

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

- 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 an 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

Source: OPEGA analysis of MCILS voucher data obtained from Justice Works.

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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

Source: OPEGA analysis of MCILS voucher data obtained from Justice Works.

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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 (6AC 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, MCLIS 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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