

**Chapter 103: STANDARDS OF PRACTICE FOR ATTORNEYS WHO REPRESENT CLIENTS
IN CIVIL COMMITMENT CASES****DRAFT**

Summary: This Chapter establishes standards of practice for Commission assigned counsel providing representation to a client in a civil commitment proceedings. These 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 in a civil commitment proceedings who is at risk by State action and is financially unable to retain defense counsel and who is 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 attorneys 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 should adhere to all Maine Commission on Indigent Legal Services (MCILS) training, experience, and mentoring requirements.
2. Defense counsel should 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. United States and Maine Constitutions
 - B. Title 34-B Maine Revised Statutes, Civil Commitments; the attorney should also be aware of DHHS guidelines for the Progressive Treatment Program (PTP), <https://www.maine.gov/dhhs/samhs/mentalhealth/rights-legal/progressive-treatment/documents/ptp-guidelines.doc>
 - C. Maine Rules of Evidence;
 - D. Maine Rules of Civil Procedure;

- E. Maine Rules of Appellate Procedure;
 - F. Maine Bar Rules;
 - G. Current Maine Case Law including but not limited to competency
3. Defense counsel shall insure that the petitioning facility is made to meet its burden that the client meets the criteria for commitment or continuing commitment.

SECTION 3. RELATIONSHIPS WITH CLIENT

1. The attorney should be an advocate for the client's goals.
- A. Upon receipt of the appointment to the case, the attorney shall communicate with the client and arrange to meet with the client immediately.
 - B. Upon meeting with the client, the attorney shall explain commitment law and procedures, discuss any alternatives to continued hospitalization, determine the client's understanding of the factual basis for the petition and the client's wishes. The attorney should also inform the client of the role of the psychological evaluator on behalf of the client.
 - C. The attorney shall not agree to a continuance without consulting the client.
 - D. After review of all relevant law and facts in the case, the attorney shall meet with their client to discuss strategy and any alternatives to commitment including less restrictive placement or remaining at the hospital on a voluntary basis. The attorney should counsel the client that these decisions remain with the client. The attorney shall remain a zealous advocate for the client. The attorney should explain the collateral consequences of a civil commitment.
 - E. The attorney should advocate in a commitment case for the client in opposition to the petition to insure the client is afforded all their due process and constitutional rights.
2. The attorney should act in accordance with the duty of loyalty owed to the client.
- A. The attorney should show respect and professionalism towards their clients.
 - B. The attorney should support their client and be sensitive to the client's individual needs.
 - C. The attorney should remember that they may be the client's only advocate in the system and should act accordingly.
3. The attorney should adhere to all laws and ethical obligations concerning confidentiality.

- A. The attorney must understand confidentiality laws, as well as ethical obligations, and adhere to both with respect to information obtained from or about the client.
- A. The attorney must fully explain to the client the advantages and disadvantages of choosing to exercise, partially waive, or waive a privilege or right to confidentiality.

The attorney must fully explain to the client the advantages and disadvantages of choosing to sign or not sign releases of information.
- C. Consistent with the client's interests and goals, the attorney must seek to protect from disclosure confidential information concerning the client.
- 4. The attorney should provide the client with contact information in writing and establish through the relevant hospital staff a means of communicating with the client.
- 5. The attorney should act in a culturally competent manner.
 - A. The attorney 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. The attorney must understand how cultural and socioeconomic differences impact interaction with clients, and must interpret the client's words and actions accordingly.

SECTION 4. INVESTIGATION

- A. The attorney should conduct a thorough and independent investigation at every stage of the proceeding.
 1. The attorney should consider if obtaining appropriate releases from the client is necessary. If the client is unable or unwilling to provide executed releases, the attorney may seek a court order.
 2. The attorney shall immediately contact the psychological examiner who is working on behalf of the client to ascertain the status of the client and the examiner's plan to contact the client, if that contact has not already occurred
 3. The attorney shall discuss with the evaluator the client's current mental status, likelihood of serious harm if the client were discharged, the client's ability to care for themselves outside of the hospital, and any less restrictive treatment alternatives available.
 4. The attorney shall thoroughly investigate the facts including reading the medical records and interviewing hospital staff including doctors, nurses and social workers. The attorney shall also interview other relevant persons such as friends, family and service providers.
 5. If determined to be appropriate and necessary, the attorney shall use formal discovery to

obtain information.

6. The attorney shall determine if any procedural defenses can be raised, and file the appropriate Motion.

SECTION 7. COURT PREPARATION

1. The attorney should develop a case theory and strategy to follow at hearings and negotiations.
2. The attorney should timely file any pleadings, motions, and briefs.
 - A. The attorney 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, the attorney should conduct the appropriate research before appearing at hearing.
 - (3) The attorney 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) The attorney should be prepared to distinguish case law that appears to be unfavorable. If the judge asks for memoranda of law, the attorney 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, the attorney should present an unsolicited memorandum of law to the court.
3. After meeting with the client and if the client is in agreement, the attorney shall contact relevant persons regarding alternatives to hospitalization. If the attorney and client agree to these alternatives after full explanation to the client, the attorney can proceed with those alternatives. If the client does not agree, the attorney shall be prepared to go to hearing on the civil commitment.
4. Prior to hearing, the attorney shall identify potential witness who will testify in support of the client. If necessary, the witnesses shall be subpoenaed. The attorney shall meet the witnesses in advance of trial to prepare them for direct and cross examination.
5. The attorney shall meet with the client to discuss whether the client should testify. When having the client testify will benefit the case or when the client wishes to testify, the attorney should thoroughly prepare the client and witnesses for direct and cross examination.

SECTION 8. HEARING

1. The attorney shall act as a zealous advocate for the client insuring that the proper procedures are followed and the client's interests represented.
2. The attorney should attend and prepare for hearings.
3. The attorney should prepare and make all appropriate motions and evidentiary objections.

- A. The attorney must file motions and evidentiary objections in advance of the hearing whenever possible.
4. The attorney must file briefs in support of motions when necessary.
4. The attorney must always be aware of preserving issues for appeal.
5. The attorney should present and cross-examine witnesses, prepare and present exhibits.
 - A. The attorney must prepare witnesses in advance of hearings.
 - B. The attorney must prepare cross examination of opposing witnesses
 - C. The attorney must organize documents, photos and all other potential exhibits before hearing.
 - D. The attorney must be aware of potential evidentiary issues regarding admissibility of testimony and exhibits.
6. The attorney should request the opportunity to make opening and closing arguments.
7. If requested by the court or necessary to protect the client's interests, the attorney should prepare proposed findings of fact, conclusions of law and orders.

SECTION 9. POST HEARINGS/APPEALS

1. The attorney should review court orders to ensure accuracy and clarity and review with client and file any appropriate post-judgment Motions.
 - A. If written court order does not accurately reflect verbal order, the attorney must take appropriate steps to correct it.
 - B. The attorney must provide the client with a copy of the final order and review it with client to ensure understanding.
 - C. The attorney 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, the attorney must advise the client of any appellate or other post-judgment options for relief.
2. The attorney should take reasonable steps to ensure the client complies with court orders.

- A. The attorney must ensure that the client understands and has an ability to meet the client's obligations under a court order.
 - (1) The attorney should create action plan for client, listing individual obligations and actions the client will need to take to meet the obligation.
 - (2) The attorney should help the client contact and follow up with treatment providers.
 - (3) If the hospital is not meeting their responsibilities in respect to providing treatment for the client, the attorney must be prepared to bring the case back to court or take other steps to ensure appropriate treatment is available.

- 3. The attorney should consider and discuss the possibility of appeal with the client.

- 4. If the client decides to appeal, the attorney should 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. The attorney should request an expedited appeal, when feasible.

- 6. The attorney should 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: February 27, 2012.