



Department of
PUBLIC DEFENSE

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Chief Justice Debra L. Stephens
Washington State Supreme Court
415 12th Avenue SW
Olympia, WA 98501-2314

RE: Response to Proposed General Involuntary Treatment Act Court Order

Dear Chief Justice Stephens,

The King County Department of Public Defense (DPD) has several concerns regarding the Proposed Order that was submitted to this Court on Tuesday, March 31, 2020. While we believe that a number of procedural protections need to be implemented to safeguard the rights of those involved in Involuntary Treatment Act (ITA) courts, DPD does not believe that the Proposed Order effectively addresses those issues and could serve to undermine the rights of vulnerable individuals and the protections that King County Superior Court has put into place for its ITA court.

DPD's concerns regarding the numbered directives included in the Proposed Order are detailed below. We've addressed each numbered paragraph in the Proposed Order.

1. The Proposed Order seeks to turn statutorily imposed requirements into nothing more than a request to hospitals to make "best effort[s]." However, all aspects of the statutory schemes governing civil commitment – including RCW Chapters 71.05 and 71.34 that have not been expressly struck or waived by Governor Jay Inslee through use of his emergency powers – must be complied with. Thus far, Governor Inslee has not struck or waived any part of the statutory scheme. As such, "[a]ll parties to civil commitment proceedings are responsible" for more than "making best efforts to comply with the Involuntary Treatment Act[.]" Proposed Order ¶ 1. All parties are required to comply with all statutory obligations identified in the RCW Chapters 71.05 and 71.34.

DPD requests that this section be changed to reflect the non-negotiable obligations that all parties in civil commitment proceedings are required to comply with the law.

2. The Proposed Order's directive that "[h]ealthcare facilities shall provide for reasonable means and methods of communication between detained and civilly committed parties and their counsel, which may include in person, video, or telephone" is an insufficient directive to the hospitals to ensure that DPD's clients are able to meaningfully consult with their attorneys. Because of the ongoing pandemic, DPD is not meeting with most clients in

person, which makes video visitation incredibly important for our lawyers and clients. Without the ability of a client and attorney to confer via video, the client's right to review documents with their attorneys is deeply undermined. *See* RCW 71.05.360(8)(e). Further, ensuring that attorneys and clients are able to meet through video technology helps the attorney build a relationship with the client so that they may understand the client's goals. Telephonic meetings alone – without the option for video – are insufficient to protect our clients' right to counsel.

Without a directive that hospitals must, unless physically impossible, provide opportunities for attorneys to meet with their clients via video, many hospitals would not invest the time, effort, or resources to ensure that clients are able to have the most meaningful access to their attorneys. DPD has already seen hospitals choose not to implement video visitation despite the ready availability of video conferencing platforms and wireless devices on which conferences could occur. As a result, the substance of any client's right to counsel turns on the coincidence of the hospital in which they are detained. This cannot be an accepted part of an intentional system of laws that affect a deprivation of liberty.

DPD requests that this section be changed to make the use of video for attorney-client communications mandatory unless it is physically impossible to do so.

3. DPD does not object to this section.
4. DPD does not object to this section.
5. The Proposed Order's directive that "[c]ourt proceedings and patient meetings with defense counsel shall be conducted by remote means if reasonably feasible" fails to afford clients and their counsel the ability to determine the best approach to building and presenting their defense. In doing so, it undermines the right to counsel. Even video conferencing will be inadequate for some clients, particularly in the ITA context, where a mental health crisis often impacts an individual's ability to communicate through electronically mediated means. There are times when in-person attorney-client meetings are necessary, and under such circumstances, the importance of a shared location for hearings takes on even greater weight. In this health crisis, it is certain that many attorney-client communications will occur remotely, but mandating that it must be so abridges the right to counsel by infringing on a client and their attorney's ability to determine the best approach to communications.
6. DPD does not object to this section.
7. The Proposed Order purports to create an exemption from "applicable statutory timeframes of hearings" by creating a generalized good cause exemption based on the existence of COVID-19. This is counter to unchanged statutory obligations. The court cannot and should not eviscerate substantive and procedural statutory protections of people facing a loss of liberty and state-imposed psychiatric treatment simply because there is a health crisis. The civil commitment statutory scheme – including its requirement of timely hearings – must be complied with. While courts may grant continuances where there is good cause, a showing of good cause – even one predicated on COVID-19 – must be made

in each individual case. A blanket exception from statutory timeframes from hearings is inappropriate and unlawful.

DPD suggests that this entire section be stricken.

8. DPD does not object to this section.
9. The Proposed Order directs that “[h]ealthcare facilities shall make their best efforts to provide requested records to counsel via remote capabilities for their use in ITA proceedings[.]” Proposed Order ¶ 9. The Proposed Order also limits attorneys to requesting “the minimum records necessary to adequately prepare and present a case.” *Id.* Both prongs of this section are problematic.

First, the Proposed Order does not define “best efforts,” nor does it set a baseline for what is acceptable for document production. The failure to provide a meaningful mandate means that each hospital will approach discovery production in a manner most beneficial to the hospital. Such an approach will frequently not meet the needs of the client seeking to defend themselves against commitment. DPD has already experienced hospitals refusing to electronically produce documents because doing so would take too much time – even though there is no other way for DPD attorneys to obtain the necessary documents to defend their clients. This section should be amended to make the hospital’s obligation to provide electronic version of discovery mandatory, unless it is physically impossible to do so.

Second, the Proposed Order seeks to bar attorneys from requesting records that they may need to provide adequate representation to their client. However, although it directs attorneys to request “only the minimum records necessary,” the Proposed Order fails to identify what constitutes “minimum records” or who will make the determination and, ultimately, undermines an attorney’s obligation to provide a robust and thorough defense for their client. Further, an attorney cannot determine which records are the “minimum ... necessary” without reviewing all the records. Such arbitrary and ambiguous limitations on an attorney’s ability to represent their client should be rejected. This section should be amended by striking the last sentence or replacing it with a sentence that affirms an attorney’s right to request all documents they believe are appropriate for the representation.

10. DPD does not object to this section.
11. DPD does not object to this section.
12. The case law and the statutes are clear. This paragraph should be stricken.
13. DPD does not object to this section.
14. DPD does not object to this section.
15. DPD does not object to this section.

16. DPD does not object to this section.

17. It is unclear what this section of the Proposed Order is meant to accomplish. DPD suggests striking it from the Proposed Order.

While it is certain that ITA courts could use guidance regarding procedure and how to most effectively protect the rights of those involved in proceedings, this Proposed Order – without substantial revisions – should not be implemented.

Thank you for taking the time to consider DPD's concerns regarding the proposed order.

Sincerely,

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Director, Department of Public Defense

La Rond Baker
Special Counsel, Affirmative Litigation and Policy

Cc:

Judge Johanna Bender, King County Superior Court
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Judge Judith Ramseyer, King County Superior Court
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