



LUCIA A. NIXON
DIRECTOR

MAINE STATE LEGISLATURE
OFFICE OF PROGRAM EVALUATION AND
GOVERNMENT ACCOUNTABILITY

TO: Members, Government Oversight Committee
FROM: Lucia Nixon, Director
DATE: March 26, 2021
RE: MCILS Audit Work – Update from OPEGA

At its meeting on February 12, 2021, the GOC received public comment, held a work session and voted to endorse the November 2020 OPEGA report on the Maine Commission on Indigent Legal Services. At the work session, the GOC requested that OPEGA to perform limited follow-up work on the report to assess the feasibility and resource needs for retrospective audit work relating to potential overbilling of high-billing attorneys. This memo reports on the results of that follow-up work.

To complete the task assigned by the GOC, OPEGA reviewed and analyzed the existing MCILS attorney voucher data and associated event notes and voucher notes, developed some estimates of the resources required to perform this work, assessed potential outcomes of retrospective audit work and consulted counsel in the Office of the Attorney General.

WORK PERFORMED AND RESULTS

1. *Evaluated the number of attorneys potentially subject to further work.* We performed some additional analysis and reviewed results from our prior data analysis to identify the number of attorneys, and associated records and entries, associated with potential high billing.

- **Results:** As noted at the work session, the MCILS attorney voucher data is voluminous—almost 4.7 million work events across 282,000 vouchers submitted by 723 attorneys. Focusing on 24 instances in which an attorney billed for more than 2,600 hours in a fiscal year would capture roughly 2.4% of total work events in the review. This does not appear feasible given the work OPEGA would be required to perform. Reducing the percentage of total work events reviewed to 1% (47,000) could be achieved by further narrowing based on number of 16+ hour days, high billing totals, and limited, specific time periods (less than a fiscal year) and would result in a potential sample size of 6-8 attorneys potentially subject to in-depth review.

2. *Assessed ability to reliably identify actual overbilling.* For the purposes of the immediate assignment, we manually reviewed all the event notes, voucher notes, and voucher override amounts for two selected high-billing attorneys to determine whether we could reliably identify actual instances of potential overbilling from those that only appear to be so due to how hours were recorded.

- **Results:** We found that the “notes” in the data provided little insight into why event durations (hours billed) were what they were, and the resulting adjusted hours were negligible. As a result, we would risk expending resources on identifying false positives—high annual billed hours that were worked, but otherwise recorded in a manner that misattributes the entirety of those hours to a single attorney.

3. Assessed data needs and data availability. We explored what attorney time records we would potentially need to conduct that subsequent work and consulted with counsel regarding whether we could obtain those records.

- **Results:** To perform the work envisioned—and provide reasonable assurance that billed hours were actually worked—we would need to access or obtain attorney time records to reconcile with the MCILS attorney voucher data. It is our understanding that the GOC, on behalf of OPEGA, could potentially subpoena all contemporaneous time records related to work specifically on MCILS cases. However, if the GOC chooses to subpoena those records, it is possible—or even likely—that this action could be challenged in court. Additionally, we do not believe that it would be possible to obtain attorney time records for non-MCILS case work.

4. Assessed work required reconcile billed hours and attorney time records. We developed a framework for understanding of what subsequent work would be required to reconcile attorney time records (provided they could be obtained) with MCILS voucher data to provide reasonable assurance that billed hours were, in fact, worked regardless of how they were recorded.

- **Results:** We found that the ambiguity of the MCILS data precludes a relatively straightforward reconciliation of MCILS attorney voucher data with attorney time records maintained as part of the attorney’s own practice. Instead, the reconciliation of even a single event entry that is misdated or batched in the MCILS data may require multiple actions including:
 - The review of all like entries across the entirety of the voucher in the data set to reconcile with time records;
 - The review of all like entries billed across multiple vouchers in instances when a defendant has multiple cases to reconcile with time records; and
 - The reconciliation of time records from multiple attorneys and potentially support staff, in addition to the billing attorney.

5. Estimated OPEGA resources required. We evaluated the OPEGA resources that would be needed to conduct this work, assuming a narrow sample, based on previous OPEGA reviews and instances in which OPEGA has reconciled multiple, varied data sets or records with one another.

- **Results:** Because of the one-to-many relationship between the MCILS voucher data and contemporaneous time records, the work associated with even a limited sample size of attorneys would significant multiply—and this would require a significant portion of OPEGA’s available resources. Our best estimate is that this further work would require two full-time staff for a period of nine to ten months. A commitment of this level of resources would have a significant impact on OPEGA’s ability to complete other existing reviews or respond to other matters that may arise throughout the year.

6. Considered the potential impact of the work. We assessed the potential impact of doing the work taking into consideration what we learned in Part I of the MCILS review, in which we identified several issues to be addressed systemically and prospectively; the results of the MCILS attorney self-audit

conducted by one attorney; and what we have learned recently about opportunities and barriers in the recoupment of overpayments.

- **Results:** If OPEGA were to expend these resources and perform this work, we believe the potential results and impact would be limited. First, considering the amount identified in the self-audit (approximately \$35,000 over three years) and then adjusting and accounting for the covered timeframe, the number of 16+ hour days and total hours subject to review, the structure of that attorney’s practice relative to those in the potential sample, we expect that the amount of any identified overpayments is likely to be small, especially when compared to the resources we would expend determining these amounts.

Second, recoupment of any identified overpayments is not guaranteed. Currently, MCILS does not have an administrative process for the identification and recoupment of funds, and, even if it were to institute one, there is a question of whether it could be applied retroactively. Additionally, other means of forced recoupment—such as a civil action—carry other considerations that would factor into whether MCILS and/or the Office of the Attorney General would decide to pursue such action.

CONCLUSION

Given the documented data quality issues and the fact that a single data entry may be potentially connected to multiple time records across different dates, attorneys, staff, and vouchers, we conclude that retrospective audit work that could provide reasonable assurance that billed hours were, in fact, worked by MCILS rostered attorneys would require an exhaustive methodology and, in turn, a significant amount of OPEGA’s overall available resources. We also conclude that, in all likelihood, the results of such work would be limited. In particular, the fiscal impacts of any identified overpayments are likely to be small—especially when compared to the OPEGA resources required to determining these amounts—and the recoupment of any identified overpayments remains uncertain.