

**Project direction statement: Maine Commission on Indigent Legal Services
Presented by OPEGA to the Government Oversight Committee - 129th Maine Legislature
December 10, 2019**

Purpose of a project direction statement in the course of a full review

After the Government Oversight Committee (GOC) added a review of financial oversight and economic use of resources related to the Maine Commission on Indigent Legal Services (MCILS) to the Approved Project List, OPEGA assigned a team of Analysts to conduct preliminary research. The preliminary research stage of the evaluation process provides the team with a broad, but comprehensive understanding of the program. Once preliminary research is complete, the team reviews themes that have emerged and identifies areas that may be of future concern to the program. This work results in a proposed project direction statement for the GOC to consider. The statement suggests a framework that will guide OPEGA in the next phase of the evaluation process, fieldwork. This document represents that work and is respectfully presented for the GOC's consideration.

OPEGA recommends that the GOC direct a full evaluation of MCILS specifically related to financial oversight and the economic use of resources, and within the scope described in this statement.

Overview of MCILS

Establishment of MCILS and Organizational Structure

MCILS is a Commission that was established in 2009. The Commission is currently made up of nine members and is supported by an office staff of 4 who conduct the day-to-day operations. Its statutory purpose is to provide efficient, high-quality representation to indigent criminal defendants, juvenile defendants, and children and families in child protective cases. This representation is provided in accordance with requirements established in statute and both the federal and state constitutions. Maine statute specifies that 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. MCILS assumed responsibility for providing indigent legal services on July 1, 2010. Prior to MCILS, indigent legal services were arranged and funded by the Judicial Branch.

An amendment to statute in 2018 increased the number of members appointed to serve on the Commission from five to nine. The membership must include one member with experience in administration and finance, one member with experience in child protection proceedings, and two members (non-voting) who are attorneys providing indigent legal services.

MCILS staff includes an Executive Director, Deputy Director, Accounting Technician, and an Office Associate, working in an office in Augusta; eight financial screening staff, who work at various courthouses across the state; and one investigator, who works part-time remotely.

Determination as indigent or partially indigent

In Maine, services for those who have been determined indigent, or partially indigent, are provided by attorneys in private practice. The Court assigns representation to a person by selecting an attorney from a roster maintained by MCILS. In order to be listed on the roster, attorneys must meet certain requirements. If they provide specific types of services, or have a defense specialty, they are listed on specific rosters accordingly.

A client's status as indigent or partially indigent is determined by a judge based on financial information provided by the person requiring representation. In some Courts, a financial screener may be available. The screener interviews the client, gathers financial information, including the client's assets, income and expenses and makes a recommendation to the judge based on this information. The judge can deny representation at the public expense or make a determination that the person is indigent or partially indigent. A person determined partially indigent is ordered to make payments toward the assigned attorney's fees.

Attorney payments

MCILS is responsible for paying counsel fees and expenses to attorneys who have been assigned to indigent or partially indigent clients. Attorneys submit a voucher to MCILS through the electronic case management program, DefenderData. The MCILS Director and Deputy Director review vouchers and approve attorney payments. Services provided by vendors hired by the attorney such as investigators, interpreters, and medical and psychological experts require advance notice and approval by MCILS. The vendor sends an invoice for the services provided to the attorney which is then submitted to and processed by MCILS who makes payment to the vendor.

Until June 30, 2019, one fixed fee contract existed to facilitate providing representation in Somerset County. MCILS contracted with three private attorneys to provide indigent legal services, paying the attorneys a fixed monthly rate. Additionally, the attorneys were reimbursed for case related expenses, such as investigators and expert witnesses. At this time, MCILS has no contracted attorney services.

MCILS General Fund budget

The Legislature appropriated approximately \$17.7 million for MCILS in FY20, and \$17.6 for FY21.

GOC decision to consider review of MCILS

During the 128th legislative session, OPEGA received a request for a review of MCILS from a GOC member with concerns related to the application of financial eligibility requirements for court-

appointed counsel, attorney billing practices, and billing and collection efforts for clients who are required to pay a portion of counsel fees. On February 17, 2017, the GOC voted unanimously to place the MCILS review request on OPEGA's Standby List.

The 2017 Working Group

While this topic was on the Standby List, the 128th Legislature created the Working Group to Improve the Provision of Indigent Legal Services (the Working Group) as part of the biennial budget. The purpose of the Working Group was to develop recommendations to improve the delivery of indigent legal services to eligible people by focusing on:

- ensuring adequate representation;
- increasing the efficiency in delivering legal services;
- verifying eligibility throughout representation; and
- reducing costs while still fully honoring the constitutional and statutory obligations to provide representation.

In December 2017, the Working Group issued its report containing nine recommendations—the following four are related to the current scope of this request.

- Recommendation 2: Enhance the MCILS staff to provide better financial accountability and quality assurance by establishing specific responsibilities for a Chief Financial Officer and a Training and Quality Control Director.
- Recommendation 4: Strengthen the financial eligibility screening procedure.
- Recommendation 5: Remove the collections function from the MCILS and have the Judiciary Committee explore alternative methods of collecting from those recipients of legal services who have been ordered by the court to contribute to the costs of those services.
- Recommendation 7: Commission an outside, independent, nonpartisan study of Maine's current system of providing indigent legal services and whether alternative methods of delivery would increase quality and efficiency.

Sixth Amendment Center report

Recommendation 7 directly led to a report from the Sixth Amendment Center evaluating the services provided by MCILS. Issued April 2019, this report contained eight findings and seven recommendations—the following, from that report, relate to the current scope of this request.

- Finding 8: A significant number of attorneys bill in excess of eight hours per day, five days per week, for 52 weeks per year. MCILS does not exert adequate financial oversight of private attorneys.

- Recommendation 4: MCILS should use its current statutory power to promulgate more rigorous attorney qualification, recertification, training, supervision, and workload standards. The State of Maine should statutorily require financial oversight by requiring that MCILS limit the number of permissible billable hours, subject to waiver only upon a finding of need for additional capacity. The State of Maine should fund MCILS at a level to ensure rigorous training and effective substantive and financial oversight of attorneys.

While the Sixth Amendment Center report was being finalized, a GOC member brought forward a request for a review of MCILS noting concerns with the administration of the program, its efficiency, and its oversight of the quality and effectiveness of representation, and the screening procedure used to determine eligibility for legal services.

On April 12, 2019, the GOC voted to move a review of MCILS to OPEGA's Approved Projects List, with the scope limited to financial oversight and economic use of resources.

Preliminary research conducted by OPEGA

During the preliminary research phase OPEGA:

- sought input from GOC members and Judiciary Committee members and staff on their questions and concerns regarding MCILS;
- reviewed statute, legislative history, rules and guidance related to MCILS;
- interviewed the State Auditor to understand any identified areas of concern;
- interviewed the MCILS Director, Deputy Director, Accounting Technician, a selection of screeners, and the screener/investigator;
- interviewed the Chief Justice and a selection of Judges;
- interviewed a selection of MCILS rostered attorneys working in different areas of law;
- reviewed the data provided to the Sixth Amendment Center on voucher payments based on assigned attorney;
- reviewed data on work performed over three years by nine attorneys and considered correspondence related to MCILS' investigation into high earning attorneys;
- considered the Sixth Amendment Center report "The Right to Counsel in Maine" (April 2019) and interviewed the Executive Director;
- considered the report of the Legislative Working Group to Improve the Provision of Indigent Legal Services (December 2017);
- reviewed a State Controller's report on MCILS' case management system; and
- reviewed reports regarding the provision of indigent legal services in other states.

Evaluation scope

OPEGA examined the various themes that emerged from preliminary research and identified the following areas which potentially pose future risks to the elements of the program that are associated with financial oversight and economic use of resources.

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.

If the GOC wishes to direct OPEGA to begin fieldwork for the purpose of conducting a full evaluation of, and report on, the financial oversight of MCILS, OPEGA proposes the areas listed above for the scope of that work. If approved, OPEGA Analysts will examine the effectiveness of MCILS' financial controls in the prevention, detection and correction of inappropriate or unnecessary expenditures and if those controls are adequate to guard against fraud, waste and abuse. Analysts will evaluate if the practices employed by MCILS staff (including screeners) relative to financial operations are being conducted in accordance with statute, rule and best practices, as well as whether they are effective, applied consistently, and when an appropriate standard, with efficiency. Generally, fieldwork will also evaluate the structure and management of the financial elements of the program and if the structure and management are appropriate and in alignment with the organization's purpose(s).

Although some of the areas noted in this statement have been examined to some degree by the Sixth Amendment Center Report and the 2017 Working Group, OPEGA's review will add to that work. With access to additional data, OPEGA will perform a more detailed analysis of attorney billing and expenditures made by MCILS for legal services. It is possible that this comprehensive analysis might allow for us to separate potential actual overbilling from outliers that may have been due to error or that just appear to be instances of overbilling. This work may also allow for a closer examination of the current systems employed to review billing and make expenditures to identify where such systems may not be adequate for an appropriate level of scrutiny and oversight.

In consideration of the parameters cited when the GOC voted to include a review of the financial operation and oversight of MCILS onto the Approved Projects List, it is important to be clear about what this review will not evaluate. The proposed scope does not include an evaluation of:

- standards for attorneys to be on the MCILS rosters;
- quality of representation provided;
- attorney rates of pay; or
- whether or not a public defender office should be introduced.

OPEGA thanks the Committee for their consideration of this project direction statement for a full review of the financial oversight and economic use of resources by the Maine Commission on Indigent Legal Services.