



MAINE COMMISSION ON
INDIGENT LEGAL SERVICES

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Executive Director

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Committee on Government Oversight
C/O Office of Program Evaluation and Government Accountability
82 State House Station
Augusta, ME 04333

Senator Chenett, Representative Mastraccio:

I am writing to set forth the response of the Maine Commission on Indigent Legal Services to the letter dated February 21, 2019 submitted by Senator Lisa Keim. The Commission strongly disagrees with Senator Keim's assertions of fraud and mismanagement. I will address each of the Senator's assertions individually.

Falsification of Attorney Vouchers:

Senator Keim points to the sum of approximately \$275,000 being paid to a single attorney in fiscal year 2018 as "blatant evidence" of fraud. Commission investigation, however, has demonstrated that the payment in question covered the work of numerous attorneys, not a single attorney.

The Commission has been investigating amounts paid to various lawyers performing indigent legal services, including the payment amount identified in Senator Keim's letter. In the Commission's attorney billing system, cases that are assigned to an attorney are entered in that attorney's name, the so-called lead attorney. In firms with multiple attorneys, however, attorneys other than the lead attorney may bill time under an individual case. The payment on the case is listed as a payment to the lead attorney.

As part of its investigation, the Commission requested that its billing system vendor provide data on all of the hours billed by individual attorneys for each day during the fiscal year, regardless of who was the "lead" attorney on any individual voucher. That data showed that the lead attorney, who was paid the \$275,000 in question, actually billed the Commission for far fewer hours than reflected by the overall voucher payments.

This finding suggested a different problem with this attorney's law firm. Numerous hours had been billed by other lawyers in the firm working on the lead attorney's cases, raising concerns about the firm's adherence to the principal of vertical representation – the idea that the attorney assigned to a case would perform all or most of the work on a case. This issue has been brought to the attention of the law firm in question. Moreover, the Commission is aware that the issue of multiple attorneys working on cases assigned to a single attorney in this firm has come to the attention of the Sixth Amendment Center. The Commission looks forward to the Sixth Amendment Center's recommendations on the issue of vertical representation and will consider that guidance in determining future steps to ensure vertical representation in Maine's system.

As part of its investigation, the Commission challenged a small number of other attorneys to explain their billing data. One such attorney performed an internal audit of billing and discovered that a division of

labor between the attorney and staff led to double billing in certain circumstances. Based on this internal audit, prompted by the Commission's inquiry, this attorney has identified the extent of the overbilling and has agreed to make substantial reimbursement to the Commission.

Overall, the Commission has investigated, and continues to investigate, attorney billing and has not found evidence demonstrating fraud.

Representation Allocated to People with the Means to Hire Counsel:

In Maine, individual judges, not the Commission, are charged with determining whether a person is indigent and entitled to counsel at State expense. The Commission does employ financial screeners who assist most courts in making the indigency decision by interviewing applicants and making recommendations to the court on whether the person is indigent, and if so, whether the person has the means to reimburse the State for some or all of the cost of representation. If the court orders a person to make reimbursements, the financial screeners track payments and engage in enforcement efforts. This process, together with the statutory process for bail money to be set-off against counsel fees paid, generated more than \$1 million in counsel fee reimbursements in fiscal year 2018.

In addition, the Commission employs a part-time financial screener who investigates financial information submitted to the court. Discrepancies found are reported to the court for reconsideration of the indigency decision. Overall, however, this process has confirmed that the vast majority of people found indigent by the court are deserving of assigned counsel. For example, in 2018, out of 339 cases reviewed, this screener found evidence that should be brought to the courts attention in only 6 cases.

Senator Keim's letter also points to the potential that deserving individuals are being denied assigned counsel. As pointed out above, the courts, not the Commission, are responsible for the indigency decision.

Quality of Representation:

Senator Keim's letter asserts negligence in the Commission's failure to use tools to extract bulk data from its billing system regarding certain items she suggests are indicia of competence in representation. Such data would be very valuable if it was the only means by which to assess what lawyers are doing in the field. At the Commission, however, staff attorneys review a summary of the work performed and the disposition in every single case as part of the voucher review and payment process. As a result, Commission staff are in a position to assess the quality of representation on an ongoing basis. The staff can and do address issues identified in voucher review with individual attorneys, including failure to meet with clients and a perceived lack of pre-trial litigation practice.

That said, as part of the Sixth Amendment Center study, the Commission was asked to extract data on the items listed in Senator Keim's letter for criminal cases in a particular county. This was done and the data was provided to the Sixth Amendment Center. The data did reflect a more global and less granular look at work being performed than does the voucher review process. As such, the data did provide useful insights, and the Commission intends to incorporate this practice into future oversight efforts. This is precisely the type of guidance the Commission is hoping will be provided by the Sixth Amendment Center study, and the Commission is open to any improvements recommended.

Mismanagement of the Somerset County Contract:

As minutes of its meetings reflect, the Commission has wrestled with the status of this contract for a number of years. Note, however, that during that time, many policy-makers have pointed to the Somerset contract as a model that should be expanded statewide. Legislation to do so was introduced, but defeated, in consecutive Legislatures.

The Somerset contract is the type of flat fee contract that has come into disfavor among the majority of proponents of indigent legal services because the flat fee could incentivize lawyers to limit the hours worked and, thereby, increase the hourly return, an outcome most likely when the contract is awarded to the lowest of many competitive bids. Note, however, that in over twenty years, the Somerset contract has gone out to bid numerous times under both the Judicial Branch and the Commission, but has never attracted more than one bid. Moreover, since the Commission was created, feedback to the Commission regarding the quality of representation provided under the contract, which included input from prosecutors and presiding judges, has always been positive.

Although the cost per case under the contract has remained competitive with the average cost per case for assigned counsel cases, the hourly rate based on the amount of the contract and the hours reported by the contract attorneys has, in more recent years, gone from similar to the rate paid to assigned counsel to a substantially higher rate. The Commission raised this as a concern when the contract was last up for review. Given that the Legislature had recently decided to hire the Sixth Amendment Center to study five counties in Maine, including Somerset, the Commission decided to extend the contract for one year so that it can consider the results of the study in deciding whether, and if so on what terms, to put the contract back out to bid.

Conclusion:

At a legislative hearing in 2018, David Carroll, Executive Director of the Sixth Amendment Center, was asked to describe the essence of effective assistance of counsel. He said, paraphrasing, that lawyers need to have adequate training and experience, and they need to have the time and resources necessary to do the case. The Commission focusses all of its efforts on these goals through the most efficient use of the taxpayer money entrusted to it. We are open and transparent. Should the Committee decide to pursue an investigation, the Commission will fully cooperate.

Sincerely,



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