



# Civil Commitment Attorney Performance Standards With Commentary

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## **Standards for Representation in Civil Commitment Cases**

### **INTRODUCTION:**

Oregon Revised Statute 151.216(j) mandates that the Oregon Public Defense Commission (OPDC) “[d]evelop, adopt and oversee the implementation, enforcement and modification of policies, procedures, minimum standards, and guidelines to ensure that public defense providers are providing effective assistance of counsel consistently to all eligible persons in this state as required by statute and the Oregon and United States Constitutions. The policies, procedures, standards, and guidelines described in this paragraph apply to employees of the commission and to any person or entity that contracts with the commission to provide public defense services in this state.”

The following standards were developed by OPDC staff with input from a civil commitment provider workgroup. Per OPDC policy, these standards will be reviewed and revised one, two, and five years from adoption. OPDC welcomes ongoing provider input regarding the content and efficacy of these standards.

Each standard sets a baseline for practice of appointed defense work and is followed by commentary that supplements the baseline standards. OPDC recognizes that in any given case, some standards and commentary might be inapplicable or even mutually exclusive.

Commentary is particularly challenging as there are many times when the commentary is impractical or even against a client’s best interest or desire. OPDC acknowledges that to practice law, exceptions to these baseline rules and their commentary must apply. The commentary provides additional considerations for counsel performing public defense. There are times when items listed in the commentary may be useful or helpful during representation. They are not meant to establish baseline minimum performance standards.

OPDC is grateful to Oregon Public Defense Commission Civil Commitment Standards Workgroup for the extensive work OPDC drew upon in the development process.

## **STANDARD 1.1: THE ROLE OF CIVIL COMMITMENT COUNSEL**

**The lawyer for a client in a civil commitment case should provide quality and zealous representation at all stages of the case, advocating at all times for the client's expressed interests according to Oregon Rules of Professional Conduct 1.14. If a client cannot express their own interests the lawyer should act to preserve all of their client's rights.**

### **Commentary:**

1. A lawyer is bound by the client's definition of their best interests and should not substitute the lawyer's judgment for that of the client regarding the objectives of the representation except as permitted by ORCP 1.14.
2. A lawyer should provide candid advice to the client regarding the probable success and consequences of pursuing a particular position in the case and give the client the information necessary to make informed decisions. A lawyer should consult with the client regarding the assertion or waiver of any of their client's rights or positions.
3. Lawyers in civil commitment cases should be prepared to navigate the healthcare systems that their clients are in and should be aware of the differences between advocacy in a health care setting and advocacy in a court setting. Lawyers should be familiar with the legal or administrative staff in those hospital systems and should be prepared to communicate with them to resolve barriers to access or information within the healthcare system.
4. A lawyer should exercise reasonable professional judgment regarding technical and tactical decisions and consult with the client on strategy to achieve the client's objectives.

## **STANDARD 1.2: EDUCATION, TRAINING, AND EXPERIENCE OF CIVIL COMMITMENT COUNSEL**

- A. **A lawyer must be familiar with applicable statutes, caselaw, local court practices, and local alternatives to commitment. A lawyer must be aware of the timelines, required notices, methods of obtaining needed information to litigate a civil commitment. A lawyer**

**should be aware of collateral consequences that may impact a client as a result of civil commitments. A lawyer has a continuing obligation to stay abreast of changes and developments in the law and with changing best practices for providing quality representation in civil commitment cases.**

- B. Prior to handling a civil commitment matter, a lawyer must have sufficient experience or training to provide quality representation. Prior to accepting appointment in a civil commitment case, a lawyer must be certified for civil commitments by OPDC.**

Commentary:

1. To remain proficient in the law, court rules, and practice applicable to civil commitment cases, a lawyer should regularly monitor the decisions of Oregon and pertinent Federal appellate courts related to civil commitment cases. Lawyers should also monitor bills before the Oregon State Legislature which may impact civil commitment practices.
2. Lawyers should have knowledge of mental health disorders, their presentations, and the mental health treatment systems available to clients. Lawyers should also understand the likely ramifications of various mental health disorders on the client's ability to successfully defend a civil commitment allegation.
3. Lawyers should have knowledge of intellectual disabilities, their presentations, and the available treatments for them. Lawyers should also understand the likely ramifications of various intellectual disabilities on the client's ability to successfully defend a civil commitment allegation.
4. A lawyer should be informed of the practices of the specific judge before whom a client they are representing is appearing.
5. Lawyers should maintain a professional network of other lawyers who routinely practice civil commitment law and should consult with that network as needed. Lawyers should be knowledgeable of how to consult with appellate counsel who routinely handle civil commitment appeals. Lawyers should subscribe to professional listservs, consult available online resources, and attend continuing legal education programs relating to

the practice of civil commitment law as available.

6. A lawyer practicing civil commitment law should become familiar with the collateral consequences of commitments such as loss of firearm rights, non-expungable, professional licensure, possible ramifications to housing, financial costs of commitment if on private insurance, possible ramifications on parenting, etc. and should stay up to date on any changes to those consequences or ways for clients to minimize their exposure to them.
7. A lawyer providing representation in civil commitment cases should be familiar with key agencies and services typically involved in those cases such as, the district attorney's office, office of county counsel, hospital staff, county behavioral health entities, private treatment facilities, and programs, along with other services and programs available as dispositional alternatives to commitment and detention.

### **STANDARD 1.3: OBLIGATIONS OF CIVIL COMMITMENT COUNSEL REGARDING WORKLOAD**

**Before seeking appointment to act as counsel or accepting appointment, a lawyer has an obligation to ensure that they have sufficient time, resources, knowledge, and experience to offer quality representation to a client in a civil commitment without hampering their representation of the lawyer's existing clients.**

#### **Commentary:**

1. A lawyer should have access to sufficient support services and resources to allow for quality representation. This includes investigation.
2. A lawyer should evaluate their ability to appear in court with clients when deciding whether to accept an appointment in a case. A lawyer must appear personally for all critical stages of the case.
3. When possible, lawyers should appear in person or in the same manner as their clients. Lawyers should be aware of the options for a client's appearance.

## **STANDARD 2.1: CLIENT COMMUNICATION**

**A lawyer must meet with their client within 24 hours of their appointment and attempt to conduct an in-person interview with the client and should thereafter establish a procedure to maintain regular contact with the client in order to explain the allegations and process of commitment proceedings, address the ongoing needs of the client, obtain necessary information from the client, consult with the client about decisions necessary for the representation, conduct a conflict check at the time of appointment, and respond to requests from the client for information or assistance concerning the case. The lawyer shall promptly respond to reasonable requests for information from the client.**

### **Commentary:**

1. For clients that are detained outside of the lawyer's primary county, the lawyer should consider having counsel in the county where the client is detained appointed.
2. A lawyer with a client detained outside of the lawyer's primary county may seek the assistance of an attorney based in the county where the client is detained to conduct the initial interview with their client and satisfy the 24-hour requirement in this standard.
3. Lawyers should know the process for appointments in counties in which they practice and should consider ways to expedite the appointments to new clients.
4. Lawyers should maintain contact with their clients throughout any diversion period to continue to accomplish the purposes of this Standard.
5. A lawyer should use clear, developmentally appropriate language, and should use an interpreter as required. Lawyers should assure that any written communication is translated where required or appropriate. A lawyer should elicit the client's point of view and encourage the client's participation in their own defense to the fullest extent possible.
6. Prior to all meetings, the lawyer should:

- a. Be familiar with the elements of civil commitment;
- b. Obtain copies of any relevant documents that are available including any initiating document, recommendations and reports made by agencies concerning commitment, and law enforcement reports that might be available;
- c. Be familiar with the legal procedure the client will encounter and be prepared to discuss the process with the client.

### **STANDARD 3.1: INVESTIGATION**

**A lawyer has a duty to conduct an independent review of the case, regardless of the client's admissions or statements to the lawyer of facts which might justify commitment. Where appropriate, the lawyer should engage in a full investigation, which should be conducted as promptly as possible and should include all information, research, and discovery necessary to assess the strengths and weaknesses of the case, to prepare the case for hearing, and to best advise the client. A lawyer has a duty to be familiar with the process to request funding for an investigator from OPDC if they do not have access to an in-house investigator, and whenever possible should avoid taking on investigations themselves that could cause them to be a witness in the case. The lawyer should not knowingly use illegal means to obtain evidence or instruct others to do so.**

#### Commentary:

1. A lawyer should attempt to interview all potential witnesses in a case including the investigator for the state, the state's psychiatrist, client's family, and other outside professionals who have worked with the client, as well as any law enforcement officers involved. Lawyers should obtain all pertinent information in the possession of the prosecution, juvenile authorities, or law enforcement. The lawyer should pursue formal and informal discovery with authorities as described in Standard 4.
2. A lawyer should obtain prior criminal offense, juvenile records, and prior commitment records of the client as well as where available their school, mental health, medical, drug and alcohol treatment records.
3. On or around the third day of the case lawyers should contact the hospital and state's investigator to confirm the hospital's understanding of the basis for the client's continued hold.

4. A lawyer should always consider whether to reduce investigation to writing and should instruct their investigators to only do so after consultation with the lawyer.
5. A lawyer may not intentionally destroy evidence in a case and must comply with all statutes governing discovery to the prosecution.

#### **STANDARD 4: DISCOVERY**

**A lawyer has the duty to pursue formal and informal discovery as soon as possible following appointment and continue to pursue opportunities for discovery throughout the case. A lawyer has a duty to be aware of all possible sources of formal discovery including the State and the hospital. Lawyers should prioritize available sources of discovery and pursue discovery from sources as the case timing allows. Lawyers must be aware of and abide by time and notice restrictions to obtain necessary information. A lawyer must be familiar with the Oregon Rules of Civil Procedure, all applicable statutes, and other rules and case law governing discovery. Lawyers must be aware of and seek medical records from the detaining hospital.**

#### **Commentary:**

1. Lawyers should consider seeking appointment orders which include a court's order to the hospital requiring they provide patient records to the lawyer.
2. A lawyer should demand discovery from both the State and the detaining hospital. Discovery should include, but is not limited to, the following:
  - a. Client's medical records;
  - b. Witness lists along with witness contact information;
  - c. Police reports, if any;
  - d. Any exhibits they intend to offer at hearing.
3. Lawyers should be familiar with the process of obtaining the investigation report from the county civil commitment investigator and should obtain those reports as soon as possible.
4. A lawyer should be familiar with and observe the applicable statutes, rules and case law governing the obligation of the defense to provide discovery. A lawyer should file

motions for protective orders or otherwise resist discovery where a basis exists to shield information in the possession of the defense from disclosure.

5. Lawyers should not rely on discovery to provide all information in the case and should not assume that the State is compliant with discovery obligations unless the lawyer has verified the compliance.

## **STANDARD 5: EXPLORATION OF DIVERSION**

**A lawyer has the duty to explore with the client the possibility, advisability, and consequences of entering into a diversion agreement when the option exists in their case. A lawyer has the duty to be familiar with the laws, local practices, and consequences concerning diversion agreements.**

### **Commentary:**

1. A lawyer should explain to the client the procedural options available to the client, the benefits, and consequences of considering a diversion and discuss with the client any rights or timelines that may be impacted by diversion.
2. A lawyer should continue to take steps necessary to preserve the client's rights and advance the client's defenses regardless of the presence of a diversion offer.
3. A lawyer whose client is in diversion should remain available to clients during the period of their diversion if the client has questions or requests legal advice regarding their diversion.

## **STANDARD 6.1: HEARING PREPARATION**

**A civil commitment hearing is a complex event that requires preparation, knowledge of applicable law and procedure, and skill. A defense lawyer must be prepared on the law and facts related to their client's case, prepared to challenge the State's case, present a defense case, and adapt to the changing nature of a civil commitment hearing. To fully prepare for a hearing a lawyer should develop, in consultation with the client and members of the defense team, an overall defense strategy for the conduct of the hearing.**

### Commentary:

1. Lawyers are expected to be fully prepared for all aspects of a civil commitment hearing within the allotted statutory timeframe.
2. Prior to the hearing, a lawyer should consult with their client in order to understand the client's goals related to the hearing such as whether or not to attend the full hearing, whether that attendance will be in person or via virtual means, whether to have someone attend the hearing for support, whether to testify or make a statement at the hearing. Lawyers should advocate for their client's goals.
3. Lawyers should review all available documents to identify potential issues in the State's case. Lawyers should plan their own presentation to address those issues in their client's favor.
4. A lawyer must, in advance of hearing, secure the attendance of necessary witnesses including through the use of subpoenas as needed, and develop outlines or plans for opening, closing, anticipated cross examinations, and direct examinations.
5. A lawyer should ordinarily have the following materials available for use at trial:
  - a. Copies of all relevant documents filed in the case;
  - b. Relevant documents prepared by investigators and examiners;
  - c. An outline or draft of opening statement;
  - d. Cross-examination plans for all possible state witnesses;
  - e. Copies of any documents needed to impeach the State's witnesses;
  - f. Direct examination plans for all prospective defense witnesses;
  - g. Copies of defense subpoenas and blank subpoenas to be used as needed during the hearing;
  - h. Copies of client's medical records relevant to the proceeding;
  - i. A list of all exhibits and the witnesses through whom they will be introduced;
  - j. Evidence codes or compilations of evidence codes, relevant statutes, copies of relevant case law, and copies of learned treatises that are relevant to the hearing; and
  - k. An outline or draft of closing argument.
6. The lawyer should analyze potential State evidence for admissibility problems and develop strategies for challenging admissibility of evidence. The lawyer should be prepared to address objections to defense evidence or testimony.

7. The lawyer should consider requesting that witnesses be excluded from the trial.
8. A lawyer should plan with the client the most convenient system for conferring privately throughout the trial. Where necessary, a lawyer should seek a court order to have the client available for conferences. A lawyer should, where necessary, secure the services of a competent interpreter/translator for the client during all trial proceedings.
9. Lawyers should begin planning for the client's potential release as soon as practicable after appointment. Preparation should include working with the client to secure suitable housing, clothing, services, mental health care, and access to medications. Lawyers should consider contacting the client's friends and relatives if available.

### **STANDARD 6.2: PRE-HEARING MOTIONS**

**A lawyer should be prepared to file motions in advance of hearing challenging the procedural issues related to their client's case. A lawyer must be knowledgeable of all motion and notice deadlines that may apply to their case. Lawyers should continue to develop motions throughout the hearing. Lawyers may not miss filing deadlines.**

#### **Commentary:**

1. The decision to file a particular pretrial motion or notice should be made by the lawyer after thorough investigation, discussion with their client, and after considering the applicable law in light of the circumstances of the case.
2. Among the issues the lawyer should consider addressing in pretrial motions are:
  - a. Motions to dismiss;
  - b. Motions related to the location of the hearing;
  - c. Motions related to judicial affidavits;
  - d. Motions related to the manner in which client appears and may be heard during the hearing;
  - e. Motions related to communication with the clients;
  - f. Motions related to the manner in which witnesses appear;
  - g. Motions related to the form and content of the examination of their client.

### **STANDARD 6.2: HEARING**

**Lawyers must be prepared at the civil commitment hearing to represent the client's interests, to cross examine State's witnesses as required to advance the client's goals, and to present any defense witnesses necessary to advocate for the client's stated goals. Civil commitment**

**hearings are inherently prone to quick changes, and the lawyer needs to be prepared to shift tactics as needed throughout the hearing. During the hearing, lawyers should be mindful to preserve any issues that may be the subject of an appeal. The lawyer should be prepared to deliver compelling reasons that the court should find in favor of the client.**

Commentary:

1. Lawyers should consider keeping blank copies of subpoenas on hand during hearings in case a witness needs to be subpoenaed during the proceedings.
2. Lawyers should consult with their clients, to the fullest extent possible, to explain any changes that occur during the hearing which may impact the client's position.
3. Lawyers should consider requesting a recess after the state's case concludes or as needed throughout the hearing to assure that the client is able to understand the proceedings to the fullest extent possible and to make any decisions that they are entitled to make during the hearing.
4. Throughout the hearing, a lawyer should endeavor to establish a proper record for appellate review. As part of this effort, a lawyer should request, whenever necessary, that all trial proceedings be recorded.
5. Lawyers should review the judgment for errors and file necessary motions to correct those errors.

**STANDARD 7.1: OBLIGATIONS OF COUNSEL FOLLOWING DISPOSITION**

**Following the conclusion of the case a lawyer must advise their client about the possibilities of appellate relief and, at the behest of the client, file the necessary paperwork to begin an appeal or to transfer the case to an appellate lawyer who will then perfect the appeal.**

Commentary:

1. The lawyer's duty to communicate with client, explain the proceedings, and answer their client's questions continues for reasonable amount of time post-disposition.
2. When a client pursues an appeal, a lawyer should cooperate in providing information to the appellate lawyer concerning the proceedings in the trial court.
3. Lawyers who represent indigent clients should be knowledgeable about the process of requesting an appellate attorney for civil commitment appeals.