

*Maine's Journey Toward An Appropriate System
For The Delivery Of Indigent Legal Services*

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Ron Schneider, Chair
Maine Commission on Indigent Legal Services**

As of July 1, 2010, in the State of Maine, the provision of constitutionally and statutorily required indigent legal services will be administered by the Maine Commission on Indigent Legal Services, a newly-created independent state agency. At the present time, Maine provides constitutionally and statutorily required indigent legal services through a varied set of county-specific and court-specific procedures for court-appointed counsel. The Commission was created through legislation in response to the impact of the State's fiscal woes on the court system and the concern that there was a conflict of interest in having judges both appoint defense lawyers and approve payment for those lawyers.

As early as 1974, it was recognized that Maine's standards for criminal justice did not comply with those of the American Bar Association and the National Advisory Commission on Criminal Justice. Maine did not have any formal plan for the selection of attorneys, did not have an independent body to administer a plan to ensure professional independence and did not have a staff to monitor, assist or train assigned counsel. Until July 1, 2010, nothing has changed since 1974 with regard to the Maine's lack of compliance. Maine has no application process for attorneys, no eligibility requirements for lawyers seeking appointment, no training for new court-appointed lawyers, no performance standards, no mandatory vehicle for defense-specific continuing legal education, no administrator to ensure professional independence, and no other checks on attorneys that the State appoints to represent the poor.

Historically and at the present time, depending on which court or which county the defendant is located in, lawyers are selected for appointment by either judges, clerks or, in some circumstances, court financial screeners. Lawyers regularly are appointed to represent a person simply because the lawyer is next on the court's list of attorneys or the lawyer is in the courtroom. Generally, to be eligible to accept court appointments, a lawyer need only possess a Maine bar card.

Lawyers are paid when at the close of a case, the lawyers submit vouchers, which are reviewed by a sitting judge, who is entitled to approve payment of the voucher in the amount requested or a lesser amount determined appropriate by the judge. Expert fees and other funds necessary for the defense are likewise subject to the approval of the presiding judge.

The present system supports the conclusion that although an indigent person in Maine could be assigned one of the best lawyers in Maine, that person could also be assigned one of the worst lawyers in Maine, and there is no independent, organized, or systematic mechanism to ensure that they do not receive the latter. It also supports a criminal defendant's reasonable belief that the State is more concerned with the cost of his defense than the quality of it.

Historically, Maine appropriated funds for constitutionally required counsel from the State's General Fund to the Judicial Branch's budget, which essentially consists of an amount for personnel expenses and an amount for everything else. While Maine's Judiciary has been consistently underfunded, matters worsened when Maine's budget problems combined with an increase in court filings and a resulting increase in counsel fees to wreak havoc on the Judiciary's budget. In FY 2009, the Legislature cut the Judiciary's budget by \$1.1 million at the same time that the Judiciary had to pay \$1.9 million extra in unexpected expenses for court-appointed counsel. The Legislature did not appropriate any additional money to cover the unexpected

increases in counsel fees, which caused a net reduction of \$3.0 million in the Judiciary's budget. Because the Judiciary would not and could not stop paying for constitutionally required counsel the budget reduction resulted in many courthouse cut backs, including reductions in court hours, staff in court clerk's offices, court security and court reporters.

In response to this crisis, the Chief Justice of Maine's Supreme Judicial Court, Leigh Saufley, established the Judicial Branch Indigent Legal Services Commission ("the Clifford Commission"), which was chaired by Senior Associate Justice Robert W. Clifford, to look at the current system and propose any changes. The Chief and others were not only concerned about the Judiciary's budget but also about the appearance of a conflict of interest caused by having judges appoint and approve payment for defense lawyers. There was particular sensitivity to the appearance of a conflict given the fact that the money used for payment to lawyers was money that was needed for day-to-day courthouse operations.

The Clifford Commission's goal was to have the responsibility for appointed counsel removed from the Judiciary's budget through the creation of an independent agency that would be separately funded. The Clifford Commission consisted of a variety of legislators, judges, prosecutors, defense attorneys, stakeholder representatives and individuals. With the assistance of the Spangenberg Group, the ABA's *Ten Principles of a Public Defense Delivery System*, and Robert Ruffner of the Maine Indigent Defense Center, the Clifford Commission drafted legislation to create the Maine Commission on Indigent Legal Services. The legislation was widely supported and became law effective September 2009. The stated purpose of the Commission is:

[T]o provide efficient, high quality representation to indigent criminal defendants, juvenile defendants and children, and parents in child protective cases, consistent with federal and state constitutional and statutory obligations.

The Commission is further charged with working “to ensure the delivery of indigent legal services by qualified and competent counsel in a manner that is fair and consistent throughout the State and to ensure adequate funding of a Statewide system of indigent legal services, which must be provided and managed in a fiscally responsible manner, free from undue political interference and conflicts of interest.”

The Commission is made up of five Commissioners: Ron Schneider, a litigator with Bernstein Shur in Portland; Marvin Glazier, a seasoned criminal defense attorney with Vafiades, Brontas & Kominsky in Bangor; Kim Moody, the Executive Director of the Disability Rights Center; Ken Spirer, who retired in 2001 as First Vice President and Assistant General Counsel at Merrill Lynch & Co. and is presently on the boards of the Maine Community Foundation and the Portland Symphony; and Sally Sutton, a Senior Policy Analyst at the University of Southern Maine’s Muskie School of Public Service since 2005.

As part of the enacting legislation, the Commission is required to do the following:

- hire an Executive Director, who will in turn hire support staff;
- establish minimum qualifications for counsel to be eligible to receive assignments from the Commission;
- develop and implement performance standards for appointed counsel;
- develop a system for appointments for contracts;
- create a training program for new lawyers;
- develop a voucher review and payment system, as well as a system for caseload management and expenditure details;
- establish rates; and
- establish a monitoring and oversight process for assigned counsel.

To date, the Commission has:

- hired an Executive Director, John Pelletier, a veteran criminal defense attorney and most recently the Criminal Process Manager for the Judicial Branch, who began work officially for the Commission on January 11, 2010, and who is working on hiring staff;
- proceeded through the substantive rulemaking process to establish a rule for minimum qualifications for attorneys to be eligible to receive assignments;
- established and distributed a request for proposals for a case management and billing computer system (the bids are scheduled to be opened on February 18, 2010);
- began work on a training program
- established rates, which at this point are the same rates used by the Judicial Branch; and
- began work on the technical rulemaking process for performance standards.

Unfortunately, while the creation of the Commission will relieve the Judicial Branch of the burden of increased defense costs as of July 1, 2010, Maine's budget problems will continue to impact the Commission. Already, as part of a \$400 million State-wide budget cut, the Commission is facing a \$600,000 deappropriation for its first year of operation. The cuts attributed to the Commission are based on an anomalous six-month downward trend in criminal filings and child protective cases in the current fiscal year. The Commission opposed the cuts and made it clear that the cuts could compromise the Commission's ability to sustain the operation of the Commission's work through to the end of its first fiscal year. The Commission may have to return to the Legislature to request further funds. Only time will tell what happens,

but the Commission is nevertheless dedicated to operating a system that delivers high quality defense services to Maine's indigent population.

If anybody has any questions, suggestions or advice, please contact either:

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