

MENTAL HYGIENE PRACTICE

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The procedure for involuntary hospitalization of an individual is provided for in *W. Va. Code* §27-5-1 through 27-5-11. The involuntary hospitalization of incarcerated individuals is dealt with in the same general fashion with some significant exceptions.

Involuntary commitment hearings are relatively informal hearings that may take place in, *inter alia*, a hospital, a mental hygiene facility or the county courthouse. The involuntary commitment process for an unincarcerated individual is initiated by an adult filing an "Application for Involuntary Custody for Mental Health Examination" (Form SCA_MH 901-1/6-06 - Exhibit A) with the mental hygiene commissioner (MHC) or the circuit court. An incarcerated individual can only be placed involuntarily after the filing, by the chief administrative officer, of form SCA-MH 901C-1/6-03. If no circuit court judge or mental hygiene commissioner is available, the application may be made to a magistrate designated by the chief judge of the judicial circuit. The applicant may be any adult who has been directed to the MHC or Circuit Court by the Sheriff, a magistrate, hospital personnel or mental health facility or the applicant may be a mental health professional, police officer or physician.

The West Virginia Rules of Evidence apply to these proceedings. In addition, a MHC who has been appointed by the circuit judge usually conducts these hearings. Normally, there is no court reporter present nor is the probable cause hearing recorded. The prosecuting attorney is not required to appear at the probable cause hearing, but may represent the petitioner, if they deem it to be in the best interest of the public, after the petitioner requests the prosecuting attorney be notified of the proceeding.

The duties of the MHC are set forth in *W.Va. Code* §27-5-1(b). Primary among the duties of the MHC is to "...safeguard, at all times, the rights and interests of the individual as well as the interests of the state." In addition, the MHC may sign and issue subpoenas, subpoenas duces tecum, and summonses, administer oaths, and make findings and conclusions of law, which are not binding on the Circuit Court. *Id.* The MHC also appoints an attorney to represent the respondent during all stages of the commitment process.

The application for involuntary hospitalization is a verified petition, which states that the applicant has reason to believe that the respondent is mentally ill and likely to cause serious harm to themselves or others as defined in *W.Va. Code* §27-5-2(a)(2) or that they are addicted as defined in *W.Va. Code* §27-1-11. The application must state information and facts as required by the form provided for this purpose by the supreme court of appeals (see Exhibit A), including that the Respondent has been offered and refused voluntary treatment.

Upon the filing of the application with the circuit court, mental hygiene commissioner or magistrate, if the contents merit a hearing, an order is issued directing the sheriff to detain or take into custody and transport the respondent to be evaluated by a licensed psychologist or physician prior to the probable cause hearing. The order must also specify that the hearing be held forthwith, or within 24 hours (*W.Va. Code* §27-5-26c) form SCA-MH-903CC24/6-06, and provide for the appointment of counsel.

The petitioner and the respondent are given notice of the hearing, and respondent's counsel may move for a continuance not to exceed 48 hours from detention in order to interview witnesses and prepare for the hearing. *W.Va. Code* §27-5-2(f). The hearing may also be rescheduled due to the need for medical care [*W.Va. Code* §27-5-2(e)].

Prior to the probable cause hearing, counsel should thoroughly review the application and Certificate of Licensed Examiner (SCA-MH-1/6-06 Exhibit C), if it has been completed; review the hospital chart, paying particular attention to the progress notes, the patient history, and any dictated report of the physician; and review any laboratory reports and medication charts to determine if the individual is capable of communicating with counsel. Lab reports are also critical in regard to respondents who are alleged to be addicted. Furthermore, there are usually notations in the respondent's history of any previous hospitalization for addiction or mental illness. Furthermore, if the mental health facility is served by a community mental health agency, there may be a staff liaison who can provide background on the respondent's prior treatment program or history. The psychiatric nursing staff is also able to provide background if the individual has been hospitalized on a voluntary basis and is now being involuntarily committed.

Certification may be by a physician, psychologist, independent clinical social worker, or an advanced nurse practitioner, with psychiatric certification. See *W.Va. Code* §27-5-2(e) for more details.

Finally, an interview of the applicant is appropriate to get information about the specific acts, which led to the filing of the application. Counsel must question if there is a reason to believe the application is the result of a domestic dispute or some other underlying motive. Generally, an application is filed by a concerned family member who has tried to care for the individual at home prior to seeking commitment.

With this background, counsel is now ready to interview the individual. Careful observation of the client will help counsel to determine and evaluate the individual's need for

hospitalization. Counsel should question the individual about why the application was brought, about the specific acts alleged, about any hallucinations or delusions, and about the process of commitment. The individual needs to know that he/she has the right to be present at the hearing, to present evidence, to examine testimony offered, and to remain silent. The individual should also be advised that the rules of evidence apply to the hearing. Often it is necessary to explain to the client how one can be a passive danger to oneself. The individual should also be advised to the commitment following a probable cause hearing cannot exceed 15 days unless proceedings for final commitment are instituted. *W.Va. Code §27-5-3(g)*.

At the probable cause hearing, the MCH swears those witnesses who will testify. The prosecutor, if they choose to appear, questions the applicant, the physician, the liaison from the local mental health facility and any other witnesses. If no prosecutor appears, the mental hygiene commissioner may initiate questioning of the witnesses. Counsel for the respondent cross-examines the witnesses to confirm that there is evidence to support the allegations that the individual is mentally ill and/or addicted. In addition, there must be testimony that the individual is a current active or passive danger to self or others. The MHC may allow the liaison to testify about the contents of the Physician's Certificate, if one has been completed. The MHC must determine that there is probable cause to believe that the individual is mentally ill and is likely to cause serious harm to self or others and/or is addicted. If the respondent is ordered committed to the mental health facility by MHC, the sheriff is to transport the individual.

If at the conclusion of the probable cause hearing it is agreed among the certifying officer, the MHC, the respondent and counsel, as an alternative to commitment, a voluntary treatment agreement can be entered. Upon entry of SCH-MH-907-1/6-06, the Respondent is

required to complete SCA-MH-907B-1/6-06 and comply with the terms as agreed upon among the participants.

In the event the Respondent does not comply with the voluntary treatment and its terms, application can be made by SCH-MH-907D/6-06 to involuntarily commit the respondent to a facility. If, after hearing, it is determined that the respondent has not complied, he can be committed, as if directly from a probable cause hearing. Note that at this hearing, a finding of probable cause has already been made, and the only consideration is of evidence regarding Respondent's complicity with the terms of the voluntary treatment agreement.

Once probable cause is found and the respondent is committed for further evaluation, he must be re-evaluated within five days, by a physician who shall determine whether the respondent is mentally ill and likely to cause danger, or addicted, and remain addicted if allowed to remain at liberty. If not completed, or re-certified, the respondent must be discharged.

After this evaluation, if it is determined that the respondent requires long-term treatment, a written application (West Virginia Department of Health and Human Resources Application for Final Commitment Hearing SCA-MH-907-K/6-06), under oath, is filed with the MHC or the circuit clerk of the county of residence of the respondent, or where he or she may be found, or in the county of the mental health facility, if the respondent was hospitalized in the facility.

The application for final commitment must state that the applicant believes that because of the symptoms of mental illness the respondent is likely to cause serious harm to self or others and/or he/she is addicted. The application must state recent overt acts of the respondent to support the belief.

Final commitment proceedings must be instituted within fifteen days from the date of admission. If such proceedings are not instituted within such fifteen-day period, the respondent shall be released immediately. All proceedings, including the final commitment hearing, must be completed within 30 days from the date of institution of the proceedings or the respondent is immediately released. *W.Va. Code §27-5-3(g) & (h)*.

Upon receipt of the Application for Final Commitment Hearing, the MHC determines if there are facts sufficient to warrant involuntary hospitalization. The MHC shall forthwith set a date for the final hearing, and the circuit clerk then gives notice to the respondent, the applicant, the spouse, adult next-of-kin, the mental health authorities, the circuit court, and counsel for the respondent, and the prosecuting attorney. This notice must be served upon the individual no less than eight days prior to the hearing. *W.Va. Code §27-5-4(e)*.

Within a reasonable time after notice of commencement of final commitment proceedings, the respondent is again examined by a physician or psychologist, appointed by the MHC, to evaluate the respondent and report his findings to the MHC regarding the respondent's mental condition and likelihood of causing harm to him/herself or others or their addiction. If the respondent refuses to submit to the examination, the MHC or circuit court shall order the person to do so. If the examination report does not find the person to be mentally ill and likely to cause harm to self or others or is addicted, the final commitment proceedings must be dismissed. *W.Va. Code §27-5-3(f)*.

Prior to the final commitment hearing, counsel must review all medical records of the respondent, meet with the respondent and determine if the respondent needs an independent evaluation. The cost of the independent examination is borne by the county of residence of the

respondent, if the respondent is indigent. Counsel should discuss the case with the independent examiner prior to the final hearing to determine whether the individual examiner will be called as a witness. If the examiner indicates that the evaluation is essentially the same as the attending physician, counsel may determine that the testimony of the independent examiner may be detrimental to the respondent. *W.Va. Code §27-5-4(h)*.

At the final hearing, the prosecutor will be present and the MHC hears all relevant material evidence from all interested parties, including representatives from the community mental health facility, and the physician or psychologist who completed the certification of the respondent. The physician may offer testimony about statements made by the respondent even though the respondent may not have been informed that the statements may be used against him/her. The respondent cannot be compelled to testify. Counsel should vigorously cross-examine all witnesses and should consult with the respondent about any questions of testimony of witnesses. *W.Va Code §27-5-4(I)*.

All final hearings are either reported or recorded, and a copy of the recording or transcript if available to respondent, to counsel or the prosecutor if the same are requested for the purpose of further hearings within 30 days.

The MCH must find at the final hearing that there is clear, cogent and convincing evidence that the respondent is mentally and that as a result of that illness is likely to cause harms to self or others if allowed to remain at liberty and/or is addicted. The MHC must also determine that the respondent is a resident of the county or is a patient at the mental hygiene facility in the county where the hearing is conducted. Finally, the MHC must find that there is no less restrictive alternative than commitment, and this burden is on the person seeking

commitment of the respondent. *W.Va. Code §27-5-4(j)*. The Findings of Fact and Conclusions of Law of the MHC are presented to the circuit court and are incorporated by reference into the Commitment Order of the court. The Order must be entered and received by the mental health facility within ten days of the final hearing.

Alternatively, the respondent may be released pursuant to a voluntary treatment agreement, final commitment, and proceed along the process of compliance and review set out above.

The Court may order the respondent to a mental health facility for an indeterminate period or for a temporary observation period not to exceed six months. An indeterminate period expires at the expiration of two years. Prior to the expiration of the six-month period, if the physician reports that additional hospitalization is necessary, the hearing process is reinstated. If the respondent is committed for an indeterminate period and if prior to two years the physician determines that additional hospitalization is necessary, the individual or counsel may request a hearing. Any time prior to the expiration of the six-month or two-year periods, the respondent may be discharged from the facility and the action is dismissed. *W.Va. Code §27-5-4(k)*.

At the final hearing, if the MHC determines that the respondent is not mentally ill and a danger to self or others or not addicted then the proceeding is dismissed. Further, if the MHC finds the respondent is mentally ill but not likely, because of such condition to cause serious harm to self or others then the MHC must dismiss the proceedings. *W.Va. Code §27-5-4(l)*.

As an alternative to hospitalization, the statute *W.Va. Code §27-5-4* provides that the court in lieu of hospitalization may order the respondent delivered to some responsible person who will agree to take care of the respondent. This most often happens when the respondent is

not a resident of the state and has been previously hospitalized in West Virginia, the respondent can be returned to the home state through the Interstate Compact On Mental Health. *W.Va Code* §27-5-4(p).

Appeal of the Commitment Order from the Circuit Court is to the State Supreme Court of Appeals and is made in the same manner as civil appeals, generally. The respondent also has the remedy of habeas corpus. *W.Va. Code* §27-5-5.

Each individual committed to a mental health facility has the specific rights which are enumerated in *W.Va. Code* §27-5-9. An individual who has been committed involuntarily has neither lost legal capacity nor been adjudged incompetent. If the specific patient rights, such as reevaluation, a treatment plan, physical examination, are not accorded the individual, the shall be released. The individual is given a copy of the patient rights by the mental health facility. As stated in the above named Code Section all of the proceedings, records and reports of the involuntary commitment proceedings are strictly confidential and are not released without a court order or the individual's consent.