Indiana Public Defender Council

# GUIDE TO INVOLUNTARY CIVIL COMMITMENT

STATE OF INDIANA

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# I. CIVIL COMMITMENT STATUTES

Title 12 (Human Services), Article 26 (Voluntary and Involuntary Treatment of Mentally Ill Individuals), Chapters 1 thru 16

## A. Relevant Statutory Definitions

### 1. Dangerous

Pursuant to Ind. Code § 12-7-2-53 "Dangerous," for purposes of IC 12-26, means a condition in which an individual as a result of mental illness, presents a substantial risk that the individual will harm the individual or others.

### 2. Gravely disabled

Pursuant to Ind. Code § 12-7-2-96, "Gravely disabled," for purposes of IC 12-26, means a condition in which an individual, as a result of mental illness, is in danger of coming to harm because the individual:

(1) Is unable to provide for that individual's food, clothing, shelter, or other essential human needs; or

(2) Has a substantial impairment or an obvious deterioration of that individual's judgment, reasoning, or behavior that results in the individual's inability to function independently."

## B. Chapter 1 Jurisdiction and Procedure

(§§ 12-26-1-1 thru 12-26-1-11)

### 1. 12-26-1-1 Statutes applicable to involuntary detention or commitment

Individual who is mentally ill and either dangerous or gravely disabled may be involuntarily detained or committed under

IC 12-26-4 (immediate detention)

IC 12-26-5 (emergency detention)

IC 12-26-6 (temporary commitment)

IC 12-26-7 (regular commitment)

### 2. 12-26-1-2 Jurisdiction of courts

### 3. 12-26-1-3 Criminal defendant found not responsible by reason of insanity—Commitment hearing—Transfer of jurisdiction

### 4. 12-26-1-4 Juvenile court jurisdiction

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Juvenile court may not commit child; if child needs to be committed, juvenile court shall transfer proceeding to court having probate jurisdiction

5. **12-26-1-5 Voluntary or temporary commitment proceedings—Jurisdiction acquired by service of summons—Jurisdiction by order for continued detention**

   If commitment proceeding initiated by filing a petition, the court acquires jurisdiction over the person alleged to have mental illness by service of summons on the individual according to the Indiana Rules of Trial Procedure or by entry of an appearance by the individual

6. **12-26-1-6 Applicability of rules of trial procedure**

   Except as otherwise provided, judicial proceeding under this article "shall be conducted as other civil proceedings according to the Indiana Rules of Trial Procedure."

7. **12-26-1-7 Computation of time**

   "(a) This section does not apply in the following statutes:

   (1) IC 12-26-4

   (2) IC 12-26-11

   (3) IC 12-26-12

   (b) This section does not apply to computation of a period during which an individual may be detained under this article.

   (c) In computing time under this article, Saturdays, Sundays, and legal holidays are not included in the computation if the time prescribed is less than fourteen (14) days."

8. **12-26-1-8 Detention upon filing of petition for commitment**
9. **12-26-1-9 Appeals from involuntary detention or commitment orders or judgments**

   Appeals from final order or judgment may be taken by the respondent, the petitioner or an "aggrieved person."

*PRACTICE TIP:* As a practical matter, the respondent, not the petitioner, would appeal as it would be easier, cheaper and quicker for the petitioner to simply file a new petition and seek a new court order.

10. **12-26-1-10 Adoption of rules**
11. **12-26-1-11 Forms prescribed by division**

C. **Chapter 2 Rights of Persons**

(§§ 12-26-2-1 thru 12-26-2-9)

1. **12-26-2-1 Habeas corpus**

   "This article does not limit or restrict the right of a person to apply to an appropriate court for a writ of habeas corpus."

2. **12-26-2-2 Right to notice of hearing, copy of petition or order, be present at hearing, and counsel.**

   "(a) This section applies under the following statutes:

   (1) IC 12-26-6 [Temporary Commitment]

   (2) IC 12-26-7 [Regular Commitment]

   (3) IC 12-26-12 [Discharge of Commitment]

(4) IC 12-26-15 [Review of Commitment]

(b) The individual alleged to have a mental illness has the following rights:

(1) To receive adequate notice of a hearing so that the individual or the individual's attorney can prepare for the hearing.

(2) To receive a copy of a petition or an order relating to the individual.

(3) To be present at a hearing relating to the individual. The individual's right under this subdivision is subject to the court's right to do the following:

(A) Remove the individual if the individual is disruptive to the proceedings.

(B) Waive the individual's presence at a hearing if the individual's presence would be injurious to the individual's mental health or well-being.

(4) To be represented by counsel."

*PRACTICE TIP*: Indiana Administrative Rule 14 permits commitment hearings to proceed through audiovisual communications (typically through CourtCall). Best practice is that counsel should speak with their client before the hearing and ask whether they prefer to be present by CourtCall or in person. If the client consents to CourtCall, both parties should file a consent to audiovisual communication. If client prefers to be present in person, CourtCall should be cancelled by counsel and transport requested. If a client does not state an opinion on whether they want to appear in person or over CourtCall, it is recommended that the client is present in person in court for more efficient and effective attorney-client communication. If client is present by CourtCall, best practice is that the attorney is physically with the client to promote effective attorney-client communication.

3. **12-26-2-3 Right to testify at hearing and present and cross-examine witnesses—Testimony received by court**

"(a) This section applies under the following statutes:

(1) IC 12-26-6 [Temporary Commitment]

(2) IC 12-26-7 [Regular Commitment]

(3) IC 12-26-12 [Discharge of Commitment]

(4) IC 12-26-15 [Review of Commitment]

(b) The individual alleged to have a mental illness, each petitioner, and all other interested individuals shall be given an opportunity to appear at hearings and to testify.

(c) The individual alleged to have a mental illness and each petitioner may present and cross-examine witnesses at hearings.

(d) The court may receive the testimony of any individual."

*PRACTICE TIP:* Depending on the client's illness and how they present, if they want to testify, the attorney should be prepared to assist the client and guide them through their testimony so that helpful information is provided to the court. As an example, if the client has insight into their mental illness and understands the importance of taking medications and is able to testify to those facts, that then can be highlighted in a closing argument. Counsel can argue a court order is not necessary and client has demonstrated they will take medications voluntarily.

If a client agrees with the commitment, the client can testify to their insight and compliance and counsel can argue that a court order is not necessary based on client's agreement with taking medications.

4. **12-26-2-4 Change of Judge—Change of venue**

   Respondent has right to change of judge but not change of venue from county

5. **12-26-2-5 Appointment of counsel—Representation of corporation—Proof required**

   "(e) The petitioner is required to prove by clear and convincing evidence that:

   (1) the individual is mentally ill and either dangerous or gravely disabled; and

   (2) detention or commitment of that individual is appropriate."

6. **12-26-2-6 Immunity from liability of persons participating in proceedings**
7. **12-26-2-7 Immunity from liability of child's advocate**
8. **12-26-2-8 Rights as citizen not deprived by detention or commitment**

   "(a) Detention or commitment of an individual under this article does not deprive the individual of any of the following:

   (1) The right to do the following:

   (A) Dispose of property.

   (B) Execute instruments.

   (C) Make purchases.

   (D) Enter into contracts.

   (E) Give testimony in a court of law.

   (F) Vote

   (2) A right of a citizen not listed in subdivision (1).

   (b) A procedure is not required for restoration of rights of citizenship of an individual detained or committed under this article."

9. **12-26-2-9 Refusal to admit individual—Grounds—Transfer**

   State institution can refuse to admit individual if inadequate space, treatment staff or treatment services.

**D. Chapter 3 Voluntary Treatment**

(§§ 12-26-3-1 thru 12-26-3-9)

1. **12-26-3-1 Grounds for admittance**
2. **12-26-3-2 Children—Application by parent or guardian—Individuals at least eighteen years of age**
3. **12-26-3-3 Discharge of individuals—Grounds**
4. **12-26-3-4 Release of individual upon written request**
5. **12-26-3-5 Grounds for refusal to release individual—Report to court**

   (a) physician not required to release individual if physician "has reason to believe the individual is mentally ill and either dangerous or gravely disabled."

   (b) physician must file a written report with court

   (c) report must

   "(1) State that there is probable cause to believe that the individual is mentally ill and either dangerous or gravely disabled;

   (2) State that the individual requires continuing care and treatment in the facility; and

   (3) Request a hearing on the report."

6. **12-26-3-6 Preliminary or final hearing on release ordered by court**

   "The court shall, within two (2) days from the date of receiving a report made under section 5 [IC 12-26-3-5] of this chapter, do either of the following:

   (1) Set a preliminary hearing to determine if there is probable cause to believe that the individual is:

   (A) Mentally ill and either dangerous or gravely disable; and

   (B) In need of temporary or regular commitment.

   (2) Order a final hearing to be held within two (2) days of the order to determine if the individual is

   (A) Mentally ill and either dangerous or gravely disabled; and

   (B) In need of temporary or regular commitment."

7. **12-26-3-7 Preliminary hearing on release—Admission of physician's statement—Required finding**

   "(a) A physician's statement may be introduced into evidence at the preliminary hearing without the presence of the physician.

   (b) A finding of probable cause may not be entered at the preliminary hearing unless there is oral testimony:

   (1) Subject to cross-examination;

   (2) of at least one (1) witness who:

   (A) Has personally observed the behavior of the individual; and

   (B) Will testify as to facts supporting a finding that there is probable cause to believe that the individual is in need of temporary or regular commitment.

(c) If after the preliminary hearing the court does not find probable cause, the individual shall be discharged immediately.

(d) If after the preliminary hearing the court finds probable cause to believe that the individual is in need of temporary or regular commitment, the court shall order the detention of the individual in an appropriate facility pending a final hearing."

8. **12-26-3-8 Final hearing on release—Physician's testimony required**

"(a) If the court sets a preliminary hearing under section 6(1) [IC 12-26-3-6(1)] of this chapter, a final hearing shall be held not later than ten (10) days after the date of the preliminary hearing.

(b) At the final hearing, an individual may not be found in need of temporary or regular commitment unless at least one (1) physician who has personally examined the individual testifies at the hearing.

(c) The testimony required by subsection (b) may be waived by the individual if the waiver is voluntarily and knowingly given."

9. **12-26-3-9 Authority of court to order temporary or regular commitment**

"(a) If an individual has not previously been the subject of a commitment proceeding, the court may only order temporary commitment.

(b) If an individual has previously been the subject of a commitment proceeding, the court may order a regular commitment if a longer period of treatment is warranted."

**E. Chapter 4 Immediate Detention**

(§§ 12-26-4-1 thru 12-26-4-9)

1. **12-26-4-1 Authority of law enforcement officer to apprehend and charge individual**

Law enforcement officer who believes individual has mental illness and is either dangerous or gravely disabled may take individual to "nearest appropriate facility" or charge the individual with an offense.

2. **12-26-4-1.5 Preliminary medical and psychological evaluation**

If a court reasonably believes an individual has a mental illness and is either dangerous or gravely disabled and is in immediate need of hospitalization and treatment, court may order law enforcement officer to transport individual to facility for preliminary medical and psych evaluation.

3. **12-26-4-2 Statement of law enforcement officer—Contents**
4. **12-26-4-3 Statement of law enforcement officer—Filing**

*PRACTICE TIP:* If an individual is detained by a law enforcement officer for an immediate detention, try to get a copy of the police report to determine why the person was detained. Be aware of the unlikely possibility that the officer who detained the respondent may be called to testify in support of commitment at the commitment hearing.

5. **12-26-4-4 Authority of superintendent or physician to furnish emergency treatment**
6. **12-26-4-5 Detention for twenty-four hours**

   "Except as provided for in section 6 [IC 12-26-4-6] of this chapter, an individual may not be detained under this chapter for more than twenty-four (24) hours from the time of admission to the facility."

7. **12-26-4-6 Requirements for detention longer than twenty-four hours**

   "If the superintendent or the attending physician believes the individual should be detained for more than twenty-four (24) hours from time of admission to the facility, the superintendent or the physician must have an application filed for emergency detention under IC 12-26-5 immediately upon the earlier of the following:

   (1) A judge becomes available.

   (2) Within seventy-two (72) hours of admission to the facility."

8. **12-26-4-7 Discharge of individual**
9. **12-26-4-8 Detention period in addition to period under IC 12-26-5**

   "A period of detention under this chapter is in addition to a period of detention under IC 12-26-5."

10. **12-26-4-9 Payment by county of costs of preliminary medical and psychological evaluation**

**F. Chapter 5 Emergency Detention**

(§§ 12-26-5-1 thru 12-26-5-12)

1. **12-26-5-1 Application for detention—Contents**

   "(a) An individual may be detained in a facility for not more than seventy-two (72) hours under this chapter, excluding Saturdays, Sundays, and legal holidays, if a written application for detention is filed with the facility. The individual may not be detained in a state institution unless the detention is instituted by the state institution.

   (b) An application under subsection (a) must contain both of the following:

   (1) A statement of the applicant's belief that the individual is:

   (A) Mentally ill and either dangerous or gravely disabled; and

   (B) In need of immediate restraint.

   (2) A statement by at least one (1) physician that, based on:

   (A) An examination; or

   (B) Information given the physician;

   the individual may be mentally ill and either dangerous or gravely disabled."

2. **12-26-5-2 Judicial endorsement authorizing apprehension of individual—Expense of transportation**

   Application authorizes law enforcement to take individual into custody and transport individual to a facility.

3. **12-26-5-3 Examination of individual—Emergency treatment**

   "An individual detained under this chapter may be examined and given emergency treatment necessary to do the following:

   (1) Preserve the health and safety of the individual.

   (2) Protect other persons and property."

4. **12-26-5-4 Lack of probable cause to believe individual is mentally ill—Report**

   While individual is detained if physician or superintendent determines there is not probable cause to believe the individual is mentally ill and either dangerous or gravely disabled, a report stating so is required under Ind. Code § 12-26-5-5.

5. **12-26-5-5 Report by superintendent or physician to court—Contents**

   "Before the end of a detention period under this chapter, the superintendent of the facility or the individual's attending physician must make a written report to the court. The report must contain both of the following:

   (1) A statement that the individual has been examined.

   (2) A statement whether there is probable cause to believe that the individual:

   (A) Is mentally ill and either dangerous or gravely disabled; and

   (B) Requires continuing care and treatment."

6. **12-26-5-6 Discharge upon report of no probable cause—Report part of individual's record**

   "(a) If a report made under section 5 [IC 12-26-5-5] of this chapter states there is not probable cause, the individual shall be discharged from the facility.

   (b) The report shall be made part of the individual's record."

7. **12-26-5-7 Report of probable cause—Recommendation of hearing and detention**

   "If a report made under section 5 [IC 12-26-5-5] of this chapter states there is probable cause, the report shall recommend both of the following:

   (1) That the court hold a hearing to determine whether:

   (A) The individual is mentally ill and either dangerous or gravely disabled; and

   (B) There is a need for continuing involuntary detention.

   (2) That the individual be detained in a facility pending the hearing."

8. **12-26-5-8 Time for court to act upon report**

   "The court shall consider and act upon a report described in section 7 [IC 12-26-5-7] of this chapter within twenty-four (24) hours of receiving the report."

9. **12-26-5-9 Orders of court for release or hearings—Time for hearing**

   "(a) After receiving a report described in section 7 [IC 12-26-5-7] of this chapter, the court may do any of the following:

   (1) Order the individual released.

(2) Order the individual's continued detention pending a preliminary hearing. The purpose of a hearing under this subdivision is to determine if there is probable cause to believe that the individual is:

(A) Mentally ill and either dangerous or gravely disabled; and

(B) In need of temporary or regular commitment.

(3) Order a final hearing. The purpose of a hearing ordered under this subdivision is to determine if the individual is:

(A) Mentally ill and either dangerous or gravely disabled; and

(B) In need of temporary or regular commitment.

(b) A hearing ordered under subsection (a) must be held not later than (2) days after the order."

**10. 12-26-5-10 Preliminary hearing**

"(a) A physician's statement may be introduced into evidence at the preliminary hearing held under section 9(a)(2) [IC 12-26-5-9(a)(2)] of this chapter without the presence of the physician.

(b) A finding of probable cause may not be entered at a preliminary hearing unless there is oral testimony.

(1) Subject to cross-examination; and

(2) Of at least one (1) witness who:

(A) Has personally observed the behavior of the individual; and

(B) Will testify to facts supporting a finding that there is probable cause to believe that the individual is in need of temporary or regular commitment.

(c) At the conclusion of the preliminary hearing, if the court does not find probable cause, the individual shall be immediately discharged,

(d) If the court finds at the conclusion of the preliminary hearing probable cause to believe that the individual needs temporary or regular commitment, the court shall order the detention of the individual in an appropriate facility pending a final hearing."

**11. 12-26-5-11 Final hearing**

"(a) A final hearing required by section 10(d) [IC 12-26-5-10(d)] of this chapter shall be held within ten (10) days of the date of the preliminary hearing.

(b) At a final hearing, an individual may not be found in need of temporary or regular commitment unless at least one (1) physician who has personally examined the individual testifies at the hearing. This testimony may be waived by the individual if the waiver is voluntarily and knowingly given.

(c) If an individual has not previously been the subject of a commitment proceeding, the court may order only a temporary commitment.

(d) If an individual has previously been the subject of a commitment proceeding, the court may order a regular commitment if a longer period of treatment is warranted."

**12. 12-26-5-12 Finding of no probable cause—Payment of custodial and transportation costs**

**G. Chapter 6 Temporary Commitments**

(§§ 12-26-6-1 thru 12-26-6-11)

**1. 12-26-6-1 Period of commitment**

"An individual who is alleged to be mentally ill and either dangerous or gravely disabled may be committed to a facility for not more than ninety (90) days under this chapter."

**2. 12-26-6-2 Methods of commencing commitment proceedings**

"(a) A commitment under this chapter may be begun by any of the following methods:

(1) Upon request of the superintendent under IC 12-26-3-5 [Voluntary treatment—grounds for refusal to release individual].

(2) An order of the court having jurisdiction over the individual following emergency detention,

(3) Filing a petition with a court having jurisdiction in the county:

(A) Of residence of the individual; or

(B) Where the individual may be found.

(b) A petitioner under subsection (a)(3) must be at least eighteen (18) years of age.

(c) A petition under subsection (a)(3) must include a physician's written statement stating both of the following:

(1) The physician has examined the individual within the past thirty (30) days.

(2) The physician believes the individual is:

(A) Mentally ill and either dangerous or gravely disabled; and

(B) In need of custody, care, or treatment in an appropriate facility."

**3. 12-26-6-3 Notice of hearings**

"(a) Notice of a hearing under this chapter shall be given to all of the following:

(1) The individual.

(2) The petitioner.

(3) The superintendent or the chief executive officer of a facility having care or custody of the individual.

(b) The notice required by subsection (a) must state the time, place, and date of the hearing."

**4. 12-26-6-4 Hearing date**

"(a) Within three (3) days after a proceeding is begun under this chapter, the court shall enter an order setting a hearing date.

(b) If the proceeding was begun under section 2(a)(3) [IC 12-26-6-2(a)(3)] [Commencement of temporary commitment by filing petition with court] of this chapter, the hearing date set

under subsection (a) must be more than one (1) day but less than fourteen (14) days from the date of notice.

(c) If the proceeding was begun under section 2(a)(1) or 2(a)(2) [IC 12-26-6-2(a)(1)] [Commencement of temporary commitment by request of superintendent following refusal to continue with voluntary treatment] or IC 12-26-6-2(a)(2) [Commencement of temporary commitment following court order following an emergency detention] of this chapter, the hearing shall be held within ten (10) days after issuance of the order."

5. **12-26-6-5 Place of hearing**

"The court may hold the hearing at a facility or other suitable place not likely to have a harmful effect on the individual's health or well-being."

6. **12-26-6-6 Appointment of physician—Examination and report**

"The court may appoint a physician to do the following:

(1) Examine the individual.

(2) Report, before the hearing, the physician's opinion as to the following:

(A) Whether the individual is mentally ill and either dangerous or gravely disabled.

(B) Whether the individual needs temporary commitment to a facility for diagnosis, care, and treatment."

7. **12-26-6-7 Proceedings following physician's report**

"If a report made under section 6 [IC 12-26-6-6] [Temporary commitment appointment of physician] of this chapter is that the individual is not either dangerous or gravely disabled, the court may terminate the proceedings and dismiss the petition. Otherwise, the hearing shall proceed as scheduled or as continued by the court."

8. **12-26-6-8 Order of commitment to facility or outpatient treatment program—Treatment plan—Reports required**

"(a) If, upon the completion of the hearing and consideration of the record, the court finds that the individual is mentally ill and either dangerous or gravely disabled, the court may order the individual to:

(1) be committed to an appropriate facility; or

(2) enter an outpatient treatment program under IC 12-26-14 [Outpatient therapy] for a period of not more than ninety (90) days.

(b) The court's order must require that the superintendent of the facility or the attending physician file a treatment plan with the court within fifteen (15) days of the individual's admission to the facility under a commitment order.

(c) If the commitment ordered under subsection (a) is to a state institution administered by the division of mental health and addiction, the record of commitment proceedings must include a report from a community mental health center stating both of the following:

(1) That the community mental health center had evaluated the individual.

(2) That commitment to a state institution administered by the division of mental health and addiction under this chapter is appropriate.

(d) The physician who makes the statement required by section 2(c) [IC 12-26-6-2(c)] of this chapter may be affiliated with the community mental health center that submits to the court the report required by subsection (c).

(e) If the commitment is of an adult to a research bed at Larue D. Carter Memorial Hospital as set forth in IC 12-21-2-3 [Division of Mental Health and Addiction—Director of Division—Duties], the report from a community mental health center is not required.

(f) If a commitment ordered under subsection (a) is to a state institution administered by the division of disability and rehabilitative services, the record of commitment proceedings must include a report from a service coordinator employed by the division of disability and rehabilitative services stating that, based on a diagnostic assessment of the individual, commitment to a state institution administered by the division of disability and rehabilitative services under this chapter is appropriate.

(g) If the court makes a finding under subsection (a) (including a finding in reference to a child under IC 31-37-18-3) [Juvenile delinquency disposition for children with mental illness], the court shall transmit any information required by the office of judicial administration to the office of judicial administration for transmission to NICS (as defined in IC 35-47-2.5-2.5) [National Instant Criminal Background Check as maintained by the FBI] in accordance with IC 33-24-6-3 [Powers and duties of the Office of Judicial Administration of the Supreme Court].

9. **12-26-6-9 Discharge before end of commitment—Notice to court**

"(a) Unless the court has entered an order under IC 12-26-12-1, the superintendent or the attending physician may discharge the individual before the end of the commitment period if the superintendent or the attending physician determines that the individual is not mentally ill and either dangerous or gravely disabled.

(b) If an individual is discharged under subsection (a), the superintendent or the attending physician shall notify the court, and the court shall enter an order terminating the commitment."

10. **12-26-6-10 Extension of period of commitment—Report—Hearing**

"(a) The period of commitment of an individual under this chapter may be extended for one (1) additional period of not more than ninety (90) days through a proceeding under this section.

(b) A proceeding under this section must be begun before the end of the first period of commitment.

(c) A proceeding under this section may be begun by filing with the court a report by the attending physician or superintendent that states that the individual continues to be:

(1) Mentally ill and either dangerous or gravely disabled; and

(2) In need of continuing custody, care, or treatment in the facility for an additional period of not more than ninety (90) days.

(d) Upon receiving a report under subsection (c), the court shall set a hearing on the report.

(e) The hearing required by subsection (d) must be held before the end of the current commitment period.

(f) Notice of the hearing required by subsection (d) shall be given to the committed individual and all other interested individuals at least five (5) days before the hearing date.

(g) A committed individual's rights and a petitioner's rights and hearing procedures are the same as those provided for the first period of commitment.

(h) If at the completion of the hearing and the consideration of the record the individual is found to be:

(1) Mentally ill and either dangerous or gravely disabled; and

(2) In need of continuing custody, care, or treatment in the facility;

the court may order the individual's continuing custody, care, or treatment in the facility for one (1) additional period of not more than ninety (90) days."

*PRACTICE TIP*: Make sure that the petitioner is only discussing issues within the timeframe of the past 90 days (when the temporary commitment was initially granted) and object on relevancy grounds if petitioner is using old information used during the initial hearing for the temporary commitment, including, but not limited to, prior commitments or hospitalizations.

**11. 12-26-6-11 Report to court**

"At least twenty (20) days before the end of the first or second temporary commitment period, the superintendent of the facility or the attending physician shall make a report to the court that states all of the following:

(1) The mental condition of the individual.

(2) Whether the individual is dangerous or gravely disabled.

(3) Whether the individual needs continuing care and treatment in a facility for a period of more than ninety (90) days."

**H. Chapter 7 Regular Commitments**

(§§ 12-26-7-1 thru 12-26-7-5)

**1. 12-26-7-1 Applicability of chapter**

Applies for commitment proceeding where individual is alleged to be mentally ill and either dangerous or gravely disabled and

Regular commitments apply to persons whose commitment is expected to exceed ninety (90) days.

**2. 12-26-7-2 Persons eligible to file petition for commitment**

"(a) This section does not apply to the commitment of an individual if the individual has previously been committed under IC 12-26-6.

(b) A proceeding for the commitment of an individual who appears to be suffering from a chronic mental illness may be begun by filing with a court having jurisdiction a written petition by any of the following:

(1) A health officer.

(2) A police officer.

(3) A friend of the individual.

(4) A relative of the individual.

(5) The spouse of the individual.

(6) A guardian of the individual.

(7) The superintendent of a facility where the individual is present,

(8) A prosecuting attorney in accordance with IC 35-36-2-4 [Defendant found not responsible by reason of insanity]

(9) A prosecuting attorney or the attorney for a county office if civil commitment proceedings are initiated under IC 31-34-19-3 [Children with mental illness] or IC 31-37-18-3 [Children with mental illness].

(10) A third party that contracts with the division of mental health and addiction to provide competency restoration services to a defendant under IC 35-36-3-3 [Temporary detention of defendant to restore competency] or IC 35-36-3-4 [Defendant has not had competency restored within six (6) months]."

**3. 12-26-7-3 Physician's statement included in petition—Reports required**

"(a) A petition filed under section 2 [IC 12-26-7-2] of this chapter must include a physician's written statement that states both of the following:

(1) The physician has examined the individual within the past thirty (30) days

(2) The physician believes that the individual is:

(A) mentally ill and either dangerous or gravely disabled; and

(B) in need of custody, care or treatment in a facility for a period expected to be more than ninety (90) days.

(b) Except as provided in subsection (d), if the commitment is to a state institution administered by the division of mental health and addiction, the record of the proceedings must include a report from a community mental health center stating both of the following:

(1) The community mental health center has evaluated the individual,

(2) Commitment to a state institution administered by the division of mental health and addiction under this chapter is appropriate.

(c) The physician who makes the statement required by subsection (a) may be affiliated with the community mental health center that makes the report required by subsection (b).

(d) If the commitment is of an adult to a research bed at Larue D. Carter Memorial Hospital, as set forth in IC 12-21-2-3 [Duties of the secretary of the division of mental health and addiction], the report from a community mental health center is not required.

(e) If a commitment ordered under subsection (a) is to a state institution administered by the division of disability and rehabilitative services, the record of commitment proceedings must include a report from a service coordinator employed by the division of disability and rehabilitative serves stating that, based on a diagnostic assessment of the individual, commitment to a state institution administered by the division of disability and rehabilitative services under this chapter is appropriate."

**4. 12-26-7-4 Hearing on petition**

"(a) Upon receiving:

A petition under section 2 [IC 12-26-7-2] of this chapter; or

A report under IC 12-26-6-11 [Temporary commitment report to court] that recommends treatment in a facility for more than ninety (90) days; the court shall enter an order setting a hearing date.

(b) If an individual is currently under a commitment order, the hearing required by subsection (a) must be held before the expiration of the current commitment period. Notice of a hearing under this subsection shall be given to the individual and all other interested persons at least five (5) days before the hearing date.

(c) The rights of an individual who is the subject of a proceeding under this chapter and of a petitioner are the same as provided in IC 12-26-6 [Temporary commitment].

(d) Hearing procedures are the same as those provided in IC 12-26-6 [Temporary commitment]."

**5. 12-26-7-5 Court order for commitment to facility or outpatient program—Term of order**

"(a) If at the completion of the hearing and the consideration of the record an individual is found to be mentally ill and either dangerous or gravely disabled, the court may enter either of the following orders:

(1) For the individual's custody, care, or treatment, or continued custody, care, or treatment in an appropriate facility.

(2) For the individual to enter an outpatient therapy program under IC 12-26-14 [Outpatient therapy].

(b) An order entered under subsection (a) continues until any of the following occurs:

(1) The individual has been:

discharged from the facility; or

released from the therapy program.

(2) The court enters an order:

terminating the commitment; or

releasing the individual from the therapy program.

(c) If the court makes a finding under subsection (a), the court shall transmit any information required by the office of judicial administration to the office of judicial administration for transmission to the NICS (as defined in IC 35-47-2.5-2.5) [National Instant Criminal Background check maintained by the FBI] in accordance with IC 33-24-6-3 [Powers and duties of the Office of Judicial Administration of the Supreme Court]."

**I. Chapter 8 Commitment of a Child**

(§§ 12-26-8-1 thru 12-26-8-9)

1. **12-26-8-1 Appointment of special advocate or guardian ad litem—Qualifications of advocate—Duties**

   "(a) A juvenile court that conducts a proceeding under this article shall appoint a court appointed special advocate, a guardian ad litem, or both for the child before the court begins a proceeding under this article.

   (b) An advocate is not required to be an attorney

   (c) An attorney representing the child may be appointed to be a child advocate.

   (d) The court may not appoint any of the following to be a child's advocate:

      (1) A party to the proceeding.

      (2) An employee of a party to the proceeding.

      (3) A representative of a party to the proceeding.

   (e) An advocate shall represent and protect the best interests of the child."

2. **12-26-8-2 Advocate deemed officer of juvenile court**
3. **12-26-8-3 Attorney may represent advocate—Appointment of attorney**
4. **12-26-8-4 Visitation and evaluation duties of advocate—Reviews**

   Child's advocate shall visit child in facility where he or she is committed within thirty (30) days after the child is first committed, evaluate the services and evaluate whether commitment is still appropriate.

   Child's advocate shall conduct a similar review sixty (60) days after the child is first committed, then six (6) months after first committed then every six months thereafter.

5. **12-26-8-5 Report of reviews by advocate**
6. **12-26-8-6 Reports available to advocate—Confidentiality**
7. **12-26-8-7 Fees paid under IC 31-40**
8. **12-26-8-8 County department's obligation to child**
9. **12-26-8-9 [Repealed]**

**J. Chapter 9 Commitment to Facilities Owned by the United States Government**

(§§ 12-26-9-1 thru 12-26-9-6)

1. **12-26-9-1 "Federal department" defined**

   In this chapter, federal department means Department of Veterans Affairs

2. **12-26-9-2 "Federal facility" defined**
3. **12-26-9-3 Determination of need for commitment of veteran and eligibility for treatment in federal facility**
4. **12-26-9-4 Commitment by court**
5. **12-26-9-5 Veteran subject to federal rules and regulations**
6. **12-26-9-6 Powers of federal hospital officers**

**K. Chapter 10 Care Pending Admission to a Facility**

(§§ 12-26-10-1 thru 12-26-10-4)

1. **12-26-10-1 Consultation on method of care**
2. **12-26-10-2 Temporary placement**

   Court may order temporary placement in least restrictive suitable facility pending admission to a facility.

3. **12-26-10-3 Confinement in county jail**

   Individual may not be confined in county jail unless dangerous and violent, there is no other suitable facility pending admission to a facility and the court so orders.

4. **12-26-10-4 Payment out of county general fund**

**L. Chapter 11 Transfer of an Individual**

(§§ 12-26-11-1 thru 12-26-11-6)

1. **12-26-11-1 Facilities to which transfer may be made—Grounds for transfer**

   Individual may be transferred to state institution, community mental health center, federal facility or psychiatric hospital if transfer is either in their best interests or the best interest of other patients.

2. **12-26-11-2 Grounds for refusal of transfer**
3. **12-26-11-3 Medical and treatment records to be provided**
4. **12-26-11-3.5 Duties of gatekeeper**
5. **12-26-11-4 Notice of Transfer**

   If individual is transferred to another facility under this chapter, the transferring facility shall give written notice to the person's legal guardian, parents, spouse and attorney.

6. **12-26-11-5 Hearing on transfer to substantially more restrictive environment**

   If individual is transferred to a "substantially more restrictive environment, the transferring facility shall provide the individual with the opportunity for an administrative hearing within ten (10) days after the transfer."

7. **12-26-11-6 Petition to set aside transfer**

   Individual who is transferred may within thirty (30) days after transfer, "petition the committing court for an order setting aside the transfer and ordering the individual and the individual's medical and treatment records returned to the facility to which the court originally committed the individual."

**M. Chapter 12 Notice of Discharge of an Individual**

(§§ 12-26-12-1 thru 12-26-12-8)

1. **12-26-12-1 Notice to petitioner on commitment proceeding—Exception**
2. **12-26-12-2 Petition for hearing on discharge**
3. **12-26-12-3 Authority of superintendent to discharge individual**
4. **12-26-12-4 Effect of petition for hearing on discharge**
5. **12-26-12-5 Hearing date set by court—Failure to hold hearing**
6. **12-26-12-6 Procedure at hearing**
7. **12-26-12-7 Findings required for order of discharge**
8. **12-26-12-8 Appointment of guardian**

**N. Chapter 13 Leave from Confinement and Discharge**

(§§ 12-26-13-1 thru 12-26-13-2)

1. **12-26-13-1 Grounds for granting leave of absence**

   Superintendent may grant committed individual a leave of absence from confinement in the facility if in the best interest of the individual.

2. **12-26-13-2 Notice of discharge to court—Entry on record**

**O. Chapter 14 Outpatient Therapy**

(§§ 12-26-14-1 thru 12-26-14-10)

1. **12-26-14-1 Grounds for placement of individual as outpatient**

   If individual is committed and physician recommends outpatient therapy, court may order individual to enter outpatient therapy.

2. **12-26-14-2 Availability of outpatient program to be confirmed by representative**

   Before outpatient therapy program can be approved by the court a representative of that program must represent to the court that the individual may enter that program immediately.

3. **12-26-14-3 Requirements to be followed by individual placed in program**

   Court may enter special conditions of commitment including requirement that individual follow the therapy program, attend medical and psychiatric appointments, and "comply with other conditions determined by the court."

4. **12-26-14-4 Notice of failure to comply with requirements—Facilities and programs to which individuals may be transferred—Notice and review of transfer**

   The individual in outpatient program who fails to comply may be transferred to inpatient program of the facility who has the original commitment.

   The individual may not be confined in a jail or correctional facility unless he or she has been placed under arrest.

   "(e) A facility to which an individual is transferred under subsection (b) shall immediately notify the court of the transfer. A transfer to a facility under subsection (b) is subject to review under section 6 [IC 12-26-14-6] of this chapter upon petition by the individual who was transferred."

5. **12-26-14-5 Hearing on failure to comply with requirements**
6. **12-26-14-6 Review of individual's placement in program—Release**
7. **12-26-14-7 Grounds for placement of involuntarily committed individual in outpatient program**
8. **12-26-14-8 Requirements to be followed by individual placed in outpatient program under IC 12-26-14-7**
9. **12-26-14-9 Recommitment of individual for failure to comply with requirements under IC 12-26-14-8**
10. **12-26-14-10 Hearing on individual's failure to comply with requirements under IC 12-26-14-8—Appeal from determination**

**P. Chapter 15 Review of Commitment**

(§§ 12-26-15-1 thru 12-26-15-5)

1. **12-26-15-1 Annual review—Report required—Notice required if review under discharge order**

"(a) At least annually, and more often if directed by the court, the superintendent of the facility or the attending physician including the superintendent or attending physician of an outpatient therapy program, shall file with the court a review of the individual's care and treatment. The review must contain a statement of the following:

(1) The mental condition of the individual.

(2) Whether the individual is dangerous or gravely disabled.

(3) Whether the individual:

(A) needs to remain in the facility; or

(B) may be cared for under a guardianship.

(b) If the court has entered an order under IC 12-26-12-1 [Notice of Discharge of Individual], the superintendent or the attending physician shall give notice of the review to the petitioner in the individual's commitment proceeding and other persons that were designated by the court under IN 12-26-12-1 or as provided in this section.

(c) If an individual has been committed under IC 35-36-2-4 [Commitment proceeding for defendant found not guilty by reason of insanity], the superintendent of the facility or the attending physician shall:

(1) file with the court the report described in subsection (a) every six (6) months, or more often if directed by the court; and

(2) notify the court, the petitioner, and any other person or persons designated by the court under this section:

(A) at least ten (10) days before, or as soon as practicable in case of emergency, when:

(i) the committed individual is allowed outside the facility or the grounds of the facility not under custodial supervision;

(ii) the committed individual is transferred to another facility and the location of that facility; or

(iii) the committed individual is discharged or the individual's commitment is otherwise terminated; and

(B) as soon as practicable if the committed individual escapes.

(d) The court may designate as a person or persons to receive the notices provided in this section a person or persons who suffered harm as the result of a crime for which the committed individual was on trial.

(e) The court may designate as a person or persons to receive the notices provided in this section:

(1) an individual or individuals described in subsection (d); or

(2) a designated representative if the person or persons described in subsection (d) are incompetent, deceased, less than eighteen (18) years of age, or otherwise incapable of receiving or understanding a notice provided for in this section.

(f) A commitment order issued by a court under IC 35-36-2-4 [Commitment proceeding for defendant found not guilty by reason of insanity], and this article must include the following:

(1) The mailing address, electronic mail address, facsimile number, and telephone number of the following:

(A) The petitioner who filed the petition under IC 35-36-2-4 [Commitment proceeding for defendant found not guilty by reason of insanity].

(B) Any other person designated by the court.

(2) The notice requirements set forth in this section."

*PRACTICE TIP*: It is possible to ask the court, at the time of the hearing which results in a regular commitment, to schedule a review of commitment at an interval of less than one year, i.e., six months. This may be a good strategy if there are extenuating or unusual circumstances that warrant a shorter interval before the court approves extending the commitment. If possible, attorneys representing individuals at involuntary commitment hearings should represent the clients at review of commitment hearing as well.

**2. 12-26-15-2 Orders of court based on report of review—Appointment of guardian**

Once the court receives the report, the court may order the individual's continued custody, care and treatment or may terminate the commitment and release the individual.

The court may also conduct a hearing under Ind. Code § 12-26-12 [Notice of Discharge of Individual]

The court may also appoint a guardian for the individual.

**3. 12-26-15-3 Hearing on court order—Notice of Hearing**

"(a) Upon receiving a copy of the court order, the individual or the individual's representative may request a hearing for review or dismissal of the commitment or order concerning the therapy program. The right to review of the regular commitment or therapy order is limited to one (1) review each year, unless the court determines that there is good cause for an additional review.

(b) When a hearing request is received, the court shall set a hearing date and provide at least five (5) days notice to all of the following:

(1) The individual.

(2) The individual's counsel.

(3) Other interested parties.

**4. 12-26-15-4 Rights of committed individual—Hearing procedures**

The rights of the committed individual and hearing procedures are the same as those for temporary commitments, Ind. Code § 12-26-6.

**5. 12-26-15-5 Discharge or release from program—Notice to court**

**Q. Chapter 16 Guardianships**

(§§ 12-26-16-1 thru 12-26-16-2)

**1. 12-26-16-1 Establishment of guardianship in lieu of regular commitment**

"At the request of the individual who is the subject of a proceeding under this article or another interested party, the court may establish a guardianship for the individual or the individual's property instead of making or continuing a regular commitment to a facility under IC 12-26-7 or at any other time."

**2. 12-26-16-2 Establishment of guardianship—Applicable law**

## II. CASE LAW ON INVOLUNTARY CIVIL COMMITMENTS

**A. Foundational SCOTUS Cases:**

**1. Jackson v. Indiana, 406 U.S. 715 (1972)**

Found Indiana's indefinite commitment of incompetent criminal defendant based solely on account of his lack of capacity to stand trial violated Fourteenth Amendment's guarantee of due process.

Such a defendant cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain competency in the foreseeable future.

If it is determined that he will not, the State must either institute civil proceedings applicable to indefinite commitment of those not charged with crime or release the defendant.

Case resulted in changes to the Indiana code.

**2. Humphrey v. Cady, 405 U.S. 504 (1972)**

Involuntary commitment to a mental hospital involves a "massive curtailment of liberty."

**3. O'Connor v. Donaldson, 422 U.S. 563 (1975)**

Burger, C.J., concurrence, in an action concerning the civil commitment process, "Commitment must be justified on the basis of a legitimate state interest, and the reasons for committing a particular individual must be established in an appropriate proceeding. Equally important, confinement must cease when those reasons no longer exist."

4. **Addington v. Texas, 441 U.S. 418 (1979)**

   Civil commitments are a significant deprivation of liberty and require due process protections.

   Preponderance of the evidence standard rejected as constitutionally inadequate.

   Due process requires a minimum of clear and convincing evidence.

   Recognized there are adverse social consequences for involuntary civil commitment.

   Concerned that involuntary commitment might be based on few isolated instances of unusual conduct which occur within the range of what is generally acceptable.

   Civil commitments are a significant deprivation of liberty that requires the petitioner to show "that the individual suffers from something more serious than is demonstrated by idiosyncratic behavior."

5. **Vitek v. Jones, 445 U.S. 480 (1980)**

   Commitment proceedings subject to due process requirements

**B. Foundational Indiana Cases**

1. **In re Roberts, 723 N.E.2d 474 (Ind. Ct. App. 2000)**

   Purpose of civil commitment proceedings is both to protect the public and to ensure the rights of the person whose liberty is at stake.

2. **Commitment of J.B. v. Midtown Mental Health Ctr., 581 N.E.2d 448, 451 (Ind. Ct. App. 1991)**

   "There is no constitutional basis for confining a mentally ill person who is not dangerous and can live safely in freedom."

3. **Civil Commitment of T.K. v. Dep't of Veterans Affairs, 27 N.E.3d 271 (Ind. 2015)**

   Dual purposes of civil commitment proceedings are

   1) to protect the public and

   2) to ensure the rights of the person whose liberty is at stake.

   Civil commitment proceedings are subject to due process requirements.

   Liberty interest at stake in civil commitment proceedings goes beyond loss of one's physical freedom and carries serious stigma and adverse social consequences.

   Requiring clear and convincing evidence communicates the importance of the legal system in reaching decisions ordering involuntary commitment and reduces the risks of inappropriate commitments.

   Disapproves of line of Court of Appeals' cases affirming commitments if the order "represents a conclusion that a reasonable person could have drawn, even if other reasonable conclusions are possible."

4. **Commitment of M.M. v. Clarian Health Partners, 826 N.E.2d 90, 97 (Ind. Ct. App. 2005), trans. denied**

   "Because everyone exhibits some abnormal conduct at one time or another, loss of liberty calls for a showing that the individual suffers from something more serious than is demonstrated by idiosyncratic behavior."

C. **Jurisdiction/Procedural Compliance:**

1. **In re Tedesco, 421 N.E.2d 726 (Ind. Ct. App. 1981) (interpreting a prior version of the relevant statute).**

   Fourteen (14) day detainment without probable cause hearing was unreasonable and violated due process rights of detainee.

   However, absent any indication the regular commitment hearing was tainted by the pretrial detention, dismissal of the proceedings not warranted.

   Commitment affirmed.

2. **A.L. v. Wishard Health Servs., 934 N.E.2d 755 (Ind. Ct. App. 2010)**

   No due process violation for petitioner to state one ground for involuntary commitment in the pre-trial pleadings (severe disability) then present evidence for an additional ground (dangerousness) at the final hearing.

   Pre-trial notice of all grounds supporting commitment is not like a charging instrument in a criminal proceeding. Report is filed to inform the trial court the examined person has been detained, whether he or she is mentally ill and either dangerous or gravely disabled, and requires continuing care and treatment.

   In contrast, a charging instrument in a criminal proceeding provides the defendant with notice for crimes with which he is charged.

   No violation of concept of fundamental fairness and no harm to respondent.

   Commitment affirmed.

3. **S.S. v. Wishard Health Servs., 951 N.E.2d 252 (Ind. Ct. App. 2011)**

   Although report was untimely filed in an involuntary commitment case, this was of no jurisdictional consequences because it was "merely a procedural requirement."

   Failure to comply with time frame was "de minimus" harm; respondent could still have sought habeas corpus relief.

   Commitment affirmed.

4. **M.E. v. V.A. Med. Ctr., 957 N.E.2d 637 (Ind. Ct. App. 2011)**

   No fundamental error where trial court failed to schedule a hearing within three (3) days of its receipt of a petition for involuntary commitment and failed to make a timely determination whether M.E.'s prehearing detention was supported by probable cause.

   The Court rejected M.E.'s argument that certain evidence presented at commitment hearing had been obtained as a result of his unlawful pretrial detention.

   Affirmed.

## D. Rights of Persons

### 1. State ex re. Kiritsis v. Marion County Probate Court, 381 N.E.2d 1245 (Ind. 1978)

Fact that proceeding may result in deprivation of liberty does not automatically invoke the protections of the Fifth Amendment, made applicable to the states through the Due Process clause of the Fourteenth Amendment.

Civil commitment proceeding, although it may result in the deprivation of a person's liberty, is not a criminal proceeding.

Civil commitment hearing not a criminal proceeding so individual's right to avoid self-incrimination inapplicable.

The Court found a balancing test between interests of individual in maintaining his liberty and interest of the State in providing treatment for mentally ill persons and protecting citizens from injury from such persons was appropriate test.

Court found "the balance weighs heavily in the State's favor. The legitimate objectives of the statute [prior version of commitment statute IC 16-14-9.1-10] and the interests of the State would be wholly frustrated were individuals permitted to claim the privilege in civil commitment proceedings. The State could commit virtually no one to its mental institutions."

Individual must comply with court order to submit to psychiatric examination. Failure to do so subjected him to contempt power of court so long as trial court held a hearing on the contempt charge and determined individual's conduct was willful and not a manifestation of mental illness for which he was not responsible.

### 2. In re Turner, 439 N.E.2d 201 (Ind. Ct. App. 1982)

Interpreting a previous version of the civil commitment statutes, the appellate court found Turner did not receive due process including the right to adequate notice of the hearing, a copy of the petition, the right to be present at the hearing and the right to be represented by counsel.

No compliance with the statutory mandates where Turner's due process rights were violated where trial court failed to apprise him of his rights.

"Failure to accord these rights is fatal to the administration of justice and will require reversal."

Reversed.

### 3. GPH v. Giles, 578 N.E.2d 729 (Ind. Ct. App. 1991)

#### a. Waiver of right to counsel

Court looked to criminal law on the issue waiver of counsel to determine when a mental health patient may proceed pro se.

Court found mental health patient may waive his right to counsel at a commitment hearing if waiver is knowing, voluntary and intelligent.

**b. Use of medical records at trial**

Relied on Ind. Code 16-4-8-3.1 (repealed) that the mental health patient's record may be disclosed, without the patient's consent, to individuals who are employed by the provider at the same facility and who are involved in the planning, provision, and monitoring of services."

Doctor was statutorily authorized to have access to GPH's records and used those records to diagnose GPH and form an opinion. No error to allow him to testify regarding information contained in GPH's medical records.

**c. Physician-patient privilege**

"If we do not allow physicians who care for the mentally ill to present as evidence information that they obtain through personal contact with the patient, we will defeat the essential purpose of the commitment statute."

The "physician-patient privilege which might otherwise exist must yield to permit a full consideration of the patient's mental condition within the framework of the commitment statute. The communications at issue there were thus admissible evidence."

**4. In re Commitment of J.B., 766 N.E.2d 795 (Ind. Ct. App. 2002)**

No physician-patient privilege in civil commitment context

No priest-penitent privilege where J.B. presented no evidence of deacon's role within the Church of Jehovah's Witnesses and no evidence of the nature or circumstances of his communications with the deacon, "especially in light of our duty to construe the privilege narrowly."

**5. M.E. v. Dep't of Veterans Affairs, 64 N.E.3d 855 (Ind. Ct. App. 2016), overruled in part by A.A. v. Eskenazi/ Midtown CMHC, 97 N.E.3d 606 (Ind. 2018).**

Hospital failed to properly serve M.E. with pleadings related to the commitment petition.

Fair notice requires that individuals who may be civilly committed and their counsel receive the petitions and documents supporting the requests for civil commitment.

Failure to serve such documents violates Indiana Rule of Trial Procedure 5 which requires that each party must be served with every pleading, including and subsequent to the original complaint, and that service must be made upon the attorney of a represented party.

**6. A.A. v. Eskenazi Health/Midtown CMHC, 97 N.E.3d 606 (Ind. 2018)**

Recognizes respondent has due process right to appear at his own commitment hearing; however, respondent is not required to appear.

Mentally competent respondent may choose to relinquish that right through a knowing, voluntary and intelligent personal waiver.

Ind. Code § 12-26-2-2 does *not* permit respondent's attorney to waive the right to appear on respondent's behalf.

Ind. Code § 12-26-2-2(b) gives trial court the authority to waive individual's presence if appearing at the hearing would be injurious to the person's mental health or well-being.

If trial court independently waives the respondent's presence at the commitment hearing, the trial court must do so at the outset of the proceeding.

Determination of whether respondent's right to be present was improperly waived is subject to harmless error review.

**E. Judge's Rights/Responsibilities**

**1. Jones v. State, 477 N.E.2d 353 (Ind. Ct. App. 1985)**

Judicial bias cannot be presumed merely because judge participated in examining the physician.

Trial court's power to examine witnesses is implicit in civil commitment proceedings because trial court has a duty to determine if the person is mentally ill and either gravely disabled or dangerous.

**2. In re Tarpley, 581 N.E.2d 1251 (Ind. 1991)**

Instead of holding mentally ill person in contempt of court for failure to comply with court ordered outpatient medication, proper procedure would be to revoke outpatient status and commit person to appropriate inpatient facility.

**3. In re Roberts, 723 N.E.2d 474 (Ind. Ct. App. 2000)**

Because judges are given wide latitude to ensure statutory criteria for commitment are met and that the rights of persons facing commitment are fully protected, the judge's latitude extends to the power to examine witnesses.

Judge's examination of petitioner's witnesses, where petitioner is not represented by counsel at the hearing, does not place judge in an adversarial role and is not a violation of due process.

**4. In re Commitment of J.W.B., 921 N.E.2d 513 (Ind. Ct. App. 2010)**

Court exceeded its authority in prohibiting transfer of civilly committed person without prior notice to the court as the statute specifies.

The trial court can require the superintendent to provide notices, can consider disputes regarding the superintendent's decision, and upon submission of the superintendent's review, can decide whether to continue or terminate the commitment.

It is the superintendent of the facility, not the trial court, who controls whether and where to transfer a committed person and whether to discharge a person.

**F. Admissibility of Evidence/Allowable Procedures at Commitment Hearing**

**1. J. v. State, 411 N.E.2d 372 (Ind. Ct. App. 1980)**

Old observations by family friend who was a general practitioner doctor, rather than a psychiatrist, was not evidence from a doctor who examined the individual within the last thirty (30) days as required by statute.

Statute cited in this case no longer in effect but current statute, Ind. Code 12-26-6-2 (temporary commitment) and 12-26-7-3 (regular commitment), requires doctor to have examined individual within the last thirty (30) days.

2. **G.P.H. v. Giles, 578 N.E.2d 729, 739 (Ind. Ct. App. 1991)**

   No physician-patient privilege exists for purposes of the civil commitment statutes, the communications between patient and doctor are admissible evidence.

3. **In re Commitment of Gerke, 696 N.E.2d 416 (Ind. Ct. App. 1998)**

   No error in allowing a deputy prosecutor to represent the petitioner in a private commitment proceeding.

   Allowing such representation serves the State's public policy interests to protect the public from persons who present a substantial risk of harm and ensures that individuals suffering from mental illness are provided with the appropriate level of care.

4. **In re Commitment of J.B., 766 N.E.2d 795 (Ind. Ct. App. 2002)**

   No priest-penitent privilege in civil commitment context where committed person failed to show the role of a deacon in Jehovah's Witnesses Church or how the information committed person communicated to the deacon fell under the priest-penitent privilege.

5. **M.M. v. Clarian Health Partners, 826 N.E.2d 90 (Ind. Ct. App. 2005)**

   Hearsay evidence in patient's records may be considered for purposes of doctor's diagnosis of patient's mental condition (see Indiana Evidence Rule 703)

   However, hearsay cannot serve as substantive evidence establishing dangerousness or grave disability to support an involuntary commitment ("the evidence rules do not permit the admission of materials, relied upon by an expert witness, for the truth of the matters they contain if the materials are otherwise inadmissible.")

   However, admission of such evidence subject to harmless error analysis.

*PRACTICE TIP*: Hearsay is a common objection in civil commitment proceedings. A physician can only testify to what is in the medical record after a foundation has been laid for those records. In addition, when something is in the medical record that would be considered hearsay and the physician testifies to it (e.g.,: landlord told doctor/nurse that client will be evicted or mom told doctor/nurse that client has not been taking medication), counsel should object on hearsay grounds. Once determined to be hearsay, it may only be used for purpose of obtaining a diagnosis, and should not be factored in toward the grave disability or dangerousness analysis.

**G. Finding of Mental Illness**

See Ind. Code § 12-7-2-130 for definition

Mental illness includes psychiatric disorder, intellectual disability, alcoholism, and addiction to narcotics or dangerous drugs but does NOT include a developmental disability.

1. **In re H., 411 N.E.2d 721 (Ind. Ct. App. 1980)**

   Insufficient evidence of mental illness

   Insufficient evidence the alleged mental illness impairs his ability to function.

   Reversed with instructions to strike the trial court's finding of mental illness from the record.

2. **In re Turner, 439 N.E.2d (Ind. Ct. App. 1982)**

   Although evidence suggested mental illness, there was no finding of such by the trial court.

Reversed.

3. **C.J. v. Health & Hosp. Corp., 842 N.E.2d 407 (Ind. Ct. App. 2006)**

   Substance abuse psychosis and poly-substance dependence are recognized as mental illnesses as defined by Ind. Code § 12-7-2-130.

**H. Sufficiency of the Evidence**

1. **B.J. v. Eskenazi Health/Midtown CMHC, 67 N.E.3d 1034 (Ind. Ct. App. 2016)**

   Individual's mental state must be evaluated *at the time of the hearing* and may not be based on *future* hypothetical contingencies.

   Ind. Code § 12-7-2-96 discusses the present tense

   "Statute clearly requires the trier of fact to assess the individual's state at the time of the hearing prior to ordering a commitment."

**I. Insufficient**

1. **In re Commitment of Linderman, 417 N.E.2d 1140 (Ind. Ct. App. 1980).**

   Although sufficient evidence Linderman suffered from mental illness, State failed to present clear and convincing evidence he was dangerous, unable to provide for himself (and thereby gravely disabled) or that he was in danger of coming to harm as a result of the alleged inability to provide for himself.

   Reversed.

2. **In re Turner, 439 N.E.2d 201 (Ind. Ct. App. 1982)**

   Turner was committed to the Madison State Hospital.

   Evidence insufficient. Reversed.

3. **In the Matter of the Commitment of J.B. v. Midtown Mental Health Center, 581 N.E.2d 448 (Ind. Ct. App. 1991)**

   "too slender a thread to support an involuntary commitment" where only evidence of dangerousness was fact J.B. ran through traffic at a busy intersection on two occasions and hitchhiked once.

4. **In re Commitment of Steinberg, 821 N.E.2d 385 (Ind. Ct. App 2004)**

   Steinberg's mother testified regarding a family history of schizophrenia. Further, Steinberg drove between Indianapolis and Bloomington and she was afraid he would "mentally go away" while driving. He had a pending charges for public intoxication and pointing a firearm.

   Insufficient evidence of both dangerousness and grave disability.

   Court observed, "[t]his is not a case where anyone was murdered or even harmed by Steinberg's conduct."

   However, be aware of Steinberg v. State, 941 N.E.2d 515 (Ind. Ct. App. 2011), where the same individual was convicted of murder in Bloomington by driving alongside a correctional officer on State Road 37 who was on his way home from work and shot him in the head.

5. **L.W. v. Midtown Cmty. Health Ctr., 823 N.E.2d 702 (Ind. Ct. App. 2005)**

   Evidence insufficient where hospital failed to make a sufficient record of dangerousness.

   Only evidence of dangerousness was that L.W. was holding iron object when police came to his door but evidence did not indicate what the object was or whether L.W. threatened the officers with it.

   In a footnote, the Court noted, "We suspect that there is a greater knowledge on the part of the parties and the trial court of L.W.'s history of mental illness than may be found in the transcript of this hearing. Be that as it may, none of their prior knowledge was expressed on this record. As such, we agree with L.W. that the evidence was insufficient to support his commitment."

   Because evidence was not sufficient to establish either dangerousness or grave disability, the commitment was reversed.

6. **T.K. v. Dep't of Veterans Affairs, 27 N.E.3d 271 (Ind. 2015)**

   Insufficient evidence of both dangerousness and grave disability.

   As to grave disability—the person's refusal to recognize that he or she has a mental illness or refusal to take medication are not enough, standing alone, to establish grave disability "because they do not establish, by clear and convincing evidence that such behavior 'results in the individual's inability to function independently.'"

7. **B.J. v. Eskenazi Hospital/Midtown CMHC, 67 N.E.3d 1034 (Ind. Ct. App. 2016)**

   Evidence insufficient to support finding of grave disability or dangerousness.

   Doctor's testimony concerning grave disability was based on future contingencies.

   Importantly, the Court noted, "We do not find this testimony persuasive as the statute clearly requires the trier of fact to assess the individual's state at the time of the hearing prior to ordering a commitment. "

   Commitment reversed.

8. **M.E. v. Dep't of Veterans Affairs, 64 N.E.3d 855 (Ind. Ct. App. 2016), *overruled in part on other grounds by* A.A. v. Eskenazi Health/Midtown CMHC, 97 N.E.3d 606 (Ind. 2018)**

   Commitment reversed for insufficient evidence of both dangerousness and grave disability.

   Evidence insufficient to support dangerousness where most specific evidence "merely amounted to unpleasant comments that M.E. made about white women."

   "Such behavior does not constitute a substantial risk that M.E. will harm himself or others, nor does it support an involuntary commitment."

   "We do not believe that aggression or paranoia, alone, establish an inability to function independently."

   VA's reliance on past behavior "ignores the fact that the statutory language looks to the patient's behavior at the time of the hearings, not to his history."

   "M.E.'s aggression, paranoia, and confrontational attitude do not establish an inability to function independently under the law."

9. **P.B. v. Evansville State Hosp., 90 N.E.3d 1199 (Ind. Ct. App. 2017)**

   Although P.B. suffers from severe mental illness, the hospital failed to present evidence she was gravely disabled and the Court of Appeals "will not presume that it could have."

   Essentially, the doctor recommended commitment because of P.B.'s "unpleasantness and inability to get along with other people, her paranoid delusions, and her failure to cooperate with treatment."

   Nonetheless, there was not clear and convincing evidence P.B. was unable to function independently or that she was in danger of not providing for her own needs.

   Reversed.

J. **Evidence of Dangerousness**

1. **Commitment of J.B. v. Midtown Mental Health Ctr., 581 N.E.2d 448, 452 (Ind. Ct. App. 1991), trans. denied**

   "It is beyond dispute that everyone exposes himself to risk now and again, and therefore a court must approach the determination of a mentally ill person's dangerousness with some circumspection. Otherwise, the danger is strong, that a mentally ill person might be inappropriately committed."

   "something more than a mere showing that a mentally ill person has taken a risk must be shown to justify an involuntary commitment."

   Abnormal risk taking cannot support finding of dangerousness unless the risk taking is caused by mental illness.

   Evidence insufficient where J.B. twice ran through traffic at a busy intersection and once hitchhiked in order to avoid her mother.

2. **Matter of Commitment of Gerke, 696 N.E.2d 416 (Ind. Ct. App. 1998)**

   Trial court is not required to wait until there is a physical act to determine that individual poses a substantial risk of harm to others.

   "The old adage of 'the dog gets one bite' does not, and should not, apply in the context of commitment proceedings, despite the severe restrictions on liberty imposed by commitment to a mental facility."

3. **Commitment of C.A. v. Center for Mental Health, 776 N.E.2d 1216, 1218 (Ind. Ct. App. 2002)**

   Behavior used an index of person's dangerousness would not occur but for person's mental illness.

   Dangerousness standard is not met by a showing that a "person made a rational and informed decision to engage in conduct that may have entailed a risk of harm."

   Evidence must show there is substantial risk of harm as result of psychiatric disorder.

4. **C.J. v. Health & Hosp. Corp., 842 N.E.2d 407 (Ind. Ct. App. 2006)**

   "Importantly, the trial court is not required to wait until harm has nearly or actually occurred before determining that an individual poses a substantial risk of harm to others."

**K. Evidence of Grave Disability**

1. **K.F. v. St. Vincent Hosp. & Health Care Ctr., 909 N.E.2d 1063 (Ind. Ct. App. 2009), overruled in part by T.K. v. Dep't of Veterans Affairs, 27 N.E.2d 271 (Ind. 2015)**

   Focused on whether K.F. had a "substantial impairment or obvious deterioration of judgment, reasoning or behavior that results in an inability to function independently."

   K.F. was 62 years old and had a late in life diagnosis of bipolar and wished to seek a second opinion before taking serious medications—"hardly a completely irrational reaction."

   While K.F. "may have made some unusual decisions and/or displayed certain behavior characteristics of a person with bipolar disorder, her conduct presents too slender a thread to support an involuntary commitment."

2. **T.D. v. Eskenazi Health Midtown Cmty. Mental Health Ctr., 40 N.E.3d 507 (Ind. Ct. App. 2015)**

   Insufficient evidence of grave disability.

   One isolated incident of unusual behavior may have indicated a need for treatment but was not a sufficient basis for ongoing regular commitment.

   Reversed.

3. **D.S. v. Ind. Univ. Health Bloomington Hosp. (In re Commitment of D.S.), 109 N.E.3d 1056 (Ind. Ct. App. 2018)**

   Hospital failed to meet its burden that D.S. did more than behave abnormally or idiosyncratically.

   Instead, hospital needed to show by clear and convincing evidence that D.S. lacked the judgment and ability to function independently.

   Reversed, trial court ordered to vacate the regular commitment.

**L. Evidence Sufficient to Sustain Commitment**

1. **Commitment of Gerke, 696 N.E.2d 416, 421 (Ind. Ct. App. 1998)**

   Trial court "not required to wait until a physical act is visited upon an individual…before determining that an individual poses a substantial risk of harm to others."

   "The old adage of 'the dog gets one bite' does not, and should not, apply in the context of commitment proceedings, despite the severe restrictions on liberty imposed by commitment to a mental facility."

2. **Mental Health Proceedings of B.M. v. Ind. Univ. Health, 24 N.E.3d 969 (Ind. Ct. App. 2015)**

   Trial court not required to wait until individual commits a physical act before determining individual poses a substantial risk of harm to others.

**M. Special Conditions of Commitment Order**

1. **Golub v. Giles, 814 N.E.2d (Ind. Ct. App. 2004)**

   It is improper to impose special conditions on a patient who is committed to inpatient therapy because the committed person must follow the facility's rules, policies and procedures.

Analogizing the special conditions of an individual committed to outpatient therapy to the special conditions of an individual placed on probation, the Court of Appeals found those same standards should apply: "the special conditions imposed upon an individual placed in out-patient commitment must be reasonably designed to protect the individual as well as the general public."

Special condition not to harass or assault family members was proper given evidence individual had threatened family and others.

However, special condition that patient not consume alcohol or drugs other than those prescribed by a doctor were improper because the doctor did not request that special condition, it was not based on an assessment of the patient and it bore no relationship to the reasons for his commitment.

2. **M.M. v. Clarian Health Partners, 826 N.E.2d (Ind. Ct. App. 2005)**

   No evidence in the record supported special condition prohibiting use of alcohol or drugs.

   Because that condition was not requested by the treating physician, was not based upon the physician's assessment of M.M. and bore no relationship to the reason for her commitment, condition vacated.

3. **M.L. v. Eskenazi Health, 80 N.E.3d 219 (Ind. Ct. App. 2017)**

   Special condition prohibiting use of drugs or alcohol not supported by the record where no suggestion that special condition had a relationship to either individual's treatment or protection of the public.

*PRACTICE TIP:* Petitioners will usually check all special boxes in a petition for involuntary commitment. If no evidence of special conditions are presented during the hearing, request during closing argument that those conditions shouldn't be part of the commitment order (if commitment is granted).

**N. Forced Medication**

1. **In re Mental Commitment of M.P., 510 N.E.2d 645, 647-48 (Ind. 1987)**

   Patient "has a liberty interest in remaining free of unwarranted intrusions into his physical person and his mind while within an institution."

   "It cannot be seriously disputed that forced medication of a mental patient interferes with that liberty interest."

   Sets out what State/Hospital must do to override patient's refusal to submit to anti-psychotic medication.

   The "petitioner must demonstrate by clear and convincing evidence that:

   a current and individual medical assessment of the patient's condition has been made;

   that is resulted in the honest belief of the psychiatrist that the medications will be of substantial benefit in treating the condition suffered, and not just in controlling the behavior of the individual;

   and that the probable benefits from the proposed treatment outweigh the risk of harm to, and personal concerns of, the patient.

   Equally, basic to court sanctionable forced medications are the following three elements.

"the court must determine that there has been an evaluation

of each and every other form of treatment and that each and every alternative form of treatment has been specifically rejected. It must be plain that there exists no less restrictive alternative treatment and that the treatment selected is reasonable and is the one which restricts the patient's liberty the least degree possible. Inherent in this standard is the possibility that, due to the patient's objection, there may be no reasonable treatment available. This possibility is acceptable. The duty to provide treatment does not extend beyond reasonable methods.

the court must look to the cause of the commitment. Some handicapped persons cannot have their capacities increased by anti-psychotic medication. The drug therapy must be within the reasonable contemplation of the committing decree.

the indefinite administration of these medications is not permissible. Many of these drugs have little or no curative value and their dangerousness increases with the period of ingestion. The court must curtail the time period within which they may be administered. If a patient does not substantially benefit from the medication, it should no longer be administered."

Although the statute this case interpreted is no longer good law, M.P. has been cited recently by the Indiana Supreme Court in A.A. v. Eskenazi Health/Midtown CMHC, 97 N.E.3d 606 (Ind. 2018) for the proposition that forced medication interferes with an individual's liberty interest.

2. **In re Commitment of J.B., 766 N.E.2d 795 (Ind. Ct. App. 2002)**

   Order allowing forced medication reversed for insufficient evidence where trial court did not consider what medications hospital wanted to administer, did not evaluate each alternative, and did not impose a definite time limit on the administration of the medication.

3. **M.L. v. Meridian Servs., 956 N.E.2d 752 (Ind. Ct. App. 2011)**

   Evidence insufficient to support forced medication

   Hospital did not present evidence what conditions medication used to treat, whether that medication would be of substantial benefit in treating M.L.'s mental illness, and not just controlling his behavior, and whether the probable benefits from the treatment outweighed the risk of harm and personal concerns of M.L.

   In addition, no evidence hospital had considered any alternative treatments and that these medications were the least restrictive treatments.

   Any future authorization of forced medication must comply with M.P.

4. **W.S. v. Eskenazi Health, 23 N.E.32d 29 (Ind. Ct. App. 2014)**

   Applied factors from In re Mental Commitment of M.P. and remanded for further hearing by trial court on issue of forced medication.

   Found commitment order did not provide for indefinite administration of court ordered medication because order provides for review of treatment plan in one year.

Treatment orders are not considered indefinite "due to Indiana statutory law that requires at least annual review of regular commitment order and treatment plan."

**O. Review Hearings/State Hospitalization**

**1. K.W. v. Logansport State Hosp., 660 N.E.2d 609 (Ind. Ct. App. 1996)**

Recommitment hearing an appropriate forum to consider patient's particular treatment program if patient clearly presents issue to the court.

However, record must be made in the trial court challenging whether the treatment is effective or appropriate and may not be raised for the first time on appeal.

**2. P.B. v. Evansville State Hosp., 90 N.E.3d 1100 (Ind. Ct. App. 2017)**

Hospital presented insufficient evidence that P.B. was gravely disabled.

Hospital bore the burden of proving P.B. was gravely disabled. Because the hospital did not present any evidence proving P.B. was gravely disabled, the reviewing court will not presume that it could have.

Essentially, doctor's recommendation in favor of P.B.'s continued commitment was based on her "unpleasantness and inability to get along with other people, her paranoid delusions, and her failure to fully cooperate with treatment."

However, because no evidence she was unable to function independently or that she was in danger of not providing for her own needs, commitment was not supported by sufficient evidence.

Reversed

**P. Children and Civil Commitments**

**1. In the Matter of K.G., D.G., D.C.B. and J.J.S., 808 N.E.2d 631 (Ind. 2004)**

Juvenile court erred in relying upon adult competency statute for guidance in how to determine juvenile incompetency and for authority to commit them to a DMHA psychiatric institution.

Although Ind. Code § 31-32-12-1(3) does not specifically mention competency, given the juvenile court's flexibility in addressing the needs of children and acting in their best interest, the statute allows for the examination and/or treatment of a child after a delinquency petition has been filed in order to determine the child's competency.

Juvenile court is not prohibited from entering an order committing an incompetent child to an appropriate facility operated by DMHA; however, the adult competency statute is not the vehicle for doing so.

Instead, Ind. Code § 31-32-12-1 is sufficient to accomplish this.

**2. In re R.L.H., 831 N.E.2d 250 (Ind. Ct. App. 2005)**

The Indiana Family and Social Services Administration, Department of Mental Health and Addiction (DMHA) appealed the probate court's order committing three (3) children to a state mental institution.

The Court of Appeals held the probate court exceeded its statutory authority in committing children to a state hospital, because the children had already been adjudicated delinquent.

Ind. Code § 31-37-19-5 and -6 specify the actions a juvenile court may take when a child is found delinquent, including outpatient treatment at a psychiatric facility or confinement in a juvenile detention center. That statute does not authorize the juvenile court to order inpatient psychiatric services.

Ind. Code § 31-37-18-3 provides that a juvenile court may 1) refer the matter to a probate court having jurisdiction of civil commitment proceedings under Ind. Code 12-26 or 2) may initiate civil commitment proceedings under Ind. Code 12-26.

Here, the juvenile court failed to follow the required statutory procedures under Ind. Code 12-26 and overstepped its authority.

Commitment orders reversed.

**Q. Appellate Issues**

**1. Mootness**

Commitment of T.W. v. St. Vincent Hospital and Health Care Center, 121 N.E.3d 1039 (Ind. 2019), here the Indiana Supreme Court determined the Commissioner lacked authority to enter temporary commitment orders (in two cases that were consolidated for the appeal) *and dismissed the appeals as moot* because a remand would serve no purpose as the temporary commitments had expired. The language regarding mootness conflicts with longstanding precedent where the appellate courts reviewed involuntary commitments on direct appeal even though the commitments had expired finding review "of great public importance."

If you are appealing from a temporary involuntary civil commitment, the appellee in your appeal may cite to the T.W. case and argue your appeal should be dismissed as moot. In response you can argue the language about mootness is dicta and there are adverse collateral consequences from having an order of involuntary temporary commitment. You can also argue include constitutional arguments against mootness under Art. 1, Section 12 (open courts) and Art. 7, Section 6 (right to one appeal). A finding of mootness operates to deprive litigants of access to courts and opportunity for appellate review. Since the T.W. case, the Court of Appeals has not issued any published decisions dismissing appeals as moot and has instead continued to review involuntary temporary commitment appeals on direct appeal finding the appeals to be of great public importance.

**2. Standard of review—Clear and Convincing Evidence Reaffirmed**

**a. T.K. v. Dep't of Veterans Affairs, 27 N.E.3d 271 (Ind. 2015)**

Indiana Supreme Court specifically disapproved of a line of Court of Appeals cases which relied on an incorrect standard of review which did not properly apply "clear and convincing."

The Court specifically disapproved of Court of Appeals analysis affirming civil commitments if such an order "represents a conclusion that a reasonable person could have drawn, even if other reasonable conclusions are possible."

**b. Specifically disapproved of:**

M.L. v. Meridian Servs., Inc., 956 N.E.2d 752 (Ind. Ct. App. 2011), trans. not sought

S.T. v. Cmty. Hosp. N., 930 N.E.2d 684 (Ind. Ct. App. 2010), trans. not sought

K.F. v. St. Vincent Hosp. & Health Care Ctr., 909 N.E.2d 1063 (Ind. Ct. App 2009), trans. not sought

J.S. v. Ctr. For Behavioral Health, 846 N.E.2d 1106 (Ind. Ct. App. 2006), trans. denied

Notes courts cannot rely on these holdings where the standard of review used to analyze sufficiency of the evidence applied an incorrect and too-deferential standard of review that has been disapproved.

**3. Judge, rather than petitioner, questioning witnesses**

**a. In re Commitment of A.W.D., 861 N.E.2d 1260 (Ind. Ct. App. 2007)**

The judge may question witnesses at a civil commitment proceeding.

Court of Appeals looks to criminal law to inform its analysis and finds that where the examination was not hostile and the questions did not demonstrate bias, there was no error.

Judges may intervene in hearing in order to promote clarity or dispel obscurity.

Judges may develop the truth or obtain facts which may have been overlooked by the parties.

In order to demonstrate reversible error, must show trial judge's questioning of witness was harmful and prejudicial to respondent's case

In the absence of specific examples of bias, reviewing court will not presume bias simply because trial court questioned witnesses.

See dissent by Mathias, J. noting "there is a fundamental difference between a judge intervening or participating in the fact-finding and a judge conducting the fact-finding."

Where trial court conducted entire direct and cross examination, "the trial court assumed the role of A.W.D.'s adversary by eliciting the evidence against A.W.D."

"By allowing the presiding judge to elicit all of the testimony on behalf of the petitioner, the trial court necessarily sought to carry the petitioner's burden of proof required to commit the respondent to involuntary mental health treatment. Indiana code and due process, however, require that the *petitioner* support the burden of proof in such a proceeding."

**b. In re Commitment of J.B., 766 N.E.2d 795 (Ind. Ct. App. 2002)**

Although temporary commitment had expired, the Court addressed the issues because they were "a matter of great public importance."

"The question of how persons subject to involuntary commitment are treated by our trial courts is one of great importance to society. Indiana statutory and case law affirm that the value and dignity of the individual facing commitment or treatment is of great societal concern."

**4. Ineffective Assistance of Counsel**

**a. K.W. v. Logansport State Hosp., 660 N.E.2d 609 (Ind. Ct. App. 1996)**

Standard for judging adequacy of counsel's representation in a mental health commitment proceeding is the same as that applied in criminal cases.

In order to prevail on claim of IAC, patient must prove by preponderance of evidence that counsel made errors so serious that he or she was not functioning as counsel within the Sixth Amendment guarantee.

Patient must also show deficient performance prejudiced him.

Patient must show that there was a reasonable probability that but for counsel's error the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

**b. Jones v. State, 477 N.E.2d 353 (Ind. Ct. App. 1985)**

Court looks to criminal defense standards for what constitutes effective representation by counsel, applies Strickland standard.

Appropriate to apply this standard because mentally ill person's liberty is at stake.

**5. Appellate Attorney's Fees**

**a. M.L. v. Eskenazi Health, 80 N.E.3d 219 (Ind. Ct. App. 2017)**

Hospital claimed the Court of Appeals could, under Indiana Appellate Rule 66(E) assess damages for an appeal that was frivolous or brought in bad faith.

"Rather than being permeated with meritlessness or bad faith, M.L.'s appeal is an entirely proper exercise of his constitutional rights to due process and appellate review, based on established precedent of this court. Moreover, we are taken aback with Eskenazi's request for appellate attorney's fees to be assessed against another arm of the same Marion County government. The Marion County Public Defender and Eskenazi serve a similar clientele—the most indigent and vulnerable in our community—and both are a vital part of that same public safety net for Marion County. To seek a financial retribution form the Public Defender Agency for protecting involuntarily committed individuals' constitutional rights based on Eskenazi's own misunderstanding of the legal mechanics of objection is remarkable. We deny Eskenazi's request."

**R. Incompetent to Stand Trial**

Background: the Indiana Code announces the time table and requirements for when individuals are found incompetent to stand trial and must be civilly committed.

Competency of criminal defendants to stand trial is governed by Ind. Code 35-36-3

Regular commitment of mentally ill individuals is governed by Ind. Code 12-26-7

**1. Statutory procedure for ICST individuals being civilly committed:**

If a trial court has reasonable grounds to believe that a criminal defendant lacks the ability to understand the proceedings and assist in the preparation of a defense, the trial court must appoint two or three competent, disinterested psychiatrists, psychologists, or

physicians to examine the defendant and testify at a hearing as to whether the defendant is competent to stand trial. Ind. Code § 35-36-3-1(a).

At the hearing, if the trial court finds that the defendant does not have the ability to understand the proceedings to assist in the preparation of his or her defense, the court shall delay or continue the trial and order the defendant committed to the Division of Mental Health and Addiction [DMHA] and the DMHA shall provide competency restoration services. Ind. Code § 35-36-3-1(b).

Within ninety days of the defendant's admission to a state institution, the superintendent of the state institution shall certify whether the defendant has a substantial probability of attaining the ability to understand the proceedings and assist in the preparation of his or her defense within the foreseeable future. Ind. Code § 35-36-3-3(a).

If a substantial probability of attaining competency within the foreseeable future does not exist, the state institution shall initiate regular commitment proceedings under Ind. Code 12-26. Ind. Code § 35-36-3-3(b).

If a substantial probability does exist, the state institution shall retain the defendant until either the defendant attains competency or for six months from the date the defendant was admitted to the state institution, whichever occurs first. Ind. Code § 35-36-3-3(b).

If a defendant has not attained competency within six months of the defendant's admission to a state institution, the state institution shall institute regular commitment proceedings under Ind. Code 12-26. Ind. Code § 35-36-3-4.

**2. Cases discussing interplay of ICST and civil commitment addressing state hospitalization**

(Fact specific but extremely useful to understand how the process works)

**a. A.J. v. Logansport State Hospital, 956 N.E.2d 96 (Ind. Ct. App. 2011)**
**b. Thomas v. Murphy, 918 N.E.2d 656 (Ind. Ct. App. 2009)**

**3. Cases discussing competency more generally**

**a. Davis v. State, 898 N.E.2d 281 (Ind. 2008)**

Due process precludes trying an incompetent defendant.

In the civil commitment context, justification for civil commitment of incompetent individual is the State's interest in protection of the public under the police power and

the protection of the mentally ill person under the *parens patriae* doctrine.

Justification for the commitment of an incompetent accused is found in the State's interest in the restoration of the accused to competency because of the right of the public and the defendant to the prompt disposition of criminal charges pending against him, and the protection of the accused against being required to answer to charges that he or she lacks the capability to understand or to assist his or her attorney in defending against.

Held: Because Davis' pretrial confinement has already exceeded the maximum sentence the trial court could impose, and because the State advanced no argument that its interests outweigh Davis' substantial liberty interests, it is a violation of fundamental fairness as embodied in the Due Process Clause of the Fourteenth Amendment to hold

criminal charges over the head of an incompetent defendant who will never be able to stand trial.

**b. Habibzadah v. State, 904 N.E.2d 367 (Ind. Ct. App. 2009)**

Habibzadah was charged with Attempted Murder and determined to be incompetent to stand trial.

When it was determined he would not regain competency in the foreseeable future, civil commitment proceedings were initiated.

Habibzadah moved to dismiss the pending charges but the Court of Appeals found it had not been determined that Habibzadah would never be restored to competency and he had not been confined beyond the maximum sentence the trial court could impose if he were convicted of the pending charges.

Held: Due process, which includes the concepts of equity and fundamental fairness, do not require the dismissal of charges.

Mathias, J. concurring suggests: "Our criminal justice system needs an earlier and intervening procedure to determine competency retroactively to the time of the alleged crime. Perhaps we as a society need to consider the concept of a defendant being *unchargeable* because of mental illness under Indiana Code section 35-41-3-6, and not just guilty but mentally ill under Indiana Code section 35-36-2-1, et seq."

**c. Curtis v. State, 948 N.E.2d 1143 (Ind. 2011)**

There is no viable fundamental fairness argument where Curtis was not involuntarily committed and where there has been no finding that he will never be restored to competency.

Curtis was entitled to dismissal of the pending criminal charges on Indiana Criminal Rule 4(C) grounds, but not on fundamental fairness grounds.

**d. Denzel v. State, 948 N.E.2d 808 (Ind. 2011)**

Companion case to Curtis v. State.

Where there has not been a determination that an individual will never be restored to competency, allowing criminal charges to pend does not violate an individual's right to due process on fundamental fairness grounds.

"It would be counterintuitive to allow a defendant to assert a due process violation based on incompetency if the defendant himself purposefully decompensated to avoid going to court."

Because Denzel's behavior of "cheeking" his medication caused him to decompensate, there was no due process violation.

Denial of motion to dismiss affirmed.

**e. State v. Coats, 3 N.E.3d 528 (Ind. 2014)**

Ind. Code § 35-36-3-1(b) requires trial courts to commit defendants found not competent to stand trial to the DMHA for competency restoration services.

Trial court cannot make the determination a defendant is unrestorable. By statute, only the superintendent of the state institution where the defendant is committed has the authority to make the determination that a defendant cannot be restored to competency.

**S. Civil Commitment Following Finding of Not Responsible by Reasons of Insanity**

From Galloway v. State, 938 N.E.2d 699, 708, fn 9 (Ind. 2010):

When a defendant is found not responsible by reason of insanity, the prosecutor is required to initiate civil commitment proceedings under either a temporary or regular commitment.

In contrast, a Guilty But Mentally Ill (GBMI) verdict is a conviction. See Ind. Code § 35-36-2-5. The court sentences the defendant in the same manner as a defendant found guilty of the offense. However, a physician must evaluate the GBMI defendant before sentencing and the defendant must be appropriately treated and evaluated once incarcerated at the Department of Correction.