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New York Article 9 Proceedings: Hospitalization of the Mentally Ill

Jamie A. Rosen

The principal statute governing the treatment of mentally ill patients in New York State is Mental Hygiene Law, Article 9. Psychiatrists, social workers, other hospital staff and administration who are involved in the treatment of psychiatric patients, as well as legal counsel for the hospital, must be familiar with the Mental Hygiene Law and related statutes, regulations and requirements imposed by the leading court cases. Privately retained attorneys for individuals and families in the community, as well as attorneys for skilled nursing facilities or assisted living facilities, should also be familiar. Education in this area of law, which very often overlaps with elder law, and knowledge of the treatment options for potential clients and their loved ones, is essential to an attorney's ability to then advise the client and implement a strategy to achieve the client's goal. This article provides an overview of Mental Hygiene Law Article 9, including hospital admission and retention, treatment over the patient's objection, assisted outpatient treatment, and mental hygiene warrants, as well as a brief discussion of the individuals involved in these proceedings, patients' rights and the role of family members.

Jamie A. Rosen

Admission and Retention

Psychiatric hospitals offer a safe setting for mental health treatment, including observation, diagnosis, therapy and medication management.[1] Article 9 sets forth the legal requirements for voluntary, involuntary and emergency admission to a hospital, as well as retention of patients pursuant to a court order.[2]

An individual may be admitted for psychiatric treatment as a voluntary patient, meaning that he or she has willingly made a written application for admission and is in need of care and treatment.[3] "In need of care and treatment" means "that a person has a mental illness for which in-patient care and treatment in a hospital is appropriate."[4] The phrase "voluntary," however, can be misleading. If a voluntary patient wishes to leave the hospital, he or she must give written notice and cannot simply check him or herself out of the hospital against medical advice. The patient must be released unless the director believes that the patient requires involuntary care and treatment.[5] If such a determination is made, the patient may be retained for no longer than 72 hours from the time of the patient's written notice.[6] Before the expiration of the 72-hour period, the director must release the patient or apply to the Supreme Court in the county where the hospital is located for an order authorizing the involuntary retention of the patient.[7] If the court makes the determination that the patient requires involuntary care and treatment, the court will issue an Order authorizing the patient's involuntary retention for a period of up to 60 days.[8]

New York has civil commitment laws for situations where treatment is appropriate for individuals suffering from a mental illness who refuse to seek treatment voluntarily. Involuntary admission for treatment is a more restrictive form of intervention and has been characterized as a "massive curtailment of liberty."[9] The hospital must demonstrate that the patient suffers from a mental illness "for which care and treatment as a patient in a hospital is essential to such person's welfare and whose judgment is so impaired that he [or she] is unable to understand the need for such care and treatment."[10] Constitutional due process requires that the continued commitment of a patient be based upon a finding that "the person to be committed poses a real and present threat of substantial harm to himself or others."[11] This standard requires a showing that the patient has made threats of or attempts at suicide or serious bodily harm "or other conduct demonstrating that the person is dangerous to himself or herself" or homicidal or other violent behavior that places others in reasonable fear of serious physical harm.[12]

Involuntary admission by medical certification requires that two physicians certify that the individual is mentally ill and requires involuntary care and treatment in a hospital.[13] This type of admission, often referred to as a "2 *PC Admission*," requires that two physicians examine the patient within 10 days of admission to the hospital and each execute a separate certificate including the facts forming the basis of the physician's opinion that the person requires involuntary care and treatment.[14] These two certificates must be accompanied by an application for the admission of such person, whether by a family member, the director of the hospital, or the supervising or treating psychiatrist.[15] An involuntary admission by medical certification is valid for up to 60 days from the date of admission or conversion to involuntary status.[16]

For an emergency admission, the statute allows for a staff physician, not necessarily a psychiatrist, to perform the initial examination of the patient. The staff physician must determine that the patient allegedly suffers from "a mental illness for which immediate observation, care, and treatment in a hospital is appropriate, and which is likely to result in serious harm to himself [or herself] or others."[17] The patient must then be examined within 48 hours by a staff psychiatrist and, if the individual meets the criteria, then he or she can then be retained in the hospital for a period of up to 15 days.[18] If the patient requires further

inpatient hospitalization beyond the 15-day admission, the patient must be converted to involuntary status by medical certification, as described above, to extend the retention to a period of up to 60 days from the date of admission.[19]

During the various retention periods, the patient, or someone on the patient's behalf, has the right to request release from the hospital, in writing.[20] The request for a court hearing must be immediately set for the next available court date. At the hearing, the hospital bears the burden of proof, by the "clear and convincing evidence" standard, that the patient meets the criteria for inpatient admission pursuant to the statute applicable to the patient's legal status. If it is determined that the patient requires involuntary care and treatment, the court shall deny the patient's request for release and the patient shall remain in the hospital for the remainder of the retention period.

If the hospital believes that a patient requires further inpatient hospitalization beyond the 60-day retention period, the hospital can apply to the court for an order authorizing continued retention for an initial period of time not to exceed six months from the date of the Order.[21] If the patient objects and requests a hearing, the procedure followed is essentially the same as when a patient requests a hearing pursuant to Mental Hygiene Law, Section 9.31.

Treatment Over Objection

When an individual is involuntarily committed for psychiatric treatment, that patient still retains the right to refuse treatment. The leading case in New York, *Rivers v. Katz*,[22] decided by the Court of Appeals, held that neither the fact that a patient is mentally ill nor that they have been involuntarily committed, without more, is sufficient to conclude that the individual lacks the capacity to understand the consequences of their decision of refuse treatment.[23] Therefore, when a patient refuses psychiatric medications or other treatment, "there must be a judicial determination of whether the patient has the capacity to make a reasoned decision with respect to the proposed treatment" before the treatment may be administered.[24] Before applying for a court order authorizing treatment over the patient's objection, first the hospital must follow strict administrative procedures.[25] At a *Rivers* hearing, the hospital bears the burden of proof, by clear and convincing evidence, that the patient lacks the capacity to make a reasoned decision about the treatment and that the proposed treatment is in the patient's best interests and narrowly tailored, taking into consideration the benefits, adverse side effects and any less intrusive alternative treatments.[26] This hearing is similar to the retention hearings described above, including testimony by the treating psychiatrist and the opportunity for the patient to testify as well.

Assisted Outpatient Treatment

When a patient is discharged from inpatient treatment in a hospital, non-compliance with outpatient treatment is often a recurring issue. The patient may fail to fill their prescriptions and take recommended psychiatric medication and/or may refuse to attend outpatient appointments with a psychiatrist or other mental health professional. In this case, the person's condition may deteriorate, he or she will likely require hospitalization again, and the whole admission process starts over. In New York, and many states across the country, legislators have made considerable efforts to prevent this hospital recidivism by allowing a court to authorize mandatory outpatient treatment and funding services to monitor compliance with that treatment.

The applicable statute in New York for Assisted Outpatient Treatment (AOT) is often referred to as "Kendra's Law."[27] In 1999, Kendra Webdale was pushed into the path of an oncoming subway train in Manhattan by a man who had a long history of mental illness and prior psychiatric hospitalizations.[28] AOT is meant to provide a less restrictive alternative to involuntary hospitalization. The goal of court-ordered outpatient treatment is to treat the person's mental illness, assist the person in living and functioning in the community, and/or to attempt to prevent a "relapse or deterioration" in the person's condition.[29] In order to achieve this goal, the outpatient treatment plan, to be approved by the court, can include, but is not limited to, case management services or assertive community treatment (ACT) team services, medication, periodic blood tests or urinalysis to determine compliance with prescribed medications and/or to detect the presence of alcohol or illegal drugs, individual and/or group therapy, partial hospital programming, alcohol or substance abuse treatment, and/or supervision of living arrangements.[30]

AOT can either be used as a discharge planning tool for hospitalized patients or as a community resource to support and supervise mental health treatment outside of a hospital setting. As part of a hospital discharge plan, AOT can help provide a smoother transition from the highly controlled environment of an inpatient psychiatric unit to an unstructured, unsupervised life in the community. In this case, the application for AOT is filed by the patient's treating psychiatrist before the patient is discharged. For those individuals already living in the community, the application can be filed by a family member, friend, mental health professional or other concerned individual in the county where the individual resides.

In order to qualify for AOT, the individual must meet certain criteria. The court must find that the person (1) is 18 years of age or older; (2) suffers from a mental illness; (3) is unlikely to survive safely in the community without supervision; (4) has a history of lack of compliance with treatment for mental illness that has:

> (i) prior to the filing of the petition, at least twice within the last thirty-six months been a significant factor in necessitating hospitalization in a hospital, or receipt of services in a forensic or other

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> mental health unit of a correctional facility or a local correctional facility, not including any current period, or period ending within the last six months, during which the person was or is hospitalized or incarcerated; or
>
> (ii) prior to the filing of the petition, resulted in one or more acts of serious violent behavior toward self or others or threats of, or attempts at, serious physical harm to self or others within the last forty-eight months, not including any current period, or period ending within the last six months, in which the person was or is hospitalized or incarcerated;

(5) is unlikely to voluntarily participate in the recommended treatment; (6) needs AOT in order to prevent a relapse or deterioration which would be likely to result in serious harm to the patient or others"; and (7) is likely to benefit from AOT.[31] If the court finds by clear and convincing evidence that the individual meets the criteria, the court can issue an Order directing the individual to comply with the mandatory outpatient treatment services provided in the treatment plan for an initial period not to exceed one year.[32]

If the individual is non-compliant with a court order authorizing AOT, there is "no punitive remedy."[33] The individual can be transported to a hospital for a psychiatric evaluation and potential admission to the hospital for inpatient treatment.[34] For example, law enforcement officials, an ambulance service, or members of a mobile crisis outreach team can take the individual into custody and transport him or her to a hospital.[35] Then, the process of potential admission, retention, and treatment, as described above, starts over.

Mental Hygiene Warrants

Family members and caregivers, however, should not have to wait until their loved one hurts himself, herself or another person before he or she can be evaluated and treated in a hospital. In New York, family and other concerned individuals can make an application to the court for a "Mental Hygiene Warrant," an order for immediate evaluation in an emergency room not to exceed 72 hours.[36]A Mental Hygiene Warrant proceeding is a civil proceeding that involves petitioning the court, in the county where the individual resides, to issue a warrant to bring an allegedly mentally ill individual to court for a hearing. The petition must contain sufficient information to demonstrate that the individual allegedly suffers from a mental illness and is "conducting himself or herself in a manner which in a person who is not mentally ill would be deemed disorderly conduct or which is likely to result in serious harm to himself or herself."[37] The individual is appointed counsel through Mental Hygiene Legal Service, or can retain a private attorney. At the hearing, the petitioner must demonstrate that the individual has or may have a mental illness that is likely to result in serious harm to himself or herself or others.[38] If the court determines that this burden has been satisfied, the court can order the removal of the individual to a hospital or comprehensive psychiatric emergency program for immediate evaluation not to exceed 72 hours.[39] At any time during the 72-hour period, the patient may, if appropriate, be admitted as a voluntary or involuntary patient. If it is determined that the patient does not meet criteria for admission, he or she must be released.

Who's Who in an Article 9 Mental Hygiene Court Proceeding

There are many individuals involved in Article 9 matters, both legal professionals and clinicians, beginning with the admission of the patient to the hospital and following that patient all the way through to the actual court hearing, if any.

Mental Hygiene Legal Service (MHLS) is a New York State agency that provides legal assistance to patients or residents of a facility, such as an inpatient psychiatric unit, and to persons alleged to be in need of care and treatment in such a facility.[40] When a patient is admitted to a hospital for psychiatric treatment, the hospital must inform the patient in writing of his or her legal status and rights under Article 9. Those rights include, but are not limited to, due process[41] and the availability of representation by MHLS.[42] MHLS is responsible for representing, advocating and litigating on behalf of these patients. MHLS is available for issues related to the admission and retention of patients in a mental hygiene facility as well as court-ordered assisted outpatient treatment, mental hygiene warrants, Article 81 Guardianship proceedings, and various other legal matters under the Mental Hygiene Law. The patient also has the right to retain private counsel.

A Supreme Court judge presides over a mental hygiene hearing in the State of New York.[43] The hearings often take place in the Supreme Court building of the county where the individual resides and/or is currently a patient. On other occasions, the hearings take place on site at a psychiatric facility.

In a mental hygiene hearing, whether for retention, treatment over objection or AOT, the court will first hear testimony from a representative of the hospital, usually the treating psychiatrist. The attorney for the hospital performs the direct examination of the psychiatrist. The psychiatrist is proffered as an expert in the field of psychiatry, by establishing his or her credentials such as attendance at medical school, completion of a residency program in psychiatry, licensure to practice medicine, board certification in psychiatry, and employment as a psychiatrist. The patient's medical record[44] at the facility where he or she is currently a patient will often be admitted into evidence as a business record.[45] Due to the potential inclusion of hearsay within the medical record, such as statements made by family members or outpatient treatment providers, the repetitive nature of a clinical record, and other common

evidentiary objections by the patient's attorney, some justices will deny a request to enter the entire medical record into evidence. Whether admitted into evidence or not, the psychiatrist will normally be permitted to review the medical record when testifying to refresh his or her recollection. The psychiatrist, as an expert, is permitted to give opinion testimony[46] as to the diagnosis of the patient, current symptoms, likelihood of posing a risk of harm to self or others, insight into the need for psychiatric treatment, capacity to make a reasoned decision about the proposed treatment plan, and several other areas that make up the elements of the hospital's case, depending on the type of hearing. The psychiatrist will testify based upon his or her own observations and examination of the patient as well as discussions with the patient's treatment team and a review of the patient's medical record.

On occasion, the court may hear testimony from a family member, friend, case manager, or other individual in the community who has direct knowledge of the individual's illness, treatment, behaviors, or symptoms that fall outside the knowledge of the treating psychiatrist and/or hospital staff. Information regarding the circumstances that led to the current hospitalization can help shed light on the patient's pattern of symptoms, noncompliance with treatment in the community, ability to care for self at home, and potential risk of harm to self or others in the community.

The patient has a right to be present and testify at these mental hygiene proceedings. Usually the patient's attorney will pose questions to the patient in the form of a direct examination and the patient is also afforded the opportunity to make a statement to the judge. The patient can then be cross examined by the hospital's attorney.

Conclusion

New York has established a comprehensive set of laws to promote the mental health of its citizens.[47] The various legal and clinical tools available through Article 9 help to ensure that individuals suffering from a mental illness have access to treatment in a hospital setting and appropriate services and supports to survive safely in the community.

Endnotes

1. *Psychiatric Hospitalization*, National Alliance on Mental Illness, available at http://www.nami.org/Template.cfm?Section=About_Treatments_and_Supports&Template=/ContentManagement/ContentDisplay.cfm&ContentID=150789.
2. Mental Hyg. L., Art. 9.
3. Mental Hyg. L. § 9.13(a).
4. Mental Hyg. L. § 9.01.
5. Mental Hyg. L. § 9.13(b).
6. *Id*.
7. *Id*.
8. *Id*.
9. *Humphrey v. Cady*, 405 U.S. 504, 509 (1972).
10. Mental Hyg. L. § 9.01.
11. *Scopes v. Shah*, 59 A.D.2d 203, 205, 398 N.Y.S.2d 911 (3d Dep't 1977); *see*, *e.g.*, *O'Connor v. Donaldson*, 422 U.S. 563 (1975).
12. Mental Hyg. L. § 9.01.
13. Mental Hyg. L. § 9.05(b), § 9.27(a).
14. Mental Hyg. L. § 9.05(b).
15. Mental Hyg. L. § 9.27(b).
16. Mental Hyg. L. § 9.13(b).
17. Mental Hyg. L. § 9.39(a).
18. *Id*.
19. Mental Hyg. L. § 9.39(b).
20. Mental Hyg. L. § 9.13; § 9.31(a), (b); § 9.39(a)(2).
21. Mental Hyg. L. 9.33(a), (b).
22. 67 N.Y.2d 485, 495 N.E.2d 337 (1986).
23. *Id*. at 495.
24. *Id*. at 497.
25. *Id*. at 486-87; *See* N.Y. Comp. Codes R. & Regs. tit. 14, § 527.8.
26. *Id*. at 486-87.
27. Mental Hyg. L. § 9.60.
28. *See* Patricia and Ralph Webdale, *Our Daughter Did Not Die In Vain*, Daily News, Jan. 3, 2013.
29. Mental Hyg. L. 9.60(a)(1).
30. *Id*.
31. *Id*.
32. Mental Hyg. L. 9.60(j).
33. *In re Urcuyo*, 185 Misc. 2d 836, 849, 714 N.Y.S.2d 862 (Sup. Ct. 2000).
34. Mental Hyg. L. 9.60(n).
35. *Id*.
36. Mental Hyg. L. § 9.43.
37. *Id.*
38. *Id*.
39. *Id.*
40. Mental Hyg. L., Art. 47.
41. *O'Connor v. Donaldson*, 422 U.S. 563 (1975).
42. Mental Hyg. L. § 9.07(a).
43. For a similar overview of Mental Hygiene Hearings in New York from the perspective of an acting Supreme Court justice in New York County, *see* Mickey Keane, Hon. Gerald Lebovits, *Mental Hygiene Hearings in New York*, N.Y. St. B.J., June 2016.
44. Pursuant to Mental Hygiene Law Section 33.13(a), a facility licensed or operated by the New York State Office of Mental Health is required to maintain a clinical record for each patient.
45. N.Y. CPLR 4518.
46. N.Y. CPLR 4515.
47. New York State Office of Mental Health, Statewide Comprehensive Plan, 2016-2010, at 1, https://www.omh.ny.gov/omhweb/planning/docs/507-plan.pdf.

Jamie A. Rosen, Esq. is an Associate Attorney at Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, Wolf, & Carone, LLP in Lake Success, New York where she practices Mental Health, Health Care and Elder Law, advising institutional clients, individuals and families on issues related to mental health. She is a member of the NYSBA Mental Health Law Committee and serves as the Co-Chair of the Nassau County Bar Association Mental Health Law Committee. She may be reached via e-mail at jrosen@abramslaw.com.