ILLINOIS STATE BAR ASSOCIATION

NOVEMBER 2021 VOL 8 NO. 1

Mental Health Matters

The newsletter of the Illinois State Bar Association's Section on Mental Health Law

Editor's Note

BY SANDRA M. BLAKE

In the fall of 2020, Illinois Supreme Court Chief Justice Anne Burke convened the Illinois Mental Health Task Force Virtual Summit. The Summit, held by the Illinois Supreme Court in cooperation with the State Justice Institute and the National Center for State Courts, was part of the National Judicial Task Force initiative to examine State Courts' response to mental illness. Justice Burke noted that the goal of the Summit was to "be a forum where representatives from the judicial, executive, and legislative branches, along with key stakeholders within the behavioral health system, such as providers, advocates, and individuals with lived experience, can come together to share information, discuss effective practices already in existence, and collaborate to create new systems for the early diagnosis and treatment of individuals suffering from mental health and substance use issues."

The five Summit sessions were free and took place via Zoom on Tuesdays from September 29 through October 27.

Continued on next page

Mental Health Court in the Age of Zoom

BY VINCENT CAIL

Following Governor Pritzker's shutdown order in March 2020, life in the state of Illinois has come to a screeching halt amidst the COVID-19 pandemic, forcing many employees in Illinois to transition into an unconventional work environment while at home. In the mental health world, adapting to the new system changes has presented confusing and frustrating aspects. This article is from the perspective of an attorney from the Legal Advocacy Service in the age of Zoom court. Although there are multiple video conferencing platforms, for the purpose of this article, Zoom will represent them all.

By now most courts in Illinois that handle mental health calls are required to function remotely via Zoom. However, virtual court hearings do not necessarily equate to in-person hearings. One of the biggest obstacles are technical difficulties.

Technical issues are problematic and can adversely affect a respondent's right to due process. On average, Zoom hearings involve a minimum of six participants: Judge, respondent, respondent's attorney, assistant state's attorney, witness, and court reporter. With all participants involved via Zoom, technical issues find fertile ground to blossom, thus making consequences potentially devastating. For example, if an

Continued on page 3

Editor's Note

CONTINUED FROM PAGE 1

Chief Justice Burke opened the first session, recognizing the various stakeholders that came together from courts, agencies, and the community to deliver this vital program. She also highlighted how critical a coordinated response is to our community problems and thanked those involved for their efforts and willingness to come together. *Mental Health Matters* reported on each of the sessions in the October 2020 and February 2021 issues.

On December 1, 2020, there was an additional presentation. Attendees viewed the documentary *The Definition of Insanity,* featuring the mental health jail diversion project in Miami, followed by a panel discussion. See **www.ncsc.org/mentalhealth** for a link to *The Definition of Insanity,* a Found Object documentary by Gabriel London & Charlie Sadoff with support from the Matthew H. Ornstein Memorial Foundation, as well as the panel discussion and the Summit sessions and materials.

Following the December 1 presentation, I determined to dedicate an issue of *Mental Health Matters* to a discussion of the roles and professional limitations of those who may be involved in a mental health case: treatment providers, State's Attorneys, defense counsel and judges. Recognizing the ethical dilemmas often faced by psychiatrists, State's Attorneys and defense counsel in the context of a mental health court case, I reached out to practitioners from across the state, asking each to prepare an article discussing their roles in the mental health arena and court cases. By way of full disclosure, and in order to avoid any potential ethical or other conflicts, I did not ask any assistant state's attorneys from the county in which I practice. I looked forward to a fascinating and enlightening series of articles. Unfortunately, I encountered some of the barriers that were referenced in the Summit's opening session. Several psychiatrists declined to participate, largely due to expressed concern that their comments would be used at later trials and hearings to impeach their testimony in some way. Some assistant state's attorneys agreed to participate, but ultimately did not submit contributions for publication. One in particular submitted an article to her office for approval in May. We have yet to receive a response. Finally, the Code of Judicial Conduct may be interpreted to preclude articles from the perspective of the bench. The ongoing effort to include all perspectives delayed the publication of this themed newsletter. My apologies to the contributors for that delayed publication.

As always, reader comments are welcome. Please join the discussion.■

Mental Health Court in the Age of Zoom

CONTINUED FROM PAGE 1

attorney's microphone is malfunctioning, they cannot make timely objections. As a result, protecting the record for appeal becomes a nightmare. If a witness's testimony is interrupted because of a poor connection, then a judge can easily miss or misunderstand critical evidence. Justice requires that the judge accurately assess the credibility of the parties in arriving at their decision. Technical issues fetter a fact-finder's ability to evaluate credibility accurately.

Other technological difficulties lie in the lack of knowledge in muting/unmuting microphones, setting up and joining Zoom conferences and presenting evidence. Try to envision a prosecutor presenting evidence to members of the court via a Zoom conference. Given the confines of the environment, you may find that it's nearly impossible to fully examine and interpret evidence through a screen, which could have negative impacts on respondent' cases.

Mental Health Matters

This is the newsletter of the ISBA's Section on Mental Health Law. Section newsletters are free to section members and published at least four times per year. Section membership dues are $30 per year.

To subscribe, visit www.isba.org/sections or call 217-525-1760.

OFFICE
ILLINOIS BAR CENTER
424 S. SECOND STREET
SPRINGFIELD, IL 62701
PHONES: 217-525-1760 OR 800-252-8908
WWW.ISBA.ORG

EDITOR
Sandra M. Blake

PUBLICATIONS MANAGER
Sara Anderson
sanderson@isba.org

A solution to help with technical difficulties is practice, practice, practice. Most attorneys did not go into their first in-court trial without practicing beforehand. Ask a co-worker to set up a Zoom call in order to review the opening, direct examination, cross-examination, and closing. This "practice session" can determine any potential issues that may be addressed before actually going in front of the judge.

Prior to the hearing, attorneys should prepare their clients for the risks of this new format. Attorneys will have to communicate with each other and hopefully agree to exhibits in advance and redact private information. When talking on the record, they should refer to exhibits by their labels rather than by describing the details.

Another obstacle in Zoom court is maintaining order. There are a number of difficulties that judges cannot necessarily control in a virtual courtroom the same way as the in-person courtroom, i.e. who is physically present, who is using a cell phone, who is talking to whom, who is coaching witnesses, etc. Zoom trials open the door for these infractions. A judge can order a witness not to have any documents or notes in front of them while testifying; however, enforcing this order becomes problematic virtually. A witness can simply ignore the court's order and there is no way to protect against this. Also, there are no safeguards in place to prevent a witness from reading from a script. In a courtroom, a witness takes the witness box empty-handed. A judge would never allow a witness to testify while holding an outline or script. In the virtual courtroom, the parties are relying on the participant's word that the judge's orders will be followed.

A solution to maintaining order in the virtual courtroom is for judges to enter stipulated injunctive orders with common sense protections such as the ban on recordings, witness tampering, and reading of scripts. Such orders may not prevent people from actively choosing to disregard; nonetheless, the orders provide the judge the ability to hold violators in contempt of court if the acts are discovered. Judges can ask to see the room from which the witness is testifying to ensure they are not being coached or using inappropriate notes. Judges might also suggest witnesses wear headphones to ensure against the possibility of coaching.

Another obstacle with Zoom court is court members not being able to see a witness's reaction to the presentation of evidence nor their physical responses to evidence such as squirming or shaking their leg. A defense attorney's cross-examination and prosecutor's closing argument do not have the same effect on-line as they do in the courtroom. The lack of face-to-face interactions eliminates the court's abilities to have a comprehensive understanding of the cases presented to them.

Some of the problems that I have personally experienced is the lack of face-to-face contact. Prior to COVID-19, I would routinely go to the area hospitals to meet with my clients face-to-face. I had numerous clients ask to see my ARDC card. Now that every communication is on the phone or a video conferencing tool, establishing trust from a person who has a mental illness presents its difficulty. It has been my experience to often have contact with clients' family members for additional information and to help bridge trust between my client and me.

Oftentimes, clients do not understand appropriate court room decorum, which is profoundly difficult in the new Zoom setting. Prior to COVID-19, I could simply look at my client or advise them to be quiet while someone else is testifying. Now, it is the judge who is admonishing my client when it is not their turn to talk.

There is only so much information that attorneys and their clients can transmit during a Zoom trial. Nothing compares to the real-time interactions with a client on good old-fashioned legal pads. Trials take place in real-time and every second counts. In the Zoom context, an attorney cannot lean over and whisper with his client or defense expert to gather critical ammunition for their cross-examination of a plaintiff or state's witness. Prior to COVID-19, my clients would write notes which were often used for cross-examination. Now, I have to ask for a breakout room and speak to my client after a witness testifies. While this is better than nothing, having to go into a breakout room adds significant amount of time to hearings.

During the past months, many state of Illinois employees have had to reinvent their day-to-day activities to ensure that work is being done and clients are still being served. There continue to be pros and cons of the virtual court. I can understand why a judge would prefer to have virtual court to in-person court. They have the opportunity to stay in their courtroom on their bench and conduct court with limited persons present and reducing their risk of being infected. Considering health risks to all parties, it may be beneficial to remain conducting Zoom hearings. Whereas in-person hearings are optimal, continuing to practice and applying the recommended solutions listed in this article may reduce challenges and contribute to an overall improved working environment. ■

Vincent Cail is a staff attorney with the Illinois Guardianship and Advocacy Commission, Legal Advocacy Service, Peoria Regional Office

Issues in Defending Mental Health Court Clients

BY TIMOTHY LEA

I have been practicing in mental health court for 11 months. In that time, there are a few issues that I have found that appear to be unique to mental health court, or at least that I did not come across while practicing in other areas of the law. It should be noted that for 10 of my 11 months, I have been working with the added difficulties that COVID has brought to all of us, and so, I will only be discussing issues that I believe will continue after we return to post COVID work.

The first issue is the pace of the mental health court process. It is much faster than other areas of law. In other practice areas, you may have a case for years before considering going to trial. You would have had full discovery, multiple depositions, and dispositive motions before ever considering taking a civil case to trial. This is not possible in mental health court. This is understandable. In many cases, the respondent needs medical treatment which may be time-sensitive and years-long pre-trial proceedings may impair the client's prognosis. Additionally, I presume that if each case required a typical pre-trial process, the medical system would become overburdened by the number of people being held inpatient waiting to have their medication petition heard. Moreover, extended pre-trial process could potentially be used coercively to pressure a respondent. Because of this, trials are often held within a few days of filing of an initial pleading. This often leads to attorneys on all sides entering a trial without a full and complete picture of the facts or law of the case. It is not exclusive to any one party, nor is it a regular occurrence, but it seems more prevalent than in other areas of the law. In a typical civil matter, by the time you get to trial the parties have made most of their legal arguments in their dispositive motions, and the facts of the case would be fully flushed out by written and oral discovery. The burdens on the pace of mental health court seem to be a necessary and unavoidable issue that is inherent to the practice.

Another issue that seems to be unique to representing respondents in mental health court is that, at times, it is exceeding difficult to build a report with my clients. Many of the clients I have had are experiencing paranoia or another presentation of mental illness that makes developing trust with them difficult. This issue is compounded by the issue discussed in the previous paragraph. Given the time constraints inherent in mental health court, I only have a limited amount of time to get my client to trust me and open up to me so that they may be an active participant in the litigation. I have been told by colleagues that this is difficult at the best of times, and during the age of COVID it is even more difficult. Due to restrictions, I have been meeting with clients primarily via computer-based communication platforms like Zoom. This adds a layer of technical issues to our communication that would not normally be there, but I imagine it also makes me seem other or strange to my clients. When seeing a client in person it is easier for a client to see my humanity, that I take the time to visit them because I care about their case. This is not to say that building a report with my clients is impossible. It has just been more difficult than what I have experienced in other practice areas.

Finally, working in mental health court has further highlighted the importance of the role of an attorney as a counselor. One of the functions of an attorney is to provide knowledge comfort to their clients. Most people who need a lawyer are having a bad day, to put it lightly. They may be accused of a crime, or been injured in an accident, or are being sued. It is our job, as attorneys, to guide our clients through that ordeal and obtain the best result for them under the law. As every lawyer knows, in some cases, even with the best representation that one can provide, the chance of success is low. This occurs often while representing respondents in mental health court. In my experience, my clients in mental health court have a greater amount fear regarding negative outcomes to their case than my prior clients in civil cases. In other areas of the law, potential negative outcomes are not as scary a prospect because there is an immediate out. In a civil case you can settle, in a criminal case you can take a plea. In mental health court, there is not always an immediate out. If the doctor believes that the respondent lacks capacity, the respondent may not be permitted just agree to take the medication. This is especially true if the respondent has a history of non-compliance. Given these additional difficulties, in my opinion, my role as counselor is more prominent in my mind as I represent my clients in mental health court.

Learning to navigate these issues has been made more difficult by COVID, and like many people, I am looking forward to getting back to practicing law in person. That being said, I believe that these issues will outlive the COVID restrictions.■

Timothy Lea is a staff attorney with the Illinois Guardianship and Advocacy Commission, Legal Advocacy Service, North Suburban Regional Office.

Three-Legged Stool of Mental Health Treatment

BY JOSEPH T. MONAHAN

For over three decades I have heard the laments of parents, siblings, and loved ones expressing frustration with the mental health system in Illinois. Complaints about the lack of services, continuity of services, residential care options, and effectiveness of treatment are repeatedly made, and the resulting devastation to individuals and families is evident.

The consequences of the fragmented non-mental health system in Illinois results in failed treatment, suicide, the criminalization of persons with mental health issues, unemployment, homelessness and the destruction of families. It is seen and experienced every day. It is expensive, inefficient and many individuals in need of service are either not served or underserved. Family members attempting to get help for loved ones are faced with a confusing legal system, lack of insurance coverage and no clear answers to how they can get help for someone with a mental health issue in need of care.

Many frustrated people come to our law firm seeking help for their loved one. Over the years we have developed a paradigm to help these individuals to get the services they need. We call it a three-legged stool of mental health treatment.

Leg One

The first leg of the stool is to get the person stabilized, which often requires in-patient hospitalization. It is not just putting a person in the hospital. It is a clear intervention that is carefully designed to stabilize the person, to get them away from the toxic environment they are in with a specific purpose to get them on the road to rehabilitation. The hospitalization must be with a specific purpose, with an eye toward what treatment is needed and a specific outcome in mind on the day of admission. The adage is that discharge planning starts on the day of admission. This must be a component of every admission to a hospital. Where is the person going to go on discharge?

Hospitalization must include a commitment to keep the person long enough to stabilize the person and get them on the correct medication. It must include a commitment to do an appropriate discharge plan. It must include going to court to secure an order for commitment if the person is not cooperating and an order for treatment if they are refusing. Anything short of these elements makes it likely the hospitalization is for naught.

Leg Two

The second leg of the stool is the treatment petition. Oftentimes we experience individuals who have been successful when they are on their medications but for whatever reason stop taking their medication. The consequences are often a deterioration of their ability to successfully function. When they are on their medication, they are capable of being independent. When off their medication, they experience significant issues and problems in their daily lives. Whether it be relationships, employment or ability to cope with the ordinary demands of life, the individual has difficulty without the proper medication.

For these individuals, there must be a commitment to get them the medication they need. A petition for treatment often must be filed in court to allow the person to receive the medication over their objection. This statutory process is designed to protect a person's right to refuse the medication but override that right when it is shown by clear and convincing evidence that the medicine is appropriate in this particular case.

Going to court to commit someone and getting them properly medicated can take time, often 10 days or more. Having the person in the hospital without medication is frustrating for the person in the hospital and the staff who cannot use all the treatment tools available to them. Waiting for the court process can cause deterioration in the person and economic challenge for the facility. It takes staff time to take someone to court and puts them in a direct adversarial position with their patient. Court intervention is expensive and stressful for all.

Yet the failure to pursue court orders allows or results in the patient's discharge without treatment. This in turn can lead to the need for re-hospitalization or further deterioration of the patient. Neither of those outcomes is attractive. Thus, many individuals who experience chronic conditions, have multiple admissions to the hospital and have not had the benefit of court intervention often end up in the criminal justice system or languish in the community.

It is our experience with chronic, long-term cases, court intervention is the answer to provide the treatment that is essential for success.

Leg Three

When a person is admitted and treated in the hospital, the trajectory is improved. However, it is important to provide a structure for success when they are ready for discharge. In our view, an appropriate discharge plan should include the available tools to allow the person to succeed without re-hospitalization. Such tools include but are not limited to an assistive outpatient treatment order, a power of attorney for health care and a mental health treatment declaration.

The Illinois Mental Health Code has a provision for an outpatient treatment order to be entered when a person is ready to be discharged. This powerful tool can be used by hospitals to ensure that the person is compliant with the discharge plan developed

by the treatment team. The actual treatment plan is made part of a 90-day court order that requires the person to comply with the plan or be taken back to court for enforcement. It can be a powerful way to emphasize accountability and allow the person to understand the court is still interested in them and is holding them accountable to the plan. Some call this therapeutic jurisprudence.

Another tool that is available is a health care power of attorney. All people should have a power of attorney for health care (POA). A person with chronic mental health issues should especially have a power of attorney for health care so they have a decision maker in the event they are unable to make decisions themselves. A POA is a very powerful tool and can be used to allow an agent to have access to a treater when the person stops taking their medication, when changes are evident, or when the person is in need of treatment but does not have the insight to understand their need for treatment. An agent can take appropriate steps to arrange for the care necessary.

A major shortcoming of the POA for persons with mental health issues is that the POA is revocable at any time. Thus, often when the POA is needed, the person will revoke the POA leaving the agent with no authority to act.

The third tool to be considered upon discharge is a mental health treatment declaration (MHTD). This tool is needed to address and fill the gap when the POA is revoked. The MHTD covers three primary powers. The attorney in fact or agent under the MHTD has the authority to admit to a psychiatric facility for up to 17 days, provide written and informed consent for psychotropic medication and/or written and informed consent for electroconvulsive therapy (ECT). The MHTD is good for up to three years and is not revocable when the person is found to be incapable of participating in mental health decisions.

Each one of these tools should be a part of every discharge plan contemplated by the hospital upon discharge. They rarely are. If these tools were used, they would enhance discharge plans and make it more likely that re-hospitalizations would not be necessary.

The three-legged stool of mental health provides a strong base for success in the treatment of persons with mental health issues. Our experience is that a strong stool will enhance the success of mental health treatment for even the most difficult treatment resistance cases.■

This article was provided by Joseph T. Monahan, MSW, JD, ACSW, the founding partner of Monahan Law Group, LLC, in Chicago. The firm focuses its practice in mental health, confidentiality, guardianship, probate and health care law. He may be contacted at jmonahan@monahanlawllc.com