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**MAINE COMMISSION ON INDIGENT LEGAL SERVICES**

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**TO:** JUDICIARY COMMITTEE

**FROM:** JUSTIN W. ANDRUS, ESQ., (INTERIM) EXECUTIVE DIRECTOR

**SUBJECT:** MCILS BIENNIAL BUDGET

**DATE:** 3/10/2021

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This memorandum is intended to respond to the requests of committee members at the work session on March 9, 2021. The Commission appreciates the committee's attention to our budget needs. In reviewing this material, please consider that I believe the following steps would be helpful from my desk as (Interim) Executive Director, but that the MCILS budget proposal must come from the Commission itself. These elements thus reflect my individual professional perspective on how to achieve the most with the least. It remains my perspective that the Commission must be fully funded to a degree exceeding these steps to achieve full compliance with the Sixth Amendment and State of Maine Constitutional and Statutory mandates.

The MCILS budget process has been complicated by the need to update the numbers supporting the initiatives the Commission identified in October 2020, and then by the invitation committee members made to me to consider how to make the most improvement in Commission operations with the fewest changes. From my perspective, the information presented in this memorandum may be best understood as continuing to present the October initiatives as first clarified by my memorandum of March 1<sup>st</sup>, and then as further illuminated by my memorandum to Senator Keim of March 5<sup>th</sup> and my memorandum to Senator Carney of March 9<sup>th</sup>.

At the work session on March 10, 2021, committee members expressed an interest in ensuring that each had received all the documents that had been circulated related to the MCILS budget. The following five documents are appended to this memorandum in satisfaction of that request.

1. MCILS Initiatives as submitted on October 19, 2020;
2. MCILS Portion of Governor's Biennial Budget;
3. (Interim) Executive Director Testimony submitted March 1, 2021;
4. MCILS Memorandum to Sen. Keim of March 5, 2021; and,
5. MCILS Memorandum to Sen. Carney of March 9, 2021.

Then Executive Director John Pelletier presented five initiatives on October 19, 2020. Those five initiatives tracked the initiatives recommended by the 6<sup>th</sup> Amendment Center Report as necessary first steps toward a constitutionally adequate public defense system. The exception is that the initiative to create a pilot public defender office was proposed for implementation in Kennebec County, rather than Cumberland County. The five initiatives were:

1. The addition of 10 Commission staff to implement attorney evaluation and performance protocols; to oversee training; and, to provide an audit function.<sup>1</sup>
2. The addition of 17 Commission employees to create and operate a trial level public defender office in Kennebec County.<sup>2</sup>
3. The addition of 20 Commission employees to create a statewide Appellate and Post-Conviction Review Public Defender Office.
4. Additional funding in the amount of \$2,804,980 per year to cover the cost of Commission operations at the FY'20 level during the next biennium.
5. Additional funding in the amount of \$11,465,959 per year to increase the hourly rate paid to contract attorneys serving indigent clients from \$60 per hour to \$100 per hour.

The Governor's budget omitted all of these initiatives.

In preparation for the joint session on March 1, 2021, I reviewed the initiatives listed in the October submission. I learned at that time that, as presented, those initiatives omitted benefits from the staff costs. Deputy Director Maciag obtained the information necessary to update those initiatives to reflect actual costs. Those numbers were reflected in the memorandum I submitted on March 1.

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<sup>1</sup> Implementation of a true audit function, and particularly a recoupment function, will require statutory changes, addressed below.

<sup>2</sup> Implementation of employee attorneys to provide direct client services will also require statutory changes.

During the week of March 1, 2021, I had conversations with committee members. I was asked to provide additional information. That information is reflected in the memoranda of March 5, to Sen. Keim, and March 9, to Sen. Carney. The Sen. Keim memorandum sets out the prospective utility of adding staff to the Commission's central-office functions at various staffing levels and described the net cost of adding the Appellate and Post-Conviction Defender office contained in the October initiatives as updated March 1<sup>st</sup>. The Sen. Carney memorandum reflects the utilization of those additional staff members in greater detail, at additional central office staffing levels of 6, 7, and 14.

A. The October initiatives, as updated on March 1, 2021, remain the Commission's proposal

The committee has asked us to produce a breakout of individual position salaries for each of the Commission's initiatives. We were also asked to produce the salaries ranges for the positions we specified. We are producing that information to you in spreadsheet form with this memorandum. We were also asked to determine whether the benefit packages assume that the employee would require family medical coverage. We have been informed that the benefit packages do assume that the employee would require family medical coverage.

The October initiatives still represent the budget request passed by the Commission through its public meeting in the fall of 2020. That remains the Commission's proposal. We are providing a spreadsheet named "October Initiatives updated March 1, 2021." There are three tabs in the spreadsheet for each of the first three October initiatives that would increase the number of Commission employees—increase of central office staff, a Kennebec County Public Defender office, and an Appellate / Post-Conviction Review Public Defender office. On each tab you will see employee classification, class code, and spec and grade, together with salary and benefit cost information for each step.

Each tab in the spreadsheet also breaks out the "All Other" costs for the initiative.

Initiatives four and five are for funding to support baseline operations and to improve the rate for payments to attorneys for client services. For clarity, initiative five sets out the amount of the increase, but does not provide the baseline funding for payments to attorneys at the current rate.

**Initiative 1**

i. Modified central office staffing

The memoranda to Senators Carney and Keim discuss alternatives to Commission initiative number one. Element 3 details Commission initiative number one as modified and is a full replacement. Total staff increased from 10 to 14 as explained below. Elements 1 and 2 show how the Commission would add functionality at lower funding amounts. The following tables show the employee specification and grade designations we proposed in the memorandum to Senator Carney, and the salary and benefits for each.

Element 1 implements Attorney Supervision and Auditing Subdivisions. The Attorney Supervision Subdivision would oversee attorney performance through review of attorney documentation and direct observation, and would investigate and resolve complaints. The Auditing Subdivision would implement audits to provide greater financial accountability.

<b><u>Attorney Supervision Subdivision</u></b>	<b><u>Auditing Subdivision</u></b>
Attorney I / PSM II Spec / Grade 47-33 Salary: \$77, 001 Fringe: \$58,287	Attorney I / PSM II Spec / Grade 47-33 Salary: \$77, 001 Fringe: \$58,287
Attorney II / PSM II Spec / Grade 47-31 Salary: \$70,720 Fringe: \$49,907	Attorney II / PSM II Spec / Grade 47-31 Salary: \$70,720 Fringe: \$49,907
Paralegal / Paralegal Spec / Grade 04-20 Salary: \$40,643 Fringe: \$38,500	Paralegal / Paralegal Spec / Grade 04-20 Salary: \$40,643 Fringe: \$38,500

Element 2 adds one office support person (new position(s) shaded in blue) that would increase the operational efficiency and tempo of the Commission executive staff by providing direct support to the executive director and the deputy director. At this time communication and information distribution duties occupy a disproportionately high number of executive staff hours. The office specialist contemplated at element 2 could receive communications from outside the Commission; research the needs of those calling and emailing executive staff; and, after discussion and under direction from the executive staff could communicate responses and decisions back out. As many of the communications the Commission receives are simultaneously necessary to the ability of an individual attorney to represent an individual client and disruptive to the ability of the Commission staff to engage in projects uninterrupted, adding an individual in this role would result in a significant net savings of time, exceeding the actual time the communications require by eliminating the time required to resume interrupted tasks.

<b><u>Attorney Supervision Subdivision</u></b>	<b><u>Auditing Subdivision</u></b>	<b><u>Central Office</u></b>
Attorney I / PSM II Spec / Grade 47-33 Salary: \$77, 001 Fringe: \$58,287	Attorney I / PSM II Spec / Grade 47-33 Salary: \$77, 001 Fringe: \$58,287	Office Support / OSIII SUPV Spec / Grade 81-22 Salary: \$46,966 Fringe: \$40,905
Attorney II / PSM II Spec / Grade 47-31 Salary: \$70,720 Fringe: \$49,907	Attorney II / PSM II Spec / Grade 47-31 Salary: \$70,720 Fringe: \$49,907	
Paralegal / Paralegal Spec / Grade 04-20 Salary: \$40,643 Fringe: \$38,500	Paralegal / Paralegal Spec / Grade 04-20 Salary: \$40,643 Fringe: \$38,500	

Element 3 would bring the total new staff count to 14 by staffing the Supervision and Auditing Subdivisions and adding Training and Investigative Subdivisions at a level calculated to approximate the central office staff needs consistent with the recommendations of the 6AC Report, but updated to account for relocating the proposed public defender office from Cumberland County to a smaller county. With the addition of the staff members contemplated by element 3, the central office would be divided into four subdivisions. The attorney supervision division would consist of three attorneys working with two paralegals. These five people would review attorney documentation and file materials, and provide direct supervision and direction to Commission contract attorneys. The training subdivision would consist of one attorney and one paralegal developing and presenting trainings ranging from the required minimum standards sessions to specialized trainings for experienced practitioners. The investigative subdivision would consist of one attorney and one paralegal investigating attorney performance complaints. The auditing subdivision would consist of two attorneys and two paralegals engaged in audit activities.

<u>Attorney Supervision Subdivision</u>	<u>Training Subdivision</u>	<u>Investigative Subdivision</u>	<u>Auditing Subdivision</u>	<u>Central Office</u>
Attorney I / PSM II Spec / Grade 47-33 Salary: \$77,001 Fringe: \$58,287	Attorney I / PSM II Spec / Grade 47-33 Salary: \$77,001 Fringe: \$58,287	Attorney I / PSM II Spec / Grade 47-33 Salary: \$77,001 Fringe: \$58,287	Attorney I / PSM II Spec / Grade 47-33 Salary: \$77,001 Fringe: \$58,287	Office Support / OSIII SUPV Spec / Grade 81-22 Salary: \$46,966 Fringe: \$40,905
Attorney II / PSM II Spec / Grade 47-31 Salary: \$70,720 Fringe: \$49,907	Paralegal / Paralegal Spec / Grade 04-20 Salary: \$40,643 Fringe: \$38,500	Paralegal / Paralegal Spec / Grade 04-20 Salary: \$40,643 Fringe: \$38,500	Attorney II / PSM II Spec / Grade 47-31 Salary: \$70,720 Fringe: \$49,907	
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Paralegal / Paralegal Spec / Grade 04-20 Salary: \$40,643 Fringe: \$38,500				

ii. Effective application of additional staff resources from 2 to 14

In broad terms, Commission operations can be reasonably divided between administrative and operational functions performed by the central office staff now, and attorney management functions that have historically been performed by central office staff but that should be performed by additional staff members in the future. Those attorney management functions can be further subdivided into training; supervision; quality assurance; and, audit functions. If the Commission were to receive the resources necessary to add central office staff, those resources would be most effectively applied first to the attorney supervision functions. Ultimately, more staff members are required to provide adequate training, supervision, and performance quality assurance then are required to provide the audit function.

At the outset, however, the Commission should provision the attorney quality functions roughly equally to the audit function to ensure that both elements were being addressed. This would hold true from two through six new positions. The seventh new position should be assigned to improve the tempo of the administrative and operation functions. The eight through eleventh positions should be added alternately to the Attorney Supervision and Audit functions, beginning with the supervision function. Any additional positions should be added to the supervision function.

At new staffing levels below six, the individuals performing each function will need to be experienced and highly skilled. It is appropriate to select the most senior grades specified above for those roles.

## **Initiative 2 - Kennebec Public Defender Office**

Pages 6 and 11 of the Commission's March 1 written testimony and tab 2 in the attached spreadsheet detail the Commission's proposal for a Kennebec County Public Defender trial office. This remains the Commission's proposal.

## **Initiative 3 - Appellate Public Defender**

Pages 7 and 14 of the Commission's March 1 written testimony and tab 3 in the attached spreadsheet detail the Commission's proposal for an Appellate and Post-Conviction Review Public Defender Office. This remains the Commission's proposal.

## **Initiative 4 – Establishes historical baseline funding**

Initiative four is set at page 2 of the Commission's submission of October 19, 2020 and calls for funding in the amount of \$2,804,980 to bring total baseline funding to \$18.3 million, consistent with historical needs.

## **Initiative 5 – Increases the rate paid to attorneys providing legal service through the Commission from \$60 to \$100**

Initiative five is set at page 2 of the Commission's submission of October 19, 2020. This initiative provides the necessary funding to cover an increase in the rate paid to attorneys providing legal service through the Commission from \$60 to \$100 per hour. Funding to pay attorneys \$60 per hour is provided in the baseline budget. This initiative provides the additional \$40 per hour.

B. Legislative Changes:

To implement any of these staffing additions, the Commission will require legislative changes as follows:

1. 4 M.R.S.A. §1804(3)(A) would require modification to permit the Commission to use attorney-employees to serve indigent clients.
2. §1804(3 and 4) would require language creating an audit and financial recoupment power, and the addition of investigative subpoena power.
3. §1805 would require language authorizing the Executive Director and/or designees to exercise the authority of the Commission regarding audits, recoupment, and subpoenas.

In addition:

4. Section 1806 should be amended to clarify whether investigative materials remain confidential at the conclusion of an investigation; whether investigative conclusions may be disclosed, and under what circumstances; whether attorney repayments to the Commission are confidential or not; and, authorizing the disclosure of complaints and/or investigative material to law enforcement, prosecutors, and to Bar Counsel as appropriate.
5. 4 M.R.S.A. §1806(4)(D) contains an incorrect statutory reference. The language, “subsection 2, paragraph F,” should be replaced with a citation to “subsection 3, paragraph F.”

C. Part FFF:

The Commission seeks to amend 4 M.R.S.A. §1804(4)(D) to permit the adoption of rules to establish standards prescribing minimum experience, training and other qualifications for contract counsel and assigned counsel through routine technical rulemaking. Please note that the language of Part FFF is correct, but that the effect of the proposed amendment is misstated in the Summary as included in the budget. Rates of compensation for assigned counsel and contract counsel would remain subject to legislative oversight. The change will allow the Commission to match improvements in its training requirements and curriculum with standards calling for those training requirements as a condition of rostering.

## PART FFF

Sec. FFF-1. 4 MRSA, §1804, sub-§4, ¶D is amended to read:

**4. Powers.** The commission may:

- A. Establish and maintain a principal office and other offices within the State as it considers necessary;
- B. Meet and conduct business at any place within the State;
- C. Use voluntary and uncompensated services of private individuals and organizations as may from time to time be offered and needed;
- D. Adopt rules to carry out the purposes of this chapter. Rules adopted pursuant to this paragraph are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A, except that rules adopted to establish ~~standards under subsection 2, paragraph B~~ and rates of compensation for assigned counsel and contract counsel under subsection 2, paragraph F are major substantive rules as defined in Title 5, chapter 375, subchapter 2-A; and
- E. Appear in court and before other administrative bodies represented by its own attorneys.

## PART FFF SUMMARY

This Part allows the Maine Indigent Legal Services Commission to establish rates of compensation for assigned counsel and contract counsel through routine technical, rather than major substantive, rulemaking, enabling the Commission to make these changes more quickly and efficiently.

#### D. Executive Director Salary

This initiative redefines the salary grade of the executive director position to realign it with the salary rates for comparable positions that have significant policy and supervisory responsibilities. The comparable positions the Commission considered were Deputy Attorney General and elected District Attorneys. The salary is set by statute at 2 M.R.S.A §6, sub-§12, at Grade 52. The Commission would like to adjust it to Grade 37, \$80,912-\$122,512. (Benefit cost range \$52,982 - \$69,012)

#### E. General Fund Non-Lapsing Language

In FY'20, the Commission was funded through an Other Special Revenue account, rather than through a General Fund account as is ordinary the case (including in FY'21). There remains \$2.6 million dollars in that OSR account. The surplus is primarily the result of a decrease in attorney payments in FY'20 due to a reduction in travel and trial time during the pandemic. The Commission proposes the following language be added to the budget to permit it to access and use these funds for its operations.

### **PART XX**

**Sect. xx-1 Transfer balances.** Notwithstanding any provision of law to the contrary, prior to June 30, 2021, the State Controller shall transfer, after the deduction of all allocations, financial commitments and other designated funds and any other transfer authorized by statute, any remaining balance in the Reserve for Indigent Legal Services account, Other Special Revenue Funds to the Maine Commission on Indigent Legal Services account, Other Special Revenue Funds in the Maine Commission on Indigent Legal Services.

#### **Summary**

This Part authorizes to transfer any remaining balance in the Reserve for Indigent Legal Services account, Other Special Revenue Funds to the Maine Commission on Indigent Legal Services account, Other Special Revenue Funds in the Maine Commission on Indigent Legal Service.