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GIVING A VOICE TO THE SILENT MENTALLY ILL CLIENT: AN EMPIRICAL STUDY OF THE ROLE OF COUNSEL IN THE CIVIL COMMITMENT HEARING

Donald H. Stone*

I. INTRODUCTION

In the civil commitment arena, where a mentally ill person is allegedly a danger to the life or safety of themselves or of others and in need of in-patient care or treatment,¹ there are two groups assigned to protect the people: one, the hospital presenter,² who is responsible for investigating and presenting evidence and testimony at a hearing to secure admission to a psychiatric facility as an involuntary patient,³ the other, the lawyer, who represents and defends the allegedly mentally ill person⁴ from such involuntary civil commitment confinement. These are their stories.

The attorney representing a mentally ill client at the involuntary admission hearing (IVA)⁵ often faces challenges in defining his role and responsibility toward his client and the community at large. There are occasions when a client's mental disorder makes it impossible to effectively communicate his desires and wishes to his lawyer. The client's ability to aid his attorney in preparing an adequate defense to the application for involuntary admission is severely compromised. There are occasions at the civil commitment hearing when the individual subject to the commitment is silent as a result of cognitive impairment, which places the attorney in the position of advocating a position without the input of the client. The hospital presenter who seeks the involuntary confinement into the psychiatric hospital is opposed by an attorney without clear instructions from the client as to how to proceed.

This article will discuss and analyze the attorney's role in light of the silent or incapacitated mentally ill client. An historical perspective of the traditional role of counsel will be examined and compared with the guardian ad litem role. The American Bar Association (ABA) standards will be scrutinized to seek guidance in understanding the duty an attorney owes to competently represent his client and keep him informed as to the proceedings and abide by decisions made by the client in the legal proceedings at hand.⁶ When a client is a person under a disability, the role and responsibility of counsel are often complex and confused,

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⁴tit. 10, § 21.01.02(25).
⁵Id. § 21.01.02(13).
⁶See Model Rules. Of Prof'L. Conduct R. 1.14 (2001) (stating that when a client's ability is impaired, the lawyer should try to maintain a normal client lawyer relationship).
thus this article will examine court decisions addressing the constitutional right to counsel, as well as seek guidance from state statutes addressing right to counsel at the civil commitment hearing as to the role of counsel at the hearing.

The competency of the mentally ill client will also be explored to provide direction to the attorney confronted with the question of client competency. Substitute decision makers at hearings, such as family members, friends, and assisting counsel, will be reviewed. The unusual and unique circumstances surrounding hearings, with liberty interests and time constraints at the forefront, make the role of counsel for the silent client of vital importance. The role of counsel at the hearing will be compared and contrasted to similar settings, such as criminal representation of disabled defendants and legal representation of juveniles.

The importance of understanding the role of counsel for the incompetent mentally ill client at a hearing is significant when it comes to the decisions to be made on behalf of the client. Should counsel zealously advocate for release from confinement at all costs? Does counsel attempt to act in the best interest of the client as a substitute decision maker, or does the attorney remain neutral at the civil commitment hearing when his client is silent on the decision of confinement to the psychiatric hospital? The mental health concerns of the client, as well as the safety concerns of the community at large, cannot be ignored in the equation of civil commitment. Moreover, the vulnerability of the mentally ill population is a consideration not to be overlooked. The prevalence of adults with serious mental illness is estimated to be 12,200,000 adults in the United States population, a significant portion of our nation’s citizenry.7

Empirical data has been collected from attorneys representing clients in civil commitment hearings to serve as a backdrop for elaboration and comparison of these and other questions. Ten attorneys with vast experience at the civil commitment venue were surveyed to obtain data and elicit opinions on various questions relating to the silent or incapacitated client. Lawyers continue to grapple with their role in representing the silent mentally ill client, torn between desiring to speak on their behalf, as well as to protect their legal interests. This article will offer recommendations regarding the role and responsibility of the attorney in representing the mentally ill person in the civil commitment arena.

On a slightly tangential but related matter, the issue of whether a mentally ill person facing civil commitment should be permitted to waive counsel and proceed pro se will be addressed. The factors an administrative law judge might consider in making a determination prior to permitting a person to proceed pro se at a hearing will also be discussed. A significant question to ponder is whether a mentally ill person should be prohibited from proceeding pro se because of the unique circumstances of the hearing, considering the important liberty interests at stake.

II. STATISTICAL REVIEW OF ATTORNEY SURVEY

"The role (of counsel) should be to represent the client’s stated interest, and if it can’t be determined with certainty, the advocate should assume the client desires release."  

Ten attorneys for the Office of the Public Defender of Maryland were surveyed to elicit their opinions on the role of the attorney at involuntary civil commitment hearings. Data was collected on topics including case preparation and client interviews, the advocacy role at the hearing, the incompetent client, and the role and responsibility of the attorney.

The average age of the ten surveyed attorneys was fifty-one, with an average of over twenty years of legal experience, ranging from full-time practice with the Office of the Public Defender to private practice. The attorneys represent clients in both state and private psychiatric hospitals, handling an average of 110 cases per year.

In the course of representing a client at the IVA hearing, eighty-three percent of attorneys discuss and counsel their clients on possible alternatives to the hearing, including postponement and voluntary admission.

The attorney may consider recommending a postponement to his client to avoid the possibility of an adverse ruling from the administrative law judge presiding at the civil commitment hearing. Advantages of seeking a postponement include avoiding the stigma of involuntary civil commitment,

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8Donald H. Stone, Role of Attorney At Involuntary Admission Hearing Survey (2000) (reproduced at Appendix I). The empirical study included a five-page questionnaire sent to attorneys assigned to represent clients at involuntary civil commitment hearings in the State of Maryland with the Office of the Public Defender. Id. The quote is that of an attorney responding to the survey.

9Id.


11Stone, supra, note 8.

12Id. The survey included seven male and three female attorneys. Id.

13Id. The data showed an average of 20.6 years in practice and 8.5 years average representing clients at IVA hearings; see infra Appendix 2, Graph #3/4.

14Stone, supra, note 8. Some attorneys were employed full-time with the Office of the Public Defender, others part-time, and others in private practice and assigned cases. Id.

15Id. State psychiatric hospitals include Springfield, Spring Grove, and Crownsville, and such private hospitals as Sheppard Pratt Health Systems, Washington Adventist, and Taylor Manor.

16Id. In the last 12 months, 110 clients were represented at IVA hearings, approximately 1,320 cases annually by the attorneys responding to the survey.

17Stone, supra, note 8; see infra Appendix 2, Graph #8.

18MD. CODE ANN., HEALTH-GEN I § 10-632(c)(1) (2000). The hearing may be postponed for good cause for seven days. Id.

19MD. CODE ANN., HEALTH-GEN I § 10-609 (2000). Voluntary admission is available to persons sixteen years or older who understand the nature of the request for admission, are capable of giving assent and able to ask for release. Id. § 10-609(a). See also Donald H. Stone, The Benefits of Voluntary Inpatient Psychiatric Hospitalization: Myth or Reality, 9 B.U. PUB. INT. L.J. 25, Fall 1999, at 25.
especially if it is likely that the patient will be released from observation status\textsuperscript{20} within seven days of the hearing. Discussions about the advantages and disadvantages of seeking a postponement of the hearing require first and foremost that the client be informed and counseled about such a decision. However, the decision regarding a postponement and subsequently remaining in the psychiatric hospital for up to an additional week is a determination within the exclusive purview of the client. This resolution, however, assumes that the client is competent to weigh all the options intelligently and make an informed decision. When a mentally ill client is unable to comprehend the nature of the hearing, decisions regarding postponement, even when in the client's best interest, are difficult to make. According to the survey, 53.5\% of attorneys\textsuperscript{21} discuss with the hospital presenter\textsuperscript{22} the choice of a postponement. The option of requesting a hearing postponement on behalf of the client who is unable to comprehend the nature of the hearing is left to the attorney representing the client. Attorneys in this position must attempt to determine what the client would want if capable of comprehending the nature of the hearing and act accordingly, determine what is in the best interest of the client and proceed, or recognize and acknowledge that the decision to seek a postponement cannot be made by anyone other than the client.

The decision to seek a postponement of the civil commitment hearing also becomes clouded when the client is unable or unwilling to communicate with his attorney, making the lawyer-client relationship difficult. There are situations in the context of the civil commitment hearing in which a client diagnosed with schizophrenia or psychosis is delusional and distrusting of all individuals, including the attorney. In other situations, a mentally ill client could be experiencing catatonic behavior whereby communication is not possible. In such situations, a lawyer's ability to obtain information in order to request or not request a postponement of the hearing is severely compromised. Once the decision not to seek a postponement to the hearing is made, or regardless of the postponement option, the civil commitment hearing is at hand. As the attorney representing the mentally ill client begins preparation for the upcoming hearing, an impending decision must be made regarding the client's view about remaining in the hospital or seeking immediate discharge from the hospital. At the hearing, the hospital presenter has the burden of demonstrating by clear and convincing evidence that the individual meets each of the following elements:

\begin{itemize}
\item[(i)] The individual has a mental disorder;
\item[(ii)] The individual needs inpatient care or treatment;
\item[(iii)] The individual presents a danger to the life or safety of the individual or of others;
\end{itemize}

\textsuperscript{20}A patient's status between the time the individual is initially confined in an inpatient facility and the time of the civil commitment hearing is that of observation status. MD. REGS. CODE tit. 10, § 21.01.02(18) (2001).

\textsuperscript{21}Stone, \textit{supra} note 8; see infra Appendix 2, Graph #9/10.

\textsuperscript{22}The hospital presenter is the individual who acts on behalf of the in-patient facility at an IVA hearing. tit 10, § 21.01.02(25).
(iv) The individual is unable or unwilling to be voluntarily admitted to the facility;
(v) There is no available less restrictive form of intervention that is consistent with the welfare and safety of the individual.  

At the adversarial civil commitment hearing in which an attorney is representing the mentally ill client who is subject to involuntary civil commitment, decisions regarding opposing or consenting to the confinement must be made by the client. Options include opposing the commitment and seeking immediate release or expressing a desire to remain in the hospital either as a voluntary or involuntary patient. When the attorney determines that his client is unable to competently express his wishes at the hearing regarding either remaining in the hospital or being released from the hospital, remarkably, all ten attorneys surveyed steadfastly took the position to seek immediate discharge from the hospital.  

This decision to seek release recognizes that there will be instances when there is compelling evidence that release of the client from the hospital will put the client's life or safety at risk, as well as the life or safety of others. The role of counsel to zealously advocate for release from confinement when the client is silent or incompetent reinforces the drastic impact that civil commitment to a psychiatric hospital has on a person. Regardless of instances in which the attorney may believe it is unsafe or irresponsible to release the person from the hospital, discharge is sought, and especially so if the health or safety of an individual may be jeopardized. The overwhelming reason turns on the significant deprivation of liberty that involuntary civil commitment causes, including loss of freedom, loss of employment, and loss of self-control and determination. Of course, one recognizes that the administrative law judge ultimately makes the decision at the hearing. For the attorney to uphold and enforce the adversarial model speaks volumes for the role of counsel in representing the silent or incompetent client at the hearing.

Only one of ten surveyed attorneys changed the decision of seeking release from the hospital for the silent or incompetent client when clear and convincing evidence was presented at the hearing that the client would present a danger to the life or safety of himself or others if released. In such cases, one attorney would take a neutral position regarding release or admission to the psychiatric hospital. The danger of taking a neutral position on the fundamental question of release or retention is that the adversarial model of the civil commitment hearing is severely compromised. No longer are there opposing positions presented and argued to the judge, and no longer are strengths and weaknesses of both sides of the argument articulated and argued. The risk of destruction of the adversarial model will lead to increased psychiatric confinement, often without

\footnotesize
\begin{itemize}
  \item[24] Stone, supra note 8; see infra Appendix 2, Graph #11.
  \item[25] Stone, supra note 8; see infra Appendix 2, Graph #11.
  \item[26] Stone, supra note 8; see infra Appendix 2, Graph #13.
  \item[27] Stone, supra note 8; see infra Appendix 2, Graph #13.
\end{itemize}
strenuous opposition or demonstration of the need for such hospitalization. When the hospital presenter and the client’s attorney speak in one voice, in which the doctor knows best and one is to ask no questions, truth is compromised. The medical model, as opposed to the legal model, has no proper place in the civil commitment arena.

When an attorney is unable to determine his client’s view regarding retention or release and the attorney believes the client presents a high degree of danger to the life or safety of himself or others if released at the hearing, two of ten attorneys surveyed would take a neutral position. The proper position, although unpopular with some psychiatrists, is to oppose hospitalization and zealously seek release. Again, the adversarial model is called into question by twenty percent of the surveyed attorneys.

In addition to the merits of the civil commitment based on the enumerated five criteria, there may be situations in which procedural irregularities exist in the certification, notice, and hearing process. Procedural violations in the admission process may result in release at the hearing by order of the administrative law judge if an error in the process occurred, the error in the process was substantial, and no other available remedy was consistent with due process and the protection of the individual’s rights. Such due process violations involving notice, hearing irregularities, or defects in the application and certification process may be significant enough to warrant release of the patient from the hospital. In situations in which a client seeks release, the decision to raise the procedural violations is made as part of the attorney’s role to seek release. However, when the client’s views regarding release or retention are unclear or silent, and the client presents a high degree of danger to the life or safety to himself or others if released, the procedural violation will go unheard by the judge, unless raised by the client’s attorney. To raise a procedural violation may result in release based not on the merits but on a procedural violation, which has no bearing on the patient’s need for psychiatric hospitalization. An attorney might look the other way and not raise the procedural violation, rationalizing that his client has not expressed a desire to be released from the hospital. A compromise, as is expressed by one attorney, is to raise the procedural violation with the administrative law judge but not advocate release. Again, to take this position and not seek release leads to the destruction of the adversarial model at the civil commitment hearing. Although a client is silent or incompetent, an attorney is responsible for demanding that all procedural protections are afforded, keeping

28Stone, supra note 8; see infra Appendix 2, Graph #14.
29Stone, supra note 8; see infra Appendix 2, Graph #14. In this question the danger is seen by the attorney as compared to question thirteen in which the danger is presented at the IVA hearing.
31Id.
32See id.
33Id. Procedural errors include lack of certificates, uncompleted documents and missing signatures.
34Stone, supra note 8; see infra Appendix 2, Graph #15.
all parties honest and just. Therefore, the attorney must raise procedural irregularities and seek release on behalf of his silent or incompetent client.\textsuperscript{35}

In a clear cut situation where the evidence presented at the hearing demonstrates the need for hospitalization, one attorney surveyed would submit on the record without making a closing argument,\textsuperscript{36} even though such closing argument is guaranteed as a right of parties to the hearing.\textsuperscript{37} Again, the risk of submitting without making a closing argument may be viewed as failing to fulfill the attorney’s role of zealous advocacy. On the other hand, if there is no merit to one’s closing argument, to waive it may be proper.

When an attorney represents a mentally ill juvenile, additional responsibilities come into play. For example, one issue is whether there is a minimum age in which a client is capable of aiding his attorney in defense of the civil commitment. Should children under the age of seven be viewed differently from children between ages seven and fourteen, and should the opinions of children ages fourteen through eighteen be given more credence and value? The survey attempts to obtain the attorney’s view of the role and responsibility in representing children at the IVA hearing, specifically whether the age of the child should have any bearing on the attorney role.

Half of the attorneys surveyed who represented children under age seven perceived their role at the civil commitment hearing differently than when representing an adult.\textsuperscript{38} For children ages seven through fourteen, forty percent of the attorneys viewed their role differently when representing a client of this age.\textsuperscript{39} For children ages fourteen through eighteen, two attorneys of ten surveyed saw their role as different than when representing an adult client.\textsuperscript{40}

\section*{III. THE RIGHT TO COUNSEL}

The right to counsel for the mentally ill at an involuntary civil commitment hearing is the cornerstone of the process of involuntary admission into a psychiatric hospital.\textsuperscript{41} If the mentally ill person subject to involuntary confinement is unable to afford an attorney, an attorney is provided by the State of Maryland through the Office of the Public Defender.\textsuperscript{42} The right is based in large part on the United States Supreme Court decision in \textit{In re Gault},\textsuperscript{43} which involved a fifteen year-old child committed as a juvenile delinquent to the

\begin{itemize}
\item \textsuperscript{35}After the patient is given an opportunity to leave the in-patient facility, the treating physician may file a petition for an emergency evaluation to initiate re-confinement. tit. 10, § 21.01.10.
\item \textsuperscript{36}Stone, supra note 8; see infra Appendix 2, Graph #16.
\item \textsuperscript{37}tit.10, § 21.01.09(C)(1)(f).
\item \textsuperscript{38}Stone, supra note 8; see infra Appendix 2, Graph #18A.
\item \textsuperscript{39}Stone, supra note 8; see infra Appendix 2, Graph #18B.
\item \textsuperscript{40}Stone, supra note 8; see infra Appendix 2, Graph #18C.
\item \textsuperscript{41}MD. CODE ANN., HEALTH-GEN I § 10-631(a)(2)-(4) (2000) (stating the rights of individuals which include the right to consult with a lawyer and the availability of agencies for referral of individuals who need legal counsel). See also MD. REGS. CODE tit. 10, § 21.01.05(c)(4) (2001) (stating the right to access to legal counsel provided in Maryland).
\item \textsuperscript{42}MD. REGS. CODE tit. 10, § 21.01.06B(2)(c) (2001).
\item \textsuperscript{43}In Re Gault, 387 U.S. 1 (1967).
\end{itemize}
Arizona State Industrial School for making lewd telephone calls.\(^{44}\) Justice Abe Fortas, writing for the Court, rejected the state's claim that appointment of counsel was discretionary and decreed that the child and his parent must be advised of the juvenile's right to be represented by counsel chosen by them, or if unable to afford counsel, that counsel would be appointed to represent the child.\(^{45}\) The court was cognizant of the loss of liberty, as well as the stigma attached to Gerald Gault's determination as a delinquent child as key factors in its opinion.\(^{46}\)

The consequences of the involuntary civil commitment include the loss of liberty, as well as the stigma attached to forced psychiatric hospitalization. Following the Supreme Court decision in \textit{Gault}, the U.S. Court of Appeals for the Tenth Circuit expanded its mandate of the right to counsel for a mentally-retarded person committed to the Wyoming State Training School for the "feebleminded" and epileptic.\(^{47}\) The court recognized the liberty of an individual is at stake, asserting that "[i]t matters not whether the proceedings be labeled 'civil' or 'criminal,' or whether the subject matter be mental instability or juvenile delinquency. It is the likelihood of involuntary incarceration-- with [sic] commands observance of the constitutional safeguards of due process."\(^{48}\) The court required counsel in hearings regarding confinement in facilities for the mentally retarded, acknowledging the need for a "guiding hand of legal counsel at every step of the proceedings."\(^{49}\)

Several years later, the District Court for the Eastern District of Wisconsin announced the broad and encompassing directive of the procedural rights of persons with mental illness in \textit{Lessard v. Schmidt}.\(^{50}\) The court articulated the constitutional rights of those persons subject to involuntary confinement and treatment, spelling out the right to counsel,\(^{51}\) elements of adequate assistance of counsel,\(^{52}\) the significance of the adversarial nature of the role,\(^{53}\) and the importance of providing counsel adequate time to prepare and review all relevant material in the case.\(^{54}\)

In a class action suit filed in Maryland to establish procedures for the involuntary commitment of persons found not guilty by reason of insanity at a criminal trial, the court in \textit{Dorsey v. Solomon}\(^{55}\) set forth various rights which must be granted before the state may confine them against their will.\(^{56}\) The court announced the right to appoint counsel at involuntary civil commitment hearings,

\(^{44}\)\textit{Id.} at 4.
\(^{45}\)\textit{Id.} at 41.
\(^{46}\)\textit{Id.} at 16.
\(^{47}\)Heryford v. Parker, 396 F.2d 393 (10th Cir. 1968).
\(^{48}\)\textit{Id.} at 396.
\(^{49}\)\textit{Id.}.
\(^{50}\)349 F. Supp. 1078 (E.D. Wis. 1972), \textit{vacated on other grounds} by 414 U.S. 473 (1973).
\(^{51}\)\textit{Id.} at 1097.
\(^{52}\)\textit{Id.} at 1098.
\(^{53}\)\textit{Id.} at 1098-99.
\(^{54}\)\textit{Id.} at 1099.
\(^{56}\)\textit{Id.} at 733.
recognizing that insanity acquittees face the same loss of personal liberty as civil committees and have the same need for counsel to safeguard their interests.\textsuperscript{57}

Other courts have recognized the unique role of counsel in the civil commitment arena by preventing a mentally ill person from discharging counsel without a determination of the person's understanding of the ramifications of his decision to proceed pro se.\textsuperscript{58} The court announced that before waiving right to counsel, a determination of the respondent's understanding of the ramifications of his decision to proceed is necessary to avoid reversible error.\textsuperscript{59} The standard for granting a waiver of counsel in the civil commitment hearing should be exceedingly high.

At the civil commitment hearing, a mentally ill person facing forced hospitalization has a significant number of decisions to make, including converting his status to a voluntary patient,\textsuperscript{60} requesting a postponement,\textsuperscript{61} or proceeding to a hearing. At the hearing, the right to counsel is a due process right\textsuperscript{62} because commitment involves a substantial curtailment of liberty and, thus, requires due process protection.\textsuperscript{63} The right to counsel may be waived if the waiver is knowing, intelligent, and voluntary.\textsuperscript{64} Courts are skeptical about permitting mentally ill persons facing involuntary hospitalization to waive their right to counsel, believing it is inherently contradictory to find a respondent severely mentally ill, yet able to knowingly and intelligently waive his right to counsel.\textsuperscript{65} Courts require warnings, explanations, inquiries, and attention directed at a mentally ill person's understanding, knowledge, or competence to waive counsel and elect to represent himself.\textsuperscript{66} At an involuntary commitment hearing, where one of the judge's central determinations is the competence of the respondent, the court must determine the ability to make a knowing and intelligent waiver of the right to counsel.\textsuperscript{67} In order for a mentally ill person to discharge counsel at the start of the hearing on a petition for involuntary commitment, the court is required to determine such person's understanding of

\textsuperscript{57}Id. The court relied on the due process clause and the equal protection clause to mandate appointment of counsel for indigent insanity acquittees. Id.
\textsuperscript{59}Id. at 287. (requiring a court to assess one's mental ability or intelligence or understanding of the purpose of counsel).
\textsuperscript{60}MD. CODE ANN., HEALTH-GEN 1 § 10-609 (2000). Voluntary admission criteria include requirements that an individual have a mental disorder, is susceptible to care, understands the nature of request for admission, is able to give continuous assent to retention, and is able to ask for release. Id. § 10-609(c)(1)-(5).
\textsuperscript{61}Postponement may be granted for good cause or by agreement of the parties for seven days. MD. REGS. CODE tit. 10, § 21.01.08(A)(2) (2001).
\textsuperscript{62}Rashid v. J.B., 410 N.W.2d 530, 532 (N.D. 1987).
\textsuperscript{64}Garaas v. D.S., 263 N.W.2d 114, 120 (N.D. 1978).
\textsuperscript{66}T.Z, 415 N.W.2d at 487.
\textsuperscript{67}Id. at 488.
the ramifications of his decision to proceed pro se.\textsuperscript{68} The court must make an inquiry to assess mental ability, intelligence, or understanding of the purpose of counsel in order for such waiver of counsel to be valid.\textsuperscript{69} Because involuntary civil commitment to a mental institution is “a massive curtailment of liberty”\textsuperscript{70} and is recognized as a more intrusive exercise of state power than criminal incarceration due to the indefinite confinement possibility,\textsuperscript{71} waiver of counsel should be cautiously exercised.

It might be suggested that if a mentally ill person’s opinion regarding forced hospitalization is unclear or unobtainable, the attorney should seek guidance from a substitute decision maker. For example, the mentally ill person’s family or close friends could speak on his behalf to advise the attorney on whether or not to oppose the involuntary hospitalization. Several problems arise in turning to substitute decision making judgment. Family and friends may disagree as to what is the best interest of the person. Additionally, it may be difficult to establish what decision the patient would make if he were competent to do so.\textsuperscript{72} There is tension when a substitute decision maker enters the fray in terms of understanding the patient’s best interest and view toward forced hospitalization. Family and friends may in good faith disagree as to what the patient would want if competent to speak. While a review of medical decision-making, living will statutes,\textsuperscript{73} and guardianship statutes may have suggestions for the person to turn to for specific decisions, there remains the question of what the mentally ill person’s view is on the decision of psychiatric hospitalization. The United States Supreme Court recognized in the important decision on the right to die that there is no automatic assurance that the view of close family members will necessarily be the same as the patient’s would have been.\textsuperscript{74} Consequently, the important and significant decision of forced psychiatric treatment should be viewed with great respect and caution. Unless the mentally ill person knowingly and intelligently accepts the inpatient psychiatric hospitalization, in all other situations counsel for the patient should zealously oppose such course of action and demand clear and

\textsuperscript{68}In re Tiffin, 646 N.E.2d 285, 287 (Ill. App. Ct. 1995) (remarking that without such a finding, the appellate court would find reversible error).
\textsuperscript{69}Id. (reversing order of commitment due to court’s failure to inquire into respondent’s knowledge of the consequences of waiving his right to counsel).
\textsuperscript{71}Honor v. Yamuchi, 820 S.W.2d 267, 269 (1991). See also Heryford v. Parker, 396 F.2d 393, 396 (1968) (stating that where the state undertakes to act in parens patriae for juveniles and mentally deficient persons, it has the inescapable duty to vouchsafe due process).
\textsuperscript{72}See In Re Estate of Longeway, 549 N.E.2d 292, 299 (Ill. 1989).
\textsuperscript{74}Cruzan v. Director, Missouri Department of Health, 461 U.S. 261, 286 (1990) (relying on the wishes of the patient and not the decision of the close family members as to the desire to have life-sustaining treatment withdrawn).
convincing evidence at the hearing that forced hospitalization is necessary and appropriate.

Several years later, the Supreme Court extended its analysis of the social stigma in *Addington v. Texas*\(^7\) The United States Supreme Court, although permitting a parent to make the decision to commit his child to a psychiatric hospital, does recognize that the child has a substantial liberty interest in not being confined unnecessarily and that commitment sometimes produces adverse social consequences for the child.\(^7\) These opinions again bolster the notion that advocacy for discharge from psychiatric confinement is appropriate and just.

The decision making process for a client under a disability is complicated but clear. It is complicated in that the attorney must ascertain the client's wishes toward psychiatric hospitalization. Even after a good faith effort is made to determine the client's position, occasionally the client's position remains unclear or is not stated. The attorney at the civil commitment hearing, however, has no time for delay or indecision and must act quickly, advocating for discharge. In some situations, the attorney representing a child in a juvenile delinquency proceeding may be tempted to ignore the client's decision and substitute his own judgment. Scholars, however, have clearly articulated the belief that neither the lawyer nor state officials may substitute their will for that of the child.\(^7\) Thus, the attorney should follow the wishes of his client at the civil commitment hearing. When those wishes are unobtainable, the attorney should oppose the hospital request for involuntary confinement and maintain the integrity of the adversarial process. The similarities between the criminal defendant and civil commitment respondent are clear. For example, in both instances one's freedom is at stake. Therefore, the role of counsel should first and foremost be to obtain freedom and zealously advocate against the loss of liberty. A court correctly noted that "[w]hen a defendant engages a lawyer or has one assigned to him he has but one simple and understandable object; he wants to be free."\(^7\) This view should permeate every phase of the lawyer's role in the civil commitment arena.

IV. EFFECTIVE ASSISTANCE OF COUNSEL

The effective assistance of counsel for a mentally ill person confronting involuntary confinement requires court guidance. The Supreme Court recognized in *Strickland v. Washington* that the right to counsel includes the right

\(^7\)441 U.S. 418, 426 (1979) This case held that the government in a civil commitment hearing is constitutionally required to demonstrate by clear and convincing evidence that the individual is mentally ill and dangerous. Id. at 433.


to effective assistance of counsel. The Court explained that the Sixth Amendment right to counsel is the right to effective assistance of counsel, and "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." 80

V. THE ROLE OF COUNSEL

The attorney representing a mentally ill person at the commitment hearing has a grave responsibility. Often the attorney is the only voice speaking on behalf of the disabled person, especially in seeking discharge from confinement in the hospital. Compounding the task, the attorney typically enters the realm of representation the morning of the scheduled civil commitment hearing often with inadequate preparation time to obtain a full and complete understanding of the client's views toward civil commitment into the psychiatric hospital. Furthermore, the testimony at the civil commitment hearing is normally provided by a hospital psychiatrist who has been treating the person since arrival at the hospital and personally examined him within forty-eight hours of the hearing. 81

The hearing relies heavily on the testimony of the hospital psychiatrist. 82 Rarely is an independent psychiatrist offered to counter the hospital psychiatrist's opinion that the patient needs inpatient care or treatment and presents a danger to the life or safety of the individual or others. 83 Consequently, the legal representation by an attorney is one of the most significant rights a mentally ill person is afforded at a civil commitment hearing. The attorney's role is to challenge the basis of the application for involuntary admission 84 and elicit facts and opinions challenging the need for hospitalization. In addition, the attorney should advocate that a less restrictive form of intervention is consistent with the welfare and safety of the individual. 85

The role of counsel in representing persons with mental illness at involuntary civil commitment hearings is viewed in one of two diverse ways. At one end of the spectrum is the traditional adversarial role of counsel. In the adversarial role, the commitment hearing is viewed in the same light as a criminal trial, as is seen in the Lessard decision. This is true, regardless of whether the attorney believes the mentally ill person would benefit from forced hospitalization or whether the

80 Id. at 686 (holding that the proper test is whether a reasonable probability exists that but for counsel's errors the result of the proceeding would have been different). See also In re Hutchinson, 454 A.2d 1008, 1011 (Pa. 1982) (finding that when reviewing claims of ineffective assistance of counsel, the court must examine the record of the proceedings to ascertain whether counsel's actions had a reasonable basis designed to effectuate his client's interest).
82 See id.
83 See id. § 21.01.09F.
84 See id. § 21.01.03. The application seeking involuntary admission can be obtained by any individual with a legitimate interest in the welfare of the individual. Id. § 21.01.03A(1).
85 Id. § 21.01.09F(5).
mentally ill person would improve more quickly if hospitalized against his will for a period of time. The attorney's role is to represent his client's expressed wishes.

At the other extreme, legal representation may be viewed as a guardian role, in which the attorney determines what is in the mentally ill person's best interest and seeks such an outcome. For example, if it is in the person's best interest to be treated as an inpatient of a psychiatric hospital, the guardian would articulate this position to the administrative law judge who would then determine whether or not to confine the person as an involuntary patient in the hospital. The guardian role severely undermines the nature of the civil commitment process, which is designed as adversarial. Maintaining the adversarial climate of the hearing is vital to learning the truth and ensuring that the administrative law judge receives all relevant information, both pros and cons regarding the need for involuntary confinement, and to protect against improper loss of liberty of the mentally ill person.

The role of counsel at the civil commitment hearing is further complicated in situations in which the mentally ill person is either silent or incapable of expressing his wishes regarding hospitalization. In cases where the client is competent to express his or her wishes to counsel, the attorney can take on the traditional adversary role with more ease. However, when the client is silent or incompetent to express his views, attorneys turn to the Model Rules of Professional Conduct for guidance.

To better understand the client-lawyer relationship in the context of the civil commitment hearing for a mentally ill person, Rule 1.14 (Client under a Disability) states as follows:

(a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

The reading of sections (a) and (b) above raises more questions than answers in understanding the role of counsel in civil commitment hearings. Rule 1.14 requires the lawyer to maintain "as far as reasonably possible . . . a normal client-
lawyer relationship with the client." The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client ... suffers from a mental disorder or disability, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. Rule 1.2(a) of the Model Rules of Professional Conduct defines the scope of a normal client-lawyer relationship as one in which "[a] lawyer shall abide by a client's decisions concerning the objectives of representation," and thus generally favors client autonomy.

In situations where an attorney has a reasonable and objective basis to doubt a client's competency to make a decision and the lawyer's actions appear contrary to the client's stated decision, the lawyer who acts in good faith and contrary to the client's decision must demonstrate, at a minimum, an objective and reasonable basis for believing that the client cannot act in his own interest. The lawyer's duty to exercise "independent professional judgment" is particularly compelling when the client is disabled. The position an attorney advances at the civil commitment hearing, that of seeking discharge from confinement, should be respected and encouraged, especially in such a complicated and stressful setting. Courts have recognized that in situations "where the client is thought to be incompetent an especially heavy and delicate responsibility falls upon his lawyer." The lawyer who represents a client under a disability may need to make decisions for his client. However, the court in Aumann noted that the lawyer should act with care to "safeguard and advance the interests of his client." The zealous opposition of involuntary and forced psychiatric hospitalization and possible subsequent forced medication does advance the interests of his client. Such persons avoid loss of liberty and the stigma of forced involuntary hospitalization, as well as the ability to participate in a meaningful way in their course of psychiatric treatment. This is what a zealous lawyer promotes and protects when the voice in opposition to forced hospitalization is clearly heard.

89 Id.
90 Id. at cmt. 1.
91 MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2001).
92 Red Dog v. State, 625 A.2d 245, 247 (Del. 1993) (noting that a lawyer may be under a duty to appeal for a capital murder defendant if the defendant is incapable of making intelligent decisions).
94 State v. Aumann, 265 N.W.2d 316, 318 (Iowa 1978) (holding that an attorney may pursue an appeal without his incompetent client's permission).
95 Id.
96 Id.
97 See MD. CODE ANN., MENTAL HEALTH § 10-708(b) (Supp. 2001). A clinical review panel can approve involuntary medication for a mentally-ill patient involuntarily committed to a psychiatric hospital.
99 Id.
In a legal dispute between divorced parents as to where their child, a mentally-retarded adult, was to reside, the New Jersey Supreme Court looked at the standard for determining the capacity of an incompetent person to decide where to live and the role of appointed counsel in guardianship proceedings. The court noted that the role of counsel for the disabled woman "is not to determine whether the client is competent to make a decision, but to advocate the decision that the client makes." The court, however, warned that the role of counsel does not extend to advocating decisions that are patently absurd or that pose undue risk for the health, safety, and welfare of the client.

When a mentally ill person is confronted with involuntary civil commitment to a psychiatric hospital, an attorney seeking release may be faced with an uncertain or unclear housing or treatment program. For example, a mentally ill person may not have an outpatient treatment plan in place or may refuse all outpatient treatment plans. Furthermore, the mentally ill client in some situations may not have a suitable housing plan to present at the hearing. As a result, an attorney who seeks discharge for a silent client or one who is unable to advise his lawyer of his view may be seeking discharge from the hospital to a non-existent housing arrangement and a non-existent outpatient treatment plan. The question that confronts the attorney at this stage is whether advocating for release puts the mentally ill person at undue risk of harm.

One view as to the action an attorney might undertake, as provided in Rule 1.14(b), is to allow the lawyer "to take . . . protective action with respect to the client." A suggestion of seeking appointment of a legal guardian to provide substitute decision making for the client is, however, likely to result in the client being involuntarily committed. Assuming that it is in the client's best interest to be involuntarily committed to a psychiatric hospital for purposes of treatment, does this end the discussion? One must never lose sight of the significant loss of liberty and freedom that occur during involuntary commitment to a psychiatric hospital. The attorney in the adversarial model of the civil commitment hearing must maintain the traditional role of counsel in zealously advocating for discharge of the silent or incompetent client. The integrity of the civil commitment hearing, adversarial in nature, demands nothing less. The appointment of a legal guardian is practically impossible because civil commitment hearings are usually held within ten days of arrival in the hospital, and the attorney becomes involved usually the day before or the day of the civil commitment hearing. Therefore, in practical terms, there is insufficient time to appoint a legal guardian before the hearing.

The active and attentive attorney who seeks discharge at the hearing, as opposed to passively concurring to the involuntary hospitalization, benefits all.

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100 In re MR, 638 A.2d 1274, 1276 (N.J. 1994).
101 Id. at 1284.
102 Id at 1284-85.
103 See id.
individuals involved in the civil commitment process. A psychiatrist or psychologist is required to demonstrate that there is a need for inpatient hospitalization as a result of dangerous behavior.\textsuperscript{106} The administrative law judge must be convinced by clear and convincing evidence that "[t]here is no available, less restrictive form of intervention that is consistent with the welfare and safety of the individual."\textsuperscript{107} Without zealous advocacy on the part of the lawyer, it is unlikely that a clear and full picture of the mentally ill person's psychiatric treatment and housing needs will be demonstrated. The risk is that zealous advocacy may lead to discharge of mentally ill persons into the community. The safety net, of course, is that an administrative law judge will make the decision only after hearing evidence in an adversarial hearing in which a finding is made that the patient does not meet the criteria for inpatient hospitalization.\textsuperscript{108} The New Jersey case of \textit{In re M.R.} cautioned against advocacy if it would pose an undue risk of harm to the client.\textsuperscript{109} However, the risk of harm to the client cannot be viewed in a vacuum without also recognizing the harm of involuntarily commitment to a psychiatric hospital. The stigma attached to a civil commitment on a person's medical record might adversely affect employment, as well as other aspects of a person's life. For example, licensing for lawyers, teacher certification, as well as relationships in the community are adversely affected by the label of having been involuntarily committed.\textsuperscript{110} Rule 1.14 of the Model Rules of Professional Conduct should offer clear guidance that in the context of the representation of the mentally ill in a civil commitment hearing, the lawyer shall maintain a normal client-lawyer relationship. The responsibility of the lawyer, unless directed otherwise by one's client, should be to oppose civil commitment and seek release. This view would maintain the integrity of the lawyer's advocacy role as well as the adversarial nature of the civil commitment hearing. As long as civil commitment is involuntary, involving loss of freedom and liberty, the lawyer's role should be to seek discharge for all silent and incompetent clients. The right to counsel "prior to involuntary commitment is basic to the accuracy of the truth finding function."\textsuperscript{111} The "loss of liberty and social stigmatization are substantial and parallel to those at risk in the criminal context."\textsuperscript{112}

\section{VI. THE ABA MODEL RULES OF PROFESSIONAL CONDUCT}

An intriguing question is what an attorney should do when a client's expressed wishes are incoherent, vague, or confused. For example, during a client interview, an attorney might ask whether the client wishes to remain in the

\textsuperscript{106}Id. § 21.01.09E-F.
\textsuperscript{107}Id. § 21.01.09F(5).
\textsuperscript{108}Id. § 21.01.09F.
hospital. The client may express an interest in leaving but still be unsure because of uncertain housing arrangements. The subject of an involuntary commitment proceeding should be afforded the opportunity to have "the guiding hand of legal counsel at every step of the proceedings."[^113] Inpatient decisions regarding release or retention, consequently, need to be made.

Another line of inquiry between lawyer and client might include discussions of allegations of dangerous behavior. The attorney might inquire about claims that the client made a recent overt attempt to harm himself, and the client might deny or minimize such danger. As part of the lawyer's investigation, he may be persuaded that the risk of harm to the client is great and discharge from the hospital at this time might place the client at risk. If the client's expressed wish is to be discharged, should the lawyer act in accordance with his client's expressed wishes (advocacy model) and pursue the request to be discharged? In the alternative, should the attorney operate in what the attorney believes is in the client's best interest (best interest model) and possibly reject the request to be discharged? Or, should the lawyer do what the lawyer believes the client would desire if the client were capable of competently instructing the attorney (substituted judgment model)? In understanding whose judgment to follow, it depends on whether the lawyer's proper role is that of the advocacy model, the best interest model, or the substitute judgment model. Scholarly guidance yields no consensus about how a lawyer should represent a client whose competency is questionable.

Courts have determined that the attorney in an involuntary commitment hearing should act as an advocate or "adversary counsel."[^114] For a lawyer to remain passive in the face of procedural improprieties is "intolerable abuse of the duty to ensure stringent protection of constitutional and statutory rights."[^115] An attorney representing a mentally ill person at a hearing may determine that significant procedural violations exist as they relate to the individual taken into confinement,[^116] and the decision of whether to raise the issue may be dictated by how the attorney sees his role. The attorney who sees his role under the best interest model and believes confinement is in the best interest of the person may forego raising a significant procedural violation affecting due process, rationalizing that to raise such a matter may result in the administrative law judge ordering the release of the individual from the inpatient facility.[^117] On the other hand, if the attorney adopts the advocacy model, the procedural due process violation is zealously advocated to the judge, and release is sought, regardless of whether release is in the person's best interest. The view that a lawyer's role is to

[^113]: Honor v. Yamuchi, 820 S.W.2d 267, 270 (Ark. 1991) (citing Heryford v. Parker, 396 F.2d 393 (10th Cir. 1968)).
[^116]: Md. REGS. CODE tit. 10, § 21.01.09G(3).
argue against commitment regardless of the petitioner's need of treatment is the only true way to insure that the truth arises from the testimony and the administrative law judge hears various perspectives and ultimately rules in an enlightened manner.

One must never lose sight of the fact that involuntary civil commitment deprives a citizen of freedom and liberty. The right to counsel is essential to protecting a citizen's due process rights. In the civil commitment process, attorneys are often confused about their role, wavering between the traditional advocate role and the inclination to act as a guardian. The role of counsel in the criminal justice arena is worthy of review and comparison, recognizing that the attorney's role in a criminal representation is to provide a full defense. This is true even for a client whom the attorney knows to be guilty. Nevertheless, in the civil commitment context, some attorneys wince at the notion of opposing confinement for clients who are silent or incapable of expressing their views about hospitalization.

One scholar offered the suggestion that, in comparison with criminal defense, the ethical guidelines governing situations where an attorney is representing a mentally disabled client are "vague" and "contradictory." In both the criminal justice and civil commitment system, a person is threatened with loss of liberty, and there is a possibility for abuse by the state, making the role of the attorney particularly important in protecting the citizen's rights. Many attorneys substitute their own judgment (substituted judgment role) for that of their client by "deciding what is best for the client and acting accordingly." Again, the attorney who seeks release in all situations, unless competently directed by one's client to do otherwise, will insure that the adversarial system of civil commitment will be protected and the client will not be hospitalized when neither inappropriate nor when a less restrictive alternative to hospitalization is appropriate.

When the attorney zealously opposes involuntary hospitalization, "each party at the hearing presents its position, and a neutral fact finder synthesizes the

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118 See Vitek v. Jones, 445 U.S. 480 (1980) (involving transfer of a state prisoner to a psychiatric institution in which the court required that prior to transfer an adversarial hearing was required, including right to counsel).
120 Id. at 1097-98.
122 Id.
123 Natalie Wolf, The Ethical Dilemmas Faced by Attorneys Representing the Mentally Ill in Civil Commitment Proceedings, 6 GEO. J. LEGAL ETHICS 163, 163 (1992). The author notes that the Model Rules require an attorney to maintain as normal a relationship as possible, yet authorizes the attorney to act as a de facto guardian, if necessary, and require the attorney to make decisions on behalf of his client and in his client's best interest when his client is incompetent to make judgments for himself or herself because of mental disability. Id. at 170-71.
124 Id. at 169.
125 Id. at 172.
conflicting information and determines the truth." The attorney zealously advocating at the hearing through cross-examination of the state's witness will paint a full picture of the client's needs and create "the greatest legal engine ever invented for the discovery of the truth." Furthermore, attorneys who adopt the advocate role serve as a check on a system characterized by rushed hearings and psychiatric opinions seeking commitment that are frequently based solely on exaggerated behavior contained in initial commitment petitions. The advocate role is preferable to the guardian role because studies have shown that commitment is more likely in the absence of adversary counsel. The over commitment of mentally ill patients is serious because many are committed involuntarily when they do not need treatment in an inpatient hospital setting. Furthermore, the criteria used to determine the need for inpatient psychiatric hospitalization, specifically the clear and imminent danger to self or others criteria, is extremely difficult to predict, resulting in inaccurate predictions of dangerousness with a considerable margin of error. Decreasing unnecessary commitments is also important in promoting the fundamental right not to be deprived of liberty absent a compelling reason.

To prevent commitment rates from increasing and to insure that only those mentally ill and dangerous persons who need treatment and are unable to appropriately receive it on an outpatient basis obtain appropriate treatment, the attorney must recognize his role as a zealous advocate opposing involuntary psychiatric hospitalization. The attorney's responsibility is to offer alternatives to inpatient hospitalization, vigorously cross-examine the state's expert witnesses, raise significant procedural violations, and demand clear and convincing evidence that the patient poses imminent danger to himself or others. To protect the liberty interest so valued by all citizens, the attorney must advocate discharge from inpatient hospitalization and challenge all forced psychiatric treatment. The result will be improved outpatient treatment programs, more appropriate housing alternatives for the mentally ill, and inpatient treatment only when no other less restrictive form of intervention is appropriate.

The quality of counsel in civil commitment hearings will be highest when attorneys see their role as zealous advocates opposing involuntary civil

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126 Id. at 176. See also Virginia Aldidge Hiday, The Attorney's Role in Involuntary Civil Commitment, 60 N.C. L. Rev. 1027 (1982).
130 Wolf, supra note 123, at 163.
131 See Hiday, supra note 129, at 560.
132 See Note, supra note 121, at 1553-56.
commitment. "The quality of counsel remains the single most important factor in the disposition of cases in involuntary civil commitment systems." Rule 1.14 of the ABA Model Rules should be modified in the context of the civil commitment hearing. Current Rule 1.14(a) should delete the following underlined portion and require the attorney to oppose inpatient hospitalization in the civil commitment hearing.

Rule 1.14 Client Under Disability

(a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

VII. CLIENT COMPETENCY

The attorney of a mentally ill person facing involuntary civil commitment initially should determine if his client is in favor of or opposed to inpatient psychiatric hospitalization. After this position is ascertained, the attorney should pursue the client's stated goal. However, often the mentally ill person is diagnosed with mental disorders such as dementia, and as a result has developed multiple cognitive deficits. The deficits are manifested by memory impairment, such as an impaired ability to learn new information or to recall previously learned information. Other patients may be diagnosed with a paranoid type of schizophrenia, characterized by delusions and frequent auditory hallucinations. In such cases, the attorney may be unsure of his client's competency to make informed decisions regarding the legal representation. If so, where does the attorney turn for guidance to determine how to understand competency and how to communicate to a person incapable of fully understanding the extent of the legal proceeding of civil commitment?

The guidance provided in the Model Rules of Professional Conduct for representing the client under a disability is less than helpful in the civil commitment setting. Under Rule 1.14(b), a lawyer may seek the appointment of a guardian or take other protective action only when the lawyer reasonably

138 Id.
139 Id.
believes that the client cannot adequately act in the client's own interest.\[^{140}\] Even if an attorney in a civil commitment hearing considers seeking an appointment of a legal guardian, several practical problems arise. First, the time element is of grave concern and significance. Often hearings are held within ten days of the patient arriving in the hospital,\[^{141}\] and the attorney often meets his client for the first time the morning of the hearing. The appointment of a guardian involves a court proceeding, though there is usually insufficient time to delay the civil commitment hearing in order for the guardianship hearing to occur. In the context of representing the elderly who are in questionable competence, a legal scholar accurately points out that "there is a general presumption in practice, and increasingly in theory, in favor of representing a questionably competent client without going through the elaborate procedures required for a formal appointment of a guardian or other substitute decision maker."\[^{142}\] Another choice, although unreasonable, would be for the attorney to refuse to represent the silent or incompetent client. However, for the attorney to decline the legal representation of the client facing loss of liberty due to forced hospitalization will leave these "vulnerable individuals unrepresented."\[^{143}\]

Commentary to Model Rule 1.14 acknowledges that "the fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect."\[^{144}\] The commentary acknowledge that if the person has no guardian or legal representative, "the lawyer often must act as de facto guardian."\[^{145}\] How does the attorney proceed in the civil commitment arena in advocating for or against hospitalization for the silent or incompetent client? Drawing upon the Model Rules of Professional Conduct, "the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client."\[^{146}\] Attorneys who represent the mentally ill client at the civil commitment hearing, unless directed to the contrary by the competent client, should zealously advocate for discharge from the hospital in all situations. The reasonable course of action at the adversarial hearing is for the administrative law judge to determine whether to involuntarily confine the mentally ill person to a psychiatric hospital. Anything less than zealous advocacy seeking release would not be in the patient's best interest. If after hearing all the testimony and evidence, the judge is persuaded by clear and convincing evidence that all five criteria for hospitalization have been met the patient will be involuntarily hospitalized.\[^{147}\] For the attorney representing the patient to take any position

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\[^{143}\]Id.
\[^{145}\]Id.; see also Paul R. Tremblay, On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client, 1987 Utah L. Rev. 515.
\[^{147}\]Md. Regs. Code tit. 10, § 21.01.09F. (2001). Criteria for admission include "(1) [t]he individual has a mental disorder; (2) [t]he individual needs inpatient care or treatment; (3) [t]he individual
other than advocating release, along with forcing the opposing side to prove the need for hospitalization, is contrary to the best interest of the patient and conflicts with the role of the attorney in seeking freedom and avoiding unwanted and unnecessary hospitalization. The following data was collected from question eleven of The Role of Attorney at Involuntary Admission Hearing Survey. The question stated: after interviewing your client in preparation for the IVA hearing, if you determine that your client is unable to competently express his/her wishes regarding remaining in the hospital or being released from the hospital at the IVA hearing, do you proceed as if your client:

(a) desires to remain in the hospital.
(b) desires to be immediately discharged from the hospital.
(c) has no opinion.

One hundred percent of the responses was for the attorney to take the position that his client desires to be immediately discharged from the hospital. This powerful data supports the notion that seeking discharge and demanding proof of the need for hospitalization is not only worthy but also in the best interest of the mentally ill client.

VIII. CONCLUSION

The right to counsel is provided in each state for a person facing involuntary civil commitment; however, lawyers have difficulty defining the proper advocacy function. State statutes appointing counsel in civil commitment hearings vary in explanation of the lawyer's role, several simply stating the right to "court-appointed counsel," "to be represented by an attorney," or "to be represented by counsel." However, other state statutes encourage zealous advocacy, as seen in the instruction to be a vigorous advocate on behalf of the person, or to "be a vigorous advocate on behalf of his client." Some state statutes, as in Virginia, explain "the role of the attorney shall be to represent the wishes of his client, to the extent possible," mirroring the client under a

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148See generally Stone, supra note 19 (providing an extensive discussion of competency to provide consent and other topics related to civil commitment).
149Id. note 8, at question 11.
150Id. See infra Appendix 2, Graph #11. See also Bruce Winick, Competency to Consent to Treatment: The Distinction Between Assent and Objection, 28 Hous. L. Rev. 15 (1991) (containing an excellent discussion on competency to consent to treatment).
151MICHAEL PERLIN, LAW & MENTAL DISABILITY 69 (1994).
152Id.
156MN. STAT. ANN. § 253B.07(2c)(4) (West 1998).
disability rule outlined in the Model Rules of Professional Conduct. One state statute, however, clearly declares that the attorney representing a respondent shall not serve as a guardian ad litem and shall oppose involuntary care and treatment unless the respondent directs the attorney not to oppose it. The enlightened Tennessee state legislature recognizes the importance of the attorney in opposing involuntary hospitalization, thus ensuring only those most in need of forced hospitalization receive such treatment.

Appendix 1

ROLE OF ATTORNEY AT INVOLUNTARY ADMISSION (IVA) HEARING SURVEY

Professor Donald H. Stone
University of Baltimore School of Law
2000

1. Age: ________  2. Sex: ________

3. Number of years in practice: ________

4. Number of years representing clients at IVA hearings: ________

5. Are you: (check one)  ____ employed full-time with the Office of the Public Defender.
   _____ employed part-time with the Office of the Public Defender.
   _____ in private practice.

6. The IVA hearings in which you represent clients are primarily at: (check one)
   _____ state psychiatric hospitals.
   _____ private psychiatric hospitals.

7. In the last 12 months, approximately how many clients have you represented at IVA hearings? ________

8. During the client interview, in preparation for the IVA hearing, in what percentage of these cases do you discuss with your client:
   a. postponement _____ %
   b. voluntary admission _____ %

9. As you interview your client in preparation for the IVA hearing, if you determine that your client is unable to comprehend the nature of the hearing, in what percentage of these cases do you discuss with the hospital presenter, immediately prior to the IVA hearing, the option of postponement? _____ %

   Explain: ________________________________________________________________
   ________________________________________________________________
   ________________________________________________________________
   ________________________________________________________________
10. As you interview your client in preparation for the IVA hearing, if you determine that your client is unable or unwilling to communicate with you, in what percentage of these cases do you discuss with the hospital presenter, immediately prior to the IVA hearing, the option of postponement?  ______%  

Explain:  ______________________________________________________  

11. After interviewing your client in preparation for the IVA hearing, if you determine your client is unable tocompetently express his/her wishes regarding remaining in the hospital or being released from the hospital at the IVA hearing, do you proceed as if your client: (please check one):  

_____  a. desires to remain in the hospital.  

_____  b. desires to be immediately discharged from the hospital.  

_____  c. has no opinion.  

12. If you checked 11.c. above, please respond to the following question: At the IVA hearing, do you see your role at the hearing as: (check one)  

_____  a. the client’s attorney.  

_____  b. the guardian ad litem.  

_____  c. other. (please explain)  ____________________________________________  

13. If you are unable to determine your client’s view regarding his/her desires and wishes at the IVA hearing, and there is clear and convincing evidence presented at the IVA hearing that your client presents a danger to the life or safety of himself/herself or others if released at the hearing, do you: (check one)  

_____  a. advocate at the hearing for your client’s release from the hospital.  

_____  b. advocate at the hearing that your client should be involuntarily admitted to the hospital.  

_____  c. take a neutral position.  

14. If you are unable to determine your client’s view regarding his/her desires and wishes at the IVA hearing, and you believe that your client presents a high degree of danger to the life or safety of himself/herself or others if released at the hearing, do you: (check one)  

_____  a. advocate at the hearing for your client’s release from the hospital.  

_____  b. advocate at the hearing that your client should be involuntarily admitted to the hospital.  

_____  c. take a neutral position.
15. If you are unable to determine your client’s view regarding his/her desires and wishes at the IVA hearing, and you believe that your client presents a high degree of danger to the life or safety of himself/herself or others if released at the hearing, and you discover a significant procedural violation that should result in the client being released at the hearing, do you: (check one)

______  a. raise it to the administrative law judge (ALJ) and advocate for release.

______  b. raise it to the ALJ and not advocate for release.

______  c. not raise it at the IVA hearing.

16. At the IVA hearing when evidence heard by the ALJ is clear and convincing that your client meets all five criteria for retention and your client desires release from the hospital, do you: (check one)

______  a. make a closing argument seeking release.

______  b. submit on the record without making a closing argument.

______  c. make a closing argument that it would be in your client’s best interest to be retained.

17. Should the role of the attorney at an IVA hearing be defined by statute to include the role and responsibility of the attorney? If so, please explain how you would define the role:

_____________________________________________________________________

_____________________________________________________________________

18. In representing a juvenile at an IVA hearing, do you see your role as being different than when you represent an adult if the juvenile client is:

   a. under age 7: Yes ______ No ______

   b. between age 7 – age 14: Yes ______ No ______

   c. over age 14 – age 18: Yes ______ No ______

19. On an average hospital hearing docket, what is the percentage of clients scheduled for an IVA hearing:

   a. that sign a voluntary admission? ______%  

   b. that have their hearing postponed? ______%  

   c. that are released prior to hearing? ______%  

   d. that have a full hearing on the merits? ______%
20. Which procedural violations most often results in obtaining client’s release: (please list the top three)

1. ________________________________ 

2. ________________________________ 

3. ________________________________ 

21. a. Average length of IVA hearing: _______ minutes 

b. Average length of time you prepare for IVA hearing: _______ minutes 

c. Average length of time you spend interviewing your client in preparation for the IVA hearing: _______ minutes 

d. Average length of time you spend reviewing medical records: _______ minutes 

e. Average length of time you spend interviewing treating psychiatrist: _______ minutes 

f. Average length of time you spend interviewing other witnesses: _______ minutes 

g. Other activity and/or preparation for IVA hearing: _______ minutes 

Explain: ____________________________________________________________

_________________________________________________________________

_________________________________________________________________

22. Suggestions for changes in IVA hearing: ________________________________ 

______________________________________________________________

______________________________________________________________

______________________________________________________________

23. Suggestions for changes in IVA laws: ________________________________ 

______________________________________________________________

______________________________________________________________

______________________________________________________________
24. Are you in favor of out-patient commitment in which a patient would be ordered to comply with medication and treatment? Yes ______ No ______

Explain: ____________________________________________________________

___________________________________________________________

___________________________________________________________

I understand that this questionnaire that I am completing for Donald H. Stone will be used as data for his research and scholarly writing. I give Mr. Stone permission to use direct quotations from this questionnaire at his discretion. I understand that I will retain anonymity in the writing of the article.

Date: ____________________________ Name (please print)

Telephone: ____________________________ Signature

Address: ____________________________
Question 2

Male | Female
--- | ---
3 | 7

Number of Responses

Sex
Questions 3 & 4

Graph #3/4

Average Number of Years

- Years in practice: 20.65
- Rep. Clients at IVA: 8.5
Graph #5

Question 5

<table>
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<th>Number of Responses</th>
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</tr>
<tr>
<td>Employed FT with OPD</td>
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</tr>
<tr>
<td>Employed PT with OPD</td>
<td>4</td>
</tr>
<tr>
<td>Private Practice</td>
<td>3</td>
</tr>
</tbody>
</table>
Graph #6

Question 6 - Setting of IVA Hearings

- No Response
- State Psychiatric Hospitals
- Private Psychiatric Hospitals
Graph #8

Question 8 - In Preparation for Hearing; Attorney Discussion
Graph #9/10

Questions 9 & 10 - Option of Postponement Discussed

Unable to Comprehend
Unwilling or Unable

Average Percentage
53.5
52.5
52
51.5
51
Graph #11

Question 11- Client Unable to Express Wishes, How to Proceed
Graph #12

Question 12

Number of Responses

Client's Attorney  Guardian at Litem  Other
Graph #13

Question 13 - Unable to Determine Client's View and Evidence

Client Dangerous

<table>
<thead>
<tr>
<th>Client Release</th>
<th>Involun. Admitted</th>
<th>Neutral Position</th>
</tr>
</thead>
<tbody>
<tr>
<td>9</td>
<td>0</td>
<td>1</td>
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</tbody>
</table>
Graph #14

Question 14 - Unable to Determine Client's View and Attorney Believes Client Dangerous

Number of Responses

- Client's Release: 8
- Invol. Admitted: 0
- Neutral Position: 2
Graph #16

Question 16 - All Criteria Met for Retention, Attorney at Closing
Graph #18A

Question 18A - Representing Juveniles: Different Attorney Role (< age 7)
Question 18B - Representing Juveniles: Different Attorney Role (age 7-14)
Graph #18C

Question 18C - Representing Juveniles: Different Attorney Role (age 14-18)
Graph #19

**Question 19**

<table>
<thead>
<tr>
<th>Average Response in Percentages</th>
<th>Sign a Voluntary</th>
<th>Hearing Postponed</th>
<th>Released Prior IVA</th>
<th>Full Hearing</th>
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<tbody>
<tr>
<td></td>
<td>37</td>
<td>10.7</td>
<td>15.7</td>
<td>24.1</td>
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