94-649 MAINE COMMISSION ON INDIGENT LEGAL SERVICES

Chapter 103: STANDARDS OF PRACTICE FOR ATTORNEYS WHO REPRESENT PARENTS IN CHILD PROTECTIVE CASES

Summary: This Chapter establishes standards of practice for Commission assigned counsel providing representation to parents in child protective proceedings. Theses standards are intended to guide assigned counsel in the conduct of their representation and for use by the Commission in evaluating, supervising and training assigned counsel.

SECTION 1. SCOPE & PURPOSE

1. These Standards apply whenever defense counsel is assigned pursuant to the Maine Commission on Indigent Legal Services' (MCILS) jurisdiction to provide representation to a client whose parental rights are at risk by State action who are financially unable to retain defense counsel and who are entitled to representation pursuant to Maine statute and/or the United States and Maine Constitutions.

2. These standards are intended as a guide for assigned defense counsel and for use by MCILS in evaluating, supervising and training assigned counsel. Although MCILS understands that not every action outlined in these standards is necessary in every case, the Commission will apply these standards, the Maine Rules of Civil Procedure and the Maine Rules of Professional Conduct, as well as all other Commission policies and procedures, in evaluating the performance or conduct of counsel.

SECTION 2. GENERAL DUTIES

1. Defense counsel shall adhere to all Maine Commission on Indigent Legal Services (MCILS) training, experience, and mentoring requirements.

2. Defense counsel shall acquire sufficient working knowledge of all relevant federal and Maine laws, regulations, policies, and rules. Defense counsel must be familiar with the following provisions and be able to recognize when they are relevant to a case:

   A. The Adoption and Safe Families Act (ASFA), 42 U.S.C. §§ 620-679.

   B. Child Abuse Prevention Treatment Act (CAPTA), P.L.108-36;

   C. Indian Child Welfare Act (ICWA) 25 U.S.C. §§ 1901-1963, the ICWA Regulations, 25 C.F.R. Part 23, and the Guidelines for State Courts: Indian Child Custody Proceedings, 44 Fed. Reg. 67, 584 (Nov. 26, 1979);

   D. Interstate Compact on Placement of Children (ICPC);

   E. Foster Care Independence Act of 1999 (FCIA), P.L. 106-169;

F. Individuals with Disabilities Education Act (IDEA), P.L. 91-230;

G. Health Insurance Portability and Accountability Act of 1996 (HIPPA), P. L., 104-192 § 264, 42 U.S.C. § 1320d-2 (in relevant part);

H. Immigration laws relating to child welfare and child custody;

I. Title 22 Maine Revised Statutes, Health and Welfare;

J. Title 19-A Maine Revised Statutes, Domestic Relations;

K. Maine Rules of Evidence;

L. Maine Rules of Civil Procedure;

M. Maine Rules of Appellate Procedure;

N. Maine Bar Rules;

O. Current Maine Case Law.

3. Defense counsel shall understand and protect the client's rights to information and decision making. Defense counsel must explain to the client what decision making authority remains with the client and what lies with the State while the child is in the State's custody. This includes but is not limited to:

A. Seeking updates and reports from any service provider working with the child/family;

B. Helping the client obtain information about the child's safety, health, education and well-being when the client desires;

C. Assisting the client in exercising his or her rights to continue to make decisions regarding the child's medical, mental health and educational services;

D. Intervening with the State, provider agencies, medical providers and the school to ensure the client has decision-making opportunities;

E. Seeking court orders when the client has been left out of important decisions about the child's life;

F. Counseling the client and helping the parent understand his or her rights and responsibilities and trying to assist the parent in carrying them out.

4. Defense counsel shall avoid continuances and work to reduce delays in court proceedings.

A. Defense counsel should not request continuances unless there is an emergency or a benefit to the client's case.

B. If continuances are necessary, defense counsel should request the continuance in writing, as far as possible in advance of the hearing, and should request the shortest delay possible, consistent with the client's interests.

C. Defense counsel must notify all counsel of the request for a continuance. Defense counsel should object to repeated or prolonged continuance requests by other parties if the continuance would harm the client.

5. Defense counsel shall cooperate and communicate regularly with other professionals in the case.

A. Defense counsel should communicate with attorneys for the other parties, court appointed special advocates (CASAs) or guardians ad litem (GALs), the caseworker, foster parents and service providers to learn about the client's progress and their views of the case, as appropriate, and in compliance with rules of confidentiality (22 M.R.S.A. § 4008).

B. Defense counsel should have open lines of communication with the attorney(s) representing the client in related matters such as any criminal, protection from abuse, private custody or administrative proceedings to ensure that probation orders, protection from abuse orders, private custody orders and administrative determinations do not conflict with the client's goals in the abuse and neglect case.

SECTION 3. RELATIONSHIPS WITH CLIENT

1. Defense counsel shall be an advocate for the client's goals.

A. Defense counsel must understand the client's goals and pursue them vigorously.

B. Defense counsel must explain that the defense counsel's job is to represent the client's interests and regularly inquire as to the client's goals, including ultimate case goals and interim goals.

C. Defense counsel must explain all legal aspects of the case and provide comprehensive counsel on the advantages and disadvantages of different options.

D. Defense counsel must not usurp the client's authority to decide the case goals.

2. Defense counsel shall act in accordance with the duty of loyalty owed to the client.

A. Defense counsel should show respect and professionalism towards their clients.

B. Defense counsel should support their client and be sensitive to the client's individual needs.

C. Defense counsel should remember that they may be the client's only advocate in the system and should act accordingly.

3. Defense counsel shall adhere to all laws and ethical obligations concerning

confidentiality.

A. Defense counsel must understand confidentiality laws, as well as ethical obligations, and adhere to both with respect to information obtained from or about the client.

B. Defense counsel must fully explain to the client the advantages and disadvantages of choosing to exercise, partially waive, or waive a privilege or right to confidentiality.

C. Defense counsel must be consistent with the client's interests and goals, defense counsel must seek to protect from disclosure confidential information concerning the client.

4. Defense counsel shall provide the client with contact information in writing and establish a message system that allows regular attorney-client contact.

A. Defense counsel should ensure the parent understands how to contact the defense counsel and that defense counsel wants to hear from the client on an ongoing basis.

B. Defense counsel and client should establish a reliable communication system that meets the client’s needs.

C. Interpreters should be used when defense counsel and client are not fluent in the same language.

5. Defense counsel shall meet and communicate regularly with the client well before court proceedings.

A. Defense counsel should spend time with the client to prepare the case and address questions and concerns.

(1) Defense counsel should clearly explain the allegations made against the parent, what is likely to happen before, during and after each hearing, and what steps the parent can take to increase the likelihood of reuniting with the child.
(2) Defense counsel should explain any settlement options and determine whether the client wants defense counsel to pursue such options.
(3) Defense counsel should explain courtroom procedures.
(4) Defense counsel should write to the client to ensure the client understands what happened in court and what is expected of the client.

B. Defense counsel should ensure a formal interpreter is involved when defense counsel and client are not fluent in the same language.

(1) Defense counsel should advocate for the use of an interpreter when other professionals in the case who are not fluent in the same language as the client are interviewing the client as well.
(2) Defense counsel should be available for in-person meetings or telephone calls to answer the client’s questions and address the client’s concerns.

(3) Defense counsel and client should work together to identify and review short and long-term goals, particularly as circumstances change during the case.
(4) Defense counsel should help the client access information about the child's developmental and other needs by speaking to service providers and reviewing the child's records.
(5) Defense counsel needs to understand these issues to make appropriate decisions for the child's care.
(6) Defense counsel and the client should identify barriers to the client engaging in services, such as employment, transportation, and financial issues.
(7) Defense counsel should work with the client, caseworker and service provider to resolve the barriers.
(8) Defense counsel should be aware of any special issues the parents may have related to participating in the proposed case plan, such as an inability to read or language differences, and advocate with the child welfare agency and court for appropriate accommodations.

6. Defense counsel shall work with the client to develop a case timeline and tickler system.

A. At the beginning of a case, defense counsel and client should develop timelines that reflect projected deadlines and important dates and a tickler/calendar system to remember the dates.

(1) The timeline should specify what actions defense counsel and client will need to take and dates by which they will be completed.
(2) Defense counsel and the client should know when important dates will occur and should be focused on accomplishing the objectives in the case plan in a timely way.
(3) Defense counsel should provide the client with a timeline/calendar, outlining known and prospective court dates, deadlines, and critical points of attorney-client contact.
(4) Defense counsel should record federal and state law deadlines in the system.

7. Defense counsel shall provide the client with copies of all petitions, court orders, service plans, and other relevant case documents.

A. Defense counsel should ensure the client is informed about what is happening in the case.

(1) Defense counsel should provide all written documents to the client or ensure that they are provided in a timely manner and ensure the client understands them. If the client has difficulty reading, the attorney should read the documents to the client.
(2) In all cases, defense counsel should be available to discuss and explain the documents to the client.
(3) Defense counsel must be aware of any case-related domestic violence allegations and not share confidential information about an alleged or potential victim's location.

8. Defense counsel shall be alert to and avoid potential conflicts of interest that would interfere with the competent representation of the client. Defense counsel should always avoid representing more than one parent in a case.

9. Defense counsel shall act in a culturally competent manner.

   A. Defense counsel should learn about and understand the client's background, determine how that has an impact on the client's case, and always show the client respect.

   B. Defense counsel must understand how cultural and socioeconomic differences impact interaction with clients, and must interpret the client's words and actions accordingly.

10. Defense counsel shall take diligent steps to locate and communicate with a missing client

   A. Defense counsel should take diligent steps to attempt to locate and communicate with the missing client to formulate what positions defense counsel should take at hearings, and to understand what information the client wishes defense counsel to share with the State and the court.

   B. If, after diligent steps, defense counsel is unable to communicate with the client, defense counsel should assess whether the client's interests are better served by advocating for the client's last clearly articulated position, or declining to participate in further court proceedings, and should act accordingly.

   C. After a prolonged period without contact with the client, defense counsel should consider withdrawing from representation.

11. Defense counsel shall be aware of the unique issues an incarcerated parent faces.

   A. Defense counsel must be particularly diligent when representing an incarcerated client, and aware of the reasons for the incarceration.

      (1) If the client is incarcerated as a result of an act against the child or another child in the family, the State agency may request an order from the court that reasonable efforts toward reunification are not necessary and attempt to fast-track the case toward other permanency goals.

         (a) If this is the case, defense counsel must be prepared to argue against such a motion, if the client opposes it.
         (b) If no motion is made to waive the reasonable efforts requirement, the agency may not undertake the same reunification efforts to assist a clients who is incarcerated.
         (c) Defense counsel should counsel the client as to any effects incarceration has on the agency's obligations and know the statutory and case law concerning incarceration as a basis for TPR.
         (d) Defense counsel should help the client identify potential kinship

placements, relatives who can provide care for the child while the client is incarcerated.

(e) Defense counsel must understand the implications of ASFA for an incarcerated client who has difficulty visiting and planning for the child.

(2) Defense counsel should understand that obtaining services such as substance abuse treatment, parenting skills, or job training while in jail or prison is often difficult.

(a) Defense counsel may need to advocate for reasonable efforts to be made for the client, and assist the client and the agency caseworker in accessing services.

(b) Defense counsel must assist the client with these services. Without services, it is unlikely the client will be reunified with the child upon discharge from prison.

(c) Some incarcerated clients (e.g. women housed at Windham M.C.C.) may have access to a specialized unit that gives a client reasonable access to their child(ren), Defense counsel should advocate for such a placement.

(d) Defense counsel must learn about available resources, contact the placements and attempt to get the support of the agency.

B. Communication: Defense counsel should advise the client on the importance of maintaining regular contact with the child while incarcerated.

(1) Defense counsel should assist in developing a plan for communication and visitation by obtaining necessary court orders and working with the caseworker as well as the correctional facility's social worker.

(2) If the client cannot meet defense counsel before court hearings, defense counsel must find alternative ways to communicate. This may include visiting the client in prison or engaging in more extensive phone or mail contact than with other (non-incarcerated) clients. Defense counsel should be aware of the challenges to having a confidential conversation with the client, and attempt to resolve that issue.

(3) Defense counsel should also communicate with the client's criminal defense attorney. There may be issues related to self-incrimination as well as concerns about delaying the abuse and neglect case to strengthen the criminal case or vice versa.

C. Appearance in Court: The client's appearance in court frequently raises issues that require the attorney's attention in advance.

(1) Defense counsel should find out from the client if the client wants to be present in court. In some prisons, inmates lose privileges if they are away from the prison, and the client may prefer to stay at the prison.

(2) If the client wants to be present in court, defense counsel should work with the court to obtain a writ of habeas corpus or other documentation necessary for the client to be transported from the prison.

(3) Defense counsel should explain to any client hesitant to appear, that the case will proceed without the parent's presence and raise any potential

consequences of that choice.

(4) If the client does not want to be present, or if having the client present is not possible, defense counsel should be educated about what means are available to have the client participate, such as by telephone or video conference.

(5) Defense counsel should make the necessary arrangements for the client. Note that it may be particularly difficult to get a parent transported from an out-of-state prison or a federal prison.

12. Defense counsel shall be aware of the client's mental health status and legal status.

A. Defense counsel must be able to determine whether a client's mental status (including mental illness and mental retardation) interferes with the client's ability to make decisions about the case.

(1) Defense counsel should be familiar with any mental health diagnosis and treatment that a client has had in the past or is presently undergoing (including any medications for such conditions). Defense counsel should get consent from the client to review mental health records and to speak with former and current mental health providers.

(2) Defense counsel should explain to the client that the information is necessary to understand the client's capacity to work with the attorney.

(3) If the client's situation seems severe, defense counsel should also explain that defense counsel may seek the assistance of a clinical social worker or some other mental health expert to evaluate the client's ability to assist the attorney because if the client does not have that capacity, defense counsel may have to ask that a guardian ad litem be appointed to the client.

(4) Since this action may have an adverse effect on the client's legal claims, defense counsel should ask for a GAL only when absolutely necessary.

(5) Defense counsel must also be able to determine, when working with a client who is a minor, whether a GAL should be appointed for the client to determine the client's best interest.

SECTION 4. INVESTIGATION

1. Defense counsel shall conduct a thorough and independent investigation at every stage of the proceeding.

A. Defense counsel must take all necessary steps to prepare each case. A thorough investigation is an essential element of preparation.

B. Defense counsel cannot rely solely on what the agency caseworker reports about the parent.

C. Defense counsel should contact service providers who work with the client, relatives who can discuss the client's care of the child, the child's teacher or other people who can clarify information relevant to the case. If necessary, the attorney should request that the Commission authorize the expenditure of funds to hire an investigator pursuant to Chapter 302: Procedures Regarding Funds for Experts and Investigators.

2. Defense counsel shall interview the client well before each hearing.

   A. Defense counsel should meet with the client regularly throughout the case. The meetings should occur well before the hearing and not at the courthouse just minutes before the case is called before the judge.

   B. Defense counsel should ask the client questions to obtain information to prepare the case, and strive to create a comfortable environment so the client can ask the attorney questions. Defense counsel should use these meetings to prepare for court as well as to advise the client concerning issues that arise during the course of the case.

   C. Information obtained from the client should be used to propel the investigation.

SECTION 5. INFORMAL DISCOVERY

1. Defense counsel l shall request and review all discoverable material in the State agency's case file.

   A. Defense counsel should request and review the agency case file as early during the course of representation as possible. The file contains useful documents that defense counsel may not yet have, and will instruct defense counsel on the agency's case theory.

      (1) If the agency case file is inaccurate, defense counsel should seek to correct it.
      (2) Defense counsel must request and review the case file periodically because information is continually added by the agency.

2. Defense counsel shall obtain all necessary documents.

   A. As part of the discovery phase, defense counsel should gather all relevant documentation regarding the case that might shed light on the allegations, the service plan and the client's strengths as a parent.

      (1) Defense counsel should not limit the scope as information about past or present criminal, protection from abuse, private custody or administrative proceedings involving the client can have an impact on the abuse and neglect case.
      (2) Defense counsel should also review the following kinds of documents: social service records; court records; medical records; school records; and, evaluations of all types.
      (3) Defense counsel should be sure to obtain reports and records from service providers. Discovery is not limited to information regarding the client, but may include records of others such as the other parent, stepparent, child, relative and non-relative caregivers.

SECTION 6. FORMAL DISCOVERY

1. Defense counsel l shall, when needed, use formal discovery methods to obtain

information.

A. Defense counsel should know what information is needed to prepare for the case and understand the best methods of obtaining that information.

(1) Defense counsel should become familiar with pretrial discovery requests and motions, and use whatever tools are available to obtain necessary information. Defense counsel should be aware of the limitations of the use of a subpoena to require the release of confidential information without a court order and should have subpoenas served in a timely manner to provide time for court involvement in the production of the documents sought.

(2) Defense counsel should consider the following types of formal discovery: depositions, interrogatories (including expert interrogatories), requests for production of documents, requests for admissions, and motions for mental or physical examination of a party.

(3) Defense counsel should file timely motions for discovery and renew these motions as needed to obtain the most recent records.

(4) Defense counsel, consistent with the client's interests and goals, and where appropriate, take all necessary steps to preserve and protect the client's rights by opposing discovery requests of other parties.

SECTION 7. COURT PREPARATION

1. Defense counsel shall develop a case theory and strategy to follow at hearings and negotiations.

A. Once defense counsel has completed the initial investigation and discovery, including interviews with the client, defense counsel should develop a strategy for representation. The strategy may change throughout the case, as the client makes or does not make progress, but the initial theory is important to assist defense counsel in staying focused on the client’s wishes and on what is achievable.

B. The theory of the case should inform defense counsel’s preparation for hearings and arguments to the court throughout the case. It should also help defense counsel decide what evidence to develop for hearings and the steps to take to move the case toward the client’s ultimate goals (e.g., requesting increased visitation when a parent becomes engaged in services).

2. Defense counsel shall timely file all pleadings, motions, and briefs.

A. Defense counsel must file petitions, motions, discovery requests, and responses and answers to pleadings filed by other parties that are appropriate for the case.

(1) These pleadings must be thorough, accurate and timely.

(2) When a case presents a complicated or new legal issue, defense counsel should conduct the appropriate research before appearing in court.

(3) Defense counsel must have a solid understanding of the relevant law, and be able to present it to the judge in a compelling and convincing way.

(4) Defense counsel should be prepared to distinguish case law that appears

to be unfavorable. If the judge asks for memoranda of law, defense counsel will already have done the research and will be able to use it to argue the case well.

(5) If it would advance the client's case, defense counsel should present an unsolicited memorandum of law to the court.

3. Defense counsel shall engage in case planning and advocate for appropriate social services.

A. Defense counsel must advocate for the client both in and out of court.

B. Defense counsel should know about the social, mental health, substance abuse treatment and other services that are available to clients and families in the jurisdiction in which defense counsel practices so defense counsel can advocate effectively for the client to receive these services.

C. If the client wishes or agrees to engage in services, defense counsel must determine whether the client has access to the necessary services to overcome the issues that led to the case.

4. Defense counsel shall aggressively advocate for regular visitation in a family-friendly setting.

5. Defense counsel shall engage in settlement negotiations and mediation to resolve the case.

6. Defense counsel shall thoroughly prepare the client to testify at the hearing.

A. When having the client testify will benefit the case or when the client wishes to testify, defense counsel should thoroughly prepare the client.

B. Defense counsel should discuss and practice the questions that the attorney will ask the client, as well as the types of questions the client should expect opposing counsel to ask. Defense counsel should help the parent think through the best way to present information, familiarize the parent with the court setting, and offer guidance on logistical issues such as how to get to court on time and appropriate court attire.

7. Defense counsel l shall identify, locate and prepare all witnesses.

8. Defense counsel shall identify, secure, prepare and qualify expert witnesses.

A. Defense counsel must identify, as early in your representation as possible, whether you will need an expert for consultation and/or testimony.

B. Defense counsel must determine if an opposing party will be employing expert witnesses.

C. Defense counsel must locate experts and seek necessary funding in a timely manner.

D. Defense counsel must spend time preparing your expert witnesses for trial.

E. Defense counsel must use interrogatories, depositions and/or interviews to question opposing experts.

SECTION 8. HEARINGS

1. Defense counsel l shall attend and prepare for all hearings, including pretrial 1. Counsel shall develop a case theory and strategy to follow at hearings and negotiations.

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C. Defense counsel must locate experts and seek necessary funding in a timely manner.

D. Defense counsel must spend time preparing your expert witnesses for trial.

E. Defense counsel must use interrogatories, depositions and/or interviews to question opposing experts.

9. Defense counsel shall prepare and make all appropriate motions and evidentiary objections.

A. Defense counsel must file motions and evidentiary objections in advance of the hearing whenever possible.

B. Defense counsel must file briefs in support of motions when necessary.

C. Defense counsel must always be aware of preserving issues for appeal.

10. Defense counsel l shall present and cross-examine witnesses, prepare and present exhibits.

A. Defense counsel must prepare witnesses in advance of hearings.

B. Defense counsel must prepare cross examination of opposing witnesses

C. Defense counsel must organize documents, photos and all other potential exhibits before hearing.

D. Defense counsel must be aware of potential evidentiary issues regarding admissibility of testimony and exhibits.

11. Defense counsel shall request the opportunity to make opening and closing arguments.

12. Defense counsel shall prepare proposed findings of fact, conclusions of law and orders.

SECTION 9. POST HEARINGS/APPEALS

1. Defense counsel shall review court orders to ensure accuracy and clarity and review with client.

A. If written court order does not accurately reflect verbal order, defense counsel must take appropriate steps to correct it.

B. Defense counsel must provide the client with a copy of the final order and review it with client to ensure understanding.

C. Defense counsel must advise the client of potential consequences of failing to comply with order.

D. If the client does not agree with the court's order, defense counsel must advise the client of any appellate or other post-judgment options for relief.

2. Defense counsel shall take reasonable steps to ensure the client complies with court orders.

A. Defense counsel must ensure that the client understands and has an ability to meet the client's obligations under a court order.

(1) Defense counsel must create action plan for client, listing individual obligations and actions the client will need to take to meet the obligation.

(2) Defense counsel must help the client contact and follow up with service agencies.

(3) If service agencies are not meeting their responsibilities in respect to the client, defense counsel must be prepared to bring the case back to court or take other steps to ensure appropriate services are available.

3. Defense counsel shall consider and discuss the possibility of appeal with the client.

4. If the client decides to appeal, defense counsel shall timely and thoroughly file the necessary post-hearing motions and paperwork related to the appeal and closely follow the Maine Rules of Appellate Procedure.

5. Defense counsel shall request an expedited appeal, when feasible.

6. Defense counsel shall communicate the results of the appeal and its implications to the client.

STATUTORY AUTHORITY: 4 M.R.S. §1804 (2) (C), §1804 (2) (D), §1804 (2) (E), §1804 (3) (D), §1804(4) (D)

EFFECTIVE DATE: