

# Practice Standards

September 26, 2018

## Section XIV, Representation of a Respondent in Involuntary Commitment – Mental Disorder

### 2. CASE PREPARATION:

A. Counsel shall solicit the support of social workers that understand the public defender's advocacy role to investigate the respondent's case and explore various mental health and social services that may be available to the respondent in the community. Counsel shall work with an OPD social worker where time and availability allow.

B. Counsel's role of advocate and advisor must be based on knowledge of the range of services available to the respondent.

C. Counsel shall advise the respondent of all available options, as well as the practical and legal consequences of those options.

D. Counsel shall help the respondent find his or her objectives by advising him or her about the probability of success in pursuing these options. If the respondent expresses a desire to seek voluntary mental health treatment or related social services, counsel must give the respondent the necessary and appropriate advice and assistance to pursue those desires.

E. Counsel shall advocate the respondent's express wishes. The primary role of counsel is to represent the perspective of the respondent alone, not the perspective of the respondent's relatives, friends or guardian. In addition, counsel will not substitute his or her judgment about what is in the best interest of the respondent. To the extent that a respondent is unable or unwilling to express personal wishes, counsel must presume that respondent does not wish to be involuntarily committed.

F. Counsel shall meet with respondent as soon as possible after notification of his or her assignment to an emergency detention or involuntary commitment case. This meeting shall be conducted in private and shall be held sufficiently before any scheduled emergency detention proceeding or involuntary commitment hearing to permit effective preparation and allow pre-hearing assistance to the respondent.

G. When meeting with the respondent for the first time, counsel shall identify himself or herself by name and by affiliation, if appropriate. If the first meeting takes place in a detention, mental health, or other health care facility, counsel shall make it clear to the respondent that he or she is not a member of the facility staff. Counsel shall inform the respondent that their conversation is confidential and that the matters they discuss should not be revealed to facility staff or others in order to preserve that attorney-client confidentiality. Counsel shall also inform the respondent that he or she has the right to remain silent prior to the commencement of any court-ordered examination and that the respondent cannot be examined without the presence of counsel.

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H. During the conference, counsel shall obtain the respondent's version of the facts of the case, including:

- a. The circumstances surrounding the filing of an involuntary commitment or emergency detention petition;
- b. The names, addresses, and telephone numbers of all persons with knowledge of the circumstances surrounding the involuntary commitment petition or emergency detention;
- c. Any information about past psychiatric hospitalization and treatment;
- d. Information to aid the exploration of alternatives to commitment;
- e. The name of a mental health professional of respondent's choice to conduct an independent evaluation.

I. During the conference, counsel shall also:

- a. Explain what is happening and why, including the basis on which the respondent's involuntary commitment is sought, and offer a description of the psychiatric examination and judicial hearing procedures;
- b. Explain the respondent's rights in the commitment process, including the right to treatment, the right to refuse treatment, and the right to an independent evaluation;
- c. Explain that the respondent may retain his or her own counsel at his or her own expense rather than accept representation by the appointed public defender;
- d. Explain the respondent's option to accept voluntary treatment or commitment, the procedures of exercising that option, and the legal consequences of voluntary admission to a mental health facility, including whether the respondent is willing to accept voluntary treatment in a mental health facility or other settings;
- e. Obtain respondent's consent to enter into negotiations for settlement of the case with the county attorney and with mental health professionals if the respondent is willing and able to give informed consent to voluntary mental health care or related social services as an alternative to involuntary commitment;
- f. Discuss the desirability of a court hearing with the respondent; and,
- g. Request the respondent's written or oral permission to obtain access to relevant records, including any facility records or incident reports.

J. After being notified of the appointment, counsel shall, in preparation of any scheduled hearing, do the following:

- a. Become thoroughly familiar with the statutory requirements governing involuntary commitment in the jurisdiction, as well as case law and court rules;
- b. Thoroughly review the petition, detention order, or other documents used to initiate proceedings, the screening report, the prehearing examination reports, the medical records of the respondent, the facility records of any facility in which the respondent has recently resided, and any other document relevant to the proceedings;

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- c. Attempt to interview all persons who have knowledge of the circumstances surrounding the involuntary commitment petition or emergency detention, including the petitioners, the police officers who detained the respondent, the psychiatrists, social workers, and other persons who have examined or treated the respondent during the current involuntary commitment or emergency detention proceedings, previous mental health treatment providers, if any; the respondent's family, guardian or acquaintances; and any persons who may provide relevant information or who may be supporting or adverse witnesses at an emergency detention or involuntary commitment hearing;
- d. Facilitate the exercise of the respondent's rights to be examined by a professional person of the respondent's choice;
- e. Discuss with the respondent the various medications that the respondent has been prescribed to address the respondent's mental illness, including the effectiveness of the medication, and the long-term effects and side effects of each.

K. Counsel must research and be aware of the voluntary admissions process to Montana State Hospital and the voluntary treatment options that are available in the community. Counsel shall explain the benefits and privileges of voluntary treatment and care to all respondents as part of counsel's efforts to make respondents aware of all options available to them.

- L. If the respondent indicates that he or she would consent to voluntary admission at Montana State Hospital or to voluntary treatment in the community, counsel shall:
- a. Determine if the respondent understands that he or she must begin or continue to receive mental health services when participating in voluntary treatment; and,
  - b. Make certain that any agreement to participate in voluntary treatment is not the product of threats, unrealistic promise, or other forms of coercion.

M. If the parties agree to the respondent's voluntary admission to Montana State Hospital or to voluntary treatment in the community, counsel shall immediately take steps to secure the dismissal of the involuntary commitment proceeding.