



March 19, 2025

Sen. Anne Carney, Chair
Rep. Amy Kuhn, Chair
Joint Standing Committee on Judiciary
Maine State Legislature
100 State House Station
Augusta, ME 04333

Re: LD 1101, An Act to Address the Limited Availability of Counsel in Courts to Represent Indigent Parties in Matters Affecting Their Fundamental Rights

Dear Sen. Carney, Rep. Kuhn, and Members of the Judiciary Committee:

On behalf of the Board of Governors of the Maine State Bar Association, we write to provide comments in **partial opposition** to *LD 1101, An Act to Address the Limited Availability of Counsel in Courts to Represent Indigent Parties in Matters Affecting Their Fundamental Rights*. Although we strongly support efforts to improve and fund Maine's indigent defense system, and we strongly supported the new initiatives proposed this year to expand staffing at the Judicial Branch, we are reluctantly unable to support the proposal in LD 1101 (Sections 1-3 of the bill) to expand the activities of Maine's courts to make "private attorney court appointments" in indigent legal defense cases. We believe more bench assignments will lead to a less efficient and effective assignment system that conflicts with the predominant system of assignments through the Maine Commission on Public Defense Services. Moreover, many defense lawyers find assignments from the bench to feel coercive in nature, no matter how well-intentioned. Finally, we want to be clear that MSBA is not in opposition to Section 4 of this bill, and in fact, MSBA **supports** the addition of new staff positions proposed in this section of the bill.

About MSBA. The Maine State Bar Association is a statewide trade association chartered in 1891 by the Maine Legislature. The Association currently represents approximately 2,500 attorneys in the State in both public service and private practice. The Association maintains 28 separate sections covering nearly every field of law practiced in Maine, from Administrative Law to Workers' Compensation Law.

What does LD 1101 do? Currently, the Maine Commission on Public Defense Services operates a system for the training, oversight, and assignment of private attorney to defend indigent Mainers in criminal and guardian ad litem matters in Maine courts. The Judicial Branch also has certain inherent authority to assign attorneys to cases. Section 1-3 of LD 1101 propose to formalize the latent authority of the Judiciary to assign defense matters to members of the Maine Bar outside of the existing MCPDS system, provided an assigning judge determines that: (1) counsel is not otherwise available to represent the individual; (2) the assigned attorney is qualified to take the case; and (3) the attorney is willing to take the case. Section 4 of the bill proposes to add new positions to MCPDS.

The shortfall in available defense counsel reflects demographic trends, and more public defenders is a key part of the answer. As this Committee is acutely aware, Maine faces a significant backlog of pending criminal matters and a shortage of qualified attorneys willing and able to represent indigent criminal defendants. The reasons for this shortfall in qualified attorneys are many, including a steady reduction in the size of the Maine bar. MSBA has previously shared some of this data with the Committee. These demographic challenges reflect long-term trends in Maine and elsewhere, and the

solutions are not obvious or simple. However, in the short and medium term, MSBA has advocated that the system should expand the use of public defenders in areas of the state where shortages of assigned counsel are more acute. In this regard, a majority of the Judiciary Committee recommended as part of the FY27 biennial budget (among other recommendations) that three new public defender offices should be established, which MSBA supports.

MCPDS continues to positively evolve. Several years ago, there was strong focus in Maine on improving the quality and oversight of assigned counsel in Maine's indigent legal defense system. The Sixth Amendment Center provided a report in the late 2010's recommending tighter financial and quality controls, and the Legislature signaled broad approval for this direction. In response, the governing structure of MCPDS (then called the Maine Commission on Indigent Legal Services) was reconfigured by the Legislature and the Commission embarked on upgrading its standards and system. In response, some private attorneys dropped out of the system feeling that the new rules were too restrictive. Others dropped out for reasons unrelated to the system, including retirement, shift in practice focus, or lack of time. Fortunately, improvements in the compensation of private attorneys, spurred by legislative action, helped slow and possibly reverse this decline in private attorneys in the system. In the recent past, as we understand it, the system has seen a slight uptick in the number of private attorneys participating as well as the number of hours provided by private attorneys.

Becoming a rostered attorney with MCPDS is simple and straightforward. The application to get on the MCPDS roster of private attorneys is a simple one. Applicants must complete a 10-question "yes or no" application form and list two references of individuals familiar with the applicant's practice. If an applicant seeking to join the roster does not wish to complete a MCPDS-sponsored training course for the area of law in which the applicant is seeking assignments, they can instead provide MCPDS with information about their relevant experience. In the past year, MCPDS has been liberal in granting waivers to attorneys seeking to participate who did not meet all of the standards for taking on particular cases.

Public defender offices are a key part of the solution. As the current system of assigning and overseeing private attorneys participating in indigent legal defense evolves, the system has also established and expanded the use of public defenders to address needs in specific areas of the state. This initiative was supported and funded by the Maine Legislature, and the system could further expand if funded in this year's biennial budget. These public defender offices have worked to hire and train new attorneys, which has taken longer than hoped – in part due to demographics and economy-wide workforce shortages, but as new attorneys have come on board and gained experience, their workloads have increased and are starting to make a difference in addressing the backlog in cases involving indigent Mainers in need of defense counsel. We think it is important to let these existing offices continue to grow and develop, and as recommended by MCPDS, expand into regions of the state where backlogs persist.

LD 1101 moves in a different direction in sections 1-3 of the bill. LD 1101 is well-intentioned with respect to sections 1-3 of the bill. Maine judges have certain inherent powers to assign cases to attorneys, although infrequently exercised in recent years. Maine's Judicial Branch is acutely aware of the shortfall in available defense counsel and of the backlog of criminal cases in the system. Some of the backlog is due to the need for more defense counsel, which is why MSBA supports more funding for MCPDS. And part of the backlog is due to a lack of resources in the Judicial Branch, which is why MSBA supports most of the new initiatives advanced in the biennial budget to address these shortfalls. Both steps must

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happen in order to address the backlog in criminal cases in Maine, particularly in the case of indigent Mainers.

But we do not believe the solution proposed in Section 1-3 of LD 1101 is the answer. Rather than working within the formal system for assigning and overseeing defense counsel to indigent Mainers, which is the role of MCPDS, Sections 1-3 of LD 1101 appear to expand a competing system (even if short-term in nature) for assigning cases by relying more heavily on assignments directly from the bench. Yes, the system proposed in Sections 1-3 of LD 1101 addresses the right issues: need for counsel, qualifications of counsel, and the willingness of counsel to take a case. But unlike the existing MCPDS system, the proposal in LD 1101 to assign counsel through the bench does not operate within the MCPDS system, other than in the context of payment. The assignment of counsel by the bench would not have access to all of the systems maintained by MCPDS, including records related to qualifications, workload, and willingness to accept cases. By contrast, MCPDS has access to all of these records and systems, and MSBA believes it would be prudent to focus on the system we have rather than set up a companion, possibly competing, system for assigning counsel to cases.

Are there gaps in the MCPDS system that assigning counsel from the bench could correct? Under the portion of LD 1101 that relates to assigning cases from the bench, one potential argument in support is that there are gaps in the current system that need to be filled by bench assignments. For example, are there attorneys not on the MCPDS roster who would be willing to take a case from the bench, but not from MCPDS? If this is the case, we would suggest that the solution is to explore why this gap exists and try to close the gap within the MCPDS system, not create a parallel system for case assignment.

Concern among defense lawyers about feeling coerced. Maine has an excellent judicial system with outstanding judges. However, there is an inherent power imbalance between a judge and a practicing lawyer. So, when a judge makes a well-meaning request of a lawyer to take on a case, lawyers often feel like they cannot say no. This is particularly the case for lawyers who practice daily before a judge.

Conclusion. It is critical that the Legislature, Judiciary, and other stakeholders work together to make our indigent defense system as effective as possible. We encourage increased dialogue among stakeholders, and MSBA would be pleased to participate in those conversations. Although we support those aspects of LD 1101 that would provide additional funding for attorneys and staff at Public Defender's offices, we do not support those portions of LD 1101 that would create a separate mechanism by which private attorneys can be appointed for indigent defense for the reasons noted above

Once again, we thank you for the opportunity to provide these comments regarding LD 1101, and we appreciate the Committee's commitment to ensuring that indigent Mainer's have access to qualified defense services. If you have questions or need additional information, please do not hesitate to let us know.

Sincerely,



Susan Faunce

President, Board of Governors

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cc: Angela Armstrong, Executive Director
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