

SERVING AS ASSIGNED COUNSEL

in Mental Health Matters

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I. IN GENERAL

- A. The purpose of the Wayne County Probate Court's Behavioral Health Unit is to:
 - a. Increase the use of Assisted Outpatient Treatment (AOT) orders for individuals who would benefit from community support and resources, with the intention of diverting those individuals from hospitalization and contact with law enforcement and the criminal justice system;
 - b. Collaborate with key stakeholders in Wayne County through training on the behavioral health processes and protocols pursuant to the Michigan Mental Health Code; and
 - c. Promote community awareness of behavioral health issues and resources across Wayne County.
- B. The BHU handles all petitions and court orders relating to mental health proceedings.
 - a. The BHU handles Petitions for Transport (for evaluation) and Petitions for Treatment, including hospitalization and Assisted Outpatient Treatment programs.
 - b. The BHU partners with the Detroit Wayne Integrated Health Network (DWIHN), outpatient mental health providers, area hospitals, law enforcement, other courts, and community advocacy groups as part of the continuum of care for our county's citizens.
 - c. See www.wcpc.us/bhu.html for more information.
- C. The role and responsibilities are different for attorneys appointed to represent parties in mental health, adult guardianship, developmental disability, and minor guardianship proceedings.
- D. For additional information, see the form and handouts found on the Court's website, www.wcpc.us, under Attorney Training – Attorney Training Materials.

II. SERVING AS ASSIGNED COUNSEL IN MENTAL HEALTH COMMITMENT PROCEEDINGS (MI/JA Cases)

- A. Applicable Statutes
 - a. The statutes controlling Mental Health Commitment Proceedings are in the Mental Health Code (Chapter 330 of Michigan Compiled Laws), not in Estates and Protected Individuals Code (Chapter 700 of Michigan Compiled Laws).
 - i. [Chapter 4](#) relates to Petitions for Mental Health Treatment (MI cases) – Civil Admission and Discharge Procedures: Mental Illness

- ii. [Chapter 5](#) relates to Petitions for Judicial Admission (JA cases) – Civil Admission and Discharge Procedures: Developmental Disabilities
 - b. For MI Cases, the definitions of a “person requiring treatment” (including the criteria for someone to receive assisted outpatient treatment) and “mental illness” are found at [MCL 330.1401\(1\)](#) and [MCL 330.1400\(g\)](#), respectively.
 - i. **Note:** Under [MCL 330.1401\(2\)](#), a person whose mental processes have been weakened or impaired by dementia, has a primary diagnosis of epilepsy, or an individual with alcoholism or other drug dependence is not a “person requiring treatment” unless they also meet the criteria under [MCL 330.1401\(1\)](#).
 - ii. The standard for determining someone to be a “person requiring treatment” under the Mental Health Code is different from a “legally incapacitated individual” for whom a guardian is appointed under EPIC.
- B. Applicable Michigan Court Rules - Subchapter [5.730](#) – Mental Health Rules**
- a. **MCR 5.730** – Except as modified by subchapter 5.730, civil admission and discharge proceedings under the MHC are governed by the rules applicable to probate court.
 - b. Review each of the court rules in this subchapter as it addresses notice, jury trials, the public nature of court records in these matters, etc.
 - c. **Specifically relating to the Assigned Attorney in mental health proceedings, see MCR 5.732 – Attorneys**
 - i. The attorney of record must represent the person in *all* Mental Health Code proceedings in probate court until discharged by court order or another attorney has filed an appearance on the individual’s behalf. **MCR 5.732(A).**
 - ii. The attorney *must* serve as an advocate for the individual’s preferred position. If the individual does not express a preference, their attorney must advocate for a disposition the attorney believes is in the individual’s best interest. **MCR 5.732(B).**
 - iii. The individual may waive their right to an attorney *only* in open court and after consultation with an attorney. The waiver may not be accepted by the court if it appears that it was not made voluntarily and understandingly. If an attorney is waived the court may appoint a guardian ad litem for the individual. **MCR 5.732(C).**

C. Procedures in Wayne County Probate Court for Serving as Assigned Counsel in Mental Health Code Proceedings

- a. Please see “Representing Respondents in Mental Health Commitment Proceedings in Wayne County Probate Court” that is included in the Attorney Training Materials on the Court’s website, as this hand-out provides the procedure in detail.

- i. Some basics:

- 1. Attorneys sign up to receive mental health appointments through Sign-up Genius (please contact the BHU if you require more information regarding this).
 - 2. Assignment packets are sent via email.
 - 3. Mental health hearings and deferral conferences are conducted via ZOOM unless specifically directed otherwise by the Judge.
 - 4. Attorneys are not required to meet in person with the subject of a petition, but instead interact with them via phone, ZOOM, or other method.

D. “Kevin’s Law” and Assisted Outpatient Treatment (AOT) Only Proceedings

- a. This mechanism for treatment under the Mental Health Code was originally enacted over 15 years ago as an additional option to involuntary commitment proceedings.
- b. Significant amendments to the law became effective February 14, 2017, and then again on March 28, 2019.
- c. Kevin’s law promotes early judicial intervention before an individual reaches a crisis situation and streamlines the involuntary treatment process by having all proceedings filed via petition.

- i. Highlights of Kevin’s Law:

- 1. Standard for issuing transport order and being determined to be a “person requiring treatment” is lower.
 - a. Prior requirement was an immediate risk of harm to self or others; Kevin’s Law, as amended, broadened this standard to include a *substantial* risk of harm due to impaired judgment, including impaired judgment for need of treatment.
 - b. Early intervention will help preserve a person’s mental health and allow them to receive treatment before they have reached a critical point or crisis.
 - 2. Allows AOT to be ordered in any MI petition if the individual is found to be a “person requiring treatment.”

3. AOT can be used as a discharge tool; the Judge can issue a detailed supplemental order regarding the type of treatment/services to be provided to the patient.
- E. Civil admission and discharge procedures -- mental illness (Chapter 4)
- a. Pay attention to the type of petition that was filed.
 - i. Civil admission and discharge procedures relating to mental illness are governed by Chapter 4 of the Mental Health Code. **MCL 330.1400, et seq.**
 - ii. An involuntary treatment petition for an individual with a developmental disability can be filed either under Chapter 4 or under Chapter 5 as a **Petition for Judicial Admission, depending on the reason for treatment.**
 - b. Involuntary admission proceedings are initiated by filing a petition with the court.
 - i. For a comprehensive analysis of the involuntary commitment procedure, see the “Flow Chart for Adjudication of Mentally Ill Adults” included on the Court’s website in the Attorney Training Materials.
 - c. Person Requiring Treatment
 - i. To be forced against their will to receive assistance, they *must* be determined to be a “person requiring treatment” under the Mental Health Code.
 - ii. Definition can be found under [MCL 330.1401\(1\)](#).
 - d. Hearing Process, Rights, and Burden of Proof
 - i. A hearing on a petition for involuntary treatment under the Mental Health Code must be held within seven (7) days of being filed, excluding Sundays and holidays. [MCL 330.1452](#).
 - ii. The person for whom involuntary mental health treatment is sought has the right to an attorney, a jury trial, to cross examine witnesses, to be present at the hearing (unless the Judge determines the person’s behavior makes it impossible to conduct the hearing or waived based on medical testimony that attendance would expose them to serious risk of physical harm), and to an independent medical examination. [MCL 330.1454](#), [300.1455](#), [300.1458](#), [330.1463](#).
 - iii. It must be shown by clear and convincing evidence that the individual is a person requiring treatment.
 - e. Prior to the hearing, there must be a deferral conference - A deferral conference must always be held by the hospital before the hearing.

1. The deferral conference is to be conducted within 72 hours of the petition being filed. **MCL 330.1455(2).**
 2. If the date and time for the deferral conference is not included on the petition you received as part of your assignment packet, contact the hospital to obtain this information.
 3. If you are unable to attend a scheduled deferral conference, contact the hospital immediately.
 4. If a representative of the CMH does not attend the deferral conference and sign the deferral form, the deferral is not valid and the hospital or attorney must resubmit it once properly completed, otherwise the hearing must proceed
 5. If you are unsure as to the CMH outpatient provider in Wayne County who will oversee the order upon discharge, include Detroit Wayne Integrated Health (PIHP) in the meeting invite (email at aotorders@diwhn.org)
 6. The inpatient facility is responsible for setting up the deferral conference
 7. General counseling of client – having clinical conversations with your client and the staff at the deferral conference is important to prevent future hospitalizations and treatment engagement in the hospital and upon discharge
- f. Alternatives to Hearing: Deferral or Waive and Stipulate
- i. Instead of going forward with a full hearing, the person could either defer the hearing or waive and stipulate to the petition and treatment plan.
 - ii. Be aware of the difference between a deferral and waiver\stipulation form – **do not have your client sign both forms.**
 1. These forms are included in the packet emailed to attorneys.
 - iii. Deferrals or waivers **cannot** be signed outside of the attorney’s presence (including “virtual” presence).
 - iv. **Deferral:** A deferral is a request to delay (i.e., defer) the hearing for up to 60 days if the patient remains hospitalized or 180 days if they agree to outpatient treatment or a combination of hospitalization\outpatient treatment. **MCL 330.1455(6).**

1. To execute a deferral, the patient must meet with their counsel, a representative from the community mental health (CMH) program, and a member of their treatment team. The form must be signed in the presence of the patient's attorney, who must then file it with the Court.
2. **Important Notes:**
 - a. The Wayne County Probate Court no longer pays for deferral conferences which the attorney does not attend.
 - b. Petitions requesting AOT only cannot be deferred. [MCL 330.1455\(6\).](#)
 - c. [PCM235](#) is the Request to Defer Hearing on Commitment form that must be used
 - i. The information required in section 4 of this form requires information from the community mental health representative who must attend the deferral conference; obtain the name & email address or telephone number of this representative
- v. **Waiver:** A waiver is a declaration (signed by the patient in the presence of their attorney) that they forgo their right to attend their hearing and they either (1) stipulate to the relief sought in the petition or (2) withdraw their petition for discharge, as applicable. The patient may sign a waiver as part of the attorney's meeting with the patient, or the day of the hearing, if the attorney meets with the patient before the hearing begins.
- g. Independent Medical Evaluation (IME)
 - i. If requested prior to the first scheduled hearing (or at the first scheduled hearing before the first witness has been sworn in on an application or petition), the patient has the right to an independent clinical evaluation, at public expense if they are indigent. [MCL 330.1463.](#)
 - ii. For a list of physicians and psychologists willing to do independent clinical evaluations, please see the "Independent Evaluator List" on the court's website under Probate Information – FAQs: [ime_evaluatorlist.pdf](#).
 - iii. You are responsible for preparing the motion and order for the independent evaluation. Include the name of the examiner in

your order; make sure they have agreed to do the work and is acceptable to the patient.

- iv. To facilitate adjudication of cases where an examination has been requested, if you plan on submitting the report into evidence, please supply the Judge and Corporation Counsel with a copy of the IME five days prior to the hearing.

h. Adjournments

- i. Adjournments are allowed only for good cause. The reason for an adjournment must either be submitted in writing to the court and opposing attorney or stated on the record. [MCR 5.735](#).

i. Treatment Orders

- i. There are three types of treatment orders: hospitalization, combined, and assisted outpatient treatment.
 - 1. Hospitalization: is one in which the patient is directed to received treatment while being held in a medical facility. An initial order for hospitalization can be for a maximum of 60 days. [MCL 330.1472a\(1\)\(a\)](#).
 - 2. Assisted Outpatient Treatment (AOT): is on where the patient is not held in a medical facility but is instead outpatient. An initial order for AOT can be for a maximum of 180 days. [MCL 330.1472a\(1\)\(b\)](#).
 - 3. Combined: is one in which the patient spends some time initially being hospitalized for treatment, and then is released and continues to receive assisted outpatient treatment. An initial order for combined treatment can be for a maximum of 180 days, with hospitalization for up to 60 days. [MCL 330.1472a\(1\)\(c\)](#).

F. Civil admission under Chapter 5 – Petition for Judicial Admission of an individual with a developmental disability

- a. Petitions for Judicial Admission are governed by Chapter 5 of the Mental Health Code, **MCL 330.1500**, *et seq.*
- b. The petition shall be dismissed unless 1 physician and 1 licensed psychologist or 2 physicians conclude in the required report that the individual meets the criteria for treatment. [MCL 330.1516\(8\)](#).
- c. No deferral conference is scheduled as deferrals are not available, and there is no provision permitting waiver.
- d. The court may order 1 or a combination of the following ([MCL 330.1518](#)):
 - i. Admission to a facility designated by the department and recommended by the CMH.

- ii. Admission to a licensed hospital at the request of the individual or his or her family member, if private funds are to be utilized and the private facility complies with all of the admission, continuing care, and discharge duties and requirements described in chapter 5 for facilities.
- iii. Outpatient program for 1 year of care treatment recommended by the CMH as an alternative to being admitted to a facility.
- e. Review the admitted reason for treatment as to which section of the code (i.e., Chapter 4 vs. Chapter 5) under which the petition for treatment should be brought.
- f. **Familiarize yourself with the differences between Chapter 4 and Chapter 5.**

G. Payment

- a. In most cases, vouchers are sent electronically along with the assignment packet.

H. If you have any further questions; please contact the BHU at BHUDept@wcpc.us for assistance.