

**Chapter 5: CO-COUNSEL REQUIREMENTS.**

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**Summary:** This Chapter establishes a process for requesting Co-counsel, expectations of Co-counsel, parameters for payment of Co-counsel, and guidelines for the delegation of tasks in assigned cases.

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**SECTION 1. DEFINITIONS.**

1. Executive Director. “Executive Director” means the Executive Director of the Maine Commission on Public Defense Services (PDS) or the Executive Director’s decision-making designee.
2. Court-Assigned Counsel. “Court-Assigned Counsel” means private counsel licensed to practice law in Maine, designated eligible to receive an assignment to a particular case, and initially assigned by a Court to represent a particular client in a particular matter. For the purposes of this rule, “Court-Assigned Counsel” does not include any employee of PDS.
3. Commission-Assigned Counsel. “Commission-Assigned Counsel” means private counsel licensed to practice in Maine, designated eligible to be assigned to provide a particular service or to represent a particular client in a particular matter, and assigned by PDS to provide that service or represent a client. For the purposes of this rule, “Commission-Assigned Counsel” does not include any employee of PDS.
4. Counsel. “Counsel” means a Court-Assigned Counsel or Commission-Assigned Counsel, or both. For purposes of this rule, “Counsel” does not include any employee of PDS.
5. Co-counsel. “Co-counsel” means an attorney who works with another attorney on a particular case. Both attorneys must be counsel of record, professionally responsible for the case, and actively participate in the representation of the client.
6. Contested Hearing. “Contested Hearing” means a hearing at which a contested issue is submitted to the court for resolution after evidence is taken or witnesses are presented.
7. Eligible. “Eligible” means the status assigned to an attorney who has satisfied all the requirements of Chapter 2, has satisfied all requirements of Chapter 3 for any applicable Specialized Panels, has applied and been approved by the Commission to receive assignments of the applicable case type, is current on their annual renewal, and is not under suspension by the Commission.
8. Substantive Meeting. “Substantive Meeting” means phone calls, emails, face-to-face

meetings, and the like, with clients about matters which materially affect the disposition of the case.

9. **Substantive Appearance.** “Substantive Appearance” includes, without limitation: bail hearings, contested motions hearings, dispositional conferences at which material discussions about the case occur, adjudicatory hearings, jury selection, trial, contested sentencing hearing, commitment hearings, appellate oral argument, hearings on preliminary protective orders, jeopardy hearings, judicial reviews, entry of a plea agreement, and hearings on petitions for termination of parental rights.
10. **Informed Consent.** “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.

## **SECTION 2. PROCEDURE FOR REQUESTING CO-COUNSEL.**

The procedure for requesting Co-counsel is as follows:

1. Prior to seeking appointment of Co-counsel from a court, Counsel must first obtain written authorization from the Executive Director. An attorney seeking such authorization shall submit a written request in a form designated by the Executive Director. The request must include:
  - A. The name of the client;
  - B. The type of case. If it is a criminal matter, the charge(s);
  - C. The docket number(s);
  - D. The reason Co-counsel is requested;
  - E. Whether there is already Co-counsel assigned to represent the client in the matter; and
  - F. The name of the prospective Co-counsel.
2. If the Executive Director authorizes Co-counsel, the assigned attorney must file with the applicable court a motion for appointment of Co-counsel. That motion must state that PDS has authorized the request for Co-counsel.
3. Counsel may only seek appointment of Co-counsel who is Eligible to receive PDS case assignments, but only one of the attorneys needs to have Chapter 3 eligibility for any

Specialized Panel.

### **SECTION 3. PARAMETERS FOR CO-COUNSEL REQUESTS.**

1. The Executive Director has broad discretion in determining whether a Co-counsel request will be granted, but requests will be granted liberally.
2. Co-counsel requests will be reviewed from a client-centric perspective.
3. Absent extraordinary circumstances, the Executive Director will not authorize more than two attorneys to serve as Co-counsel for a particular client in a particular matter.
4. If Counsel does not obtain written authorization for Co-counsel from the Executive Director prior to seeking appointment of Co-counsel, then the Co-counsel will not be paid for any work on the case.
5. Co-counsel does not need to be requested for Co-counsel's work to be compensable if:
  - A. The attorney assigned and co-counsel work in the same law firm;
  - B. Co-counsel is Eligible;
  - C. The attorney who was not assigned to the case will not be appearing in court on behalf of the client, engaging in negotiations related to the case, or having Substantive Meetings with the client; and
  - D. The attorney(s) who was/were not assigned to represent the client will be spending no more than a combined total of three hours of work on the client's matter(s) unless Counsel receives prior written authorization from the Executive Director.

### **SECTION 4. EXPECTATIONS OF CO-COUNSEL.**

1. When Co-counsel is assigned:
  - A. Each Co-counsel must enter a case for that client in the PDS electronic case management system.
  - B. Time entries for each Co-counsel must be maintained in their own case entries for that client in the PDS electronic case management system.
  - C. Each Co-counsel must be actively engaged in the representation of the client.
  - D. At least one Eligible Co-counsel must be present for all Substantive Meetings.
  - E. At least one Eligible Co-counsel must be present for every Substantive Appearance.
  - F. Counsel must avoid unnecessary duplication of effort.

## **SECTION 5. VERTICAL REPRESENTATION.**

1. Counsel may delegate tasks related to the representation of an assigned client to another Eligible 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 PDS rules, and to the extent consistent with this Chapter. The assigned attorney is nevertheless responsible to PDS and to the client individually for all services provided by any attorney during the period of the assignment.
2. The following tasks may not be delegated: 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; appellate oral arguments; or plea agreements, unless all the terms have been fully negotiated, reviewed with the client by the attorney assigned to represent them, and agreed to by the client.
3. Delegation of any task may only occur subject to the following:
  - A. Questions related to the delegation of any task must be resolved from a client-centric perspective.
  - B. Delegation shall be an exception to the expectation that Counsel will personally provide continuous representation of assigned clients.
  - C. Delegation of any task may be made only to Eligible attorneys.
  - D. Delegation of any task may be made only with informed client consent.
4. 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.
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.
  - B. Counsel shall document the client's informed consent prior to delegating an appearance. Where possible that informed consent shall be in writing and signed by the client. Counsel shall maintain documentation of consent and shall provide it to PDS on request.

6. If a task is delegated pursuant to this Chapter, the attorney to whom the task was delegated must enter a case in the PDS electronic case management system and bill their time under that case entry. Case entry, closure, and billing must be conducted in accordance with the applicable PDS rules.

#### **SECTION 6. NON-COMPENSABLE TASKS.**

The following tasks are non-compensable:

Supervision of any kind whether over Co-counsel or over the file generally, this includes but is not limited to an attorney's obligations pursuant to Maine Rule of Professional Conduct 5.1. However, this does not preclude compensation for time spent mentoring a less experienced attorney if that is the purpose of the Co-counsel request.

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