

**OP. NO. 03-103**

**MENTAL HEALTH GENERALLY: ADMISSIONS AND DISPOSITIONS IN GENERAL.**

**COURTS NOT OF RECORD: DISTRICT COURTS.**

**Judge has discretion to briefly delay civil commitment hearing to better provide due process for temporarily detained patient who cannot safely be brought for hearing within prescribed 48-hour time frame, to close hearing for good cause and conduct proceedings in patient's holding room without public present, or to conduct hearing outside patient's presence if patient's interests are adequately represented by counsel; may conduct hearing via video conferencing. Retired general district court judge may conduct civil commitment hearings when recalled to duty by Chief Justice of Supreme Court of Virginia or designated to hear and dispose of action by chief district judge.**

The Honorable S. Lee Morris  
Chief Judge, Portsmouth General District Court  
December 18, 2003

**Issues Presented**

You ask two questions pertaining to the holding of civil commitment hearings under Title 37.1. Specifically, you ask what actions a judge may take that will not result in the release of an apparently ill patient when the hearing time requirements of §§ 37.1-67.1 and 37.1-67.3 cannot be met, and the patient cannot be safely brought to a public hearing. You also inquire whether the definitions in § 37.1-1 permit a retired general district court judge to conduct civil commitment hearings.

**Response**

It is my opinion that a judge has several options when confronted with a situation in which a temporarily detained patient cannot safely be brought for a public civil commitment hearing within the time parameters required by §§ 37.1-67.1 and 37.1-67.3. First, a judge may continue a civil commitment hearing beyond the prescribed forty-eight-hour time frame when such continuance serves to protect the due process or statutorily created rights of the temporarily detained person. Second, a judge may order the hearing closed for good cause upon motion of the patient or his attorney and conduct the hearing in the holding or seclusion room. Third, in extreme situations, a judge may hold the hearing in the public hearing room outside the patient's presence, after a finding of good cause to do so for the patient's benefit, trusting that the patient's interests will be adequately represented by his attorney and others appearing on his behalf. Finally, a judge may hold the hearing within the requisite time period and within the "presence" of the patient and the public, yet still address important safety concerns by using video conferencing procedures where available.

It is also my opinion that a retired general district court judge may conduct civil commitment hearings when he has been recalled to duty by the Chief Justice of the Supreme Court of Virginia or he has been designated to hear and dispose of an action by a chief district judge.

### **Background**

You pose a hypothetical situation in which a judge arrives for a duly scheduled civil commitment hearing of a patient held under a temporary detention order and discovers that the patient is violent, in restraints, and is incapable of intelligently participating in the hearing. The patient cannot be brought safely from the holding room to the public hearing room, and a hearing, if any, must be held in the holding room where the patient is restrained. The holding room is in a secured part of the facility where the public is not permitted.

### **Applicable Law and Discussion**

The Supreme Court of the United States consistently has stated that civil detention and commitment involve "a significant deprivation of liberty that requires due process protection."<sup>1</sup> The requirements of due process mandate, among other things, that a hearing be provided as expeditiously as possible following an individual's involuntary detention in a mental health facility.<sup>2</sup> Sections 37.1-67.1 and 37.1-67.3 unambiguously state that a civil commitment hearing must be held within forty-eight hours of execution of a temporary detention order, except as extended by weekends or holidays.<sup>3</sup> In an attempt to protect the right to a speedy hearing, prior Attorneys General have concluded that §§ 37.1-67.1 and 37.1-67.3 do not authorize involuntary detention beyond the length of time specified in the statutes.<sup>4</sup>

The right to a speedy hearing, however, is not the only right implicating due process considerations or the applicable statutory provisions.... Indeed, to conduct a hearing speedily without allowing full play for such other rights may well lead to a longer deprivation of liberty than any confinement occasioned by a brief continuance.<sup>[5]</sup>

Among the other rights possessed by an individual facing deprivation of his liberty through civil commitment are the rights to be represented by an attorney, to be present during his hearing, and to testify if he so chooses.<sup>6</sup> In addition, civil commitment hearings generally are open to the public.<sup>7</sup>

The problem is that the exercise of certain legal rights, such as the right to a speedy hearing, may serve to preclude the exercise of other rights, such as the right to be present or to have a public hearing. Thus, to exercise one right may be tantamount to a waiver of other rights. It is a general rule that an adult may waive any constitutional or statutory right as long as the waiver is "an intentional relinquishment or abandonment of a known right or privilege."<sup>8</sup>

When a person is entitled to competing rights, he or she ordinarily is recognized as having the right to elect which rights he or she will exercise and which he or she will waive; however, the approach is not always so straightforward when the competency of the individual is an issue.<sup>[9]</sup>

If, in the judge's discretion, the patient has the capacity to make a knowing and intelligent waiver of one of his rights and this waiver is evidenced by some affirmative act,<sup>10</sup> the judge may grant the waiver and proceed accordingly. In the hypothetical situation you present, however, the patient is incapable of intelligently participating in a hearing. If the patient is so impaired that he cannot exercise his own prerogative to waive a particular right, the judge may consider a request for waiver made on the patient's behalf by his attorney.<sup>11</sup>

A request for a waiver in the situation you describe may take one of three forms. First, the individual or his attorney may ask to delay the hearing beyond the prescribed forty-eight-hour time frame in order that the individual may regain some control over his behavior and thus exercise his right to participate meaningfully in the hearing. This may be in the individual's best interests, because it may result in a shorter length of confinement overall. Any such continuance should be of limited duration, with the judge keeping in mind the underlying rationale of the time frames articulated in §§ 37.1-67.1 and 37.1-67.3, and the significant deprivation of liberty borne by the individual awaiting hearing.<sup>12</sup> Alternatively, the judge may, on a case-by-case basis, order a hearing closed if, on motion of the patient or his attorney, the court determines that good cause to close the hearing is shown.<sup>13</sup> A closed hearing may be held in the holding room or seclusion room where the patient is located instead of in the public hearing room.<sup>14</sup> Finally, the hearing may proceed as scheduled in the public hearing room while the individual remains in the holding room, for his own safety and that of others, after a finding of good cause by the court, trusting that his interests will be adequately represented by his attorney and others appearing on his behalf.<sup>15</sup>

A judge should also consider holding the civil commitment hearing through the use of video conferencing if such technology is available and its use is practical under the circumstances. Throughout the country, courts are beginning to utilize video conferencing to conduct judicial business.<sup>16</sup> In 1995, the United States Court of Appeals for the Fourth Circuit considered a challenge to the use of video conferencing in a civil commitment hearing.<sup>17</sup> The Fourth Circuit conducted its analysis based on the three-factor test articulated by the United States Supreme Court in *Mathews v. Eldridge*.<sup>18</sup> The Fourth Circuit held that "the use of video conferencing allows for the [patient's] 'presence,' at least in some sense, at the commitment hearing."<sup>19</sup> Applying the three-part analysis enunciated in *Mathews*, the Fourth Circuit found that, despite a "sizable infringement" on the involuntarily committed individual, the use of video conferencing in civil commitment hearings violated none of the individual's constitutional or statutory rights.<sup>20</sup> In reaching its conclusion, the court spoke about the safety risks inherent in proceedings involving a potentially mentally unstable individual,<sup>21</sup> much like the hypothetical situation you present. Therefore, it is my opinion that a civil commitment hearing may be conducted by video conferencing in situations where a patient cannot be brought safely from a holding room to a public hearing room for his hearing.

Your final inquiry is whether the definitions in § 37.1-1 permit a retired general district court judge to conduct civil commitment hearings pursuant to § 37.1-67.3. Section 37.1-67.3 provides that commitment hearings are to be conducted by a "judge." Section 37.1-1 defines "judge" to include "only the judges, associate judges and substitute judges of general district courts ... and of juvenile and domestic relations district courts ..., as well as the special justices authorized by § 37.1-88."

Section 16.1-69.22:1 provides for the temporary recall of retired district court judges:

The Chief Justice of the Supreme Court may call upon and authorize any judge of a district court who is retired ... to perform, for a period not to exceed ninety days at any one time, such judicial duties in any district court as the Chief Justice ... shall deem in the public interest for the expeditious disposition of the business of such courts.

In addition, § 16.1-69.35(1) permits the chief judge of each district to designate a retired district judge to hear and dispose of any action properly coming before the district court when a regular judge is unable to hold court, the chief district judge determines that assistance is needed, and another regular district judge is not reasonably available. Finally, § 16.1-69.35(3) allows the Chief Justice of the Supreme Court, "upon his own initiative or upon written application of the chief district court judge desiring assistance," to designate "a retired judge to provide judicial assistance" to relieve congestion in the work of a district court. In all of these instances, the recalled or designated retired judge is to have all of the powers, duties, privileges and jurisdiction of any judge while so acting.<sup>22</sup> For that reason, it is my opinion that retired judges may conduct civil commitment hearings pursuant to § 37.1-67.3 when acting under the authority of a recall pursuant to § 16.1-69.22:1 or § 16.1-69.35.

In contrast, it would be inappropriate for a retired general district court judge to conduct a civil commitment hearing if he were not restored to active service pursuant to recall. As a general rule, words in a statute are to be given their usual and commonly understood meaning.<sup>23</sup> "The word 'judge' or 'justice' means '[a] public officer who, by virtue of his office, is clothed with judicial authority.' This definition would not include one who is retired."<sup>24</sup> A retired judge is only on active service and restored to judicial authority when he regains the powers, duties and privileges of his prior position by virtue of recall.

### **Conclusion**

Accordingly, it is my opinion that a judge has several options when confronted with a situation in which a temporarily detained patient cannot safely be brought for a public civil commitment hearing within the time parameters required by §§ 37.1-67.1 and 37.1-67.3. First, a judge may continue a civil commitment hearing beyond the prescribed forty-eight-hour time frame when such continuance serves to protect the due process or statutorily created rights of the temporarily detained person. Second, a judge may order the hearing closed for good cause upon motion of the patient or his attorney and conduct the hearing in the holding or seclusion room. Third, in extreme situations, a judge may hold the hearing in the public hearing room outside the patient's presence, after a finding of good cause to do so for the patient's benefit, trusting that the patient's interests will be adequately represented by his attorney and others appearing on his behalf. Finally, a judge may hold the hearing within the requisite time period and within the "presence" of the patient and the public, yet still address important safety concerns by using video conferencing procedures where available.

It is also my opinion that a retired general district court judge may conduct civil commitment hearings when he has been recalled to duty by the Chief Justice of the Supreme Court of Virginia or he has been designated to hear and dispose of an action by a chief district judge.

<sup>1</sup>Addington v. Texas, 441 U.S. 418, 425 (1979), *cited in* Zinermon v. Burch, 494 U.S. 113, 131 (1990); Vitek v. Jones, 445 U.S. 480, 491-92 (1980).

<sup>2</sup>See 1996 Op. Va. Att'y Gen. 154, 155.

<sup>3</sup>Section 37.1-67.1 provides, in part, that "[t]he duration of temporary detention shall not exceed forty-eight hours prior to a hearing. If the forty-eight-hour period herein specified terminates on a Saturday, Sunday or legal holiday, such person may be detained, as herein provided, until the next day which is not a Saturday, Sunday or legal holiday."

Section 37.1-67.3 provides, in part, that "[t]he commitment hearing shall be held within forty-eight hours of the execution of the temporary detention order as provided for in § 37.1-67.1; however, if the forty-eight-hour period herein specified terminates on a Saturday, Sunday, legal holiday, or day on which the court is lawfully closed, such person may be detained, as herein provided, until the next day that is not a Saturday, Sunday, legal holiday or day on which the court is lawfully closed."

Use of the word "shall" in a statute generally indicates that its procedures are intended to be mandatory, rather than permissive or directive. See Op. Va. Att'y Gen.: 1996, *supra* note 2, at 158 n.3; 1989 at 250, 251-52.

<sup>4</sup>Op. Va. Att'y Gen.: 1983-1984 at 232, 233; 1981-1982 at 251.

<sup>5</sup>1996 Op. Va. Att'y Gen., *supra* note 2, at 155-56 (concluding that it is acceptable to briefly delay civil commitment hearing beyond statutory time period, at patient's request, in order to exercise his right to employ attorney, seek independent evaluation, or call other witnesses).

<sup>6</sup>Va. Code Ann. § 37.1-67.3 (LexisNexis Supp. 2003).

<sup>7</sup>Section 37.1-90 (Michie Repl. Vol. 1996).

<sup>8</sup>Johnson v. Zerbst, 304 U.S. 458, 464 (1938); *see also* Weidman v. Babcock, 241 Va. 40, 45, 400 S.E.2d 164, 167 (1991) (quoting Fox v. Deese, 234 Va. 412, 425, 362 S.E.2d 699, 707 (1987) ("Waiver is the voluntary, intentional abandonment of a known legal right, advantage, or privilege.")).

<sup>9</sup>1996 Op. Va. Att'y Gen., *supra* note 2, at 156.

<sup>10</sup>It is generally understood that waiver of a right requires an affirmative act. See Barker v. Wingo, 407 U.S. 514, 525-26 (1972).

<sup>11</sup>See 1996 Op. Va. Att'y Gen., *supra* note 2, at 156.

<sup>12</sup>Virginia has a short time frame for conducting a civil commitment hearing compared to other states. See, e.g., Md. Code Ann. [Health-Gen.] § 10-632(b), (c)(1) (2002) (hearing must be held within ten days, but may be postponed additional seven days for good cause); N.J. Stat. Ann. § 30:4-27.12(a) (Michie 2003) (hearing must be held within twenty days of initial admission); N.C. Gen. Stat. § 122C-267(a) (2002) (hearing must be held within ten days and court may grant continuance of up to five additional days). Therefore, it is reasonable to

assume that a slight delay beyond the initial forty-eight-hour period in holding the individual's civil commitment hearing would not violate due process rights.

<sup>13</sup>1996 Op. Va. Att'y Gen. 166, 174 n.18.

<sup>14</sup>In your hypothetical situation, the holding room or seclusion room is in a secured part of the facility where the public is not permitted, for the safety of both the patient and the public and in compliance with insurance requirements. In most situations, the public in attendance are family members, friends or persons involved with the care of the individual, and unless there is a large number of such individuals, most hospitals will permit them to enter that portion of the hospital where the holding room or seclusion room is located. The hearing could, therefore, be held in the holding room or seclusion room under these circumstances.

<sup>15</sup>See *Schmidt v. Goddin*, 224 Va. 474, 481-83, 297 S.E.2d 701, 705-06 (1982) (holding that Schmidt's due process rights were not violated when he was excluded from courtroom hearing during testimony of witnesses with whom he would have daily contact, because committee, guardian ad litem, and Schmidt's children and their counsel were present); see also *Coll v. Hyland*, 411 F. Supp. 905 (D.N.J. 1976) (discussing at length protection of individual's due process rights under New Jersey civil commitment statute). In *Schmidt*, the Supreme Court of Virginia specifically adopted the reasoning in *Coll* which stated that, "[i]n a proceeding designed at least in part to benefit the patient, it would indeed be a paradox to require him to hear testimony which might adversely affect his mental condition." *Schmidt*, 224 Va. at 483, 297 S.E.2d at 706 (quoting *Coll*, 411 F. Supp. at 913).

<sup>16</sup>For a discussion of the use of interactive video conferencing in judicial matters, see *Edwards v. Keen Mtn. Corr. Officer Logan*, 38 F. Supp. 2d 463 (W.D. Va. 1999).

<sup>17</sup>*United States v. Baker*, 45 F.3d 837 (4th Cir. 1995).

<sup>18</sup>*Mathews* identified three factors to be used "in determining those procedural safeguards due a person whose interests are to be adversely affected by government actions." *Baker*, 45 F.3d at 843. The first factor to be considered is "the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), quoted in *Baker*, 45 F.3d at 843.

<sup>19</sup>45 F.3d at 843.

<sup>20</sup>*Id.* at 847-48.

<sup>21</sup>*Id.* at 847.

<sup>22</sup>See Va. Code Ann. § 16.1-69.22:1(C) (LexisNexis Repl. Vol. 2003) ("Any judge recalled to duty under this section shall have all the powers, duties, and privileges attendant on the position he is recalled to serve."); § 16.1-69.35(1)

(LexisNexis Repl. Vol. 2003) ("While acting, any judge so designated shall have all the authority and power of the judge of the court, and his order or judgment shall, to all intents and purposes, be the judgment of the court."); § 16.1-69.35(3) (LexisNexis Repl. Vol. 2003) ("Every judge so designated shall have the same powers and jurisdiction and be authorized to perform the same duties as any judge of the district for which he is designated to assist and while so acting his order or judgment shall be, to all intents and purposes, the judgment of the court to which he is assigned.").

<sup>23</sup>The Covington Virginian, Inc. v. Woods, 182 Va. 538, 548-49, 29 S.E.2d 406, 411 (1944).

<sup>24</sup>1984-1985 Op. Va. Att'y Gen. 153, 153 (quoting Black's Law Dictionary 754 (rev. 5th ed. 1979)). The current legal definition of "judge" is "[a] public official appointed or elected to hear and decide legal matters in court." Black's Law Dictionary 844 (7th ed. 1999).

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