested and held in custody for murder, juveniles facing custodial interrogation, and people in mental health facilities who are accused of crimes.

**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.**

#### Substantive oversight

MCILS should develop and adopt standards related to attorney qualification, recertification, training, supervision, and workload as detailed in the section on Massachusetts' Committee for Public Counsel services (*see* discussion at p. 32.).

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<sup>316</sup> MASS. GEN. LAWS c. 211D §§ 5-6(b) (2018).

## Financial oversight

The State of Maine should adopt statutory language to require MCILS to limit attorneys' billable hours in a day and year, subject to waiver for complex cases and systemic capacity needs, and require attorneys to submit bills under the penalty of perjury (*see* discussion at p. 84.).

To provide this recommended substantive and financial oversight, MCILS will need to increase its staff. Indeed, most indigent defense systems have substantially larger administrations than the three employees allotted to MCLIS. For example, in Massachusetts, the CPCS administration has 11 senior management positions,<sup>317</sup> each of whom has significant attorney and non-attorney staff.

MCILS should be resourced to build on the effort it has begun to provide oversight and mentoring in the field. MCILS should expand its network of Resource Counsel (currently 25 attorneys at 10 hours per month) and require them to conduct assessments of attorney performance in all practice areas measured against the MCILS performance standards, to investigate complaints from clients or judges, and to inform MCILS of local training needs. MCILS should use the information developed by its Resource Counsel, together with information drawn from its billing records, to devise and implement a program of periodic recertification for all participating attorneys. MCILS should also be resourced to assign experienced mentors to assist attorneys with complex issues at least in their first two years of practice to promote efficiency by those providers.

Appendix A sets out a recommended budget and budget narrative for an expanded MCILS administration. The projected annual cost of the office is \$1,424,740.70.

**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**

<sup>317</sup> *Directories – CPCS Management Team*, COMMITTEE FOR PUBLIC COUNSEL SERVICES, <https://www.publiccounsel.net/dir/management/> (last visited Mar. 21, 2019). The senior management positions at CPCS are: chief counsel, general counsel, deputy chief counsel for the children and family law division, director of the mental health division, deputy chief counsel of the private counsel division, deputy chief counsel of the public defender division, director of the youth advocacy division, director of administration & operations, chief financial officer, chief information officer, and director of human resources. Massachusetts' caseload is over ten times that of Maine, so all of these CPCS senior management positions have significant attorney and non-attorney staff. For example, in the central administration offices, there are 11 FTE in house attorneys, all with 20+ years' experience, and six FTE administrative assistants. In the county offices, there are 30 supervising attorneys and 17 administrative assistants.

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

The contract currently used in Maine to cover the existing caseload in Somerset County without substantive oversight causes conflicts of interest between the indigent defense attorney’s financial self-interest and the legal interests of the indigent defendant. The contract also can cause concurrent conflicts of interest between indigent defendants, and between the indigent defendants and the attorney’s retained clients. Maine should follow the lead of other states that have recently banned these practices, including:

- *Idaho.* County commissioners may provide representation by contracting with a defense attorney “provided that the terms of the contract shall not include any pricing structure that charges or pays a single fixed fee for the services and expenses of the attorney.”<sup>318</sup>
- *Michigan.* The Michigan Indigent Defense Commission is statutorily barred from approving local indigent defense plans that provide “[e]conomic disincentives or incentives that impair defense counsel’s ability to provide effective representation.”<sup>319</sup>
- *Nevada.* Announcing that the “competent representation of indigents is vital to our system of justice,” the Nevada Supreme Court banned the use of flat fee contracts that fail to provide for the costs of investigation and expert witnesses and required that contracts must allow for extra fees in extraordinary cases.<sup>320</sup>
- *Washington.* The Washington *Rules of Professional Conduct* decree that “A lawyer shall not: (1) make or participate in making an agreement with a governmental entity for the delivery of indigent defense services if the terms of the agreement obligate the contracting lawyer or law firm: (i) to bear the cost of providing conflict counsel; or (ii) to bear the cost of providing investigation or expert services, unless a fair and reasonable amount for such costs is specifically designated in the agreement in a manner that does not adversely affect the income or compensation allocated to the lawyer, law firm, or law firm personnel.”<sup>321</sup>

**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**

<sup>318</sup> IDAHO CODE § 19-859 (2018).

<sup>319</sup> MICH. COMP. LAWS § 780-991(2)(b) (2017).

<sup>320</sup> Order, *In re Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases*, ADKT No. 411 (Nev. filed July 23, 2015).

<sup>321</sup> WASH. R. PROF’L CONDUCT 1.8(m)(1).

**additional compensation of \$25 per hour for designated case types such as murder, sexual assaults, and postconviction review.**

Numerous judges and other criminal justice stakeholders report that finding counsel to accept assignment of sex assault and postconviction cases is increasingly difficult. Many assigned defense attorneys say these case types present such difficult challenges that they handle them only when privately retained. The most severe cases are relatively few in number, require a very high level of expertise, and thus warrant a higher compensation rate than ordinary crimes. Permitting MCILS to pay a higher rate for the most serious cases is needed to assure the availability of qualified counsel.

All national standards require that “counsel should be paid a reasonable fee in addition to actual overhead and expenses.”<sup>322</sup> There is also a significant amount of state case law that requires states to pay attorneys a reasonable fee in addition to overhead expenses. We highlight two:

- *Kansas*. In 1987, the Kansas Supreme Court determined that the state has an “obligation to pay appointed counsel such sums as will fairly compensate the attorney, not at the top rate an attorney might charge, but at a rate which is not confiscatory, considering overhead and expenses.”<sup>323</sup> Testimony taken in the case set the average overhead rate of attorneys in Kansas in 1987 at \$30 per hour. Kansas now compensates public defense attorneys at \$80 per hour. Maine has a higher cost of living than Kansas, making the rate an equivalent of \$98.40 per hour in Maine.<sup>324</sup>
- *Alabama*. In 1993, the Alabama Court of Criminal Appeals determined that indigent defense attorneys were entitled to overhead expenses (set at \$30 per hour) in addition to a reasonable fee.<sup>325</sup> A decade later, when the Attorney General issued an opinion against paying the overhead rate and the state comptroller subsequently stopped paying it, the issue went to the Alabama Supreme Court, which determined that assigned counsel are entitled to a reasonable fee in addition to overhead expenses.<sup>326</sup> After this litigation, the Alabama legislature increased the hourly rate to \$70. Maine has a higher cost of living than Alabama, making the rate an equivalent of \$86.80 per hour in Maine.<sup>327</sup>

<sup>322</sup> AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 8 cmt. (2002).

<sup>323</sup> *State ex rel Stephan v. Smith*, 747 P.2d 816, 242 Kan. 336, 383 (Kan. 1987).

<sup>324</sup> *Cost of Living Portland, Maine vs. Wichita, Kansas*, PAYSACLE, <https://www.payscale.com/cost-of-living-calculator/Maine-Portland/Kansas-Wichita> (last visited Feb. 28, 2019). Portland, Maine has a 23% higher cost of living than Wichita, Kansas.

<sup>325</sup> *May v. State*, 672 So. 2d 1307, 1308 (Ala. Crim. App. 1993).

<sup>326</sup> *Wright v. Childree*, 972 So. 2d 771, 780-81 (Ala. 2006).

<sup>327</sup> *Cost of Living Portland, Maine vs. Birmingham, Alabama*, PAYSACLE, <https://www.payscale.com/cost-of-living-calculator/Maine-Portland/Alabama-Birmingham> (last visited Feb. 28, 2019). Portland,

Furthermore, 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.<sup>328</sup> For comparison purposes, a \$95 hourly fee in South Dakota in 2019 is equivalent to a \$114.95 hourly fee in Maine in 2019.<sup>329</sup> We recommend that the State of Maine adopt similar statutory language to ensure that Maine’s assigned counsel compensation rate stays current.

**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.**

MCILS does not currently have the statutory authority to establish governmentally employed public defender offices. The relevant part of the statute says: “The commission shall [d]evelop and maintain a system that uses appointed private attorneys, contracts with individual attorneys or groups of attorneys *and consider other programs* necessary to provide quality and efficient indigent legal services.”<sup>330</sup> The statute needs to be amended to give MCILS express authority to create staffed public defender offices.

To be clear, there is no pre-existing, uniform “cookie-cutter” indigent defense services delivery model that states *must* apply. The question for Maine policymakers, in conjunction with criminal justice stakeholders and the broader citizenry of the state, is simply how best to do so given the uniqueness of the state.

The 6AC does not presume that the full-time public defender offices recommended here are the *only* jurisdictions or case types best served by public defender offices in Maine. Indeed, we were struck that, as far back as 1971, the Institute of Judicial Administration, the Supreme Judicial Court, and the Superior Court of the State of Maine recommended a “hybrid public defender/assigned counsel delivery model” with

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Maine has a 24% higher cost of living than Birmingham, Alabama.

<sup>328</sup> See Letter from Greg Sattizahn, State Court Administrator, South Dakota Unified Judicial System, to Andrew Fergel, State Bar of South Dakota, RE: 2019 Court-Appointed Attorney Fees and Mileage (Nov. 15, 2018), *available at* <https://ujs.sd.gov/uploads/docs/2019CourtAppointedAttorneyFees.pdf>.

<sup>329</sup> For comparison purposes, the cost of living in Portland, Maine, is 21% higher than in Sioux Falls, South Dakota. See *Attorney/Lawyer Cost of Living Portland, Maine vs. Sioux Falls, South Dakota*, Payscale, <https://www.payscale.com/cost-of-living-calculator/Maine-Portland/South-Dakota-Sioux-Falls/Attorney--Lawyer> (last visited Feb. 28, 2019). Thus, a \$95 hourly wage in South Dakota is equivalent to \$114.95 in Maine.

<sup>330</sup> ME. REV. STAT. ANN. tit. 4, § 1804(3)(a) (2018) (emphasis added).



public defender offices located in Portland, Augusta, and Bangor.<sup>331</sup> We note that both Kennebec County (Augusta) and Penobscot County (Bangor) appear to have enough adult criminal cases to justify public defender offices, but because we did not conduct site visits in those two counties we refrain from making that recommendation at this time.<sup>332</sup> That said, MCILS and Maine policymakers should consider expanding public defender office to these two counties once the state appellate defender and Cumberland County public defender offices are created and operating.

### State appellate defender office

Many states have found it appropriate to separate the public defense appeals system from the public defense trial system to ensure that the direct appeal is a check against potentially ineffective trial representation. For example:

- *Florida*. Each of the state's 20 judicial circuits (together covering the state's 67 counties) has a public defender office, overseen by an elected chief public defender, with full-time attorneys who provide representation to indigent defendants at trial. Five independent state appellate defender offices provide representation in all appeals.
- *Louisiana*. Each of Louisiana's 42 judicial districts (together comprising the state's 64 parishes) has a local chief defender who oversees the public defender office or the contract defenders that provide representation to indigent defendants at trial. For all indigent appeals, the Louisiana Public Defender Board contracts with a non-profit that itself contracts with individual attorneys to provide representation.
- *Michigan*. The State Appellate Defender Office, overseen by the Appellate Defender Commission, provides appellate representation to indigent defendants statewide. Separately and independently, the Michigan Indigent Defense Commission oversees trial representation.
- *North Carolina*. The North Carolina Office of Indigent Defense Services oversees the provision of right to counsel services throughout the state. Staff public defenders are employed in a centralized unit to provide appellate representation, separate and apart from the trial services.

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<sup>331</sup> See INSTITUTE OF JUDICIAL ADMINISTRATION, THE SUPREME JUDICIAL COURT AND THE SUPERIOR COURT OF THE STATE OF MAINE 57-58 (1971).

<sup>332</sup> Based on MCILS data, Penobscot County and Kennebec County had the second and third highest indigent defense caseloads after Cumberland County.

- *Oregon.* Oregon provides trial level indigent defense services entirely through contracts with private attorneys. The Office of Public Defense Services has an appellate division of full-time staff attorneys to provide representation in most direct appeals.

Appendix B sets out a budget and budget narrative for a state appellate public defender office that assumes 80% of direct appeals and post-conviction cases statewide will be represented by the new state appellate defender office (based on FY2018 caseloads). The total projected cost of the office in the first year is \$2,369,659.22, including \$55,100 in one-time capital outlay (furniture, computers, and phones).<sup>333</sup>

#### Cumberland County trial level public defender office

The American Bar Association states in its *ABA Ten Principles of a Public Defense Delivery System* that, wherever there is a “sufficiently high” caseload, the public defense delivery system should consist of “both a public defender office and the active participation of the private bar.”<sup>334</sup> Although the ABA has never defined what it means by “sufficiently high,” there is little doubt that the number of cases arising in Cumberland County meets this threshold.

Appendix C sets out a budget and budget narrative for a Cumberland County trial level public defender office that assumes the office will provide representation in 80% of all adult criminal and juvenile crime cases (based on FY2018 caseloads). The public defender office would not handle any civil cases; those would continue to be handled by appointed private attorneys. The projected annual cost of the office is \$3,042,048. The 2018 cost for providing trial level representation in 80% of Cumberland County’s adult criminal and juvenile crime cases was \$1,921,804, so creation of a public defender office to handle these cases will cost an additional \$1,120,244 over 2018 cost.

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<sup>333</sup> The current cost for representation in 80% of the appellate cases is \$622,215.

<sup>334</sup> AMERICAN BAR ASS’N, *ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM*, Principle 2 (Feb. 2002).

# APPENDIX A

## MCILS ADMINISTRATION

PERSONNEL	TITLE	SALARY	BENEFITS	POSITIONS	TOTAL
ATTORNEYS	Executive Director	\$101,002.17	\$54,385.78	1	\$155,387.95
	Deputy Director	\$96,906.00	\$54,267.36	1	\$151,173.36
	Training Director	\$72,418.42	\$38,994.53	1	\$111,412.95
	Family Law Resource Attorney	\$72,418.42	\$38,994.53	1	\$111,412.95
	Delinquency Resource Attorney	\$72,418.42	\$38,994.53	1	\$111,412.95
	Adult Trial Resource Attorney	\$72,418.42	\$38,994.53	1	\$111,412.95
	Mental Health Resource Atty	\$72,418.42	\$38,994.53	1	\$111,412.95
	Audit Director	\$70,675.00	\$39,578.00	1	\$110,253.00
	Training staff	\$37,408.00	\$20,948.48	2	\$116,712.96
	Auditing staff	\$37,408.00	\$20,948.48	2	\$116,712.96
Sub-Total					\$1,207,304.98

NON-PERSONNEL EXPENSES	CURRENT	PROJECTED
Risk management insurances	\$1,795.39	\$7,181.56
Mailing/postage/freight	\$4,675.71	\$18,702.84
Cellular phones service	\$1,406.69	\$5,626.76
Service center	\$3,095.00	\$12,380.00
Office supplies & equipment	\$2,062.61	\$8,250.44
Office equipment rental	\$1,274.45	\$5,097.80
Eyeglasses reimbursement	\$300.00	\$1,200.00
OIT/TELCO	\$27,774.75	\$111,099.00
Subscriptions	\$327.75	\$1,311.00
Dues	\$585.00	\$2,340.00
Annual report prorated	\$9.58	\$38.32
Annual parking permit fee	\$1,140.00	\$4,560.00
Printing/binding	\$22.00	\$88.00
InforME annual fee	\$2,640.00	\$10,560.00
Sub-Total		\$188,435.72

CAPITAL EXPENDITURES	RATE	NUMBER	TOTAL
Laptop computer	\$1,400.00	10	\$14,000.00
Furniture	\$1,200.00	10	\$12,000.00
Cell phones	\$300.00	10	\$3,000.00
Sub-Total			\$29,000.00

<b>GRAND TOTAL</b>	<b>\$1,424,740.70</b>
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## BUDGET NARRATIVE

In addition to the current Director and Deputy Director, the 6AC recommends the addition of five attorney positions: Training Director, Family Law Resource Attorney, Juvenile Resource Attorney, Mental Health Resource Attorney, and Adult Trial Resource Attorney. Each of the Resource Attorneys will provide direct supervision and provide help desk assistance to attorneys in the field. The Training Director will be responsible for developing and instituting new attorney and on-going training programs, as well as periodic topic-specific trainings to be delivered regionally and remotely. The Training Director will oversee a staff of two to help with logistics and training development. MCILS should also have a dedicated professional with an auditing background to oversee all financial auditing functions, supported by two professional staff members.

With the additional staff, the 6AC recommend that the Director position be paid on par with the salary and compensation of a District Attorney (\$155,387.95)<sup>335</sup> and that the Deputy Director be paid what the MCILS Director is currently being paid (\$151,173.36).<sup>336</sup> The new attorney positions are paid salaries and benefits at the rate paid to assistant district attorneys (\$111,412.95).<sup>337</sup> Although the 6AC are not experts in the prosecution function, 6AC staff has travelled all across the country and interacted with numerous prosecutors, and it is our general observation that the prosecution function in Maine is under-resourced, especially in relation to salaries and compensation. Still, we present these recommendations because the prosecution function offers the best current comparison.

The Auditing Director is projected at the salary and compensation of the current MCILS Deputy Director (\$110,253). The four training and auditing staff are compensated at the current salary and benefits package of the existing rate for the Accounting Technician (\$58,356.48).<sup>338</sup>

Non-personnel expenses reflect the current MCILS budget,<sup>339</sup> less line items dedicated specifically for financial screeners. Each expense was prorated based on the existing three MCILS staff members (excluding financial screeners and costs associated

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<sup>335</sup> Email from Mark A. Toulouse, Division Chief – Finance & Administrative Services, Office of the Attorney General State of Maine, to David Carroll, Executive Director of Sixth Amendment Center (Mar. 12, 2019). This amount reflects salary plus benefits calculated at approximately 35% of salary.

<sup>336</sup> Email from John Pelletier, Director, Maine Commission on Indigent Legal Services, to David Carroll, Executive Director of Sixth Amendment Center (Mar. 7, 2019).

<sup>337</sup> Email from Mark A. Toulouse, Division Chief – Finance & Administrative Services, Office of the Attorney General State of Maine, to David Carroll, Executive Director of Sixth Amendment Center (Mar. 12, 2019). This amount reflects salary plus benefits calculated at approximately 35% of salary.

<sup>338</sup> Email from John Pelletier, Director, Maine Commission on Indigent Legal Services, to David Carroll, Executive Director of Sixth Amendment Center (Mar. 7, 2019).

<sup>339</sup> Email from John Pelletier, Director, Maine Commission on Indigent Legal Services, to David Carroll, Executive Director of Sixth Amendment Center (Mar. 7, 2019).

primarily for screening) and then multiplied by the recommended staff of twelve. Capital outlay expenses for new computers, furniture, and cell phones are calculated at available retail rates.

# APPENDIX B

## STATE APPELLATE DEFENDER OFFICE

PERSONNEL	TITLE	SALARY	BENEFITS	POSITIONS	TOTAL
ATTORNEYS	Chief Public Defender	\$101,002.17	\$54,385.78	1	\$155,387.95
	Deputy Public Director	\$96,906.00	\$54,267.36	1	\$151,173.36
	Assistant Public Defender	\$72,418.42	\$38,994.53	11	\$1,225,542.45
	Investigator	\$43,068.00	\$24,118.08	1	\$67,186.08
	Social Worker	\$43,068.00	\$24,118.08	1	\$67,186.08
	Paralegal	\$38,500.00	\$21,560.00	3	\$180,180.00
	Office Manager	\$43,068.00	\$24,118.08	1	\$67,186.08
Sub-Total					\$1,913,842.00
NON-PERSONNEL EXPENSES				COST/STAFF	PROJECTED
Risk Management Insurances				\$598.46	\$11,370.80
Mailing/Postage/Freight				\$1,558.57	\$29,612.83
Cellular Phones				\$468.90	\$8,909.04
Service Center (payroll processing, etc.)				\$1,031.67	\$19,601.67
Office Supplies/Equip.				\$687.54	\$13,063.20
Office Equipment Rental				\$424.82	\$8,071.52
Eyeglasses reimbursement				\$100.00	\$1,900.00
OIT/TELCO				\$9,258.25	\$175,906.75
Subscriptions				\$109.25	\$2,075.75
Dues				\$195.00	\$3,705.00
Annual report prorated				\$3.19	\$60.67
Annual parking permit fee				\$380.00	\$7,220.00
Printing/Binding				\$7.33	\$7,500.00
InforME Annual Fee (webhosting, etc.)				\$880.00	\$16,720.00
Rent				\$5,000.00	\$95,000.00
Sub-Total					\$400,717.22
CAPITAL EXPENDITURES			RATE	NUMBER	TOTAL
Laptop computer			\$1,400.00	19	\$26,600.00
Furniture			\$1,200.00	19	\$22,800.00
Cell phones			\$300.00	19	\$5,700.00
Sub-Total					\$55,100.00
<b>GRAND TOTAL</b>					<b>\$2,369,659.22</b>

## BUDGET NARRATIVE

For 2018, MCILS reports that there were 235 direct appeal cases and 96 post-conviction cases statewide. Assuming 80% are handled in-house, that means a new statewide appellate office will handle approximately 265 direct appeal and post-conviction cases. The NAC standards are nationally recognized as the absolute upper limit of cases that a defense attorney can be expected to handle and still provide effective, zealous representation to each and every client. For appellate services, the NAC Standards prescribe that attorneys should handle no more than 25 appeals in a single year.<sup>340</sup> Thus eleven attorneys are needed to staff the office.

National standards require one supervising attorney for every ten attorneys carrying a full caseload.<sup>341</sup> Therefore, in addition to a Chief Appellate Defender, a Deputy Chief Defender is required for supervision.

Although national standards require one investigator for every three staff attorneys<sup>342</sup> and one social worker for every three attorneys,<sup>343</sup> these standards are generally seen as applying to trial practice. Therefore, we are recommending one investigator and one social worker for the appellate office to assist on the post-conviction workload. National standards also require one paralegal for every four staff attorneys.<sup>344</sup>

The 6AC recommends that the Director position be paid on par with the salary and compensation of a District Attorney (\$155,387.95)<sup>345</sup> and that the Deputy Director be paid what the MCILS Director is currently being paid (\$151,173.36).<sup>346</sup> The new attorney positions are paid salaries and benefits at the rate paid to assistant district attorneys (\$111,412.95).<sup>347</sup> Again, although the 6AC are not experts in the prosecution

<sup>340</sup> NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON THE COURTS, ch. 13 (The Defense), Std. 13.12 (1973).

<sup>341</sup> NATIONAL STUDY COMM'N ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES 4.1 (1976) ("Proper attorney supervision in a defender office requires one full-time supervisor for every ten staff lawyers, or one part-time supervisor for every five lawyers.").

<sup>342</sup> NATIONAL STUDY COMM'N ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES 4.1 (1976) ("Defender offices should employ investigators with criminal investigation training and experience. A minimum of one investigator should be employed for every three staff attorneys in an office. Every defender office should employ at least one investigator.").

<sup>343</sup> NATIONAL LEGAL AID & DEFENDER ASS'N, MODEL CONTRACT FOR PUBLIC DEFENSE SERVICES § VII.F, available at <http://www.nlada.org/defender-standards/model-contract/black-letter>

<sup>344</sup> U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE PUB. NO. NCJ185632, KEEPING DEFENDER WORKLOADS MANAGEABLE (2001).

<sup>345</sup> Email from Mark A. Toulouse, Division Chief – Finance & Administrative Services, Office of the Attorney General State of Maine, to David Carroll, Executive Director of Sixth Amendment Center (Mar. 12, 2019). This amount reflects salary plus benefits calculated at approximately 35% of salary.

<sup>346</sup> Email from John Pelletier, Director, Maine Commission on Indigent Legal Services, to David Carroll, Executive Director of Sixth Amendment Center (Mar. 7, 2019).

<sup>347</sup> Email from Mark A. Toulouse, Division Chief – Finance & Administrative Services, Office of the Attorney General State of Maine, to David Carroll, Executive Director of Sixth Amendment Center (Mar. 12, 2019). This amount reflects salary plus benefits calculated at approximately 35% of salary.

function, 6AC staff has travelled all across the country and interacted with numerous prosecutors, and it is our general observation that the prosecution function in Maine is under-resourced, especially in relation to salaries and compensation. Still, we present these recommendations because the prosecution function offers the best current comparison. Support staff salaries and benefits are based on support staff compensation in the Cumberland County District Attorney Office.

Non-personnel expenses reflect the current MCILS budget, less line items dedicated specifically for financial screeners. The rent projection is based on \$25 per square foot charged against 200 square feet per staff (or \$5,000 per staff member). Capital outlay expenses for new computers, furniture, and cell phones were calculated at available retail rates.



# APPENDIX C

## CUMBERLAND COUNTY TRIAL LEVEL PUBLIC DEFENDER OFFICE

PERSONNEL	TITLE	SALARY	BENEFITS	POSITIONS	TOTAL
ATTORNEYS	Chief Public Defender	\$101,002.17	\$54,385.78	1	\$155,387.95
	Deputy Public Director	\$96,906.00	\$54,267.36	1	\$151,173.36
	Assistant Public Defender	\$72,418.42	\$38,994.53	12	\$1,336,955.40
	Investigator	\$43,068.00	\$24,118.08	4	\$268,744.32
	Social Worker	\$43,068.00	\$24,118.08	4	\$268,744.32
	Paralegal	\$38,500.00	\$21,560.00	3	\$180,180.00
	Office Manager	\$43,068.00	\$24,118.08	1	\$67,186.08
Sub-Total					\$2,428,371.43

NON-PERSONNEL EXPENSES	CURRENT	PROJECTED
Risk Management Insurances	\$598.46	\$15,560.05
Mailing/Postage/Freight	\$1,558.57	\$40,522.82
Cellular phones service	\$468.90	\$12,191.31
Service Center (payroll processing, etc.)	\$1,031.67	\$26,823.33
Office Supplies/Equip.	\$687.54	\$17,875.95
Office Equipment Rental	\$424.82	\$11,045.23
Eyeglasses reimbursement	\$100.00	\$2,600.00
OIT/TELCO	\$9,258.25	\$240,714.50
Subscriptions	\$109.25	\$2,840.50
Dues	\$195.00	\$5,070.00
Annual report prorated	\$3.19	\$83.03
Annual parking permit fee	\$380.00	\$9,880.00
Printing/Binding	\$7.33	\$190.67
InforME Annual Fee (webhosting, etc.)	\$880.00	\$22,880.00
Rent	\$5,000.00	\$130,000.00
Sub-Total		\$538,277.39

CAPITAL EXPENDITURES	RATE	NUMBER	TOTAL
Laptop computer	\$1,400.00	26	\$36,400.00
Furniture	\$1,200.00	26	\$31,200.00
Cell phones	\$300.00	26	\$7,800.00
Sub-Total			\$75,400.00

<b>GRAND TOTAL</b>	<b>\$3,042,048.82</b>
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## BUDGET NARRATIVE

For 2018, MCILS reports 1,232 murder, class A, B, and C cases, 2,022 class D and E cases, and 329 juvenile crime cases in Cumberland County. Assuming 80% are handled in-house, that means a new trial level public defender office would handle 985 felony cases, 1,618 misdemeanor cases, and 263 delinquency cases. The NAC standards are nationally recognized as the absolute upper limit of cases that a defense attorney can be expected to handle and still provide effective, zealous representation to each and every client. For adult trial level services, the NAC standards prescribe that attorneys should handle no more than 150 felonies in a single year, or 400 misdemeanors, or 200 delinquency cases.<sup>348</sup> Thus twelve attorneys are needed to staff the office.

National standards require one supervising attorney for every ten attorneys carrying a full caseload.<sup>349</sup> Therefore, in addition to a Chief Public Defender, a Deputy Chief Defender is required for supervision.

National standards require one investigator for every three staff attorneys<sup>350</sup> and one social worker for every three attorneys.<sup>351</sup> This means that the new Cumberland County public defender office will need four investigators and four social workers. National standards also require one paralegal for every four staff attorneys,<sup>352</sup> requiring the new office to have three paralegals.

The 6AC recommend that the Director position be paid on par with the salary and compensation of a District Attorney (\$155,387.95)<sup>353</sup> and that the Deputy Director be paid what the MCILS Director is currently being paid (\$151,173.36).<sup>354</sup> The new attorney positions are paid salaries and benefits at the rate paid to assistant district

<sup>348</sup> NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON THE COURTS, ch. 13 (The Defense), Std. 13.12 (1973).

<sup>349</sup> NATIONAL STUDY COMM'N ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES 4.1 (1976) ("Proper attorney supervision in a defender office requires one full-time supervisor for every ten staff lawyers, or one part-time supervisor for every five lawyers.").

<sup>350</sup> NATIONAL STUDY COMM'N ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES 4.1 (1976) ("Defender offices should employ investigators with criminal investigation training and experience. A minimum of one investigator should be employed for every three staff attorneys in an office. Every defender office should employ at least one investigator.").

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<sup>352</sup> U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE PUB. NO. NCJ185632, KEEPING DEFENDER WORKLOADS MANAGEABLE (2001).

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<sup>354</sup> Email from John Pelletier, Director, Maine Commission on Indigent Legal Services, to David Carroll, Executive Director of Sixth Amendment Center (Mar. 7, 2019).

attorneys (\$111,412.95).<sup>355</sup> Again, although the 6AC are not experts in the prosecution function, 6AC staff has travelled all across the country and interacted with numerous prosecutors, and it is our general observation that the prosecution function in Maine lacks adequate funding, especially in relation to salaries and compensation. Still, we present these recommendations because the prosecution function offers the best current comparison. Support staff salaries and benefits are based on support staff compensation in the Cumberland County District Attorney Office.

Non-personnel expenses reflect the current MCILS budget, less line items dedicated specifically for financial screeners. Each expense<sup>356</sup> was prorated based on the existing three MCILS staff members and then multiplied by the recommended staff of eleven. The rent projection is based on \$25 per square foot charged against 200 square feet per staff (or \$5,000 per staff member). Capital outlay expenses for new computers, furniture and cell phones were calculated at available retail rates.

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<sup>355</sup> Email from Mark A. Toulouse, Division Chief – Finance & Administrative Services, Office of the Attorney General State of Maine, to David Carroll, Executive Director of Sixth Amendment Center (Mar. 12, 2019). This amount reflects salary plus benefits calculated at approximately 35% of salary.

<sup>356</sup> Email from John Pelletier, Director, Maine Commission on Indigent Legal Services, to David Carroll, Executive Director of Sixth Amendment Center (Mar. 7, 2019).



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