
SPECIALIZED CASE TYPE CONTROL

TO: COMMISSION

FROM: JWA

SUBJECT: SPECIALIZED CASE TYPE CONTROL

DATE: MAY 21, 2021

CC:

MCILS Rules Chapter 3 sets out the requirements for attorneys to be considered eligible to receive certain types of cases. “Chapter 2 of the Commission’s Rules sets out the minimum eligibility requirements to be rostered to accept appointments from the Maine Commission on Indigent Legal Services (“MCILS”). The Rules in this Chapter are promulgated to establish the eligibility requirements to be rostered on specialty panels for specific types of cases.” Summary, Chapter 3.

MCILS Rules Chapter 3 is implemented in the Court through Maine Rule of Unified Criminal Procedure 44(a)(1), which states in part:

If the defendant in a proceeding in which the crime charged is murder or a Class A, Class B, or Class C crime appears in any court without counsel, the court shall advise the defendant of the defendant’s right to counsel and assign counsel to represent the defendant at every stage of the proceeding unless the defendant elects to proceed without counsel. If the defendant is without sufficient means to employ counsel, the court shall make an initial assignment of counsel. Assigned counsel must be designated by the Maine Commission on Indigent Legal Services as eligible to receive assignments for the type of case to which counsel is assigned. The Maine Commission on Indigent Legal Service will, pursuant to procedures established by the Commission, accept the initial assignment made by the court or substitute other counsel for counsel assigned by the court. Counsel initially assigned by the court shall remain counsel of record unless the Commission does not accept the assignment and provides notice of substitution of counsel and counsel files a notice of withdrawal pursuant to Rule 44B, or counsel is otherwise granted leave to withdraw pursuant to Rule 44B

(Emphasis added) A similar provision for class D & E cases follows.

MCILS had historically deviated from the requirements of Chapter 3 of its rules in two material ways. First, the Commission had not promulgated an application for attorneys who wanted to represent parents in child protective matters. Second, attorneys were approved to represent indigent defendants in some cases even when those attorneys had not been designated as eligible to receive assignments for the type of case in question. On January 4, 2021, the Commission resolved to enforce Chapter 3. MCILS began enforcing the rule not later than January 19, 2021, with the commencement of the tenure of its interim Executive Director.

MCILS has no information to suggest that any client received ineffective assistance of counsel through the appointment of an attorney who had not been designated as eligible for that case. MCILS will investigate any allegation of ineffective assistance of counsel on receipt of information raising the issues, irrespective of whether the attorney in question had been designated as eligible.

With respect to the Child Protective bar, MCILS now requires attorneys to apply and be designated as eligible to represent parents as a condition of approval. On January 29, 2021, MCILS attorneys were notified by broadcast email that the application for designation as eligible in child protective cases was online at a specified link to the MCILS website, and that the application must be returned by February 28, 2021. After initial reluctance, most attorneys who had represented parents in child protective cases in the past filed applications and were approved to continue. There were some exceptions, particularly in Aroostook County. Issues of attorney retention and the ability of MCILS to meet its mission are addressed elsewhere in this letter. Appointments to child protective cases are now addressed in the same manner as all of the other specialized panels.

MCILS approves attorneys to represent clients through its Defender Data software. Initial case information is obtained from the courts and from our attorneys. That information includes the docket number, from which the court location can be derived; the client name; and, the charges, from which any applicable specialized panel can be derived. That information is input into the software by the attorney.

An attorney may have established eligibility to accept cases of a specialized type. That attorney may or may not have been listed on the roster of eligible attorneys for a specific case type in a specific court during a specific period. In other words, it is possible for an attorney to have been designated as eligible as contemplated by Rule 44, and for that attorney to be not presently rostered simultaneously. As discussed elsewhere, it is not uncommon for attorneys to place themselves on or off rosters to control caseloads.

For cases in which the case type and attorney eligibility designations match, and in which the attorney is presently rostered to accept cases of the specified type in the court in question, approval is simple. If there is a mismatch between either the case type and the attorney eligibility, or between the court location and the attorney's roster status, or both, then manual review is required. The Executive Director presently performs that function.

Between 50 and 70 cases per week require manual review by the Executive Director. Some of those cases are legacies of prior MCILS policy in which an attorney was appointed without the correct eligibility designation under the prior administration. Those cases have tapered off substantially and should be effectively eliminated in the near future. The majority of the remaining cases are instances in which an attorney has been properly designated as eligible but has been appointed by a court in which that attorney does not routinely accept cases of that type. These cases satisfy both Chapter 3 and Rule 44 and are approved. MCILS is sensitive to attorney travel time, and the cost associated with that time, and tries to have reasonably local counsel on its cases. This is not always possible, however. Sometimes a client has matters in multiple counties, and consistent counsel is necessary for adequate client service. Frequently, courts cannot identify local counsel willing and able to serve, and thus must look further afield.

After eliminating the legacy matters and the eligible case type matters, there remain a subset of cases in which the assigned attorney has not been designated as eligible for the case type associated with the file. From this set there are several additional grounds for approval consistent with the MCILS rules. For example, if the attorney seeking approval is co-counsel to another eligible attorney, then the case may be approved. The eligible attorney would serve as lead counsel in that instance. Another example is post-conviction review. An attorney may be eligible to perform post-conviction review of a case type for which that attorney has not sought a designation of eligibility to serve as trial counsel.

After approving matters as set forth above, there remain the matters that cannot be approved. MCILS contacts the attorneys in those matters to direct them to withdraw. If an attorney failed to withdraw, MCILS would use the substitution provision of Rule 44 to appoint eligible counsel. MCILS has not yet been called on to take that action because counsel have been responsive to the withdrawal requirement.

The current process is cumbersome, but required both by the limitations of Defender Data, and because MCILS has had no information management system that would permit even partial automation of the reviews. Information pulled from Defender Data regarding the approval of cases for which an attorney appears to be ineligible may be accurate and misleading, because the system does not communicate the basis for the approval. A secondary logging and reporting system would eliminate the ambiguity but is impracticable with current staffing levels.