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**CONTINUOUS REPRESENTATION**

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**TO:** MCILS ELIGIBLE COUNSEL

**FROM:** JUSTIN W. ANDRUS, EXECUTIVE DIRECTOR

**SUBJECT:** CONTINUOUS REPRESENTATION

**DATE:** 11/5/2021

**CC:** COMMISSION

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I. Basis

MCILS approves and administers the assignment of individual attorneys to represent indigent clients, and, where appropriate, assigns counsel to represent clients directly. In criminal cases, assignments made by the Court are made under Rule 44. Rule 44 contemplates the assignment of counsel as individuals. For civil cases, Rule 88 adopts the provisions of criminal Rule 44. The individual attorney assigned by the Court or by MCILS to represent an indigent client is responsible to MCILS for all services rendered to that client and for all billing claimed for those services during the period of the assignment.

Except as qualified below, the attorney assigned to represent an indigent client shall personally provide direct representation to the client at all substantive appearances. Notwithstanding the exceptions set forth below, the attorney assigned to represent an indigent client shall personally ensure the adequacy of all phases of representation and the accuracy of billing submitted to MCILS for that representation.

Continuous representation is a fundamental principle of an effective public defense delivery system:

ABA Ten Principles of A Public Defense Delivery System – Principle 7:

The same attorney continuously represents the client until completion of the case. Often referred to as “vertical representation,” the same attorney should continuously represent the client from initial assignment through the trial and sentencing. The attorney assigned for the direct appeal should represent the client throughout the direct appeal.

“Continuous representation from appointment through disposition,” ABA Principle 7, requires that the same attorney initially appointed to a case continuously represent the

defendant through disposition of the case. Commonly referred to as “vertical representation,” the continuous representation by the same attorney is contrasted with “horizontal representation” – a representational scheme whereby one attorney represents the client during one court proceeding before handing off the client’s case to another attorney to cover the next stage.

As the American Bar Association explains, “horizontal representation” is uniformly implemented as a cost-saving measure in the face of excessive workloads and to the detriment of clients. In fact, the ABA rejects the use of horizontal representation in any form, stating specifically that: “[c]ounsel initially provided should continue to represent the defendant throughout the trial court proceedings and should preserve the defendant’s right to appeal, if necessary.”

In explaining why horizontal representation is so harmful to clients, the ABA states:

Defendants are forced to rely on a series of lawyers and, instead of believing they have received fair treatment, may simply feel that they have been “processed by the system.” This form of representation may be inefficient as well because each new attorney must begin by familiarizing himself or herself with the case and the client must be re-interviewed. Moreover, when a single attorney is not responsible for the case, the risk of substandard representation is probably increased. Appellate courts confronted with claims of ineffective assistance of counsel have commented critically on stage[d] representation practices.

The nexus between the requirement that trial counsel be appointed as early as possible and the requirement that the attorney who is appointed initially to represent the client remains with that client’s case through to completion is to ensure that the minimum level of advocacy necessary to mount a meaningful defense commences as soon as possible. In defender systems relying on horizontal representation schemes, the delay in appointing the actual trial lawyer has negative consequences for the client, as exculpatory evidence like video tapes are routinely destroyed within days, physical evidence like bruises fade away quickly, and witnesses can become harder and harder to track down. (*The Right to Counsel in Maine – Evaluation of Services Provided by the Maine Commission on Indigent Legal Services*, pp. 53-54)

## II. Policy

- A. An attorney may delegate tasks related to the representation of an assigned client to another attorney only to the extent consistent with the assigned attorney’s duties to the client under the Constitutions of the United States and the State of Maine, the Maine Rules of Professional Responsibility, applicable MCILS practice standards, and to the extent consistent with this policy. The assigned attorney is nevertheless responsible to MCILS and to the client individually for all services provided by any attorney during the period of the assignment, and for all billing claimed for those services.

- B. Except as set out below, an assigned attorney may not delegate substantive appearances to another attorney. Substantive appearances include, without limitation: bail hearings; motions hearings; dispositional conferences; adjudicatory hearings; jury selection; trial; sentencing; commitment hearings; appellate oral argument; hearings on preliminary protective orders; jeopardy hearings; judicial reviews; and hearings on petitions for termination of parental rights. The assigned attorney shall personally ensure that clients and all witnesses have notice of and are prepared for each proceeding.
- C. Delegation of those substantive appearances in which delegation may be appropriate shall occur only as follows:
1. Questions related to the delegation of substantive appearances will be resolved from a client-centric perspective.
  2. Delegation of substantive appearances shall be an exception to the expectation that assigned counsel will personally provide continuous representation of assigned clients.
  3. Delegation of substantive appearances may be made only to counsel who have been designated eligible to receive assignments of the applicable case type.
  4. Delegation of substantive appearances shall be made only with informed client consent.
    - a. “Informed consent” means a person’s agreement to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. Whether a client has given informed consent to representation shall be determined in light of the mental capacity of the client to give consent, the explanation of the advantages and risks involved provided by the lawyer seeking consent, the circumstances under which the explanation was provided and the consent obtained, the experience of the client in legal matters generally, and any other circumstances bearing on whether the client has made a reasoned and deliberate choice.
  5. In the context of delegation of an appearance for an assigned client, informed client consent shall include informed consent from the client to reveal those confidences and secrets as are necessary to the delegated representation.
    - a. “Confidence” refers to information protected by the attorney-client privilege under applicable law, and “secret” refers to other information relating to the representation if there is a reasonable prospect that revealing the information will adversely affect a material interest of the client or if the client has instructed the lawyer not to reveal such information.
  6. Assigned counsel shall document the client’s informed consent prior to delegating an appearance. Where possible that informed consent shall be in a writing signed

by the client. Counsel shall maintain documentation of consent and shall provide it to MCILS on request.

- D. Assigned counsel shall not delegate hearings on dispositive motions, jury selection, trials, sentencing hearings, summary preliminary hearings, jeopardy hearings, contested judicial reviews, hearings on petitions for termination of parental rights, or appellate oral arguments.

If an attorney cannot appear to represent a client at an appearance for which delegation is prohibited, counsel may, with informed client consent, seek the assignment of co-counsel in the matter. Where appropriate and permitted by rule, the appearance of co-counsel may be limited.