

Specific Standards For Representation In *Civil Commitment Proceedings*

This chapter pertains to cases of involuntary commitment of the mentally ill. Under Oregon law, a mentally ill person is a person who, because of a mental disorder, is either dangerous to self or others or unable to provide for basic personal needs and is not receiving such care as is necessary for health or safety. The types of cases referred to in this chapter as 'commitment proceedings' include initial commitment, re-commitment, conditional release, trial visit revocation, outpatient commitment, and 'diversion' (a 14 day period of intensive treatment). Because it is generic, the term 'commitment client' is used in this chapter in lieu of the term 'allegedly mentally ill person.'

Not addressed in this chapter are any specific standards that may apply to civil commitment of the mentally retarded. Nonetheless, counsel will find this chapter useful in cases involving involuntary commitment of the mentally retarded.

STANDARD 4.1

Pre-requisites For Representation

In addition to being proficient in substantive and procedural law, counsel should possess knowledge, skill, training and experience commensurate with the nature of the allegations and the complexity of the case. Implementation

1. At a minimum, counsel should meet the requirements of the Qualification Standards for Court Appointed Counsel to Represent Indigent Persons at State Expense, Oregon Judicial Department (1990), Standard 3.1 F.
2. Counsel should have basic knowledge of the classification of mental disorders (*Diagnostic and Statistical Manual of Mental Disorders [Fourth Edition Revised]*) and the ability to read and understand medical terminology related to mental disorders and the treatment of the mentally ill.
3. Counsel should be familiar with the medications used to treat mental disorders and, in particular, the effects of those medications on the client's participation.
4. Counsel should be aware of how a particular mental disorder will affect attorney/client communications. Counsel should recognize communications may require special efforts on the part of counsel.
5. Counsel should have familiarity with mental health resources and other resources available in the community that will provide an alternative to involuntary hospitalization.
6. Counsel should be familiar with the facilities, both inpatient and outpatient, that

provide services to the mentally ill.

7. Counsel should frequently represent clients in commitment proceedings. If counsel is not frequently before the court representing commitment clients, counsel should observe local court proceedings and/or consult with counsel experienced in local commitment proceedings. Counsel should be familiar with local court practices.

8. Counsel should avail oneself of any CLE's or specialized training to further educate counsel on substantive issues, substantive law, statutory law and procedures, local court rules, and local practices as they relate to commitment proceedings.

STANDARD 4.2

Counsel's Role

It is counsel's role to act as a zealous advocate for the client's ultimate goals and objectives in the commitment proceedings and to advise the client on how best to achieve them.

Implementation

1. It is counsel's duty to ascertain the client's ultimate goals and objectives in the proceedings.

a. It is the unusual circumstance where the client cannot express the ultimate goal, i.e., 'I want out of this hospital, jail, custody situation.' Counsel should nearly always be able to ascertain if the client's desire is 'liberty'. If the client desires liberty, then counsel should work to achieve liberty.

b. Counsel should assume the role of advocate for the client's rights and not attempt to take on an additional role. Counsel is not the judge, the consensus of the community, the client's family member, the prosecutor or the mental health provider.

c. In those rare instances when a client, because of mental status, cannot express his or her ultimate goals and objectives in the commitment proceedings, it is the role of counsel to protect the client's constitutional and statutory rights.

2. Counsel should advise the client of probable successes and consequences of adopting any posture in the proceedings.

3. Counsel should assess whether counsel has the requisite training, skill, knowledge and experience to represent a commitment client in other types of legal matters before undertaking representation in such matters.

4. If counsel represents the commitment client in other types of proceedings, such as guardianship, conservatorship, or criminal proceedings, counsel should assess how the client's participation and position in one proceeding may potentially affect the client's participation and position in other proceedings and advise the client

accordingly. For example, if counsel represents a client in both a civil and criminal matter, it may potentially pose problems if counsel asserts a claim of mental disorder exculpating culpability in the criminal matter while on behalf of the same client counsel argues against a civil commitment because the client denies a mental disorder.

STANDARD 4.3

Initial Client Interview

Upon being retained or appointed by the court, counsel should conduct an initial interview with the client as soon as possible, in most cases within 24 hours, but in all cases prior to the hearing.

Implementation

1. Counsel should ascertain where the client is located and visit personally. In many instances, the client will be detained in a hospital, jail, or locked care facility. In the remaining cases, the client will be located via the information contained in the citation or delivery warrant.
2. In the initial interview, counsel should:
 - a. clearly introduce herself to the client and make sure the client understands the role counsel plays in the civil commitment process and the difference between counsel's role and that of the state's attorney;
 - b. discuss the issue of client confidentiality and secure the client's oral and written permission to obtain access to relevant records;
 - c. explain the reason for the commitment proceedings and the possible results;
 - d. ascertain the client's desired resolution;
 - e. explain legal rights;
 - f. provide legal advice;
 - g. describe the likely course of events;
 - h. prepare the client for a mental status exam by examiners appointed to aid the judge; and
 - i. describe the burden of proof and the findings the court must make in order to further deprive the client of liberty.
3. When counsel has ascertained the client's ultimate goal, counsel should advise the client of the available options and the probable success and consequences of choosing a particular option. For example, if the client wants discharge but in counsel's estimation is likely to be more successful in presenting a conditional

release, that alternative should be presented to the client. Counsel should follow the client's desires as to which option to pursue.

4. Counsel should inform the client of:

- a. the right to a postponement and the likelihood of continued detention during the postponement;
- b. the right to subpoena witnesses, including expert witnesses;
- c. the right to subpoena any physician who is, or has been, treating the client at the client's request and counsel's statutory obligation to do so under ORS 426.075(4);
- d. the right to assert applicable privileges regarding confidential communications with a psychologist, psychiatrist, caseworker, physician, social worker or others, and the likely results of waiver of that privilege;
- e. the right to have the investigator personally present at the hearing as a pre-requisite to admissibility of the investigator's report;
- f. the right to object to the admissibility of hearsay in the investigator's report; and
- g. the right to request a qualified examiner in addition to the one the Court is required to appoint.

5. If the proceedings are for a violation of trial visit or a violation of conditional release, counsel should describe the proceeding, the standard of proof required, the allegations before the Court, and advise the client of the consequences of a revocation.

6. If the proceeding is a re-commitment proceeding, counsel should inform the client of the right to protest re-commitment and require an independent medical examination.

7. If the client is detained because of a certificate for a 14 day period of intensive treatment, 'diversion', counsel shall meet with the client and review the certificate within 24 hours of the filing of the certificate. Counsel shall inform the Court whether the client consents to or protests the certificate within one judicial day of the time the certificate is delivered to the Court. ORS 426.237(3)(c)

8. Counsel should inform the client in the applicable case of the fact that the Court may prohibit the client from possession of a firearm in the future.

9. Counsel should advise the client of the legal basis under which the Court will order:

- a. discharge;
- b. commitment;

- c. conditional release;
 - d. revocation or modification of a trial visit;
 - e. outpatient commitment;
 - f. recommitment; and
 - g. the length of commitment.
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STANDARD 4.4

Obligations Of Counsel Pre-hearing

Counsel should obtain documents filed in the case, review reports and records of relevance, prepare pre-trial motions and engage in negotiations at the client's direction.

Implementation

1. Counsel should obtain and review where relevant the:
 - a. court file;
 - b. investigation report;
 - c. medical records;
 - d. police reports; and
 - e. evidence offered by opposing counsel.
2. Counsel should conduct interviews with relevant witnesses prior to the hearing.
3. Counsel should research, prepare, file and argue pre-trial motions to protect the client's statutory and constitutional rights:
 - a. counsel should review and challenge the substance and process of the initiation of the commitment proceedings:
 - i. counsel should ascertain if the notification of mental illness meets the statutory criteria for substance and process, including whether the notification is under oath, contains the factual basis for a commitment proceeding, meets the statutory requirements for a commitment proceeding, and comports with the timeliness provisions of the statute;
 - ii. counsel should review the notice and content of the investigator's report to see if they comport with the statutory requirements;
 - iii. counsel should review the notice and filing of medical records sought to be introduced; and

- iv. counsel should review the basis for a warrant of detention and determine if the warrant is sufficient in its substance, execution and return.
 - b. counsel should challenge for bias the judge or mental health examiners, where appropriate.
 - c. counsel should be aware of the basis for and file a motion to seek release from custody in the form of a Petition for Writ of Habeas Corpus when appropriate.
 - d. counsel should be aware of the application of the rules of evidence in the commitment proceedings and litigate matters of admissibility of evidence by means of a motion in limine when appropriate.
 - e. counsel should make appropriate requests for extraordinary expenses for the services of experts when necessary.
4. Counsel should ascertain whether the client may achieve the ultimate goal without the necessity of a contested commitment hearing. If appropriate in furtherance of that goal, counsel should:
- a. seek to negotiate a satisfactory outcome with opposing counsel;
 - b. approach the mental health investigator about a dismissal or less restrictive resolution without the necessity of a hearing;
 - c. prepare and present a conditional release alternative;
 - d. prepare and present a stipulation to the basis for a commitment to the court; and
 - e. determine if a postponement will assist in achieving the client's desired resolution. counsel should seek the postponement at the client's request.

STANDARD 4.5

Commitment Proceedings

Counsel should provide quality representation and advocacy for the client at commitment proceedings.

Implementation

1. At a hearing, counsel should be prepared to:
 - a. raise procedural motions, including the exclusion of witnesses at the client's request;
 - b. assert privileges, including the physician/patient, psychotherapist/patient, social worker/patient and other privileges;

- c. protect against self-incrimination;
 - d. make an effective opening statement as to the client's ultimate goal and the facts that will be presented to support that goal;
 - e. cross-examine and present expert and lay witnesses;
 - f. present a plan for discharge;
 - g. present alternatives, including conditional release, voluntary commitment and outpatient commitment, where appropriate; and
 - h. present stipulations.
2. In closing, counsel should argue strict application of the burden of proof and the law.
 3. At all times, counsel should endeavor to preserve the record for appeal.

STANDARD 4.6

Obligations Of Counsel Post-hearing

It is counsel's responsibility to represent or obtain representation for any residual legal matters relating to the case.

Implementation

1. Counsel should take the necessary actions to effect an appeal at the client's request. Counsel should undertake to file a Notice of Appeal or assure that alternative counsel is appointed to perfect an appeal.
2. Counsel should assess any treatment issues that exist requiring legal intervention and, where appropriate, refer the client to the bar association, advocacy group, attorney general's office, legal aid, private counsel or other appropriate source.
3. Counsel should, where appropriate, inform the client of the existence of social services, such as housing and food available in the community, the existence and location of community mental health providers, and the existence of medical treatment available in the community upon discharge from a hospital.

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