

Feasibility of Model Court Orders

Report to the Committee Studying Treatment Options for Offenders with Mental Illness or Substance Abuse Disorders (SJR 97/HJR 142, 2002)

October 18, 2002

Written public comments may be submitted to Nancy Roberts by November 8, 2002, at the following address: Division of Legislative Services, General Assembly Building, 910 Capitol Street, Richmond, Virginia, 23219 (e-mail nroberts@leg.state.va.us or fax 804-371-0169). Comments will be compiled by staff and presented to the Committee at its meeting on November 25. If you have questions, please call Nancy Roberts at (804) 786-3591.

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MEMORANDUM

TO: The Committee Studying Treatment Options for
Offenders with Mental Illness or Substance Abuse Disorders

FROM: Steven L. Dalle Mura, Director of Legal Research
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IN RE: Report on the Feasibility of Model Court Orders

DATE: September 30, 2002

As adopted by the 2002 Session of the General Assembly, both Senate Joint Resolution 97 and House Joint Resolution 142 request the Office of the Executive Secretary of the Supreme Court ("OES") "to examine the feasibility of designing and implementing a model court order that addresses mental health services." OES is to undertake this assessment because, as the resolutions reflect, the General Assembly has found that "a model court order would expedite the process by which the judge, prosecutor, defense attorney and the mental health community could work together to secure the necessary screening, assessment and treatment services for persons with mental illness."

Executive Summary

It would be feasible to develop model court orders to secure the assessment, referral, commitment or treatment of those accused of crimes who are believed to require or who would benefit from access to mental health services, when the associated components of this study result in well-defined options for the provision of those services. However, at this stage in the study, it is premature to begin the process of developing such orders or to envision the shape and structure of these orders. The development of such model court orders could occur only after a determination of the subject population of these orders, the location in the judicial process for the use of these orders, the type of judicial officer who would enter these orders, and the particular options which would be included in these orders. The development of those

orders could occur within the context of the usual monitoring of legislation which OES undertakes in order to revise current court forms and create new court forms.

The Types of Court Forms

Over a period of years, OES has developed forms for use by circuit courts, district courts and magistrates at various stages of civil and criminal proceedings. These forms include not only model court orders, but also forms used to initiate proceedings in court, such as a petition or a warrant, as well as forms used in the midst of a proceeding, such a subpoena for a witness or for documents.

In both the district courts and the magistrate system, the use of these standard forms is mandatory. Va. Code § 16.1-69.51. In circuit court proceedings, the standard forms are not mandatory, except where the law may require the use of a form developed by OES, such as for certain probate transactions. In addition, there are specific types of proceedings where the law mandates the use of a particular form, regardless of the forum. Examples of the latter include a defendant's request for a certificate of analysis in criminal proceedings involving drugs or alcohol. Va. Code § 19.2-187. Finally, the law will also on occasion require the mandatory use of a certain form in a proceeding, but will direct an entity other than the court system to develop and promulgate that form. For example, the State Mental Health, Mental Retardation and Substance Abuse Services Board and the Commissioner of Mental Health, Mental Retardation and Substance Abuse Services share the responsibility for the development and promulgation of forms used in involuntary commitment proceedings. Va. Code §§ 37.1-64, -67.3.

Model court orders — as well as model court forms as a whole — are found in several formats. First, there are pre-printed form orders with text which is set forth at some length and with tightly structured alternatives. Rather than always having to enter text which describes the finding made or the action taken, the judicial officer may simply check a box indicating the choice of one alternative, as opposed to another alternative. Attached are four relevant examples of this format, district court forms DC-342, ORDER FOR PSYCHOLOGICAL EVALUATION; DC-494, TEMPORARY DETENTION ORDER; DC-522, ORDER FOR EVALUATION TO DETERMINE COMPETENCY TO STAND TRIAL – JUVENILE; and DC-523, ORDER FOR PROVISION OF RESTORATION SERVICES TO INCOMPETENT JUVENILE. (Attachments A through D.) This format is typically used where the options are fairly well circumscribed (*e.g.*, to detain or not) and where the press of the volume of a docket urges the use of that format (*e.g.*, with garden-variety civil proceedings in general district court, such as landlord-tenant cases). This is the predominant format found in the form orders used by district court judges and magistrates, although there are orders used in circuit court which conform to this format. The forms in this format are produced through a process described below, which utilizes the

technical expertise and experience of judges, clerks and magistrates.

A second type of form order is a more "open-textured" document which uses set text components, but in a word processing-oriented format. These components consist of standardized paragraphs or sentences, but are more amenable to being combined and modified at the discretion of the judicial officer and as the parameters of the proceeding require. Given both the resources available and the pace of proceedings, this family of forms lends itself to use more readily in circuit courts. *The Handbook for Judges and Clerks*, a manual produced by OES for judges and clerks of the circuit courts, contains model orders of this sort. Attached are two examples of these orders, set 2.0-900, DEFENDANT'S MENTAL CONDITION (PRE-CONVICTION MATTERS), and set 11.0-200, NOT GUILTY BY REASON OF INSANITY (POST-TRIAL MATTERS). (Attachments E and F.) Although a considerable amount of the material to be incorporated into these orders is set forth in detail, distribution of these components in a word processing format on a disk means that both the sequence and the content of the components can be modified and combined with other components as required for an order in a particular proceeding.

The Development of Court Forms

Since each model court form reflects the statutory procedural and substantive requirements relating to a certain proceeding, activity regarding the development of new court forms and the revision of existing court forms is concentrated in the first half of the calendar year. OES staff analyzes legislation affecting those statutory procedural and substantive requirements to be incorporated either into existing forms or into newly created forms. Proposed revised forms and proposed new forms are drafted for consideration by two advisory committees. These drafts are presented, usually in late April, to the District Court Forms Advisory Committee and to the Circuit Court Forms Advisory Committee. These committees are composed of judges and clerks from the respective levels of court. The District Court Forms Advisory Committee is supplemented by several members who are magistrates. If the forms to be considered are intimately connected with the work of another governmental entity, such as the Division of Child Support Enforcement, the Commissioners of Accounts or the Department of Juvenile Justice, representatives of those constituencies may be invited to attend the meeting and share their perspectives.

The recommendations of the District Court Forms Advisory Committee are presented to the Committee on District Courts ("CDC"), the body which is statutorily charged with determining the form and content of the records used in the district courts. Va. Code § 16.1-69.51. Upon approval by the CDC, the forms are printed and distributed to the district courts and the magistrates. Absent those relatively infrequent occasions when there is a need for

further review by the Judicial Council or the Supreme Court itself of the recommendations of the Circuit Court Forms Advisory Committee, the recommendations of that committee do not undergo a further review, but are simply printed and distributed directly to the circuit courts. Of course, these processes work under the imperative of having the revised forms and newly created forms distributed to all users prior to July 1st, which is the effective date of most legislation.

As part of its usual monitoring of legislation, OES would assess any legislation prompted by this study and either develop recommendations for pre-printed model court orders for the review process described above or else incorporate the provisions of that legislation into the model court orders which are a part of THE HANDBOOK FOR JUDGES AND CLERKS. The particular course taken would be a function of which particular constituency will utilize these orders.

Prerequisites for the Development of Model Court Orders Pursuant to SJR 97 and HJR 142

There is no reason at this point to fear that it will not be possible to develop and promulgate effective model court orders which can be used by judicial officers for the provision of mental health services to those accused of a crime who have entered the judicial process. However, the reason it is premature to begin development of any orders in detail is that the answers to several groups of questions are not yet clear within the context of this study. As will become evident, these groups of questions are not discrete, isolated inquiries. The answers to one group of questions will influence the answers to the other groups of questions.

(i) What is the subject population for these orders? Would the envisioned services apply to particular types of offenders, either with regard to seriousness of offense, type of offense or characteristics of the accused? For example, if one segment of the subject population will be juveniles accused of committing a delinquent act, then their inclusion in the subject population will have a significant impact on the model court orders.

(ii) At what point in the judicial process would these orders be utilized? Once the offender enters what may be broadly described as the judicial process, there are a number of points where a judicial officer will have an offender before her and a decision regarding the appropriateness of mental health services could be made. There are points of decision from arrest to bail determination to arraignment to appointment of counsel to pre-trial proceedings, and so forth. The answer to the prior group of

questions will influence the resolution of this question. For example, if the subject population will include not only those accused of misdemeanors, but also those accused of felonies, then there will be additional decision-points, such as a preliminary hearing in district court for a defendant charged with a felony.

(iii) What type of officer would be utilizing these orders? At what level of court would these determinations occur? Once again, the answers to the two preceding groups of questions will affect the answers to these questions. If the intent is to permit intervention, diversion or some other decision prior to any trial (or any involved pre-trial proceeding), then one would naturally focus on magistrates as primary decision-makers. Or, for example, if the subject population is envisioned as those charged with misdemeanors, then it is not likely that the circuit court would be implicated, since misdemeanor cases would be heard in circuit court only upon appeal, after a conviction in district court. As a final example, if a significant component of the subject population were to be juveniles charged with a delinquent act, then magistrates would play a rather less significant role with reference to that population, but the intake officers of the Department of Juvenile Justice would become an absolutely crucial participant.

(iv) Finally, to what services would the orders apply? Would the "decision tree" for determining whether to enter such an order be a series of rather circumscribed "either-or" decisions or would the determination be more open-ended? Similarly, would the range of service options be rather circumscribed or more open-ended? It may be that the shape of the services to be provided and the complexity of the determination to be made would effect a judgment about where in the process the decision-point should be placed and who should be the decision-maker. Typically, decisions made early in the process, such as before a magistrate, are decisions which would be made with less detailed a backdrop of information about the subject, in contrast to a decision-point which may occur later. In addition, as a very pedestrian observation, it is necessary to know what the service options are, *i.e.*, what the judicial officer can decide, in order to know, quite literally, what content to put in the form order.

These groups of questions will determine the most appropriate format — as well as the content — for these form orders. The issues of when the orders are generated, by whom, and whether the options provided at a given decision-point are open-ended or more tightly delimited will all fashion the form orders.

Conclusion

The attached examples of the two families of forms are meant to serve not only as illustrations of orders currently in use, but also to represent the conclusion of OES that it will be feasible to develop model orders to address the concerns which prompted Senate Joint Resolution 97 and House Joint Resolution 142. These examples illustrate how model court orders currently exist to accommodate judicial decisions which are not wholly dissimilar from the types of judicial decisions likely to be implicated by this study. However, this description of both the process of the development of forms and the considerations which shape them demonstrates how it is premature at this point to develop even skeletal model court orders "to secure the necessary screening, assessment and treatment services for persons with mental illness."

Attachments (6)