

Commonwealth of Massachusetts
Committee for Public Counsel Services
MENTAL HEALTH LITIGATION UNIT

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TRIAL PRACTICE CHECK LIST
CIVIL COMMITMENTS

A. Initial Steps

- Obtain a copy of petition and other pleadings; file appearance with court.
- Meet with client no later than the next business day following acceptance of assignment.
- Interview client; explain counsel's role and ascertain client's wishes.
- Obtain and Review hospital records, including:
 - Medical Record - note medications prescribed, purposes of medication, side effects, physical condition.
 - Treatment Review Notes - note diagnoses, treatment history (inpatient & outpatient), incidents of threats or violence to self or others.
 - Unit Notes/Nursing Notes - note client's adjustment to unit, relationships with staff, degree of cooperation with treatment program, restraints and seclusions.
- Identify procedural defects; file the appropriate motions.
- Move for funds for an independent clinical evaluation, if appropriate.
 - Retain independent clinician - discuss purpose and results of evaluation.

- Confer with potential witnesses including:
 - Treating psychiatrist/psychologist.
 - Nursing staff.
 - Other staff.
 - Family members.
 - Independent clinician
 - Other possible witnesses suggested by the client or developed through research and interviews.

- Develop trial strategy; review the following areas:
 - Medication history, including side effects.
 - Pattern of participation in inpatient treatment, including past community residential and non-residential placements.
 - Pattern of participation in outpatient treatment, including past community residential and non-residential placements.
 - Relative degree of success of previous treatment plans (particularly less restrictive alternatives).
 - Current treatment plan (degree of restriction in program, signs of progress).
 - Criminal record.
 - Employment record.
 - Prior hospitalizations and commitments including previous evaluations.
 - Home situation, relationships with "significant others."

- Meet with client to discuss strategy and alternatives to commitment; determine with client appropriate course of action.

- Meet with hospital attorney or treating physician to negotiate possible settlement.
 - Talk to client to review possible settlement agreement.
 - If possible, agree to settlement and have case dismissed.

- If case cannot be settled, review in preparation for hearing. Consider presence or absence of:
 - Mental Illness (*i.e.*, "A substantial disorder of thought, mood, perception, orientation, or memory which grossly impairs judgment, behavior, capacity to recognize reality or ability to meet the ordinary demands of life, but shall not include alcoholism ..." 104 CMR 27.05(1)).

- Likelihood of serious harm (see G.L. c. 123, § 1):
 - As exhibited by the client toward himself.
 - As exhibited by the client toward others.
 - Risk of physical impairment or injury due to inability to protect self in the community.

- Possibility of a less restrictive placement.

- Ability of petitioner to prove all elements beyond a reasonable doubt.

B. Preparation for Hearing

- Formulate alternative final dispositions with regard to least restrictive treatment setting.
 - Contact programs involved, obtain confirmation of participation, consider meeting between program and client.

- Prepare for hearing:
 - Prepare any motions in limine and briefs.
 - Prepare theory of defense
 - Prepare consistent direct and cross-examination questions.
 - Prepare argument.
 - Prepare client.
 - Review testimony with and prepare witnesses; summon if necessary.
 - Draft proposed findings of fact and conclusions of law.

C. Post Hearing

- Meet with client to discuss disposition and appellate rights.

- Consider an appeal under G.L. c. 123, § 9(a); at client's request, file notice of appeal (within 10 days of entry of judgment) and notify CPCS for appointment of appellate counsel.

- Consider an application for discharge (G.L. c. 123, § 9(b)); at client's request, file petition in Superior Court and notify CPCS for appointment of counsel.