

# Practice Standards

September 26, 2018

## Section XV, Representation of a Respondent in Involuntary Commitment – Serious Developmental Disability

### 3. COURT PROCEEDINGS:

A. Counsel should seek the most expedient and timely resolution of the involuntary commitment proceeding possible while providing effective and competent advocacy for the respondent. Counsel should only seek the continuance of any phase of the involuntary commitment proceeding if it is necessary to effectively advocate for the respondent.

B. Counsel should ensure that a respondent actively participate in every stage of the involuntary commitment proceeding. Counsel shall encourage the respondent to exercise his or her right to be present at all hearings. Counsel shall advise the respondent of the legal basis under which the court will order discharge, commitment, or recommitment, and the length of commitment.

C. Counsel shall avoid using his or her authority to waive respondent's presence at the hearing except in the following extraordinary cases:

- a. When the respondent unequivocally refuses to attend and cannot be encouraged to do so;
- b. When attending would seriously jeopardize the respondent's mental or physical condition; or,
- c. When the respondent's presence at the hearing would completely disrupt and prevent a meaningful proceeding.

D. If the respondent waives the right to be present, counsel shall make a record of his or her advice to the respondent regarding the right to be present and the choice to waive that right. In such circumstances, counsel shall make a record of the facts relevant to the respondent's absence from the hearing.

E. If at the time of hearing, a respondent is under the influence of prescribed medications, counsel shall consider introducing evidence regarding the nature of the medication and its likely effects upon the respondent's demeanor.

F. Counsel shall competently and effectively engage in all aspects of trial advocacy.

G. Counsel shall be familiar with the applicable court rules and local customs in practice regarding the admissibility of evidence commonly offered in involuntary commitment proceedings such as hospital and medical records.

H. Counsel shall focus the court's attention on the legal issues to be decided, such as whether the criteria for commitment have been met. Counsel shall plan objections to the admissibility of evidence regarding previous commitment and pending criminal charges, if any,

# Practice Standards

September 26, 2018

## Section XV, Representation of a Respondent in Involuntary Commitment – Serious Developmental Disability

so as to preclude their consideration at least until the adjudicative issue of whether commitment is warranted has been determined.

I. During the involuntary commitment hearing, counsel shall, where it benefits the respondent, examine and cross-examine adverse lay and expert witnesses and challenge other non-testimonial evidence regarding:

- a. Whether the case for commitment is based upon self-help deficits so severe so as to require total care;
- b. Whether there is a real factual basis for the determination of these deficits that would prevent safe and effective habilitation in community-based services;
- c. Whether the case for commitment is based on imminent danger to self or others;
- d. Whether there is any real factual basis for the determination of imminent danger;
- e. The probability of dangerous behavior in the future;
- f. Whether any indications of poor functioning are due to the respondent's social situation or to a mental disorder;
- g. Whether the information and the interpretation of that information relied upon by the residential facility screening team was accurate;
- h. Whether health examinations and screenings were thorough;
- i. Whether the respondent had recently been exhibiting abnormal or unusual behavior; and,
- j. The factual basis of conclusory opinions about the respondent's suitability for commitment under the applicable legal standards.

J. Counsel shall offer evidence favorable to the respondent's case and present lay and expert witnesses, including an impartial, independent developmental disabilities expert who has examined the respondent if possible.

K. After discussions with the respondent and with his or her consent, counsel shall present all evidence available that is favorable to the respondent regarding appropriate alternatives to involuntary commitment, including, but not limited to, the ability of the respondent to be served in the community, including the respondent's history of successful placement in the community, the availability of community-based services or other mechanisms to support the respondent in the community, including powers of attorney, guardianship or conservatorship.

L. Counsel shall offer evidence favorable to the respondent regarding the least restrictive placement for the commitment during the proceeding.

M. Counsel shall also thoroughly examine and cross-examine adverse lay and expert witnesses, particularly regarding the factual basis of conclusory opinions about the necessity of committing the respondent to the most restrictive setting available, such as the Montana Developmental Center. Counsel shall explore and consider offering evidence of the respondent's

# Practice Standards

September 26, 2018

## Section XV, Representation of a Respondent in Involuntary Commitment – Serious Developmental Disability

compliance with treatment, success in community treatment programs, and family and other support in the community.

N. Counsel shall consider the condition of the respondent in determining the degree to which the hearing procedures shall conform strictly to the applicable rules, as some respondents may not be able to consent knowingly and voluntarily to the waiver of any procedural or evidentiary rights. Counsel shall argue strict application for the burden of proof and the law and at endeavor at all times to preserve the record for appeal. Counsel shall review all orders and seek the amendment of orders as necessary, including the deletion of provisions not supported by the record.

O. Counsel shall provide continuity in representation for the respondent throughout the involuntary commitment process. If the court has ordered involuntary commitment, counsel shall advocate for an appropriate individualized treatment plan to be developed, including a post-institutionalization plan which contains all the elements required by law and is tailored to the respondent's needs and is reasonably designed to maximize the resident's abilities and enhance the resident's ability to cope with the environment. Counsel shall argue for the exclusion of all provisions that are unnecessarily restrictive or unsupported by the record. The plan should include the following elements:

- a. All assessments of the respondent's specific limitations and needs;
- b. A description of intermediate and long range habilitation goals, with a projected timetable for their attainment;
- c. A statement of and an explanation for the plan of habilitation necessary to achieve the habilitation goals of the resident;
- d. A specification of the professionals and other staff members who are responsible for the particular resident's attaining these rehabilitation goals;
- e. Criteria for release to less restrictive settings for habilitation, based on the resident's needs including criteria for discharge and a projected date for discharge.

P. Counsel who has represented a respondent preceding and during a court hearing shall make every effort to maintain responsibility for the respondent's legal representation so long as the respondent remains committed.

Q. If counsel who represented the respondent during the commitment proceedings does not continue to represent the respondent after commitment is ordered, he or she shall make all reasonable efforts to ensure that the respondent is well represented in all matters that stem from the respondent's commitment. Specific objectives include:

- a. A smooth transfer of responsibility to new counsel who assumes representation in post-hearing matters, including motions for amended findings, stays of the commitment order pending appeal, appeals, petitions for writs, periodic review

# **Practice Standards**

September 26, 2018

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hearings, recommitment proceedings and other available legal actions to contest commitment;

- b. Monitoring of the treatment and services provided a committed respondent to ensure the quality of the treatment and services.