

Subject: Comments on 5-7-08 Minutes

From: Jim Gottstein <jim.gottstein@psychrights.org>

Date: Sun, 25 May 2008 12:02:13 -0800

To: Jennie Marshall-Hoenack

CC: Susan Wibker, Carla Raymond, Collene Brady-Dragomir, Doug Wooliver, Elizabeth Brennan, Elizabeth Russo, Morgan Christen, "John E. Duggan", Peter Michalski, Stephanie Rhoades, "Craig F. Stowers", Linda Beecher, Stacie Kraly , Jim Gottstein

Hi All,

I am sorry I was unable to attend the May 7th meeting, but have (hopefully) attached (a) my [comments on the May 7th Minutes](#), and (b) a copy of the [Supreme Court's Order staying a forced drugging order pending appeal](#) it issued on Friday. The latter pertains to my last comment on the Minutes.

As we approach a year since the subcommittee was formed, a couple of things strike me. One is how slow the process is going. The second is, with the exception of the objection process to the Masters' recommendations, none of the serious problems [I have been raising since last August](#) have even begun to be addressed.

James B. (Jim) Gottstein, Esq.  
President/CEO

Law Project for Psychiatric Rights  
406 G Street, Suite 206  
Anchorage, Alaska 99501  
USA  
Phone: (907) 274-7686 Fax: (907) 274-9493  
jim.gottstein[[at]]psychrights.org  
<http://psychrights.org/>

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The Law Project for Psychiatric Rights is a public interest law firm devoted to the defense of people facing the horrors of forced psychiatric drugging. We are further dedicated to exposing the truth about these drugs and the courts being misled into ordering people to be drugged and subjected to other brain and body damaging interventions against their will. Extensive information about this is available on our web site, <http://psychrights.org/>. Please donate generously. Our work is fueled with your IRS 501(c) tax deductible donations. Thank you for your ongoing help and support.

Subcommittee on Involuntary Commitments and the Involuntary  
Administration of Psychotropic Drugs  
5-7-08

Present:

Judge Morgan Christen – Co-Chair (attended until 2:15)  
Judge Peter Michalski – Co-Chair (arrived at 2:05)  
Judge Stephanie Rhoades  
Master Jack Duggan  
Elizabeth Russo  
Linda Beecher  
Elizabeth Brennan  
Stacie Kraly  
Doug Wooliver – subcommittee staff

Meeting convened at 1:30 pm

Judge Christen started the meeting with a handout that showed the results of a manual audit of Anchorage mental commitment cases where an objection was filed to an order for psychotropic drugs. The Audit found 4 objections out of 89 petitions in calendar year 2007 and 9 objections out of 26 petitions filed through April 15<sup>th</sup> of this year.

**Comment [JG1]:** I would like a copy of the hand out.

The committee discussed the accuracy of these numbers and eventually agreed that, although many other objections are annually filed in mental commitment cases, the figures were probably accurate for objections to petitions for the administration of psychotropic drugs.

#### Level of Appellate Review

The number of objections to psychotropic drug orders was important because one of the main topics for the meeting was whether objections to a standing master's order should be heard de novo by a superior court judge. Because only in Anchorage are mental commitment cases referred to a standing master, the discussion was limited to Anchorage practices. (Sitka also uses a standing master system, but it is less frequent than in Anchorage and, because there has never been an objection to a psychotropic medication order in that court, the issues before the subcommittee have never come up there.)

**Comment [JG2]:** I don't think objections to the Masters's recommendations are appeals, although there are similarities.

**Comment [JG3]:** These are recommendations, not "orders."

The members agreed that de novo review was appropriate and began discussing what that meant.

The current review practice appears to be limited to the superior court judge listening to the audio recording of the hearing, reading the documents in the file, and basing his or her decision on that record.

**Comment [JG4]:** I don't get the sense that the judges are actually listening to the recordings.

The members agreed that this level of review was appropriate in some cases, but in others there should be a mechanism to reopen the record to allow additional evidence. A three-level process was discussed:

**Comment [JG5]:** The issue of whether the transcript required under Civil Rule 53(d)(1) is mandatory was taken under advisement by the Alaska Supreme Court in S-12677 on May 20th .

- 1) Review the existing record;

- 2) review the existing record with written and or oral arguments regarding the record and findings made by the master; and
- 3) hold a new hearing with additional evidence

**Comment [JG6]:** Neither of these are a de novo review.

It was later noted that option 1 was unlikely as most appeals would include an oral or written argument as to why the master's findings were inconsistent with the evidence presented.

One possible option would be to have the objection state which level of review was being requested in each case.

The committee also discussed whether an appeal was the appropriate forum for the introduction of new evidence. Some members thought that it might be better to request a new hearing before the master. Another option could be to follow the CINA practice of holding all evidentiary hearings before only a superior court judge.

**Comment [JG7]:** I don't think objections are an appeal. It is the Superior Court's responsibility to decide the petition and the Master makes recommendations only.

#### Timing of Objection

One of the problems with the current system in Anchorage is that a superior court judge may approve the master's recommendation without knowing that an objection is coming. The committee discussed the possibility of establishing a deadline for filing an objection (perhaps 48 hours) with the master holding

**Comment [JG8]:** Is something missing or should the "with" be "to?"

Another problem for attorneys is that the master will make oral findings from the bench with more detailed written findings being sent to the superior court judge. Because of this, objections are necessarily filed based on the oral findings. One suggestion was that written findings could be incorporated into a court form. This could facilitate a written order contemporaneous with the oral findings and allow the attorneys to better file objections within the timelines being contemplated. But others doubted whether a form would be very useful in these typically fact-specific cases.

**Comment [JG9]:** This seems completely improper. The respondent is entitled to object based on the written recommendations.

#### Court Rule or Standing Order

The committee discussed whether any changes to current practice should be in the form of a court rule or a standing order. The argument for the standing order was that the issue was limited almost exclusively to Anchorage and the changes being discussed were already allowed under existing court rules.

The argument for a court rule change was that both judges and attorneys know to look in the rules for specific procedures. The rule option was viewed as particularly helpful to new judges and attorneys who might be less likely to know of a standing order.

The rule could be limited to cases where the initial findings and recommendations were made by a standing master. This would help ensure that a rule solving an Anchorage-only problem does not create new problems for courts that don't share the problem.

### Bridge Between Incompetency in Criminal Cases and Civil Commitment Proceedings

The committee also addressed the gap that exists between the criminal and civil systems when a defendant is found incompetent to stand trial and incapable of restoration and is supposed to be referred for civil commitment proceedings. There is no "bridge" between these two systems and no rules clearly establish who is supposed to do what and when.

#### Follow-up Action

Judge Michalski agreed to prepare a rough draft of a rule that would address the issues relevant to a superior court review of an objection to a master's order for psychotropic medication.

Judge Rhoades agreed to prepare a rough draft for a rule that would link the criminal and civil systems when a criminal defendant is referred for civil commitment proceedings.

#### Next Meeting

The next meeting date is being scheduled.

**Comment [JG10]:** It would be helpful to me to know the citation for "supposed to be referred for civil commitment proceedings." I believe these are two separate issues that may or may not co-exist. Civil commitment is only appropriate if the person is found to be a sufficient danger to self or others or gravely disabled. Competency to stand trial is completely different. Of course, where the crime is one of violence, there would be a much more direct linkage.

**Comment [JG11]:** Again, the Masters are making recommendations to the Superior Court for the Superior Court. They are not orders for psychotropic medication. Am I missing something on this?

Another very important issue is there needs to be a workable method for the Superior Court considering motions for stay pending appeal. Under current practice, the only mechanism seems to be an Emergency Motion to the Supreme Court. In that regard, I have attached a copy of a stay pending appeal on just such a motion the Supreme Court issued on May 23rd. Presumably, the Supreme Court will want a mechanism that does not require emergency application to it to be effective. It seems to me the automatic 10 day stay in Civil Rule 62 should be adapted for use on this issue.