

Practice Standards

September 26, 2018

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

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 the respondent may exercise his or her right to a jury trial. Counsel shall inform the respondent of his or her right to a jury trial and explain the benefits and detriments of a jury trial and a hearing in front of the judge alone. Counsel shall immediately notify the court if respondent chooses a jury trial. If the respondent waives his or her right to a jury trial, counsel shall establish that the waiver is knowing and voluntary.

C. Counsel shall ensure that a respondent actively participates in every stage of the involuntary commitment process. 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, emergency detention, commitment, conditional release, revocation or modification of a trial visit, outpatient or community commitment, or an extension of the commitment period, and how the court will determine the length of commitment.

D. Counsel shall avoid using his or her authority to waive respondent's presence at the hearing, except when attending would seriously jeopardize the respondent's mental or physical condition and an alternative location for the hearing in surroundings familiar to the respondent would not prevent such adverse effects upon the respondent's mental condition.

E. 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.

F. Respondent has the right to be free from any non-lifesaving medication for up to 24 hours before the hearing. If, at the time of hearing, a respondent is under the influence of psychotropic or other prescribed medications, counsel should consider introducing evidence regarding the nature of the medication and its likely effects upon the respondent's demeanor.

G. Counsel should zealously and effectively engage in all aspects of trial advocacy.

H. 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.

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I. Counsel shall focus the court's attention on the legal issues to be decided, such as whether the criteria for detention or commitment have been met. Thus, in emergency detention proceedings, counsel shall seek to bifurcate the determination of whether there is probable cause for an emergency detention and the determination of the least restrictive setting for that detention. In involuntary commitment proceedings, counsel shall seek to bifurcate the determination of whether the respondent requires commitment and the post trial disposition hearing if it will advantage the respondent. Counsel shall plan objections to the admissibility of evidence regarding previous commitment and pending criminal charges so as to preclude their consideration at least until the adjudicative issue of whether commitment is warranted has been determined.

J. 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 detention or commitment is based on dangerousness to self or to the person or property of others;
- b. Whether there is any real factual basis for the determination of dangerousness;
- c. The probability of dangerous behavior in the future;
- d. How well the respondent is currently functioning and whether any indications of poor functioning are due to the respondent's social situation or to mental disorder;
- e. Whether there is any useful purpose to hospitalization and whether possible alternatives exist or have been explored;
- f. Whether mental health examinations and screenings were thorough;
- g. Whether the respondent had recently been exhibiting abnormal or unusual behavior;
- h. Whether involuntary medication should be ordered; and,
- i. The factual basis of conclusory opinions about the respondent's suitability for detention or commitment under the applicable legal standards.

K. Counsel should be aware of the basis for and file a motion to seek release from custody in the form of a *writ of habeas corpus* when appropriate.

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

M. After discussions with the respondent and with his or her consent, counsel shall present all favorable evidence available regarding appropriate alternatives to involuntary commitment including, but not limited to, voluntary mental health treatment and commitment to community-based mental health treatment and care.

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N. Whether or not the commitment hearing, the post trial dispositional hearing, the detention proceeding, or the detention placement determination are bifurcated, counsel shall offer evidence favorable to the respondent regarding the least restrictive placement for the commitment during the proceeding or part of the proceeding that constitutes the post trial dispositional hearing or detention placement determination.

O. 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 State Hospital. Counsel should explore and consider offering evidence of the respondent's compliance with treatment, success in community treatment programs, and family support in the community.

P. 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 an involuntary medication order. Counsel should explore and consider offering evidence regarding the medications that the respondent has found to be effective, as well as those medications which have not been effective or cause significant long-term or side effects.

Q. Counsel should consider the condition of the respondent in determining the degree to which the hearing procedures should 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 should argue strict application for the burden of proof and the law; at all times, counsel should endeavor 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.

R. Counsel should provide continuity in representation for the respondent throughout the involuntary commitment process. If the court has ordered the involuntary commitment, counsel shall advocate for an appropriate treatment and discharge plan to be developed which is reasonably designed to achieve the end sought in the commitment order. The treatment plan should be tailored to the respondent's needs. Counsel shall argue for the exclusion of all provisions that are unnecessarily restrictive or unsupported by the record. The treatment plan should include the following elements;

- a. All assessments of the respondent's problems and needs;
- b. A brief description of the nature and effects of service and treatment already administered to the respondent;
- c. A description of services and treatment to be administered, their possible side effects, and feasible alternatives, if any;
- d. The identities of agencies and specific individuals who will provide the services and treatment in the future;
- e. The settings in which the services and treatment will be provided;

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- f. A time table for attaining the goals or benefits of treatment or care to be administered;
 - g. A statement of the criteria for transition to less restrictive placements or for conditional or unconditional discharge from involuntary mental health services and treatment, as well as the date for transfer or discharge; and,
 - h. A statement of the least restrictive conditions necessary to achieve the purposes of hospitalization.
- S. The discharge plan should include the following:
- a. An anticipated discharge date;
 - b. Criteria for discharge;
 - c. Identification of the facility staff member responsible for discharge planning;
 - d. Identification of the community-based agency or individual who is assisting in arranging post-discharge services;
 - e. Referrals for financial assistance needed by the patient upon discharge; and,
 - f. Other information necessary to ensure an appropriate discharge and adequate post-discharge services.
- T. Counsel who represented a respondent preceding and during a court hearing should make every effort to maintain responsibility for the respondent's legal representation so long as the respondent remains an involuntary patient or subject to a conditional release.
- U. If counsel who represented the respondent during the commitment proceeding 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 hearings, court ordered release to alternative placement or treatment, and other available legal actions to contest commitment, as well as continued representation in proceedings to revoke conditional release, to extend conditions of release or the commitment period in a more restrictive setting, and other legal proceedings to extend commitment.
 - b. Monitoring of the treatment and services provided a committed respondent to ensure the quality of the treatment and services.