

## **Practice Standards**

December, 2012

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

#### **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 developmental health and social services that may be available to the respondent in the community.

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 determine the respondent's objectives by advising the respondent about the probability of success in pursuing those options.

E. Counsel shall advocate the respondent's express wishes. The primary role of counsel is to represent the perspective of the respondent alone, and not the perspective of the respondent's relatives, friends, or guardian. In addition, counsel shall not substitute his or her judgment about what is in the best interests 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 involuntary commitment case. This meeting shall be conducted in private and shall be held sufficiently before any scheduled 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/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 attorney-client confidentiality. Counsel should 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.

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 the involuntary commitment;

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- b. The names, addresses, and telephone numbers of all persons with knowledge of the circumstances surrounding the petition;
  - c. Information about past treatment either in the community or at the Montana Developmental Center or any past psychiatric hospitalization;
  - d. Information to aid the exploration of alternatives to commitment;
  - e. The name of a developmental disabilities expert 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 examination conducted by the residential facility screening team and judicial hearing procedures;
  - b. Explain the respondent's rights in the commitment process, including the right to treatment and the right to refuse treatment;
  - 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 health care or other services, the procedures to exercise that option, and the legal consequences of voluntary acceptance of such services; discuss whether respondent is willing to accept those voluntary services;
  - e. As an alternative to involuntary commitment, obtain respondent's consent to enter into negotiations for settlement of the case with the county attorney if the respondent is willing and able to give informed consent to voluntary health or other services;
  - 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 and incident reports.
- J. After being notified of appointment to the case, 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 or other documents used to initiate the commitment proceedings, the report of the residential facilities screening team, the report by the QMRP or other case manager, prehearing examination reports, the medical records of the respondent, and the facility records of any facility in which the respondent has recently resided and any other document relevant to the proceedings;
  - c. Consider the advisability of seeking the services of a qualified mental retardation professional;

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- d. Attempt to interview all persons who have knowledge of the circumstances surrounding the involuntary commitment petition:
  - i. The petitioners;
  - ii. The developmental disabilities professional, community services providers, facility staff, social workers, case managers, mental health professionals, and other persons who have examined or treated the respondent during the current involuntary commitment proceedings;
  - iii. Previous service providers, if any;
  - iv. The respondent's family, guardian or acquaintances;
  - v. The responsible person and the person's advocate, if any; and,
  - vi. The persons who may provide relevant information or who may be supporting or adverse witnesses at a commitment hearing.
- e. Facilitate the exercise of the respondent's right to be examined by a professional person of the respondent's choice.

K. Counsel must ensure that a respondent's consent to receive voluntary services is knowing and not a result of coercion or undue influence. Counsel shall explain the benefits and privileges of voluntary services and care to all respondents as a 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 receive voluntary services, counsel shall:

- a. Ascertain whether the respondent was indeed aware that by electing to convert to voluntary status, he or she was agreeing to enter or remain in services voluntarily; and
- b. Make certain that this agreement was not the product of threats, unrealistic promise, or other forms of coercion

M. If counsel has determined that the respondent's consent to receive voluntary services is knowing and uncoerced, counsel shall immediately take steps to secure the dismissal of the voluntary commitment proceeding.