Representing clients in Certification Review Hearings – Everything you want to know

BASIC and ADVANCED INFORMATION

The following are some suggestions that may help when you encounter a case that needs that little extra advocacy to take it over the top and increase the chances of a “No Probable Cause” Finding.

Procedural vs. Substantive

A procedural issue involves contesting the validity of the process of placing the patient on the hold. You are asking the Hearing Officer to rule on whether due process was followed and the hold considered valid. You will frequently have to work to prevent the facility representative from presenting “evidence” on the case (e.g. The representative blurts out, “the patient made a serious suicide attempt and it’s very important that he stay in the hospital!”) This would constitute making a “substantive” argument. State, “Please do not present evidence until the Hearing Officer has determined the Certification is valid. If you give confidential information about the client before it is determined whether the Hearing Officer has jurisdiction to hear the case, you will be engaging in a violation of his/her right to confidentiality.”

A Substantive argument refers to presenting evidence that applies to the substance of the case. Substantive arguments are made only if there is no procedural error or you are overruled on a procedural argument and the Hearing Officers decides to proceed with the case. The majority of your cases will rely on solely substantive arguments.

Procedural Issues

Procedural issues could also be called “Due Process” issues. When you encounter this special type of evidence you will usually be in the preliminary stages of preparing your case. Due Process refers to the procedure spelled out in the law as part of taking legal action on someone, such as acting to deprive an individual of his/her liberty.

Some Hearing Officers may say they will not make rulings on procedural issues and that the procedural error must be brought before a judge at a writ. It has been effectively argued that **a Hearing Officer only has jurisdiction to hear evidence**

presented on a VALID certification, and therefore the Hearing Officer must determine the validity of the certification to **determine whether he/she has jurisdiction** to hear the case. To hear evidence on an invalid certification could be argued to constitute breach of confidentiality, in that the Hearing Officer doesn't have jurisdiction. There are Hearing Officers who have changed their minds after considering this perspective.

Hearing Officers may ask how the procedural error "prejudices" your client's case. This means you need to explain how the error violates due process and places your client at some disadvantage in presenting his/her best case. Does it interfere with the preparation of case? Does it interfere with the patient receiving adequate representation?

Examples of Procedural Issues

Late Service of Certification (after expiration of 5150). The facility failed to serve the patient with a copy of the Notice of Certification before the expiration of the 5150.

Argue that the facility failed to change the patient's legal status before the 72 hours have elapsed. Statute (*W&I Code, Section 5152(b)*) limits the legal actions that may be taken at the time of the 5150 expiration, to very specific options, including discharge, and offering voluntary status. None of the options is to detain the patient on no legal status for any period of time and then sometime later, instituting a 5250.

Argue that failure to change legal status before expiration of the 5150 and then attempting to detain the patient on a 5250 after the 5150 has expired violates due process , *W&I Code, Section 5152(b)* (*see i. above*)and violates legislative intent of LPS, *W&I Section 5001(a)*, "to end indefinite, inappropriate and involuntary commitment".

Argue it is a violation of *W&I Code, Section 5157*, the 5150 advisement the patient received upon being admitted, legally informing the patient of the date and time the 5150 expired and statutorily allowable actions at the end of the 72 hours (*W&I Code, Section 5152(b*), **none** of which includes holding the patient on no legal status.

a. No Notice of Certification Served on the patient

The Notice may have been completed and the patients' rights advocate may have a copy of the Notice. Failure to serve the patient interferes with the right to adequate representation when the patient does not know about

the hold. The PRA's attempt to interview and prepare the patients for a hearing may surprise a patient who has not been informed by the facility of the hold. This can result in a patient believing that the PRA is instituting the hold and create animosity which interferes with establishing rapport and allowing for quality representation.

See attached details in

"THE IMPORTANCE OF TIMELY SERVICE OF NOTICE OF CERTIFICATIONS"

Consider offering this written explanation to a Hearing Officer who fails to see how not serving (or serving late) the person certified prejudices your case.

b. Possible Signature Errors.
   - The notice of Certification is missing the required signatures.
   - One or two of the signatories does not meet the qualification to sign the certification.
     i. *W&I Code, Section 5251*, The Notice of Certification must have 2 signatures, and:
        1. First signatory must be the doctor or psychologist as described in the code. One must be "the person in charge of the facility".
        2. If 2nd signatory is both person in charge of facility (or designee) and is the treating doctor, then a nurse or social worker may sign.
           a. Check the chart to be sure the nurse or social worker participated in the evaluation as required. If not, argue the certification was not signed by the statutorily required signatories because the nurse had to have participated in the evaluation during the 5150 period.

c. Facts on Certification do not meet the criteria for the hold. Check to be sure that the facts listed on the Notice of Certification support the "allegation" that the patient meets the criteria to hold him/her.
   i. W&I Code, Section 5252 specifies that the notice of certification must be "substantially" in the manner listed in this section, which includes, "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:" Clearly the law intends the doctor to list evidence regarding the legal criteria.

ii. The cert serves as notice to the patient of the hold and reasons for instituting it. The act of "serving the patient" and "notifying the patient of his/her rights" includes informing the patient of facts the doctor relied upon in deciding to place the hold. The patient and PRA need this information when considering whether to contest the hold and serves in developing a legal argument to oppose the hold. It prejudices the case because a failure to have facts ahead of time, <u>can disadvantage the patient and advocate in preparing evidence</u> to contest the facts the facility is relying on. This interferes with the patient's right to adequate representation.

d. <u>Voluntariness.</u> The patient was not offered the opportunity to remain in the facility on a voluntary basis. W&I Code, Section 5250 lists the procedure for instituting a 5250:
   - The 1st step is to conduct the evaluation during the 72-hour hold.
   - The 2nd step involves offering the least restrictive alternative.
     - The patient must be told the results of the evaluation, recommend intensive treatment and offer that treatment on a voluntary basis. If the patient is unable or unwilling to accept voluntary treatment, the hold may be instituted after…
     - The 3rd step, determining that the patient is DTO, DTS or GD.

i. This issue is easier to argue if your client is not seeking to leave the facility, specifically wishes to remain for treatment, but disagrees with being on an involuntary hold. However, wishing to be released does not preclude you from arguing this as a rationale for declaring the hold to be invalid. Some patients state that they would not have objected to remaining in the hospital if the clinicians did not attempt to force it upon them.

ii. Point out the LPS concept to **<u>treat patients in the manner least restrictive of their person liberty,</u>** and this involves allowing patient to be voluntary whenever possible. I stress this to doctors, when I provide in-services to them and remind them that they are supposed to tell the patient the results of the "evaluation" you have provided during the 72-hour hold and your opinion that they should stay and allow them to provide more treatment in an inpatient environment.

iii. Do not accept the argument that they didn't want to risk offering the patient voluntary status because the patient would then ask to sign themselves out. Section 5258 establishes that a person could be voluntary and then subsequently placed back on an involuntary hold if

the circumstances warrant it, such as the person becomes "unwilling" to be voluntary and is DTS, DTO, or GD. In determining the total time of detention of a patient, all intervening periods of voluntariness count. The question of being unable to be voluntary refers to a person being able to give knowing and voluntary consent, including the ability to understand the form giving consent to voluntary admission.

e. Check for evaluation completed before issuing 5250.
    i. Section 5250 states that a person may be placed on hold "**if** the person…has received an evaluation". Evaluation does not consist of a brief conversation. It is defined in Section 5008(a). It is extensive. If chart notes don't document evidence that the person received an "evaluation" by the Multidisciplinary Treatment Team (e.g. there are no doctor's notes at all or even no psychosocial evaluation), then you could argue a procedural issue that the patient did not receive an "evaluation" as defined *W&I Code, Section 5008*.
f. Untimely Hearing. Section 5256 states that a person placed on a 5250 shall have a Certification Review Hearing with 4 days of being placed on the hold. Exception: if the patient or advocate requests a postponement of the hearing until the next scheduled hearing day.
    i. If the patient has been on the 5250 hold longer than 4 days before having the opportunity to have a hearing, this is a due process violation. This could occur if the PRA and court were not notified the patient was certified and subsequently didn't take the patient to a CRH and the patient did not have his/her hearing on the regularly scheduled hearing day. Ask for the patient to be ordered released by the Hearing Officer.
    ii. Writ request impact on potential untimely hearing: If the patient decided to request a writ hearing and by-pass the Cert Review Hearing, and if the writ does not take place, the patient must have a Cert Review Hearing within 4 days. Otherwise, the cert could be ruled invalid. Procedural issue: Due process violation -untimely hearing. This is a risk if the PD working with the patient, cancels/continues the writ and fails to inform the patients' rights advocate, who would have taken the patient to a Cert Review Hearing if aware the writ was not held.

Documents to Keep With You

Carrying copies of the sections of code mentioned throughout above discussions of procedural issues would be wise.

Carrying copies of past rulings on procedural issues will help assure you get similar rulings on the same procedural issues, even if you get different Hearing Officers. It serves as a precedent and they tend to want to keep things consistent.

Common Issues

Continuances

1. Who can request them?
    a. Section 5256 speaks to this and mentions only the patient or advocate (on behalf of the patient as long as it is the expressed interest of the patient) as being able to postpone the hearing.
        i. There was a County Counsel opinion In Alameda County that Hearing Officers also have the authority to initiate a continuance. This was years ago, and I am the only one who remembers it. Dispute it if a hearing officer tries it…because…
    b. A Hearing Officer may attempt to impose a continuance:
        i. If it is of benefit to your client, take a recess and give your client the option to take advantage of it.
        ii. Hearing Officer's may use it due to reluctance to find NPC in favor of your client's position. Either insist that you have presented your client's position and he/she would like a ruling… or take a recess to discuss it with your client and forcefully advocate for your client's desire for a ruling based on evidence presented.
2. Can a request for continuance be denied?
    a. Nowhere in code does it state any conditions on patients or advocates continuing cases.
3. When do you request one?
    a. When your client requests it.
    b. When your client decides it is good judgment based on your recommendation.
        i. Your client needs more time to decide his/her position on contesting the hold.
        ii. Your client wants more time to recover, be in better shape, and increase the possibility of presenting well in the hearing.

iii. Your client is in seclusion and/or restraint or this was imposed recently. Your client can insist on having a hearing regardless of what you advise, even if you have the hearing in the seclusion room.
iv. Your client needs some time to arrange a third party offer.

c. Your client needs court interpreter and you were unable to arrange one in time.
d. Your client is excessively sedated from medication and cannot present well in the hearing and you do not have enough evidence or permission to represent client in his/her absence.

4. Can you request more than one?
    a. There is nowhere in code that allows for this. You might want to subtly SUGGEST a second continuance if you need time to arrange a 3rd party offer.

Persons present in Hearing

The usual persons present are the patient, the PRA, the Hearing Officer and the Facility Representative.

Other persons may be present at the patient's request or at the very least ONLY with the patient's permission.

Family members may not attend the hearing without patient's permission. Facility staff should not offer family members to attend as they will be frustrated if the advocate must enforce a patient's wish that they not be present. Section 5328 protects the confidentiality of evidence presented in the hearing.

1. If family members have information they wish to have presented that they feel is relevant to the decision, they should give the information to the facility representative to present. The representative has an affirmative obligation to present it. The patient has a right to hear and answer to any information presented to the Hearing Officer in the hearing.

Section 5256.3 states that the patient shall be present in the hearing unless presence is waived by patient or his/her advocate.

1. Beware attempts to remove your patient from the hearing for any reason, including interrupting presenters or being disruptive. The code says "shall" which is mandatory and only the patient or advocate may waive his/her presence. The patient also has the right to hear the decision by the Hearing Officer at the conclusion of the hearing.

a. However, a Hearing Officer may end a hearing by making a decision, which he/she may abruptly do it the patient is so disruptive that the Hearing Officer uses the behavior as evidence of Probable Cause. If the Hearing Officer tries to remove your client from the hearing over the client's objection, remind the Hearing Officer of that authority and insist your client be allowed to stay until after the decision is announced.

2. Your client can choose to be present for only parts of the hearing. You may want to suggest to a patient that he/she waive presence at the hearing until it is time for you and he/she to present your case, to avoid the experience of having the patient hear every negative comment from the chart, which can be upsetting and put your client at a disadvantage for giving his/her best performance.
3. <u>Dealing with attempts to prevent patients' rights advocate from presenting evidence on behalf of the client</u>.
    a. Some Hearing Officers attempt to require that the patient be the one to present all the evidence in contesting his/her hold. You have the right to present evidence for your client.
    b. The code provides for representation by an advocate for a reason. We are trained to know how to stick to facts that are relevant to the legal issue at hand. A patient usually has his/her own idea of what is important and relevant information, but is at a disadvantage in being ignorant of the intricacies and legal issues. Your client may be likely to give far more information than is necessary, or even info that is damaging to his case.
        i. Point out to the Hearing Officer that the county has placed the duty upon you to represent the patient, that statute provides for patients' rights advocates to provide representation and that you have a mandate to do so in order to protect the patient's right to representation in the face of being deprived of their liberty. Emphasize the seriousness of losing liberty.
        ii. Point out that you must be allowed to present information you obtained from the chart and interviews and that the source of your information is the same as that of the facility and is not less credible.
        iii. Point out that you spent much time interviewing your client and will present information in what is possibly a more timely manner, and that you will also have the patient present information, and they can obviously ask questions if your presentation doesn't give them the info they are looking for.

4. Some facilities may try to allow more than one of their staff member to present evidence in the hearing (e.g. social worker and doctor). This could make a patient feel ganged up on and at a distinct disadvantage.
    a. Section 5256.2 states that "evidence in support of the certification position shall be presented by a person designated by the director of the facility." This is singular not plural.
    b. If the Hearing Officer wants to allow more than one facility presenter, you could emphasize the problems this could cause by having more than one advocate assist in the hearing. It will be a fiasco and quickly become apparent why there must be a limit on the number of presenters.
    c. If the facility wishes another member of the treatment team to speak, they could call that person in as a witness, to provide just their testimony and then leave.

Third Party Offers

Section 5008(h) and 5250 state that "a person is not gravely disabled if he/she can safely survive without involuntary detention with the help of responsible family members, friends or others who are both willing and able to help provide for the person's basic personal needs for food, clothing and shelter." This is known as a "third party offer".

1. When your client is certified on Grave Disability, make it routine to consider the possible benefit of utilizing a third party offer if it were available.
2. It can be an important strategy to decide how to present a third party offer.
    a. Do you want the person(s) making the offer to be present in hearing?
        i. Since the code says the offer must be in writing, think of the possible advantage to presenting it on paper only and having the actual person absent, to avoid having the person offering assistance from being questioned in a manner designed to discredit him/her.
        ii. You may want to avoid having third party in the hearing to avoid having any difficult family dynamics being considered as evidence of the third party offer being inadequate.
        iii. Hearing Officers may focus on the "able" part of the definition of third party offers and use some biased lines of questioning to justify declaring the person "unable" to "safely" provide assistance.
        iv. The person could be invited to be present in the hearing only to make the offer, but not present to hear all of the evidence the facility will present to argue that the patient is not ready for

discharge, and possibly have the facility talk the person out of offering assistance. The information presented in the hearing is protected under Section 5328 on confidentiality.

v. If you decide to try to present the third party offer as a signed document only, you may be decide to suggest your patient wave his/her presence also. Some Hearing Officers consider a valid third party offer to be sufficient evidence in itself to drop the criteria of grave disability without needing to have any other evidence presented by either party.

Try to maintain control. You are the most knowledgeable and individual in the hearing. You cover a very large number of hearings compared to anyone else in the room. It is important to control the tone and flow of information

It is our goal to attempt to maintain as much of the control of the hearing as we can without appearing blatantly insubordinate to the Hearing Officer.

1. Respectfully request that the Hearing Officer maintain order in the hearing and hold everyone to their respective roles.
2. Gently object if the facility begins to present information supporting different from criteria alleged on the certification. Prevent facility representative attempts to throw in every bit of negative evidence in the chart.
3. Ask Hearing Officer to ask the facility limit their focus on the most current evidence. Ask them to avoid reliance on the 5150 circumstances as the main evidence supporting criteria.
4. Summarize why the information you presented supports a decision to release your client from the hold. If the facility rep rebuts your summary, repeat your summary as many times as necessary for you to have the last word before the Hearing Officer makes the decision.
5. Discourage the hearing officer from seeing themselves as a member of the treatment team. Distract the Hearing Officer from the trap of supporting the facility's interest in the patient's clinical needs.
6. Make your summary of the facts force the Hearing Officer's to see their obligation to make a LEGAL decision. Specifically question the facility rep's clinical conclusions and broad generalizations about your client instead of focusing on evidence consisting of specific conduct. (e.g. "patient is paranoid" vs. "patient thinks his neighbors are conspiring against him" and "patient has poor insight and judgment" vs. "patient couldn't understand how interrupting others caused problems at school")
7. If the facility argument is a clinical plea to keep the patient at the hospital longer for just a little longer without showing the patient meets one of the

dangerousness criteria (e.g. “We just want a few more days to stabilize her.” and “We are waiting for the lab results for a blood level.”)
Ask if the same clinical care the hospital is offering can be provided in a less restrictive setting. (e.g. “Can patients ever have labs test done in an outpatient clinic to measure therapeutic levels of meds?”)

a. “Can blood levels of medications be monitored by an outpatient doctor? What behavior is my client exhibiting that lead you believe he couldn’t continue his treatment in a less restrictive environment at home, with his outpatient clinician? What is the facility providing my client that he cannot while staying at home and going to outpatient care?

8. Add comments to your summary brining the hearing officer’s focus on the legal issue of depriving your client of liberty. Add LPS concepts and legal points to your summary. “Obviously the treatment team cares about your welfare and presented that you might benefit from further treatment in the hospital. But the legal issue before the Hearing Officer is whether the facility’s evidence meets the legal standard that would allow this treatment be IMPOSED upon you involuntarily. State to the Hearing Officers: “The evidence from the facility fails to show probable cause that my client is (DTO…DTS...GD?), necessary to deprive him of his liberty. The facility has failed to prove that my patient could not get his clinical needs met in a less restrictive environment, and my client feels it would better support the recovery he began here in the hospital by being at home, pursuing ongoing treatment with his outpatient provider.”

THE IMPORTANCE OF TIMELY SERVICE OF NOTICE OF CERTIFICATIONS

Late service/Lack of service of a Notice of Certification to the patient is a violation of a patient's due process to receive notice of the deprivation of liberty, to be informed of their right to appeal the deprivation of liberty and the right to adequate representation.

Welfare and Institutions Code Section 5253 "A copy of the Certification Notice shall be personally delivered to the person certified…advocate"

Service of the Notice of Certification serves two purposes: 1) to provide information to the patient to allow the patient to prepare any argument they may have contesting the facts that the doctor has relied on. 2) To protect the patients' due process rights to adequate representation by the Patients' Rights Advocate, which requires giving the advocate sufficient time to meet with the client and review the information in the chart.

When the Patients' Rights Advocates Office receives a copy of the Notice of Certification, it includes a Proof of Service in which it is declared under penalty of perjury that the patient has been served and a Patients' Rights Advocate assigned to represent the patient. An advocate meets with the patient as soon as possible. The Patients' Rights Advocate will assume the patient has been served by a member of the facility staff and knows about the hold and the right to a Certification Review Hearing to contest the hold.

If the "proof of service" on the Notice of Certification is signed, it is assumed the patient has been served and notified of the 5250 hold. There is potential for the patient to get confused and angry, if the advocate interviews the client, assuming he/she is aware of the 5250. The advocate ends up being the first person to inform the client of the intention to keep him/her past 72 hours. The client may see the advocate as participating in the decision to keep the patient longer. Rapport cannot be built. This is a due process violation (failure to serve the person certified) and it prejudices the patient's case due to the inability to establish a client/advocate relationship interfering with a patient's right to adequate representation as a person facing deprivation of personal liberty.

HEARINGS FOR PATIENTS SCHEDULED FOR DISCHARGE BUT STILL PRESENT IN FACILITY

Advocates should protect the right to the least restrictive legal status by insisting on hearing burden of proof for any patient for whom there is a discharge order in the chart, but the patient is still physically present in the facility.

Statute provides that a Certification Review Hearing shall be held for every patient on a 5250. *W&I Code, Section 5256* – "*When a person is certified for intensive treatment pursuant to Sections 5250 and 5270.15 a certification review hearing shall be held unless judicial review has been requested…*" There are no contingencies, such as, only if the patient is present in the hearing; or only if the patient disagrees with staying in the hospital; or only if the patient is able to give a specific position to the patients' rights advocate. This requirement is to protect the due process of rights of patients subject to deprivation of liberty. In not providing for contingencies, the laws protect a patient from being coerced into forgoing the right to have the certification reviewed by an unbiased authority *(i.e. Hearing Officer)*. This intent is explained in Doe v. Gallinot.

This right extends to patients for whom there are plans to discharge on the day of the hearing, with a discharge order in the chart or not. Upon the facility representative's presentation of a plan to discharge the patient the day of the hearing, the hearing officer should not hesitate to hold the evidentiary hearing for the person. It is incorrect to simply state on the hearing record that the patient is discharged. As long as a patient is not free to physically walk out the door at will, that person is being involuntarily detained, deprived of his/her liberty. W&I Code, §5256 – *"The Certification Review Hearing shall be within four days…unless postponed at the request of the person or his or her attorney or advocate.*" It is not within the authority of the hearing

officer or facility representative to postpone the hearing in any attempt to circumvent the due process protection provided by hearing. In those instances where the hearing has not been held, the hearing officer has left the facility, the opportunity for a hearing is lost and subsequently the plan to discharge the patient is not completed, the patient has effectively remained detained on involuntary status in violation of his/her due process rights to the Certification Review Hearing. The legally correct way to comply with statute and the intent of the law is assure that a Certification Review Hearing is held the person. There is obviously no guarantee of the hearing officer's ruling, but the hearing is likely to go quickly. The burden of proof remains with the facility, and if the patient is ready for discharge, it is logical to assume the facility will not have much evidence to support the certification criteria, and it would not be illogical to assume that the hearing officer will rule, "No Probable Cause" and the patient be released from the hold.

Complying with the code and intent of statute not only protects the due process of patients. Holding the Certification Review Hearing: protects the 5150/5250 designation of the facility. W&I Code, § 5250 (b) *"…No facility shall be designated to provide intensive treatment unless it complies with the Certification Review Hearing required by this article."*

Protects the treating doctor from potential liability of holding the patient in violation of the aforementioned code. W&I Code, §5259.1 states "*Any individual who is knowingly and willfully responsible for detaining a person in violation of the provisions of this article is liable to that person in civil damages*."

Protects the facility from liability because there will be a record that the facility did not present enough evidence to meet the burden of Probably Cause that the patient meets criteria for involuntary detention. The code provides that if the doctor complies with the

requirements in LPS, the doctor is protected from immunity for liability for any action taken by the patient after discharge.

Conversely, it would be the facility's disadvantage to provide sufficient evidence for a finding of probable cause and then discharge the patient shortly afterward. Should there be some tragic event alleged to be associated with the patient being released before the end of the 14 days, there would be a record that there was evidence of the patient being unsafe to leave the hospital very close to the time the patients was released and it would be questionable whether the doctor evaluated the patient adequately assure a safe discharge. There is case law to support this.

If you have a particularly challenging case and no other advocates with whom to brainstorm, consider contacting advocates from another county such as Alameda or San Mateo. Collaborating with each other makes us one large strong team, statewide.

Other topics for discussion:

- How much strategy is it good to share with your client?
- Could it hurt your client's case to share procedural issues with your client before trying to put them before the Hearing Officer?
- When do you present client's personal agenda as evidence?
- What if your client wants to present information that is irrelevant to the legal issues or is even damaging to possibility of prevailing at the hearing?
- What if your client changes position in the middle of the hearing?
- What if the facility representative interrupts? Interrogates your client during the hearing? Intentionally antagonizes your client in the hearing? Lies?
- What if the facility representative continues to argue every point you make and the Hearing Officer allows the hearing to become a free-for-all?
- How do I use inconsistencies in documentation to create doubt in the Hearing Officer and increase probability of finding NPC?
- Grave Disability? What evidence should the Hearing Officer consider relevant?
    - Is the issue of grave disability different depending on the client's living situation (alone vs. Board & Care Home?)
- Grooming? Communication ability? Social skills? Homelessness? Following directions? Annoying behavior?
- What if the facility tries to argue to find probable cause by attempting to predict future behavior?
- Is the evidence clinical or cultural? How do cultural issues consist of more than language barriers?

- What is the burden of proof and how do I remind the Hearing Officer to require the facility to meet it?