
MCILS -RESPONSES TO OPEGA AND 6AC REPORTS

TO: GOVERNOR MILLS; CHIEF JUSTICE STANFILL
SENATOR CARNEY; REPRESENTATIVE HARNETT

FROM: JUSTIN W. ANDRUS, EXECUTIVE DIRECTOR

SUBJECT: MCILS RESPONSES TO OPEGA AND 6AC REPORTS

DATE: 1/14/2022

MCILS began the year subject to oversight and interest related, in large measure, to reports published by OPEGA and by the Sixth Amendment Center. While those reports do not necessarily encompass every change that MCILS can make to improve the provisions of indigent legal services, the reports do serve as a useful guide to some of those improvements.

Throughout 2021, MCILS has worked to address as many of the shortcomings identified in the two reports as possible. Most have been addressed, as follows:

I. **OPEGA Issues and Recommendations**

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 to attorneys.

Recommendation: Formal policies and procedures should be established by MCILS management to better define allowable and covered expenses. These policies and procedures would clarify expectations for billing and invoicing practices that if proactively communicated, would improve the effectiveness of the system to approve expenditures and process payments to rostered attorneys and non- counsel service providers.

MCILS has updated its Chapter 301 to make changes to, and to provide clarity about, the rules, practices, and expectations for billing attorney time and certain non-counsel expenses.

MCILS has also published Defender Data usages standards and guidance on the nature and expectations of the relationship between MCILS and counsel.

MCILS updated its Chapter 302 governing non-counsel service providers in August 2021. A revised and more streamlined process for requesting non-counsel funds is in development.

Issue 2. Data available to MCILS staff via Defender Data is unreliable and potentially misleading

Recommendation: The quality of available data in terms of consistency, accuracy, and reliability could be improved in several ways if the agency undertakes the following interrelated initiatives:

- **Establish and communicate expectations and guidance outlining how time events are to be recorded in Defender Data to improve the consistency of the data;**

MCILS has published its expectations to eligible counsel.

- **work with Justice Works to develop data-entry controls that reflect newly-established expectations and provide guidance to correct potential data issues, or errors, when they occur; and correct data errors within Defender Data at the time they are identified...**

The MCILS contract with Justice Works for the current implementation of Defender Data is in its final extension. That implementation is of a legacy version of the software that will be deprecated shortly. MCILS is working to develop an updated data-entry control concepts for implementation in the new case management and billing system. MCILS is actively working with MaineIT to finalize the request for the new system.

Issue 3. Current efforts to monitor attorney vouchers are inefficient and of limited effectiveness.

Recommendation: Assuming improvements are made to the overall quality of MCILS’s attorney voucher data, the agency should reevaluate its process for reviewing attorney vouchers with the objective of improving both effectiveness and efficiency. At a minimum, the following process attributes should be considered by MCILS in reevaluating and potentially redesigning its attorney voucher review process.

- **The process should identify, investigate and, as necessary, address the types of instances with the greatest potential impacts to financial stewardship and the quality of representation— high daily and annual hours worked by attorney.**

The next MCILS case management system, expected in FY23, will report on both high and low periodic attorney-hours.

- **The process should utilize technology to identify and correct potential data entry errors when they occur, such as flagging the input of values in excess of established limits, instead of relying on manual review of vouchers to identify potential errors.**

The MCILS system design calls for these flags. MCILS expects this function to be part of the next MCILS case management system, expected in FY23.

- **The process should incorporate data and risk-based audit techniques to the greatest extent possible to potentially reduce the burden placed on the Executive Director and Deputy Executive Director by the manual review of vouchers—allowing them to focus on other important, but neglected, aspects of MCILS’s purpose as discussed in Part III.**

MCILS, through its Audit Counsel, has developed a data and risk-based audit system, to permit meaningful sampling of voucher data. MCILS expects implementation of that system in March 2022.

- **Additionally, we note that transitioning from a voucher-based payment system to a timecard-based payment system may address issues related to the timeliness and accuracy of daily hours worked.**

MCILS agrees with OPEGA that a timecard-based periodic billing system would bring benefits to the system from both an accuracy-oversight perspective, and from an attorney satisfaction perspective. Moving to that system would require a substantial additional appropriation for the year of the transition, however.

MCILS currently has an arrears-billed relationship with assigned counsel. Counsel bill at the end of a case, or at an intermediate trigger point. Time accrues in each case. Implementation of a timecard-based payment system would require payment of all the accrued time during the first payment cycle. MCILS would be able to make those payments. Doing so would exhaust its payment budget, however. Additional payments would require an additional appropriation.

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

Recommendation: Development of a broader audit/review procedure for non-counsel invoices and periodic use of a risk-based method to select and review invoices would allow the agency to identify and correct instances of inappropriate high daily billings, duplicate charges, duplicate payments, and potentially, other instances of noncompliance.

MCILS expects to produce and implement an audit and review procedure for non-counsel invoices in or about April 2022, after implementation of the counsel-fee audit structure is accomplished. As it stands, MCILS accounting staff review every non-counsel invoice. Staff identifies errors and requires correction by non-counsel providers before payment.

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.

Recommendation: Establishment of a formal audit process would serve as a more effective control than the current methods used by the agency and would provide for consistency in enforcement efforts. A more effective process could include policies and procedures that would guide the agency regarding:

- **how and when audits are to be conducted;**
- **the records to be maintained by attorneys (and other non-counsel service providers) for potential MCILS review;**
- **a means of determining, confirming, and/or settling disputed overpayment amounts;**
- **a mechanism to recoup overpayments;**
- **penalties (including dismissal from the MCILS roster) for noncompliance; and**
- **consistent enforcement of all MCILS rules.**

MCILS has developed and is implementing a formal audit process for attorney fees. Full implementation is expected by March 31, 2022. A formal process for non-counsel requests and invoices will follow. Documentation of a formal investigative process will be presented to the Commission at or before its January 2022 meeting, together with a proposed updated appellate review structure. Work is ongoing on the question of administrative recoupment. For the moment, MCILS would rely on the Court to provide the venue for a recoupment action. MCILS is enforcing its rules, including through dismissal from the MCILS rosters for noncompliance.

Issue 6. The agency charged with administering MCILS purpose is understaffed.

It remains the case that MCILS is understaffed. Of the six positions authorized by the legislature, MCILS has filled four. Even when all six positions are filled, however, MCILS will remain understaffed to provide adequate supervision. National standards support a supervisory ratio of 10:1 and assume that supervisors are working in the same offices as the defenders being supervised. To provide proper field oversight, MCILS would require significant additional staffing. That staffing level should reflect both the number of attorneys in need of supervision, and their geographic dispersal.

Issue 7. MCILS staff operates without clearly defined roles and uses current staff inefficiently.

Currently, MCILS staff have clearly defined roles, with limited overlap.

Issue 8. The Commission receives insufficient support for necessary operations.

MCILS expects to be able to meet its current and projected operational expenses for the FY22-23 biennium with current funding. To meet some of goals set for MCILS, however, additional funding and headcount will be necessary.

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

MCILS is improving its oversight structure, primarily through the installation of four new attorney-administrators. Indigent defense would benefit from the addition of field trainers and supervisors under the next budget, however.

II. Recommendations of the Sixth Amendment Center:

RECOMMENDATION 1: The State of Maine should remove the authority to conduct financial eligibility screenings from the Maine Commission for Indigent Legal Services. The reconstituted Task Force on Pretrial Justice Reform should determine the appropriate agency to conduct indigency screenings.

MCILS supported legislation that would have removed its authority to conduct financial eligibility screenings. LD 1685 as drafted would have transferred the financial screening function from MCILS to the Judicial Branch and would have eliminated MCILS involvement in collection actions against indigent clients. This section was deleted before other provisions of LD 1685 were enacted.

Resolution of this recommendation requires legislative action and cannot be accomplished by MCILS without that support.

RECOMMENDATION 2: The State of Maine should statutorily bar communication between prosecutors and unrepresented defendants, unless and until defendants have been informed of their right to appointed counsel, a judge has conducted the legally required colloquy, and a defendant has executed a written waiver of the right to counsel in each case to ensure that all waivers of the right to counsel are made knowingly and voluntarily.

The legislature enacted 15 MRSA §815, prohibiting most communication between prosecutors and unrepresented defendants, absent a knowing waiver. Most or all prosecution offices now refer unrepresented defendants to MCILS for information. MCILS has been able to provide basic legal information to callers, without providing legal advice, and to facilitate early assignment of counsel in partial resolution of recommendation 3, below. MCILS is actively working on a program that will allow those unrepresented defendants who make contact to receive the benefit of early advice and assignment of counsel.

MCILS was recently asked by CLAC for its opinion on proposed amendments to §815. MCILS supports the amendments on the proposed draft.

RECOMMENDATION 3: Except for ministerial, non-substantive tasks, the State of Maine and the Maine Commission on Indigent Legal Services should require that the same properly qualified defense counsel continuously represents the client in each case, from appointment through disposition, and personally appears at every court appearance throughout the pendency of an assigned case.

MCILS implemented a continuous representation policy requiring informed client consent before counsel may delegate representation to another person and prohibiting delegation of enumerated dispositive appearances.

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

MCILS was unable to make effective progress on redrafting its standards until additional staff came on-board. Four new staff are now on-board and have begun a comprehensive review of existing MCILS rules and standards. We anticipate updating the rules to implement standards that will begin to address this recommendation by July 1, 2022.

RECOMMENDATION 5: The State of Maine should statutorily ban all public defense contracts that provide financial disincentives to or that otherwise interfere with zealously advocating on behalf of the defendants' stated interests, including the use of fixed fee contracts. Maine should require that any public defense contract include reasonable caseload limits, reporting requirements on any private legal work permitted, and substantial performance oversight, among other protections.

Public defense contracts of the type specified in recommendation 5 have not yet been statutorily banned, however, MCILS does not now make use of any such contracts.

RECOMMENDATION 6: The State of Maine should fund MCILS at a level that allows private attorneys to be compensated for overhead expenses plus a reasonable fee (i.e., \$100 per hour). MCILS should be authorized to provide additional compensation of \$25 per hour for designated case types such as murder, sexual assaults, and postconviction review.

The Legislature approved funding to increase the attorney compensation rate to \$80 per hour under the current budget. MCILS continues to support increasing the compensation rate to provide adequate funding for support staff and overhead, and supports authorization to provide additional compensation for designated case types.

RECOMMENDATION 7: The State of Maine should authorize and fund MCILS at an appropriate level to employ state government attorneys and support staff to operate a statewide appellate defender office and a Cumberland County trial level public defender office.

The Legislature did not fund the initiation of any statewide or local public defender offices. A hybrid model using both contracted and employed counsel would permit the most flexibility in staffing cases and promote the most effective representation for indigent clients. MCILS expects to renew its request for employed counsel for the next biennial budget.