

Performance Guidelines for Attorneys Representing Respondents in Civil Commitment Proceedings

GUIDELINES PREAMBLE

The following guidelines are intended to assist defense attorneys in providing vigorous and effective representation to clients responding to a civil commitment petition. The facts of each case, the circumstances of each respondent, and developments in the law and in court procedures require counsel to determine, with the client's assistance and on a case-by-case basis, the best manner to proceed.

As used in these Guidelines, "must" and "shall" are intended to describe mandatory requirements. "Should" is not mandatory but is used when providing guidance about what attorneys can and are encouraged to do in the interest of providing quality representation.

Guideline 1. Role of Counsel

Counsel shall assist the client in determining the client's goals and objectives in the commitment proceedings, shall explain to the client how best to achieve those goals, and advocate for the client at all stages of the commitment process.

Counsel shall represent the client's expressed wishes. Where counsel believes that the client's directions will not achieve the best long-term outcome for the client, counsel shall provide the client with additional information to help the client understand the potential outcomes and offer an opportunity to reconsider. In the end, counsel shall act in accordance with the client's expressed interests.

Counsel shall not substitute counsel's view of the client's best interests for those expressed by the client. Counsel shall not substitute the interests or views of a family member or friend, a guardian or holder of a durable power of attorney for those expressed by the client.

Guideline 2. Role of Counsel When a Client Does Not Express His or Her Ultimate Goals

When a client cannot express his or her ultimate goals and objectives, then counsel shall protect the client's constitutional and statutory rights. Counsel should assume that the client does not wish to be involuntarily detained or treated. Counsel shall abide by the Rules of Professional Conduct (RPCs) throughout the representation, including RPC 1.14.

In taking any protective action, counsel should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests, and the twin goals of intruding to the least extent possible on the client's right to make independent decisions and maximizing the client's capacities. In considering alternatives, counsel should be aware of any law that requires counsel to advocate for the least restrictive action on behalf of the client. *See* Comment 5 to RPC 1.14.

Guideline 3. Education, Training and Experience of Counsel

Counsel shall, at minimum, have the qualifications required by the Washington Supreme Court's *Standards for Indigent Defense*, Standard 14.1 and 14.2(M), for representation of a respondent in a civil commitment proceeding.

Counsel shall have a basic knowledge of the classification of mental disorders, as described in the most recent Diagnostic and Statistical Manual of Mental Disorders ("DSM") and other resources, and the ability to read and understand medical terminology related to mental disorders and treatment of persons with a mental illness, substance use disorder, co-occurring disorders, and chemical dependency. Counsel shall have ready access to the most recent DSM, as well as research resources for related medical conditions. Counsel should also have basic knowledge and understanding of common personality disorders and medical conditions that may produce similar symptoms.

Counsel shall be familiar with the classes of medication prescribed to treat mental disorders and chemical dependency and the possible effect of those medications on the client's ability to interact with counsel and to participate in court proceedings.

Counsel should be familiar with treatment facilities, both in-patient and out-patient, that provide services to persons with mental illness, including the scope of those services. Counsel should be familiar with local facilities and state hospitals that may be remote from where the client lives. Counsel should be familiar with the limitations on available treatment and transportation obstacles associated with such facilities.

Counsel should attend CLEs or specialized training for further education on substantive issues, substantive law, statutes, local court rules, and local practice relating to commitment proceedings. Counsel should also develop interviewing and de-escalation skills through appropriate training opportunities. Counsel should develop a resource list of local mental and behavioral health experts who may be consulted or used as testifying experts on available resources for the client and other matters.

Counsel should know where socio-economic disparities and racial, gender, and age biases exist in the civil commitment system, and how they might affect a client and might influence counsel's perspective. For example, gender bias might influence a mental health provider's treatment recommendations or a court's treatment requirements. Counsel also should know about the potential effects of past sexual assault or trauma on a client.

Guideline 4. General Issues and Duties of Counsel for Respondents in Civil Commitment Proceedings

Before agreeing to act as counsel or accepting appointment by a court, counsel shall determine if counsel has sufficient time, resources, and knowledge to effectively represent the client.

Counsel shall be alert to potential and actual conflicts of interest that would impair counsel's ability to represent a client. Counsel shall not represent a client in a civil commitment proceeding

and act as guardian ad litem for that client in the same or any other proceeding. Counsel shall not reveal information relating to the representation of a client unless:

- the client gives informed consent to the release; or
- disclosure is impliedly authorized to carry out the representation; or
- disclosure is an exception to the rule of confidentiality permitted by the Rules of Professional Conduct.

Disclosures, for example to prevent reasonably certain death or substantial bodily harm, are permitted only to the extent necessary to prevent the harm.

Counsel should assess and advise how a client's participation and position in a civil commitment proceeding may affect the client's participation in other proceedings, such as a criminal case. To the extent authorized by the client, the attorney should consult with counsel representing the client in the other proceedings.

Guideline 5. Preparation for Initial Client Meeting

Prior to the first meeting with the client, counsel shall be knowledgeable about civil commitment law, procedures, and court rules. Counsel should have obtained copies of the initial petition or petition for continued court-ordered treatment, statements in support of the petition, and other materials that will be submitted to the court in support of the petition, reviewed them, and researched any unfamiliar terms in advance of the meeting.

When first appointed, counsel shall make every effort to consult with the client to determine the client's goals and to develop evidence to present to the court that will support those goals. Counsel should recognize that communication with the client may require additional efforts.

The initial client meeting shall be in private and occur enough in advance of any scheduled hearing to allow time for preparation and reasonable efforts to contact potential witnesses on the client's behalf. If there is not sufficient time for adequate preparation between counsel's appointment and the scheduled hearing, then counsel must advise the court and make every effort to continue the hearing, even if only for a few hours, to allow sufficient time for preparation.

In some cases, an attorney will be appointed to represent a client only after the client is detained pursuant to a 72-hour hold. Counsel should meet with the client within 24 hours of being notified of assignment when preparing to respond to a 14-day petition. Counsel representing a client responding to a 90-day petition, shall meet with the client within 24 hours of appointment or as soon as practicable thereafter, regardless of whether counsel previously represented the client when responding to a petition for a 14-day commitment or is newly appointed. Counsel representing a client responding to a 180-day petition shall meet with the client within 24 hours of appointment or as soon as practicable thereafter, regardless of whether counsel has previously represented the client when responding to a petition for a 14-day or 90-day commitment or is newly appointed.

Guideline 6. Substance of Client Meetings

Counsel shall communicate information to the client during the initial or subsequent meeting. Counsel shall determine the amount and kind of information the client is able to absorb in one meeting. If necessary or as requested by the client, counsel shall repeat this information during the course of the representation.

Counsel shall explain that conversations between client and attorney are confidential, counsel's role, the civil commitment process and the client's rights during that process.

Counsel shall obtain, when possible in light of the client's symptoms, the client's version of the facts of the case, the names and contact information of persons with knowledge of the circumstances that led to the filing of the petition, the names and contact information of persons knowledgeable about the client's current level of functioning relative to discharge to the community, information about past treatment, and information relevant to possible alternatives to commitment.

Counsel shall advise the client of the legal basis under which the Court can order the client be discharged, committed, or released conditionally, and the length of any commitment period. Counsel shall advise the client of the right to request experts to complete an independent evaluation and assist in defending the case, and if a 90-day petition is filed, the right to request a mental health professional to seek less restrictive alternatives. Counsel shall specifically advise the client of the right to remain silent and possible consequences following civil commitment, such as the loss of the right to possess a firearm.

Counsel shall explain the different consequences that could follow from a voluntary agreement to enter treatment, an involuntary commitment following a contested hearing, an agreement to a stipulated order of commitment, and a negotiated agreement to a less restrictive order. These may include, among others, an impact on the right to possess a firearm and whether a hospital will help the client find a place to live after the client leaves the hospital or to enroll in a supplemental income program such as SSI or outpatient treatment. Counsel should inquire of any proposed provider whether a client will be billed for voluntary or outpatient treatment.

Guideline 7. Preparation for Commitment Hearing

Counsel shall obtain and review the court file, investigation report, medical records, police reports, if any, and all other evidence offered by the petitioner(s) or opposing counsel. In advance of the hearing, counsel should attempt to interview witnesses who will be called by opposing counsel. Counsel also should attempt to contact persons the client has identified as possible witnesses and who, in counsel's assessment, may provide relevant information. Counsel shall make any appropriate request for expenses to pay for the services of expert witnesses.

Counsel shall determine whether the petition and/or request for commitment should be challenged because it does not satisfy the statutory criteria required for civil commitment and/or constitutional protections. Counsel shall determine whether the client was given a

timely opportunity to refuse psychotropic medications for the 24 hours before a potential hearing. If the treatment team has failed in this regard, counsel must advise the client of the options available to address such failure. Counsel shall be familiar with the rules of evidence, particularly those that apply to civil commitment hearings and govern the admissibility of documentary and testimonial evidence.

Guideline 8. Planning for Release Following Commitment

Counsel should evaluate whether it would be helpful to consult with an independent social worker or mental health professional to aid in planning for the client's release or a less restrictive commitment order and, if so, apply for funds. Counsel should contact persons whom the client has identified as willing to assist in arranging an alternative to hospitalization or otherwise support discharge at the hearing.

If counsel learns of persons who may be willing to assist with an alternative to hospitalization or otherwise support discharge from a source other than the client, then, with the client's permission, counsel should contact those persons. Counsel should evaluate whether release planning is adequately provided by the hospital staff and, if so, with the client's permission, provide information supporting an alternative to hospitalization or discharge to hospital or other personnel involved in discharge planning.

Guideline 9. Commitment Hearing

Counsel shall, prior to the commitment hearing, communicate to the client what is expected to happen before, during, and after the hearing. Counsel shall continue to consult with the client during the hearing.

Counsel should provide the client with information regarding appropriate courtroom conduct. Counsel shall apply for accommodations that will assist the client in participating in the hearing, including accommodations for physical disability, interpreter services or, transportation assistance.

If the hearing is scheduled to be conducted by video, then counsel shall advise the client of the process and ask whether the client wishes to object to proceeding by video. If the client objects to proceeding by video, then counsel shall make that objection on the client's behalf.

Counsel shall be familiar with the legal and technological requirements for video proceedings. If the hearing will proceed by video, whether or not the client objects, counsel shall make every effort to ensure those requirements are satisfied and make objections, if needed.

Counsel shall assert and seek to protect the client's right to actively participate in the civil commitment proceeding. If at the time of the hearing the client is under the influence of prescribed medication, counsel shall consider introducing evidence regarding the nature of the medication and its likely effects on the client's demeanor. Counsel shall contest whether a client will be hospitalized and, to the extent feasible, whether appropriate placement and resources are available.

Counsel should make an opening statement describing the client's goal and the facts that support that goal, cross-examine expert and lay witnesses as is appropriate to the case, and present alternatives to confinement as approved by the client.

At the hearing, counsel should be prepared to:

- raise procedural motions, including exclusion of witnesses;
- assert privileges, including physician/patient, psychotherapist/patient, spouse/domestic partner, Fifth Amendment, social worker/patient and other privileges; and
- as appropriate, introduce evidence on the client's behalf.

Counsel representing a client in a jury trial contesting the State's commitment petition shall be familiar with the laws and procedures governing the selection of a jury and jury instructions. Counsel shall, to the extent feasible, include as an issue not just whether a client will be hospitalized or housed, but how a client shall be hospitalized or housed.

Counsel shall communicate the advantages and disadvantages of the client testifying. The decision to testify ultimately rests with the client. Counsel shall be familiar with state law regarding examination of the client and what information may be admissible for purposes of the hearing.

Counsel should make a closing argument that includes the evidence presented, the burden of proof, and the statutory requirements for commitment.

Counsel should consider proposing findings of fact and conclusions of law and/or making objections to findings and conclusions proposed by opposing counsel and should ensure that any proposed findings and objections are included in the record for appeal.

Guideline 10. Limited Basis for Waiver of Client's Presence at the Hearing and Alternatives to Waiver

Counsel shall be familiar with the practice of the local jurisdiction regarding waiver of presence and inform the client about local practice. Some jurisdictions will not permit a client to waive presence at a hearing. Others will allow the client to waive presence only after the court has advised the client about the possible loss of the right to possess firearms.

Counsel shall not waive the client's presence at the hearing, except when the client elects to waive or unequivocally refuses to attend, despite encouragement to attend.

If the court is considering whether the client's behavior constitutes a constructive waiver of presence, then counsel shall, after consultation with the client, offer alternatives to removing the client from the hearing. Possible alternatives may include:

- offering the client a paper and pencil to write down questions rather than orally responding;
- taking frequent breaks;

- asking the judge to give the client a “roadmap” regarding who will be testifying and when;
- offering to mute client and counsel’s microphone during witness testimony during video proceedings other than when making an objection or responding to an objection; and/or
- offering the client, if available, the option to observe video proceedings from a separate room.

Guideline 11. Post-Commitment Proceedings When the Client Is Committed

If the court orders the client committed for up to 14 days, then counsel has a continuing obligation to maintain contact with the client and prepare to represent the client if the State seeks a 90-day commitment. Such representation shall include consulting with the client to determine the client’s goals and to develop evidence to present to the court that will support those goals. Such evidence may include, for example, proposals for less restrictive treatment, housing alternatives, or an individualized treatment plan appropriate to the client’s needs. Counsel shall, to the extent the client agrees, argue against all provisions that are unnecessarily restrictive or unsupported by the record.

If the State seeks a 180-day commitment, then counsel should seek to provide continuity of representation and to represent the client in the 180-day commitment hearing. If the client is transferred to another hospital outside the jurisdiction in which counsel works then, when feasible, counsel shall work to ensure a smooth transition to the new counsel who will represent the client at the 180-day hearing.

Mental Proceeding Rules (MPR) 2.4 and 3.4 provide that commitment hearings “shall be proceeded with as in any other civil action.” Counsel should be familiar with Civil Rule (CR) 71(b), which provides “A court appointed attorney may not withdraw without an order of the court. The client of the withdrawing attorney must be given notice of the motion to withdraw and the date and place of the motion to be heard.”

The Rules “govern the procedure in the superior court in all suits of a civil nature whether cognizable as cases at law or equity...”. The limited exceptions to CR 71 are found in CR 81 and do not, on their face, include civil commitment proceedings.

Guideline 12. Post-Commitment Proceedings When the Client Is Not Committed

If a petition is dismissed or if the court does not order a client committed, then counsel should, where appropriate, inform the client of social services or direct the client to appropriate hospital or treatment staff who can assist the client. Such services may include housing and food available in the community, the existence and location of mental health providers, and the existence of medical treatment available upon discharge from a hospital.

Guideline 13. Advising the Client about Revisions and Appeals

Counsel shall advise the client of the right to seek revision of a commissioner’s ruling or to appeal, and the process for each. Counsel shall explain to the client the consequences of any decision to waive the right to seek revision or to appeal. The decision whether to seek revision or to appeal belongs to the client. If the client is not able to absorb the information immediately

following a hearing, then counsel shall consult with the client in person or by phone to explain the revision or appeal process and the client's choices.

Counsel shall take the necessary steps to seek revision of a commissioner's ruling or to perfect an appeal if the client requests it.

Counsel should consider developing a short advisory sheet to give clients outlining the right to appeal and deadlines by which an appeal must be filed. The advisory should include information about how to contact counsel to discuss an appeal and, in appropriate cases, counsel's recommendation about whether to appeal. Such an advisory may be helpful when counsel must immediately appear in another hearing or leave for another hospital to represent another client.

Guideline 14. Perfecting an Appeal

When the client chooses to appeal, counsel shall file a notice of appeal and preserve the client's right to appeal, including presenting a motion to proceed *in forma pauperis*. Counsel shall assist the client in obtaining appellate representation.

To preserve issues for appeal, counsel should consider proposing findings of fact and conclusions of law and/or making objections to findings and conclusions proposed by the prosecutor or entered by the court, and should ensure that counsel's proposed findings, conclusions, and/or objections are included in the record.

When the client, at the time that commitment is ordered, is unable to decide whether to appeal, counsel shall make clear to the client the deadline for filing an appeal, seek a decision from the client in time to meet the deadline, and be prepared to file the appeal should the client decide to appeal. If a guardian or person holding a durable power of attorney believes the client should not pursue an appeal, counsel should advise the court in writing that counsel assumes the client has the authority to make the decision to appeal and proceed as the client wishes.

Guideline 15. Obligations of Counsel to Appellate Attorney

Counsel should be available to appellate counsel to answer questions and issues regarding the appeal and provide privileged information and documents requested by appellate counsel, to the extent authorized by the client.

Guideline 16. Continuity of Representation

Counsel should make every effort to represent the client for the duration of the commitment process. Even if the client is transferred out of the jurisdiction, CR 71 provides the attorney may not withdraw without an order from the court.

If counsel is not able to continue to represent the client, then counsel shall work to ensure a smooth transition to new counsel when possible. Steps to provide a smooth transition shall include:

- advising the client about the process for the client's transfer to a different hospital;

- move the court pursuant to CR 71 for an order allowing counsel to withdraw and appointment of new counsel;
- advise the client how to contact substituted counsel; and
- to the extent permitted by the client, providing the substituted counsel with privileged information and documents counsel received when representing the client.