



MAINE COMMISSION ON INDIGENT LEGAL SERVICES

2/3/2022

Nathan L. Libby, Senate Chair
Genevieve McDonald, House Chair
Government Oversight Committee
82 State House Station
Room 104 Cross Building
Augusta, ME 04333-0082

Via e-mail only to: Lucia Nixon and Sabrina Carey

Re: **Maine Commission on Indigent Legal Services**
Third Report – February 11, 2022

Dear Senator Libby and Representative McDonald:

On behalf of the Maine Commission on Indigent Legal Services, (“MCILS”), I respectfully submit the following in preparation for our third report to the Government Oversight Committee on Friday, February 11, 2022. In framing this report, I have been guided by your letter of March 10, 2021, directing that each report address the following four areas:

- I. Budget and Finances
- II. Auditing and Accountability
- III. Quality Control; and,
- IV. Determination of Indigency

In addition, I have provided copies of the three documents that constituted the MCILS annual report this year, together with additional supporting documents.

I. Budget and Finances

For FY22, MCILS has a working budget of \$27,467,561.30, of which \$ 16,188,447 was unobligated as of January 4, 2022. 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. MCILS continues to wait to learn when and how those funds will be available. They are earmarked for attorney 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 February 3, 2022, 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 February 3, 2022, MCILS paid vouchers totaling \$10,311,278. Much of the time recorded on the vouchers paid since July 1st still reflects work performed under the \$60 / hour 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 will be able to meet its fiscal obligations. We observed a surge in new cases over the summer but have seen the rate at which new cases are entered decrease. We have no way to determine whether the surge will resume, 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.

II. Auditing and Accountability

MCILS has continued to work to improve its ability to provide accountability. Since our last report, MCILS has hired an audit director and an audit counsel. Those new staff members have developed an audit program and expect to implement it in March 2022. An explanation of that process is attached to this report and incorporated in it.

III. Quality Control

MCILS continues to work toward improving its ability to ensure that its attorneys are well trained; that each is qualified to perform client services; and, that client services meet or exceed requirements. MCILS has been successful in ensuring that cases are assigned only to those attorneys that meet its requirements.

MCILS continues to study systems that provide the requisite constitutional guarantees, with particular focus on the Massachusetts [Committee for Public Counsel Services](#) system, as well as alternatives from other states. The CPCS model as an overarching structure provides for attorney-employees of MCILS; contracts with groups of attorneys; and, contracts with individual assignments. This structure provides a full range of options for further development, while supporting near-term implementation of training, performance, and financial controls.

The addition of a training and supervision director and counsel have permitted MCILS to begin to build out a more robust oversight structure. Deployment is expected by July 1st as part of the transition to the next fiscal year. Some changes are contingent on changes to statute or rules. We continue to work with the Judiciary Committee and others toward that end.

In the meantime, MCILS continues to investigate instances in which attorneys may not have performed to an adequate standard. Since February 1, 2021, there have been 51 investigations. Three have resulted in suspensions. Several remain open.

Attorney Attrition

The most serious issue impacting the Commission's ability to provide appropriate representation to its indigent client base continues to be attorney attrition. In May 2021 there were 322 attorneys serving clients through the MCILS program. That number fell to approximately 225 by August and has subsequently rebounded to 279. The number varies from day to day, as attorneys opt in and out of eligibility for cases. The number of available attorneys has hovered at near 280 for some time, but it is not always the same 280 attorneys from day to day. The increase in the count reflects some attorneys returning to eligibility after opting out to control their caseloads. The total number of attorneys in circulation in the program continues to decrease.

Depletion of the MCILS attorney pool continues to exceed the replenishment rate. Attorneys continue to report that the MCILS compensation rate does not present a reasonable business case once the costs of benefits and overhead are considered. Attached is a memorandum on attorney demographics and costs. Please consider it incorporated herein.

Specialized Case Type Control

Last year, MCILS faced criticism related to the assignment of cases to attorneys who had not yet been certified as qualified to receive those cases. Today, the training and supervision division ensures that every case is staffed by qualified counsel.

IV. Determination of Indigency

MCILS has seen serious attrition among its financial screeners. Nominally, MCILS employs six fulltime; two parttime; and one investigative screener, for a total of nine individuals. Today three positions are vacant and as many as three additional positions may become vacant this fiscal year. MCILS is actively seeking candidates to fill the vacant positions, but the first effort to do so for the first two positions that became vacant was unsuccessful. MCILS continues to discuss with the Judiciary Committee the benefits of transitioning the screener function to the Judicial Branch. The best practices for an indigent defense system support that transition. The Judicial Branch has indicated that it opposes that transition.

I am looking forward to addressing the Committee on February 11th, and to providing details where requested.

Sincerely,

/s/ Justin W. Andrus

Justin W. Andrus
Executive Director
MCILS

Enc:

MCILS Annual Report for 2022, with its incorporated memoranda
Audit Protocol
Attorney Demographic and Cost Report



MAINE COMMISSION ON INDIGENT LEGAL SERVICES

January 14, 2022

Governor Janet Mills
Chief Justice Valerie Stanfill, Maine Supreme Judicial Court
Senator Anne Carney, Senate Chair of the Judiciary Committee
Representative Thomas Harnett, House Chair of the Judiciary Committee

Delivered via Email

Re: **Annual Report of the Maine Commission on Indigent Legal Services**
4 M.R.S.A. §1804(3)(H)

Governor Mills, Chief Justice Stanfill, Senator Carney, and Representative Harnett:

The Maine Commission on Indigent Legal Services, (“MCILS”), by and through its Executive Director, Justin Andrus, respectfully presents its annual report. Pursuant to 4 M.R.S.A. §1804(3)(H):

By January 15th of each year, [the Commission shall] submit to the Legislature, the Chief Justice of the Supreme Judicial Court and the Governor an annual report on the operation, needs and costs of the indigent legal services system. The report must include:

- (1) An evaluation of contracts; services provided by contract counsel and assigned counsel; any contracted professional services; and cost containment measures; and
- (2) An explanation of the relevant law changes to the indigent legal services covered by the commission and the effect of the changes on the quality of representation and costs.

Overview

The Maine Commission on Indigent Legal Services provides indigent legal services through a system of private assigned counsel representing indigent people facing a loss of liberty in cases brought by the State of Maine. MCILS sets standards for attorneys providing indigent legal services, and attorneys are assigned to individual cases by the court from lists of eligible counsel created and maintained by MCILS. MCILS also provides funds for investigative and expert services necessary for the representation of indigent clients. The work of MCILS is funded by an annual appropriation from the Legislature.

In calendar year 2021, 354 MCILS-approved assigned counsel opened 28,571 cases, averaging 73 cases per counsel. Each individual counsel is a private citizen of the State of Maine who has agreed to provide the services necessary to permit the State to discharge its constitutional and statutory obligations to every citizen, part-time resident, and visitor to the State. Every person who has reason to come within the jurisdiction of the State of Maine is among the constituency those counsel serve. MCILS thanks each of them for their dedicated service, and willingness to prioritize the public good above personal reward.

MCILS would also like to thank those with whom we have outside relationships that support our mission. We have received outstanding support from MaineIT, our Bureau of Human Resources contacts, and the Bureau of Budget. Many State employees, already with tremendous works loads, took on our tasks and projects, and brought them to fruition.

Finally, MCILS thanks the judges and particularly the clerks who have moved mountains to ensure that consumers of indigent legal services have access to justice. The clerks in particular have had to weather our changing procedures, and shifting requests. Without their patience, diligence and care, MCILS could not discharge its function.

MCILS began the year in midst of change of leadership, and under intense scrutiny following the publications of both the Sixth Amendment Center's report, *The Right to Counsel in Maine: Evaluation of Services Provided by the Maine Commission on Indigent Legal Services*, of April 2019, and the OPEGA report of December 2020. Using both of those reports as lodestars, MCILS worked throughout the year to implement resolutions to the issues each identified. MCILS has experienced significant successes through that work and has identified solutions to many of those issues that remain. A detailed report on MCILS responses to both publications is appended to this letter, together with a report on MCILS efforts to comport with the American Bar Association's *Ten Principles of a Public Defense Delivery System*. Please consider those memoranda part of this report.

1. An evaluation of contracts; services provided by contract counsel and assigned counsel; any contracted professional services; and cost containment measures

In calendar year 2021, MCILS relied exclusively on services provided by assigned counsel to provide direct client services. MCILS saw a decline in the number of counsel seeking assignments to serve indigent clients from January into the summer. Since August, there has been a rebound in the number of available counsel.

MCILS counsel have successfully staffed every case in which the Court sought to make an assignment of counsel, together with those cases in which MCILS assigned counsel directly. No client was deprived of counsel. At times, however, MCILS had to search for appropriate counsel.

MCILS counsel report that there are three primary stressors that cause them to withdraw from eligibility to receive assignments either temporarily or permanently, or to consider doing so. The single greatest cause for withdrawal reported is the insufficiency of the resources available to counsel. While the rate of pay for assigned counsel increased from \$60 to \$80 per hour in 2021, at that rate it remains impossible for counsel to meet the expenses of staff, benefits, and overhead while retaining a reasonable wage. Parity with a prosecutor, including staff, would require a rate of at least \$100 per hour simply for payroll. MCILS must continue to work toward providing its assigned counsel with rate of pay that will provide parity with the State and allow a reasonable wage to counsel after expenses.

The second primary stressor reported to MCILS is difficulty navigating conflicting demands on attorney time, especially from different courts. To ensure that every indigent defense case is staffed, MCILS counsel are generally required to practice in more than one county, and many are frequently asked to take specific cases in counties that can be distant from counsel's office. Counsel have stepped up reliably to assume responsibility for these cases but doing so results in court scheduling that calls for an individual to be in two places at once, and further results in significant travel time. We have appreciated the Courts' willingness to consider changes to scheduling practices and to resume the more widespread use of remote appearances to help assuage these pressures, while recognizing that it is not always possible for a Court to do so.

Long term resolution of the scheduling and travel issues calls for an increase in the number of counsel available to serve clients in those counties that do not have a dense attorney population. That increase must come in two forms. First, incentives must be developed to induce attorneys to join the MCILS system generally, and to agree to be located in areas in which counsel are in need. The Access to Justice Tax Credit is a start in this direction. In addition, student loan forgiveness or abatement programs should be made available to counsel. Counsel must have access to the same types of legal research and other business systems that the State has available. Group health insurance must become realistic. These changes all require the participation of outside stakeholders.

Further, MCILS has asked for the authority and funding to hire State employed public defenders. To fully meet its constitutional and statutory obligations, MCILS must see that initiative proceed, and be expanded. As discussed below, there are benefits to an employed public defense system that must be realized for MCILS to fully achieve its mission. Many of those benefits can accrue to assigned private counsel in addition to employed counsel, making an investment in that system productive statewide. In the context of addressing the need to increase the number of counsel available to serve clients in currently underserved areas, MCILS would use the opportunity to employ client-serving counsel in part to create squads of attorneys who could travel to areas of need to provide those services. With the help of the Court in scheduling those attorneys, it would become possible for those employed counsel to become a very efficient mechanism for addressing changes in attorney availability across the state.

The third major stressor reported to MCILS is the ongoing evolution of MCILS itself. Over the course of this year, MCILS has made many changes to its operating practices, and we recognize that each one calls for resilience on the part of assigned counsel to adapt to those changes. MCILS has additional changes to make but doing so piecemeal risks alienating the people we rely on at each change. Instead, MCILS asks for the support to make its next evolution now, and once.

Following the publication of the Sixth Amendment Center report, MCILS resolved to introduce the concept of a public defender office to indigent defense in Maine. MCILS continues in that request. As proposed, the public defender office would serve as part of a hybrid system providing service to indigent clients through both managed assigned counsel and through employed defenders. That system would provide the ability for MCILS to provide genuine mentorship and training and engage in meaningful quality control and oversight to both employed and contracted counsel. In addition, MCILS must receive the resources it needs to develop effective programs fostering diversion programs; presenting effective mitigation evidence; and, working across the bar to foster trial level advocacy that supports effective appellate work. Providing resources to these programs will tend to reduce the net-cost of the collateral consequences of certain convictions and to better prepare people leaving the criminal justice system to become productive members of society, rather than repeat offenders.

MCILS and its attorneys have made great strides this year. From this point forward, however, MCILS requires the authority and funding to complete its evolution into an integrated public defense provider, so that counsel – assigned and employed – have the resources and flexibility across the state to provide consistent excellence to consumers.

Attorney Costs: With respect to existing operations, MCILS is meeting its immediate task of providing service in every appropriate case, within its budget. As of January 13, 2022, there were 279 attorneys actively seeking assignments. There were no counties in which there were no attorneys seeking cases of any specific case type. There are periods however, including the present, in which there is one or more county in which there are no local attorneys seeking cases of specific types.

The following table sets out the case statistics by case-type for 2021:

Case Type	New Cases	Vouchers Paid	Approved Paid	Average Amount
Appeal	157	188	285547.19	\$1,518.87
Child Protection Petition	2,377	4,848	2988213.12	\$616.38
Drug Court	10	122	183812	\$1,506.66
Emancipation	77	66	22695.97	\$343.88
Felony	6,778	6,745	4813782.57	\$713.68
Involuntary Civil Commitment	1,142	1,144	250861.51	\$219.28
Juvenile	600	739	355263.63	\$480.74
Lawyer of the Day - Custody	2,783	2,626	690817.72	\$263.07
Lawyer of the Day - Juvenile	288	246	56613.09	\$230.13
Lawyer of the Day - Walk-in	1,779	1,631	456947.18	\$280.16
Misdemeanor	10,027	9,674	3489502.11	\$360.71
Petition for Modified Release Treatment	5	54	27642.38	\$511.90
Petition for Release or Discharge	1	10	7031.53	\$703.15
Petition for Termination of Parental Rights	369	902	648481.74	\$718.94
Post-Conviction Review	71	86	169401	\$1,969.78
Probate	48	28	37029.4	\$1,322.48
Probation Violation	1,347	1,446	623647.83	\$431.29
Represent Witness on Fifth Amendment Issue	17	15	6640.12	\$442.67
Resource Counsel Criminal	0	25	4654	\$186.16
Resource Counsel Juvenile	0	4	136	\$34.00
Resource Counsel Protective Custody	2	5	794	\$158.80
Review of Child Protection Order	681	2,565	1413159.65	\$550.94
Revocation of Administrative Release	12	11	3946.36	\$358.76
Summary	28,571	33,180	\$16,536,620.10	\$498.39

The total cost of direct payments to attorneys of \$16,536,620 is an increase from \$13,440,142 in 2020. MCILS attributes this difference to the period in which there were fewer in-court events for counsel. In calendar year 2019, the last pre-pandemic period for comparison, direct payments to attorneys totaled \$17,299,475. MCILS does expect an increase in the total of payments to attorneys as the result of the increase in the hourly rate. Because the rate did not go into effect until July, and because counsel bill MCILS in arrears, the impact of the rate change is not yet fully reflected in the total.

Contracts: Other than services MCILS receives from the State directly, there are three outside contracts. The first is a contract with an attorney skilled in immigration law. Immigration counsel is available to confer with MCILS counsel on any case in which there may be immigration consequences. Because immigration law is complicated, and changes frequently, this service is essential to MCILS operations. The services immigration counsel provides vary from month to month, but the effective cost to MCILS is much less than it would cost to engage immigration counsel on an *ad hoc* basis at a typical hourly rate.

The second contract is between MCILS and Justice Works, an outside vendor that provides the MCILS case management and billing system. This contract was the product of competitive bidding in 2016 and is in its last extension. MCILS relies on this service for the core of its financial relationship with assigned counsel. MCILS is working with MaineIT to identify a successor product.

Finally, MCILS has a contract with Attorney Jamesa Drake to develop a training curriculum for attorneys joining MCILS to become assigned counsel. That contract calls for Attorney Drake to produce that training once. The training is an important addition to the ability of MCILS to train counsel. Fulfillment of this training is delayed at the request of MCILS due to the pandemic.

Cost Containment: Cost containment measures in 2021 have focused on publishing detailed expectations for attorney billing and ensuring that attorney vouchers and non-counsel invoices receive effective review. MCILS has also reinforced its payment timing rules. Two new audit staff members have been hired to add to the financial review supported by our existing staff. The audit staff have developed an audit process. MCILS anticipates that process will roll out in March. Because adequate services both from counsel and from non-counsel providers is a constitutional guarantee, cost containment for MCILS means ensuring that payments are appropriate, rather than trying to eliminate services to reduce the overall cost.

2. An explanation of the relevant law changes to the indigent legal services covered by the commission and the effect of the changes on the quality of representation and costs.

4 M.R.S.A. §1804 – Commission Responsibilities

Section 1804 was amended to authorize the use of employed attorneys to provide indigent legal services. MCILS asked for this amendment to permit flexibility in staffing indigent defense cases, however MCILS was not provided the headcount or budget to implement employed counsel.

Section 1804 was also amended to require the Commission to establish a system to audit financial requests and payments, and to recoup payments where necessary. Commission staff are working toward implementation of this system as a necessary component of ensuring that the financial resources allocated to indigent defense are properly spent on that defense.

At this time there are no additional costs related to this amendment.

15 M.R.S.A. §815 – Communication between prosecutor and unrepresented defendant

Section 815 was enacted to prevent most communication between a prosecutor and an unrepresented defendant, absent a knowing and voluntary waiver. MCILS supported this change because, among other benefits, it alleviates the concern that an unrepresented defendant will plead guilty to a charge in exchange for an offer from the State without the benefit of counsel as to the collateral consequences of the conviction.

This section has had the effect of driving unrepresented defendants to MCILS early in the lifespan of a charge, allowing MCILS the opportunity to provide advice to those defendants. While this increases the number of people MCILS interacts with, doing so is consistent with its defense function. MCILS does not yet have enough data to determine what impact this section will have on its costs.

36 M.R.S.A. §5219-ZZ – Access to justice credit

Section 5219-ZZ creates the opportunity for up to five eligible attorneys in each year from 2022 to 2027 to receive a credit of \$6,000 against state income taxes in each of five years. One of the requirements of eligibility for the credit is participation in the MCILS program. Another is a commitment to open, join, or purchase a law practice in an underserved area.

MCILS supports this effort to promote participation in its program, particularly in underserved areas. As implemented, however, the credit is not available to most existing counsel as an incentive to remain in the program and does not provide its complete relief within the income band of most new counsel.

In conclusion, MCILS has heard and responded to the criticisms leveled against it by owning its shortcomings and working quickly and effectively to cure them. There is still a lot of work to do, however. MCILS asks for its seat at the table, the prerogative to implement its vision, and the support to permit it to deliver on its promise.

Respectfully submitted,

/s/ Justin W. Andrus
Justin W. Andrus, Esq.
Executive Director
MCILS

cc: Commissioners
MCILS Staff
MCILS Eligible Counsel
MCILS Interested Party Distribution List

MCILS -RESPONSES TO OPEGA AND 6AC REPORTS

TO: GOVERNOR MILLS; CHIEF JUSTICE STANFILL
SENATOR CARNEY; REPRESENTATIVE HARNETT

FROM: JUSTIN W. ANDRUS, EXECUTIVE DIRECTOR

SUBJECT: MCILS RESPONSES TO OPEGA AND 6AC REPORTS

DATE: 1/14/2022

MCILS began the year subject to oversight and interest related, in large measure, to reports published by OPEGA and by the Sixth Amendment Center. While those reports do not necessarily encompass every change that MCILS can make to improve the provisions of indigent legal services, the reports do serve as a useful guide to some of those improvements.

Throughout 2021, MCILS has worked to address as many of the shortcomings identified in the two reports as possible. Most have been addressed, as follows:

I. **OPEGA Issues and Recommendations**

Issue 1. There are no established policies and procedures governing expenditures and payments and MCILS's expectations for billing practices may not be effectively communicated to attorneys.

Recommendation: Formal policies and procedures should be established by MCILS management to better define allowable and covered expenses. These policies and procedures would clarify expectations for billing and invoicing practices that if proactively communicated, would improve the effectiveness of the system to approve expenditures and process payments to rostered attorneys and non- counsel service providers.

MCILS has updated its Chapter 301 to make changes to, and to provide clarity about, the rules, practices, and expectations for billing attorney time and certain non-counsel expenses.

MCILS has also published Defender Data usages standards and guidance on the nature and expectations of the relationship between MCILS and counsel.

MCILS updated its Chapter 302 governing non-counsel service providers in August 2021. A revised and more streamlined process for requesting non-counsel funds is in development.

Issue 2. Data available to MCILS staff via Defender Data is unreliable and potentially misleading

Recommendation: The quality of available data in terms of consistency, accuracy, and reliability could be improved in several ways if the agency undertakes the following interrelated initiatives:

- **Establish and communicate expectations and guidance outlining how time events are to be recorded in Defender Data to improve the consistency of the data;**

MCILS has published its expectations to eligible counsel.

- **work with Justice Works to develop data-entry controls that reflect newly-established expectations and provide guidance to correct potential data issues, or errors, when they occur; and correct data errors within Defender Data at the time they are identified...**

The MCILS contract with Justice Works for the current implementation of Defender Data is in its final extension. That implementation is of a legacy version of the software that will be deprecated shortly. MCILS is working to develop an updated data-entry control concepts for implementation in the new case management and billing system. MCILS is actively working with MaineIT to finalize the request for the new system.

Issue 3. Current efforts to monitor attorney vouchers are inefficient and of limited effectiveness.

Recommendation: Assuming improvements are made to the overall quality of MCILS’s attorney voucher data, the agency should reevaluate its process for reviewing attorney vouchers with the objective of improving both effectiveness and efficiency. At a minimum, the following process attributes should be considered by MCILS in reevaluating and potentially redesigning its attorney voucher review process.

- **The process should identify, investigate and, as necessary, address the types of instances with the greatest potential impacts to financial stewardship and the quality of representation— high daily and annual hours worked by attorney.**

The next MCILS case management system, expected in FY23, will report on both high and low periodic attorney-hours.

- **The process should utilize technology to identify and correct potential data entry errors when they occur, such as flagging the input of values in excess of established limits, instead of relying on manual review of vouchers to identify potential errors.**

The MCILS system design calls for these flags. MCILS expects this function to be part of the next MCILS case management system, expected in FY23.

- **The process should incorporate data and risk-based audit techniques to the greatest extent possible to potentially reduce the burden placed on the Executive Director and Deputy Executive Director by the manual review of vouchers—allowing them to focus on other important, but neglected, aspects of MCILS’s purpose as discussed in Part III.**

MCILS, through its Audit Counsel, has developed a data and risk-based audit system, to permit meaningful sampling of voucher data. MCILS expects implementation of that system in March 2022.

- **Additionally, we note that transitioning from a voucher-based payment system to a timecard-based payment system may address issues related to the timeliness and accuracy of daily hours worked.**

MCILS agrees with OPEGA that a timecard-based periodic billing system would bring benefits to the system from both an accuracy-oversight perspective, and from an attorney satisfaction perspective. Moving to that system would require a substantial additional appropriation for the year of the transition, however.

MCILS currently has an arrears-billed relationship with assigned counsel. Counsel bill at the end of a case, or at an intermediate trigger point. Time accrues in each case. Implementation of a timecard-based payment system would require payment of all the accrued time during the first payment cycle. MCILS would be able to make those payments. Doing so would exhaust its payment budget, however. Additional payments would require an additional appropriation.

Issue 4. Invoice-level review of non-counsel invoices may be of limited effectiveness in identifying certain types of noncompliance.

Recommendation: Development of a broader audit/review procedure for non-counsel invoices and periodic use of a risk-based method to select and review invoices would allow the agency to identify and correct instances of inappropriate high daily billings, duplicate charges, duplicate payments, and potentially, other instances of noncompliance.

MCILS expects to produce and implement an audit and review procedure for non-counsel invoices in or about April 2022, after implementation of the counsel-fee audit structure is accomplished. As it stands, MCILS accounting staff review every non-counsel invoice. Staff identifies errors and requires correction by non-counsel providers before payment.

Issue 5. Defined policies and procedures for audit and investigation have not been established. Current methods used by MCILS are limited, inconsistent, and of limited scope, depth and effectiveness.

Recommendation: Establishment of a formal audit process would serve as a more effective control than the current methods used by the agency and would provide for consistency in enforcement efforts. A more effective process could include policies and procedures that would guide the agency regarding:

- **how and when audits are to be conducted;**
- **the records to be maintained by attorneys (and other non-counsel service providers) for potential MCILS review;**
- **a means of determining, confirming, and/or settling disputed overpayment amounts;**
- **a mechanism to recoup overpayments;**
- **penalties (including dismissal from the MCILS roster) for noncompliance; and**
- **consistent enforcement of all MCILS rules.**

MCILS has developed and is implementing a formal audit process for attorney fees. Full implementation is expected by March 31, 2022. A formal process for non-counsel requests and invoices will follow. Documentation of a formal investigative process will be presented to the Commission at or before its January 2022 meeting, together with a proposed updated appellate review structure. Work is ongoing on the question of administrative recoupment. For the moment, MCILS would rely on the Court to provide the venue for a recoupment action. MCILS is enforcing its rules, including through dismissal from the MCILS rosters for noncompliance.

Issue 6. The agency charged with administering MCILS purpose is understaffed.

It remains the case that MCILS is under-staffed. Of the six positions authorized by the legislature, MCILS has filled four. Even when all six positions are filled, however, MCILS will remain understaffed to provide adequate supervision. National standards support a supervisory ratio of 10:1 and assume that supervisors are working in the same offices as the defenders being supervised. To provide proper field oversight, MCILS would require significant additional staffing. That staffing level should reflect both the number of attorneys in need of supervision, and their geographic dispersal.

Issue 7. MCILS staff operates without clearly defined roles and uses current staff inefficiently.

Currently, MCILS staff have clearly defined roles, with limited overlap.

Issue 8. The Commission receives insufficient support for necessary operations.

MCILS expects to be able to meet its current and projected operational expenses for the FY22-23 biennium with current funding. To meet some of goals set for MCILS, however, additional funding and headcount will be necessary.

Issue 9. A weak oversight structure impacts the ability of MCILS to adequately meet its statutory purpose.

MCILS is improving its oversight structure, primarily through the installation of four new attorney-administrators. Indigent defense would benefit from the addition of field trainers and supervisors under the next budget, however.

II. Recommendations of the Sixth Amendment Center:

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.

MCILS supported legislation that would have removed its authority to conduct financial eligibility screenings. LD 1685 as drafted would have transferred the financial screening function from MCILS to the Judicial Branch and would have eliminated MCILS involvement in collection actions against indigent clients. This section was deleted before other provisions of LD 1685 were enacted.

Resolution of this recommendation requires legislative action and cannot be accomplished by MCILS without that support.

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.

The legislature enacted 15 MRSA §815, prohibiting most communication between prosecutors and unrepresented defendants, absent a knowing waiver. Most or all prosecution offices now refer unrepresented defendants to MCILS for information. MCILS has been able to provide basic legal information to callers, without providing legal advice, and to facilitate early assignment of counsel in partial resolution of recommendation 3, below. MCILS is actively working on a program that will allow those unrepresented defendants who make contact to receive the benefit of early advice and assignment of counsel.

MCILS was recently asked by CLAC for its opinion on proposed amendments to §815. MCILS supports the amendments on the proposed draft.

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.

MCILS implemented a continuous representation policy requiring informed client consent before counsel may delegate representation to another person and prohibiting delegation of enumerated dispositive appearances.

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.

MCILS was unable to make effective progress on redrafting its standards until additional staff came on-board. Four new staff are now on-board and have begun a comprehensive review of existing MCILS rules and standards. We anticipate updating the rules to implement standards that will begin to address this recommendation by July 1, 2022.

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.

Public defense contracts of the type specified in recommendation 5 have not yet been statutorily banned, however, MCILS does not now make use of any such contracts.

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.

The Legislature approved funding to increase the attorney compensation rate to \$80 per hour under the current budget. MCILS continues to support increasing the compensation rate to provide adequate funding for support staff and overhead, and supports authorization to provide additional compensation for designated case types.

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 Legislature did not fund the initiation of any statewide or local public defender offices. A hybrid model using both contracted and employed counsel would permit the most flexibility in staffing cases and promote the most effective representation for indigent clients. MCILS expects to renew its request for employed counsel for the next biennial budget.

ABA TEN PRINCIPLES OF PUBLIC DEFENSE DELIVERY

TO: GOVERNOR MILLS; CHIEF JUSTICE STANFILL
SENATOR CARNEY; REPRESENTATIVE HARNETT

FROM: JUSTIN W. ANDRUS, EXECUTIVE DIRECTOR

SUBJECT: MCILS / ABA TEN PRINCIPLES OF PUBLIC DEFENSE DELIVERY

DATE: 1/14/2022

**ASSESSMENT OF MCILS ADHERENCE TO
THE AMERICAN BAR ASSOCIATION'S
TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY**

In assessing its own performance, MCILS turns to the American Bar Association's [Ten Principles of a Public Defense Delivery](#) system for guidance. The Sixth Amendment Center's April 2019 report on [The Right to Counsel in Maine](#), providing useful insight into the then-current state of indigent defense in Maine, casts much of its comment in the light of those principles. In February 2020, the MCILS Subcommittee on Public Defender Program promulgated its memorandum reporting its findings (the "Subcommittee Report"). That report was also framed by the ABA principles. MCILS continues to use the principles to frame this discussion:

1. THE PUBLIC DEFENSE FUNCTION, INCLUDING THE SELECTION, FUNDING, AND PAYMENT OF DEFENSE COUNSEL, IS INDEPENDENT.

MCILS fails substantially with respect to this principle. The ABA comment to Principle 1 states in part that the public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel.

The Subcommittee Report recognized that the through the creation of MCILS, independence from direct judicial control of indigent defense through the judicial budget was accomplished but noted that there were outstanding issue impacting independence. In particular, the Subcommittee noted that the judiciary still controlled the assignment of lawyers; and, that MCILS spent what the report characterized as, "an inordinate amount of time" diverting its collective attention to funding.

These issues remain outstanding. MCILS has made some progress on the issue of independence in the assignment of counsel by implementing a process permitting internal assignments in appropriate cases. That internal process is effective in those cases to which it is applied but is only applied infrequently because most cases in which assignment is appropriate remain subject to judicial selection of counsel.

MCILS should transition to a properly funded and supported model in which potential consumers of indigent legal services are advised of the opportunity to apply for assigned counsel, and then screened for eligibility by an external screening process. Matters in which a consumer has been deemed eligible for assigned counsel should then be communicated from the Court's electronic case management system directly to the MCILS electronic case management system. MCILS would then assign the case. This would be consistent with the comment to Principle 2, that, "[t]he appointment process should never be *ad hoc*, but should be according to a coordinated plan directed by a full-time administrator who is also an attorney familiar with the varied requirements of practice in the jurisdiction." This change in process would be agnostic as to whether fulfillment of the assignment was performed by contracted or employed attorneys.

The issue of funding remains as well. MCILS appreciates the support of the Legislature last session, and the ongoing interest of many legislators. Still, MCILS staff spends a lot of time working to foster support. More problematic, MCILS must make operational decisions that impact the quality and availability of client services based on present and anticipated political environments.

To solve these issues, MCILS funding should be statutorily defined based on a state-wide per-capita funding level consistent with an adequate defense function and revised based on changes to the state-wide cost of business. MCILS should maintain a non-lapsing account with trust-like rules to address fluctuations in costs. The account could be initially funded with a small fraction of the current surplus and should be exempt from STACAP. Operational savings would be deposited to the account, and unusual operating costs could be debited from the account.

2. WHERE THE CASELOAD IS SUFFICIENTLY HIGH, THE PUBLIC DEFENSE DELIVERY SYSTEM CONSISTS OF BOTH A DEFENDER OFFICE AND THE ACTIVE PARTICIPATION OF THE PRIVATE BAR.

The State of Maine fails with respect to this principle as Maine remains the only state in the United States without a defender office within its public defense delivery system. There can be no genuine dispute that Cumberland, Kennebec, and Penobscot Counties do have a sufficiently high caseload to justify the implementation of a public defender program in one or all those counties. The availability of counsel to provide services to consumers of indigent legal services has been a recurrent theme for MCILS in both its internal and external communications this year. The number of attorneys eligible and willing to receive assignments has fluctuated, reaching a low over the summer and rebounding this fall and early winter. The MCILS bar has worked diligently to serve indigent clients. Every case has been staffed successfully.

Still, there have been times identifying counsel who are both eligible and willing has required a search, and others when local counsel have been unavailable and thus distant counsel has been assigned. MCILS would be best able to provide efficient, high-quality representation to consumers if it had the ability to allocate cases between both the existing private bar and employee attorneys.

Through its initiatives request in late 2020, and through testimony to legislative committees in early 2021, MCILS asked that it be funded for “pilot” defender programs. These programs might be better characterized as “start-up” programs. They are intended to be permanent, rather than experimental in nature. MCILS should be permitted to pursue these programs.

The availability of both private and employed counsel should permit MCILS operational flexibility in staffing cases. The option of becoming employed counsel should promote retention in the defense bar by making the benefits of State employment available to those defense counsel who elect to that employment (See Principle 8), while also promoting retention of skilled and experience counsel who prefer to remain independent.

While under the MCILS initiative the first defender office would be in Augusta, that office should have the option of hiring, training, and supervising a set of defenders available to travel to staff cases in other counties if necessary.

3. CLIENTS ARE SCREENED FOR ELIGIBILITY, AND DEFENSE COUNSEL IS ASSIGNED AND NOTIFIED OF APPOINTMENT, AS SOON AS FEASIBLE AFTER CLIENTS' ARREST, DETENTION, OR REQUEST FOR COUNSEL.

The Subcommittee Report commented that MCILS failed with respect to this principle, in part, because of the delay in assignments through judicial action. The Subcommittee's assessment remains accurate today. A recommendation for addressing that issue is set out above. There is an additional issue, however, in that there are often long delays between when a consumer is arrested or charged, and the initial appearance when counsel is assigned.

MCILS should be resourced and authorized to oversee a process whereby consumers are advised early of the right to counsel, including by law enforcement, and referred to a centralized MCILS attorney. That attorney should be able to provide baseline legal information and, where possible, to facilitate the early assignment of counsel.

4. DEFENSE COUNSEL IS PROVIDED SUFFICIENT TIME AND A CONFIDENTIAL SPACE WITHIN WHICH TO MEET WITH THE CLIENT.

The comment to Principle 4 states that:

Counsel should interview the client as soon as practicable before the preliminary examination or the trial date. Counsel should have confidential access to the client for the full exchange of legal, procedural, and factual information between counsel and client. To ensure confidential communications, private meeting space should be available in jails, prisons, courthouses, and other places where defendants must confer with counsel.

The Subcommittee Report noted that MCILS did not provide sufficient oversight to ensure that this principle was met, and noted concern with attorney communications in courthouses, particularly for lawyers of the day.

At the present time, MCILS continues to fail with respect to Principle 4, but LR #2256 is currently pending before the legislature to remedy the deficiency, at least in part. Proposed 15 MRSA §458(1) provides a person summonsed, arrested, charged, or indicted the opportunity for confidential communications with counsel in preparation for and during appearances, in a manner that cannot be overheard or monitored by another person. MCILS supports LR #2256. Passage would ameliorate the conditions that contribute to issues of confidentiality in jails and courthouses.

MCILS still needs further support for its supervision mission to be able to ensure

that assigned counsel can provide both time and confidential space for client communications outside of the jails and courthouses.

5. DEFENSE COUNSEL'S WORKLOAD IS CONTROLLED TO PERMIT THE RENDERING OF QUALITY REPRESENTATION.

At the time of the Subcommittee Report, the MCILS case and workloads were uncontrolled. The Subcommittee noted that MCILS could not control work that assigned counsel might perform outside of the MCILS program. While MCILS remains unable to control assigned counsel's workload, MCILS is actively working on remedying that deficiency.

Since the Report was issued, MCILS has implemented program changes to permit attorneys to control their individual caseloads. MCILS has shifted from the historical monthly roster concept to a near real-time system in which attorney eligibility and availability update daily. Under this system, counsel are able to indicate to the Courts that they should not be assigned cases during periods in which counsel are either unable or unwilling to accept new work.

MCILS is in the process of updating or replacing its case management system. With the new system, and appropriate instructions and requirements around its use, MCILS will be able to determine on a timely and ongoing basis whether an attorney has the bandwidth to accept additional assigned cases. As part of that process, MCILS should promulgate rules that require attorneys with practices divided between indigent legal services and private practice to specify the proportion of each type of work. The MCILS caseload standards should then be adjusted proportionately to ensure that counsel workloads are appropriate.

The ability of MCILS to meet this principle is dependent on a functional, real-time interface with the Court's electronic case management system.

6. DEFENSE COUNSEL'S ABILITY, TRAINING, AND EXPERIENCE MATCH THE COMPLEXITY OF THE CASE.

The ABA comment to Principle 6 holds 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." The Subcommittee Report held that MCILS was not upholding Principle 6 in 2020. The same remains true today.

Today, MCILS is ensuring that lawyers considered “qualified” under MCILS rules are assigned to cases for which they are rostered and deemed qualified. But, what remains true at the current time is that the current MCILS rules for attorney qualification for appointments establishes a low barrier to entry. As the Sixth Amendment Center found in its report:

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 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.

(Sixth Amendment Center report on *The Right to Counsel in Maine*, at page IV of the Executive Summary).

During the 2021 session, the legislature granted MCILS the authority to implement revised standards for attorney qualification. MCILS expects to exercise that authority through an updated ruleset in 2022.

In the meantime, MCILS continues to operate under the legislatively approved set of attorney qualifications. The MCILS case management system prevents automatic approval of any instance in which counsel has not been designated eligible to provide service. MCILS staff then follow up with counsel to determine whether an actual eligibility conflict exists, and to resolve that conflict in a manner that ensures each client receives eligible counsel.

7. THE SAME ATTORNEY CONTINUOUSLY REPRESENTS THE CLIENT UNTIL COMPLETION OF THE CASE.

The Sixth Amendment Center report recommended that MCILS improve the quality of service to its consumers by requiring that except for ministerial, non-substantive tasks, the same properly qualified defense counsel continuously represent the client in each case, from appointment through disposition, and personally appear at every court appearance throughout the pendency of an assigned case.

MCILS promulgated a policy in 2021 to ensure vertical representation, while providing a mechanism for obtaining informed client consent for the delegation of non-substantive appearances in appropriate instances. The policy requires that eligible, properly assigned counsel represent each client at substantive appearances. This policy implements the recommendation of the Sixth Amendment Center and approximates adherence to the ABA Principle.

The MCILS lawyer of the day program remains in effect at this time. The Subcommittee Report found that the lawyer of the day program was problematic because counsel for a client's initial appearance would not necessarily serve the client throughout the case. MCILS is working to address this issue. The lawyer of the day program will be modified to permit the early assignment of permanent counsel where possible, including in as many instances as possible prior to the initial appearance.

To accomplish the goal of providing vertical representation, MCILS will need the assistance of the Courts to fully integrate each respective case management system. This would permit MCILS to become aware of cases in need of assignment earlier, and in a form that would permit matching with eligible counsel.

8. There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.

The ABA Comment to Principle 8 states that:

There should be parity of workload, salaries, and other resources (such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts) between prosecution and public defense. 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. No part of the justice system should be expanded, or the workload increased without consideration of the impact that expansion will have on the balance and on the other components of the justice system. Public defense should participate as an equal partner in improving the justice system. This principle assumes that the prosecutor is adequately funded and supported in all respects, so that securing parity will mean that defense counsel is able to provide quality legal representation.

In 2020, the Subcommittee Report noted that there is no parity between assigned counsel and the state, nor was the defense function an equal partner in the system. The Subcommittee wrote that, “In short, the Commission is at present not representative of an essential third leg of the three-legged stool that is the criminal justice system.” This remains true today.

In 2021, MCILS made strides toward accomplishing parity, but there is still a long way to go. Legislative support for MCILS and assigned counsel permitted a radical improvement in quality assurance and oversight but fell short of providing MCILS with the resources it and assigned counsel need to achieve genuine parity.

For example, the payment rate for assigned counsel was increased from \$60 to \$80 per hour this year. This increase alleviated some burden for counsel. It is universally appreciated. That increase, however, does not allow defense counsel to practice with the same resources as attorneys for the state. MCILS is seeking data from assigned counsel to quantify the expenses state-wide and expects to publish a report on that data in early 2022.

Even without that data, however, the gulf between the practice conditions of assigned counsel and their state-employed peers is stark. In 2020, the legislature gave MCILS permission to hire two paralegals to support its operations. Those paralegals would be paid \$40,463, with fringe benefits costs of \$38,500, for a total of \$78,963 per position, excluding equipment costs. That is an effective hourly cost of \$39 per hour, of effectively half of the \$80 gross payment assigned counsel receive per hour. At that rate MCILS has been unable to attract appropriate candidates to its positions, and they remain unfilled, suggesting that those rates are low for the labor market. Even if assigned counsel could hire staff at that rate, however, only \$41 per hour would remain for counsel to operate the law firm, obtain benefits, and earn take-home pay. Defenders thus cannot hire staff but must litigate cases against District Attorney offices equipped with up to three support staff per attorney.

MCILS asked to hire employee-defenders in the last session. The junior defenders were intended to bring parity with assistant district attorneys. Those defenders would have been paid \$70,720, with fringe costs of \$49,907, totaling \$120,627 each – an effective hourly rate of \$60 per hour.

In other words, defender parity requires an hourly rate of \$100 per hour simply to make payroll. Rent, equipment, insurance, legal research software, books, communications, internet access, and other expenses would still not be accounted for at that rate.

MCILS should be funded to permit true parity between prosecution and defense offices. In addition, MCILS must increase the rate of pay for investigators to a rate that allows functional equivalence to law enforcement, on at least a per-case basis.

Eliminating the resource disparity between the defense and prosecution functions is only part of the solution, however. Unlike the prosecution, MCILS has not been treated a full partner in the justice system. That must change. MCILS should be designated by statute as the core of the defense function, and should be included at every level of dialogue, planning, and policy making. MCILS has appreciated the access the Court has provided, particularly at the leadership level, but that access must be of right, and carry the same force as the prosecution.

This parity in the power structure is essential in any functional defense system but is especially vital in Maine. Much is made of the fact that Maine is the only state that relies on private attorneys for all of its defense function. Much of the discussion around that fact carries a negative connotation. The reality, however, is that Maine is fortunate to have a legal culture in which private attorneys are willing to invest their time and energy in providing what is ultimately the State's obligation. MCILS attorneys are diligent, conscientious, believers in justice. They are, however, not adequately recognized and represented in government. MCILS must be funded and authorized to fulfill that function.

9. Defense counsel is provided with and required to attend continuing legal education.

MCILS has historically been inconsistent in the training opportunities it can afford counsel. In 2021, MCILS was granted authority to hire two attorney staff members to begin a true oversight and training function. Those staff members joined MCILS at the end of October, and have since then been presenting legal education programs, and identifying outside programs for counsel. In 2022, MCILS expects to obtain access to an outside library of national level programming, and to integrate that material into its systems. It remains true, however, that MCILS may never be able to require attendance and adherence to a comprehensive multi-week orientation and training, and ongoing training and mentorship, to private assigned counsel as it would be able to provide to employed public defenders. This is certainly true if MCILS is not funded and authorized to provide payment to private assigned counsel for attending those trainings.

10. Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.

The Subcommittee Report noted that in 2020 MCILS was unable to provide meaningful supervision and systematic review of the services performed by MCILS assigned counsel. In 2021, MCILS added the two staff position noted above. Those staff members have made significant progress toward ensuring that counsel meet eligibility standards to support quality representation. It has not yet been possible to develop a systematic process, however. MCILS continues to fail with respect to Principle 10, but MCILS anticipates working to remedying the deficiency in 2022.

Implementation of that process will require additional resources, however. It will not be possible for the central office staff to perform a meaningful number of field evaluations, or to provide direct support to attorneys.

National standards require one supervising attorney for every ten attorneys practicing with a full caseload. As of January 7, 2022, MCILS had approximately 300 attorneys representing indigent clients (of which approximately 280 were actively seeking additional cases). Compliance with a constitutionally sound supervision structure will require the addition of many field training and supervision staff. MCILS should be authorized and funded to employ that staff.

In addition, MCILS must have better access to information other participants in the process may hold regarding attorney performance. To ensure quality, MCILS must receive information from prosecutors, clerks, and judges when MCILS assigned counsel do not perform adequately.

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Random Sampling: Fraud Detection

1. Test Objectives

The purpose of selecting this random sample is to identify anomalous entries reflected in submitted vouchers which are indicative of fraudulent or non-compliant billing practices. This sample is drawn to test for the presence of double billing, over billing, billing for work not done, and misstated billing. These billing practices each share characteristics and are component parts of the larger problem that is fraudulent billing.

2. Type of Test Performed

In pursuing the objective stated above, this sampling procedure will employ both compliance testing and substantive testing. The **compliance tests** designed for this audit procedure are intended to identify the presence of actions or practices which are expected to exist where fraudulent billing practices are present. The **substantive tests** designed for this are intended to quantify the presence and extent of fraudulent billing practices within the indigent defense system.

3. Deviation Conditions

A deviation occurs when the auditor finds, given the evidence collected, that the sampling unit (voucher) contains at least one intentionally misstated billing entry. In this context a deviation does not occur when the misstatement reduces the value for that billing entry below the amount for which the attorney is entitled. The auditor must use their professional judgment in determining whether a deviation has occurred in each sampling unit. However, the auditor should apply the formal procedures and guidelines developed for determining the presence of fraud within a sampling unit.

4. Population

The relevant population includes all vouchers submitted to MCILS through electronic or other means during the previous calendar year. Because this sampling procedure is designed to test for fraud within the system generally, it is appropriate to reduce stratification of the population as fraud is as likely to exist within any strata likely to be defined. Further, not only does MCILS lack the data necessary to determine that stratification would yield more representative results, but stratification would result in reduced efficiency and increased costs to MCILS.

Additionally, the overall audit strategy employed by MCILS includes both automated and manual sampling procedures designed to identify, among other things, anomalous or fraudulent billing practices. For example, MCILS has designed continuous auditing and monitoring controls and procedures which will be implemented once the underlying infrastructure is developed. These controls and procedures are designed to perpetually monitor MCILS's billing system in real time to identify the types of anomalies auditors will be testing for pursuant to this procedure. Once an anomaly is identified, the audit division and MCILS Executive Directors will be notified of the anomaly and a report will be

generated to provide auditors with the information needed to pursue the alert according to the established auditing procedures.

MCILS also engages in manual sampling strategies designed to identify anomalous and fraudulent billing practices within the system. For instance, MCILS has developed a scheme which scans the system for conditions matching pre-defined criteria determined by audit staff. The criteria set is designed to, among other things, identify the conditions expected where fraud is present. Of course, this set of criteria is limited to data housed within the case management and billing system used by MCILS to manage attorney billing. But, while MCILS's manual methods for sampling will not initially determine the presence of fraud, they will allow audit staff to focus their efforts and initiate targeted audits where fraud may be present.

Therefore, because MCILS has implemented complimentary sampling and audit procedures, including some level of 100% audit through continuous auditing and monitoring, the appropriate population for this sampling procedure is the entire population of vouchers submitted within the relevant time period.

5. Sample Size

The sample size is determined using the Yamane formula which determines the appropriate sample size based on the overall population and desired confidence level. This sampling procedure is designed with a 95% confidence level and is based on the population of vouchers as described above in Section 4. Because the population size is variable, the sample size will not be known until the sample is drawn. However, the range of possible sample sizes is predictable given historical voucher data. Consequently, this sampling procedure assumes a sample size of 395. This size was determined by recording the number of vouchers submitted per year starting in 2016 and ending in 2021. The Yamane formula was then applied to each year to determine the appropriate sample size. Because the number of vouchers submitted per year were fairly consistent across the data set, each sample size was within .5 of 395. Therefore, although the sample size should be determined according to the actual characteristics of the population, this sampling procedure assumes a sample size of 395.

6. Selection Method

This auditing procedure uses random selection to choose both attorneys and records to be audited. To do so, this procedure employs two levels of randomization.

The first level of randomization designates the attorneys who will be subject to audit. The number of attorneys selected is dependent on the sample size and the amount of vouchers submitted by the attorneys that are selected. As an initial step, the appropriate sample size for the population is designated as described above in Section 5. The system will then begin to randomly select attorneys from the roster. The randomization system will be entirely handled by software and every attorney will have an equal chance of being chosen. When an attorney is selected, the software will determine how many vouchers were submitted by that attorney

during the relevant period. The software will then calculate a percentage of those vouchers and reduce that number from the overall sample size. The attorney will then be removed from the master list and a new attorney will be selected. This process will continue until the population counter reaches zero. In the event that the last attorney is chosen where the amount of necessary records left in the counter is lower than the appropriate percentage of vouchers submitted by the attorney, that attorney should still be selected and the percentage control should be enforced. This will occasionally result in an actual sample size which is larger than the originally calculated sample size and may result in additional costs. However, the increased sample size will not reduce the confidence level or increase the error rate of the test. Once the attorneys and the appropriate amount of cases for each attorney have been selected, the system will then randomly select the cases submitted by that attorney for auditing.

Next, the second level of randomization will select the actual vouchers (sampling units) which will be the subject of the audit. This random process will also be automated and therefore handled by a software solution. Initially, the software will generate a list of voucher numbers submitted by the attorney within the relevant population described above in Section 4. The system will then randomly select a number from that list which will be included in the sample. The number selected is then removed from the population and another voucher is randomly chosen. This process will repeat until the appropriate amount of vouchers have been randomly selected for each attorney. Once this process is complete a list of each attorney and the respective vouchers will be generated and output to audit staff for viability testing.

7. Test Sample Viability

Once the sample is selected it will be tested for viability. A sample will be determined viable if the average voucher amount across the selected sample is within a predefined range. This is done by first calculating the average voucher amount across the population. A 10% deviation in either direction from the average is then calculated and assigned as the upper and lower ends respectively. For example, if the average voucher amount for population is \$450 then the viability range will be \$405-\$495. If the average sample voucher amount is within that range, then the sample is considered representative of the population. However, if the average sample voucher amount is outside the permissive range then the sample is considered non-representative. Where a sample is considered non-representative, the sample will be discarded, and a new sample drawn using the process described above in Section 5.

8. Evaluate Sample Results

While the audit procedures are being conducted auditors must record their findings and periodically review their results and findings. Where deviations are found, the sample size should either be increased, or the relevant record should be rejected as unreliable. Auditors will use their professional judgment when determining whether to reject a record or increase the sample size. If the record is rejected a new record should be randomly selected from the

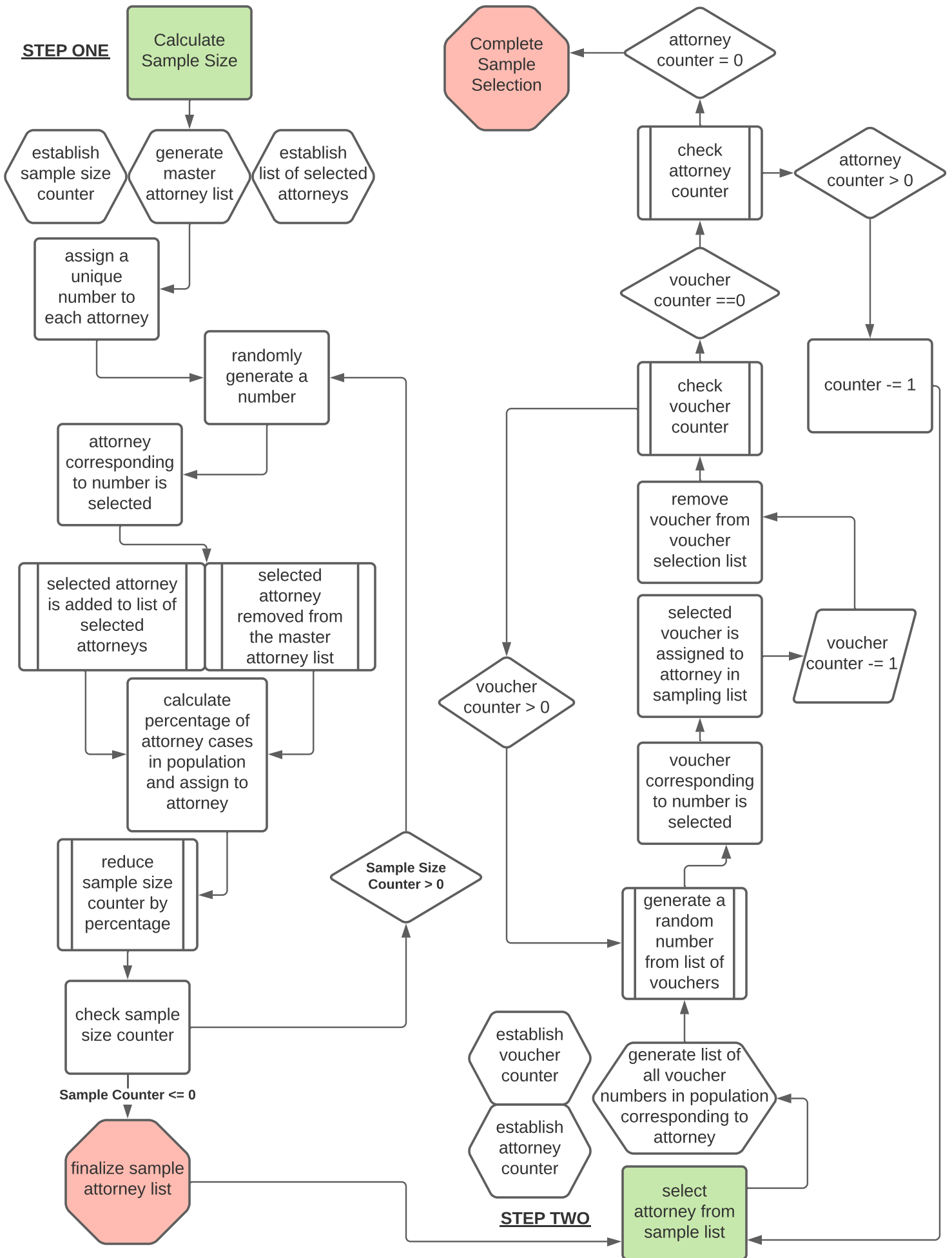
respective attorney's voucher population. Once the substantive audit procedures have been conducted the results from that sample must be summarized and evaluated.

The substantive test results should be evaluated for the rate of deviations found. If there are 5 or more deviations, then the auditor must extrapolate the results of the sample to the population. Otherwise the deviations should be detailed and recorded instead of extrapolated to the population. Where results are being extrapolated to the population, audit staff should calculate the percentage of error (POE). They should do so using the following formula:

$$\frac{\$ \text{Deviations (or sample results)}}{\$ \text{Total Sample}} \quad (\$ \text{Population})$$

The numerator in the above formula should represent the subject of testing relevant to the sample. The numerator should not contain any non-recurring deviations which do not affect the rest of the population. Similarly, non-systematic errors should be evaluated to determine their cause. Once the cause is understood they should be investigated according to the auditor's professional judgment. The denominator should be the corresponding value represented by the sample. The population value should be the complete population as defined above in Section 4.

Once the POE is calculated, it should be extrapolated to the population. This number will provide an estimate regarding the level of fraud present in the system. Where deviations were found, audit staff should also determine the next steps, in accordance with established policies and procedures. A report should then be drafted which describes the findings and overall result of the audit. Finally, this audit process and the audit procedures employed should be reviewed for efficiency and effectiveness so that appropriate changes may be made.



ATTORNEY DEMOGRAPHICS AND EXPENSES

TO: COMMISSION

FROM: JUSTIN ANDRUS, EXECUTIVE DIRECTOR

SUBJECT: MCILS ATTORNEY DEMOGRAPHICS AND EXPENSES

DATE: 1/21/2022

CC:

I. Attorney age and location demographics

On January 19th, MCILS published a survey to its attorneys seeking information related to attorney demographics and the cost of operating a law firm. The survey will not close finally until on or after April 16, 2022, but by 9:30 a.m. on Friday, January 21, 77 attorneys, representing 28% of those actively seeking cases had responded. These provide a useful sample from which to form a preliminary report. This report may be updated as additional responses are received.

Overall attorney age, experience, and degree of participation in indigent defense is reflected in the following table:

Responses Received	77
Average Age	52
Average years of practice	21
Years serving indigent clients	18
Years with MCILS	9
% MCILS caseload	70

These overall statistics are concerning from an attorney replacement rate perspective, suggesting that few new attorneys are joining the MCILS program. Only 27 of the 77 attorneys reported joining MCILS after its creation. Only 18 were in the first five years of practice. These numbers illustrate the pressing need for the State to not only eliminate barriers to entry to indigent defense, but to create incentives to do so.

A breakdown of age demographics by county reveals that the problem of attorney replenishment is even more stark in some areas of the state. With 14 counties represented in the sample, we see that in four the average respondent is over 60 years old, and that only in Kennebec is the average age what might reasonably be mid-trajectory for a career in the law. In considering the table that follows, please note that this table reflects the attorney

demographic by the county in which counsel has an office, but that many counsel serve clients in multiple counties.

County	Age (Ave)
Androscoggin	58
Aroostook	52.5
Cumberland	48
Hancock	62
Kennebec	44
Knox	62
Lincoln	63
Oxford	60
Penobscot	50
Sagadahoc	52
Somerset	58
Waldo	49
Washington	55
York	48

While MCILS has been able to staff all of its cases so far, the issue of recruitment, and the related issue of retention, remain high priorities. Unless a practice including indigent defense is made more accessible and more attractive, MCILS will likely be unable to staff its cases in the not distant future.

II. Attorney Expenses

a. Overview

The 8th ABA Principle of a Public Defense Delivery System requires that **“There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.”**

The comment continues by explaining that there should be parity of workload, salaries and other resources (such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts) between prosecution and public defense. 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 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.

It remains the situation that defense counsel – including all counsel serving indigent clients in matters involving state action – do not experience parity with the prosecution functions.

For example, the payment rate for assigned counsel was increased from \$60 to \$80 per hour in July 2021. That increase alleviated some burden for counsel. It is universally appreciated. The increase, however, does not allow defense counsel to practice with the same resources as attorneys for the state. MCILS has sought data from assigned counsel to quantify the expenses state-wide. Data from the initial sample of respondents is discussed below.

Before turning to that data, however, the gulf between the practice conditions of assigned counsel and their state-employed peers is evident. In 2020, the legislature gave MCILS permission to hire two paralegals to support its operations. Those paralegals would be paid \$40,463, with fringe benefits costs of \$38,500, for a total of \$78,963 per position, excluding equipment costs. That is an effective hourly cost of \$39 per hour, or effectively half of the \$80 gross payment assigned counsel receive per hour. At that rate MCILS has been unable to attract appropriate candidates to its positions, and they remain unfilled, suggesting that those rates are low for the labor market. The most recent job listing has recent expired without a single applicant. Even if assigned counsel could hire staff at that rate, however, only \$41 per hour would remain for counsel to operate the law firm, obtain benefits, and earn take-home pay. Defenders thus cannot hire staff but must litigate cases against District Attorney offices equipped with up to three support staff per attorney.

MCILS asked to hire employee-defenders in the last legislative session. The junior defenders were intended to bring parity with assistant district attorneys. Those defenders would have been paid \$70,720, with fringe costs of \$49,907, totaling \$120,627 each – an effective hourly rate of \$60 perhour.

In other words, defender parity requires an hourly rate of more than \$100 per hour across assuming 40 billable hours per week, and 50 weeks per year, simply to make payroll. Rent, equipment, insurance, legal research software, books, communications, internet access, bar dues, and other expenses would still not be accounted for at that rate.

Even the idea that assigned counsel could, or should, bill 2,000 hours per year illustrates the lack of parity between the defense and prosecution functions. Maine State employees will enjoy 13 paid holidays in 2022. State attorneys will be granted at least two full weeks of vacation, in addition to personal time and sick time. Holidays, vacation time, and personal days result in approximately 10% of a State employee's pay resulting from paid time off. Furthermore, State employed attorneys have the opportunity to be paid while sick or injured, or while caring for children or family members under certain circumstances.

Line state prosecuting attorneys are also not required to engage in billing and business management tasks and are paid for time spent attending trainings and engaging in professional development. Assigned counsel must dedicate time to those functions without compensation. Even very efficient assigned counsel spend 20% or more of their time engaged in tasks for which they cannot bill.

In considering parity then, it is necessary to discount the potential for assigned counsel to earn revenue to account for that administrative time, and further to account for the paid time State attorney spend performing tasks that are not compensable for assigned counsel. From 260 total week days per year, 26 must be discounted to account for State paid holidays, vacation and personal time for prosecutors. This leaves 234 workdays per year (still without adequately addressing the disparity with respect to sick time and other special leaves). 234 days of eight hours of work, is 1,872 hours. Discounting those by the 20% of activity that cannot be billed results in slightly fewer than 1,500 hours per year. At the current attorney compensation rate of \$80 per hour, this results in gross payment of \$120,000 per year.

Remarkably, that \$120,000 per year is almost precisely the projected cost of a paid defender, again calculated for parity with a typical assistant district attorney. That \$120,000 per year excludes, however, staff and overhead altogether. It is also important to recognize that many assigned counsel do not receive a caseload that permits billing even to that standard.

The attorneys who had answered the MCILS survey when the sample was collected for analysis ranged widely among different tiers of office expense. In discussing parity with the State, however, the comparisons cannot be made assuming that defense counsel can continue to operate from beleaguered, under resourced positions. The State must provide the resources necessary for defense counsel to achieve a reasonable living while also permitting their clients to benefit from the same resources available to prosecutors.

Of the responding attorneys, 26 of 77 reported practicing with one or more other attorneys. The remainder are sole practitioners. The survey questions were phrased to elicit responses on a per attorney basis, to permit uniform consideration of the data.

b. Survey Data – Attorney Specific Costs

Assigned counsel report that servicing student loan debt is a major expense and an impediment to serving indigent consumers. The ability of prosecutors to earn loan forgiveness through state service while defense counsel are unable to do so represents a significant point of departure from parity.

Of the 77 respondents, 29 reported still having student loan debt, while 25 reported no debt and 23 declined to answer. As might be expected, there is a marked difference in the average ages between those who still have school debt, and those that do not. It is reasonable to assume that most of those students now graduating from law school will carry loan debt, and thus debt service should be considered an obstacle to recruitment.

	<u>Yes</u>	<u>No</u>	<u>Declined</u>
Count	29	25	23
Age	45	59	

The 29 attorneys who provided data on their student loans were responsible for an average of \$119,951 in principle, and pay an average of \$727 per month, including those who have negotiated a loan payment through an income-based repayment plan. One-third of those making student loan payments were not able to pay enough to reduce the principle balances due.

Based on these responses, a prosecutor is eligible to receive a benefit worth on average almost \$120,000 over ten years, while defense counsel have no similar opportunity. Parity between the functions requires some form of loan forgiveness or payment for assigned counsel.

A similar disparity exists with respect to health, dental, vision, and disability insurances. Among the sampled attorneys, 39% did not indicate that they could maintain health insurance. Counsel reported an average monthly premium of \$724 – with almost 25% over \$1,000 – for insurance that carried an average deductible approaching \$5,000 and significant copays and coinsurance burdens.

These insurance costs, and uninsured costs, create a significant deterrent to serving consumers of indigent legal services, while providing an incentive to enter state service instead. In addition, the high uninsured costs pose a risk to clients by creating a disincentive for counsel to seek medical attention when necessary.

31% endorsed having dental insurance and only 16% endorsed having vision benefits. From among the 77 respondents, one indicated that they had access to short term disability insurance and four indicated access to long term disability insurance. All of these are benefits available to state attorneys.

Finally, only 29% of attorneys responding during the sample period are able to contribute to a retirement account or plan, and only three of the 77 indicated that they believed they could support themselves in retirement. In contrast, a state attorney earns access to a pension, and will receive a payment of 20% of final average salary every year, after 10 years of service.

Achieving parity between the defense and prosecution functions, and promoting recruitment and retention of defense counsel, is dependent on addressing these disparities, and ensuring that defense counsel have reasonable, equivalent access to the same benefits as prosecutors. When considering how to accomplish that parity, it is important to consider the cost differences between insurance for state group insurance enrollees and the individual policies most assigned counsel are eligible for.

c. Survey Data – Staff Specific Costs

Prosecutors are provided with staff to support their offices. Most assigned counsel are unable to engage staff to support their practices with the budget available from serving consumers of indigent legal services. Among the attorneys who provided the data sampled here, only 36% had any staff support. Among those with some staff support, on average each had less than one full time equivalent in support, in contrast with prosecutors who, by report, enjoy staff support from 1:1 to 3:1 per prosecutor. For those attorneys with staff support, the average direct payroll cost for staff was \$4,000 per month. Five attorneys reported being able to provide any staff fringe benefits.

The impossibility of acquiring adequate staff support results in attorney fatigue and eventually to burnout, adding to the difficulty in recruitment and retention. The absence of staff support has a tendency to create a negative impact on client services by making it more difficult for clients to communicate with counsels' offices.

d. Survey Data – Office Costs

The survey asked counsel to provide the costs involved in operating their offices. The averages are reflected in the table below. Not every attorney reported incurring every expense, but every expense listed reflects a benefit afforded to the prosecution function by the State. The sole exception may be for legal malpractice insurance, because prosecutors have immunity, while assigned counsel do not.

Rent/Mortgage	\$ 823.00
Utilities	\$ 236.00
Landline	\$ 130.00
Cellular Telephone	\$ 146.00
Internet	\$ 126.00
Legal Research Subscriptions	\$ 58.00
Technology / Software	\$ 200.00
Legal Malpractice Insurance	\$ 285.00
Supplies	\$ 199.00
Postage	\$ 76.00
Storage	\$ 83.00
Total office expenses	\$ 2,362.00

III. Conclusion

The data available today shows that for the defense function to achieve parity with the prosecution function, the State must pay defense counsel \$150 per hour, based on a 1,500 billable hour year. This would achieve an effective salary for defense counsel of \$70,720, while providing salary, staff, and office expense parity. At the current rate of \$80 per hour, each full-time defender is under-resourced by \$107,934.

Attorney salary and benefits	\$ 120,627.00
Staff salary and benefits	\$ 78,963.00
Office expenses	\$ 28,344.00
Total per attorney:	\$ 227,934.00

1500 billable hour year:

\$ 151.96	\$ 227,934.00
(@ \$80 / hr)	\$ 120,000.00
Deficit	\$ 107,934.00

In addition, to achieve parity defense counsel must have access to a retirement program that provides similar benefits to prosecutors at a similar cost; to group health, vision, and disability programs that provide benefits with reasonable deductibles and copays; and, access to a loan forgiveness or payment program that provides the same degree of relief for career defenders as is available to career prosecutors.

As the indigent defense bar continues to age, and as some of those in the program continue to exit due to financial pressure, MCILS is well below a 1:1 replenishment rate. Without eliminating these practice disparities and creating incentives to joining the defense bar, the State will be unable to meet its obligation to provide counsel.

Furthermore, under-resourced counsel may not in every instance be able to offer clients the degree of service each could otherwise perform. Indigent clients deserve healthy, rested, and well-informed counsel, and the ability to communicate with counsel through staff.

/JWA