
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

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**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. Inparticular, 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.