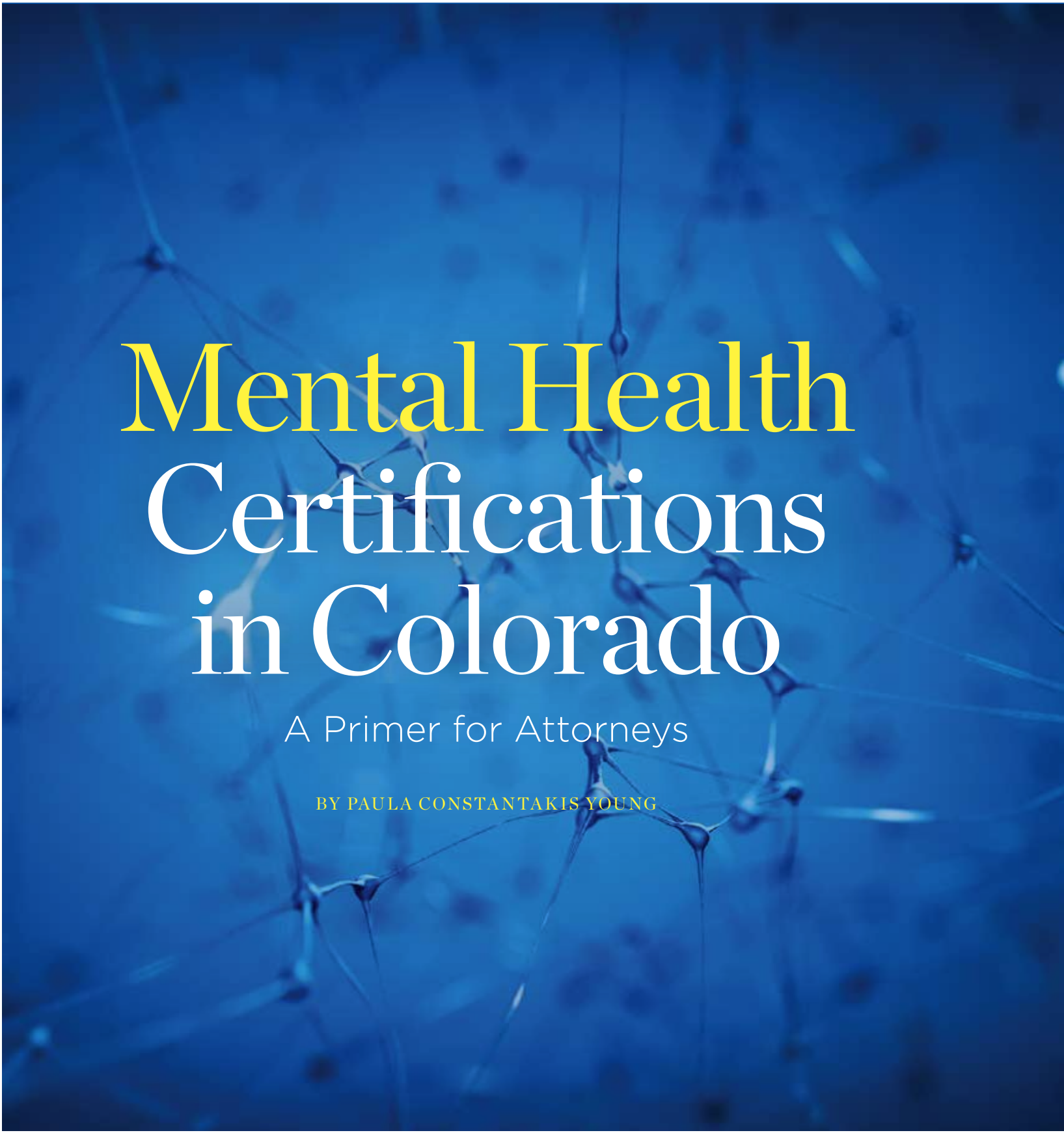

Mental Health Certifications in Colorado

A Primer for Attorneys

BY PAULA CONSTANTAKIS YOUNG

This article discusses mental health certifications in Colorado and their importance in guardianship, trust, and estate matters.

Knowledge of Colorado's procedure for securing involuntary treatment for people with mental health disorders is a valuable tool for estate planning attorneys whose clients are guardians, conservators, or trustees with insufficient authority to address a mental health crisis for a ward/protected person or beneficiary. For attorneys appointed to represent an individual in mental health certification cases, understanding the process and their clients' rights is essential. In Colorado, the certification process is codified in CRS §§ 27-65-101 et seq., which outline strict procedural and confidentiality requirements that, if not followed, can result in the certification's termination.

This article discusses emergency 72-hour holds, short-term mental health certifications, court-ordered evaluations, and long-term care and treatment. It does not cover impositions of legal disability for persons with intellectual and developmental disabilities, or alcohol and drug certifications, which are covered under CRS §§ 27-10.5-102 et seq. and CRS §§ 27-80-101 et seq., respectively.[1]

Mental Health Certifications

Mental health certifications are a mechanism to provide immediate mental health treatment to individuals who pose a threat to themselves or others but who refuse to seek or accept mental health treatment on their own. The process usually involves an involuntary hold and mental health evaluation at a treatment facility, followed by a period of involuntary hospitalization if certification is deemed necessary by the evaluator. An individual who objects to certification is entitled to a hearing before a judge or jury, who will either uphold or dismiss the certification. If an individual does not initially meet the certification criteria, they may still meet the criteria for a court-ordered evaluation that could later lead to certification.

Unlike a guardianship or conservatorship petition, which can be filed by a "person interested in the welfare of the respondent,"[2] only certain medical professionals can certify an individual for short-term mental health treatment.[3] Mental health certifications deprive a person's liberty, so the statutes must be strictly construed.[4] Though individuals may equate their hospitalization to incarceration and the certification to a criminal proceeding, certifications are not criminal in nature.

The scenario below illustrates how and when a guardianship/conservatorship and mental health certification might be used in tandem to assist an individual in need.

"Diane," an elderly, widowed mother of two adult daughters, lived alone in her large home. She exhibited symptoms of bipolar disorder and depression during her married life, but support from her husband helped keep these symptoms in check. After he died and Diane retired from her job, Diane's symptoms worsened and her behavior became more erratic. For example, she spent $30,000 on various items that she claimed were gifts for others, but such gifts were never delivered, and her neighbors found her outside several times in freezing temperatures while not properly dressed for the cold. Diane also had untreated colon disease and was at risk of continually infecting herself due to her poor hygiene. When Diane's daughters questioned her erratic behavior, she became angry.

Diane's daughters obtained emergency guardianship and conservatorship to address Diane's incapacity and need for financial protection. A mental health certification was also initiated because neither a guardian

nor conservator can force a ward/protected person to undergo mental health treatment.

Guardianship/Conservatorship versus Mental Health Certification

To understand why mental health certification may be necessary, it can be helpful to first consider the limitations of guardianships and conservatorships.

A guardianship may be ordered for an incapacitated adult, who is deemed a ward.[5] A conservatorship may be ordered for an individual who needs assistance managing their assets; such person is deemed a protected person.[6] In a guardianship or conservatorship petition, the individual who is the subject of the petition is termed the respondent.

The burden of proof in adult guardianship, conservatorship, and mental health certification cases is by clear and convincing evidence, but each proceeding requires the petitioner to satisfy different elements. In an adult guardianship, the court must find that the ward is an incapacitated person whose physical health, safety, or self-care needs cannot be met by less restrictive means, including the use of appropriate and reasonably available technological assistance. A guardian has authority to make decisions regarding the ward's support, care, education, and welfare.[7]

In an adult conservatorship, the court must find that the protected person is unable to manage their property and business affairs because of an inability to effectively receive and/or evaluate information or to make and/or communicate decisions, even with the use of appropriate and reasonably available technological assistance.[8] Once appointed, a conservator has the authority to manage the protected person's finances and business affairs.[9]

Guardians and conservators do not have the authority to consent to mental health treatment against a ward's or protected person's will. Thus, in situations where a person needs immediate mental health treatment but refuses to seek or accept such treatment, a mental health certification can be initiated.

In a mental health certification, the respondent must be found to be mentally ill after an evaluation, and as a result of such mental illness is (1) a danger to self, (2) a danger to others, or (3) gravely disabled. It also must be found that the respondent either has not accepted, or is not likely to remain in, voluntary treatment, and that the respondent is incompetent to participate effectively in treatment decisions.[10]

While both mental health certifications and guardianship proceedings include professional evaluations, these evaluations have different purposes.[11] The evaluation in a mental health certification case assesses whether the respondent requires mental health treatment that can only be attained through a period of involuntary hospitalization. In contrast, the evaluation in a guardianship case determines whether a person's cognitive and functional limitations constitute incapacity to such a degree that a guardianship is needed.

Certification Steps

A certification can be initiated by peace officers, medical doctors, psychologists, psychiatric nurse practitioners, licensed clinical social workers, or certain therapists/counselors.[12] Someone experiencing a mental health crisis may be taken into custody for up to 72 hours while an evaluation is completed. After the evaluation, the person may be released or they may be certified for short-term mental health treatment for up to three months.

Emergency 72-Hour Hold

A 72-hour hold may be used for someone who appears to have a mental health disorder and appears either to be an imminent danger to themselves or others or to be gravely disabled.[13] Gravely disabled means the person is at risk for substantial bodily harm, the worsening of a serious physical illness, or significant psychiatric deterioration due to self-neglect or

the inability to provide for their own essential needs.[14]

If the person poses an imminent threat to themselves or others, part of the emergency hold process includes taking the person into custody and transporting them to a mental health facility for evaluation.[15] The evaluation must be completed within 72 hours, and the person must be either certified or referred for services on a voluntary basis.

Court-Ordered Evaluation

A court may order a mental health evaluation for a person who has routinely displayed dangerous behavior, even though the behavior was not observed by someone who can initiate a certification and danger was not imminent. This is helpful for clients who may have called the police about a family member or friend who needs to be certified, but the imminent danger has passed when the peace officer arrives, precluding the officer from taking the person into custody for a mental health evaluation. In such cases, the county attorney mental health unit may be able to help.

Under CRS § 27-65-106, a person with an alleged mental health disorder that causes them to be a danger to self or others, or gravely disabled, may be court ordered to submit to an evaluation. While many of the criteria are identical to those required for an emergency hold, this section of the statute does not require imminent danger. Therefore, it provides an option for those who need to seek treatment for a person who may be seriously mentally ill but who cleverly can control their behavior to avoid certification under CRS § 27-65-105. Obtaining a court-ordered evaluation is a three-step process:[16]

1. An individual petitions the district court (in Denver, the probate court) in the county in which the respondent resides or is present.
2. If the court grants the petition, an order for mental health screening and writ of assistance to aid with transport to a facility will be issued. The order will include the name of a designated facility or the name of a professional appointed to screen the respondent.[17] A copy of the petition, statement of facts, and order are then provided to the appropriate law enforcement officer who will serve the respondent with these documents when they are picked up and transported to the evaluation. The county attorney's office can assist with scheduling the appointment for the evaluation.

> "If the person poses an imminent threat to themselves or others, part of the emergency hold process includes taking the person into custody and transporting them to a mental health facility for evaluation."

3. After the evaluation is complete, a confidential report is filed with the court and a copy is provided to the respondent.

Though anyone can draft the petition, this is usually done by the county mental health attorney. The petitioner must include a statement of facts indicating that the respondent has a mental health disorder and showing reasonable grounds to warrant an investigation.[18] Estate planning attorneys may assist their clients with gathering information for the petition and locating the county attorney mental health unit.

Once the petition is granted and the evaluation is completed, the evaluator will issue a report that includes a recommendation as to whether there is probable cause to believe that the respondent meets criteria for a certification. The report will also determine whether the respondent would likely submit to an evaluation voluntarily. If there is probable cause but the respondent refuses to be evaluated, the court will order the respondent to be taken into custody and placed in a designated facility for a 72-hour hold. The evaluating facility must follow certain procedures to protect the respondent's rights, notably the right to counsel.[19]

Evaluation Process

Once the respondent is admitted to a designated facility, a licensed medical doctor or psychologist[20] must do the evaluation. If, during the 72-hour hold, the doctor determines that the person does not require evaluation or treatment, the person must be released. Alternatively, if the doctor believes the person can be properly cared for without being hospitalized, the person must be provided services on a voluntary basis.[21] If, however, further evaluation and treatment are necessary and the person refuses voluntary treatment, the person must be certified for short-term treatment.[22]

In some instances, a person may convince the doctor that they will seek help voluntarily but then fail to follow through. The doctor is unlikely to talk to the person's family members or friends even if they specifically request communication and have relevant information. Thus, the doctor may be unaware of the person's history. Some people may be brought in multiple times before they are finally certified.

Respondent's Rights after Certification or Evaluation

Once a person is admitted to a designated facility and evaluated under CRS §§ 27-65-105 or -106, the respondent may be certified for no longer than three months of short-term treatment

under CRS § 27-65-107. A hospitalization of three months is extremely rare. Most certified individuals are hospitalized for up to 10 days, depending on treatment progress.

Failure to meet certain requirements under CRS § 27-65-107 can deprive the court of jurisdiction and violate the respondent's due process rights. For example:

- A respondent must be offered voluntary treatment as an alternative to certification. If a respondent refuses voluntary treatment, or reasonable grounds exist to believe that the respondent will not remain in voluntary treatment, certification occurs.
- The notice of certification and certification must be signed by a medical doctor or psychologist who participated in the evaluation. If a nurse practitioner or social worker signs the notice, it is not valid unless it is also co-signed by a doctor.
- The notice of certification and certification includes a physician's statement, which must state sufficient facts to establish reasonable grounds to believe that the respondent has a mental health disorder and as a result of such disorder, is a danger to self, others, or is gravely disabled.
- The certification must be filed with the court within 48 hours of the evaluation, excluding weekends and court holidays, and the court must be in the county where the respondent resides or was present when taken into custody.
- The certification must be personally delivered to the respondent within 24 hours of certification.

Once certified, the respondent remains in the custody of the facility. They can only leave the facility with prior authorization and for limited purposes, such as transfer to another hospital for medical treatment. If, for example, the respondent has a court date for a criminal matter, they cannot leave the facility to attend the proceeding. Staff at the facility will contact the court and explain the certification.

Significant restrictions also exist regarding the respondent keeping personal property, making phone calls to anyone except the respondent's court appointed attorney or clergy, and visitation by family or friends. There are no restrictions for visits with counsel.

If the notice of certification and certification for short-term treatment are deficient, respondent's counsel should file a motion to dismiss. In some cases, the county attorney may agree to such a motion. If the certification is dismissed, the respondent will be discharged from the facility. Whether a new certification is initiated depends on whether the respondent is still considered a danger to self, a danger to others, or gravely disabled.

> "The respondent's right and access to legal counsel is paramount. Once a certification is filed with the court, the court must appoint an attorney for the respondent and provide the attorney a copy of the certification."

Attorney Appointment

The respondent's right and access to legal counsel is paramount. Once a certification is filed with the court, the court must appoint an attorney for the respondent and provide the attorney a copy of the certification.[23] Either the state or the respondent pays the attorney fees, depending on the respondent's assets. The attorney is responsible for notifying the court if the respondent is indigent.

Depending on the respondent's personal relationships and circumstances, the attorney may be the respondent's sole contact outside of the facility. Respondents often have many questions, particularly if this is a first certification. Unless the respondent objects, the attorney should speak with a member of the respondent's care team to obtain their medical history. The attorney can advocate for the respondent if, for example, the respondent objects to a medication and complains about serious side effects. Some facilities have been investigated and/or closed by the state for failing to comply with state regulations, providing respondents the incorrect diagnosis or treatment, or denying respondents their rights.

A certification is a deprivation of an individual's liberty and is by nature an emergency proceeding.[24] Thus, the attorney should meet with the respondent promptly to discuss the respondent's right to object to psychiatric and medical treatment and to advise them of their rights as a patient under CRS §§ 27-65-116 and -117. Under the State Court Administrator's Office billing requirements, an attorney is expected to make at least one visit with the respondent at the facility. This has been a challenge during the COVID-19 pandemic, but many facilities will set up video visits for the respondent's and the attorney's safety.

Access to Client Information and Records

The court clerk sends the order appointing attorney to the treating facility. If the facility does not receive the order, a copy sent by the attorney will usually suffice to allow the attorney access to the respondent's records, including records from other agencies, institutions, or persons, and correspondence. While this order serves as a medical release, untrained facility

staff will sometimes deny attorneys access to the respondent or their information since the attorney's name does not appear on the release of information (ROI) in the respondent's chart. In such cases, staff who do not comprehend the purpose of the order may wrongly insist that the respondent sign an ROI before providing the attorney any information.

But an order appointing attorney abrogates the need for an ROI. Moreover, the requirement of an ROI defeats the purpose and effect of the court order. It is unlikely that the respondent knows the name of their court-appointed attorney; thus, they have no reason to provide an ROI. If the facility will not honor the order, the attorney should speak to the charge nurse or facility director or, in extreme cases, the facility's legal counsel. The attorney should follow up with the facility's administration regarding its obligation to honor the order.

Physical Access to Respondent

Situations in which a respondent's access to counsel is restricted are fraught with constitutional problems for the respondent and the attorney. A respondent has a right to see their attorney, clergy, or physician at any time.[25] These rights may be denied only for good cause, and the treating doctor must provide the respondent and counsel the reason for the denial.[26]

Sometimes, facility staff will mistakenly inform the attorney that they may only see the respondent during visiting hours, or they may refuse to release the respondent from group therapy to speak to the attorney. These are unlawful restrictions on the respondent's access to their attorney. When the attorney makes the initial call to the facility, it is best to confirm that the staff understands that the attorney can see the respondent upon request. Providing the facility with a copy of the statute regarding the respondent's right to see their attorney may be necessary.

Occasionally, a respondent will refuse to meet with or speak to their attorney by phone. For example, a respondent may refuse to believe that the attorney has been appointed on their behalf. If this occurs, the attorney should attempt to contact the respondent again after a day or two, when they may be more agreeable to a conversation. If the respondent still refuses, unless the respondent objects, the attorney could talk to the respondent's nurse or social worker, who may help facilitate a conversation with the respondent. Rarely, a respondent may claim that they have another attorney. In such cases, the attorney should contact the court regarding a substitution of counsel. A respondent may insist on appearing before the court pro-se, in which case the attorney should inform the court of the respondent's decision and motion the court for an order terminating their appointment.

Finally, staff may attempt to require that a nurse or medical technician be present during the attorney's meeting with the respondent. All meetings between attorneys and clients are confidential. For safety reasons, it may be appropriate for the door to the meeting room be partially open, as long as staff is not standing outside the door within listening range.

Attorney's Communications with Respondent's Family/Friends

Attorneys should be cautious if respondents ask them to contact a relative, partner, or friend. These individuals may misunderstand the attorney's role and not grasp that the appointment ends when the certification is terminated. Another risk is that the respondent may later become upset with the attorney for speaking with the individual and misinterpret the attorney's intent. The best practice is for the attorney to explain to the respondent that their conversations are confidential, and that the attorney prefers to only communicate with the respondent.

Objection and Request for Hearing

Unless waived, a respondent who objects to certification has the right to a hearing before a judge or jury within 10 days of the certification.[27] Jury trials are uncommon, because attorneys

generally want to avoid further distress to the respondent. While court hearings usually last between 60 and 90 minutes, a jury trial can last up to two days, which may be difficult for someone experiencing a mental health crisis.

Under CRS § 27-65-111(1), the state must prove by clear and convincing evidence that the respondent is mentally ill, is a danger to self or others, or is gravely disabled. There is significant case law on what constitutes clear and convincing evidence.[28]

The respondent's attorney must request a hearing through the county attorney's office, and some counties require a written objection. Mental health cases are not filed on ICCES, and the cases are sealed. The respondent's objection can be to the certification and/or medication requested by the treating physician. The respondent may request a second opinion from a doctor, who is appointed by the court and who can testify at the hearing.[29] The doctor's fee is paid by the state.

If the respondent objects to medication, a copy of the physician's letter requesting an order for the involuntary administration of medication is usually included with the notice of certification. This letter is separate and more detailed than the physician's statement included in the notice of certification and will request medication in all formulations, including oral or intramuscular. The request may also include blood tests needed to monitor the respondent's physiological response to the medication. In some cases, a respondent may be willing to stipulate to taking oral medication but not to receiving injections. In such cases, the hearing must proceed, as injectable medication is only requested in cases where the respondent has a history of poor compliance with oral medication.

If a respondent agrees to one medication but not another, the attorney can negotiate with the county attorney, in tandem with the respondent's physician, to include medication acceptable to the respondent. For example, the physician may agree to an alternative if a respondent experiences severe side effects from a particular medication. If the respondent agrees to take the medication requested by the physician and to submit to the necessary bloodwork, no hearing is required. The county attorney will draft a stipulation for counsel to sign, and the court will enter an order approving the stipulation.

It is not uncommon for a respondent who objects to medication to initially insist on going to court but later change their mind and stipulate. This is especially true for respondents who decide that discharge from the facility is a higher priority than waiting for their hearing date. While the respondent may request a hearing, it is not mandatory that the respondent attend the hearing. In such cases, the hearing will proceed, and the attorney can cross-examine the doctor and other witnesses.

In rare cases, the physician may ask the court for electro convulsive therapy (ECT). If the respondent consents, a hearing may still be necessary because some courts or parties prefer a hearing before ECT is ordered. In a contested hearing, the court must find that drug treatments have been either of limited success or unsuccessful before ordering ECT. The county attorney must present evidence about the type of ECT and where it will be performed. Evidence must also include the risks to the patient and the number of treatments that the physician requests.

At the conclusion of the hearing or trial, the court will issue an order. If the certification is upheld, the respondent must be advised of the right to appeal at the conclusion of the hearing. If the state does not meet its burden, the certification will be terminated and the respondent will be discharged from the facility.

Client Consent

If the respondent consents to the certification and is taking medication consistently and voluntarily while in the facility, then no hearing or stipulation is required. In rare instances, a respondent may be certified without court-ordered medications.

Additional Rights During the Evaluation or Certification

Respondents subject to an evaluation, care, or treatment have certain rights under CRS § 27-65-117, including sending and receiving mail, making private telephone calls, seeing visitors, and keeping some personal possessions, including clothing. Computer access is not provided, and clients are not allowed to have their cell phones. These rights may be denied by the facility for good cause.

Emergency Medication

A treating physician may administer emergency psychiatric medication to a patient for up to 10 days if necessary to protect the patient from inflicting immediate and serious harm to themselves or others, or to prevent the immediate and irreversible deterioration of the patient due to a psychotic episode.[30] Facilities do not give notice to a patient's attorney that the patient has been given emergency medication. The justification for emergency medication is that waiting for a court hearing would place the physical well-being of the respondent, other patients, or staff in immediate jeopardy.[31]

While this can understandably be traumatic for the respondent, sometimes their thought process will improve once medication is administered. In such cases, the attorney may be able to have more meaningful communications with a respondent, particularly one who was delusional or hostile in prior conversations.

Termination of the Short-Term Certification

The treating physician decides when to terminate the respondent's certification. This is based on the physician's opinion that the respondent is no longer a danger to self or others, or is no longer gravely disabled, even though the respondent may not be functioning at an optimal level. The attorney may be able to assist the respondent with their discharge plan. For example, if a respondent is homeless, counsel can advocate for the respondent not to be released to a shelter and request that the respondent's social worker locate suitable housing and inquire about financial assistance that may be available.

Once the respondent is discharged, the physician completes a notice of termination of involuntary treatment, which is filed with the court and served on the parties.[32] When discharged, the respondent will be referred to outpatient treatment, especially if the physician recommends continuing medication. If the respondent is indigent, the respondent can be referred to a county mental health center, such as WellPower in Denver, Jefferson Center for Mental Health, or Mental Health Partners of Boulder.

"The justification for emergency medication is that waiting for a court hearing would place the physical well-being of the respondent, other patients, or staff in immediate jeopardy."

Transfer of the Short-Term Certification

If the treating physician determines that the respondent no longer needs to be hospitalized but still needs treatment and is unlikely to continue treatment voluntarily, the physician will sign a notice of transfer, which is filed with

the court. The respondent will be transferred to an outpatient mental health center. The certification remains in effect and can either be terminated or extended at the end of the three-month period.

Extension of Short-Term Certification

If a respondent's treating physician determines that the respondent needs additional treatment after the initial three months, the physician will file an extended certification for up to an additional three months.[33] Like the initial certification, a hearing is not required unless the respondent objects. The attorney continues to represent the respondent during the extended certification.

Long-Term Care and Treatment

If further treatment is needed, a respondent's treating physician may petition the court for long-term care and treatment under CRS § 27-65-109, which is for a six-month period. (The statute no longer refers to "certification.") The notice of respondent's right to a hearing is so essential that the statute requires two notices—one in the petition itself and a separate notice that must be provided to the respondent and their attorney. If a hearing is not requested within 10 days of the notice and there is no stipulation, the court can enter an ex-parte order for long-term care and treatment. An order for long-term care and treatment can continue for several years, renewing every six months.

Each time an extension is requested, the respondent's physician must certify to the court at least 30 days before the long-term certification expires that an extension is necessary. Failure to do so will result in dismissal of the petition.

Conclusion

While mental health certification is not an alternative to conservatorship or guardianship, it is another option that lawyers can recommend to clients in appropriate circumstances. Knowing when a mental health certification can be initiated and understanding the certification process will help lawyers better serve their clients. CL

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NOTES

1. HB 22-1256 will modify Article 65 of Title 27, and portions become effective on July 1, 2023, January 1, 2024, and January 1, 2025. The citations in this article are accurate through June 30, 2023.
2. CRS § 15-14-304.
3. CRS § 27-65-107(2).
4. *People in the Interest of Bucholz*, 778 P.2d 300 (Colo.App. 1989).
5. CRS § 15-14-301.
6. CRS § 15-14-425.
7. CRS §§ 15-14-311 and -314.
8. CRS § 15-14-401.
9. CRS § 15-14-418.
10. CRS § 27-65-111(1).
11. CRS §§ 15-14-306 and 27-65-105
12. CRS § 27-65-105(1)(a)(I).
13. CRS § 27-65-105.
14. CRS § 27-65-102(9)
15. CRS § 27-65-105(1.5).
16. CRS § 27-65-106(2).
17. CRS § 27-65-106(4).
18. CRS § 27-65-106(3).
19. CRS § 27-65-106(6)–(10).
20. Termed a "professional person" under CRS § 27-65-102(17).
21. CRS § 27-65-105.
22. CRS § 27-65-107.
23. CRS § 27-65-107(5).
24. *Sisneros v. Dist. Ct.*, 606 P.2d 55 (Colo. 1980).
25. CRS § 27-65-117(1)(d).
26. CRS § 27-65-117(2).
27. CRS § 27-65-107(6).
28. *People v. Lane*, 581 P.2d 719 (Colo. 1978); *People v. Medina*, 705 P.2d 961 (Colo. 1985); *People v. Rothwell*, No. 21CA1707 (Colo.App. Aug. 25, 2022) (not selected for official publication) (the author represented the respondent in this case).
29. CRS § 27-65-111(2).
30. *Medina*, 705 P.2d 961; 2 CCR § 502-1.
31. *Medina*, 705 P.2d at 974, 975.
32. CRS § 27-65-110.
33. CRS § 27-65-108.