



Probable Cause Hearings Legal Standards

*W*ith the increasingly heavy hearing caseload, many advocates spend most of their time in preparing for and participating in hearings. Representing clients in hearings provides advocates the opportunity to use a variety of skills to assert patients' rights, including interviewing, record review, presentation of witnesses and oral argument. In the next three Empowerment Resources, OPR will provide advocates with information about effective hearing representation.

A certification review hearing is usually the first time clients have an opportunity for a review of the factual and legal basis for their commitment. In this first chapter are the legal standards on which advocates should build the framework of their representation. Even though the hearings are informal, there are still legal standards that must be met and it is important for advocates to understand them and use them to assist clients with effective representation.



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Certification Form Requirements

If a person is detained for 72 hours and has received an evaluation, he or she may be certified for 14 days of intensive treatment related to the mental disorder or impairment by chronic alcoholism, under the following conditions (W&I§ 5250)

- (a) The professional staff of the agency or facility providing evaluation services has analyzed the person's condition and has found the person is, as a result of mental disorder or impairment by chronic alcoholism, a danger to others, or to himself or herself, or gravely disabled.
- (b) The facility providing intensive treatment is designated by the county to provide intensive treatment, and agrees to admit the person. A designated facility is required to provide a certification review hearing.
- (c) The person has been advised of the need for, but has not been willing or able to accept, treatment on a voluntary basis.
- (d)(1) A person is not "gravely disabled" if that person can survive safely without involuntary detention with the help of responsible family, friends, or others who are both willing and able to help provide for the person's basic personal needs for food, clothing, or shelter.
- (2) However, unless they specifically indicate in writing their willingness and ability to help, they will not be considered.

Advocacy Guide –

The certification form is a legal document that should be filled out correctly. Part of the advocate's role is to assure that the facility staff is filling them out properly.

If you see a pattern of certification forms not filled out properly, not served in a timely manner or other problems, you should suggest to your Mental Health Director and the facility administration that you provide training for staff.

If the legal process is not followed, your client has the right to file for a writ of habeas corpus.

Signatures Required

Before an individual can be committed a certification form must be signed by two people.

The first person shall be the professional person, or his or her designee, in charge of the agency or facility providing evaluation services – this is a physician or psychologist.

The second person shall be a physician or psychologist who participated in the evaluation. If the professional person in charge, or his or her designee, is the physician who performed the medical evaluation or a psychologist, the second person to sign may be another physician or psychologist unless one is not available, in which case a licensed clinical social worker or a registered nurse who participated in the evaluation shall sign the notice of certification. *Welf & I C §5251*

Advocacy Guide –

*It is important that when looking over the certification form you review it to make sure the first signature as the designee of the professional person in charge of the agency or facility, is a physician who is a board certified psychiatrist or a licensed psychologist who has a doctoral degree in psychology and at least five years of postgraduate experience in the diagnosis and treatment of emotional and mental disorders. *Welf & I C §5251**

The second signature may be a registered nurse or a clinical social worker, who participated in the evaluation.

There should be progress notes in the patient's medical record signed by signatories that show they participated in the evaluation.

Here again, if you find the certificate is not signed by the proper individuals, you should notify the facility that you will be raising the issue with the hearing officer. The failure to have the form properly signed may also be the basis for filing a writ of habeas corpus.

Delivery of Certification/Advisement

A copy of the certification notice shall be personally delivered to the person who is certified for commitment, the person's attorney, or the attorney or advocate designated in Section 5252.

The person certified for commitment shall be asked to designate any person they want to receive a copy of the certification notice. If the person is incapable of making this designation at the time of certification, he or she shall be asked to designate a person as soon as he or she is capable. *Welf & I C §5253.*

The person delivering the copy of the notice of certification is required to:

- Inform the person he/she is entitled to a certification review hearing, to be held within four days to determine if probable cause exists to detain the person for intensive treatment related to the mental disorder or impairment by chronic alcoholism.
- Inform the person of his/her rights regarding the hearing, including the right to assistance of another person to prepare for the hearing or to answer other questions and concerns regarding his or her involuntary detention, or both. *Welf & I C §5254.*
- Inform the person certified of his/her legal right to a judicial review by habeas corpus, and inform the person of his/her right to counsel, including court-appointed counsel pursuant to Section 5276. *Welf & C §5354.1*

Advocacy Guide –

*F*acility staff is required to deliver the certification and advise the patient of their rights – placing the certificate on the bedside table is not sufficient.

*M*any clients are unable to remember that the certification was given to them, and they were given information about why they are staying in the hospital and what rights they have. Make sure you go over the certification with your clients and clearly explain their rights.

**CERTIFICATION
INSTRUCTIONS**

Below is instruction on the proper filling out of the certification form. It is important to remember that this is a legal document and must be filled out correctly.

A notice of certification is required for all persons certified for intensive treatment pursuant to Section 5250 or 5270.15, and shall be in substantially the following form (strike out inapplicable section):

The authorized agency providing evaluation services in the

County of _____ has evaluated the condition of:

Name _____

Address _____

Age _____

Sex _____

Marital status _____

We the undersigned allege that the above-named person is, as a result of mental disorder or impairment by chronic alcoholism:

- (1) A danger to others.
- (2) A danger to himself or herself.
- (3) Gravely disabled as defined in paragraph (1) of subdivision (h) or subdivision (l) of Section 5008 of the Welfare and Institutions Code.

They must **strike-out** the criteria that are not applicable.

The specific facts which form the basis for our opinion that the above-named person meets one or more of the classifications indicated above are as follows:
(certifying persons to fill in blanks) _____

(Strike out all inapplicable classifications.)

Specific Facts – why do they **currently** meet the criteria for the hold? Merely restating the criteria on the 5150 does not meet the request for specific facts

The above-named person has been informed of this evaluation, and has been advised of the need for, but has not been able or willing to accept treatment on a voluntary basis, or to accept referral to, the following services:



They are to **list the services** that the patient has refused referral to. This can be important information for the hearing officer to have in a discussion about voluntary treatment on an outpatient basis.

We, therefore, certify the above-named person to receive intensive treatment related to the mental disorder or impairment by chronic alcoholism beginning this _____ day of _____, 19__, in the intensive treatment facility herein (Month) named _____.

(Date)

Signed _____

Signed _____

Countersigned _____
Representing facility)



Who signs this document is important.
1st – professional person, or his or her designee, in charge of the agency – **a physician or a licensed psychologist** who has a doctoral degree in psychology and a least five years of postgraduate experience in the diagnosis and treatment of emotional and mental disorders.
2nd – a physician or psychologist who **participated in the evaluation** – the physician shall be if possible a board certified psychiatrist. W&I § 5251



If a physician is the 1st signature, then the second may be a licensed clinical social worker or a registered nurse who **participated in the evaluation.**

I hereby state that I delivered a copy of this notice this day to the above-named person and that I informed him or her that unless judicial review is requested a certification review hearing will be held within four days of the date on which the person is certified for a period of intensive treatment and that an attorney or advocate will visit him or her to provide assistance in preparing for the hearing or to answer questions regarding his or her commitment or to provide other assistance. The court has been notified of this certification on this day.

Signed _____

Advocacy Guide –

The staff member delivering this certification form must:

Deliver it personally to the patient;

Advise the patient that a certification review hearing will be held within four days;

Advise the patient they can request judicial review with a writ of habeas corpus;

Ask if there is someone the certification should be sent to or notified;

Advise the client that a patients' rights advocate will be available to assist them with the hearing and answer questions *Welf & C* §§ 5252-5254

The Hearing

Advocate

As soon after the certification as practicable, an attorney or patient advocate shall meet with the person to discuss the commitment process and to assist the person in preparing for the certification review hearing, answer questions or otherwise assist the person as appropriate. *Welf & I C §5255.*

Hearing Timing/Postponement

The certification review hearing shall be within four days of the date on which the person is certified for a period of intensive treatment unless postponed by request of the person or his/her attorney or advocate. Hearings may be postponed for 48 hours or, in counties with a population of 100,000 or less, until the next regularly scheduled hearing date. *Welf & I C §5256.*

Hearing Location

The certification review hearing shall be held in a location compatible with, and least disruptive of, the treatment being provided. Hearings conducted by certification review officers shall be conducted at an appropriate place at the facility where the person is receiving treatment. *Welf & I C § 5256.1*

Advocacy Guide –

You should work with facility staff and hearing officer to develop a protocol on all the practical details of the hearings, who's responsible for what, and when. Once they are mutually agreed upon there should be less problems with compliance. Just because they "have always done it that way" doesn't mean you can't suggest changes, if you think something will go smoother with a change, change it.

The advocate is not responsible for the hearing, the facility is, you should have spent enough time with your client to be comfortable and prepared but it is not the advocate's responsibility to find the client and or the medical record when you need them, either to prepare for the hearing or for the hearing itself. This is where the protocol mentioned above is useful.

The Hearing

The person shall be present at the certification review hearing unless he/she, with the assistance of his or her attorney or advocate, waives his/her right to be present at a hearing. *Welf & I C §5256.3*

At the certification review hearing, the person shall have the following rights:

- (1) Assistance by an attorney or advocate.
- (2) To present evidence on his/her own behalf.
- (3) To question persons presenting evidence in support of certification.
- (4) To make reasonable requests for the attendance of facility employees who have knowledge of, or participated in, the certification decision.
- (5) Prior to the beginning of the hearing, the hearing officer shall be informed if the person has received medication within 24 hours (or longer at the hearing officer's request) and the probable effects of the medications.

Welf & I C §5256.4(a)

Advocacy Guide –

*E*ven if your client chooses not to attend the hearing, the hospital must present enough information to prove that the patient meets the criteria for a hold. This would include a discussion of voluntary treatment, if your client wishes to stay.

A "no contest" to the certification, is not the same thing as staying voluntarily. If the patient is willing to stay in the hospital and is participating in treatment you should argue for voluntary treatment even without the presence of the patient.

*D*on't forget about your ability to have staff come to the hearing to answer questions, if something is documented in the medical record that isn't clearly understood and you think it is a misinterpretation, ask the staff to attend and have them clarify.

*B*e prepared to explain behavior that can possibly be attributed to new medication, slurred speech, inability to focus or sit still, and not attending groups -sleeping. (Use Empowerment #3 – Medical Records to get medication information) Don't rely on the hospital representative. to present all of the information.

The hearing shall be conducted in an impartial and informal manner in order to encourage free and open discussion by participants. The person conducting the hearing shall not be bound by rules of procedure or evidence applicable in judicial proceedings. *Welf & I C §5256.4(b)*

Reasonable attempts shall be made by the mental health facility to notify family members or any other person designated by the patient, of the time and place of the certification hearing, unless the patient requests that this information not be provided. The patient shall be advised by the facility that is treating the patient that he or she has the right to request that this information not be provided. *Welf & I C §5256.4(c)*

Advocacy Guide –

Remember there were recent changes to the W & I § 5008 - Added to section (a) - [The historical course shall include, but is not limited to, evidence presented by persons who have provided, or are providing, mental health or related support services to the patient, the patient's medical records as presented to the court, including psychiatric records, or evidence voluntarily presented by family members, the patient, or any other person designated by the patient. ***Facilities shall make every reasonable effort to make information provided by the patient's family available to the court.*** The hearing officer, court, or jury shall exclude from consideration evidence it determines to be irrelevant because of remoteness of time or dissimilarity of circumstances.

Added section (b) This section shall not be applied to limit the application of Section 5328 or to limit existing rights of a patient to respond to evidence presented to the court.

What this means for your advocacy is, if the family has information they would like the hearing officer to have, they can give it to the facility representative to present. The hearing officer can decide if he/she feels it is relevant. If you have information that contradicts the information the family provides, make sure you present it to the hearing officer.

The patient continues to decide whether the family can attend the hearing or not, W&I § 5256.4(c) – provides that the family is only notified of the hearing if the client wants them notified.

All evidence which is relevant to establishing that the person certified is or is not as a result of a mental disorder or Chronic Alcoholism, is a danger to themselves or others, or gravely disabled shall be admitted at the hearing and considered by the hearing officer. *Welf & I C §5256.4(d)*

Although resistance to involuntary commitment may be a product of a mental disorder, this resistance shall not, in itself, imply the presence of a mental disorder or constitute evidence that a person meets the criteria of being dangerous to self or others, or gravely disabled. *Welf & I C §5256.4(e)*

Hearing Conclusion

If at the conclusion of the certification review hearing the person conducting the hearing finds that there is **not probable cause** to believe that the person certified is, as a result of a mental disorder or impairment by chronic alcoholism, a danger to others, or to himself or herself, or gravely disabled, then the person may no longer be involuntarily detained.

Nothing herein shall prohibit the person from remaining at the facility on a voluntary basis or the facility from providing the person with appropriate referral information concerning mental health services. *Welf & I C §5256.5*

If at the conclusion of the certification review hearing the person conducting the hearing finds that there **is probable cause** that the person certified is, as a result of a mental disorder or impairment by chronic alcoholism, a danger to others, or to himself or herself, or gravely disabled, then the person may be detained for involuntary care, protection, and treatment related to the mental disorder or impairment by chronic alcoholism pursuant to Sections 5250 and 5270.15. *Welf & I C §5256.6.*

Advocacy Guide –

In a Probable Cause Hearing, being resistant to staying in the hospital does not indicate grave disability, danger to themselves or others.

There is a large body of case law defining “grave disability” – (See Empowerment Resource #2 – Conservatorship) for a memorandum on this subject.

If no probable cause is found, and the patient chooses to leave the hospital, they must be provided with proper discharge plans. The facility should have begun the process when the patient first came into the hospital. Under no circumstances may a patient be sent away from the hospital without medications and a way to get home. Federal regulations require these be provided. (See Empowerment Resource # 12 – Discharge Planning)

Notification

The person certified shall be given oral notification of the decision at the conclusion of the certification review hearing.

As soon thereafter as is practicable, the attorney or advocate for the person certified and the director of the facility where the person is receiving treatment shall be provided with a written notification of the decision, which shall include a statement of the evidence relied upon and the reasons for the decision.

The attorney or advocate shall notify the person certified of the certification review hearing decision and of his or her rights to file a request for release and to have a hearing on the request before the superior court as set forth in Article 5 (commencing with Section 5275).

A copy of the decision and the certification made pursuant to Section 5250 or 5270.15 shall be submitted to the superior court. *Welf & I C §5256.7.*
Legal Standards

Advocacy Guide –

You might find it helpful to read over the hearing officer's written decision after the hearing to help you understand why he/she made the decision they did. This may give you information that will be useful when you prepare for hearings in the future.

If your client requests a writ be filed, you may want to send any information you have gathered in your preparation to the public defender. You may need to set up a protocol on how best to get them the information.

If your client is filing a writ because of a procedural problem, make sure you get this information to the Public Defender(PD). The PD may assume that the writ has been filed because the client doesn't meet the criteria for a hold, not that there was a problem with paperwork or timelines.

A person may be involuntarily detained only if there is probable cause to believe that, as a result of a mental disorder, the person is a danger to self, danger to others or gravely disabled. (WIC §5150). Such persons may be detained involuntarily for psychiatric evaluation and/or treatment. If there is no probable cause at the outset, the detention is invalid under statute. The probable cause appellate court has defined "probable cause" pursuant to WIC § 5150 as follows:

"To constitute probable cause to detain a person pursuant to WIC §5150, a state of facts must be known that would lead a person of ordinary care and prudence to believe, or to entertain a strong suspicion, that the person detained is mentally disordered and is a danger to himself or to others or is gravely disabled.

In justifying a particular detention, the officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant his belief of suspicion." People V. Triplet, 144 Cal. App. 3d 283 (1983)

Mental Disorder

An equally important concept in commitment law is the link between condition and behavior. In order to be detained under WIC § 5150, the person must be, "as a result of" a mental disorder, a danger to self or others or gravely disabled. Danger to self or others without a mental disorder does not meet the standard. Likewise, inability to provide food, clothing and shelter without a mental disorder is not enough. *Welf & I C §5150, Heater v. Southwood Psychiatric Ctr. (1996)42 CA4th 1068,1080, 49 CR2d 880.*

Advocacy Guide –

The most important phrase in the definition above is "*specific articulable facts.*" What it points out is that factual accounts of the action and behaviors of the person or statements the person makes, that indicate a mental disorder which impedes the ability to provide food, clothing and shelter or which implies immediate dangerousness to self or others are necessary to the involuntary hold. There must be an articulable connection between the mental disorder and dangerousness and the inability to provide for oneself. For example, a mental health client may find themselves unable to provide for food, clothing and shelter for reasons unrelated to their mental disorder, such as the loss of a job, recent divorce. etc.

Danger to Self

This criteria may be either a deliberate intention to injure oneself (i.e. overdose) or a disregard of personal safety to the point where injury is imminent (i.e. wandering about in heavy traffic). The danger must be present, immediate, substantial, physical, and demonstrable.

Danger to Others

Danger to others should be based on words or actions that indicate the person in question either intends to cause harm to a particular individual or intends to engage in dangerous acts with gross disregard for the safety of others.

Grave Disability

The person must be unable to provide for basic personal needs as a result of a mental disorder. Mere inability to provide for basic personal needs is not sufficient. Nor is refusal of treatment evidence of grave disability. Note also that regardless of the person's past, the question is whether they are presently gravely disabled.

Furthermore, a person is not gravely disabled if that person can survive safely without involuntary detention with the help of responsible family, friends, or others who are both willing and able to help provide for the person's basic personal needs for food, clothing, or shelter. However, unless they specifically indicate in writing their willingness to help it will not be considered.

Advocacy Guide –

Danger to Self

Documentation should include some or all of the following:

- Words or action showing intent to commit suicide or bodily harm.
- Words or actions indicating gross disregard for personal safety.
- Words or action indicating a specific plan for suicide.
- Means available to carry out suicide plan (i.e. pills, firearms present or available).

Danger to Others

Documentation should include some or all of the following:

- Threats against particular individuals.
- Attempts to harm certain individuals.
- Means available to carry out threats or to repeat attempts (i.e. firearms)
- Expressed intention or attempts to engage in dangerous activity.

Advocacy Guide continued -

Grave Disability

Documentation should include some or all of the following:

- Signs of malnourishment
- Inability to articulate a plan for obtaining food.
- No food available in the house or at hand.
- Irrational beliefs about food that is available (i.e. it's poisoned, inedible, etc.)
- Destruction or giving away of clothing to the point where the person can not clothe themselves.
- Inability to formulate a reasonable plan to obtain shelter

Homelessness should not be assumed to make the person gravely disabled, if they have lived successfully on the street. Unconventional life style also is not criterion, unless the person has for example an unexplained an unusual weight loss, or they are having health problems related to inability to care for themselves.

STANDARDS FOR VOLUNTARY STATUS

All Patients have the right to be considered for voluntary treatment and must be advised of this right. *Welf & I C §5250(c)*

Patients may be voluntarily admitted when

- They are not dangerous to themselves, dangerous to others or gravely disabled and they request treatment.
- They are dangerous to themselves, dangerous to others or gravely disabled but they are willing to accept treatment.

Advocacy Guide -

Factors to consider for evaluating appropriateness for voluntary status:

*P*atient awareness of the situation

The need for assistance

The patient's plans for addressing the problem

*A*ny progress already made by the patient at the facility or changes in circumstances that precipitated the hospitalization.

*C*ompliance with medication, participation in facility activities and general cooperation. (any expressed desire for treatment should be presumed to be credible.)

*W*illingness and ability as it relates to the hospital treatment immediately proposed - not on the patient's plans for or willingness to accept treatment in a more distant future.

From Voluntary to Back to Involuntary

The patient manifest behavior **at the time of proposed change** that constitutes a danger to self, others, or grave disability as a result of a mental disorder and the patient is unwilling or unable to accept treatment voluntarily
Welf & I C §5250

Advocacy Guide -

Factors to consider in appropriateness of change

- *Detailed documented change in behavior constituting danger to self or others or grave disability.*
- *Specific factual descriptions of what has changed about the patient's condition.*
- *Detailed documented change in behavior constituting danger to self or others or grave disability.*
- *Specific factual descriptions of what has changed about the patient's condition.*
- *Clinical conclusion should be substantiated by examples of observed behavior and other facts about the patient.*
- *Document why the patient is no longer willing or able to be voluntary*