

STATE OF MAINE

UNIFIED CRIMINAL DOCKET

Location:

Docket No.:

STATE OF MAINE

v.

DEFENDANT.

MOTION TO WITHDRAW

M.R.U. CRIM. P. 44, 44B

NOW COMES Amy L. Fairfield, Counsel of Record for the Defendant in the above-captioned matter(s) and hereby respectfully moves this Honorable Court for leave to withdraw.

In support of this Motion, Counsel further states:

1. Undersigned counsel's ability to represent indigent defendants properly and fully has been profoundly and heedlessly undermined necessitating to my great sadness withdrawal. Undersigned counsel was first assigned by this Court as counsel for the Defendant in the above-captioned matter(s) by Order dated . The undersigned has duly represented the Defendant for the duration of the representation.
2. In or about Fall 2019, it is my understanding that an employee of Maine Commission on Indigent Legal Services ("MCILS") solicited a local media outlet to attempt to prevail upon the entity to publish a story about the employee's perception that undersigned's law office was overbilling court appointed cases. Because there was nothing to substantiate the baseless contentions, the reputable news outlet declined to publish any such news stories.
3. Approximately one-year prior thereto, undersigned and her firm were investigated by MCILS as to billing and the Board of Bar Overseers for a separate but related matter to

the MCILS investigation. MCILS specifically assisted the Board of Bar Overseers in their investigation. I fully cooperated in both investigations which were lengthy and comprehensive and thoroughly evaluated counsel's and her firm's billing and billing practices. Including working with MCLIS as there was and is little guidance as to MCILS billing to ensure undersigned counsel and her firm's billing practices were consistent with expectations and in compliance. Both entities made findings of no wrongdoing regarding their billing investigations, as well as all other issues raised in the investigations.¹

4. Shortly thereafter, the MCILS employee did prevail upon another media outlet to publish a story invoking fantastical amounts of billable hours and revenue generated by undersigned and a handful of other attorneys in the law office. Despite MCILS highlighting the erroneous data as flawed, the outlet chose to run false and misleading data about counsel's law office and certain attorneys within the office causing strife and concern.²

¹ In November 2019, Assistant Bar Counsel sent counsel a letter dismissing the Complaint after a year-long investigation. In its decision dismissing the 650-page Complaint against undersigned, the following excerpt of their decision is instructive:

“In summary, you have identified various billing procedures by Attorney Fairfield's office that on the surface appear somewhat irregular. Because of the significance of the allegations involved, as part of our confidential investigation of this matter, we have conferred extensively with MCILS. Based upon our investigation, and after a comprehensive review of your allegations and the material submitted in support of those allegations, we have concluded that there is no evidence to establish that Attorney Fairfield or her office have intentionally or knowingly overbilled or misrepresented their billing practices to MCILS. ...”

² Undersigned noticed claim for slander and defamation against the media outlet, the specific reporter who authored the hit piece and the reporter's supervisors.

5. Consequently, undersigned counsel worked with the former executive director of MCILS to ensure that this MCILS employee at issue was not involved in any way with undersigned's cases in the future.³
6. In late October 2020, OPEGA⁴ released its report and findings relative to its investigation into MCILS attorney billing and found no evidence of any wrongdoing on the part of undersigned and/or her law office or its employees.
7. A short time later, the then-Executive Director of MCILS resigned.
8. On or about January 25, 2021, undersigned counsel called the new Interim Executive Director due to concern that she had expert witness invoices outstanding and to discuss how best to proceed after the resignation of the Executive Director considering the same MCILS employee issues identified above raising grave concern about confidential client materials and submissions to MCILS. During that conversation, six days into his employment with MCILS, the Executive Director told undersigned counsel that he was going to be sending a letter seeking information from undersigned's law office. He also indicated that he would think about how to proceed with the issues the MCILS employee posed.

³ On one occasion, counsel had to meet with the former MCILS director who met me at a local courthouse in order that neither me nor my clients were compromised by the employee.

⁴ In part, OPEGA's charge was to investigate sensationalized issues surrounding MCILS billing, which assignment followed the release of The Sixth Amendment Center Report in April 2018, which also reported attorney hours/revenues erroneously, despite providing accurate data. The chief problem is that the billing software that MCILS uses is woefully inadequate and, when called upon to produce data for individual attorneys' billable hours submitted to MCILS, what was produced was all the hours billed on cases that undersigned was appointed to regardless of which attorney did the work. In other words, for FY 2016, the software documents that Amy L. Fairfield was paid \$307,000 for the twelve-month period when in fact, Amy L. Fairfield was actually paid \$134,000 for the same period for an average of 42 hours per week, rather than the 90 plus hours per week that \$307,000 would have required.

9. Several days later, on February 10, 2021, undersigned counsel emailed the Interim Executive Director and requested direction as to how to proceed to keep client information contained in the invoices secure and confidential. The Interim Executive Director then followed up with a phone call during which the Interim Executive Director received and entertained counsel's concerns with general disinterest. And a few days later, the Interim Executive Director began making targeted demands from counsel for production of data and information as to mine and the firm's clients.
10. Thereafter, on February 19, 2021, counsel received a letter (dated February 12, 2021) via certified mail, the contents of which counsel found to be rather astounding for any number of reasons, not the least of which being the sheer breadth of the records demanded by the Irreverent Executive Director, even notwithstanding a keen awareness of the highly privileged nature of the records sought. Indeed, the Interim Executive Director demanded, *inter alia*, "a complete Clio time entry database file that includes all matters billed to MCILS in .csv format." The Interim Executive Director's demand letter was clear: turn it over—*all of it (!)*—within 21 days from the date of the letter—which, incidentally, was dated five days *earlier* than the postmarked date—or else face the consequences to be determined by the Interim Executive Director in accordance with his delegated authorities. Specifically, the Interim Executive Director demanded that undersigned provide him with five years of case management data to include all firm billing records and all firm entries for all clients for each attorney employed by the office for the specified timeframe for both appointed cases as well as private cases. This demand to my great alarm and concern clearly unjustifiably infringed on not only the privacy of all the firm's clients but encompassed demanded production of data and

information of a confidential nature and protected by the attorney-client and attorney work product privilege.

11. Inexplicably and notwithstanding MCILS investigative findings, the Board of Bar Overseers' investigative findings, and OPEGA's findings, the new Interim Executive Director of MCILS was apparently embarking upon a targeted campaign seemingly designed to unjustifiably harass and intimidate undersigned counsel and her firm while she and counsel of her firm day in and day out tirelessly advocate for their client's rights in courts all over Southern Maine.

12. In response to the letter, undersigned shared with the Interim Executive Director that these investigations as to billing/record keeping had already been done, findings were made, and, in the interest of cooperation and protecting the firm's clients, counsel inquired into what specifically the Interim Executive Director was now seeking despite the prior investigations and findings given the clear privacy and privilege concerns. In response, he simply gave me days to respond to his outrageous and unreasonable requests.

13. Undersigned counsel has also inquired of the Interim Executive Director if he has made any similar demands to any other attorneys or firms, which he refuses to answer. Upon information and belief, except for one other attorney in this office, Patrick H. Gordon⁵, no other attorney and/or firm has had such demands made of him/her/them.

⁵ A copy of a recent thread of emails between the Interim Executive Director and Attorney Gordon is reproduced herewith as content that is illustrative of the supercilious behavior of the Interim Executive Director during his tenure in his temporary position. There has been no meaningful dialogue—the opportunity for it having been foreclosed by the Interim Executive Director's treatment of a surrender to his demands for data as a prerequisite to further engagement—rather, there have been demands for confidential and privileged information and work product with threats of actions the Interim Executive Director will take if there is not total compliance.

14. During this conversation, undersigned counsel also explained to the Interim Executive Director that there have been no rules promulgated by MCILS to rostered attorneys that set standards and/or expectations regarding record keeping and/or billing records, and as such, she previously sought guidance from the former Executive Director, which was dismissed out of hand.
15. Beginning in early May—by which time the Interim Executive Director’s spurious preoccupation with the undersigned and her firm was fully three months old—the Interim Executive Director had apparently undertaken to promulgate a hard and fast set of rules purported intended to govern rostered attorneys’ use of the MCILS voucher platform, defenderData. Indeed, in an email to all rostered attorneys on May 7, 2021, the Interim Executive Director set forth his “Defender Data [sic] useage [sic] standards”, in which he readily acknowledges the communication likely “contains information and instructions you may not yet have.”⁶
16. Weeks later, at a regularly scheduled Commission meeting on May 24, 2021, the Interim Executive Director reported on the fallout of the substance and intent of that communication, namely, that the categorical proscription of certain longstanding and common practices, amongst which is that of billing for staff time. During that meeting, the Interim Executive Director admitted that since he had sent the email to MCILS attorneys he had received several communications from concerned attorneys who indicated that they could not afford to exist without being able to bill staff time. The communication even elicited response from a sitting Judge who, of his or her own

⁶ See email from Interim Executive Director Justin Andrus (via mcils@maine.gov) dated May 7, 2021.

volition and on the basis of firsthand communications with rostered attorneys following the May 7 email, was so concerned by the potential for the Interim Executive Director's newfangled directives to engender financial devastation for rostered attorneys. During that May MCILS meeting instead of attempting to meaningfully listen to the concerns of and attempt to support legal counsel of this honorable state who tirelessly and often with minimal financial reward represent the indigent of the state, the Interim Executive Director proposed to MCILS Commissioners an amnesty program for attorneys to self-report staff billing and plan to re-pay any monies attorneys were "overpaid" as a result. The Interim Executive Director recommended to the MCILS Commissioners that the discussion about attorneys billing staff time be tabled as more needed to be learned before MCILS could take next steps, and/or lose any more attorneys from its rosters.

17. On June 7, 2021, at a special MCILS meeting, the Interim Executive Director reported that further reflection on the proposed amnesty program—to offer those attorneys who are billing staff/paralegal time the ability to self-report and repay any monies paid for non-attorney time, which offer would have presumably been extended to undersigned—had led him to conclude that attorneys who self-report paralegal billing would be exposed to potential professional misconduct claims—a fear that is not applicable to undersigned or her firm—raised by such self-reports. He termed his earlier "amnesty" proposal unworkable, and offered no further thoughts on how to proceed, only to say that he, as of that day, would resume all pending investigations tied to that issue, after announcing at the previous meeting that those investigations would be suspended pending formal presentation of the amnesty program to the Commission. He also reported that he had become aware of more instances of attorneys billing staff time. In fact, he went as far as

to express his “surprise” after learning how commonplace these practices have been amongst rostered attorneys. Notably, the Interim Executive Director sent undersigned a demand for confidential and privileged information within thirty-six hours of the above proclamation he made days earlier before the Commission.

18. At this moment, upon information and belief, there are MCILS rostered attorneys who bill paralegal time with the Interim Executive Director’s knowledge and apparent tacit consent. Conversely, the Interim Executive Director has made repeated demands for privileged and confidential information spanning several years and dozens of attorneys without any sort of explanation as to what he is looking for and any sort of metric for what constitutes record keeping/billing issues and the consequences of the same.
19. Despite the Executive Director’s apparent willingness to overlook other attorneys and/or firms billing practices that are directly at odds with the Interim Executive Director’s espoused understanding of existing MCILS rules, within days of the public MCILS meeting where he declared the same, the Interim Executive Director again renewed his demand in writing for undersigned’s counsel and her firm’s entire database with all client entries for the entire firm to be produced to him that same day and within hours of his demand. On Thursday, June 10, 2021, the Interim Executive Director then enlarged the deadline for surrender and to cede to his demands for wholesale production of complete data sets and information encompassing information of a confidential nature and protected by the attorney-client and attorney work product privilege to be produced no later than Monday, June 14, 2021, by 4:00 p.m.
20. Upon information and belief, the Interim Executive Director is targeting undersigned counsel and her firm because she frequently takes on some of the toughest and most

contentious cases that oftentimes provoke rigorous and unpopular fights against some of the highest-ranking law enforcement agencies in the state and at times discovery by undersigned counsel of things of a threatening nature to the same.⁷ Counsel welcomes the opportunity to provide further and more detailed information, documentation and evidence about these assertions should it please the Court, as most of the information, documents and/or evidence require disclosure of sealed and/or confidential information; counsel has been repeatedly threatened with prosecution for any violation of the secrecy imposed by Order and/or by statutory authority as interpreted by OAG and other entities and individuals.

21. Since early February 2021, undersigned has been repeatedly and systematically harassed and threatened by the Interim Executive Director, and has been told she can expect the following actions: having the matter turned over to the Office of the Attorney General, being de-rostered, withholding payment for submitted vouchers for the entire firm, as well as being publicly humiliated by findings the Interim Executive Director could make, as well as being told the identity of the MCILS Commissioner who will hear an appeal should I choose to file an appeal if there is an unfavorable finding made by the Interim Executive Director, which he has alluded there will be. Undersigned often agonizes over the open question of where, if at all, the indigent defendants and their lives, and their Constitutional Rights will fit into the Interim Executive Director's plan.

⁷ Upon information and belief, an Assistant Attorney General is present for every executive session taken during public MCILS meetings. Conversely, undersigned has no idea if she and/or her law office have ever been discussed during such an executive session, but undersigned, nor anyone in her office has ever been invited to a single executive session held by MCILS.

22. In just the past two weeks, MCILS has subjected counsel and her firm to unnecessary directed inquiries under the auspices of enhanced oversight measures—which, in practice, can hardly be regarded as achieving their stated ends based on a simple time effectiveness analysis—by way of in the needless hours chasing down proof that attorneys performed certain LOD shifts⁸, and MCILS has requested duplicative information/documents from our office multiple times in this regard, which, upon information and belief, is designed to harass and waste the time of attorneys who are being targeted by this governmental agency. It is degrading and shameful, and it is clear now that MCILS, in its current make-up, does not prioritize indigent legal defense or, more importantly, the people it purports to serve.

23. Undersigned has served as the head of a de facto public defender’s office for the southern part of the state for approximately fifteen years. Our office is frequently requested to fill in for an LOD shift, or several shifts some days, last minute. We are also often called upon to take on some of the most difficult clients and cases, and the Courts often deny our continuance requests noting the law office’s ability to “send another attorney to cover.” It has been an incredible honor to serve in the capacities we have, but current administrative circumstances have made it nearly impossible to focus on representing our

⁸ In 2017, our office handled 415 LOD assignments; in 2018, we handled 396 LOD assignments; and in 2019, we handled over 447 LOD assignments. Of these assignments, 22% were last minute call-in shifts, and adjustments to the LOD calendar are not always made during these frenetic times. With the new MCILS policy, before payment can be made, documentary proof evidencing that the attorney performed the shift is required. Maine pays its appointed counsel less than almost every state in the country, and apparently thinks it sound to whittle the hourly wage further by sending attorneys to retrieve letters from Assistant District Attorneys who were also present for LOD shifts we need proof for. Attorney Patrick Gordon spent most of a day last week groveling and collecting such documentation to be paid \$150 after a demand for proof of attendance and work was made by MCILS with no further explanation as to what would qualify as needed proof. Defense attorneys seem to have more of a Giglio policy than law enforcement officers do in this state.

clients in the ways we are required to, and, most importantly, in the ways our clients deserve.

24. For the past decade or better, the courts have appointed our office to between 7% and 11% of the entirety of the court appointed cases in the state on an annual basis. With hundreds of rostered attorneys, and a maximum of 14 attorneys practicing court-appointed work full time from our office, we are appointed a very large share of work for the state. In each of these years we have received payments equal to (one year), or less than the commensurate percentage of the MCILS annual budget (nine years) for the same year. In other words, the Interim Executive Director is squarely without a legitimate basis or credible reason to investigate our office.
25. Upon information and belief, the Interim Executive Director's conduct in his capacity as same is causing a Constitutional crisis, as the conditions which he promotes as appropriate to this tragically underpaid state entity, are draconian and will force good and highly qualified attorneys from continuing to represent the state's indigent population.
26. Because undersigned counsel no longer has any faith that MCILS given its current make-up, will ensure that clients' rights and confidences are protected, undersigned counsel must withdraw, because anything less than new counsel will not ensure the Constitutional rights of her clients—some of the most vulnerable people in southern Maine—are protected.
27. For over sixteen years, undersigned counsel has served the people of Maine proudly and with every bit of tenacity and energy she has, but these last couple of months have been crippling. At base, undersigned counsel is not willing to have confidential and privileged client information subject to the whims of a single person, which recently enacted

legislation seemingly bestows—who may/may not have pure motives and/or care about the population we serve above self- interests. It is with a tremendously heavy heart that undersigned counsel files this necessary motion.

28. Finally, all of this has caused incredible stress and heartache for undersigned counsel, which has manifested in medical issues that are no longer manageable without intervention. Upon advice from her medical treatment provider, undersigned counsel must withdraw from all her current court-appointed cases.

29. Counsel is no longer able to represent the Defendant and withdrawal is accordingly unavoidable.

30. A conformed copy of this Motion has been forwarded to the Defendant at the last known mailing address of

WHEREFORE, Amy L. Fairfield respectfully prays for leave of this Honorable Court to withdraw as Counsel in the above-referenced matter(s).

DATED at Lyman, Maine, this _____ day of July 2021.

Respectfully submitted,

Amy L. Fairfield
Maine Bar Reg. No. 009598
Duly Assigned Counsel for Defendant
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STATE OF MAINE

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DEFENDANT.

**ORDER ON:
MOTION TO WITHDRAW**

M.R.U. CRIM. P. 44, 44B

The Court, after due consideration of Attorney Amy L. Fairfield’s foregoing Motion to Withdraw, hereby:

GRANTS Attorney Fairfield’s Motion and permits her leave to withdraw as counsel for the Defendant in the above-captioned matter(s). The Court further assigns Attorney _____ as substitute counsel for the Defendant in the above-captioned matter(s).

DENIES Attorney Fairfield’s Motion.

SO ORDERED.

Dated: _____

Judge/Justice, Unified Criminal Docket