

Mental Health Law Reform 2008-2012

Virginia Office of the Attorney General
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Virginia's Civil Commitment Process

§ 37.2-800 *et seq.*

Virginia's Commitment Process

ECO

- Emergency Custody Order (ECO) - order issued by a magistrate that requires any person in the magistrate's judicial district who is incapable of volunteering or unwilling to volunteer for treatment to be taken into custody and transported for an evaluation in order to assess the need for hospitalization or treatment

Virginia's Commitment Process

ECO

- ECO can be issued on the sworn petition of any responsible person or on magistrate's own motion
- Issued when magistrate finds probable cause to believe that a person meets the commitment criteria
- Authorizes law enforcement to take a person into custody and transport for an evaluation by a CSB employee or designee
- Period of custody not to exceed 4 hours

Virginia's Commitment Process

TDO

- Temporary Detention Order (TDO) - an order issued by a magistrate that authorizes law enforcement to take a person into custody and transport to a facility designated on the order

Virginia's Commitment Process

TDO

- Issued on sworn petition of any responsible person or magistrate's own motion
- Only after an in-person evaluation by CSB employee or designee
- Issued when magistrate finds probable cause to believe that a person meets the commitment criteria
- 48 hour detention period

Virginia's Commitment Process Hearing

- Commitment Hearing
- District Court Judge or Special Justice
- Held within 48 hours of execution of TDO unless Saturday, Sunday or legal holiday and then extended to the next day that is not a Saturday, Sunday or legal holiday
- Open to the public

Virginia's Commitment Process Hearing

- Possible Dispositions
 - Voluntary Admission
 - Involuntary Admission
 - Mandatory Outpatient Treatment
 - Release

Mental Health Law Reform

Mental Health Law Reform 2008

- In 2008, the General Assembly made the most sweeping reforms to mental health law in the past 30 years.
- 120 bills dealing with mental health law were introduced during the 2008 General Assembly Session

Mental Health Law Reform 2008

- Approximately \$42 million new dollars appropriated for
 - Emergency mental health services
 - Increased case managers, clinicians
 - Children's mental health services
 - Jail diversion projects

Mental Health Law Reform 2008

- Legislative Purposes
 - To ensure that help is available for people and families who need help
 - To protect the public when there is a substantial likelihood of harm
 - To increase accountability and consistency

Significant 2008 Amendments

- Commitment criteria
- ECO/TDO/Hearing Procedural changes
- Mandatory Outpatient Treatment
 - Monitoring MOT (§ 37.2-817.1)
 - MOT Review Hearing (§ 37.2-817.2)
 - Rescission of MOT Order (§ 37.2-817.3)
 - Continuation of MOT Order (§ 37.2-817.4)
- Disclosure/Privacy provisions

Commitment Criteria

- Old
 - Imminent danger to himself or others as a result of mental illness
 - So seriously mentally ill as to be substantially unable to care for himself
- New
 - Mental illness
 - Substantial likelihood that person will in near future
 - Cause serious physical harm to self or others as evidenced by recent behavior causing, attempting, or threatening harm and other relevant info, if any
 - Suffer serious harm due to lack of capacity to protect himself from harm or to provide for his basic human needs

Procedural Changes 2008

- Evidentiary Considerations – ECO/TDO (§37.2-808(A); 37.2-809(C))
 - Magistrate may consider
 - Recommendations of any treating or examining physician or psychologist
 - Past actions of the person
 - Past mental health treatment
 - Relevant hearsay
 - Any medical records available
 - Affidavits if the witness is unavailable and the affidavit so states
 - Any other relevant information

Procedural Changes 2008

- Evidentiary considerations – Hearing (§ 37.2-817(C), (D))
 - Judge or special justice may consider
 - Recommendations of any treating physician or psychologist
 - Past actions of the person
 - Past mental health treatment
 - Examiner’s certification
 - Available health records
 - Preadmission screening report
 - Any other relevant evidence

Procedural Changes 2008

- ECO renewal (§ 37.2-808)
 - ECO can be extended for an additional two hours if requested by a family member, CSB, treating physician or law enforcement and magistrate finds good cause exists to grant the extension
 - Good cause includes the need for additional time to allow
 - CSB to identify a facility of temporary detention
 - Medical evaluation

Procedural Changes 2008

- ECO Custody Transfers
 - Law enforcement may transfer custody to facility or location if facility is:
 - Licensed to provide level of security necessary to protect person and others from harm
 - Is actually capable of providing that security; and
 - Has entered into an MOU with law enforcement setting forth terms and conditions under which it will accept custody transfer – no fee may be charged to law enforcement

Procedural Changes 2008

- Independent Examiner Qualifications
(§ 37.2-815(A))
 - Psychiatrist or Psychologist licensed in Va. and qualified in diagnosis of mental illness
 - If not available:
 - Licensed clinical social worker
 - Licensed professional counselor
 - Psychiatric nurse practitioner
 - Clinical nurse specialist

Procedural Changes 2008

- Independent Examiner – Qualifications
 - LCSW, LPC, psychiatric nurse practitioner, or clinical nurse specialist must:
 - Be qualified in assessment of mental illness
 - Complete a certification program approved by DBHDS
 - Note: Psychiatrist or psychologist NOT required to complete certification program.

Procedural Changes 2008

- Attendance at Commitment Hearings
 - Attendance of CSB mandated (§ 37.2-817(B))
 - In person but if impracticable, by telephone or two-way electronic video and audio communication system
 - Independent examiner, if not physically present, and treating physician at the temporary detention facility shall be available for questioning through electronic means (§ 37.2-817(A))

Procedural Changes 2008

- Duration of involuntary admission order (§ 37.2-817(C))
 - 30 days for initial order
 - 180 days on recommitment

Mandatory Outpatient Treatment

- Criteria (§ 37.2-817(D))
 - A) inpatient commitment criteria
 - B) less restrictive alternatives that offer opportunity for improvement of condition determined appropriate
 - C) person has sufficient capacity to understand stipulations of treatment; has expressed interest in living in community; has agreed to abide by treatment plan; deemed to have capacity to comply, understand and adhere to treatment plan
 - D) ordered treatment can be delivered on outpatient basis by CSB or designated provider

Mandatory Outpatient Treatment

- Duration
 - Determined by court based on CSB recommendation
 - Not to exceed 90 Days
 - At end of 90 days, can be extended for up to 180 days

Mandatory Outpatient Treatment

- Monitoring
 - CSB where person resides is mandated to monitor compliance
 - Monitoring includes
 - Contacting service providers to determine if person is complying
 - Providers shall report material noncompliance to the CSB
 - Notifying the court of material noncompliance – petition for review hearing

Mandatory Outpatient Treatment

- Monitoring (cont'd)
 - Court shall hold a hearing within 5 days of receiving a petition for review (within 48 hours if person is detained under a TDO)
 - Dispositions
 - Involuntary admission
 - Continued mandatory outpatient treatment with modifications to the treatment plan
 - Rescission of MOT order

Disclosure/Privacy Provisions

- Court records
 - Court records of civil commitment proceedings are confidential
 - Accessible only to the person, treatment facility, CSB, treatment providers and Supreme Court (for oversight purposes)
 - Court may order production of dispositional order only upon motion and a finding that disclosure is in the best interest of the person or the public

Disclosure/Privacy Provisions

- Disclosure
 - New section § 37.2-804.2
 - Requires health care providers to disclose health information to one another, magistrates, the court, attorneys, guardians ad litem and law enforcement involved in the commitment process
 - Health information provided to law enforcement limited to that information necessary to protect the officer, person or public from physical injury or to address person's health care needs
 - ECO/TDO/commitment order to provide for disclosure pursuant to § 37.2-804.2

Firearms

- § 18.2-308.1:3
 - Unlawful for any person found incompetent to stand trial, involuntarily admitted, ordered to MOT, or who was the subject of a TDO and subsequently agreed to voluntary admission to purchase, possess or transport a firearm
 - Clerk of court must forward all such orders to the CCRE upon receipt (§ 37.2-819)

Higher Education Bills

- Parental notification – Public institutions required to notify parents of a dependent child who has been found to meet the commitment criteria by a student health or counseling center (§ 23-9.2:3(C))
- Threat assessment teams (§ 23-9.2:10)

Higher Education Bills

- Disclosure of mental health records – Public and private institutions of higher education may require a student to provide from the originating school a complete student record, including any mental health records held by the school (§ 23-2.1:3)

Mental Health Law Reform 2009

- Over 30 bills related to mental health law introduced during the 2009 General Assembly Session
- Many tweaked changes made in 2008

Significant 2009 Amendments

- Alternative transportation
- Notification Provisions
- Advance directives
- CIT
- Juvenile MOT

Alternative Transportation

- Permits person or entity other than law enforcement to transport persons under ECO and TDO
- Strengthens authority of judge/special justice to order alternative transportation after commitment hearing
- Follows lead of 27 other states

Notification of Family

- In considering alternative transportation, family members pointed out that if they could be notified that their family member is in crisis, they may be able to provide transportation or perhaps defuse the crisis so that emergency custody, temporary detention and involuntary admission could possibly be avoided.
- The HIPAA Privacy Rule contains a notification provision and although Virginia law allowed such notification, it was not absolutely clear to providers that such disclosure could occur.

Notification of Family

- To clarify Virginia law, the notification provision of the HIPAA Privacy Rule (45 C.F.R. §164.510(b)) was imported into the Virginia Patient Health Records Privacy Act (§ 32.1-127.1:03(D)(34)) and Title 37.2 (§ 37.2-804.2)

Notification of Family

- Health care provider may notify a family member or personal representative of an individual who is the subject of the civil commitment process of information that is directly relevant to such person's involvement with the individual's health care, including the individual's location and general condition when:

Notification of Family

- Individual has capacity and
 - Has agreed to notification;
 - Has been provided opportunity to object and does not express objection; or
 - Health care provider, based on professional judgment, can reasonably infer from circumstances that individual does not object

§§ 37.2-127.1:03(D)(34), 37.2-804.2

Notification of Family

- If opportunity to agree or object cannot practicably be provided because of individual's incapacity or an emergency circumstance,
- Information may be provided, if health care provider, in exercise of professional judgment, determines notification in best interest of individual

§§ 37.2-127.1:03(D)(34), 37.2-804.2

Notification of Family Prohibition

- Notification shall not be made if health care provider has actual knowledge that the family member or personal representative is currently prohibited by court order from contacting the individual

Individual Opportunity to Notify

- Provides individual receiving services the opportunity to have someone of his choice notified by treatment facility of his general condition, location and transfer to another location
- Required State MHMRSAS Board to amend Human Rights Regulations to provide this opportunity

§ 37.2-400

Procedural Changes 2009

- 4 Hour Custody/Extension
 - Clarified 2008 legislation that period of emergency custody initiated by law enforcement is effective for 4 hours
 - Requires magistrate to extend law enforcement initiated period of custody additional 2 hours for good cause shown, including allowing
 - CSB to locate suitable TDO facility
 - Completion of medical evaluation

§ 37.2-808, HB 2060 effective February 23, 2009

Procedural Changes 2009

- 2 Hour NGRI Custody Extension
 - Requires magistrate to extend emergency custody orders issued by judge, special justice or magistrate for 2 hours upon good cause shown for NGRIs on conditional release

§ 19.2-182.9, HB 2060 effective February 23, 2009; SB 1083 effective April 8, 2009

Procedural Changes 2009

- Law Enforcement Custody
 - Clarifies that law-enforcement officer who takes custody of person may go beyond territorial limits of his jurisdiction to obtain assessment of need for hospitalization
 - Clarifies if person has consented to transport for MH assessment or evaluation beyond officer's territorial limits and revokes consent, law-enforcement may take custody up to 4 hours if person otherwise meets criteria (2 hour extension provisions apply)
 - Enactment clause reflects that these provisions are declarative of existing law

§ 37.2-808

Procedural Changes 2009

- Examiners/CSB Attendance

- Prohibits exclusion of examiner from hearing pursuant to order of sequestration of witnesses

§ 37.2-815, HB 2060 effective February 23, 2009

- Prohibits exclusion of CSB employee, or employee representing CSB that prepared preadmission screening report, from hearing pursuant to order of sequestration of witnesses

§ 37.2-817, HB 2060 effective February 23, 2009

Procedural Changes 2009

- CSB Attendance/Reports

- Any employee of CSB that prepared preadmission screening report, not actual employee that prepared report, meets hearing attendance requirement

§ 37.2-817, HB 2060 effective February 23, 2009

- Preadmission screening report required to be admitted into evidence and made part of record; admissibility not discretionary with court

§ 37.2-816, HB 2060 effective February 23, 2009

Procedural Changes 2009

- Independent Examiners
 - Adds marriage and family therapists to list of professionals who may conduct independent examinations for involuntary commitment hearings if psychiatrist or psychologist not available
 - Must complete certification program approved by DBHDS

§ 37.2-815

Procedural Changes 2009

- Hearing/Opportunity for Voluntary Admission
 - In determining whether person is capable of consenting to voluntary admission under § 37.2-814, judge/special justice may consider evidence of person's past compliance/non-compliance with treatment

§ 37.2-814

Firearms/CCRE Reporting

- Clerks continue to be required to forward MOT orders by close of business on day of receipt
- Clerks required to certify and forward any order of involuntary admission or certification of voluntary admission of person subject to TDO to CCRE
 - As soon as practicable, but not later than
 - Close of business on next following business day from day of receipt

§37.2-819, HB 2060 effective February 23, 2009

Psychiatric Treatment of Minors Act

- Mandatory Outpatient Treatment for Juveniles (§§ 16.1-345 through 16.1-345.5)
 - Adds detailed procedures for monitoring MOT for juveniles
 - Similar to adult MOT procedures
- Added hearing attendance requirements for CSBs and independent evaluators similar to those in the adult civil commitment context (§ 16.1-344)

Crisis Intervention Teams

- By January 1, 2010, DCJS and DBHDS shall support the development and establishment of CIT programs throughout the Commonwealth.
- Such teams shall assist law-enforcement officers in responding to crisis situations involving persons with mental illness and/or substance abuse.

§ 9.1-187 (A)

- DCJS in consultation with DBHDS and other stakeholders shall develop a training program for all persons involved in CIT programs

§ 9.1-188

Crisis Intervention Teams

- Goals of CIT programs shall be to:
 - Provide immediate response by specially trained officers
 - Reduce time officers spend awaiting assessment
 - Provide a therapeutic location or protocol for assessment for officers to bring individuals in crisis
 - Afford a sense of dignity to individuals in crisis
 - Reduce likelihood of physical confrontation
 - Decrease arrest and use of force
 - Identify underserved populations and link to care

§ 9.1-187(A)

Crisis Intervention Teams

- Each crisis intervention team shall develop a protocol that permits law-enforcement to release a person with mental illness and/or substance abuse when the CIT has determined that the person is sufficiently stable and to refer the person for emergency treatment services

§ 9.1-189

Crisis Intervention Teams

- In November 2009, 2010, and 2011, DCJS and DBHDS submitted reports to the JCHC assessing the impact and effectiveness of CIT programs in meeting the program goals
§ 9.1-190

Advance Directives

- Significantly expanded Health Care Decisions Act to permit advance directives beyond end of life decisions and appointment of health care agent to include instructions for all health care decisions, including mental health care and MH facility admissions

§ 54.1-2981 et seq.

Advance Directives

Mental Health Admissions

- New § 37.2-805.1 section permits agent appointed in advance directive or guardian to admit incapacitated person to MH facility for up to 10 days if:
 - Physician on staff or designated by admitting facility examines person and makes specific findings in writing
 - CSB pre-admission screening required for admission to DMHMRSAS facilities

§ 37.2-805.1

Mental Health Law Reform 2010

- Step-down MOT
- Permits a judge or special justice to authorize a treating physician to discharge a person who has been involuntarily admitted to MOT without a further hearing

Step-Down MOT

- Two Step Process
 - Judicial findings made at time of commitment hearing and authorization for treating physician to discharge an individual to MOT included in order for involuntary admission
 - Physician determination prior to discharge to MOT

Mental Health Law Reform 2012

- MOT on Motion Prior to Release
- Permits specified individuals to file a motion with the court for a hearing to determine whether a person who is involuntarily admitted and meets other criteria should be ordered to MOT upon discharge

Remaining Recommendations

- TDO extension – 48 to 72 hours with a 24 hour minimum before hearing
- Supervision of special justices
- Mandate the provision of core services
- Campus mental health – community colleges