



SEN. NATHAN LIBBY, SENATE CHAIR  
REP. GENEVIEVE MCDONALD, HOUSE CHAIR

MEMBERS:

SEN. LISA KEIM  
SEN. DONNA BAILEY  
SEN. RICHARD BENNETT  
SEN. JEFFREY TIMBERLAKE  
SEN. ELOISE VITELLI  
REP. KATHLEEN R.J. DILLINGHAM  
REP. AMY ARATA  
REP. H. SAWIN MILLETT, JR.  
REP. MARGARET O'NEIL  
REP. HOLLY STOVER

MAINE STATE LEGISLATURE  
GOVERNMENT OVERSIGHT COMMITTEE

**MEETING SUMMARY**  
**February 12, 2021**  
**Accepted February 26, 2021**

**Call to Order**

The Chair, Sen. Libby, called the electronically conducted Government Oversight Committee meeting to order at 9:03 a.m.

**ATTENDANCE**

Senators:	Sen. Libby, Sen. Keim, Sen. Bailey, Sen. Timberlake and Sen. Vitelli Absent: Sen. Bennett
Representatives:	Rep. McDonald, Rep. Arata, Rep. Millett, Rep. O'Neil and Rep. Stover Joining the meeting in progress: Rep. Dillingham
Legislative Officers and Staff:	Matthew Kruk, Acting Director, OPEGA Amy Gagne, Senior Analyst, OPEGA Etta Connors, Adm. Secretary, OPEGA/Clerk, GOC
Maine Commission on Indigent Legal Services Commissioners and Staff	Joshua Tardy, Chair Michael Carey, Commissioner Robert Cummins, Commissioner Justin Andrus, Interim Executive Director Eleanor Maciag, Deputy Executive Director

Sen. Libby summarized the process for the electronic meeting, including the public comment period on OPEGA's Maine Commission on Indigent Legal Service's report.

**Introduction of Committee Members**

The members of the Government Oversight Committee introduced themselves.

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## Summary of January 29, 2021 GOC Meeting

The Meeting Summary of January 29, 2021 was accepted as written.

### New Business

- **OPEGA Report on Maine Commission on Indigent Legal Service (MCILS)**

Sen. Libby again summarized the process that will be used for today's Public Comment Period.

- **Public Comment Period**

**Justin Andrus** has been with MCILS for 24 days and proud to report on some things they have done, and are doing, to address issues identified in OPEGA's MCILS report and the Sixth Amendment Center's (Center) report. He said MCILS's Deputy Director Maciag and Commission Chair Tardy and Commissioners Mr. Cummins and Mr. Carey have been supportive. There are aspects of the Legislature's procedure that he is not acquainted with yet so invites the GOC's direction.

Mr. Andrus has been a licensed attorney in Maine since October, 2002 and mostly represented indigent clients. He has experience and a broad perspective of the system. As an Assistant Bar Counsel at the Maine Board of Overseers of the Bar, he focused on assisting attorneys in the ethical practice law by providing private ethics opinions and advice. He has some experience with the system and works with assisting attorneys in performing as they are expected to perform and is something he both knows and is comfortable doing.

Mr. Andrus began the Interim Executive Director position on January 19<sup>th</sup>. Chair Tardy and Justice Alexander asked him to serve as Interim Executive Director. He agreed to do so because of the mission of MCILS and it is vitally important to bring it into compliance with the Sixth Amendment and their statutory and fiscal obligations. He put aside his attempt to return to private practice for a while to undertake this position. As he talks about MCILS he said he is going to identify some issues, some of which he knew about before he joined MCILS and some he identified after being in the position. The fact that MCILS had to recruit him illustrates the reality that as it exists right now, and what is asked of the Commission is an impossible task. He is proud to talk about what the Commission has achieved, but said it very much needs the GOC's support and the support of everyone who is dedicated to seeing the Sixth Amendment mission served adequately and to help them develop the structure needed to provide adequate oversight. He wanted to acknowledge that in MCILS's meeting with the Judiciary Committee last week, they received the support of that Committee to add staff to their total operations and need that support to continue because they cannot accomplish their mission without it.

When Mr. Andrus arrived at MCILS he accepted the OPEGA report as a fundamental checklist. It is not a checklist that leads MCILS to the ultimate performance they want to provide, but it is a checklist for baseline deficiencies that OPEGA had identified for them. He was proud to report that on every front that he can identify from the OPEGA report, MCILS has begun making progress. They have either developed or communicated billing standards and revised their processes for attorneys to input data into their system to improve the quality of the data. MCILS has engaged Justice Works, who is the vendor that provides their billing platform called Defender Data, to begin the process of implementing user level checks of data validity, including clearing typos and ensuring that the data that gets put in is granular and accurate. In MCILS's procedures he has moved the baseline voucher checking function to that feature because the baseline voucher checking function, in effect, means to address typographic issues, but ultimately does not address the broad issues. In the meantime, they are working with Justice Works to develop and implement

true database levels of access for MCILS so they can do their own queries and identify billings data that are suspect and review these data. He said they started out talking about things as high billing events and moved to risk events because in addition to overbilling, underbilling could represent a quality of service issues. MCILS will be using that feature and function to identify both issues and has begun to identify what those risk triggers should be. One example is the 12 hour emails referenced in the report and MCILS has begun to implement requirements that attorneys provide substantive answers to these emails. Starting next week, he expects to push out a requirement that will call for attorneys to certify under oath that either the billing numbers are correct or they have been corrected and will be repaying MCILS for overpayments. The audit function in OPEGA's report identified MCILS problems and he believes they have the support of legislators and the Executive to tidy up MCILS's statutes and rules to ensure that they have a robust process that will allow them to do that.

OPEGA's report identifies 4 statutory elements for which the Commission had not yet adopted standards for. Mr. Andrus said MCILS is in the early days of doing that and the focus so far has been triaging the financial issues as quickly as they can. What he anticipates doing over the next few weeks is communicating with his colleagues in similar positions in other states to survey how they do that and begin to have a robust review. MCILS has asked the Judiciary Committee for its support for 2 additional positions, an attorney and a paralegal, in the supplemental budget. The attorney would take on a role responsible for ensuring quality assurance and the paralegal would specifically be involved in reviewing financial standards.

MCILS is also updating the process by which rostered attorneys request non-counsel funds for investigators and experts. Mr. Andrus would like to develop a standardized billing form that must be used for payment that will allow MCILS to receive the data in a manner that is subject to review. Parallel to all of that, Justice Works is involved with the technical side of that work. He checked with them earlier in the day hoping to give the GOC a timeframe, but they are not ready to give that update. In addition, MCILS is working with OIT to develop their own database that will allow MCILS to bring all of the qualifications they have with their attorneys into a structured database system where it will then be possible to regulate and evaluate that data. Now there is just a lot of paper and it is difficult to go back and determine qualifications, when qualifications were achieved, if they were lost or to be able to address issues related to non-counsel billings. MCILS began working on that earlier in the week and anticipates that in a week, or so, they will have information from Justice Works as to their timeframe and will have access to the data and be able to determine what data they need to have, including investigations, into the process.

Mr. Andrus said although he is not able to speak to anything with great specificity on this subject, MCILS has begun the process of investigating those instances that appear to implicate either a failure to perform adequately or questions related to billing. He did not want to sound vague in the subject most people are probably most interested in and would do his best to answer questions about that. The threshold he has established is that if MCILS receives any information, or complaint, about a person's ethics or a person's billing, that will get investigated.

Mr. Andrus said that going forward MCILS needs people. They can implement all the structures talked about, but practically speaking, it is impossible for the staff MCILS has now to continue to add tasks, or to do them adequately. When you add correcting the issues of the past, identifying new paths forward, implementing those new paths and then engaging in the investigative work that moves paths forward, and the training for those new paths, it is not work that 4 office staff can do. He often talks about there being 2 of them because there are 2 attorney staff. MCILS does have 2 non-attorney staff and he wants to recognize them as well, but MCILS will absolutely require more people to do its job. Again, MCILS needs to be resourced on a lot of levels. They need to be resourced immediately for the agency level tasks that are necessary to demonstrate compliance and oversight. Again, Mr. Andrus thanked the Judiciary Committee

for recognizing the need for additional staff and would appreciate whatever help the GOC could provide in that regard.

**Eleanor Maciag** had no prepared remarks and said Mr. Andrus did an excellent job explaining what MCILS has been working on since he came on board. She is available for any questions by the GOC.

Sen. Keim appreciated Mr. Andrus's testimony, noting that the Judiciary Committee, which she is a member of, heard that presentation and asked if Ms. Maciag had anything to add that is specific to OPEGA's report.

Ms. Maciag did not have any specific comments regarding the report.

**MCILS Commission Chair Tardy** said he is optimistic and enthusiastic about Mr. Andrus stepping up into the Interim Executive Director role. He can see on day 24 that he has moved the needle and has made progress. As Mr. Andrus testified, the OPEGA report was a very important initial checklist that provided guidance and a framework for how he would look under the hood of the Commission. Chair Tardy believes progress is being made, particularly in the area of billing procedures and financial accountability. He is encouraged that there are active investigations of billing practices and believes strongly that what OPEGA's report concluded, what the Judiciary Committee has concluded, what the Center's report has concluded, and what every outside group that has looked under MCILS's hood concluded, is that in order for them to be sustainable and to perform at a constitutionally required level, they need more resources. He is encouraged with the dynamic leadership that Mr. Andrus has provided and can see that MCILS is already making positive change. Chair Tardy believes that MCILS staff is performing at a maximum level and are going to need help because it is simply unsustainable. They are looking for ways, through the budget process, to affect positive change going forward. He is, however, very encouraged that they have an Interim Executive Director who is responsive to the critical assessments made by the GOC's work.

Sen. Libby said at the Committee's work session on OPEGA's report they will be discussing next steps and one thing they may consider is having MCILS report back to the GOC on a regular basis over next 12 to 24 months. He asked if Commission Chair Tardy would be open to assisting the Committee in that process.

Chair Tardy said absolutely and that he thinks the more MCILS is under a microscope, the more it is in the public interest and is fundamental to their task, as a Commission, and part of their oath.

Sen. Keim said the GOC still has further scope questions to discuss regarding OPEGA's work and asked if Chair Tardy or the Commission had any comment regarding that. Is there anything specific he would like to see OPEGA take on, or any charge to the Committee itself, that he feels is important

Chair Tardy said, especially given the time of being between budgets, and as they prepare their biennial budget presentation to the various legislative committees, he is interested in how GOC and OPEGA may assist MCILS regarding audit related functions that could help MCILS on financial transparency and accountability. But, for how that is actually implemented, he would yield to Mr. Andrus. He knows that Commissioner Carey, who Chairs MCILS's Accountability Subcommittee, has some specific thoughts on how those resources could be best deployed. His macro view is that if there are resources that are willing to be expended and looking under the hood of MCILS, as a Commissioner, could say the Commission would welcome it and thinks that is actually a way to enhance public confidence. The high percentage of MCILS rostered attorneys are extremely competent, provide great representation and thinks the GOC will see that, but they acknowledge the public criticisms and if an audit is needed, they will welcome it.

**Robert Cummins**, MCILS Commissioner, emphasized something that had less to do with OPEGA's report and more to do with the State's mandate that MCILS provide efficient, high quality, legal representation to

indigents as articulated in the state statute. He was surprised that there were not questions from the GOC when Mr. Andrus articulated in his presentation that Maine is not complying with the Sixth Amendment and that they are, as a Commission, unable to fulfill their statutory duties. The focus on efficiency is wonderful, but it is less important, in his judgment, than the mandate to represent the indigent with quality services and with the necessary funds to investigate. The lawyers who have volunteered their services to assist the indigent in Maine are grossly underpaid. The hourly rate is an embarrassment, and the lack of funding for forensic and other services, particularly in a criminal case, are woefully deficient. It seems anomalous to him to discuss the financial aspects of a commission's performance when the task of the commission is so woefully underfunded that it becomes a serious question as to whether, or not, Maine, the Executive, Judicial and Legislative Branches are committed to provide the kinds of services Maine's indigents require.

Commissioner Cummins said Sen. Keim raised a question about if there were specific things that can be done and he said there certainly are. In MCILS's budget proposal they requested funding for a pilot project for a public defender service in Kennebec County. That has been rejected. We need to restructure and reform the representation of indigents in the State of Maine and funds are needed to do that.

**Michael Carey**, MCILS Commissioner and Chair of the Subcommittee for Financial Responsibility, reported that the Subcommittee has had a number of meetings, robust debates with staff and have taken detailed public and rostered attorneys' comments that included some great suggestions, specifically some of the red flags that they are looking to adopt came from the Bar. Commissioner Carey said that the specific suggestions and the next steps forward reported by Mr. Andrus are unanimously supported by the Commission. He would echo what Chair Tardy said and what Mr. Andrus has indicated regarding the need for additional staff. He thinks it is critical that they look to improved auditing going forward to fix the future and that needs to be the focus along with getting the OIT changes done in the database system. In terms of looking at the past, which he would like to see done, that would be a place where MCILS would love to have OPEGA staff help, with the support of the GOC. His understanding is that the level of the data, which he is not surprised to hear, is sufficiently inconsistent and will require more in-depth work than simply database queries that MCILS hoped to do in the future. That is an area MCILS could have help in. His focus has mostly been on fixing the financial pieces and would ask the Committee to be aware that the Commission has not met some basic statutory standards which are needed to comply with the Sixth Amendment, including has not passed rules for evaluating and overseeing attorneys. That was a requirement that was put in the Statute in 2009 and it is an embarrassment that it is not done.

Sen. Libby said he has heard that some of the folks involved in MCILS are interested in talking to OPEGA about assisting in future audits. OPEGA has a number of items on their Work Plan and whenever the GOC tasks them with taking on a major project, it impacts the other items on that Work Plan. He asked if Commissioner Carey was able to speak at all to other discussions he has had about audit resources, including with the State Auditor's Office, hiring internally to have that capacity on a permanent basis, or going external and hiring an audit team going forward.

Commissioner Carey said audits going forward need to be a function of MCILS staff so that the Commission, and the State, does not find itself in this position again. He distinguishes between looking back at the past and some of the specific practices reported on in the OPEGA and other reports. He thinks it would be helpful to have additional staff resources. One of the staff positions that Mr. Andrus spoke to that was unanimously supported by the Judiciary Committee, is to add to the supplemental budget a paralegal level position to help with reviewing audits. It is his understanding that is needed for the forward looking audit process. In terms of all other resources to spend on at this point, it is his understanding that they have the resources to finish the fiscal year to pay attorneys. Because of COVID, MCILS has a cash flow benefit in the sense that the funds have not been expended and they should be able to carry over some funds. The specific accounting details are beyond this scope, but MCILS should have funds to carry over. However,

they do expect those funds to be used and is not an indication that the decline in cases they have seen during the COVID period have gone away, they have been pushed out. He agreed with Commissioner Cummins about the low rate for attorneys that do very good work.

In terms of outside resources, Commissioner Carey thinks it was Sen. Libby's suggestion in the last meeting, that MCILS talk with the State Auditor. Commissioner Carey has spoken with the Auditor's Office and they were very clear that the crux of their annual work is happening and he had the sense there was no time right now to help. He also asked about joining the Financial Subcommittee as a member to give some of their audit and forensic accounting expertise. That is a piece that is still ongoing so he does not think there will be significant resources from the Auditor's Office for the next few months. Commissioner Carey did not want to leave the impression that they have given up hope in terms of getting additional resources on a going forward basis to do audits of the past. It becomes a question of priority and his strong priority is that they fix the future and not find themselves in this position again. Right now, even with the additional 2 staff resources on top of the 4 that they have, he does not see a lot of time to devote to past audits.

**Jane Langdon-Gray** is a MCILS rostered attorney, said she is pleased by the testimony she has heard so far at the meeting. Even before OPEGA's report she definitely saw problems with MCILS's database access. She used to work for Wayfair as an online retail operations analyst and her work there primarily consisted with interacting with the Wayfair database. Being able to access data is huge. She was dumbfounded when she found out how many staff MCILS actually had. Just knowing the number of vouchers, or data items that she enters in any given week, she did not know how MCILS has dealt with so few staff this long. She would underscore the request for additional resource staff. She also wanted to support the Commission in what they have done so far. Despite the inefficiencies noted, she has never had anything but great support from the Commission. They have always been responsive to her queries and she gets paid for the work she does. She said most of the other MCILS rostered attorneys get paid to do what they love, but deserve to be paid more. Having OPEGA's report and public scrutiny has led to further dialogue and communication with MCILS and some of the greater political community in Maine. Getting more support is important and she thinks Mr. Andrus is the person to do it.

**Cory McKenna** wanted to let the GOC know that he has been practicing his entire career in court-appointed defense. While he would like to see a rate increase for MCILS rostered attorneys he realizes that is not the primary focus. He believes the primary focus should be on getting more staffing for MCILS and thinks it is nothing short of a miracle that they have been able to do what they have done with 3 employees. It is a difficult task, but he hopes that MCILS can implement some of the great things they have started to do under the Mr. Andrus's direction. Mr. McKenna looks forward to having higher standards, more oversight, being able to prove to the public at large, clients and the State, that they have an excellent court appointed system and the only way to do that, he believes, is to be able to have adequate staff to be able to show that the service is being delivered at the highest level and that the representation is the quality that he knows it is. Having private attorneys is the unique advantage in that it brings people who want to do this work to the table, and it lets them work more as an attorney and less as part of a system. He hopes that the GOC hears the call. He is not sure what others have testified to at the meeting, but he believes funding for MCILS staffing is the most important thing and from that everything else will flow in the future and there will only be positive things to come.

**Dwight Hines** said he has a great deal of respect for OPEGA and the work they do. His concern regarding MCILS is the low pay of the rostered attorneys and that there are preventative things that can be done regarding the need for indigent legal services. There are a lot of people that go pro se and self-represent themselves in court and many are on the cusp of being indigent. He thinks there is a way of reducing the number of people that are needing indigent legal services and has data from the National Center for State Courts regarding that. He knows from talking with the Director of the National Federation of Independent

Business in Maine that there are a number of small businesses that if they could have had an attorney, would still be in business. There are a number of grants available for different projects and someone should be looking into the possibility of MCILS receiving grants. He said the Court system is very biased and you need a lawyer representing you. You need to have attorneys step up to show they are important for the economic development and stability and they are not doing that. You have to prevent people from coming into the indigent legal system.

**Rob Kilgore** said he spends a lot of time in MCILS Defender Data because of the legal work his wife does. He thinks he is qualified to offer his thoughts because he has a degree in public administration and an MBA in statistics.

He said he hears everyone saying MCILS needs more staff. He agrees MCILS definitely need more funding and probably needs more staff in the short term. The problem with throwing bodies at an efficiency problem is that you are never going to hit a point where you can say we have all the people we need. There is always going to be something more that is going to be expected of those people. So, the solution to the efficiency problem here is that MCILS has to look at their technology. That may also mean going to another vendor. He does not know what MCILS's contracts are, or how long they are locked in with them, but there is a lot of technology things that can be done to alleviate a lot of their issues.

Mr. Kilgore noted OPEGA's report says 37% of days in which a staff person was approving vouchers they reviewed more than 100 vouchers allowing less than 5 minutes to review each one. That is obviously not an effective use of staff time to say I am going to look at this thing for 5 minutes and just approve it because it hit a list of criteria. If you have an established set of criteria that is written down and that is codified somehow you could share that with the attorneys and their staff, which OPEGA's report says on page 7 is not happening. You can automate a lot of that work. Anecdotally, at his previous position they had a lot of field work sales representatives and a decade ago the process was for them to fill out an order form, fax it or email it to the office where they had a data entry department that would then hand key those orders into their system. As they grew all of their profit growth was eaten up because they had to keep throwing bodies at the data entry process. What they did was to create an online order portal where the sales reps entered their own orders into their system. The company could get rid of a bunch of the data entry people, or repurpose them for other positions in the company, and the sales reps could process their orders faster. That part worked. However, there was an unintended consequence. Their customer records went bonkers in terms of data because they basically gave the keys to the kingdom to the inmates of the asylum. Any time you say we don't want to do the data entry, we want a third-party to do it and you don't give them clear guidelines, you are going to have a data nightmare. There are ways you can do it by automating control in the system. Make it so every voucher does not have to be looked at by a human being. Set rules into the code of the system and then your people who are reviewing vouchers are only reviewing the ones that get flagged, the ones that break those rules. That allows you to keep your staff costs under control while at the same time, increasing your compliance. It is a technology solution, not a body solution. You probably need more people in the short term, but you got to realize more people is just a band aid, especially if you are talking about using a technology solution going forward. Don't just take the wasteful practices and then automate those, but figure out how you can actually make a system that is going to work well. The number one piece of feedback he would have for the GOC is to think hard about what you are spending that money on.

Second, Mr. Kilgore addressed the pay rate issue and agreed with the previous speaker, Ms. Langdon-Gray, that the money should be spent on fixing the problem and not the rate. The vast majority of the attorneys working in the system, and he exchanges emails with many, are true believers. They do the work because they love it, because it is what needs to be done. They are helping out the vulnerable members of our society and we should not forget the mission of MCILS. It is protecting the people in our society that suffer

mental illness, addiction and generational poverty. Those are the people MCILS is making sure receives effective legal counsel and that is very important.

Mr. Kilgore noted that when the Sixth Amendment Center's report came out the media went bonkers about all the fraudulent attorneys and the spending of the State's money, etc. and that basically no one came to the attorneys' defense. Everyone was silent and he is glad to hear Chair Tardy speak about the effective counsel. Everyone needs to speak to that louder because, as in the OPEGA report, it states the Center really did not have the best information to work with. He thinks a real disservice was done for the attorneys working for MCILS who are true believers. Let's not forget that 97.7% of attorneys' annual fiscal total are below 40 hours a week and instead everyone focused on the 2.3% and that is what the media ran with. He agrees with Chair Tardy that the more MCILS is under the microscope the more this will be in the public interest and agrees it should be. However, you do need to make sure the public is getting the right information and that the people who are doing this good work are not getting thrown under the bus.

**Kenneth Capron** said OPEGA's report on MCILS was excellent and complements to them because they seemed to have held no punches and that is what people like to see, an in depth analysis of what could be going wrong. The prior point about 8 attorneys causing a lot of stir in any system said there are overbillers at one end and there are underbillers on the other end. That is just the way it is. He thinks OPEGA did a good job identifying where problems may lie and they will not know until they take a deeper dive. In addition, he wanted to ask the GOC when they review reports like OPEGA's report today, do they ever consider looking at the State Auditor's reports on the similar functions as MCILS? He never hears the State Auditor's reports come into play and is curious if the State had identified these problems previously. Mr. Capron liked the criminal Gideon (right to counsel) that exists, but wondered if, at some point, the Committee might also take a look at a civil Gideon because there are a lot of civil cases that are improperly adjudicated just because of a lack of funds. At some point that needs to be put on the table and the issues in both are funding.

Mr. Capron wondered if OPEGA, in their work, did an evaluation of whether a public defender's office would be a better alternative to MCILS where you have full time staff that works the public defense. He has no idea on that, but threw it out because it is an alternative that could be considered so that you do not have to worry about other attorneys and how much they bill or how many hours they worked. Maybe that is something that needs to be controlled. It is one thing to have rights, the Constitution spells out a lot of rights that we have, but if we can't afford to defend ourselves and defend our rights then we have no rights at all. That is where both criminal and civil Gideons (right to counsel) come into play. Without some protection the public has zero rights.

Mr. Capron said he is a strong believer that those who benefit from the system should pay for the system. He is surprised that the State has never considered some sort of a charge structure to practicing and active attorneys to pay for the entire judiciary system. That should not be on the burden of the tax payers who may, or may not, benefit. In reality, it is the attorneys who benefit most from having a court system and a judiciary system. He thinks that is the place to put the money rather than increasing taxes broadly. The funding should come directly from attorneys across the board as a flat rate.

Mr. Capron said indigent legal representation is a necessary service. There is no question in his mind from reading the report that there is staff needed and he would like to see the GOC put forward a recommendation. But again, you have a budget wall that is going to make that difficult, if not impossible. He would recommend that somewhere in the GOC's efforts that they start looking at a solution to the funding issue for the Judiciary Branch. He knows that is a far reaching issue, or concern, but thinks without solving the funding issue, they are going to have the same problem of understaffing, not just in this department, but across the board, like the Maine Human Rights Commission, Legal Services for the

Elderly, etc. Every agency that provides legal services for indigent people, or for residents in general, is understaffed.

**Robert Ruffner** has been practicing criminal defense for about 20 years and his practice is almost entirely indigent defense. In December of 2007 he formed the Maine Indigent Defense Center as an advocacy mechanism to work to reform how indigent defense is provided in Maine. At the time Maine did not have MCILS and indigent defense was under the Judiciary Branch. He thinks the Sixth Amendment Center and OPEGA reports provide an excellent opportunity to advance the ball forward and causes indigent defense to increase the quality and value of what is being provided to the State of Maine. Essentially, after MCILS was formed a decade ago, there has not been a lot of progress. It was an excellent first step, but it then stalled for a variety of reasons. Primarily because there was never enough staff to do anything except keep the lights on and bail water to keep the ship afloat and they worked incredibly long hours just to achieve that. Over the years he has echoed almost all of the criticisms that were laid out in the Center's report, as well as, the OPEGA report. He would point out that everything about the current system is better, even though flawed, than it was under the Judicial Branch. What the State of Maine decided to do was to give the process independence, take it away from the Judicial Branch, where it should not be, and structure it basically the same, with slight improvements. There were standards, though they were not particularly strong or stringent. There were no standards to get on the roster or to have certain types of cases. Now there are. It was all paper billing in the old days so when talking about not having answers to data, or knowing even who had what number of cases over period of times, or billed in a certain number of hours in a week, month or day, existed under the Judicial Branch. He pointed out that the reason he formed the Indigent Defense Center was to focus on the service being provided to the clients. The State has to provide indigent legal services, either by statute or the Constitution. All of Maine benefits from the service provided because without it being provided, individuals who are a danger to themselves or others, could not be hospitalized, prosecuted or punished. If we have confidence in the outcome of the judicial process because there is quality representation for the individuals, we have confidence that the right person was prosecuted and the right sanction was imposed and that the best tools for reducing recidivism and for healing have taken place. That also applies in child protective, involuntary commitment and juvenile law as well.

Mr. Ruffner knows OPEGA's report focused on a narrow portion of the criticisms that were laid out in the Center's report. The Commission should have anticipated and been able to answer the questions and had explanations for them as part of their duties when the Center's report was being done, when they were investigating that. And it didn't and was a failure on their part. He, and all the other MCILS attorneys, still have many clients that are in the system. You cannot computerize being able to tell whether an attorney is doing a good job or whether an attorney is missing the opportunity to grow and do a better job. You do that through training and mentoring. That is labor intensive and involves qualified individuals who have the expertise to provide that evaluation and to give feedback. It is the same thing that you see in the District Attorney's Office. At his first trial he had a homicide attorney second chairing him. She obviously was very experienced and had better things to do than sit next to him while he was doing his first jury trial in a misdemeanor case, but without having an experienced person next to him the office would not have known if he knew what he was doing, if he is any good at doing trials, if he is missing things, if they needed to get him, and other attorneys, up to speed on certain issues. That takes a human being, you can't database that. In addition, the ability to do case file reviews during, or after a case is done, does not exist without human beings. We don't have the ability to get feedback from clients. One change on the Commission he recommends is there ought to be a client representative as part of the Commission. We don't have the capacity to get feedback from their clients to find out how they can do a better job. While he understands it is important that money that we pay as taxpayers in Maine be spent responsibly and there is accountability for that, he thinks we are leaving open the deficiencies in the system in terms of what we should be doing for these individuals who are entitled to representation. There needs to be a simultaneous effort. He is not suggesting to stop talking about the billing practices and whether there is adequate oversight or accuracy. There needs to be a concurrent discussion and resources brought to bear on the issue of quality and filling

gaps. There are still situations where people languish in jail due to gaps in the system for months because there was a slip-up in the process. We have attorneys that are underutilized because we do not have a way to accurately reflect the fact that they could take on more than the arbitrary standards allowed.

Absent knowing Mr. Andrus for almost 2 decades as a practitioner, Mr. Ruffner would have no real information about him as an attorney. Reviewing the vouchers in terms of quality is a false tool. It is the only tool the Commission has had historically, but it is not an effective tool for a variety of reasons. He would urge the GOC to continue their work on MCILS and he was heartened to hear the idea of the Commission reporting back regularly to the GOC. He thinks that will be very healthy for the discussion going forward to keep focus and energy on the important and vital work that the Commission does. All legislators have constituents who are being represented right now by MCILS attorneys. Making sure that the best outcome is achieved for them, which not necessarily means an acquittal. It may mean a chance for them to turn their lives around because the attorney has the training, skills and resources to advocate for that sort of outcome and that can make a huge impact, not only for constituents, but the communities in which they live in. Somebody who is able to turn their lives around and become a productive member of society benefits us all and is not someone you see again in his office. This is a vital service to the whole State that the Commission is tasked with. He urged the members of the GOC, in their discussions with other legislators and the Governor's Office, to recognize that we need to improve both fronts, quality and accountability.

**Written testimony:** The only written testimony received for the public comment period on OPEGA's MCILS report is a letter from the 129<sup>th</sup> Government Oversight Committee to the 130<sup>th</sup> GOC. (A copy of that correspondence is attached to the Meeting Summary.)

The Chair, Sen. Libby, closed the public comment period at 10:38 a.m.

#### - **Committee Work Session**

Sen. Libby said this is the opportunity for the members of the Committee to have a back-and-forth discussion about where they would like to see this project go in terms of next steps and what, if any, direction they want to give OPEGA staff for further inquiry. There are a variety of action the Committee can take and, at the very minimum, at the end of their discussion he will be asking for a motion to endorse OPEGA's MCILS report. He said endorsement is a typical action that the Committee takes on OPEGA reports. It does not necessarily mean that the members agree with all of the political considerations around an investigation, but endorse means that they affirm that the OPEGA analysis was impartial, accurate and factual.

Sen. Libby said there are some members of the Committee who are interested in having further conversation with either MCILS staff or Commissioners and they have agreed to remain at the meeting for that discussion.

Sen. Keim said there were 5 scope questions that the GOC had originally created for OPEGA to review. Scope questions 1 and 5 are the questions in this MCILS report. She wanted to hear the opinion of MCILS staff and Commissioners of what would be most helpful to them moving forward. She has her ideas of what she thinks should be involved, but thinks it is a great time to be able to hear from the MCILS Commissioners or Director.

Mr. Kruk, OPEGA Acting Director, summarized the remaining scope questions at the request of the Committee.

Mr. Kruk said scope question 4 is related to the sufficiency of MCILS's response to identify concerns and any recommendations that would come from reports, not just OPEGA's, that are related to financial oversight. Questions 2 and 3 were related to indigency and partial indigency determinations and a lot of which is under the Judicial Branch.

Commissioner Carey viewed the 5 scope questions earlier in preparation for this hearing. He does not think any of the questions are moot, or past the point, and are all important questions. He would suggest, however, that help with resources to do audits from the past is critical. He referred to the State's role in the sentence "the Commission shall work to ensure the delivery of indigent legal services by qualified and competent counsel." As he referenced earlier, the Commission has not yet set forth standards for the evaluation of assigned counsel and he would strongly recommend to the Legislature that existing staff need to be focused on ensuring that funds are used properly. That is not to say that it is more important, it is to say they have not yet met the basic function of statute and the Sixth Amendment and if looking at the past gets the Legislature and the public to trust that they are using State resources properly, they can focus on assuring quality legal services.

Mr. Andrus said to answer Sen. Keim's questions of how OPEGA can help would first be to keep the light on MCILS and challenge what they are doing. He thinks that will do two things that are both vitally important. First, it is going to demonstrate the existing reality that the majority of their attorneys are providing excellent representation honestly, fairly and efficiently. They need to demonstrate that fact not by him proclaiming it, but by opening their books to the GOC, and anyone else who it is appropriate to look at data. Second, it is very difficult for them to identify, as they do the work of the day, all of the places where there needs to be system level efficiency and oversight changes. It is easy to say this step in the day can be done differently and alleviate the immediate derations of doing something. It is difficult to do that on a global view without having somebody having a look. It would be good to have a trainer. He does not know of the things that the GOC can do, but recognized that Chair Libby talked about the need to recognize that there is other work happening and MCILS is not the only child of OPEGA. To the extent that there is time, or resources, to participate directly in analyzing what is there, MCILS would invite that. He would accept anything the GOC/OPEGA can do to help them down that road.

Rep. Millett said he is pleased with the question Chair Libby posed to Chair Tardy for quarterly report backs to the GOC to keep them aware of progress being made, both under the Interim MCILS Director and going forward. He would like to particularly see the GOC updated regularly on the status of the staffing request, the pilot project budget request, the biennial funding level and the carry forward amount that Commissioner Carey mentioned. He thinks they can do that because they have representation on this Committee from both the Appropriations and Financial Affairs (AFA) and Judiciary Committees. As has been referenced today, the MCILS has been flat funded in the current biennium in \$17.7 million in the year just concluded and \$17.6 million going forward. The AFA Committee has before them, with a recommendation from the Judiciary Committee, the ability to free-up some carry forward money that was in a reserve account approaching \$3 million. In the AFA Committee's first pass of that at their meeting yesterday, they did not act upon it because of a piece of language and concentrated more on the low-hanging fruit, but that does appear to be in reserve amount of money that could be used for the balance of this year and going forward. He would like to see if the Committee could get from the MCILS staff, perhaps from Mr. Andrus, an estimate of the carry forward balance that he might see from Fiscal Year 2021. Rep. Millett would also like to hear from the Commission, or the Administration, on why the additional staff were not recommended in the biennial budget and why the pilot project in Kennebec County was also similarly rejected. What also caught his attention and thinks it came from Mr. Ruffner, is to focus going forward on quality. Reading the statutory charge, efficiency is something that was referred to by, he believes, Mr. Kilgore, and the intersection of funding and technology as a focus of how to get to a more efficient measure of representation. He thought there was value in the comment about going forward having coordination between the work of the State Auditor and the work of the Commission and he

questions the resource available to do much more rearview mirror auditing. He liked the idea of coordinating the going forward audit work.

Sen. Libby also was questioning the auditing work needed by MCILS and understands from Commissioner Carey that a discussion with the State Auditor has occurred and at the time the request was made, the audit resources of that office may not be available for the look back, but he would be happy to explore that further. He knows that OPEGA's resources for the look back audit is limited as well, mostly due to the quality of the data that is available.

Commissioner Cummins did not want to be misinterpreted in terms of his focus on quality as distinguished from efficiency. He agrees it is important to account to the Legislature and the public. He took an oath that indigents charged with a criminal offense are adequately and competently represented. He said they are now two years past the Center's report having been issued to the Judiciary Committee and MCILS has attempted to comply with the observations in that report, but they will not be able to do the job they are mandated to do, without the support of Legislature, Judicial and Executive Branches.

Mr. Cummins said the question was raised about the Kennebec County pilot project and he thought it was important because it will demonstrate to the stakeholders and to the public, that there is a reformed system that can be implemented that will satisfy, in so many respects, the obligations to meet the Constitutional requirements here in Maine. There is no way to measure the quality of performance on a computer or by reports of time records. MCILS is short of staff, they don't have enough funds and they cannot assure, despite the efforts of a lot of wonderful lawyers, that they are meeting the obligation they face as Commissioners and that is to ensure that high quality performance is rendered in every case where an indigent is charged or a dispute over the best interest of a child is at stake.

Sen. Libby reminded everyone participating in the meeting that the work session portion of the GOC meeting is for the opportunity of the Committee members to have the back and forth with Commission staff and Commissioners to help them answer question as the GOC goes through the process as a Committee. He would ask from all non-committee members to please keep their remarks to questions poised by Committee members or along those discussion points.

Mr. Andrus referred to Rep. Millett's comments about quality and referred to Commissioner Cummins statement that quality is not on the doorstep of this group. He would refer members to 14 MRSA §1801 and look at the actual statutory charge which is unequivocally about providing defenses and that it should be done in an efficient way. In other words, the Sixth Amendment's quality problem is a charge to all of them and the financial stuff is second to that. His immediate focus has been on the purpose of establishing the resources to meet the second need.

Mr. Andrus said MCILS is going to have a lot of more broadly defined roles in the organization and have staff out looking at what people are doing. He has begun that process.

Mr. Andrus believes they are asking for \$6.2 million in the supplemental budget. He wanted to make sure that everybody is aware that they are seeing a cash flow now because the absence of trials under the pandemic has resulted in a significant reduction in the attorney time being spent. The piper, however, is going to come on that issue and trials are going to stack together at some point in the future when the current pandemic situation is under control. They will see a ramp up that is at least equal to the ramp down that they have been experiencing. The thing to remember is, to the extent that it looks like MCILS may have surplus funds, they are going to have surplus expenses in the foreseeable future.

Mr. Andrus said there was a question about what happened to the Kennebec County pilot project in the request of the biennial budget. They asked for it, they want it and he is doing everything in his power, as is

the rest of the crew doing everything in their power, to demonstrate to the Legislature and the Executive, that they are eliminating the waste, getting control over whether or not there is fraud and making sure there isn't. All of that is in an effort to demonstrate to the GOC that the organization is worthy of the funding to allow them to achieve their Sixth Amendment mandate.

Rep. Arata noted that OPEGA's report mentions that there are a lot of vacancies in MCILS. She knows the budget calls for 11½ positions and was wondering if the vacancy level has had an impact on MCILS's ability to get the work done and if filling those vacancies might suffice rather than adding the two more positions that have been requested.

Mr. Andrus said those vacancies are vacancies in their needs, but they are not vacancies in their budget so when they asked for those positions they were asking to add staff. His request to add two positions in the supplemental budget was moved through the Judiciary Committee last week. MCILS does not have 11 vacancies or 10 vacancies that they could fill, although he would be delighted to have the problem of finding the right people to fill all of those needs. MCILS has 4 office staff and 8 financial screeners. He is one of the staff, Ms. Maciag is one of those staff and they have a financial technician and an administrative position. They have 8 people in the field doing the financial screening and are not available to the staff in the office. There are 600 lawyers and approximately 28,000 clients and at the end of the day there are 2 MCILS staff making decisions, providing oversight for those people and 2 more MCILS staff helping to implement the tasks associated with that oversight in various ways.

Sen. Keim believed Rep. Millett brought up several good issues and wanted to make sure they all got answered. She did have questions about where the pilot project would be – Kennebec versus Cumberland, but thinks it is a discussion better for the Judiciary Committee so she would go back to Rep. Millett's questions and asked if they were all answered and then she will ask some of her own.

Rep. Millett believes his questions had been answered in one way or another. He wanted to say that when he focused on the words quality and efficiency he was reflecting on a comment the Committee heard this morning, not in any way suggesting against the checklist that Mr. Andrus and staff are working on now, that that ought to rise to additional priorities. He does think however, they are assumed to be part of their ongoing charge anyway. The budgetary and staffing questions have been answered. The comments that Mr. Andrus made about the pandemic having reduced the level of representation in current fiscal year and having that come back in the upcoming year thinks makes logical sense. However, he thinks both at the Judiciary Committee and the AFA Committee level need to have a sense of the magnitude of that carry forward, make sure it is not swept and allowed to continue and that they have further responses, outside of MCILS and from the Administration, on the reasons or the rationale other than fiscal, for not including the pilot project and/or addressing the staffing requests that have been made. Rep. Millett said Chair Libby answered the audit coordination question going forward and backwards, so that has been answered to his satisfaction.

Sen. Keim said going forward systems are going to be in place to create accountability and they have chatted about whether or not the GOC could task OPEGA with a deeper dive into what went on in the past. She understands there is a lot of difficulties with the data, and as she has talked with different Commissioners and different folks involved with MCILS, what she sensed was a big concern that the GOC try to do something further with looking back. She wondered how the Commission, MCILS's Interim Director and Mr. Kruk feel about doing that work. She knows Mr. Kruk did a lot of the leg work on the MCILS review and probably has some comments for the GOC on the validity of OPEGA doing a deeper dive. If that is an appropriate question, she would like to ask it.

Mr. Kruk said the voucher is essentially the attorney's invoice and each line item on that invoice are work events. There is a selected drop down field that indicates what was done, for example, a phone call with a

client, and then the attorney enters the duration of the event. The voucher system was just used for two purposes, for attorneys to bill hours worked on a case and for MCILS to ensure that billed hours were reasonable and appropriate for the type of tasks. With that narrow focus, driving how hours are reported and reviewed, the data entered by the attorneys did not necessarily need to be granular with discrete entries for each work event in a day of the attorney in order to be approved and paid. As a result, OPEGA finds themselves left with data sets that have entries capturing essentially the hours of multiple attorneys under one attorney, batching multiple small work events over the entire course of the case into one large single event entry and capturing work hours on the wrong date. The data set is 500 or 600 attorneys billing 4.5 million work events on 282,000 vouchers and any single voucher can span a very long period of time, in some cases, for the duration of a case. When OPEGA first received the data, they had plans for identifying outliers, or unreasonable numbers, for specific tasks and attorneys.

Mr. Kruk said as stated in OPEGA's report, they did look at high outlying values for 8 particular event types. There may be more, he did not recall the exact number. Within those 8 event types there were 110,000 outlying values over the 10 year period with some pretty wild entries. For example, 30 hours to prepare an email or a 20 hour phone call with a client. Obviously OPEGA picked up on those immediately, but when they took a closer look at those entries, they found that over 80% of them were either flagged by MCILS and later corrected by the attorney, had an event note from the attorney, a voucher note from the attorney, or the voucher total was overridden by MCILS's Director or Deputy Director. The notes are narrative and OPEGA did not have a good way to process them in bulk and also to identify which entries reference or explained the hours billed. Also, from the OPEGA's review of the high daily hours tracking spreadsheet, hours may be batched by attorneys without a note in Defender Data and there is no good way for OPEGA to detect that. When the voucher total was overridden, only the voucher total was corrected. The particular line item of entry that caused the issue, like 12 hours being entered instead of 1.2 hours was not corrected and it remains in the data.

OPEGA received some poor quality data from MCILS that they were able to use to assess MCILS's monitoring efforts and controls and that is really the focus of the issues in the OPEGA report rather than specific instances of potential overbilling. When OPEGA goes beyond that level of analysis and tried to use the data to identify potential overbilling instances, we start to run into issues. To do a deeper dive OPEGA would need to identify specific attorneys and time periods because there is no way they can review all of the attorneys, or even review an attorney's entire year of billing. To do that, OPEGA would be leveraging all of their future work and resources against data that has a lot of quality issues. Additional complications also factor in. OPEGA would still have to work with the Attorney General's (AG) Office to figure out what they would be able to obtain from attorneys. Could OPEGA retain or review the attorneys' time records related to non-MCILS cases? They then would have to be able to figure out what they could provide to the GOC. Assuming OPEGA could identify specific attorneys and timeframes from the data and assuming they had the authority to get all the information they needed, they still don't know whether the selected attorneys will have those records, or if the information is going to be in the format OPEGA could use. Mr. Kruk said obviously if it is the will of the GOC, they will be glad to try something. If the Committee wants to do something OPEGA could put a couple of analysts on the project for a month to work the data and see how much of the bad data they can sift out, or account for, and figure out what a sample might look like. They would also work with the AG's Office to figure out what they can obtain for records and then come back to the GOC with an outline of where OPEGA is and what could be done. The Committee could decide on the next step once they receive that information. Mr. Kruk did not want to commit to something OPEGA may not be able to do based on what they have.

Mr. Andrus had additional information to add to Mr. Kruk's comments and an answer to Rep. Millett's question during the time Sen. Keim was asking him if any information remained outstanding. He does not know how much information the GOC wants today, but one focus of his work to date has been eliminating the sources of the data issues that Mr. Kruk talked about. If the Committee wants that detail he would be

happy to share it. For Rep. Millett, he said he could not predict what the flood of court cases would look like because he does not have all the data, but he can give one data point which is illustrative. In September 2019 there were 2,600 open outstanding cases on the Unified Criminal Docket for trial in Portland. A year later there were 4,400 so they are backing up at a rate that caused a doubling in less than 9 months in terms of Courts' work schedule. Anecdotally, what he is hearing is that some courts are thinking having some jury trials in an April timeframe, but he has no idea if that is realistic. When that flood comes, they are going to be looking at a doubling of expected case volume per court for 6 or 8 months of backlog. It is a significant problem that comes in both the terms of the load that will be on the courts, MCILS's attorneys and the prosecutors and the cost associated with that work.

Sen. Bailey noted that when Mr. Kruk talked about both what OPEGA has done and going forward, in terms of looking at the billing issues, he only talked about alleged overbilling irregularities. Is she to take away from that that OPEGA has not looked at, nor has plans to look at underbilling because as the GOC has heard today, and raised before, is the interplay of where quality comes in. An extreme example is if an attorney submitted a voucher for a murder trial for 2 hours. That should be a red flag that something is not right. Is OPEGA only planning to look at overbilling, or would they look at underbilling as well?

Mr. Kruk said OPEGA's focus was the outliers that were high so would not have looked at underbilling. They were focused on the idea of potential overbilling because this was borne from the Center's work. Mr. Kruk said he should be referring to overbilling as "potential" overbilling because, at this point, OPEGA only has some outlying values that may look like overbilling, but they could actually be the result of how the hours were recorded and, in reality, all the billed hours actually reflect hours spent working on cases.

Mr. Andrus said, on this point, the first thing he did to come up to speed as a Director at a Financial Subcommittee was to change their nomenclature and concept of high billing triggers to risk triggers. From his perspective in meeting the Commission's charge, low billing events are a big problem. For example, the absence of motions to suppress in certain cases should be alarming. It is an investigation that he is going to have to do because he has a Freedom of Access request from the ACLU specifically asking that question, among others. He is going to look at what information exists and that data is about to come out. There are going to be some confidentiality statute constraints on what is produced and MCILS still needs to finish that work so he does not want to suggest they are waiving that part of the process by talking about its existence here, but that work is about to be done.

Sen. Keim said regarding determining indigency thinks the Committee has heard from the Center's report that there are a considerable lack of consistency and people who are going through the system that also speaks to fairness. She has concern that the GOC look at the standard, that they understand how they are being applied, if standards are being applied equally in all areas. She knows that the Commission is looking to see where this would be housed because it may be decided that it should not be housed at MCILS, but somewhere they still need to have a look at how the system is determining indigency and the fairness around that issue. She is not sure who is best to speak to that matter, but that is another issue that the GOC has in the upcoming scope for review of MCILS and she thinks it is important.

Mr. Andrus said that he was not ready to answer Sen. Keim's question because he has not had the opportunity to get his head clear around that part of MCILS's operation. He said at the beginning of the meeting he would acknowledge where his 24 days in the position have not yet been enough and this is one area for that. He said MCILS very much needs to figure out whether their standards are what they should be and make sure they are being applied consistently. His charge under state statute, 4 MRSA §1801 is the representation of the defendant, or civil litigants, in those instances, first. MCILS has had an internal discussion in the last day regarding the issue of addressing fines and restitution on behalf of courts and whether they should have any part in that. His view is, without knowing all of the other factors, MCILS should be moving that function outside so they are not having a conflict between their organization and the

people they are intended to represent. But until then, they need to tidy it up and hopefully can answer the Senator's question more fully in a couple of weeks.

Sen. Keim asked if there was another person on the Commission who might have a comment around her previous question. It was something that was highlighted pretty strongly in the Center's report.

Commissioner Carey agreed with Sen. Keim's concern and also saw the issue raised in the Center's report. From his perspective he has been focusing on the financial processes of the organization and as one person on the Commission, and more as a citizen than anything else, he does agree with the Center and it should be a Judiciary Branch function, but agrees with Mr. Andrus that they administer it for now, and need to do properly.

Sen. Libby talked about the next steps that the GOC may want to decide on. The first is the Committee has had some discussion about asking MCILS Commissioners and staff to return to the GOC on a quarterly basis. He would like to see if there is agreement by other members of the Committee on frequency and scope. He suggested that MCILS report back to the Committee quarterly for the remainder of the 130<sup>th</sup> Legislature. He thinks for the scope the GOC is interested in their finances and budget, their audit progress, quality control and determinations of indigency. Those are four areas that he is interested in and heard from other Committee members being interested in as well. He asked if there were other subjects that members would like to see as part of the report back, or is there general comment on the issue of MCILS report backs, in general.

Rep. Stover said for the next quarter report back, she would like to hear, as was suggested by Rep. Millett, that if the Committee is to assume there is a potential of a \$3 million carryover, where would services be if the backlog of cases actually come into the court. What is that carryover going to mean within the existing budget and if the cases that have been backlogged will eat up existing resources. She was trying to better understand how that is going to reflect on the budget. Does the \$3 million play into it, or are you really looking at a deficit when the Courts reopen and all the cases come forward. She said maybe for the next quarterly discussion MCILS can report on the budget status, both with the courts and the dollars the State is putting forward.

Sen. Keim agreed with having MCILS report back quarterly and on the matters listed by Sen. Libby and Rep. Stover.

**Motion:** That the Government Oversight Committee ask that the Maine Commission on Indigent Legal Services report back to the GOC on a quarterly basis for the remainder of the 130<sup>th</sup> Committee on, at the very least, finances and budget, audits, quality control, determination of indigency and other matters as appropriate. (Motion by Rep. Millett, second by Rep. O'Neil, motion passed by unanimous vote 12-0. Sen. Bennett voted on the motion in accordance with the GOC Rules.)

Sen. Libby said in past reports there have been times where OPEGA has assisted the GOC in developing draft legislation to be submitted to one of the joint standing committees for consideration. The 129<sup>th</sup> GOC did not direct OPEGA to develop draft legislation and he understands there are a number of proposals sitting in the Judiciary Committee so would look to other members to see if they agree that at this time it appears that the GOC does not necessarily need to ask OPEGA to assist them on that front and that there is adequate attention being paid by the Judiciary Committee and others so it is not something the GOC would want to consider at this time.

Sen. Keim, a member of the Judiciary Committee, thinks that Committee is following up on MCILS very well and they can put forth legislation if needed. Other members agreed.

Sen. Libby brought the Committee back to the conversation about OPEGA staff being engaged in audit work. There is past audit work and future audit work and he is concerned about the quality of the data that OPEGA has reviewed to date. Mr. Kruk has offered to have a couple of OPEGA analysts work with the Assistant AG and Commission staff to at least come back to the GOC with their assessment of how a look back audit may work. He would be open to a conversation like that, however, he also wanted to put on the table that he has referenced the State Auditor's Office a couple of times throughout the Committee's discussion and thinks it is probably to the point where perhaps the Co-Chairs asks the Auditor for a meeting to discuss the matter because he knows that the GOC wants to be protective of OPEGA staff resources and imagines the Auditor wants to be protective of that Office's staff resources. But if folks are interested in doing a look back, it is going to take some significant resources and he wanted to make sure they were considering that before tasking OPEGA staff with doing that work. Unless there is a direction from the Committee, they are not asking staff to spend time on the look back at this time.

Sen. Keim understood the Chair to say that OPEGA staff was going to look at what a look back would entail and come back to the Committee with some idea of it. Is the Committee not doing that?

Sen. Libby said he would like the Committee to give the staff some direction and thinks the options before them are to do nothing, to do some preliminary work and then a third option would be to engage in a full look back audit with the data OPEGA has available. He is not advocating for the third option, but he does want the Committee to weigh in on option one or two. He thinks those are the most practical options at this point. He asked Mr. Kruk if he mischaracterized, or if there was any clarifying information he would like to share.

Mr. Kruk thought OPEGA could come back in about a month after working a bit in incremental stages to see what is possible, or where they would end up. He did not want to mislead the GOC that OPEGA can do this, get past something they cannot do, or say it is impossible when there is a way to do it. OPEGA is not at a point to be able to say that yet. He also wanted to point out that moving forward, how it has been described so far, almost sounds like it is a consulting relationship and that is typically not a role that OPEGA would have with an agency they have reviewed. As an auditor you always want to make sure you are not assuming management's responsibility. That said, he is very glad to sit down and talk with anyone from MCILS to better explain what OPEGA observed, what they would expect, what they were looking for, but beyond that, is not something OPEGA would typically do.

Sen. Timberlake thinks the GOC would want to have at least OPEGA do some look back and report back to the Committee giving some guidance as to what they can do, can't do and what they think they could give for information. He does not think a little more information would hurt and he would like to receive more information.

Sen. Keim asked if part of that would be a communication with the State Auditor to see what role they could possibly play so the Committee is considering all options at once.

Sen. Libby said if that is the direction the Committee would like to go he would be happy to work with the staff to have that conversation with the Office of the State Auditor.

Sen. Keim clarified that she is hoping that OPEGA staff would come back to the GOC with framed information as a value proposition of whether or not it is worth the time and what they think the Committee is going to be able to gain from that information. She asked if the OPEGA staff was currently working on the 3 remaining scope questions of MCILS, or was that work completely set aside while they focused on scope questions 1 and 5.

Mr. Kruk said OPEGA is actively working questions 2 and 3. Those questions relate to indigency and partial indigency and those determination. However, question 4 relates to the sufficiency of MCILS's response that happened in the past. A lot has changed since OPEGA brought scope question 4 before the GOC. At that time there were only 3 Commission members with 2 vacancies. None of those members are on the current Commission and the Commission has been expanded to 9 members. The former MCILS Executive Director, the only one MCILS ever had, recently resigned. There is an Interim Director and the GOC has heard from him at today's meeting. OPEGA had not seen a lot of movement on prior recommendations, whether that be from the report from the Legislature's Working Group or the Center. However, recently they have heard about actions being taken, not only in response to those reports, but also OPEGA's report. Because those conditions have changed so much OPEGA wondered if it makes sense for them to proceed with question 4.

Sen. Keim agreed and thinks the GOC could vote to remove question 4. It does seem that so many changes have taken place and with her serving on the Judiciary Committee as well, she has been watching the changes take place. She agreed that scope question 4 is no longer needed. Sen. Keim made the following motion:

**Motion:** That the Government Oversight Committee removes scope question 4 from the Review of Maine Commission on Indigent Legal Services. (Motion by Sen. Keim, second by Rep. O'Neil, motion passed by unanimous vote 12-0. Sen. Bennett voted on the motion in accordance with the GOC Rules.)

Sen. Libby asked the members of the Committee if it was a good time for a motion to endorse OPEGA's MCILS report. He said endorsement for the GOC and for their policies in statute, is that if you are voting in favor of endorsement, that means that as a Committee member you find the results credible, objective and complete with regard to the assigned scope of reviews. He would entertain a motion to endorse the report.

**Motion:** That the Government Oversight Committee endorse OPEGA's Maine Commission on Indigent Legal Services report. (Motion by Sen. Keim, second by Rep. O'Neil, motion passed by unanimous vote 12-0. Sen. Bennett voted on the motion in accordance with the GOC Rules.)

Sen. Libby closed the work session on OPEGA's MCILS report at 11:53 a.m. On behalf of the Committee, he thanked Mr. Andrus, Ms. Maciag and the members of Commission. The GOC appreciated their efforts and the time they spent at today's meeting

## Unfinished Business

None

## Report from Director

- **Status of projects in process**

Mr. Kruk reported that there are no status changes since the last GOC meeting on January 29<sup>th</sup>. The only change is that the two tax projects he talked about last meeting, the Research Expense Tax Credit and Credit for Rehabilitation of Historic Properties, have been added to the Work Plan.

## **Planning for upcoming meetings**

Sen. Libby said the next GOC meeting will February 26, 2021 and the agenda will include the public hearing, work session and vote on the Pine Tree Development Zone report and a request for review of the Wild Blueberry Commission. The request for review came from several legislators and that review request will be first on the agenda. The requestors will be invited to join the meeting to talk about their request.

## **Next GOC meeting date**

The next GOC meeting is scheduled for Friday, February 26, 2021 at 9:00 a.m.

## **Adjourn**

The Chair, Sen. Libby, adjourned the meeting at 11:57 a.m. on the motion of Rep. McDonald, second by Sen. Keim, unanimous.



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  
REP. TERESA PIERCE

MAINE STATE LEGISLATURE  
GOVERNMENT OVERSIGHT COMMITTEE

Date: November 20, 2020

To: Government Oversight Committee 130<sup>th</sup> Maine Legislature

From:  Senator Justin Chenette, Representative Anne Marie Mastraccio and  
Members, Government Oversight Committee

RE:  **OPEGA Evaluation of the Maine Commission on Indigent Legal Services  
(Part I)**

As members of the Government Oversight Committee of the 129<sup>th</sup> Legislature, we received presentation of a report evaluating the Maine Commission on Indigent Legal Services (MCILS) on November 9, 2020. This report is the first of 2 to be completed by the Office of Program Evaluation and Government Accountability (OPEGA). We send this communication to establish a trail of expectations in response to OPEGA's report and to express our belief that the issues presented in this report are of great concern and that the 130<sup>th</sup> Legislature's attention to these concerns is not only warranted, but critical. We anticipate that you will be the committee to hold a public comment period on this report and we submit this communication to you as a form of testimony. Although addressing the findings cited in the report can be accomplished by the Commission within their existing statutory authority, it may be prudent for the next Legislature to compel action through legislation.

OPEGA's report highlights a weak oversight structure within the organization that has multiple negative impacts. This weak oversight structure is a systemic issue resulting in the failure of the organization to meet parts of its statutory purpose, as well as other requirements in law meant to ensure MCILS provides high quality legal representation to indigent or partially indigent defendants in Maine. For example, the report finds that there is no mechanism for assessing the quality of representation – a central element to MCILS's purpose. Further, the report cites that the Commission has neglected to comply with requirements in law related to, or in support of, MCILS's

purpose. Some of those neglected provisions require the development of standards for addressing conflicts of interest among rostered attorneys and standards for appropriate counsel caseloads. OPEGA's evaluation outlines the elements of a strategic plan as a way to address this systemic problem. This plan provides a holistic approach that would focus on the organization's statutory purpose and additional requirements in law and result in a strengthened oversight structure.

OPEGA's evaluation also describes several concerning issues with the systems and procedures used by MCILS to process payments and expenditures associated with providing attorneys to low income defendants. The evaluation finds these systems and procedures are inadequate to meet the organization's financial responsibilities and describes ways in which they could be improved, which are summarized below.

- Establish clear policies and procedures to govern/guide attorney billing practices.
- Address the quality and reliability of the data in the Defender Data system by way of better communication to attorneys on how to enter time-events, employing technology within the system to establish internal controls, and to correct mistakes in the data (not just the invoice total) when they are discovered.
- Establish a more efficient and effective process of voucher review - which places a focus on addressing high daily and high annual work hours, utilizes technology to identify and correct outlying billing entries and employs risk-based auditing techniques.
- Develop a broader audit/review procedure for non-counsel invoices that would better identify and correct instances of non-compliance.
- Institute formal audit procedures to serve as a more effective control than current methods and would ensure consistency in enforcement of non-compliance.

We encourage you to look to OPEGA's report and we recommend ongoing oversight of MCILS's efforts to correct the inadequacies and, if necessary, introduction of legislation to compel them to make improvements by a date certain.