



SEN. JUSTIN CHENETTE, SENATE CHAIR
REP. ANNE-MARIE MASTRACCIO, HOUSE CHAIR

MEMBERS:

SEN. JAMES HAMPER
SEN. LISA KEIM
SEN. NATHAN LIBBY
SEN. LINDA SANBORN
SEN. JEFFREY TIMBERLAKE
REP. KATHLEEN R.J. DILLINGHAM
REP. AMY ARATA
REP. H. SAWIN MILLETT, JR.
REP. MARGARET O'NEIL

MAINE STATE LEGISLATURE
GOVERNMENT OVERSIGHT COMMITTEE

MEETING SUMMARY
November 9, 2020
Approved November 20, 2020

Call to Order

The Chair, Sen. Chenette, called the Government Oversight Committee meeting to order at 10:00 a.m. in the State House.

Attendance

Senators:	Sen. Chenette and Sen. Libby Participating in the meeting by Zoom: Sen. Timberlake and Sen. Keim Absent: Sen. Hamper and Sen. Sanborn
Representatives:	Rep. Mastraccio, Rep. Dillingham, Rep. Millett, Rep. Pierce and Rep. Arata Participating in the meeting by Zoom: Rep. O'Neil
Legislative Officers and Staff: Participating in the meeting by Zoom	Etta Connors, Adm. Secretary, OPEGA and GOC Clerk Danielle Fox, Director of OPEGA Matthew Kruk, Principal Analyst, OPEGA Amy Gagne, Senior Analyst, OPEGA
Executive Branch Officers and staff participating in the meeting by Zoom	John Pelletier, Executive Director, Maine Commission on Indigent Legal Services
Commissioners of Maine Commission on Indigent Legal Services participating in the meeting by Zoom	Joshua Tardy, Esq., Chair Michael Carey, Esq., Commissioner

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Sen. Chenette summarized the meeting procedures. The GOC convened with a quorum in Room 228, State House with members social distancing, wearing face masks and abiding by all of the procedures necessary for following the public health perspectives. Some GOC members will move to other locations in the building after Committee introductions and voting on several agenda items.

Introduction of Committee Members

The members of the Government Committee introduced themselves.

Summaries of February 28 and March 13, 2020 GOC Meetings

Motion: That the Summaries of the February 28 and March 13, 2020 GOC meetings are accepted. (Motion by Rep. Pierce, second by Rep. Dillingham, motion passed by unanimous vote.)

New Business

•Proposal to reclassify New Machinery for Experimental Research (NMER) from Category A (full review) to Category B (expedited review)

Director Fox said the next full tax evaluation scheduled for OPEGA to be working on is the New Machinery for Experimental Research (NMER) for tax exemption. It is a point-of-sale exemption from sales and use tax when entities are purchasing certain types of equipment. It is very close to another tax exemption on the books dealing with business machinery tax exemptions and was enacted at the same time.

As OPEGA started their research on NMER they realized that it fell more into the expedited category and does not meet the criteria for a Category A - full evaluation. In particular, it falls under the category of inputs and tangible products category which is a category of multiple expedited tax exemptions that OPEGA will have on the schedule to review under category B.

OPEGA is suggesting that the GOC consider moving the NMER exemption from the category of a full review and classify it as expedited in the input to tangible products category so it aligns with other tax exemptions that it is similar to.

If NMER is moved off the full evaluation list and into the expedited category, OPEGA would begin work on the Historic Preservation Credit for a full review, the next tax expenditure review on the established schedule of full reviews.

Rep. Arata asked if changing NMER's category allowed the exemption to proceed quicker or give the businesses some concrete information that they need in order to invest in this type of equipment. Director Fox said it does not change the exemption at all. This exemption has been on the books and would be ongoing. It does not change the exemption at all and continues to be ongoing as a broad-based point-of-sale exemption. Rep. Arata just wanted to clarify that they were not creating any uncertainty with companies.

Rep. Mastraccio agreed with the change of the review category for NMER and made the following motion:

Motion: That the Government Oversight Committee move the New Machinery for Experimental Research tax exemption from Category A, full review, to Category B, expedited review, and that the exemption be grouped with other exemptions in the inputs to tangible products category. (Motion by Rep. Mastraccio, second by Sen. Libby, motion passed by unanimous vote.)

RECESS

The Chair, Sen. Chenette, recessed the Government Oversight Committee at 10:11 a.m. to allow some Committee members to relocate to other rooms in the building.

RECONVENED

The Chair, Sen. Chenette, reconvened the GOC meeting at 10:16 a.m.

New Business con't

- **Presentation of OPEGA Report on Maine Commission on Indigent Legal Services (MCILS) (Part 1)**

Director Fox thanked Matt Kruk, Amy Gagne and Ariel Ricci, the OPEGA Analysts who worked on the MCILS review. A copy of Director Fox's report presentation slides is attached to the meeting summary and a copy of the MCILS report is posted on OPEGA's website at: <http://legislature.maine.gov/opega/opega-reports/9149>.

Rep. Mastraccio referred to the Defender Data system and asked if that is the system that has been used over the last ten years. Director Fox said OPEGA's time period for the review was for over the last ten years and used the data entered into that system. Rep. Mastraccio understands it is two different systems being talked about. One was the Advantage system which in the non-counsel State vendor payment system. She is trying to find out if there is a problem with the actual system that MCILS uses for payment, or is it the people putting the information in are not entering the correct or appropriate information.

Director Fox said OPEGA did not do an evaluation of the Defender Data system itself, although does believe that it could be implemented to add controls that would flag outlying values for MCILS and the attorneys entering the information. One of the primary issues identified is that when the data is entered, an attorney enters the information on a case into the system, their work entries and the hours they work on an individual work piece, they do not have good or consistent guidelines on how to enter that information. It is inconsistent and varies depending on which attorney is entering the information. She thinks it is less about the system, which OPEGA did not evaluate in and of itself, but more about the data entered that is the issue and the fact that there are not standards for entering that information. Also, the technology of the system is not being used as much as it could be.

Rep. Mastraccio wanted to be clear that the system is not the problem. She does not want someone coming back to say the system is too difficult. Director Fox said regardless of what system you have, if there is inconsistent entry of data and attorneys are not following the guidelines in terms of entering multiple attorneys under one attorney, or including paralegal hours in the attorney's hours, those problems would exist regardless of the system unless the system was designed to flag those entries, which the current system is not. She was not saying the system could not be designed to flag certain things, but the issue is that there are really no guidelines or standards that are communicated well to attorneys to enter that data into the system in the first place.

Sen. Keim referred to the paralegals being billed under attorney hours and asked if it is clear in their directions that they are not supposed to bill paralegals the same as an attorney. Director Fox said OPEGA was told that the Executive Director and the Deputy Executive Director interpret the rules to say that paralegal hours are included under administrative expenses so you cannot bill for the paralegal hours on top of an attorney's hours. She gave the example of an attorney works on a case on a day for six hours while a paralegal put in two hours.

That attorney could not bill for eight hours. The two hours of work by the paralegal are included in the six hours billed by the attorney. That is the interpretation of the rule by the Executive Director and Deputy Executive Director. Whether that information is communicated well to attorneys who are submitting their bills into the system is unclear. Some attorneys may understand that to be the case and others may not, but based on what OPEGA heard, it seems a rather common occurrence.

Sen. Keim asked if OPEGA saw that guideline written down anywhere? Are there no written rules about billing? Director Fox said the fee schedule in rule does talk about billing, but beyond that there are no guidelines provided to attorneys in terms of how to enter that into the system. There is information in the fee schedule and OPEGA understands the interpretation of that fee schedule by the Executive Director and Deputy Executive Director of MCILS, but how well that is communicated to billing attorneys is less clear. She said there are some occasions where an attorney can ask for a paralegal to be paid as a non-counsel vendor, but that would require a preapproval. We are aware that in some instances that happens, but that is a separate issue.

Sen. Keim referred to page 9 of the report where it discusses reviewing vouchers and commented that the Executive Director has spent a lot of time at the State House working on behalf of Criminal Law Advisory Committee (CLAC). She then referred to page 21 of the report and where OPEGA made note to “moving forward with a focus on the potentially more-impactful work related to indigency determinations.” Sen. Keim said because that falls into part two of the review, she hoped that Director Fox could explain what that work would look like and what that statement is referring to. Director Fox said, as noted at the beginning of her report presentation, this report is an expedited or abbreviated review. When the GOC originally tasked OPEGA with reviewing MCILS there were five scope areas, but because of issues that came to light, the Committee asked that OPEGA give part of the report sooner. The consistency of determining indigency is something that will be addressed in a subsequent report that OPEGA is currently working on.

Rep. Millett followed-up on Sen. Keim’s focus on the above sentence on page 21 where Director Fox indicated that the GOC and the Legislature may wish to direct OPEGA with a focus on the more-impactful work and if the Director was saying the GOC should not take specific action based upon OPEGA’s part two findings and defer to a more detailed analysis. He asked how the GOC might act more quickly and in a more forceful way if they wish to call legislative attention to the problems the Director has identified. Director Fox said that sentence is preceded by OPEGA’s concerns about whether or not the data, because of the inconsistencies in entries she spoke about earlier, will allow OPEGA to do the work they thought they could do using the information in the Defender Data system because it is inconsistent. It may not allow for the type of analysis that OPEGA wanted to do in terms of identifying potential attorneys where they could do further work. That kind of work would require case reviews of the files in attorneys’ offices for what OPEGA thinks is a relatively small number of instances. It is up to the GOC to determine the work that OPEGA does, but did not know if that is necessarily the best use of time if there is another entity that could maybe do that sort of case review more effectively. The GOC could then ask OPEGA to move on to the next phase of the MCILS review which talks about the issue of determining indigency.

Rep. Millett acknowledged that his question may be premature given the upcoming discussion of oversight, however, he wanted to encourage the GOC chairs, that before this Committee departs their role as the 129th they need to be thinking about how they frame a recommendation for the next Legislature and the general public to cure these problems and that they not just walk away from them. That is his only reason for raising the question at this time.

Sen. Chenette said at the end of the Director’s report presentation the GOC will talk about what the next steps look like, and particularly, the timeline for those discussions.

Director Fox continued with the report presentation.

Sen. Chenette went back to what Rep. Millett said and wanted to get clarification from Director Fox because as he reads the report and hears her presentation, he gets a sense that MCILS's staffing element is such a minor piece and that it is more, referring to page 33 of the report, "lacks adequate standard operating procedures and formal written policies." To him it is about the rules, policies, procedures, and financial structure and that we have to go back to the ground level to look at how this entire organization is set up and perhaps infuse some project management techniques before talking about staffing levels. He asked if that was an accurate reflection, or something that can be gleaned, from OPEGA's report. He was trying to get down to exactly what the GOC needed to be having discussions around and, as Rep. Millett said, how they frame this for the next Legislature because they are going to be the ones responsible for how we remedy this situation, either within the existing system or a new system.

Director Fox thought that was a fair assessment. If you just added staff you would still have a lot of the previously identified problems. She did not know if adding staff was going to do anything in terms of identifying high annual billing hours or necessarily providing the Commission the support it needs in terms of strategic direction, etc. While OPEGA does find that there is currently a lack of adequate staffing, just adding staff would not address the issues that OPEGA has raised in the report.

Rep. Mastraccio agreed with Sen. Chenette. What she has learned about statute is that every time the Legislature writes laws, rules follow and sometimes they are rules that the Legislature approves and sometimes they are not. It is like this statute was passed and then no rules were ever written. When you talk about the strategic plan, MCILS has everything they need to figure out what they are supposed to do, but if we are not doing what we are suppose to be doing for people who require indigent legal services, that concerns her. She thinks the GOC needs to act rather quickly and agreed with Rep. Millett that the Committee needs to be ready to act.

What concerns Sen. Keim is the Legislature correctly set MCILS up to do this job well. There is nothing in statute that would prohibit someone from managing this organization well, yet it fell down for a decade. She said part of the reason was poor leadership in the organization. She asked how, as legislators, when they are supposed to have oversight of these types of organizations, do they get needed information sooner. She has been working on issues regarding MCILS for a long time. MCILS is an organization that the Legislature is supposed to have oversight of and it has an important role in our society. She has been sitting on the Judiciary (JUD) Committee for four years and knew MCILS needed help, but the information on OPEGA's report is terribly concerning and wanted to hear how do they, as legislators, do better in this kind of work regarding oversight in other organization the Legislature has oversight of.

Director Fox did not think that was for her to say of how legislators should do this oversight function better. One of the things they have done is to task OPEGA with providing this report and hopes it has provided legislators with information that will inform improved efforts of oversight. She hopes that the MCILS report will highlight the issues the organization, or the Commission, is not focusing on and equips legislators with detailed information to be able to ask questions that will be helpful for a greater level of oversight by the Legislature.

Sen. Timberlake said that over the last few years Sen. Keim has brought to his attention MCILS's problems, but in listening to the report presentation it looks like there is just a few bad apples that are making it look like a bigger problem. He is not convinced that giving MCILS a lot of money is going to be the solution. It is more about making people accountable for what they are billing and to bill in a timelier fashion. He asked how the Legislature can do that.

Director Fox said OPEGA looked at the systems that are used to process payments and monitor whether or not billing is done accurately, not on how many attorneys were involved. The focus was whether or not the system would catch those sorts of things, identify overbilling or really high annual work hours and the current system

that MCILS is using, does not. OPEGA's report does speak to ways in which systems could be improved, either within the Defender Data system, with the guidance that is provided to attorneys in terms of how to bill so the data that goes into the system is good. OPEGA does offer suggestions about how to do risk-based auditing that can be improved moving forward and are internal and are Commission and agency functions that are in their existing statute now. There is nothing necessarily in statute that would be required to implement any of the improvements that OPEGA suggests in the report. Those things are all within the existing authority of the Commission and the agency and it is up to them to determine how many staff would be required to accomplish that and whether or not that would necessitate an increase in the amount of staff.

Sen. Chenette followed-up with Sen. Timberlake's point and what Director Fox just mentioned of it does not require a statutory change so basically, a legislative action in order for the Commission to be able to implement, at least the structural and policy adjustments as outlined as an OPEGA recommendation, does not necessarily mean they will do it. So, in order to ensure that, he is not talking staffing, but about the financial oversight structure and some of the outlines that Director Fox put forward as issues to catch the overbilling moving forward, it seems there might be a need for the Legislature to define what the expectations are and write it down somewhere. MCILS had the existing authority to create a formal process before this report was released.

Director Fox agreed that some of the improvements could be done within the existing authority, but obviously, changing staffing levels requires legislation. OPEGA's hope is that having this report in the GOC's hands and their subsequent MCILS report, will allow for legislators generally, or members of the committee of oversight, the JUD Committee, the ability to ask those questions of the Commission and staff. If those things are happening, they will get that feedback and will ask for whatever documentation, or reports, that they think are appropriate to ensure that these concerns, or others of the JUD Committee, are being addressed. OPEGA's intent is that their MCILS report will be a tool to facilitate that oversight and possibly, if the Legislature is dissatisfied with the response they are getting from any agency they oversee, they can use their authority to legislate to compel people to do certain things. OPEGA is hoping their report is a foundation for that work.

Sen. Keim said the observation that the expectations of the Commission and the Executive Director were not known by either, is a helpful observation. As the Committee discusses MCILS, she noted that she had familiarity from serving on the JUD Committee and knows that Committee will take this matter up and will discuss how to change things. Many of the necessary changes do not require legislation, but said we cannot do a good job with indigent legal services if we don't have more staff. It is going to have to be both. With the current MCILS there has been a total lack of financial stewardship and complete lack of quality oversight. We have done an incredible disservice with indigent legal services for the people of Maine and that is very disappointing.

Rep. Millett said he feels the need before the 129th GOC disappears to have a more formal recommendation for the improvements. Referring back to what Rep. Mastraccio said about when the Commission was created in 2009, they were directed to do certain things, but have not. They have not done the rule making, have a formal policy guidance or written communications. He is waiting to hear from the Chair of the Commission, Joshua Tardy, and look at his recommendations on subcommittees, staff requests and piloting the public defender program. It seems that the GOC would benefit, as a committee, to have at least a draft before them of legislation that would demand conformity to the normal process of rulemaking, compliance activities and work on a strategic plan so that legislation could be a product that the GOC might authorize going forward early in the 130th in order to be timely for discussion within JUD and the AFA Committees, as the budget issues are forthcoming. He asked if OPEGA could prepare some fairly direct draft legislation regarding both the Executive Director's responsibilities and the Commission's oversight for the GOC's consideration at their next meeting

Sen. Chenette thought it may be helpful to outline the report process. The GOC does have the authority to report out legislation in regard to a report and have had situations where they basically draft a proposal to go before the committee of jurisdiction, which in this case, would be the JUD Committee. He asked if Director Fox could frame for the GOC the process going forward. The GOC had the presentation of the report today and now there are other steps in the process. Because there still needs to be a public hearing and work session on the report where does legislation come into play?

Director Fox did not think there was any formal restriction on the GOC regarding when they could introduce legislation on an OPEGA report they have received. However, doing so today might be outside the normal process, but then again, they are in a position where the 129th is going out and the 130th will be coming in. It is always a little awkward when reports are received on the cusp of one legislature ending and another starting. The GOC's Committee Rules do say that you cannot hold a public hearing on a report earlier than two weeks after the presentation of the report. That is a bit of a concern because voting on something at the next meeting, November 20th, would be before the Committee could have a public hearing. The thought was there would be a public hearing for the 130th Legislature, who would be the ones to vote on any legislation that came before it, rather than the 129th. This is totally up to the GOC to decide, but would say that it would not be typical to make recommendations and vote on legislation the day of a report presentation. It is important to remember that the MCILS report only became public at 10:00 this morning when it was presented to this Committee. Interested parties, stakeholders and others have not had a chance to look at the report and it had been anticipated that there would be a public comment period in the early months of the 130th Legislature and that legislation, if there were any, would come from that Legislature and introduced to that Legislature, but that is not for OPEGA to say. She can say what process typically happens, but that is a decision that is up to the GOC.

Sen. Chenette said before the Committee gets to the next steps in the process, they do have 3 three individuals from MCILS at the meeting so GOC members can ask them questions. He introduced John Pelletier, Joshua Tardy and Michael Carey.

Rep. Millett referred to Commissioner Tardy's comment letter, as Chair of MCILS, included in OPEGA's MCILS report and noted that some steps are being taken that seem to reflect the tenor of the report. The subcommittee activity, the piloting of the public defender program and the focus of their role being strengthened. He asked, if Commissioner Tardy was willing to comment on how the GOC can be helpful to the new nine member Commission to accomplish the correcting of the weaknesses that the report cites. How can the 129th GOC be most helpful to the Commission to address MCILS's weaknesses and to do so in a timely fashion.

Commissioner Tardy said legislation from the GOC that mandated MCILS to perform certain functions and clarified the Commission's role and tells them to pick up the pace to implement procedures that carry out some of the recommendations from OPEGA's report, the Sixth Amendment Center report and the other independent reports probably has to come with some fiscal analysis as well. He finds OPEGA's report helpful to the momentum he hopes the Commission is trying to develop going into a very tough budget cycle. Commissioner Tardy lost zoom connection. He resumed and not knowing where he cut off said his point is that language in statute that mandates MCILS's course of action is helpful, that it builds on to the momentum that the existing new Commission has tried to develop as they go forward. The subcommittees created, which Commissioner Carey can talk about, has focused on a lot of OPEGA's report. The need for financial billing standards to clarify those billing standards, to better communicate them going forward and to have teeth in any reimbursement/claw back procedures for attorneys who overbill are very helpful. He does not think it is as simple as we just need more staff. He also does not necessarily agree with the comment by Sen. Timberlake that it is only a few bad apples. He thinks the Commission owns more that there are just a few bad apples. Financial systems need to be improved and he knows that Commissioner Carey and his subcommittee have been working diligently in that regard.

Commissioner Carey asked if he could respond to earlier questions that have been raised by the GOC. He said he is on MCILS's financial responsibility subcommittee and said that subcommittee had drafted a report for the entire Commission that was shared on February 24th. It was a draft because they were awaiting OPEGA's report to finalize that report and go forward. He said MCILS's report is entirely consistent with this report and they had anticipated almost every single one of the action items, at least all of the financial items.

Specifically, Rep. Mastraccio had asked about the Defender Data system and said he wanted to highlight first that he agreed with OPEGA's report and thinks this is a systemic failure and is not an issue of a software problem. It is a systemic failure, particularly, the use of the limited human resources of MCILS is not well used when doing manual work. The changes that will be needed for the Defender Data system to support smarter uses of technology to be most effective, they called for the expectation of a time card being entered within fourteen days after the date of the work. The report goes into detail about time currently is entered when vouchers are submitted which might be months, or years, after the day in question. The Commission subcommittee has suggested and the full Commission has agreed to, is to entering a timecard within fourteen days from the time the work is performed. That is a fundamental structural change in how the system is done and we don't yet have an estimate of how much time that will take, but it will take a certain amount of time at a certain amount of cost. That timecard is not just a question of entering the time for that day, they also expect to have the entry of aggregative amount of attorney time entered for non-MCILS billed clients, for CLE's and training, as well as, to support a better data analysis. The subcommittee spent a significant amount of time on the twelve hour billing and that is an absolutely critical first step. For twelve hour billing is that a flag kicks off whenever the total aggregate time entries for one day are over twelve hours. As the Director suggested, that might happen months, or years, after the fact and it is a simple email. There is no functionality within the system to go in and actually address the issues, but that is calling a problem to the attorneys' and staffs' attention. He said one of the subcommittee's members is former Sen. Katz, himself and Don Hornblower, a roster attorney in the Androscoggin area who shared one of the high billing alerts that he received. There were thirty-two different cases that were listed and the only thing listed were docket numbers for those particular cases. He needed to go into the system and search for each one of the thirty-two docket numbers separately and separately come up with a response outside the system to address that issue. It is proper to expect someone to be able to justify their time, but it needs to be done in a way that removes barriers to doing that properly. At the same time the staff addressing these issues is done in an unacceptably manual way. There are eight spreadsheets where a staff member cuts and pastes from the email into the spreadsheet each of the days that come in, follows up manually with the attorney and manually enters the results of that follow-up. That process is unacceptable and there is no reason for it. Changing that process will result in a systemic change and they do not know what the cost will be.

The subcommittee looked at the voucher review process and made a couple of suggestions for change. First, adding two levels of control on the voucher review process. When a particular voucher is looked at, it is not seeing the forests through the trees issue. What the system presents is the voucher. It does not present metadata such as what is the average cost for a particular time period that vouchers of this subtype have. As OPEGA's report suggested, there are max amounts that can be billed for any particular case type. It does not show whether that particular attorney had submitted a disproportionate number of billings over that max case type. It does not show whether that voucher includes days that are subject to a twelve hour flag. There is a significant amount of mediator that can, and should, be added to be able to automate the review if that review is manual. There should be additional triggers and automatic systems to be able to identify where the human should look at this particular voucher for more information. In that voucher system there are two controls that the subcommittee suggested be added. One, if that amount is subject to a twelve hour flag, that should be highlighted and if the response period for that twelve hour flag has not been responded to, the Commission believes that attorneys that have not responded to these requests for information, and expectations for information, should not be allowed to enter additional billing after a certain point. That should be a control that

currently does not exist and would require a system change. Finally, the subcommittee talked about an audit function that should occur and that would require some system changes as well.

Sen. Keim followed-up on Rep. Millett's question of how to be helpful, noting that OPEGA's and the Sixth Amendment Center's reports really show that there needs to be a complete overhaul of how work is done in Indigent Legal Services. She is always cognizant of the fact that the Commissioners are not really paid to do this work. She asked Commissioner Tardy if he needs more resources to take on these tasks as a Commission.

Commissioner Tardy said they absolutely do. The newly constituted Commission is putting in extraordinary hours to do the oversight work. He believes if MCILS has adequate staffing that this would be right within the purview of an executive director's position. He, or she, would be creating the management model and expressing the needs that the Commission has from a management model going forward and then suggesting to the Commission, they are the board of oversight - Commissioner Tardy lost the zoom connection.

Commissioner Carey continued for Commissioner Tardy saying they would make a supplemental budget request for a training manager and for an audit manager. Both of those positions are necessary going forward. The other half of the problem, as noted in the Sixth Amendment Center's report, is quality. The Commission is not ensuring quality and effective legal representation and that is, not only not meeting the constitutional requirement, it is a threat of litigation which appears to be more real than hypothetical.

Sen. Chenette said he hears what Commissioner Carey is saying about MCILS's work being unacceptable and we need to take certain actions and said nothing has stopped the Commission, or MCILS staff, from making any changes, even without OPEGA's report. One of the things identified, particularly in OPEGA's report, is that we have a situation where we have identified clearly, either overbilling or double billing issues and that Commission staff basically reached out after receiving that flag about the issue and then did not get complete information, or any information, from those attorneys to actually assess and defend their actions. He is not seeing any remedy on the staff side for that outside contact besides we asked for information and the attorneys sent what they sent. He asked Mr. Pelletier if staff, or the Commission, has taken any deliberate steps to remedy those situations now?

Director Pelletier said MCILS's small staff is being asked to do a large amount of work. Staff is spending every day coming to work and doing what is necessary to make the Commission and the system function. In response to Sen. Chenette's specific question about billing, he said when the issue came up he had concerns about the need to address with the attorneys who are the most problematic, their billing practices. MCILS does not have a person who can be sent out to do an audit. As Director Fox said earlier, it is very intensive work to do a file audit in an attorney's office. MCILS does not have the staff, or the resources, to do that. So, what was most important to him was to determine whether, in these instances, they could identify what was going on and satisfy himself and the rest of the staff that there was not intentional fraudulent billing going on. The responses he got did not match the letter of the request, but they were sufficient to satisfy him of no intentional billing. There was some mention earlier about an attorney who identified overbilling and that money has recently begun to be repaid. There was an attempt to get a loan and make a lump sum payment, but when the pandemic hit the loan was delayed and now the person is making periodic payments. He felt that he had done what he had to do within the resources available to devote to that issue. The most concerning issue of whether he thought there was intentional wrong doing was satisfied, to his satisfaction.

On the issue of paralegal bills, Director Pelletier said it has come to their attention that there was some paralegal billing and the MCILS staff is dealing with individual offices on that issue. They believe their position on that is well known and is reflected, to some extent, by the number of times that lawyers make special request to MCILS for paralegal billing on a big case. He said MCILS is working hard to address issues identified in OPEGA's report.

Sen. Chenette followed-up saying Director Pelletier has been the Executive Director for MCILS for a ten year period of time and he is trying to understand that all of the recommendations in OPEGA's report seem to center on the structure of the organization that he led and that he has not necessarily heard a response, or seen something, that indicates any level of responsibility like why hasn't anything been adjusted in that ten year period. He was assuming it was the same kind of structure when Director Pelletier took it over that it is now and asked what in that time period has changed, or why weren't any of these matters dealt with, prior to OPEGA's report being released.

Director Pelletier said when he was hired the structure did not exist. MCILS had a statute and no staff. The staff authorized by the Legislature was for two attorneys, an accounting technician and an administrative assistant. They have since day one been working every day to do what is necessary to provide functional representation to Maine's indigent population. MCILS reviews 30,000 vouchers. Because they pay attention to the vouchers submitted they have saved \$36,000. A lot of the money they save is not captured because it is about sending vouchers back to the lawyer to get a question answered and they make the change. MCILS processes over 100 requests for funds for experts, investigators, etc. a month and processes those invoices. Does MCILS have a perfect system, no. They do not have technological solutions to double billing, but there were very few that were found. MCILS did identify a private investigator with billing issues and that person does not work for them any longer. When they started there was no rosters. Now they update rosters monthly, they have rosters that define characteristics of attorneys. MCILS developed a training program. The Commission wants to bolster training and he would agree with that. He said they did what they had within their capacity to provide training that did not exist before, both to get on the roster and for rostered attorneys.

Director Pelletier referred to collections and said when they took over they had roughly \$500,000 a year in the collection account and now they are over a million dollars of collection money that is being done through MCILS. Basically, they have two lawyers and an accountant. The administrative assistant hasn't even been present. He agreed it would be the best of all worlds to have procedures and guidelines and spend time on that side of it, but what they have been doing is spending every day doing what they had time to do to make the system function. He believes the system does function. He sees lawyers working every day to avoid prison time through facilitating treatment to reunite families in the child protective system, to defend cases and have trials and win not guilty verdicts. What he can tell the GOC is that MCILS's focus has been on do what needs to be done to make the program function and they have done that with the limited resources they have.

Certainly, it can be made better and more staff can improve a lot of the issues addressed by the report, but the staff have been devoted to getting the work done. He said MCILS staff does an extraordinary amount of work and with the resources they have he is proud of what they have done and accomplished to date.

Rep. O'Neil said she knows this is beyond the scope of the report before the GOC today, but wanted to hear from folks affiliated with the Commission on whether the Legislature has set them up to fail with the current model. She is thinking about whether it makes sense to fix the system we have or start fresh with the public defender model given the scale of costs and system changes that are being discussed.

Commissioner Tardy does not think it is too heavy of a lift and that the Commission, with its subcommittee groups, have gone down the path of putting better systems in place. They will be making requests to the Legislature for some rule changes going forward, especially to minimum standards. He thinks there is a budget correlation to their ability to be successful, but the will and motivation of the existing Commission is such that they will do the best they can with what the Legislature gives them for resources. Commissioner Tardy thinks they have a critical, sort of an emergency need, for additional staffing, but that is solvable and that these reports, as tough as they are sometimes to hear and accept, are very helpful. He believes the quality of representation, on whole, is good and what they need to do is have better systems in place to deal with attorneys who don't live up to constant performances and the Commission is working on that. While it is a heavy list, it is not an undoable list.

Commissioner Carey agreed with Commissioner Tardy saying the existing system, with some additions, can meet the requirement for proper financial oversight. They are ensuring quality representation and also agrees that many attorneys are very good. To the point of Rep. O'Neil's question regarding the public defender system, said his personal opinion is that there are a few counties in the State of Maine where that system may make sense. Most of the State of Maine, in terms of land area, will need to be done within a system that looks like the one they have now for financial oversight or measured with quality and they have to get this right.

Sen. Libby asked about the role of the State Auditor in the next 3 to 6 months to help address a number of the issues that were raised in OPEGA's report. He is not sure who to ask about that, but wanted to put that question out on the floor, could we engage the Office of State Audit in this work.

Commissioner Carey said the audit function that the finance subcommittee had anticipated and recommended to the Committee, was the need for a quarter or half-time FTA. The Commission sees that as a going forward issue and that it is important to communicate holistically to the roster, to defendants, to the Legislature and to the State as a whole, that we are good stewards of the financial purse and of the expectations of the statute. In terms of addressing past billing issues, that would be helpful whether those resources came from the State Auditor, OPEGA or from an outside third-party. He is not suggesting what the GOC may or may not do, but that is how the Commission looked at it looking back at audit questions.

Sen. Libby was thinking about the financial pieces, as well as, the program evaluation piece because the State's Department of Audit has those two components to it. Maybe the GOC writes them a letter, or maybe Director Fox has a conversation with Audit, or may somebody has already started that process.

Sen. Chenette asked if Sen. Libby was suggesting getting the State Auditor to provide templates for some of the financial oversight pieces of MCILS. Sen. Libby said he was suggesting that if the Committee is interested, that perhaps the Office of State Auditor may be able to provide multiple resources to MCILS, JUD Committee and the GOC in helping to sketch out the next 3 to 6 months of work.

Sen. Chenette and other members of the GOC thanked Commissioners Tardy and Carey and Director Pelletier for attending the meeting and answering their questions.

Rep. Millett thought he heard Commissioner Tardy indicate that legislation directing responses toward correcting the inefficiencies, etc. would be helpful and wondered if the OPEGA staff might help with that drafting for consideration either on November 20th or when the 130th GOC is convened.

Rep. Mastraccio had a concern that the GOC will not have had a public comment period prior to drafting that legislation. If they are fortunate enough to have another meeting, they should have the discussion of a letter. She is hoping there will be some transition from current members to future members of the GOC. This Committee is not going to be able to have the public hearing, but could draft a letter for the next iteration of the GOC who would have that letter in front of them as part of the public hearing. She would have liked to have had the public hearing and had that legislation ready to go because she agrees with Rep. Millett, but she is more concerned about the GOC's process and that they follow that process because we are going to always have a new Legislature every 2 years. This year you add a pandemic into it so the Committee did not get to finish their work and is something that Sen. Chenette and she were very concerned about and is why they wanted to meet before the next legislature was sworn in. She said her suggestion was a way to have this Committee's voice at that table and any current members who are future members, would be able to share the GOC's strong concerns.

Rep. Millett said he was looking for anything that would establish a trail of expectations because he does not want this issue to fall through the cracks so he will play by the rules and make sure that we have advice from staff and the outgoing members before fading away. He accepted the comments from the House Chair, Rep. Mastraccio, and thinks the Committee can build upon them.

Director Fox said it sounds like the GOC's decision is to write a letter to the 130th GOC saying that had this Committee had more time before the ending of the 129th this was what our plan was and we don't want the ball to be dropped. This GOC can draft a letter to the next Committee, but her question is whether or not we make the decision of what that letter says today or at the final meeting of this GOC. She would want direction from the GOC for the letter. If the Committee wants to review that correspondence at the meeting on the 20th she would need some direction on what the members want that letter to include or the other option is the GOC could decide what that letter would say on the 20th and then members could sign off on it electronically. Changes could not be made through email, but she could submit the letter to members through email for their approval and then submission to the next GOC.

Sen. Chenette asked if other members of the Committee had thoughts about the letter and, to Rep. Millett's phrase "of to "establish a trail of expectations" is a good way of phrasing that versus a committee bill as a vehicle. To basically outline some of the key recommendations from OPEGA's MCILS report as a basis for the discussions for the next GOC who will have to have a public comment period and subsequent work sessions on the report.

He asked if members had thoughts about the letter, saying they will have to decide on the letter's contents in order to give Director Fox some direction.

Rep. Mastraccio thinks that there are enough people who are not participating today that she is hoping will have some input at the next meeting. If for some reason the GOC does not get to meet again, then they may just have to have a letter that goes around and to make sure that all members sign off on it. She hoped at the next GOC meeting they could have that discussion and basically say what they would like the letter to say and have Director Fox, at that point, pass it around to make sure that it captures the Committee's intent.

Rep. Millett said he liked that approach.

Sen. Chenette said, in his opinion, and other members can give their opinions, would be to take the recommendations that OPEGA has already outlined in the MCILS report and turn that into the letter as the basis and if the Committee then has objections to any of the elements of the letter, based on just recommendations in OPEGA's report, then they can have that discussion at their last meeting. He thinks the easiest and most streamlined approached to this, would be to boil it down to the bullet points that Director Fox has already articulated as the recommendations.

Director Fox said now that they are experiencing this new way of holding a committee meeting, this recording will be on the GOC YouTube channel so OPEGA can provide a link to this meeting and the presentation to the future GOC as well.

Sen. Chenette referred back to Sen. Libby's point about contacting the State Auditor for their help and asked Director Fox if the Committee could do a Chairs letter to the State Auditor's Office to start some line of communication and maybe have feedback before the GOC's meeting on the 20th. Director Fox needed a little more information about what the collaboration is intended to get at or look like, but she can certainly reach out to Sen. Libby for that information.

Sen. Libby said one of the things he picked up on was where OPEGA's team was limited in their ability to pursue further is gather data, evaluate data or draw conclusions and he just wondered if the staff power at the State Auditor's Office could provide support to do field audits and partner with MCILS to help them with their

work that they have set out to accomplish. He feels the Auditor's Office is a substantial resource that maybe could provide value.

Sen. Chenette said the GOC Chairs could draft a letter to the State Auditor's Office regarding Sen. Libby's suggestions and the GOC could submit a letter to the next GOC that includes the GOC's expectations and blueprint for action regarding the MCILS report. He asked if there were any other comments, concerns or questions about that path or additional paths the Committee wants to take. Hearing none, Sen. Chenette moved on to the next agenda item.

Unfinished Business

None

Report from Director

Director Fox wanted to point out to the GOC that they did receive Quasi independent reports from the policy committees that oversee those agencies. This is a statutory report requirement that agencies first, prior to submitting a report, establish policies regarding procurement and if they waive the competitive bid requirement for procurement that is \$10,000 or more, the justification for those sorts of waivers and the criteria that would be applied to allow those waivers to happen. They also require Quasi independent agencies to establish policies for making donations and for how they will pay for travel and meal reimbursement expenses. Then on a biennial basis the agencies submit a report to the policy committees regarding whether or not they have indeed established those policies and whether any changes have been made to those policies since their report. Also, how they have dealt with procurement, any waivers of the competitive bid process, making donations and reimbursement for travel and meals, etc. The GOC reviews a copy of those reports, but they also go to the policy committees, who have jurisdiction over those agencies, and the policy committees ask questions and review those reports and then submit a report to the GOC with their findings. The policy committees listed below have reviewed their Quasi independent agency reports and then submitted a report to the GOC. Generally speaking, all of the Committees found that there was nothing of concern to report. There was one entity under the Energy and Utilities Committee that has just been enacted and became operational. They have yet to establish those policies, but they intend to. There was another entity that the committee was seeking more information from, but were not concerned. If they raised any concerns they would report back to the GOC.

Director Fox wanted the GOC to know that those reports have been received and would have been discussed in the late spring of the Second Session. If any report raises concerns for members, that can be discussed at the next meeting. The reports are listed below.

- Legislative Joint Standing Committees' Reviews Under 5 MRSA §12023 sub§ 3 – Quasi independent reports received:
 - Education and Cultural Affairs Committee on Review of:
 - Child Development Services System
 - Maine Community College System
 - Maine Health and Higher Educational Facilities Authority
 - Maine Maritime Academy
 - University of Maine System

- Energy, Utilities and Technology Committee on review of:
 - Maine Municipal and Rural Electrification Cooperative Agency
 - ConnectME Authority
 - Efficiency Maine Trust

- Judiciary Committee on Review of:
 - Maine Human Rights Commission

- State and Local Government Committee on Review of:
 - Maine Municipal Bond Bank
 - Maine Government Facilities Authority

- Transportation Committee on Review of:
 - Maine Turnpike Authority
 - Northern New England Passenger Rail Authority
 - Maine Port Authority

- **Status of projects in process and preview of what is to come in the 130th Legislature.**

Director Fox reported that upon the completion of this part of the **MCILS** review, OPEGA has begun their work on the remaining scope areas and is in fieldwork. As the Committee knows, OPEGA is presenting at the next meeting a limited scope review of the **Pine Tree Development Zones** program and that addresses a narrow scope of questions and will be presented on November 20th. In terms of tax expenditure reviews the GOC approved the parameters for the **Seed Capital Investment Tax Credit** review and OPEGA is deep in fieldwork on that review and anticipates the review could be ready for presentation sometime in the First Session of the 130th Legislature, but said she reserves the right to give more updates on that review if it turns out to be a larger project than anticipated. The **Maine Citizen Initiative Process** review has been a lower priority as other things have come forward, but is towards the end of fieldwork. Some elements of the review are drafted, but during an election season it is hard to engage with the Secretary of State, as well as, the Ethics Commission. OPEGA is still working on that review and should be ready for presentation fairly early on in the 130th Legislature. OPEGA is working on presenting a parameters document for the GOC for the **Historic Preservation Credit** so that will be something that will need to be approved and then that tax expenditure review would move into fieldwork.

OPEGA is also required annually to do an expedited review of tax expenditures and those are by category and generally goes to the Taxation Committee. OPEGA often presents it to the GOC as well, but the statute really requires that OPEGA compiles this information and bring it to the Taxation Committee. That information will be going to the new Taxation Committee of the 130th Legislature and will be ready as soon as that committee is named.

Director Fox noted that one of the things still pending is the GOC's vote on the BETR/BETE report, as well as the MCIC report so that is something that is on the agenda for the next meeting. Because the discussion of the reports started with this Committee, she thinks the intent was that this Committee would have the vote on them and if there are any recommendations to go to the Taxation Committee, those would be developed by this Committee. She will send out the power point presentation on those two reports and because they were heard in February, will send a link to the audio as well if members wanted to relisten to any of the discussions or questions on those reports. She will put that information together and email it to the Committee members.

Sen. Chenette thought receiving that information would be helpful. If the GOC needs to take a vote they will plan to do so on the 20th. In order for a vote to take place, members have to physically be in the room at the State House.

Next GOC meeting date

The next Government Oversight Committee is scheduled for Friday, November 20, 2020 at 10:00 in Room 228 State House. The Committee will follow all the health and safety precautions and spread members out throughout the building who are physically present.

Adjourn

The Chair, Sen. Chenette, adjourned the Government Oversight Committee meeting at 12:47 p.m.

129th Maine Legislature Government Oversight Committee

Office of Program Evaluation and Government Accountability
November 2020 Report Presentation:
Maine Commission on Indigent Legal Services

OPEGA Evaluation - Maine Commission on Indigent Legal Services 2020

About this report

- Pursuant to GOC vote on 1/10/20, this report addresses 2 of the 5 scope areas in the GOC's Project Direction Statement (approved 12/10/19).
- 1. Adequacy of systems and procedures used by MCILS staff to process payments and expenditures associated with providing legal representation to clients who have been determined to be indigent or partially indigent.
- 2. Reasonableness of and consistency in the application of standards, criteria and procedures which inform the determination of whether a defendant/client is indigent.
- 3. Reasonableness of and consistency in the application of criteria and procedures used in determining, ordering and monitoring payments towards counsel fees by those who have been determined to be partially indigent.
- 4. Sufficiency of response by MCILS, or MCILS staff, to internally identified concerns and to recommendations made in reports which examined or evaluated the operations of the Commission regarding financial oversight.
- 5. Adequacy of the oversight structure of MCILS in ensuring that operations align with and accomplish the organization's purpose.

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Presentation Outline

Maine Commission on Indigent Legal Services (MCILS)

- Brief background:
 - About MCILS
 - Establishment of MCILS and Organizational Structure
 - Representation for indigent or partially indigent
 - Attorney and non-counsel payments
- Systems and procedures used by MCILS staff to process payments and expenditures associated with providing legal representation:
 - Discussion of 5 issues identified by OPEGA
- MCILS Structure of Oversight:
 - Discussion of 4 issues identified by OPEGA

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MCILS Purpose

Title 4 §1801

“.....to provide efficient, high-quality representation to indigent criminal defendants, juvenile defendants and children and parents in child protective cases, consistent with federal and state constitutional and statutory obligations.”

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

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MCILS – structure

- Commission and agency established in 2009
- Prior to 2009, indigent legal services administered and funded through judicial branch
- 9 member Commission (increased from 5 in 2018)
 - Representation on Commission must include experience – administration and finance, child-protective proceedings, indigent defense
- MCILS agency staff
 - Executive Director
 - Deputy Executive Director
 - Accounting Technician
 - Office Associate
 - Eight financial screeners in courthouses across state and one investigator working remotely

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Representation of indigent/partially indigent

- Indigent (or partial) determined by a judge based on financial information provided by person requesting representation – some court locations have financial screeners who assist
- A person who is determined to be partially indigent will receive an order to pay a portion of the cost of representation
- When a judge determines a defendant is indigent/partially indigent, Court assigns representation from a regional roster of private attorneys maintained by MCILS
- Attorneys must have met basic requirements to be listed on the roster, along with ongoing requirements such as continuing education
- Attorneys with particular specialty (homicide, domestic violence, sexual offenses) are listed accordingly on a roster

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A primary function of MCILS is to arrange for the payment of counsel fees and expenses to attorneys who have been assigned represent indigent/partially indigent

- Attorney payments
 - Attorneys submit vouchers to MCILS via the DefenderData system
 - Exec. Director and Deputy Exec. Director review the vouchers and approve payments (current hourly rate is \$60/hour)
- Non-counsel payments
 - Services provided by vendors such as investigators, interpreters, medical experts
 - Pre-approved by Exec. Director/Deputy
 - Vendor submits invoice to attorney who verifies satisfactory completion of work and then invoice is submitted to MCILS for processing
 - Payment made directly to vendor by MCILS

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Are the systems and procedures used by MCILS to process payments and expenditures associated with providing legal representation adequate?

See Part II of report – beginning on page 4

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1. There are no established policies and procedures governing expenditures and payments – and MCILS's expectations for billing practices may not be effectively communicated to attorneys
2. Data available to MCILS staff via Defender Data is unreliable and potentially misleading
3. Current monitoring efforts of attorney vouchers are inefficient and of limited effectiveness
4. Invoice-level review of non-counsel invoices may be of limited effectiveness in identifying certain types of noncompliance
5. Audit or review procedures have not been established and current efforts used by MCILS are limited, inconsistent and of limited scope, depth and effectiveness

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Note: A primary driver of this review was 6AC report

- 6AC cited annual hours billed by rostered attorneys – which raised concern about potential overbilling and/or fraud (media reports, too)
- OPEGA obtained data directly from billing service provider – based on our analysis
 - Magnitude of 6AC findings appear to be overstated (see appendix)
 - However, the underlying issue - MCILS's ability to identify when overbilling happens – remains valid
 - Concerns related to identifying potential overbilling are discussed in this presentation, particularly under Issue #3 (related to system of voucher review used by MCILS)

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Issue 1: There are no established policies and procedures governing expenditures and payments – and – MCILS's expectations for billing practices may not be effectively communicated page 5

- Policies and procedures outlining billing expectations are sparse and are mostly unwritten or otherwise codified
- Those standards that do exist (fee schedule established in agency rules) may not be effectively communicated
- MCILS is reviewing vouchers which are submitted to them without the benefit of formal guidance
- This is a system of limited effectiveness

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Issue 1, continued

OPEGA observed some internal standards which are referred to as "informal" by Ex. Dir/Deputy. These guide their treatment of common, generic activities

- o Given the frequency of nonconformity with even these sparse standards, it appears they are not communicated effectively to roster attorneys

Without written guidance that is well-communicated, attorneys may not have an awareness/understanding of what is expected

-Example: billing separately for paralegal hours, which according to agency rules are "routine office expenses" to be included in attorney's hourly rate of pay

Voucher-level review by MCILS staff relies on info entered into Defender Data by attorneys who are provided sparse, informal guidance on billing standards (Issue 3 speaks to issues with that monitoring system)

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Issue 2: Data available to MCILS staff via Defender Data is unreliable and potentially misleading page 7

The quality and accuracy of the data impedes the effectiveness and efficiency of the agency's current system of attorney voucher review.

• Scenarios observed by OPEGA where quality and accuracy of data impedes effectiveness and efficiency – attorney entries into the system:

1. entered hours of multiple attorneys under one attorney
2. batched multiple work events into one large single event entry
3. entered work hours on the wrong date
4. entered staff work hours (paralegals) under an attorney

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Issue 2, continued

Problems with quality and accuracy of the data also limit effectiveness of any future, high-level data analysis that would potentially identify and flag outlying values

When MCILS's staff monitoring does identify and correct and incorrect entry/value – they only change the voucher total – leaving the incorrect value in the data set.

- Hinders establishment of baseline metrics and the ability to conduct more effective review and audits (see Issue 5)

Data issues impacted our analysis and will ultimately limit our ability to identify specific attorneys for further audit work

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Improving the data – consistency, accuracy, reliability

- Communicate expectations and guidance how time events should be entered into Defender Data to improve consistency
- Work with Justice Works to develop data-entry controls (based on newly-established guidance) to correct potential issues/errors when they occur
- Correct the data errors within the system when they are identified to improve reliability when used for further data analysis or risk-based auditing (see Issue 5)

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Issue 3: Current efforts to monitor attorney vouchers are inefficient and of limited effectiveness pages 8-16

Event-level voucher entries are individual entries on a voucher reporting time spent by an attorney on a case-related work activity.

Voucher review process comprises many elements which have the effect of limiting overall effectiveness:

- Event-level voucher review, generally
- Defender Data entries and identifying outlying values
- Monitoring High Annual and Daily Hours Worked
- 12-hour alert notification system
- Identification of double-billing
- Financial stewardship

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Issue 3
Event-level voucher review, generally

- A time-consuming effort involving manual review of all event-level entries on each attorney voucher (one per case, generally)
- Average annual number of vouchers paid FY10-FY19 was just over 28,000 containing roughly 450,000 individual events
- On almost 37% of work days, a single staff person reviews more than 100 vouchers – allowing less than 5 minutes per voucher to conduct the review

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Issue 3
Defender Data Entries and Identifying Outlying Values

- Despite the significant staff burden associated with current method of voucher review, the agency does not appear to make effective use of technology as a preventative control against data entry errors
- Defender Data system is not being utilized as a **control**, preventing or limiting the input of values exceeding some established maximum - or generating flags prompting follow-up
- OPEGA found nearly 110,000 outlying values (FY10-19) across 8 types of timekeeping events. 81.4% were ultimately addressed – but required review, questions and follow-up with the billing attorney by MCILS
- Data entry controls could reduce staff time required to address such issues

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Issue 3
Monitoring high annual and daily hours worked

MCILS staff's system of event-level voucher review does not monitor cumulative annual hours recorded as worked by an attorney

Using the data set OPEGA obtained, we observed instances of noteworthy high annual hours worked and high daily hours worked reported by attorneys – although the vast majority (97.7%) reported an average of 40 hours/week or less

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Table 3: Annual Fiscal Year Hours Billed by Attorney (10 year period)

Total Annual Hours	Average hours per week*	Number of Attorneys	Percent of Total
1,040 or less	20 or less	3,655	82.7%
1,041 to 2,080	20-40	663	15.0%
2,081 to 2,600	40-50	76	1.7%
2,601 to 3,120	50-60	16	0.4%
3,121 or more	More than 60	8	0.2%
Total		4,418	100.0%

Source: OPEGA analysis of MCILS voucher data obtained from Justice Works.
*Assuming 52 weeks worked per year.

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- OPEGA found 8 noteworthy instances where an attorney, in a particular year, billed for over 3120 hours

Table 4: Attorneys Exceeding 3,120 Hours in Any Fiscal Year

Fiscal Year	Work Attorney	Total Hours	Calculated Hours per Week
2018	Attorney A	4429.0	85.2
2014	Attorney B	3446.8	66.3
2019	Attorney C	3438.3	66.1
2015	Attorney D	3400.9	65.4
2014	Attorney D	3398.0	65.3
2013	Attorney B	3343.1	64.3
2017	Attorney E	3281.4	63.1
2013	Attorney F	3269.8	62.9

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- Again, using data set we obtained, OPEGA identified almost 3000 instances where an attorney billed more than 16 hours in a day
- More concerning were 224 instances (attorney/date combinations) where more than 24 hours were billed in a day, ranging from 24.1 hours to 84.2 hours
- Most of these instances (roughly 70%) were recorded by six attorneys

Table 5: Attorneys with highest counts of billing more than 24 hour days

Work Attorney	Count of 24+ Hour Days
Attorney G	41
Attorney B	32
Attorney A	27
Attorney E	25
Attorney D	19
Attorney F	13

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- During the time period that 6AC was conducting its review of MCILS, staff established the 12-hour alert notification system – although OPEGA found this to be an ineffective control to address potential overbilling

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Issue 3

12-hour alert notification system

MCILS Executive Director instituted an internal investigation into high billing by attorneys

The investigation reviewed billings by attorneys who billed more than \$150,000 in any of the three preceding fiscal years (FY 16, 17, 18)

Following this work, the 12-hour alert notification system was implemented – where Defender Data notifies an individual attorney when they've billed more than 12 hours in a day (on one or more vouchers)

The alerts are entered into a spreadsheet and tracked

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12-hour alert notifications

- Alerts are independent of voucher approvals (payment could be made even if there is flag about high hours)
- Creates a flag, but does not correct potential issues – alert could be generated years after the date on which the threshold was met given the nature of submitting vouchers
- Attorneys response rate to the alerts was poor – 70% provided no response. Of those who did respond:
 - A little more than a third claimed their billing was accurate
 - Some responded that work recorded was accurate but just entered on wrong date
 - Some cited other explanations for high hours which do not appear consistent with agency rules or billing practices
 - Multiple attorneys capture under the same hours
 - Paralegal time billed as (added to) attorney's hours

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Issue 3
Identifying double billing

Double billing is any scenario in which MCILS is paying an attorney for the same time twice.

- Despite the poor response to 12-hour billing notifications and the agency's general lack of follow-up, one attorney's response to those alerts were useful in showing how double-billing could occur and that the current system of event-level voucher review is unlikely to detect it -
 - Duplicate time entries
 - Overlapping time entries
 - Over-allocation of time spent in court or travelling

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Issue 3, continued
Cost savings, financial stewardship

- The agency efforts using the current system of voucher review have resulted in relatively few instances where the agency has adjusted a voucher total.
- Although some may have been addressed by an attorney before the voucher was paid (after being questioned by MCILS staff), the average annual savings from voucher adjustments averaged just \$36,000
- The average annual voucher expenditures are roughly \$13.5 million
- The system appears to be of limited effectiveness when it comes to realizing cost savings

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Redesigning voucher review – new process attributes

- Identify, investigate and address instances with the greatest impacts to quality representation and financial stewardship – high daily and high annual hours
 - Utilize technology to identify and correct data entry errors instead of relying on manual review
 - Incorporate data and risked-based audit techniques to reduce staff burden (and allowing for focus on important and neglected aspects of MCILS's purpose – described in Section III)
- *****
- Transitioning to a timecard-based system may address issues related to the timeliness and accuracy of daily hours worked reported by attorneys

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Issue 4: Invoice-level review of non-counsel invoices may be of limited effectiveness in identifying certain types of noncompliance

Vendor invoice review (for non-counsel services) is unlikely to identify duplicate charges, high daily billings or duplicate invoices

- Invoices are reviewed by accounting technician for applicable limits, pre-approvals and accuracy
- Once approved, they are processed via state's vendor payment system (Advantage) – the data entered into the system is only what is necessary to process payment
- No analysis/review across multiple invoices from a vendor – and Advantage data lacks key elements critical to such analysis
- MCILS review of invoices is of limited effectiveness in identifying high-daily hours, duplicate charges or duplicate billings

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**Issue 4, continued
non-counsel invoice review**

- Although limited by the data in Advantage, OPEGA performed some high level analysis allowing us to select a judgmental sample of 235 invoices (about 1.5% of all invoices paid by MCILS) – to attempt to determine if these scenarios were occurring
- We found one vendor (sole-proprietor) who, on 4 occasions over a period of a few months, submitted multiple invoices on a given day which billed for a high number of daily hours. (see table 6 on p. 17).
- Current system of review would not detect this red flag
- MCILS did describe a one-time vendor audit (private investigator services) that identified high daily hour billing concerns – but these have not been formalized as part of agency's regular reviews

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Issue 5: Defined policies and procedures for audit and investigation have not been established. Current methods used by MCILS are limited, inconsistent and of limited scope depth and effectiveness

- As noted, MCILS has no formal policy and procedures for guiding attorney billing – similarly, the agency lacks defined policies and procedures auditing/investigating attorneys
- We became aware of 3 instances where MCILS did conduct an audit or investigation – one relating to nine high-billing attorneys reported by 6AC
- OPEGA characterizes this investigation as ad-hoc

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**Issue 5, continued
MCILS investigation into high billing attorneys**

- Executive Director wrote letters to 3 attorneys informing them they were the highest earners and asked for a response explaining high billing (unrealistic totals) and to provide contemporaneous time records.
 - Attorneys responded with various explanations and none provided contemporaneous records
 - Generally, the responses would not allow for MCILS to confirm explanations – OPEGA did not see that the agency took steps to verify or challenge responses or conduct field audits
 - One respondent conducted a self-audit and identified overpayment – but there appears to be no system for confirming or agreeing on amount to be returned by vendor – nor did MCILS make much of an effort to collect payment

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- Summary of Part II

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Is the oversight structure of MCILS adequate?

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OPEGA was tasked with determining the adequacy of the oversight structure of MCILS in ensuring that operations align with and accomplish the organization's purpose

MCILS's structure fails to provide adequate oversight of agency operations - and of the Commission's purpose to efficiently provide high-quality legal representation to indigent clients

The interrelated reasons for this inadequate oversight structure will require a holistic approach to remedy

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OPEGA found that -

6. The agency charged with administering MCILS's purpose is understaffed
7. MCILS staff operates without clearly-defined roles and uses current staff inefficiently
8. The Commission receives insufficient support for necessary operations
9. A weak oversight structure impacts the ability of MCILS to adequately meet its statutory purpose

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Issue 6

The agency is under-staffed

- It was described to OPEGA that the current staff of MCILS is the minimum level necessary to allow the system to function
- Thus, there was little time available to consider new initiatives, improvements or wider substantive structural issues (such as quality representation)
- Annual reports do not appear to describe a staffing need or indicate what functions are not being attended to as a result of minimal staff
- OPEGA was told that requests for additional staffing/resources would not be looked upon favorably
- MCILS did not advocate for or make formal requests for additional staff in prior budget cycles until the most recent supplemental budget request in early 2020

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Issue 7

MCILS staff operate without clearly defined roles and uses current staff inefficiently

- OPEGA found an inefficient use of existing staff due to the absence of a clear, effective agency structure with defined roles, responsibilities and expectations
- It appears to OPEGA that a substantial portion of management staff time is spent on day-to-day operations including a significant amount of administrative-level work
 - Rostering
 - Attorney voucher approval
 - 12-hour notification follow-up

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Issue 7, continued

Roles not clearly defined, inefficient use of staff resources

- Management's focus on administrative-level duties impacts the capacity to provide policy support and strategic direction to the Commission
 - Inefficient use of resources to have management level positions doing administrative level work
 - Mismatch of functions/qualifications did not appear to be an area of focus for Commission
 - Given absence of job descriptions would be difficult for Commission to assess if staff are doing appropriate level of activities or focused on mutually understood priorities
 - Consequence is that no remaining capacity for staff to provide strategic support to Commission – such support would guide the agency towards meeting its purpose and allow for oversight of the organizational structure of the agency

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Issue 8

The Commission receives insufficient support for necessary operations

- OPEGA observed an inconsistency in expectations between Commission and Executive Director as to who should be assuming the initiative for providing policy direction and engaging in planning
- Other than statute (mostly focused on the initial establishment of MCILS), there is no written expectation of Commission's role - and they are not provided any sort of training to orient them to their functional role
- OPEGA observed differing perspectives on whether Commission is largely responsible for rulemaking, budgets or wide-ranging oversight of provision of legal services, including oversight of the work of the agency

This creates a risk of insufficient accountability for the provision indigent legal services

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Issue 8
Information provided to Commission

MCILS statute sets minimum requirements for information to be provided to Commission – this appears to be met

But for the Commission to exercise oversight and make key decisions towards organization's objectives, a consistent flow of useful information is required

It is unclear to OPEGA who is responsible for identifying issues and determining what information should be distributed

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Issue 8, continued
Information provided to Commission

Financial information

- Monthly operations report – summary data on new cases opened, average number and value of vouchers, those exceeding \$5,000, basic budget information, etc
- OPEGA observed that this does not furnish Commission with useful information to make decisions, conduct oversight or identify concerns– review of meeting minutes showed no evidence of decisions based on this data

12-hour billing flags

- After an update (5/19) to inform commission trigger was reduced from 16 to 12 hours, no formal briefings
- Financial responsibility sub committee established by new Commission (12/19) began to look at the system

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Issue 8, continued
Information provided to Commission

Resource Counsel Program (RC)

- Established in 2018 to provide "mentoring, supervision and evaluation of private assigned counsel providing indigent legal services"
- It appears, as a program, to be optional as agency does not monitor or enforce that new attorneys meet with resource counsel. New attorneys are required to meet with RC at least 3 times in first 6 months – but OPEGA learned that attorneys were being added to roster and assigned to cases prior to the first required meeting
- The RC policy includes a requirement that staff report on the program 6 months after adoption (12/18) – other than a note (10/18) that billings were being submitted by attorneys serving as RC and that some RCs brought issues to staff seeing guidance on attorney performance, the Commission received no substantive information on the program (nor does any appear to have been gathered)

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Issue 9
A weak oversight structure impacts the ability of MCILS to adequately meet its statutory purpose

OPEGA finds that the oversight of the operations in place is inadequate to meet MCILS stated purpose – as well as separately listed statutory requirements

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

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**Issue 9, weak oversight
Quality representation**

High quality representation is central to MCILS's purpose – but there is no mechanism to measure attorney performance against practice standards or otherwise oversee or assess quality

- Despite a 2017 external evaluation stating MCILS doesn't provide systemic oversight/evaluation of attorneys – effective mechanisms to do so have not been implemented (GAC also cited this lack of oversight of quality)
- MCILS cited RC and information gleaned during voucher reviews as an informal system of evaluating quality representation - OPEGA finds these to be insufficient
- OPEGA notes an additional area of risk – that there is no mechanism to assess quality and availability of attorneys on a regional basis

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**Issue 9, weak oversight
Screening for indigence**

OPEGA observed through review of relevant rules and guidelines and interviews with screeners, lawyers and judges - a general lack of oversight attention paid to this function

- Inconsistent understanding of role
- Indigence guidelines should be reviewed
- Location and number of screeners
- Collections

The absence of oversight creates a risk of inefficiency, ineffectiveness and inconsistency potentially impacting indigent and partially indigent clients

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**Issue 9, weak oversight
meeting statutory obligations**

4 MRSA §1804 requires MCILS (Commission) to establish the following:

- Standards for counsel caseloads
- Standards for the evaluation of counsel
- Standards for independent, quality and efficient representation of clients whose cases present conflicts of interest
- Procedures for handling complaints about the performance of counsel

These standards have not been developed and does not appear to OPEGA that there are imminent plans to resolve noncompliance Although required in statute since 2009, MCILS has not established standards for conflict of interest and counsel caseloads.

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**Issue 9
Statutory obligations**

4 MRSA §1805 requires the Executive Director to

- Ensure provision of indigent legal services complies with all constitutional, statutory and ethical standards
- Assist the Commission in developing standards for the delivery of indigent legal services
- Coordinate the development and implementation of rules, policies, procedures, regulations and standards adopted by the Commission

As we've noted, MCILS lacks standard operating procedures and formal written policies – even when required in statute, MCILS relies on informal methods or does not address the standard at all

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**Issue 9, weak oversight
Effectiveness and Efficiency of Financial Procedures**

Reports of summary data regarding expenditures provides no information about financial processes and systems used by the agency and does not appear to inform decisions or actions of the Commission

Although the process used to review expenditures and submit payment for vouchers comprises a majority of the agency's working hours, the Commission appears to have dedicated little time to understand those processes and evaluate their effectiveness and efficiency

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**Addressing the interrelated issues contributing to
MCILS weak oversight structure will require a
holistic approach**

- Formal strategic plan with a framework driven by and addressing each of the elements of MCILS's stated purpose
- A focus on the purpose of MCILS would include clearly expressed priorities, articulated objectives for all processes/systems to achieve those priorities and well-defined roles and responsibilities for staff and the Commission itself

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