



MAINE COMMISSION ON INDIGENT LEGAL SERVICES

August 31, 2021

Nathan L. Libby, Senate Chair
Genevieve McDonald, House Chair
Government Oversight Committee
c/o Lucia A. Nixon, OPEGA Director
82 State House Station
Room 104 Cross Building
Augusta, ME 04333-0082

Via e-mail only to: lucia.nixon@legislature.maine.gov

Re: **Maine Commission on Indigent Legal Services**
Second Quarterly Report

Dear Senator Libby and Representative McDonald:

The Maine Commission on Indigent Legal Services respectfully makes its second quarterly report to the Government Oversight Committee. As before, this report is guided by the Committee's letter of March 10, 2021 to Commission Chair Tardy, directing that the quarterly report, at a minimum, address MCILS progress in the following areas: budget and finances, auditing and accountability, quality control and determination of indigency, as well as other areas as appropriate. MCILS is further guided by the reporting directives set out in the supplemental budget.

By e-mail dated 8/25/2021 OPEGA Director Nixon requested an update on the final dispositions of the three MCILS related bills address by the Legislature this year. Their status follows:

LD 1685 – Passed to be enacted by both the House and the Senate 7/2/2021. Became law without the Governor's signature 7/15/2021. Text attached.

LD 1686 – Passed to be enacted by the House on 6/17/2021. Carried over, in the same posture, to any special or regular session of the 130th legislature on 7/19/2021.

LD 1687 - Passed to be enacted by both the House and the Senate 7/2/2021. Became law without the Governor's signature 7/15/2021. Text attached.

I. Budget and Finances

For FY22, MCILS has a working budget of \$27,467,561.30, of which \$24,043,939.56 was unobligated as of August 23, 2021. The working budget consists of \$17,549,392 appropriated through the biennial budget; \$9,918,169.30 appropriated through the supplemental budget, and \$844,522.69 carried forward.

MCILS saw a carry forward of approximately \$2.6 million in addition to the money appropriated for it in the Budget. According to the Budget Office, that money will be available to the Commission through a Financial Order.

In addition, MCILS has been awarded \$4 million in COVID relief funds to help ensure that counsel fees generated because of pandemic related delays may be timely paid. That money will be available to MCILS in October 2021 and is earmarked for those fees.

MCILS also holds \$16,232.70 in unobligated cash in an account dedicated to paying the costs associated with presenting training for rostered counsel.

As of August 23, 2021, the MCILS budget was encumbered in the amount of \$128,745 to protect two outstanding contracts. The first contract is for the outside development and implementation of a week-long training program for counsel. The second is for a specialist immigration attorney to provide immigration law support to MCILS clients.

Between July 1 and August 23, 2021, MCILS paid vouchers totaling \$2,721,233. Most of the time recorded on the vouchers paid since July 1st reflected work performed under the \$60 / hour rate. The current rate of expenditure would annualize to \$20,214,873.71 in fees, but that calculation does not include the increased rate. We project that as vouchers evolve to reflect the rate of \$80 / hour for work performed after July 1st, the cost of attorney fees will be approximately \$25 million at the current work tempo.

Non-counsel costs have been below the historical average for the past year. We attribute this to the lull in courthouse activity, which has meant that trial related costs have been avoided. We project that non-counsel costs will return to approximately \$1 million for FY22.

Based on the foregoing, MCILS would be able to meet its fiscal obligations. We have observed a surge in new cases, however. We have no way to determine whether the surge will continue, or whether we are seeing a backlog of cases that were on hold now being filed by the State. As always, MCILS cannot control the number of cases it is called on to staff. Every case that MCILS becomes responsible for was initiated by the State.

For the period FY15 through FY19, representing the five most recent years before the pandemic, MCILS opened an average of 26,392 cases. In FY20, MCILS opened 27,332 cases. In FY21, MCILS opened 28,783 cases. We have faced questions at times about the MCILS budget in the light of a decrease in criminal filings. While the total number of filings may have decreased, MCILS has seen an increase in workload over time. It is striking that in FY20 MCILS saw a .7% decrease in case openings when compared to FY19, against a 30.1% decrease in filings as reported by the Judicial Branch.

For FY22, MCILS projects a minimum new case count of approximately 31,000 cases, with the potential for more. May and June of 2021, the final months of FY21, showed an increase in new cases of 12% and 11% respectively over the pre-pandemic average for each of those months. July 2021 showed an increase of 28% over the pre-pandemic average. If May through July 2021 prove predictive of the next year, MCILS would be called on to address 31,000 cases. If July proved predictive, the case count would exceed 33,000 cases. Historically, the number of cases opened in July is only 2% higher than the overall average number of cases opened during the fiscal year, suggesting that MCILS may likely approach the high end of 33,000 cases.

At 33,000 cases, projected attorney fees would scale to \$28,650,000. MCILS would likely remain able to meet its fiscal obligations by drawing on the COVID funds. There is a risk however, that if the tempo remains high MCILS may have a deficit in FY23.

We are also observing a change in the services attorneys are billing for. The Courts have largely eliminated remote appearances and have eliminated e-mail filing. As a result, counsel have returned to spending a lot of time driving and waiting in courthouses. In addition, the Courts are requiring counsel to prepare multiple cases for trial during the same window, even when only one of the cases can actually be tried. This promotes efficiency for the Court by ensuring that trial opportunities are not wasted but results in a multiplication of cost for MCILS. Because MCILS matters are arrears billed, we do not yet have a good projection of the total cost of the changes in practice but anticipate that they will be significant.

Outside the costs of direct client services, there has been little change. We have not yet been authorized to hire the new staff members the Legislature authorized, and so have not incurred the costs that will be associated with those hires.

II. Auditing and Accountability and Quality Control

MCILS continues to improve its oversight of attorney performance and fiscal responsibility within the constraints imposed by its current staffing level. MCILS has not yet been authorized to hire for any of the attorney positions the Legislature authorized. We therefore remain limited in our abilities, particularly with respect to assessing performance in the field.

1. Attorney Qualifications

MCILS has effectively implemented its existing attorney qualification structure and is effective in ensuring that only counsel who have been qualified are designated eligible to receive appointments under Rule 44. Similarly, MCILS has been effective in approving only eligible counsel who receive appointed cases. Because the Court makes appointments, there is occasionally a matter that must be reassigned rather than approved. In those instances, counsel are directed to withdraw and arrange for substitute counsel through the Court. These instances are infrequent at this point. We appreciate the Court's work to adhere to our eligibility designations.

The MCILS attorney qualification structure bears reconsideration. We anticipate overhauling our structure over the remainder of the fiscal year.

2. Attorney Performance

Issues of attorney performance remain difficult for MCILS to assess. We receive occasional information about performance issues and follow up on those, but MCILS needs to develop and implement a formal performance assessment and reporting structure. That structure depends on the availability of staff at some point in the future.

We have received some reports of attorney performance problems, and the occasional report of exceptional performance. In the last 30 days we received one report from a clerk, and one report from a District Attorney, for example. We also occasionally become aware of an issue through a published decision.

We have asked both the Court and the Maine Prosecutor's Association to assist us by providing a feedback structure. Both the Court and the MPA indicated that each would raise this subject at an organizational meeting, but we have not received any substantive feedback. I have reminded both groups that I hope to develop a process with them. I am looking forward to working with each group when it is ready to work with me.

The MCILS contract with Justice Works to provide Defender Data as our billing and case management system will conclude this fiscal year. We have drafted a Request for Proposals to obtain a new system. We anticipate that system to foster greater oversight through better data tools. We have submitted the RFP to Maine IT for review, and we are waiting for their reply as a prerequisite to publishing it.

3. Auditing and Attorney Financial Compliance

MCILS has not yet been able to develop and implement a formal audit procedure because we have not yet been authorized to hire the attorney staff we will need for that process.

MCILS is not seeing evidence of ongoing financial irregularities in attorney billing or non-counsel costs. Voucher review is performed weekly to the standard possible under the existing staff level. Lynne Nash continues to perform a detailed analysis of each non-counsel invoice we receive to identify and address issues. She also evaluates every Lawyer of the Day assignment.

4. Investigations

Since January 19, 2021, MCILS has begun 30 investigations into issues related to counsel. 20 have been cleared and closed. There have been a total of eight suspensions. Four of those suspensions have then

resulted in reinstatement when administrative deficiencies were corrected. Four attorneys remain suspended from MCILS. Three investigations were active on August 23rd.

As MCILS overhauls its rules, I anticipate implementing more defined investigative and adjudicative functions. I also anticipate implementing rules and policies to define the use of the MCILS subpoena power.

5. Attorney Attrition

a. Changes to the Practice Environment

MCILS has experienced two phases of attorney attrition since January 2021. The first occurred during the winter and early spring as some attorneys who preferred to not amend their practices to comport with changes to MCILS rules and enforcement dropped out, and as those dissatisfied with the payment rate withdrew. We have no indicia at this time that there continue to be significant numbers of lawyers leaving the service for reasons related to rule enforcement. Similarly, the increase in the hourly rate paid to MCILS counsel from \$60 to \$80 per hour appears to have provided some relief. Although to achieve parity with prosecutors across salary, benefits, overhead, and staff a rate of at least \$100 per hour would be necessary, the rate increase to \$80 per hour appears to have helped support counsel in remaining affiliated with MCILS.

MCILS is now in a second phase of attrition, however. Due to changes in the practice environment, and a surge in the number of new cases, our attorneys are finding that they cannot accept additional cases. They are therefore removing themselves from the rosters of attorneys willing to accept new cases. This in turn is causing significant issues for MCILS in providing lists of eligible counsel adequate to permit the Court to make the necessary appointments. Recently MCILS has had to resort to contacting counsel directly to staff cases. That practice proved unsustainable. Instead, MCILS now provides clerks who ask for assistance in placing cases with updated rosters covering larger geographic areas. In the recent past, this need was limited to counties in northern and eastern Maine. More recently, however, even the Court in Portland has required assistance to staff Child Protective matters.

In broad terms, MCILS has this summer received approximately 260 applications from attorneys who wish to continue to serve indigent clients. In December 2020, MCILS had approximately 430 attorneys in the system.

Attorneys who have not left MCILS entirely are choosing not to accept further appointments. We have received feedback suggesting several major causes. Some are within our control, and we are working on them. These include payment rate and rules, and MCILS procedures generally. The other causes lie outside of the scope of MCILS authority, however. Attorneys continue to struggle with what they experience as inefficiencies in practice brought on by the return to in-person appearances as the default, and the elimination of any form of e-filing. The latter is exacerbated by the difficulties with the postal system. USPS has recently formalized its performance expectation for first-class mail to five business

days. Attorneys also struggle with having too many cases placed on trial lists as backup. They report finding it difficult to prepare multiple cases during the time available to them.

MCILS understands and respects the Court's need to manage its operations in a manner that will meet its obligations. We do not presume any authority on our part there. At the same time, we need the Court to work with us to bridge the needs of both its own operations and the needs of counsel to provide competent and adequate representation to indigent clients.

It would help if the Court would reinstate remote appearances as the default for procedural appearances, or at least issue guidance on how to request remote appearances, and when permission might be granted. It would also help if the Court provided guidance on how to resolve scheduling conflicts between courts. Some compromise on remote filing would significantly help reduce the stress on counsel and slow down the burn out rate and subsequent withdrawal of counsel from the rosters of MCILS.

MCILS surveyed its attorneys in August 2021 to better understand the issues counsel face. The survey responses are appended.

b. Increases in workload

According to Judicial Branch data provided to MCILS on August 11th, criminal cases pending in the Unified Criminal Docket on August 6, 2021 had increased over August 6, 2020, by 23.1% for felony cases, and by 8.9% for misdemeanor cases. This overall increase is troubling from a case-staffing perspective but masks the significance of the issue for specific counties. Felony cases are up by 32.8% in Aroostook County; 45% in Piscataquis County; 60.2% in Waldo County; and, a staggering 75% in Penobscot County.

Some of this is the backlog of cases not resolved during the pandemic-related shutdown. That element is not unexpected. MCILS is also seeing a dramatic increase in the number of new cases for which it must provide counsel, however. This was unexpected.

In the six years preceding FY21, MCILS opened an average of 26,548 cases per year. Despite Judicial Branch statistics that reflect a continuing decrease in the number of criminal filings, MCILS has not experienced a significant decrease. It is striking that in FY'20 MCILS saw a .7% decrease in case openings against a 30.1% decrease in filings as reported by the Judicial Branch.

In FY'21, MCILS opened 28,783 cases. This represented an increase of 5% over FY'20, and 8% over the historical average. At this case volume, MCILS attorneys were stretched to provide service in every case. MCILS has so far been able to provide counsel in every matter, but it has become difficult to do so.

For FY'22, MCILS projects a minimum new case count of approximately 31,000 cases, with the potential for more. May and June of 2021, the final months of FY'21, showed an increase in new cases of 12% and

11% respectively over the pre-pandemic average for each of those months. July 2021 showed an increase of 28% over the pre-pandemic average. If May through July 2021 prove predictive of the next year, MCILS would be called on to address 31,000 cases. If July proved predictive, the case count would exceed 33,000 cases. Historically, the number of cases opened in July is 2% higher than the overall average number of cases opened during the fiscal year, suggesting that MCILS may likely approach the high end of 33,000 cases. The data underlying these calculations follows:

	May	June	July
FY'15	1,999	2,189	2,122
FY'16	2,250	2,232	2,086
FY'17	2,104	2,097	2,125
FY'18	2,203	2,371	2,091
FY'19	2,269	2,509	2,494
FY'20	1,439	1,976	2,591
FY'21	2,423	2,524	2,439
FY'22			2,804
15-19 Ave	2,165	2,280	2,184
	12%	11%	28%
		May – July	7,751
		Annualized	31,004.00

The increase in case count is troubling. In the current practice environment, MCILS attorneys find themselves needing to decline cases to manage their caseloads now. With the projected 14% increase from 28,793 to 33,000 cases MCILS will not be able to provide counsel to staff all cases.

It bears note in considering these case volumes that MCILS and its attorneys are the only participants in the judicial system with no ability to control case volumes. Every case for which MCILS must provide an attorney was brought at the outset by an agent of the State. Those state agents can dismiss a matter, as may the Court in some circumstances. Where appropriate, an indigent client may have the ability to resolve a matter by agreement. MCILS counsel, however, have no ability whatsoever to reduce the case count directly. Instead, counsel must work each case to its conclusion.

III. Determination of Indigency

A. Screener Operations

MCILS employs 6 full-time and 3 part-time financial screeners. During this past legislative session, LD 1685 proposed to transfer the screener function from MCILS to the Judicial Branch. While LD 1685 passed, a Committee Amendment struck the provision concerning the screener transfer and the screener function remains with the Commission. Since the last quarterly update, two financial screener positions have become vacant – in Bangor and Portland. We have hired a replacement for the Bangor position with a start date of September 7 and we will begin applicant interviews for the Portland position the week of September 6th.

B. Collection of Attorney Fees

Historically, MCILS has engaged in the collection of attorney fees through the AOC under the terms of a Memorandum of Understanding outlining that relationship. The most recent iteration of the MOU expired 12/31/2015.

On August 9th, State Court Administrator Glessner requested a meeting to go through the various provisions of the MOU so we could discuss the implementation of the changes required from the AOC's perspective, including changes to MEJIS access and collection responsibilities. On August 12th, I meet with Administrator Glessner and Director of Court Operations Maddaus to discuss the MOU.

We have not yet reached resolution with AOC. We look forward to our next meeting.

1. MEJIS Access

Administrator Glessner explained that AOC intends to eliminate MEJIS access by agencies outside the Court. MCILS has no standing to demand access to MEJIS, though MCILS should have access equal to any agency or entity outside of AOC that is in any way related to its practice areas. Legislative action on this issue may be appropriate.

The elimination of MEJIS access poses operational challenges to MCILS. MCILS interrogates MEJIS frequently. Screeners address MEJIS on many cases to determine what charges are pending, and what limits to set on collection, for example. When we lose MEJIS access we would need to transition to a process of emailing the clerks in each case in which there is a partial indigency order to obtain a copy of the docket record. Our central office staff uses MEJIS to determine appointment and case status for purposes ranging from connecting clients with counsel, to determining whether attorneys who are suspended or die have outstanding cases. These queries would need to become emails to the clerks as well.

In addition, we are seeing a surge in calls from unrepresented defendants due to the new legislation that prevents the district attorneys from talking with those defendants. MCILS supports the legislation because defendants need to be counselled before engaging the state, but all those people are now directed to us. Most of the calls turn out to be inquiries about whether a case is pending; whether there is a warrant; or, when an appearance is scheduled. Without MEJIS access we will need to refer each of those people to the court for each of those questions.

2. Collection of Counsel Fees

During the meeting Administrator Glessner also explained that the Courts had never expected to be responsible for MCILS collections on a permanent basis. The MOU reflects the expectations of both MCILS and AOC that responsibility for collections would have been transferred to MCILS as early as 2010. This did not occur because MCILS did not have the capacity to assume the collections tasks.

Administrator Glessner explained that the time for the Court to exit the collections function is arriving. He was very clear to communicate that there is no deadline yet, and that AOC would like to work with MCILS to accomplish the transition.

As the conversation proceeded, Administrator Glessner and Director Maddaus clarified that the Court would continue to set-off first-party bail for counsel fees pursy, subject to some restrictions clarified in an email of August 27th.

There are two separate issues related to the collection of counsel fees that need resolution:

a. Collection of Direct Payment from Clients

Certain clients assigned counsel under the MCILS program are found to be only partially indigent. These clients are assigned counsel, subject to a periodic repayment requirement imposed by the Court. Today, those periodic repayments are collected by the clerks on behalf of MCILS. As I understand it, this is the activity the Court will cease performing.

MCILS has two issues. First, the collection of direct payments from clients may tend to put MCILS in conflict with the people to whom it is responsible for the provision of services. Second, MCILS has no practical ability to engage in the collection process with its current resources.

Naturally, MCILS does not suggest that the Court is obligated to perform our functions. When the Court is ready to cease the collection of direct repayments, however, that function will stop overall.

If MCILS is to engage in the collection of direct repayments, then we will require additional staff, space, and computing resources to receive, process, and account for those payments. Partially indigent clients are presently able to make their payments through any courthouse. MCILS does not have fulltime staff in any courthouse and has no staff in many courthouses. To permit walk-in payments, MCILS would require staff in the field in addition to the current financial screeners.

It may be possible to transition to mailed-in and electronic payments. This could eliminate the issue of field staff. I estimate that we would require two full time staff members to perform the collection function.

This issue will require legislative action to fund an internal collection apparatus before MCILS can fulfill the direct-collection imperative. MCILS is developing data to permit an assessment of cost-efficiency. Based on a very high-level review, it may be that the cost of collections staff for MCILS would exceed their utility.

b. Collection of Bail

I understand that the Courts are willing to continue collecting MCILS fees through the bail offset statute. There is an issue of timing between MCILS and AOC, however. Under current the current MCILS rules, an MCILS attorney must submit a voucher for payment within 90 days of the completion of a case. Director Maddaus has explained that the clerks need to know the amount of a counsel voucher within 21 days to complete the bail set off and return any remaining bail to the defendant within 30 days.

Pursuant to 15 M.R.S.A. §1074(3): When a defendant has deposited cash or other property owned by the defendant as bail or has offered real estate owned by the defendant and subject to a bail lien as bail and the cash, other property or real estate has not been forfeited, the court, before ordering the cash or other property returned to the defendant or discharging the real estate bail lien, shall determine whether the cash, other property or real estate or any portion of the cash, other property or real estate is subject to setoff as authorized by this section.

The issue is that while MCILS can respond to an inquiry from the clerks as to the existence of a claim against bail within the 21-day window, MCILS may not be able to provide the amount of that claim within the window. The opportunity to properly recoup attorney fees through the bail code is compromised because MCILS cannot meet the 21-day mandate from the Judicial Branch.

This is an instance in which the reasonable operational needs and ability of MCILS and AOC conflict, and may thus require legislative resolution.

Thank you for the opportunity to provide this information. I am looking forward to addressing the Committee on September 8th, and to providing details where requested. If there is additional information the Committee would like me to be prepared to present at the hearing, I am available by email at. I would be happy to try to satisfy any requests.

Sincerely,

/s/ Justin W. Andrus, Esq.

Justin W. Andrus
(Interim) Executive Director

cc: etta.connors@legislature.maine.gov

Enc. MCILS Survey Responses
LD 1685 – Maine 130 – HP 1254
LD 1687 – Maine 130 – HP 1256