STATE OF MAINE
KENNEBEC, SS.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. KENSC-CV-22-54

ANDREW ROBBINS, ET AL.,

Plaintiffs,

v.

MAINE COMMISSION ON INDIGENT LEGAL SERVICES, ET AL.,

Defendants.

JOINT MOTION TO CONDUCT PRELIMINARY REVIEW OF CLASS ACTION SETTLEMENT, DIRECT NOTICE TO CLASS MEMBERS OF PROPOSED SETTLEMENT, AND MAKE FURTHER ORDERS AS PART OF THE SETTLEMENT APPROVAL PROCESS

The Parties in the above-captioned action, pursuant to M. R. Civ. P. 23(e), jointly move this Court to conduct a preliminary review of their proposed class settlement ("Proposed Settlement"),[1] direct notice of the Proposed Settlement to Class Members, and set a fairness hearing date for final approval of the Settlement. *See* Proposed Settlement, attached as **Exhibit 1**.

I. INTRODUCTION

After litigating several pretrial motions, conducting extensive discovery, and participating in active settlement negotiations over nine months including four in-person Judicial Settlement Conference sessions, the Parties have crafted a Proposed Settlement that will facilitate significant reform of Maine's indigent defense system. In the course of settlement negotiations, joint advocacy for legislative action has already led to significant reforms in

[1] This Motion incorporates by reference the definitions of the capitalized terms in the Settlement Agreement, attached as **Exhibit 1**.

indigent legal services in Maine, including (i) creation of the State's first fully staffed, "brick and mortar" public defender office; (ii) a new Deputy Executive Director position at the Commission dedicated to attorney training and supervision; (iii) increased hourly compensation for private attorneys to $150/hour; (iv) a statutory requirement that all jails provide bi-weekly reports identifying in-custody criminal defendants to facilitate the Commission in carrying out its obligations, and; (v) a statutory requirement that the Commission adopt enforceable rules in areas directly impacting its role in administering statewide indigent criminal defense, including attorney caseloads, attorney qualifications, and attorney evaluations.

On top of these changes, the Proposed Settlement takes a two-pronged approach to facilitate reforms. *First*, the Proposed Settlement imposes concrete obligations to facilitate the Commission's operations. Under the Proposed Settlement, the Commission agrees to promulgate final rules governing key aspects of the delivery of indigent legal services, including training, supervision, and performance. The Proposed Settlement imposes concrete, objective metrics for enforcement of these rules. For example, within three years of the Effective Date of the agreement, 75% of all counsel (new and existing) will meet qualification standards and 85% of all counsel will meet training standards. Through this process—which requires significant, ongoing collaboration between the parties—the Commission will dramatically reshape its delivery of indigent-defense services in the state.

Second, building off the political successes detailed above, the Proposed Settlement requires the Parties to continue good-faith efforts to advocate for the funding and development of additional trial-level public defender offices across the state, as well as the creation of new appellate and post-conviction review public defender units. More broadly, the Parties agree to identify and advocate for any additional legislation and budgetary appropriations necessary for

the Commission to meet its obligations under the Proposed Settlement. These provisions represent a unique solution to the reality that it is not possible—whether through settlement or judgment—to compel particular appropriations from the state treasury. The judicial, legislative, and executive branches have each contributed to the reforms outside the Settlement without which the Settlement would not have been possible. The Parties have agreed to continue the advocacy and engagement which has already led to significant change, and the Settlement requires the Parties to build off this momentum in the years to come.

In sum, the Settlement creates a multi-pronged approach to tackle complex and far-reaching challenge from multiple angles. Rather than impose a set of one-time reforms that may be out-of-date by next year, the Proposed Settlement requires the Parties to engage in a robust, ongoing campaign to continue the work of reforming Maine's indigent defense system. At the same time, the Proposed Settlement mandates concrete changes, with measurable metrics, to facilitate continued improvement. There is no quick fix or single solution to the current and future challenges to Maine's indigent criminal defense system. The Proposed Settlement provides meaningful short and long-term reforms in the State's provision of indigent legal services.

II. PROCEDURAL HISTORY

A. Litigation

Plaintiffs' March 1, 2022 Complaint, asserting a cause of action pursuant to 42 U.S.C.A. §1983, alleged that Defendants had failed to develop and implement an effective system for the appointment of counsel for indigent defendants, including alleged failures to: (i) set and enforce

standards for caseloads of counsel and the performance of counsel; (ii) monitor and evaluate rostered attorneys; and (iii) provide training to rostered attorneys.[2]

The Court granted in part and denied in part the Commission's motion to dismiss on June 2, 2023. The Court recognized that Plaintiffs had sufficiently alleged that they had "been denied counsel, both actually and constructively, because Maine's system for providing counsel to indigent defendants is inadequate under Sixth Amendment standards." Order on Motion to Dismiss at 3 (June 2, 2022). At the same time, the Court recognized that there were limitations on the scope of relief the Court might ultimately be able to order, and that the "Court would obviously have to be cognizant of the separation of powers doctrine if any remedy were ordered." *Id.* at 4.

On June 2, 2022, this Court certified a Plaintiffs' class, pursuant to M. R. Civ. P. 23(a) and 23(b)(2), consisting of:

> All individuals who are or will be eligible for the appointment of competent defense counsel by the Superior or District Court pursuant to 15 M.R.S. §810 because they have been indicted for a crime punishable by imprisonment, and they lack sufficient means to retain counsel.

Order on Motion for Class Certification, p.5 (Jul. 13, 2022).

Thereafter, the Parties actively engaged in written discovery, including exchanging over 40,000 pages of documents and conducting and defending the depositions of the named Plaintiffs located in Maine. Over the next eight months, the Parties propounded and responded to document requests, requests for admission, and interrogatories; issued public records requests;

[2] Defendants deny all liability and contest the merits of Plaintiffs' allegations: that Defendants' acts or failures to act create a substantial risk of violation of the Sixth Amendment.

litigated substantive discovery disputes; retained expert witnesses; and assisted retained experts with the investigation and preparation of their expert reports.

B. Settlement Negotiations

In September 2022, recognizing the benefits of a collaborative solution, the Parties initiated arms' length settlement negotiations alongside ongoing discovery efforts. On October 4, 2022, at the Parties' request, the Court ordered the Parties to participate in a Judicial Settlement Conference overseen by Active Retired Justice Thomas Warren.

Beginning in October 2022, the Parties engaged in four in-person Judicial Settlement Conferences overseen by Justice Warren (on October 12, November 18, January 27, and March 3); conducted dozens of intervening direct negotiations between the Parties in person and by phone; and exchanged multiple rounds of detailed written settlement proposals, counter-offers, and counter-proposals. On March 3, 2023, the Parties participated in a fourth in-person Judicial Settlement Conference overseen by Justice Warren. As a result of significant progress at this Settlement Conference session, the Parties jointly requested a temporary stay to focus their efforts on negotiating a final settlement agreement and legislative efforts to provide the resources the Parties jointly identified as necessary for the Commission to fulfill contemplated settlement obligations. The Court temporarily stayed this litigation on March 9, 2023.

Between March and June 2023, the Parties agreed to key substantive terms of a settlement, contingent on two important external conditions: (i) legislative appropriation of specified additional funding for the Commission, and (ii) establishing critical information-sharing protocols between the Judicial Branch and the Commission. Owing to significant progress in both of these areas, the Parties finalized the Proposed Settlement. The Proposed Settlement was executed by representatives of the Parties on August 21, 2023.

III. STANDARD OF REVIEW

Rule 23 of the Maine Rules of Civil Procedure establishes the procedures applicable to class actions, including the requirement that the Court consider a proposed settlement between the parties prior to resolution by compromise. M. R. Civ. P. 23(e) ("A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.").

Maine courts interpreting Maine Rule of Civil Procedure 23 generally follow federal interpretations of the rule's federal counterpart, Fed. R. Civ. P. 23.[3] *See, e.g., Deane v. Cent. Maine Power Co.*, No. BCD-CV-2020-00020, 2022 WL 1539587, at *3 (Me.B.C.D. Apr. 04, 2022) (applying federal Rule 23 case law and noting that "the Maine rule is virtually identical to its federal counterpart, and Maine courts value constructions and comments on the federal rule as aids in constructing our parallel provision") (cleaned up); *Millett v. Atlantic Richfield Co.*, 2000 ME 178, 760 A.2d 250, 253-54. "If the parties negotiated at arm's length and conducted sufficient discovery, the [] court must presume the settlement is reasonable." *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 32–33 (1st Cir. 2009) (citing *City P'ship Co. v. Atl. Acquisition Ltd. P'ship*, 100 F.3d 1041, 1043 (1st Cir. 1996)).

[3] Maine courts have applied the "fair, reasonable, and adequate" standard to evaluating proposed class settlements even prior to the federal amendment codifying that standard. *See, e.g., Frank v. PEC Israel Econ. Corp.*, No. 99-261, 2000 WL 33675376, at *2 (Me. Super. May 12, 2000) ("The Stipulation and the Settlement are approved as fair, reasonable, adequate and in the best interests of the Class."). Noting the "self-evident proposition" that negotiated resolutions which "affect public rights should be subject to closer scrutiny than those that resolve purely private disputes," the Law Court has endorsed the use of the same standard in an analogous context: a consent decree affecting public rights. *Pike Indus., Inc. v. City of Westbrook*, 2012 ME 78, ¶ 22 (quoting *Durrett v. Housing Authority of the City of Providence*, 896 F.2d 600 (1st Cir. 1990));

"Court approval of a Rule 23 class action settlement generally proceeds in two stages." *Michaud v. Monro Muffler Brake, Inc.,* 2:12-cv-00353-NT, 2015 WL 1206490, at *8 (D.Me. March 17, 2015) (citing *The Manual for Complex Litigation*, Fourth, § 21.632 (2011)). "[C]ounsel shall submit the terms of the proposed settlement, and the court makes a preliminary determination of the fairness, reasonableness, and adequacy of the settlement terms and directs notice to class members on the certification, proposed settlement, and date of the final fairness hearing. *Id.* (cleaned up). At this initial stage, giving notice to the class "is justified by the parties' showing that the court will likely be able to" give final approval to the settlement and certify the settlement class. Fed. R. Civ. P 23(e)(1)(B); *see, e.g., Miller v. Carrington Mortgage Servs., LLC*, 2020 WL 2898837, at *4 (D. Me. Jun. 3, 2020), report and recommendation adopted, 2020 WL 3643125 (Jul. 6, 2020) (describing first- and second-step procedures under Rule 23(e)). Notice must be "reasonably calculated to reach the class members and inform them of the existence of and the opportunity to object to the settlement." *Nilsen v. York Cnty.*, 382 F. Supp. 2d 206, 210 (D. Me. 2005)). Because this Action has been certified as a class action under Rule 23(b)(2), rather than 23(b)(3), Class Members do not have a right to opt out or request exclusion from the Settlement, but they retain the right to object to the Settlement.

Following notice to the class, "the court holds a fairness hearing where the settlement proponents must demonstrate that the proposed settlement is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *Miller*, 2020 WL 2898837, at *4. The court looks to the following factors in applying the "fair, reasonable, and adequate" standard: (i) "the class representatives and class counsel have adequately represented the class"; (ii) "the proposal was negotiated at arm's length"; (iii) "the relief provided for the class is adequate, taking into account" factors

including, “the costs, risks, and delay of trial and appeal”; and (iv) “the proposal treats class members equitably relative to each other.” Fed. R. Civ. P. 23(e)(2).

“Typically, a court’s final approval of a class action settlement involves balancing the advantages and disadvantages of the proposed settlement as against the consequences of going to trial or other possible but perhaps unattainable variations on the proffered settlement.” *Michaud*, 2015 WL 1206490 at *8 (internal punctuation and citation omitted). At the final approval hearing, any Class Members who may have objected to the Proposed Settlement will have an opportunity to be heard. After considering the arguments and evidence submitted by proponents of the Settlement and any objections, the Court will make a final determination whether to approve the Proposed Settlement.

IV. SUMMARY OF THE PROPOSED SETTLEMENT

Under the Proposed Settlement, Defendants commit to support reform of indigent defense services in the following ways: (a) successfully advocating, in the current legislative session, to improve the structure and funding of Maine’s indigent defense system; (b) committing to continued advocacy for additional, specified structural reforms of Maine’s indigent defense system; (c) enacting an updated regulatory framework to ensure that Counsel have the skills, training, supervision, and support to provide effective assistance; (d) obtaining and analyzing electronic trial-court data directly from the Judicial Branch to promote the Commission’s effective oversight of indigent legal services; (e) implementing caseload and workload standards to support Counsel’s capacity to provide effective assistance; and (f) establishing objectively measurable, enforceable metrics regarding Counsel qualifications, evaluation, training, and Lawyer of the Day.

A. Successful advocacy in the current legislative session regarding legislative reforms to improve the structure and funding of Maine’s indigent defense system.

The Parties recognize the need for immediate short-term reforms to retain and attract more Counsel to provide indigent defense. Defendants have agreed to and successfully advocated for enactment of immediate reforms in the current legislative session (FY '24), including both substantive legislation and legislative approval of additional funding and staffing for the Commission. Ex. 1, §III.A.

The Parties' joint advocacy in the context of settlement negotiations in this litigation resulted in the following substantial legislative reforms to help stabilize and expand the indigent defense system:

- The creation of the State's first fully staffed "brick and mortar" district-based public defender office, which will consist of a District Defender, five new trial-level public defender positions, two paralegal positions, a legal secretary position, and funding for all other associated costs.[4]
- The continuation of the rural defender unit established in late 2022, which consists of a chief Rural Defender, six trial-level public defender positions (with one position specifically dedicated to Aroostook County courts), two paralegal positions, and funding for all associated costs.[5]
- A new Deputy Executive Director position at the Commission focusing on training and supervision.[6]
- An increase in the hourly rate for all appointed attorneys from $80/hour to $150/hour.[7]

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[4] *See* P.L. 2023 ch. 412 sec. A-24.
[5] *See id.*
[6] *See id.*
[7] 94-649 C.M.R. c. 301, § 2.

- A statutory requirement that all jails provide bi-weekly reports to the Commission regarding their pretrial detention populations to assist the Commission in facilitating prompt assignment of counsel in all pending cases.[8]
- A statutory requirement that MCILS enact rules on topics including caseloads, eligibility standards, and attorney evaluation. These rules will apply to public defenders as well as contract and assigned counsel.[9]

B. Commitment to continued advocacy for long-term structural reforms of Maine's indigent defense system.

The Parties recognize that in addition to these immediate reforms, there is a need for ongoing structural reform and strengthening of Maine's indigent defense system on a long-term basis. Establishment of a fully staffed district-based public defense office—the first of its kind in Maine—will assist in stabilizing Maine's indigent legal system and ensuring consistent high-quality representation. This office will provide a model for future district-based offices across the state.

To meet the demand for highly qualified, well-trained, well-supported attorneys, complementing Maine's existing appointed counsel system, the Proposed Settlement includes Defendants' commitment to good-faith efforts over the next four years to advocate for the funding and development of additional fully staffed trial-level public defenders' offices. Ex. 1, at §III.B. Defendants further agree to make good-faith efforts to advocate for the creation of new appellate and post-conviction review public defender units. Id.

In addition, the Parties agree over the next four years to jointly use their best efforts to identify and advocate for any additional legislation necessary to implement the terms of the

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[8] *See* P.L. 2023 ch. 344 sec. 7.
[9] *See id.* sec. 1.

Settlement. This legislation will include any statutory reforms necessary for the Commission to fulfill its obligations and meet the metrics under the Proposed Settlement, as well as budgetary appropriations necessary for the Commission to meet its obligations under the Settlement, including funding for additional employed or contract positions to promote and implement standards for evaluation and supervision of counsel. Ex. 1, §V.

C. Updated regulatory framework to ensure that Counsel have the necessary skills, training, supervision and support to provide effective assistance.

The Parties agree to revise, update, and enact new regulations governing key areas of indigent defense services. Ex. 1, §VI. New and revised Commission regulations will support counsel by addressing the skills, training, supervision, and support necessary to carry out their responsibilities. Under the Proposed Settlement, Plaintiffs will assist the Commission by preparing proposed rules concerning the following topics:

- Minimum qualifications to serve as counsel;
- Eligibility standards for specialized case types;
- Ensuring adequate representation of clients in the event of conflicts of interest;
- Handling complaints regarding performance of Counsel;
- Initial and regular ongoing training;
- Performance standards for each of the following practice areas: juvenile practice, adult criminal practice, child protective practice, involuntary commitment practice, appellate practice, post-conviction practice, Lawyer of the Day (LOD) practice;
- Supervision and regular evaluation of compliance with performance standards;
- Improvements to the Lawyer of the Day program.

The Commission agrees to promulgate final rules on each of these topics. These final rules will include written procedures for implementation and enforcement and take into account Plaintiffs' proposed standards and model standards for indigent defense. Ex. 1, §VI(E). The rules will be judicially enforceable. Ex. 1, at §VI(F).

D. System-wide access to trial-court data to support the Commission's effective oversight of indigent legal services.

Defendants need thorough, detailed, up-to-date data from the Judicial Branch regarding trial court activity to meet their obligations to oversee indigent legal services. The Proposed Settlement addresses the need for robust information-gathering in four ways.

First, to facilitate prompt assignment of counsel in all eligible cases, Defendants anticipate newly implemented access to real-time data on newly filed criminal cases. Through discussions in tandem with—and crucial to—Defendants' performance of their obligations under the Proposed Settlement, Defendants anticipate access to previously unavailable trial-court data maintained by the Administrative Office of the Courts. That data includes the attorneys assigned to individual cases by the court, the date of assignment, and how long individual cases have been pending. This arrangement will be an invaluable supplement to Defendants' current case-by-case access to trial court's docket and facilitate an objective data-driven approach to the statewide indigent defense system. That information is expected to include hearing and trial schedules for individuals entitled to court-appointed counsel. Implementing daily access to this data will allow Defendants to incorporate it into their case management system and provide a robust set of metrics to monitor timeliness and effectiveness.

Second, Defendants will engage a consultant to assist with analysis and effective use of the newly available system-wide data. That consultant will be retained through a Request for Proposals, with input from Plaintiffs. Ex. 1, §XII(A).

Third, to allow Plaintiffs to evaluate compliance with the Proposed Settlement, the Commission will provide Plaintiffs with quarterly reports on the status of the indigent defense system, including data regarding: (i) case assignments and caseloads; (ii) complaints and resolution of complaints; (iii) the frequency of defense counsel requests for investigators or experts, motion filings, case resolution by dismissal, pleas to lesser charges, frequency and outcome of trials; (iv) statutory or budgetary initiatives the Commission has identified as necessary to comply with its obligations; and (v) rules the Commission plans to notice for rulemaking hearings. Ex. 1, §XII(B).

Fourth, in connection with settlement negotiations, the Parties have successfully advocated for enactment of a new statutory requirement that all jails provide regular reports to the Commission regarding their pretrial detention populations. That information will assist the Commission in facilitating prompt assignment of counsel by providing the Commission with regularly updated information on incarcerated pretrial populations. Ex. 1, §IV(A).[10]

E. Caseload and workload management to ensure that Counsel has the capacity to provide effective assistance of counsel.

The Proposed Settlement reflects recently adopted enforceable case load limits adopted by the Commission in July 2023. Ex. 1, §VII. These regulations were developed with input from the Plaintiffs. and take effect in January 2024. 94-649 CMR ch.4. The newly adopted standards will support attorney capacity to provide appropriate attention to indigent clients and address the risk that the indigent defense system does not disproportionately rely on a small number of attorneys who may, for various reasons, stop accepting new cases.

Under the Proposed Settlement, the Commission further agrees to ensure that the caseloads of all Counsel can be accurately tracked and recorded, and that the caseload limits

[10] *See* P.L. 2023 ch. 344, sec. 7.

established by rule will be appropriately enforced. The Commission agrees to grant waivers from the caseload limits to no more than 25% of rostered counsel during the first two years after the Effective Date of the Settlement, and to grant waivers to no more than 10% of rostered counsel after that period.[11] The Commission will grant waivers only in extraordinary circumstances where doing so is necessary to protect a client's interest. Ex. 1, §VIII(A)(2)(e).

The Commission will re-evaluate their caseload standards in 2025 to determine whether the standards should be amended. T hat re-evaluation will take account of the national recommendation on attorney caseloads to be issued by the American Bar Association Standing Committee on Legal Aid and Indigent Defense in 2023. Ex. 1, §VII(B)(2).

F. Establishment of enforceable metrics regarding Counsel qualifications, evaluation, training, and Lawyer of the Day to ensure effective assistance of counsel.

The Proposed Settlement facilitates the Parties' goals with objective standards. In addition to the enacted rules on caseload standards, the Proposed Settlement sets deadlines for the Commission to enact enforceable rules in four areas: (i) minimum attorney qualifications; (ii) evaluation; (iii) training, and; (iv) Lawyer of the Day practices. The Proposed Settlement requires Commission enforcement of these rules and establishes concrete, objective benchmarks that the Parties and this Court can use to assess compliance. Ex. 1, §§VIII - XI.

First, regarding minimum qualifications and eligibility, the Commission will issue rules governing the minimum qualifications for Counsel and eligibility for specialized panels within one year of the Effective Date of the Proposed Settlement. Ex. 1, §VIII. The rules will include: (i)conflicts check requirements; (ii) standards governing representation when conflicts arise, and;

[11] Consistent with the class definition established in this Court's order on class certification, the Parties agree that, for purposes of the Settlement, compliance will be measured against the rosters for Cases With Drug Offenses, Homicides, Operating Under the Influence Cases, Other Felony Cases, Serious Violent Felony Cases, and Sexual Offense Cases. Ex. 1, §VII(B)(1)(a).

(iii) a process to ensure that lawyers meet applicable standards before being assigned to cases in those areas. The Commission will enforce these qualifications and eligibility standards according to objective metrics: (i) two years from the Effective Date of Settlement, 85% of new attorneys and 50% of existing attorneys will meet the qualifications standards; and (ii) three years from the Effective Date, 75% of all counsel will meet the qualifications standards. Ex. 1, §VIII.

Second, regarding performance standards and evaluation, the Commission will initiate a system-wide evaluation within three months of the Effective Date. The evaluation will focus on systemic (as opposed to individual) performance. The evaluation will include review of data and regular observation of court proceedings throughout the state. The Parties will jointly engage in this evaluation. Within 18 months of the Effective Date of the Proposed Settlement, the Parties will use the information gathered to identify systemic improvements that should be implemented. Within two years of the Effective Date, the Commission will implement changes to its training program to focus on the identified areas of concern. Ex. 1, §IX.

In addition, the Commission will promulgate revised performance standards for juvenile practice, adult criminal practice, child protective practice, involuntary commitment practice, appellate practice, post-conviction practice, and Lawyer of the Day practice. Ex. 1, §IX(B). The Commission will adopt standards for handling complaints regarding the performance of counsel as well as standards for the supervision and regular evaluation of counsel against those performance standards. Ex. 1, §IX(B)(1). Within three years of the Effective Date, the Commission will conduct annual individual evaluations of 20% of new Counsel and 5% of Counsel who have handled Commission cases for over 5 years, on a randomized basis. The evaluations will focus on client communication, pretrial preparation, legal research and written advocacy, motion practice, billing practices, cooperation with Commission procedures, and lack

of substantiated client complaints. Attorneys meeting performance standards will be exempt from another random evaluation for three years. Any attorneys who do not meet performance standards will be provided additional training, supervision, and evaluation or, where appropriate, removed from the roster of counsel available for appointment. Within three years of the Effective Date, 95% of all complaints concerning attorney performance will be investigated and resolved by Commission staff within twelve months of the complaint.

Third, regarding training, the Commission will promulgate new rules governing initial and ongoing training requirements for Counsel. Ex. 1, §X. Counsel will be compensated for their time spent in training and at least a portion of trainings will be conducted in person. For newly rostered attorneys without criminal defense experience, the Commission will implement a robust onboarding training comparable to the "zealous advocacy training" offered by the Massachusetts Committee for Public Counsel Service. Within two years of the Effective Date (subject to legislative appropriation of funding for training staff that both Parties agree to support), 85% of newly rostered attorneys and 50% of current attorneys will meet the established training standards. Ex. 1, §X(B). Within three years from the Effective Date, 85% of all Counsel will meet training standards. *Id.*

Fourth, several provisions of the Proposed Settlement address Plaintiffs' concerns with the Lawyer of the Day program. Plaintiffs will provide the Commission with proposed rules establishing case load standards specific to the Lawyer of the Day program. The Commission will promulgate new final rules governing Lawyer of the Day performance. Ex. 1 §XI. Additionally, Plaintiffs and the Commission will jointly observe Lawyer of the Day proceedings as part of the system-wide evaluation detailed above. Based on this evaluation, the Parties will identify areas for systemic improvements through targeted training. Ex. 1 §XI(B). Finally, the

Parties acknowledge that the Commission has had challenges overseeing the Lawyer of the Day program in part due to inadequate information-sharing protocols between the Commission and the Judicial Branch. Implementation of access to previously unavailable trial-court data will mitigate those challenges and allow the Commission to promulgate and enforce performance standards for the Lawyer of the Day program. Ex. 1, §XI.

G. Effective enforcement mechanisms to implement reform.

The Proposed Settlement includes transparent and effective enforcement mechanisms. Ex. 1, §§II(H) – (I); XII. The current litigation will be stayed for four years. During the stay, the Parties will be subject to stringent compliance metrics. The Commission will provide quarterly reports to Plaintiffs on specified topics to permit Plaintiffs to assess compliance with the Proposed Settlement. Ex.1, §XII(B).

In the event there is a dispute regarding either Party's compliance with the Proposed Settlement, the Parties will work to resolve the dispute by providing written notice, and promptly meeting to seek informal resolution. If the Parties are not able to reach agreement, then the Parties may return to this Court to litigate a motion seeking to lift the stay, permitting litigation in this Action to resume. If the Court finds that Defendants have materially breached the Proposed Settlement and failed to remediate the breach, the stay will be lifted and litigation will resume.[12] Barring a material, unremediated breach of the Proposed Settlement, this Action will be dismissed four years from the Effective Date of the Proposed Settlement. The Parties have designed the Proposed Settlement to improve indigent legal services in Maine, not to create unnecessary litigation.

[12] Defendants deny all liability and contest the merits of Plaintiffs' allegations: that Defendants' acts or failures to act create a substantial risk of violation of the Sixth Amendment. In the event of an unremediated material breach of the Proposed Settlement, Plaintiffs' claims will be tested in this Court.

V. **ARGUMENT AND MEMORANDUM OF LAW**

A. The Court should direct notice to the Class because the Court will likely be able to approve the Settlement as fair, reasonable, and adequate.[13]

The Court should direct notice to the Class based on a finding that it will likely be able to approve the Proposed Settlement as fair, reasonable, and adequate. *Pike Indus., Inc.*, 2012 ME 78 at ¶ 25; *see also* Fed. R. Civ. P. 23(e)(2); *Miller*, 2020 WL 2898837, at *4. The Proposed Settlement meets that standard because (i) "the class representatives and class counsel have adequately represented the class"; (ii) "the proposal was negotiated at arm's length"; (iii) "the relief provided for the class is adequate, taking into account" factors including, "the costs, risks, and delay of trial and appeal"; and (iv) "the proposal treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2).

1. The Class Representatives and Class Counsel have adequately represented the Class.

The class representatives and Class Counsel have more than adequately represented the Class. The Parties on both sides are represented by experienced, well-qualified counsel and this Court has already approved Plaintiffs' Counsel as Class Counsel to represent the Class in this Action. Class Counsel's advocacy has resulted in a Proposed Settlement that provides highly beneficial relief to the Class.

The focus of this Action is and always has been on indigent defendants' right to effective assistance of counsel under the Sixth Amendment. Fulfilling that constitutional obligation requires that Counsel be appropriately, trained, evaluated, supervised, and supported. Plaintiffs' Complaint alleges that before the commencement of this litigation, the Commission's primary de

[13] As noted above, in general, notice to the class likewise requires a finding by the court that it "will likely be able to" certify the class for purposes of final judgment. Fed. R. Civ. P 23(e)(1)(B). Here, the Court has already certified the Class in its July 13, 2022 Order, and nothing has changed that should alter the Court's conclusion.

facto responsibility was ensuring that assigned attorneys were paid on time; training of these lawyers was incidental, and supervision of these attorneys was nonexistent. *See Complaint*, ¶110 (arguing that the Commission had not "set or enforced standards for counsel caseloads, conflicts of interest, or attorney performance). Since the commencement of this litigation, the Commission has begun the process of restructuring the delivery of indigent legal services. It has hired Maine's first public defenders and has adopted enforceable rules governing the caseloads and workloads of attorneys to ensure that every attorney has sufficient time to devote the proper level of attention to every client. The Commission has also secured funding to hire additional public defenders and open Maine's first "brick and mortar" district-based public defender office.

Against that backdrop, the Proposed Settlement obligates the Parties to continue to advocate for the structural transformation of Maine's public defense system: a system that relies on both appointed counsel and public defenders. These developments are calculated to bring greater stability to the system, promoting the availability of defense counsel when and where they are needed. This hybrid defense system provides additional tools to attract, train, and nurture the next generation of defense lawyers who will be able to learn the practice with guidance and support.

The Proposed Settlement obligates the Commission to adopt and enforce a robust regulatory structure governing the screening, training, evaluation, and supervision of the Counsel on its rosters. Measurable enforcement of these rules will mitigate the risk that Class Members will be assigned lawyers who lack the time, training, or resources to meaningfully participate in the adversarial criminal process. The Settlement achieves Plaintiffs' goal of ensuring adoption and enforcement of rules governing the provision of indigent legal services, including adequate gatekeeping, supervision, and training of appointed Counsel. In addition, as part of the settlement

negotiations, the Parties have committed to jointly work on the continued structural reform of Maine's indigent legal system, including through continued legislative advocacy, to better ensure adequate representation at each critical stage of litigation.[14]

The remedies incorporated in the Proposed Settlement approach the limit of what could be achieved through declaratory and injunctive relief, given the broad judicially created immunities associated with litigation under 42 U.S.C. §1983. Plaintiffs could not sue the State of Maine itself, or an arm of the state, to force it to increase the budget available for indigent defense services. Maine's indigent defense system has been chronically underfunded. Appropriations cannot be compelled through litigation. *See Bogan v. Scott-Harris*, 523 U.S. 44, 49 (1998). The appointment of counsel is the responsibility of the Judiciary, Plaintiffs could not sue judges to hold them accountable for any action or inaction that may have resulted in delay or denial of counsel. *See Bradley v. Fisher*, 13 Wall. (80 U.S.) 335 (1871); *Pierson v. Ray*, 386 U.S. 547 (1967); *Richards v. Ellis*, 233 A.2d 37, 38 (Me. 1967).[15]

Because the defendant in this Action is the Commission, the Proposed Settlement is focused on aspects of Maine's indigent defense system that the Commission has the authority to address: advocacy for legislative reform and budget appropriations; promulgation and enforcement of rules governing the caseloads, qualifications, training, and evaluation of Counsel; and comprehensive data collection and monitoring of the system as a whole. But there are important aspects of Maine's indigent defense system that are within the control of separate

[14] Though this litigation only involves adults in the criminal system, the Settlement includes numerous reforms that will also benefit juveniles, parties in child protective cases, people subject to involuntary commitment, and other areas of law overseen by the Commission. For example, the Commission agrees to review and revise all of its performance standards as part of this agreement—not just the standards related to adult criminal practice.

[15] Prosecutors are likewise protected from suit by robust immunity doctrine. *See Imbler v. Pachtman*, 424 U.S. 409, 422-24 (1976); *Ingraham v. Univ. of Maine at Orono*, 441 A.2d 691, 692 (Me. 1982).

actors who are not (and cannot be) parties to this suit. The continued evolution of Maine's indigent defense system will require contributions from all stakeholders.

2. The Proposed Settlement was negotiated at arm's length.

The Proposed Settlement resulted from extended arms' length negotiations by informed, qualified counsel. The Parties actively negotiated for over a year. Those negotiations included the able assistance and oversight of Active Retired Justice Warren and the engagement and active involvement of representatives of the political branches of the state government: bodies unaligned with either Plaintiffs or Defendants.

Before reaching the Proposed Settlement, the Parties engaged in a thorough investigation of their legal claims and defenses, including pre-trial motion practice in this Court on the motion to dismiss and class certification. The Parties also engaged in thorough factual investigation of their claims and defenses through over eight months of discovery: (i) propounding and responding to written interrogatories, requests for admission, and requests for production; (ii) production and review of tens of thousands of pages of documents; (iii) taking and defending depositions, and (iv) retention and preparation of expert witnesses. In addition, the Parties engaged in a thorough investigation of possible remedies, guided by the precedents of Maine courts as well as the negotiated and court-ordered remedies in indigent defense reform litigation throughout the country. Throughout the litigation, the Parties have regularly reviewed detailed information concerning the supply of defense attorneys on the rosters maintained by the Commission as well as the demand for defense attorneys based on criminal filings throughout the State.

3. The relief provided for the Class is adequate given the substantial costs, risks, and delay if the matter is not resolved now.

If this case is not resolved now, the costs, risks, and delays of proceeding with litigation are considerable. Plaintiffs have prevailed on the motion to dismiss (in part) and on class certification, but there is significant litigation ahead if the case cannot be resolved. Absent settlement, the Parties will resume time-intensive discovery, including additional written discovery and likely motions to compel concerning document production and assertions of privilege; over a dozen depositions; and the designation and depositions of experts. At the close of discovery, one and likely both Parties will seek summary judgment, requiring substantial time from the Parties and the Court. Given the complexity of issues and the number of potential witnesses, trial of this matter would likely take at least three weeks. There will almost certainly be an appeal of any final decision—raising the likelihood of an additional year or more of delay notwithstanding potential remand and retrial. In addition to the effects on Plaintiffs Class, MCILS currently employs nine individuals in its operations staff. That staff is responsible for overseeing Maine's indigent defense system, including the maintenance of lists of eligible private attorneys willing to accept court appointments to represent indigent defendants pursuant to M. R. U. Crim. P. 44. Continued litigation will demand substantial staff time and resources on litigation—resources that otherwise could be invested in Defendants' oversight of indigent defense services.

Moreover, both Parties recognize risks and uncertainty on their legal claims and defenses going forward, particularly given the lack of clarity surrounding the applicable legal standards. Almost all systemic legal challenges to indigent defense systems across the country have been resolved by settlement. There is no clear body of law delineating the standard for civil enforcement of the Sixth Amendment for prospective injunctive relief. Some courts have evaluated whether structural defects have resulted in a lack of traditional markers of adequate

defense. *See, e.g., Kuren v. Luzerne County*, 146 A.3d 715, 744 (Pa. 2016)). Others have looked to whether individuals have been actually or constructively denied counsel at a critical stage of a criminal proceeding. *See, e.g., Tucker v. State*, 484 P.3d 851, 866-865 (Idaho 2021). Each Party believes they could prevail under either standard, but the lack of direction from the Law Court imposes substantial risks and uncertainty for both Parties.

Even if Plaintiffs prevail at trial, Maine's "much more rigorous" separation of powers jurisprudence renders the attainable relief highly uncertain. *See Bates v. Dep't of Behavioral & Developmental Servs.*, 2004 ME 154, ¶ 84. As the Court observed in its Order on Defendants' Motion to Dismiss, it "has no authority to direct a specific appropriation." *Id.* Instead, the Court has authority to issue an order that requires the Commission to perform acts consistent with its legal role and obligations. *See* Order at 4. The Proposed Settlement hews as closely as possible to that approach.

Both Parties face the potential that, if Plaintiffs prevailed, the relief ordered would be necessarily broad. As this Court observed, it has authority to "order MCILS to comply with the Constitution if a constitutional violation has occurred." *See Order on Motion to Dismiss*, at 4. Implementation of such an order could well lead to protracted litigation about exactly what it requires and whether Defendants are in compliance with the Court's mandate. That possibility motivated the Parties to design a Settlement where compliance is both discernable and achievable.

4. The Proposed Settlement treats class members equitably relative to each other and raises no other fairness concerns.

Finally, the Proposed Settlement treats class members equitably and does not raise any other fairness concerns. This is a case for declaratory and equitable relief only. There is no risk that any member of the Class, including class representatives, will be unduly enriched by their

participation in this case. The Proposed Settlement does not involve compensation or other preferential treatment to any Class Members.

Moreover, a review of the Settlement provisions for partial payment of the attorneys' fees and expenses of Plaintiffs' counsel demonstrates the absence of any self-dealing by Class Counsel. Class Counsel made significant compromises with Defendants in the provisions for attorneys' fees: settling for a sum far below their substantiated claim. The Proposed Settlement provides for payment of $295,000.00 in full satisfaction of Plaintiffs' claim for attorneys' fees and costs, to be held in an escrow and payable once the case is dismissed. Ex. 1, §XIX. Class Counsel's actual attorneys' lodestar fees[16] invested in this case to date are significantly higher: $618,375.82 in fees plus $21,309.06 in out-of-pocket costs and expenses. Moreover, the final total number of hours expended by Class Counsel in this case will be significantly higher, given the substantial time required for Class Counsel to assist with and monitor Defendants' compliance with the Settlement during the four-year stay of litigation. Defendants' agreement to pay Class Counsel 46% of their actual lodestar fees and costs does not raise any concern of excessive compensation for attorneys.

B. The Court should approve the proposed Notice to the Class because it is reasonably calculated to inform Class Members of the Proposed Settlement and their opportunity to object.

1. Legal standard for approval of Notice to the Class.

[16] As Maine courts have routinely observed, "[i]n determining an attorney fee award, courts usually employ the lodestar calculation, which is the product of the number of hours appropriately worked times a reasonable hourly rate or rates." *Helwig v. Intercoast Career Institute*, No. CV-09-225, 2013 WL 5628638, at *1 (Me.Super. Sep. 18, 2013) (awarding over $100,000 in fees for a single plaintiff individual discrimination action) (cleaned up).

The Court's review of the proposed Notice is governed by Maine Rule of Civil Procedure 23(e), which provides that "notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." Maine courts look to the established body of law applying Fed. R. Civ. P. 23 with respect to notice. *See* Fed. R. Civ. P. 23(e)(1) (the court "must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to approve the proposal); Rule 23(e)(5)(a) (noting that "any class member may object to the proposal" and including the requirements for such objections).

Notice of a proposed settlement satisfies Rule 23 and due process if it "fairly apprise[s] the prospective members of the class of the terms of the proposed settlement and the options that are open to them in connection with the proceedings." *Walsh v. CorerPower Yoga LLC*, No. 16-cv-05610-MEJ, 2017 U.S. Dist. LEXIS 20974 (N.D. Cal. Feb. 14, 2017) (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174 (1974); *see also* Newberg on Class Actions § 8:15 (5th ed.) ("[N]otice must be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.") (internal quotations omitted).

While Fed. R. Civ. P. 23 requires that reasonable efforts be made to reach all class members, it does not require actual notice to each class member. *Silber v. Mabon*, 18 F.3d 1449, 1454 (9th Cir. 1994). A class settlement notice satisfies due process if it contains a summary sufficient to "apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections." *UAW v. GMC*, 487 F.3d 615, 629 (6th Cir. 2007) (*quoting Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 314 (1950). Notice is a summary, not a complete source of information. *See, e.g., Petrovic v. AMOCO Oil Co.*, 200 F.3d

1140, 1153 (8th Cir. 1999); *In re "Agent Orange " Prod. Liab. Litig.* MDL No. 381, 818 F.2d 145, 170 (2d Cir. 1987); *Mangione v. First USA Bank*, 206 F.R.D. 222, 233 (S.D. Ill. 2001).

2. The Parties' proposed Notice program meets the requirements of Rule 23 and due process.

The Parties' proposed Notice program meets the requirements of Rule 23 and comports with due process. The proposed Notice program takes a thorough, multilayered notice approach designed to reach as many Class Members as possible. This approach is adequate and reasonable under the circumstances. *Ross v. Trex Co.*, 2013 WL 791229, at *1 (N.D. Cal. Mar. 4, 2013) ("Due Process does not entitle a class member to 'actual notice,' but rather to the best notice practicable, reasonably calculated under the circumstances to apprise [them] of the pendency of the class action and give [them] a chance to be heard."); *see also In re Prudential Ins. Co. of Am. Sales Practices Litig* ., 177 F.R.D. 216, 231 (D.N.J. 1997) ("Courts have consistently recognized that due process does not require that every class member receive actual notice so long as the court reasonably selected a means likely to apprise interested parties."); *Lee v. Enter. Leasing Companywest*, No. 10-CV-00326-LRH-WGC, 2014 WL 4801828, at *2 (D. Nev. Sept. 22, 2014) ("Under this 'best notice practicable' standard, courts retain considerable discretion to tailor notice to the relevant circumstances").

Because this case has been certified as a class action under Rule 23(b)(2), rather than 23(b)(3), class members do not have a right to opt out or request exclusion from the Settlement, but they retain the right to object to the Settlement. See, e.g., *Melnick v. Microsoft Corp.*, No. CV-99-709, 2001 WL 1012261, at *3 (Me. Super. Aug. 24, 2001) (citing *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 142-143 (3d Cir. 1998); *see also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362 (2011) ("[Fed. R. Civ. P. 23] provides no opportunity for (b)(1) or (b)(2) class members to opt out, and does not even oblige the District Court to afford them notice of the action.").

In order to ensure that the Settlement Class is aware of the Settlement and has the opportunity to register any objections with the Court, the Parties propose the following Notice program:

In-Custody Class Members: To notify class members who are in custody, the notice program includes posting the notice in the common areas of all Maine jails and 72-hour holding facilities: York County Jail, Cumberland County Jail, Androscoggin County Jail, Kennebec County Correctional Facility, Two Bridges Regional Jail, Knox County Jail, Franklin County Jail, Somerset County Jail, Aroostook County Jail, Hancock County Jail, Oxford County Jail, Penobscot County Jail, Piscataquis County Jail, Waldo County Jail, and Washington County Jail. County officials will be requested by the parties to personally deliver the notice to class members who are in custody in these facilities and unable to access the common areas.

Out-of-Custody Class Members: To notify class members who are not currently in-custody, the notice program includes print advertisements in local newspapers, namely the Portland Press Herald, Lewiston Sun Journal, Kennebec Journal, and Bangor Daily News.

Additionally, every judge in Maine will be provided with copies of the notice and will be requested by the parties to distribute the notice to every defendant appearing in Maine criminal court.

Incoming Class Members: To notify incoming class members, the notice program includes posting the notice in a visible location in every location where arraignment are held in each of Maine's courthouses. Additional copies of the notice will also be available to provide to any individual upon request.

Finally, the proposed Notice itself includes all information required to provide Class Members notice of the proposed Settlement and afford them an opportunity to object to the

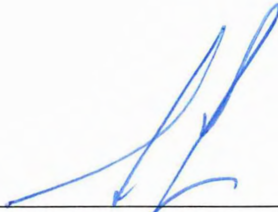
Proposed Settlement. *See* Proposed Notice, attached as **Exhibit 2**. The proposed Notice is in plain language understandable to the Class and provides: (i) the case name and case number; (ii) a description of the case and the legal claims; (iii) the class definition approved by the Court; (iv) a summary of the terms of Settlement; (v) a clear description of the options available to Class Members such as the manner of filling objections and the 60-day deadline applicable to objections; (vi) information about Plaintiffs' counsel; (viii) the time and location of the Fairness Hearing to consider final approval of the Settlement, and; (ix) an explanation of how to make inquiries and obtain further information about the Settlement, including a website providing a copy of the complete Proposed Settlement.

IV. Conclusion.

For all these reasons, the Parties respectfully asks the Court to grant their Joint Motion, direct Notice of the Proposed Settlement to the Class, schedule a Final Fairness Hearing for 90 days from the date of the order directing notice to the Class Members or as soon as practicable after that date, and grant all such other and further relief as this Court deems just.

August 21, 2023

MAINE COMMISSION ON INDIGENT LEGAL SERVICES, et. al.



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August 21, 2023

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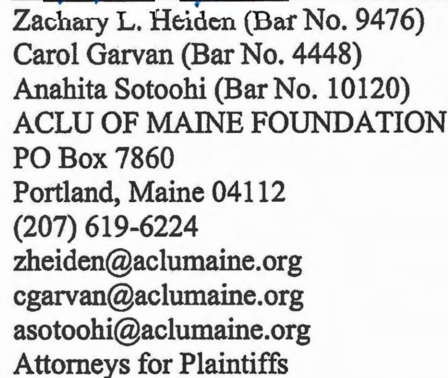

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EXHIBIT 1

SETTLEMENT AGREEMENT

I. Definitions

A. "The Action" is *Robbins, et al. v. Maine Commission on Indigent Legal Services, et al.* ("MCILS"), originally filed in March 2022 in Kennebec County Superior Court, Dkt. No. KENSC-CV-22-54.

B. "Effective Date" is the date upon which the Court issues final approval of this Settlement Agreement.

C. "Plaintiffs," "Settlement Class," "Class," or "Class members" means the Named Plaintiffs and all members of certified class as defined in the Court's July 15, 2022 Order granting certification.

D. "Defendants" are the named Defendants in the Action.

E. "Parties" are all Plaintiffs and Defendants in the Action.

F. "Class Counsel" are the attorneys representing the Plaintiffs and the Settlement Class in this Action.

G. "Defendants' Counsel" are the attorneys representing the Defendants in this Action.

H. "Remaining Claims" are the Plaintiffs' claims in Count I of the Complaint in this Action, which remain pending following the Court's June 2, 2022 Order on Defendants' Motion to Dismiss.

I. "Counsel" refers to all rostered private counsel handling MCILS cases and all employed public defenders handling MCILS cases.

J. "Execution Date" is the date on which this Agreement is signed by the Parties or their designated representatives.

II. Term, Effect, and Dispute Resolution

A. The Parties stipulate to the dismissal of the Remaining Claims without prejudice four (4) years from the Effective Date.

B. This settlement will be binding upon the Settlement Class.

C. In consideration of the reforms implemented by Defendants and in order to allow the continued progress of reforms to the operations of MCILS, the Parties consent to a stay in this litigation for a period of four (4) years from the Effective Date.

D. Plaintiffs, including all members of the Settlement Class, will not provide any releases to Defendants, but will not reassert or revive the Remaining Claims or substantially similar claims for systemic relief against Defendants for a period of four (4) years after the Effective Date.

E. If the Court determines that there has been a material and unremedied breach of this Agreement as set forth in Section II.I below, Plaintiffs may resume litigation of the Remaining Claims against only the breaching Party or Parties.

F. Nothing in this Section precludes Plaintiffs, including all members of the Settlement Class, from asserting claims against Defendants alleging a particularized injury arising from their individual circumstances and seeking individual, as opposed to systemic, relief. However, Plaintiffs, including all members of the Settlement Class, may not allege, as the basis for any such claims against Defendants, systemic failures or deficiencies in Maine's indigent defense system occurring during the four (4)-year settlement period following the Effective Date.

G. Plaintiffs will not appeal the Court's June 2, 2022 Order dismissing Count II of their Complaint, except that Plaintiffs retain their appeal rights in the event the stay of this litigation is lifted due to a material and unremedied breach of the Agreement and the Parties resume litigation to a final judgment in the Superior Court, as set forth in Section II.I below.

H. Dispute Resolution. If a dispute arises regarding either Party's compliance with any provision of the Agreement, then the Party asserting noncompliance shall first send written notice to the other Party specifying the concern and requesting an opportunity to meet and confer. The Parties shall schedule a mutually convenient time, place, and manner to confer, within 14 business days, to seek resolution of the dispute. This informal dispute resolution procedure is a condition precedent to seeking judicial intervention with respect to a dispute regarding compliance with this Agreement. To facilitate open discussion, the Parties' communications and all information exchanged during this informal dispute resolution process shall be deemed to be part of confidential settlement negotiations pursuant to M. R. Evid. 408 and shall not be disclosed or used by one Party against the other unless mutually agreed, in writing, between the Parties. Any agreement generated by this informal dispute resolution process to resolve a dispute shall be reduced to writing.

I. Lifting of Stay. If the Parties have not resolved an allegation of non-compliance raised as provided in Section II.H within thirty (30) days after Defendants' receipt of the notice of alleged non-compliance, Plaintiffs may seek leave from the Court to resume litigation in the Action based on a material and unremediated breach of §§V – XI of this Agreement ("Performance Metrics"). Within twenty-one (21) days of Plaintiffs' request to the Court for leave, Defendants may file an objection to Plaintiffs' request. The Parties will seek and/or consent to the Court's prompt consideration of the request. The Parties agree that, absent consent from Defendants to Plaintiffs' request for leave to lift the stay, the standard determining whether the stay approved by the Court should be lifted, in consideration of the breach, is whether the Court, upon consideration of the Parties' written submissions and with the taking of testimony and other evidence as determined

necessary by the Court, the Court finds, by a preponderance of the evidence, that Defendants have materially breached the Performance Metrics and failed to remediate that breach.

III. **Advocacy Regarding Funding.** Defendants have undertaken a good-faith effort to advocate for the advancement of appropriate legislation, including the legislative approval of funding for, the commitments as described in Section III.A. Defendants will undertake a good-faith effort to advocate for the advancement of appropriate legislation, including the legislative approval of funding for, the commitments described in III.B below:

A. Current Legislative Session (FY '24). Defendants successfully advocated for the following legislative reforms to improve the structure and funding of Maine's indigent defense system, located in Comm. Amend. A to LD 258, "An Act Making Unified Appropriations and Allocations from the General Fund and Other Funds," at p. 188 – 189.[1]

1. Creation of a new, fully staffed public defender unit, which will consist of 6 new trial-level public defenders, 2 paralegal positions, an office manager, and funding for associated costs;
2. Continued funding of the Rural Defender Unit, established in 2022, consisting of a District Defender, 4 trial-level public defenders and funding for associated costs;
3. Creation of a new Deputy Executive Director position at MCILS, focused on training and supervision of Counsel; and

   $150/hour for all appointed counsel.

B. Future Legislative Sessions (FY '25 onward). To maintain and improve access to indigent defense services, Defendants will undertake a good-faith effort to advocate for the following in upcoming legislative sessions:

1. The creation of additional fully staffed trial-level public defenders' offices; and
2. The creation of new Post-Conviction Review and Appellate public defender units.

IV. **Advocacy Regarding Statutory Initiatives.** The Parties have successfully undertaken good-faith efforts to advocate for the enactment of additional statutory initiatives to facilitate the effective provision of indigent legal services, as reflected in LD 565, "An Act to Improve Maine's System for Protecting Sixth Amendment Rights," signed into law by Governor Janet Mills on June 28, 2023. In sum, LD 565:

A. Requires all jails to provide bi-weekly reports to the Commission regarding their pretrial detention populations to assist the Commission in facilitating prompt assignment of counsel in all pending cases;

B. Requires Defendants to enact rules on topics including caseloads, eligibility standards, and attorney evaluation: a judicially enforceable requirement; and

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[1] Available at https://www.mainelegislature.org/legis/bills/getPDF.asp?paper=HP0163&item=2&snum=131.

C. Confirms that MCILS rules apply to public defenders as well as contract and assigned counsel.

V. Best Efforts on Legislative Measures and Appropriations

A. Throughout the period of this Agreement, the Parties will continue to use their best efforts to identify and advocate for the enactment of any additional legislative measures necessary and appropriate to implement the terms of the Settlement, including

1. Any additional statutory reforms necessary for Defendants to fulfill their obligations or meet any of the metrics under this agreement; and
2. Any additional budgetary appropriations necessary for Defendants to fulfill their obligations or meet any of the metrics under this agreement, including, but not limited to, funding for employed or contractual positions to implement standards for supervision and regular evaluation of counsel against those performance standards (§IX) and training (§X).

VI. Rulemaking Procedure

A. Within ten (10) months from the Effective Date, Plaintiffs will provide Defendants with draft rules:

1. Providing revised minimum qualifications to serve as Counsel; and revised eligibility standards to serve as Counsel for specialized case types. 4 M.R.S. § 1804(2)(B); 1804(3)(E).
2. Requiring all Counsel to perform conflict checks before representation and standards for adequate representation of clients whose cases present conflicts of interest. See 4 M.R.S. §1804(2)(E).
3. Regarding handling complaints regarding performance of Counsel.
4. Regarding initial and regular ongoing training. See 4 M.R.S. §1804(3)(D).

B. Within eighteen (18) months of the Effective Date, Plaintiffs will provide Defendants with draft rules:

1. Providing performance standards for all Counsel for each of the following practice areas: juvenile practice; adult criminal practice; child protective practice; involuntary commitment practice; appellate practice; post-conviction practice; Lawyer of the Day practice. See 4 M.R.S. §1804(2)(D), 3(D).
2. Providing standards for supervision and regular evaluation of Counsel against those performance standards. See 4 M.R.S. §1804(2)(D), 3(D).
3. Providing caseload standards specific to the Lawyer of the Day (LOD) program.

C. In order for Plaintiffs to prepare draft rules on the topics identified above, a material component of this Agreement necessary to effectuate a fair, reasonable, and adequate settlement, Plaintiffs require data and information in Defendants' possession, within six (6) months from the Effective Date, Defendants will provide the following data and information to Plaintiffs:

1. The number of rostered attorneys currently accepting new MCILS cases, for each case-type currently delineated by MCILS;
2. The number of attorneys, for the past two years, that have failed to meet MCILS's current Standards for Qualification of Assigned Counsel, 94-649 C.M.R. c. 2, §§1-6, how MCILS learned about the failure, and the consequence (if any) MCILS imposed on the attorney;
3. The number of attorneys, for the past two years, who have waived into the rosters for specialized case types, broken down by type of waiver;
4. Materials used in MCILS's most recent minimum standards trainings
5. The number of attorneys MCILS has evaluated in the past two years, the results of the evaluations and the process of the evaluations.
6. For each attorney suspended or removed from MCILS's roster in the past two years: a description of how MCILS learned the information leading to suspension or removal; how MCILS investigated the allegations resulting in suspension or removal;, and whether the attorney was suspended or removed from the MCILS roster.
7. For the past year, the number of times a rostered attorney has withdrawn from representation in an MCILS case and the length of time that passed before a new attorney was appointed to the case, and barriers to prompter reassignment (if any)
8. Twenty applications, selected at random, for inclusion on MCILS rosters within the past two years
9. MCILS's current timekeeping requirements and procedures
10. Number of attorneys currently rostered to serve as Lawyer of the Day, broken down by court.

D. MCILS's provision of all documents identified in §§VI.C.1 – 10, above is expressly conditioned upon the following confidentiality provisions:

1. Class Counsel will not use or disclose those documents for any purpose whatsoever other than to prepare draft rules on the topics addressed in §VI.A.
2. Class Counsel shall not disclose or permit the disclosure of any documents to any third person or entity except as set forth in subparagraphs (a) – (d). Subject to these requirements, the following categories of persons may be allowed to review documents provided pursuant to §§VI.C.1 – 10:
    a. Parties' Counsel. Class Counsel, Defendants' Counsel, and employees of those attorneys who have responsibility for the preparation and trial of the action;
    b. Contractors. Those persons specifically engaged for the limited purpose of making copies of documents or organizing or processing documents but only after each such person has

completed the certification contained in Attachment A, Acknowledgment of Understanding and Agreement to Be Bound.

c. Consultants and Experts. Consultants, investigators, or experts (hereinafter referred to collectively as "experts") employed by the Parties or attorneys for the Parties to assist in the preparation and trial of this action but only after such persons have completed the certification contained in Attachment A, Acknowledgment of Understanding and Agreement to Be Bound; and

d. Others by Consent. Other persons only by written consent of the producing party or upon order of the Court and on such conditions as may be agreed or ordered. All such persons shall execute the certification contained in Attachment A, Acknowledgment of Understanding and Agreement to Be Bound.

E. Within 6 months of receipt of proposed rules identified in Section VI(B), Defendants will issue notices of rulemaking hearings under 5 M.R.S. § 8053 for rules addressing the subject matter identified in Section VI(A).

F. Rules adopted pursuant to this paragraph are intended by the Parties to be judicially enforceable, consistent with LD 565. Rules adopted pursuant to this subsection are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A, except that rules adopted to establish rates of compensation for assigned counsel and contract counsel under subsection 3, paragraph F are major substantive rules as defined in Title 5, chapter 375, subchapter 2-A.

G. Defendants will issue regulatory agendas under 5 M.R.S. § 8060 as necessary to promulgate rules under this Agreement.

VII. Metrics re Caseloads/Workloads

A. 6 months from Effective Date: Defendants will ensure that the caseloads of all Counsel can be accurately tracked and recorded consistent with (proposed) 94-649 CMR ch.4. The tracking system will be based both on reporting from Counsel and from judicial-branch data on the number of cases handled by Counsel.

1. Defendants have issued final rules establishing caseload standards for all Counsel. See 4 M.R.S. §1804(2)(C), (3)(G).
2. Defendants will issue a written report on what (if any) additional statutory changes or budgetary initiatives are necessary to comply with those caseload standards.

B. 2 years from Effective Date:

1. No more than 25% of Counsel included on the roster(s) for representation of indigent defendants who have been indicted for a crime punishable by imprisonment are operating with waivers from the caseload limits, such that 75% or more of Counsel are operating within the caseload limits.

a. Until such time that MCILS alters the current "case type" roster categories, the "case types" from which the determination of compliance with caseload standards for §§VII.B.1, 2, and 3 will be made are:

(i) "Cases with Drug Offense";

(ii) "Homicide Cases";

(iii)"Operating Under the Influence Cases";

(iv)"Other Felony Cases";

(v) "Serious Violent Felony Cases"; and

(vi)"Sexual Offense Cases".

2. Recognizing that new national recommendations on caseload standards are being issued in 2023, Defendants will engage in a mandatory re-evaluation of their initial proposed caseloads standards in 2025 and evaluate whether those caseloads should be amended. Based on that review, MCILS will issue a written recommendation on whether the caseload standards should be amended. As part of this mandatory re-evaluation process, Defendants will consider, at minimum, the new national recommendations on caseload standards.

C. <u>3 years from Effective Date and thereafter:</u>

1. No more than 10% of Counsel are operating with waivers from the caseload limits, such that 90% or more of Counsel are operating within the caseload limits.

VIII. Metrics re Minimum Qualifications and Conflicts of Interest

A. <u>1 year from Effective Date</u>:

1. Defendants will issue final rules establishing:

   a. Revised minimum qualifications standards for all Counsel, including standards for minimum experience and initial training. See 4 M.R.S. §1804(2)(B).

   b. Revised minimum eligibility standards for attorneys to serve as Counsel for specialized case types. See 4 M.R.S. §1804(2)(B), 3(E).

   c. Standards requiring all Counsel to perform conflict checks before representation and standards for adequate representation of clients whose cases present conflicts of interest. See 4 M.R.S. §1804(2)(E).

2. At minimum, these qualifications, eligibility, and conflicts standards will

   a. Include written procedures for implementing and enforcing these qualifications standards.

b. Involve consideration of Massachusetts CPCS standards to the extent applicable. https://www.publiccounsel.net/assigned-counsel-manual/

c. Involve consideration of the existing eligibility requirements set forth in 94-649 C.M.R. ch. 3.

d. Take into account Plaintiffs' proposed standards provided to Defendants under this Agreement and recommendations of the consultants engaged under this Agreement.

e. Ensure that cases assigned to Counsel who do not meet the qualifications standards for that case type will be promptly rejected and reassigned unless Counsel obtains a waiver of the qualifications standards, and direct Counsel to promptly withdraw.

   (i) MCILS will grant waivers only in extraordinary circumstances where doing so is necessary to protect a client's interest.

   (ii) Waivers will be granted on a case-by-case basis (*i.e.*, they will allow an attorney to handle a specific case or cases, not to exceed the caseload limits generally).

   (iii) Waivers will be capped based on the percentages set forth below (*i.e.*, after three years from the Effective Date, only 25% of Counsel may be operating outside the qualifications and eligibility standards at any given time).

f. Require that all participating attorneys agree, as a condition of accepting cases, to comply with all MCILS rules.

3. Defendants will issue a written report on what (if any) additional statutory changes or budgetary initiatives are necessary to comply with those qualification standards

B. <u>2 years from Effective Date</u>:

1. 85% of Counsel new to the roster meet qualifications standards
2. 50% of Counsel on existing roster (as of the date standards are issued) meet qualifications standards

C. <u>3 years from Effective Date and thereafter:</u>

1. 75% of all Counsel meet qualifications standards

IX. Metrics re Performance Standards & Evaluation

A. <u>Within 3 months of the Effective Date, Defendants will initiate system-wide evaluation procedures consisting of the following:</u>

1. Plaintiffs and Defendants will jointly establish a schedule for observation of court proceedings in each of the eight prosecutorial districts to be completed within 12 months of the Effective Date of this Agreement. Those court proceedings will include Lawyer of the Day appearances.

2. On a quarterly basis, Defendants will collect and review system-wide data as outlined in Section XII below, including concerning (i) the number of Counsel requests made for investigations and experts; (ii) the number of motions filed on substantive issues; (iii) the frequency with which cases are resolved by outright dismissal or nonconviction disposition; (iv) the frequency of please to a lesser charge; and (v) the number of trials conducted and the outcome of the trials.
3. No later than 18 months after the Effective Date of this Agreement, the Parties will confer regarding areas in which the Parties agree that systemic improvements can be implemented through training and jointly agree to the subject matter and/or specific training to be provided in order to prioritize topics of concern arising out of the court observations, and system-wide data outlined above.
4. No later than two years after the Effective Date, Defendants will, based on the Parties' jointly identified areas of concern following observation, implement changes to Defendants' training program to focus on those areas of concern which the Parties agree could be constructively addressed by additional training.
5. Following the initial period of court observations, review of system-wide data, and training implementation, the Parties agree to continue joint observations of court proceedings and review of system-wide data. Defendants shall continually evaluate and, where supported by court observations and system-wide data, revise the training offered by MCILS to address identified areas of concern.
6. Conferences between the Parties and, when directed by the Executive Director, court observations, will include MCILS training staff.

B. <u>2 Years from the Effective Date of this Agreement:</u>

1. Defendants will issue final rules establishing:
    a. Performance standards for all Counsel for each of the following practice areas: juvenile practice; adult criminal practice; child protective practice; involuntary commitment practice; appellate practice; post-conviction practice; Lawyer of the Day practice. See 4 M.R.S. §1804(2)(D), 3(D).
    b. Standards for supervision and regular evaluation of Counsel against those performance standards. See 4 M.R.S. §1804(2)(D), 3(D).
    c. Standards for handling complaints regarding the performance of counsel.
2. At minimum, these final rules will:
    a. Include written procedures for implementing and enforcing these standards.

b. Involve consideration of Massachusetts CPCS standards to the extent applicable. https://www.publiccounsel.net/wp-content/uploads/Assigned-Counsel-Manual.pdf

c. Involve consideration of MCILS's existing performance standards, 94-649 C.M.R. ch. 102.

d. Take into account Plaintiffs' proposed standards provided to Defendants under this Agreement and recommendations of the consultants engaged under this Agreement.

e. Require attorneys to agree that, by accepting MCILS-assigned cases, they agree to abide by the applicable performance standards.

3. Defendants will issue a written report on what (if any) additional statutory changes or budgetary initiatives are necessary to comply with these standards for performance, supervision and evaluation, and complaint investigation

C. 3 years from Effective Date and each year thereafter, Defendants will initiate individual evaluation of rostered counsel on a randomized basis, consisting of:

1. 20% of Counsel new to handling MCILS cases (defined as Counsel who have been handling MCILS cases for fewer than 5 years total), and 5% of experienced Counsel (defined as Counsel who have been handling MCILS cases for 5 years or more total) will have been randomly selected for evaluation and evaluated by MCILS against applicable performance standards in the past 12 months.

   a. Evaluation will at minimum include review of: Counsel's submitted time records for the past twelve months; three randomly-selected case files for cases handled by Counsel in the past twelve months; three samples of Counsel's written work-product (for example, substantive motions) filed in the past twelve months; and at least one in-person court observation of Counsel.

   b. MCILS staff will meet with Counsel selected for evaluation.

   c. Evaluation criteria will be drawn from MCILS's enacted rules on performance standards and will focus on:

      (i) Prompt and consistent client communication, including initial client interviews with client and communication with client concerning possible dispositions and plea negotiations;
      (ii) Pretrial preparation, including witness interviews and appropriate use of investigators and experts;
      (iii) Frequency and quality of legal research and filing of memoranda of law;
      (iv) Conduct of trials and litigation of substantive motions;

(v) Billing practices, including whether counsel are maintaining contemporaneous time records showing time spent on each task for each case;
(vi) Cooperation with Defendants' training, supervision, evaluation, and complaint investigation procedures;
(vii) Lack of substantiated client complaints.

d. MCILS staff will provide a written evaluation based on the above evaluation criteria and meet with Counsel to discuss that evaluation.

e. If an attorney has been evaluated as meeting performance standards, then the attorney will be exempt from selection for random evaluation for the next 3 years.

2. 95% of all complaints regarding Counsel's performance in past 12 months will have been investigated and resolved by MCILS staff.

3. 95% of Counsel found to not meet performance standards as a result of their evaluation will be either:

   a. removed from the roster, or

   b. placed on a probationary period, provided with additional training and supervision for at least the next 12 months, and subject to a new evaluation at the conclusion of that 12 months.

4. Defendants will issue a written report on what (if any) additional statutory changes or budgetary initiatives are necessary to comply with these standards for performance, supervision and evaluation, and complaint investigation.

X. Metrics re Training

A. <u>1 year from Effective Date</u>

1. Defendants will issue final rules establishing standards for initial and regular ongoing training, supplemental to 94-649 CMR ch. 2, §5. See 4 M.R.S. §1804(3)(D).

2. At minimum, standards will

   a. Provide for a substantial portion of trainings to occur in-person.
   b. Provide that counsel will be compensated for their time spent in trainings.
   c. Provide that the content and frequency of trainings be re-evaluated by Defendants on an annual basis based on the outcome of the system-wide and individual evaluations outlined in Section IX above and the system-wide data collected under Section XII below.
   d. Include written procedures for implementing and enforcing these training standards.
   e. Require that newly rostered attorneys without criminal defense experience complete a robust onboarding training analogous the

"zealous advocacy training" provided by the Massachusetts Committee for Public Counsel Services. https://www.publiccounsel.net/assigned-counsel-manual/

f. Require that attorneys participate in at least 8 hours of annual training to remain on the MCILS roster.

g. Involve consideration of the Massachusetts CPCS standards to the extent applicable. https://www.publiccounsel.net/assigned-counsel-manual/

h. Take into account Plaintiffs' proposed standards provided to Defendants under this Agreement.

3. Defendants will issue a written report on what (if any) additional statutory changes or budgetary initiatives are necessary to comply with training standards

B. 2 years from Effective Date

Subject to the legislative appropriation of funding for training staff consistent with the FY '24-'25 request of MCILS:

1. 85% of Counsel new to the roster have met training standards in past 12 months

2. 50% of Counsel on existing roster (as of the date standards are issued) have met training standards in the past 12 months

C. 3 years from Effective Date

Subject to the legislative appropriation of funding for training staff consistent with the FY '24-'25 request of MCILS:

1. 85% of all Counsel have met training standards in the past 12 months

XI. Metrics re Lawyer of the Day

A. While operating under the present, case-specific electronic docket access afforded to MCILS by the Judicial Branch, Defendants will continue to coordinate with the Judicial Branch, including individual courts and/or clerks, to facilitate the presence of qualified counsel to serve as Lawyer of the Day.

B. Once MCILS has, in the discretion of the Executive Director, obtained timely access to data reflecting the performance of Counsel serving as Lawyer of the Day, Defendants will adopt performance standards for Lawyers of the Day and include the Lawyers of the Day in the supervision addressed in §IX, above.

1. Defendants will issue a written report on what (if any) additional statutory changes or budgetary initiatives are necessary to comply with those standards.

2. Defendants will take into account Plaintiffs' proposed standards provided to Defendants under this Agreement.

XII. Data Collection and Reporting

A. The Parties jointly agree that thorough, accurate, and up-to-date data collection and analysis of Maine's indigent defense system is critical to Defendants' ability to perform its obligations as required by statute and this Agreement. To that end:

1. Defendants will engage a consultant to advise the Parties on data collection and analysis.
2. Defendants will engage the consultant and Defendants will pay the costs of the consultant. Defendants will seek grant funding to cover all or some of the costs of retaining the consultant, including available federal grant funding for indigent defense through the Byrne-Jag program and the BJA Strengthening the Sixth Program.
3. By the Effective Date, the Parties will confer in good faith and agree on the contents of the Request for Proposals ("RFP") to be issued relative to the consultant. Neither Party will have supervisory authority over the consultant. The consultant will maintain the confidentiality of all confidential information they obtain.

B. In order to permit Plaintiffs to assess compliance with the provisions of this Agreement, Defendants will:

1. Promptly provide to Plaintiffs copies of the following documents upon their finalization and any subsequent amendment:
    a. The reports identified above on what (if any) statutory changes or budgetary initiatives are necessary to implement and enforce with the newly issued standards
    b. Copies of all rules regarding which Defendants plan to issue notices of rulemaking hearings under 5 M.R.S. § 8053.
2. Provide quarterly reports to Plaintiffs containing:
    a. To the extent made reasonably available to MCILS, meaning in a form/manner not requiring individual access and review of the dockets of individual cases to which MCILS rostered counsel has been assigned by MCILS, data concerning case assignments (number and types of cases) and caseloads of each public defender and private contract attorney
    b. Data concerning (i) the number of counsel requests made for investigations and experts; (ii) the number of motions filed on substantive issues; (iii) the frequency with which cases are resolved by outright dismissal or nonconviction disposition; (iv) the frequency of please to a lesser charge; and (v) the number of trials conducted and the outcome of the trials.
    c. The number of complaints received concerning contract or employed counsel and how those complaints were resolved
    d. Copies of all new policies or procedures.

XIII. Court Review and Approval. This Settlement Agreement is subject to approval by the Court pursuant to M. R. Civ. P. 23 in the context of the Action.

A. The Parties will use their best efforts to effectuate this Settlement Agreement, including cooperating in promptly seeking the Court's approval of the Settlement Agreement, the giving of appropriate Class Notice under M. R. Civ. P. 23(d) and (e), and the implementation of a four-year stay of the Remaining Claims, as follows:

1. Within seven (7) days after the Execution Date, the Parties will jointly file with the Court a stipulation for suspension of all litigation deadlines pending approval of this Agreement.

2. Within twenty-eight (28) days of the Execution Date, Class Counsel and Defendants' Counsel will file this Agreement with the Court and will file a joint motion for the Court to direct notice of the settlement to the class, requesting that the Court:

a. Determine, preliminarily, that it is likely to be able to approve this Agreement, justifying dissemination of Class Notice;

b. Schedule a Final Approval Hearing to:
(i) determine, finally, whether the Settlement Class satisfy the applicable requirements of M. R. Civ. P. 23(a) and 23(b)(2) and should be finally certified for purposes of judgment;
(ii) review objections, if any, regarding the settlement;
(iii) consider further the fairness, reasonableness, and adequacy of the settlement; and
(iv) consider whether the Court will issue the Final Order and Judgment Approving Settlement and issuing a four-year stay of the action;

c. Set a briefing schedule for the Final Approval Hearing;

d. Consider and determine that the proposed Class Notice and Notice Program, including the deadline for members of the Settlement Class to assert objection(s) ("Objection Deadline"), comply with the guidance of M. R. Civ. P. 23(e) , due process, and provide appropriate notice;

e. Direct Class Counsel and Defendants' Counsel to cause the Class Notice to be distributed on or before the Notice Date in the manner set forth in the Notice Program, the cost of which will be paid by Defendants;

f. Require any member of the Settlement Class who wishes to object to the fairness, reasonableness, or adequacy of the settlement to submit to Class Counsel, postmarked on or before the Objection Deadline, a statement of his or her objection, as well as the specific reason(s), if any, for each objection, including any legal support that the Settlement Class member wishes to bring to the Court's attention and any evidence that the Settlement Class member wishes to introduce in support of his/her objection, and to state whether the Settlement Class member and/or his/her counsel wish to make an appearance at the Final Approval Hearing, or be barred from separately objecting;

g. Require Class Counsel to file with the Court all objections received by the Objection Deadline.

h. Suspend and extend all applicable pretrial deadlines in the Action so that the Parties will in no way be prejudiced by their efforts to resolve the Action by means of this settlement; and

i. Establish the date and time of:
(i) the Final Approval Hearing;
(ii) the Notice Date; and
(iii)the Objection Deadline.

3. Within fourteen (14) calendar days after the Court's order directing notice to the Class of this Agreement, Class Counsel and Defendants' Counsel will cause the Court-approved Class Action Settlement Notice to be distributed to the members of the Settlement Class, in accordance with the Notice Program.

4. Members of the Settlement Class will have sixty (60) days, or such other time as the Court may provide, after the date of the Class Action Settlement Notice to object to the settlement.

5. Within twenty-one (21) calendar days after the Objection Deadline, Plaintiffs and Defendants will file a joint motion for final approval of this Agreement and the Parties' settlement. Such Final Order and Judgment Approving Settlement will:

a. Confirm the final certification of the Settlement Class;

b. Confirm that the Settlement Class comply with all requirements of M. R. Civ. P. 23(b), including confirmation of the adequacy of Plaintiffs as representatives of the Settlement Class;

c. Confirm that the Notice Program complied in all respects with the requirements of due process and M. R. Civ. P. 23 by providing appropriate notice to the Settlement Class;

d. Determine that this Agreement was entered into in good faith, is reasonable, fair, and adequate, and is in the best interest of the Settlement Class;

e. Make all appropriate and necessary findings of fact required to enter a final judgment pursuant to M. R. Civ. P. 58;

f. Issue a four-year stay of the Remaining Claims and bar Plaintiffs and all members of the Settlement Class from reasserting the Remaining Claims or substantially similar claims against Defendants for a period of four (4) years from the Date of Final Approval, unless as expressly permitted by the Court because the Court has determined that there has been a material and unremedied breach of this Agreement;

g. Order that each party will bear its own fees and costs in connection with the Action and the settlement thereof, except as provided in Section XIX below;

h. Address any disputes regarding the construction and/or enforcement of this Agreement pursuant to the procedures set forth in Section II.H and II.I, above.

B. The Parties will exercise their best efforts to schedule the Fairness Hearing within thirty (30) days after the Objection Deadline.

C. In the event that the Court does not approve the Settlement Agreement, then the Parties will meet and confer for a period of 30 days to determine whether to enter into a modified agreement prior to the resumption of litigation. If the Parties have not entered into a modified agreement within such 30-day period, then the Parties will seek a Court conference for the purpose of establishing a new Scheduling Order.

XIV. No Admission of Liability. This Settlement Agreement is a compromise of disputed claims and does not constitute an admission by Defendant to any of the claims or allegations asserted by Plaintiffs in the underlying lawsuit: claims which Defendants expressly deny.

XV. Construction. This Agreement has been negotiated and prepared among each of the Parties and their respective attorneys. The Parties accordingly agree that this Agreement shall be construed and interpreted without regard to the party drafting this Agreement, reflecting the involvement of all Parties in the drafting of this Agreement.

XVI. Choice of Law. This Agreement shall be governed by, and construed in accordance with, the laws of the State of Maine.

XVII. Advice of Counsel. The Parties represent that they know and understand the contents of this Agreement and that this Agreement has been executed voluntarily. The Parties each further represent that they have had an opportunity to consult with an attorney of their choosing and that they have been fully advised by the attorney with respect to their rights and obligations under this Agreement.

XVIII. Entire Agreement. No promise, inducement, understanding or agreement not expressly stated herein has been made by or on behalf of either Party. This Agreement contains the entire agreement of the Parties related to the subject matter of this Agreement.

XIX. Attorneys' Fees and Costs. In resolution of Plaintiffs' claim for attorneys' fees, costs, and expenses, Plaintiffs accept and Defendants will cause to be paid, $295,000.00 ("Fees Settlement Amount"). That payment will be effected by depositing the Fees Settlement Amount in an interest-bearing escrow account within 30 days of the Effective Date. The Fees Settlement Amount, plus accrued interest, will be paid to Plaintiffs' counsel within 30 days of the dismissal of the Action at the end of the four-year stay of litigation. If the Court lifts the stay prior to dismissal and the Parties resume litigation of the Action, then this provision for payment of the Fees Settlement Amount is void and has no effect, and Plaintiffs' claim for attorneys' fees will, instead, be decided by the Court in the ordinary course of litigation.

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SEEN AND AGREED TO:

FOR PLAINTIFFS

____
Andrew Robbins

____
Zachary L. Heiden
Carol Garvan
Anahita Sotoohi
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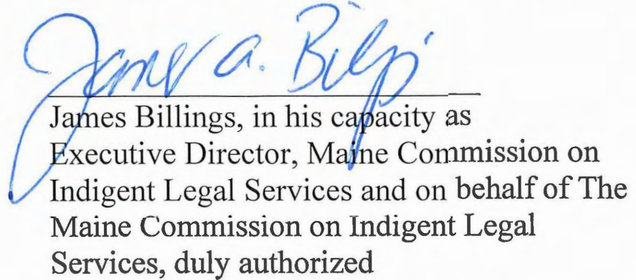
Counsel for Plaintiffs

FOR DEFENDANTS

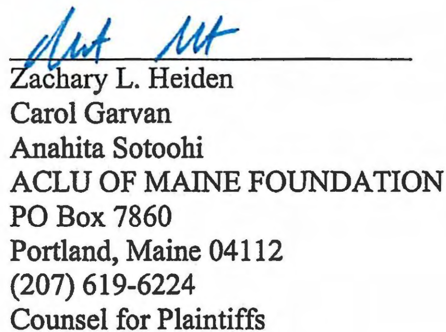


James Billings, in his capacity as
Executive Director, Maine Commission on
Indigent Legal Services and on behalf of The
Maine Commission on Indigent Legal
Services, duly authorized

SEEN AND AGREED TO:

FOR PLAINTIFFS

____
Andrew Robbins



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Counsel for Plaintiffs

FOR DEFENDANTS

____
James Billings, in his capacity as
Executive Director, Maine Commission on
Indigent Legal Services and on behalf of The
Maine Commission on Indigent Legal
Services, duly authorized

For himself and all others similarly situated,

Andrew Robbins

ATTACHMENT A

STATE OF MAINE
KENNEBEC, ss

SUPERIOR COURT
Docket No. KENSC-CV-22-54

ANDREW ROBBINS, et al.,

Plaintiffs,

v.

MAINE COMMISSION ON INDIGENT LEGAL SERVICES, et al.,

Defendants

ACKNOWLEDGMENT
AND
AGREEMENT TO BE BOUND

The undersigned hereby acknowledges that he/she has read the Confidentiality Order dated ____________________________ in the above-captioned action and attached hereto, understands the terms thereof, and agrees to be bound by its terms. The undersigned submits to the jurisdiction of the Kennebec County Superior Court in matters relating to the Confidentiality Order and understands that the terms of the Confidentiality Order obligate him/her to use documents designated CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER in accordance with the Order solely for the purposes of the above-captioned action, and not to disclose any such documents or information derived directly therefrom to any other person, firm or concern.

The undersigned acknowledges that violation of the Confidentiality Order may result in penalties for contempt of court.

Name: ______________________________________

Job Title: ______________________________________

Employer: ______________________________________

Business Address: ____________________________

____

____

Date: _______________ _________________________
Signature

EXHIBIT 2

Notice of Proposed Settlement

***Robbins v. MCILS*, Case No. KENSC-CV-22-54, Kennebec Superior Court**

Please Read this Notice Carefully.

This is a Notice of a Class Action and Proposed Settlement Regarding Criminal Defense Representation in Maine for People Who Cannot Afford an Attorney.

A Maine State Court approved this Notice and authorized its posting.

This is **NOT** a solicitation from a lawyer. You will **NOT** be asked to pay any money for this case under any circumstances.

What is the purpose of this Notice?
This notice contains information about a proposed settlement of a class action case challenging Maine's criminal defense system for people who cannot afford an attorney. It summarizes the case and the proposed settlement, provides instructions on how to comment on or object to the settlement, and explains what happens next.

What is this case about?
Plaintiffs claim that the Maine agency that oversees criminal defense attorneys for poor people has failed to ensure that those attorneys provide effective assistance of counsel, because the agency has not properly trained, evaluated, supervised, and supported those attorneys. Plaintiffs claim that, as a result, the State cannot guarantee that those attorneys provide effective assistance to their clients, including meeting with clients, counseling them about legal options, and advocating for them in court. This case is not about overturning anyone's criminal convictions. Instead, this case seeks to reform the public defense system by advocating for structural changes and requiring the State to create and enforce rules about how lawyers do their job.

Who are the Class Members?
All individuals who are or will be eligible for the appointment of competent defense counsel by the Superior or District Court pursuant to 15 M.R.S. §810 because they have been indicted for a crime punishable by imprisonment, and they lack sufficient means to retain counsel.

Who brought this case?
Plaintiffs Andrew Robbins, Brandy Grover, Ray Mack, Malcolm Peirce, and Lanh Danh Huynh filed this case on March 1, 2022 on behalf of themselves and all others in similar situations across the State.

Where is this lawsuit pending?
This case is pending in Kennebec County Superior Court before Justice Michaela Murphy.

Who is this lawsuit against?
This case is against the Maine Commission on Indigent Legal Services, its commissioners, and its Executive Director.

Who is settling?
The Plaintiffs and Defendants have agreed to a proposed settlement and jointly asked the Court to approve it.

Who are the lawyers for the Plaintiffs?
The class is represented by lawyers at the American Civil Liberties Union of Maine Foundation, P.O. Box. 7860, Portland, ME 04112; Preti Flaherty, 1 City Center, Portland, ME 04101; and Goodwin Procter, 100 Northern Avenue, Boston, MA 02210.

Can I get any money from this lawsuit?
No. This lawsuit is not about money. It seeks a court order explaining the State's obligations and requiring the State to meet them.

Can I overturn my criminal conviction?
No. This lawsuit is not an attack on any individual criminal conviction or plea. The

lawyers for the Plaintiff Class cannot advise you on these matters. Nothing in this settlement prevents you from bringing an individual claim to challenge your conviction.

Do I have to pay any lawyers?
No. The Plaintiffs' attorneys will be paid by the State in connection with this settlement. You do not have to pay anything.

What are the key terms of the settlement?
You can review the full proposed settlement agreement and the motion to the court to approve the settlement here: https://www.aclumaine.org/en/cases/sixth-amendment-class-action. Key terms of the settlement include:

- The State will adopt new rules governing who can be a lawyer for people who cannot afford a lawyer.
- The State will monitor the number of cases those lawyers are handling to make sure that every client gets proper attention.
- The State will adopt rules for minimum qualifications and training for lawyers.
- The State will evaluate the performance of lawyers to make sure they are doing everything they should do for their clients.
- The Parties in this case will ask the legislature to open public defender's offices where needed to provide enough lawyers.
- The State will provide regular reports so that Plaintiffs can monitor whether the State is doing what it promised.
- The State will pay $295,000 for Plaintiffs' attorneys' fees and costs.
- In exchange, this case will be put on hold and in four years, if the State has done everything it promised to do, then the case will be dismissed.
- If the State does not do what it promises to do, then the case will continue.

What are my options?
Any Class Member who objects to the settlement can submit an objection and appear at a Fairness Hearing that will be held on ______ at ___a.m. at the Capital Judicial Center in Augusta. To submit a written objection, you must send a letter titled "Objection to Class Settlement in *Robbins v. MCILS*, No. KENSC-CV-22-54" to ACLU of Maine, P.O. Box. 7860 Portland, ME 04112. You can also write in support of the settlement. Any written comment or objection must be postmarked by _______. Your objections will be provided to the Court, which will consider them in deciding whether to approve the settlement.

If you send a written objection, please include your 1) name and address, 2) the specific reasons for your objection, 3) whether you plan to appear at the Fairness Hearing, and 4) any legal support, evidence, or documents you want the court to consider.

What happens next?
A Maine Superior Court Justice will hold a Fairness Hearing on ______ at ___a.m. After that hearing, the judge will decide whether the settlement should be approved as fair and reasonable. You are not required to attend any hearing, but you may if you wish.

If the Court approves the settlement, all Class Members will be bound by the settlement. This means you cannot make similar legal claims against Defendants for systemic failures in the State's indigent defense system for four years, but can make those claims after four years.

The settlement does **not** prevent you from bringing an individual claim to challenge your conviction.

How do I get more information?
Do not call or write any judge or court seeking more information. If you have any questions concerning this notice or the settlement agreement, please contact ACLU of Maine at (207) 774-5444 or P.O. Box. 7860 Portland, ME 04112. You may review the full settlement agreement and court documents at https://www.aclumaine.org/en/cases/sixth-amendment-class-action.

STATE OF MAINE
KENNEBEC, ss.

SUPERIOR COURT
DOCKET NO. KENSC-CV-22-54

Andrew Robbins, et al.,

Plaintiffs,

v.

Maine Commission on Indigent Legal Services, et al.,

Defendants.

Order Approving Joint Motion to Give Notice to the Class of Proposed Settlement and to Make Further Orders as Part of the Settlement Approval Process

Before the Court is the parties' Joint Motion to Give Notice to the Class of Proposed Settlement and to Make Further Orders as Part of the Settlement Approval Process. Under Maine Rule of Civil Procedure 23, **I MAKE THE FOLLOWING DETERMINATIONS AND ORDERS**:

1. This Order incorporates by reference the definitions and terms in the Settlement Agreement so that they have the same meaning in this Order.

2. The Court **GRANTS** the parties' joint request for a preliminary review of the Settlement Agreement under Maine Rule of Civil Procedure 23 and finds that the parties have made the required "showing that that the court will likely be able to: (i) approve the proposal under Rule 23[]; and (ii) certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(e)(1); *see also* 1981 Advisory Notes to Me. R. Civ. P. 23 (noting that the federal rule provides an "appropriate guideline[] for class action practice in Maine."). The Court determines, on a preliminary basis only, that the proposed settlement likely is fair, reasonable, adequate.

3. The Court directs notice of the proposed settlement to the class as set forth in the parties proposed Notice of Proposed Settlement, according to the procedures in the parties' proposed Notice program. The proposed Notice Program is reasonably calculated to reach the Class Members and advise them of the settlement and their opportunity to object. The proposed Notice provides notice in a straightforward, reasonable manner and adequately advises Class Members of: the terms of the proposed Settlement and the benefits it would provide to Class Members; their right to object to or the Settlement and the procedure for doing so; and the date, time and location of the Final Approval Hearing. The Court further finds that the Notice comports with the requirements of Rule 23 and due process.

4. The Court **APPOINTS** as Class Counsel: Carol J. Garvan, Zachary L. Heiden, and Anahita D. Sotoohi of the ACLU of Maine; Kevin P. Martin, Gerard J. Cedrone, Jordan Bock, and Shweta Rao of Goodwin Procter; and Matt Warner and Anne Sedlack of Preti Flaherty.

5. Consistent with the Settlement Agreement and the approved Notice to the Class of the proposed Settlement, this Order establishes the following deadlines:

   a. Within 14 calendar days of entry of this Order, the Notice of Settlement will be posted in the common areas of all Maine jails and 72-hour holding facilities: York County Jail, Cumberland County Jail, Androscoggin County Jail, Kennebec County Correctional Facility, Two Bridges Regional Jail, Knox County Jail, Franklin County Jail, Somerset County Jail, Aroostook County Jail, Hancock County Jail,

Oxford County Jail, Penobscot County Jail, Piscataquis County Jail, Waldo County Jail, and Washington County Jail.

b. Within 14 calendar days of the entry of this Order, counsel for the parties will, via telephone, U.S. first class mail, and by email if an email address is available, ask county officials to personally deliver the Notice of Settlement to class members who are in custody at any Maine jail or 72-hour holding facility and unable to access the common areas.

c. Within 14 calendar days of the entry of this Order, counsel for the parties will request that the Notice of Settlement appear in print in the Portland Press Herald, Lewiston Sun Journal, Kennebec Journal, and Bangor Daily News.

d. Within 14 calendar days of the entry of this Order, counsel for the parties will make a request to each Maine trial court judge, via email if an email address is available and via U.S. first class mail, the Notice of Settlement. The parties will request that each judge distribute the Notice of every defendant appearing in a Maine criminal court.

e. Within 14 calendar days of the entry of this Order, counsel for the parties will request that the Notice to be posted in a visible location, in every location where arraignments are held in Maine's courthouses. Counsel for the parties will send, via email, the Notice to the clerk of each courthouse. The parties will request that a copy of the Notice be provided to any individual upon request.

f. The Court finds that these methods of notification constitute an reasonable method of notifying Class Members of the Action, the proposed Settlement, and their rights with respect to it. The Court finds that the mailing, emailing, and posting of notices to Class Members as set forth in these paragraphs complies with all constitutional and statutory requirements, including all due process requirements.

g. Within 60 calendar days of the parties' request for the posting of the Notice of Settlement as described above, any objection to the Settlement, containing the information required by the Notice of Settlement, must be timely postmarked and mailed to the ACLU of Maine.

h. Within 21 calendar days of the Objection Deadline, the parties will file a joint motion for final approval of the proposed Settlement.

6. On ________________________, 2023 at _______ __.m. in Courtroom ______ at the Kennebec County Superior Court, 1 Court Street, Augusta, Maine 04330, counsel for the parties must appear before the undersigned for a Final Approval Hearing, at which the Court will consider whether the proposed settlement is fair, reasonable and adequate.

11. All proceedings in this matter—except those authorized by this Order and in the Settlement Agreement or in furtherance of the proposed settlement—are stayed until further notice.

It is so ordered.

Date:

Justice, Maine Superior Court