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By Thomas L. Hagel*

Defending the Mentally Ill: A Discussion of Nebraska's Involuntary Commitment Proceedings

"Who are you?" said the Caterpillar.

This was not an encouraging opening for a conversation. Alice replied, rather shyly, "I—I hardly know, sir, just at present—at least I know who I was when I got up this morning, but I think I must have been changed several times since then."

"What do you mean by that?" said the Caterpillar sternly. "Explain yourself!"

"I can't explain myself, I'm afraid sir," said Alice, "because I'm not myself, you see."†

Alice's state of confusion lends an accurate insight into the unmapped world of the seriously mentally ill. The attorney representing a client in a civil commitment proceeding is a stranger, an intruder, in the boundless nether world of the mentally ill. To effectively represent his client, an attorney must do his best to familiarize himself with the vital medical, psychological, social, and legal signposts that dot the otherwise uncharted landscape. If he does not, his client may very well be deprived of his liberty for an indefinite period of time, often in an archaic institution possessing characteristics most commonly found in jail and penal complexes.

This article will discuss various aspects of representing individuals who are allegedly "mentally ill and dangerous," under the provisions of the Nebraska Mental Health Commitment Act.¹ The discussion will deal primarily with the involuntary commitment of such individuals. Commitment of those accused or convicted of criminal offenses will only be alluded to in passing, while voluntary admissions to a mental institution will not be addressed. The purpose of this article is to discuss the various problems inherent in representing mentally ill individuals and to examine the legal and tactical aspects involved in the handling of such cases. Before em-

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† L. CARROLL, ALICE'S ADVENTURES IN WONDERLAND 38 (Wingate ed. 1954).

1. NEB. REV. STAT. §§ 83-1001 to 1078 (Reissue 1976).

barking on the discussion a word of caution is in order. The attorney must remember that there will be few guideposts that will be of assistance in representing such clients. The applicable statutory definitions are vague, and the worlds of psychology and psychiatry are beset with conflicting theories, confusing terminology, and contradictory philosophies. These cautionary notes must be kept in mind throughout the discussion of the multi-faceted problem of the involuntary commitment of free people in a free society.

I. INTRODUCTION

The initial problem confronting an attorney in representing an allegedly mentally ill and dangerous client in a commitment proceeding is to determine what "role" he should play at such a hearing. This problem creates a serious dilemma. The dilemma involves ethical and humanistic implications which are often in conflict. In essence, the question posed is whether the attorney should act as an adversary in his client's interest, pursuant to the requirements of the Code of Professional Responsibility,² or as a non-adversary "friend of the Board" whose function is merely to advise the client of his legal rights and to assist in safeguarding them. The latter non-adversary "role" is often based upon the attorney's belief that his client is in need of treatment and that an involuntary commitment, if provided for in a proposed treatment plan, would be "in the client's best interest." This role conflict must be resolved prior to an attorney's entrance into the case. If it is not, the attorney and the client may be at odds throughout the duration of the case.

It must be noted at the outset that an attorney's duty to his client is regulated by the provisions of the Code. For example, Canon 7 dictates that "a lawyer should represent a client zealously within the bounds of the law."³ Further, Ethical Considerations 7-11⁴ and 7-12⁵ refer to the responsibilities of the attorney whose client is mentally deficient or disabled. However, none of these provisions set out specific criteria or guidelines to be followed. Ethical Consideration 7-11 simply states that the attorney's responsibilities "may vary according to the intelligence, experience, mental condition or age of a client . . . or the nature of a particular proceeding. Examples include the representation of . . . an incompe-

2. ABA CODE OF PROFESSIONAL RESPONSIBILITY AND JUDICIAL CONDUCT (1971). [hereinafter referred to as the CODE].

3. *Id.* CANON 7.

4. *Id.* EC 7-11.

5. *Id.* EC 7-12.

tent."⁶ Ethical Consideration 7-12 merely adds that an attorney may at times "be compelled in court proceedings to make decisions on behalf of the client" and that in such instances the attorney should "consider all circumstances" and act to "safeguard and advance the interests of his client."⁷ Other than the broad dictate of Canon 7, an attorney is left to find his own ethical path to follow when representing an allegedly mentally ill client.

It is this lack of specific differentiation among the various "circumstances" that poses the problem of an appropriate "role" for the attorney to fill in representing his less-than-competent client.⁸ In relation to commitment proceedings, the vague language of the Code offers little guidance. It must be kept in mind that the mental condition of the client is the heart of the controversy in a commitment proceeding. The lack of a definitive standard raises several questions. Must an attorney prejudge the mental condition of his client to his own satisfaction, and then mold his "role" accordingly? If, in fact, the attorney feels that his client is mentally ill, dangerous, and in need of involuntary treatment, should this belief alter his "role" in "representing a client zealously within the bounds of the law?" Or should the attorney make every attempt to free his client from commitment and completely disregard the potential consequences of such freedom to his client?⁹ Would it not be less com-

6. *Id.* EC 7-11.

7. *Id.* EC 7-12. EC 7-12 states in part:

Any mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities upon his lawyer. Where an incompetent is acting through a guardian or other legal representative, a lawyer must look to such representative for those decisions which are normally the prerogative of the client to make. If a client under disability has no legal representative, his lawyer may be compelled in court proceedings to make decisions on behalf of the client. If the client is capable of understanding the matter in question or of contributing to the advancement of his interests, regardless of whether he is legally disqualified from performing certain acts, the lawyer should obtain from him all possible aid. If the disability of a client and the lack of a legal representative compel the lawyer to make decisions for his client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of his client.

8. Consider, for example, the different responsibilities of an attorney dealing with: (a) a client who wants to give all of his possessions to the poor so as to follow the teachings of Christ; (b) a client who informs you that he wants to change his will as a result of his decision to commit suicide; or (c) a client being held for an involuntary commitment hearing due to forty years of chronic alcoholism. How does the Code apply to these differing situations and "circumstances?"
9. Consider, for example, a client who has been detained, pending a com-

plicated and more humane to simply leave the fate of your client in the hands of the mental health board and concerned physicians? Can such questions be resolved by reference to the Code?

It is suggested that the solutions to the various conflicts and quandaries noted above can and must be resolved by the individual attorney according to his professional judgment. It is further suggested that, after all other circumstances are considered, the individual attorney must rely upon a literal interpretation of the dictate of Canon 7 and represent his client so as to safeguard the individual from the state's attempt to deprive that individual of his liberty. The primary reason for such a view is that involuntary commitment to a mental institution is a deprivation of liberty that should be subject to constitutional protection. It is incarceration against one's will, whether it be termed "civil" in nature or labeled as "treatment."¹⁰ The dictates of ethics and law must take precedence over humanistic considerations that need not answer to the rule of law. This is the only avenue open to an attorney in such cases. All others would result in the abandonment of the client to the unbridled control and discretion of the medical and social science professionals who often place a higher value on what they characterize as "treatment" than upon the right of the individual to be free. As Justice Brandeis warned, "[e]xperience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent."¹¹

II. INVOLUNTARY COMMITMENT PROCEDURE

In 1976 Nebraska's laws governing the civil commitment of the mentally ill were changed dramatically. The change was the product of Legislative Bill 806.¹² The effect of this legislation was to completely revamp the civil commitment standards and procedures in Nebraska.¹³ This revampment was partially in response to a

mitment hearing, due to his repeated attempts to kill himself after he finds out that he has incurable cancer and has been in a state of psychotic depression since learning of his condition. Can the decision to commit suicide ever be a "rational" choice?

10. See *Heryford v. Parker*, 396 F.2d 393 (10th Cir. 1968). See also *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Livermore, Malmquist & Meehl, On the Justifications for Civil Commitment*, 117 U. PA. L. REV. 75 (1968).
11. *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (dissenting opinion).
12. L.B. 806, 85th Leg., 2d Sess. (1976).
13. See NEB. REV. STAT. §§ 83-325 to 328 (Reissue 1971) (repealed 1976). Under the prior statutory scheme, local "boards of mental health" were empowered, with almost unlimited discretion, to involuntarily

number of court decisions which clarified and established various legal rights of those characterized as "mentally ill."¹⁴ An increasing number of courts, at every jurisdictional level, have embraced the cause of protecting the rights of the mentally ill. The enactment of the Nebraska Mental Health Commitment Act¹⁵ advanced this cause by establishing due process safeguards within the commitment procedural framework, thus substantially narrowing the category of individuals eligible for involuntary commitment. The result of the enactment of these laws has been to codify constitutional safeguards within the commitment system itself.¹⁶

However, the practitioner must keep in mind that this act is not the sole source of law applicable to commitment proceedings.

commit individuals to mental institutions for an observation period of not more than sixty days upon a showing that the individual was "mentally ill" and in need of hospitalization. The commitment proceeding was initiated by the filing of an application. If sufficient grounds were shown to exist, the board would issue an arrest warrant, have the individual taken into custody and examined by a board-appointed physician. A final hearing would then be held in which the examining physician would report the results of his examination to the board. If the individual was ordered hospitalized, the hospital superintendent was charged with his or her care and further evaluation. Depending upon the evaluation of the superintendent, an individual could be committed and held involuntarily for an indefinite period of time. There were no statutory provisions for review or judicial appeal of the superintendent's decision. As a result of these procedures, certification of indefinite commitment was tantamount to a "lifetime sentence" to institutions that often more closely resembled prisons than hospitals. See also R. PERRUCCI, *CIRCLE OF MADNESS: ON BEING INSANE AND INSTITUTIONALIZED IN AMERICA* (1974).

14. See *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Doremus v. Farrell*, 407 F. Supp. 509 (D. Neb. 1975). These cases dealt specifically with the constitutional rights of individuals who were involuntarily confined to mental institutions. The court in *Doremus* declared unconstitutional NEB. REV. STAT. §§ 83-325 to 328 (Reissue 1971) (repealed 1976) and § 83-306(4) (Cum. Supp. 1974). The court held that these statutes failed to provide individuals to be committed with the constitutional protection of due process and equal protection of the law. For a general overview of recent court decisions in this area, see *Developments in the Law: Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190 (1974).
15. NEB. REV. STAT. §§ 83-1001 to 1078 (Reissue 1976).
16. An excellent discussion of the historical development of the Nebraska Mental Health Commitment Act may be found in Peters, Teply, Wunsch & Zimmerman, *Administrative Civil Commitment: The Ins and Outs of the Nebraska System*, 9 CREIGHTON L. REV. 266 (1975), and Peters, Teply, Wunsch & Zimmerman, *Administrative Civil Commitment: The Nebraska Experience and Legislative Reform Under The Nebraska Mental Health Commitment Act of 1976*, 10 CREIGHTON L. REV. 243 (1976).

Numerous courts have recognized that an involuntary commitment is a deprivation of liberty within the context and meaning of the United States Constitution. Thus, specific constitutional rules of law have been applied to such proceedings. This is true even in cases where states have provided for some degree of constitutionally inspired protections within their statutory frameworks. Nebraska has included provisions for many of these constitutional protections within the Nebraska Mental Health Commitment Act.¹⁷ However, these provisions are somewhat vague as to their meaning and scope, and limited in their application.¹⁸ Therefore, an attorney must look to other sources to fully protect his client's rights.

17. Some of the basic constitutional safeguards found in the Act are as follows:

1. Notice of time and place of preliminary and final hearing, list of allegations forming the basis of the petition and personal service of the summons or notice of the hearing. NEB. REV. STAT. § 83-1048 (Reissue 1976).
2. Right to counsel and right to appointed counsel for indigents. *Id.* § 83-1049.
3. Right to discovery. *Id.* § 83-1053.
4. Right to appear personally at all hearings, testify in his or her own behalf and present witnesses and evidence. *Id.* § 83-1056.
5. Right to compulsory service of process to obtain testimony of witnesses. *Id.* § 83-1057.
6. Right to confront and cross-examine adverse witnesses and evidence, such right being equivalent to those rights guaranteed by the sixth and fourteenth amendments to the Constitution of the United States, and Article one, section eleven of the Constitution of Nebraska. *Id.* § 83-1058.
7. Right to have formal rules of evidence applied at all hearings, with the standard for inadmissibility being that as applied in criminal proceedings. *Id.* § 83-1059.
8. Right to a transcript of all proceedings. *Id.* § 83-1061.
9. Right to appeal final orders of the Board to the District Court, with further appeal to the Supreme Court of Nebraska. *Id.* § 83-1043.
10. Right to a review as to treatment, disposition or discharge. *Id.* § 83-1046.
11. Right to file petitions or applications for writs of habeas corpus to challenge the legality of such subject's custody or treatment. *Id.* § 83-1066(9).
12. Right to engage or refuse to engage in religious worship and political activity. *Id.* § 83-1066(6).
13. Right to be free from involuntary servitude. *Id.* § 83-1066(7).

These enumerated rights are not all of those found in the Act. They are, however, some of those that have significant constitutional connotations within the meaning and content of the United States Constitution.

18. Consider, for example, the provisions of NEB. REV. STAT. § 83-1059 (Reissue 1976), dealing with the rules of evidence and the standard for the inadmissibility of evidence. In referring to "criminal proceed-

III. APPLICABILITY OF CONSTITUTIONAL LAW

From the foregoing it is clear that an involuntary commitment infringes upon the most precious and basic right guaranteed and protected by our nation's constitution—the right to liberty itself. For this reason courts have applied constitutional principles to commitment proceedings.¹⁹ Though the present state statutes guarantee to an individual the most important constitutional protections relative to such proceedings, these statutes have never been interpreted by appellate courts as to their scope of meaning and application. Therefore, an attorney must analyze those court decisions that have delineated the constitutional protections, above and beyond statutory schemes, afforded to the mentally ill in such proceedings.

For example, involuntary commitment without notice or a hearing is a denial of liberty without due process of law in violation of the fourteenth amendment. Nebraska law, of course, provides for notice and a hearing prior to commitment. However, such statutes are clearly inadequate in protecting the liberty of persons who are detained and held at the discretion of any peace officer for a commitment hearing.²⁰ Such detention and possible incarceration

ings," does the statute intend to make applicable the rules of evidence, as to inadmissibility, that apply at the trial of criminal offenses or those applied at preliminary hearings held in felony cases? See NEB. REV. STAT. § 27-1101 (Reissue 1975). Is it the intent of section 83-1059 to make the "exclusionary rule" applicable to commitment hearings? Is the intent to make the "*Miranda* rule" apply to such hearings? If so, must the examining doctor, usually an "agent of the state," read a subject his or her "*Miranda* warnings" prior to interviewing the subject? These are not merely hypothetical questions. They have arisen at hearings. They can only be resolved by legislative revision or appellate review. To date, at least two federal courts have held that the privilege against self-incrimination applies in commitment proceedings and that a person could not be committed, on the basis of statements made to a psychiatrist, unless they were made with knowledge of a right to remain silent. See *Lynch v. Baxley*, 386 F. Supp. 378 (M.D. Ala. 1975); *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded on other grounds*, 414 U.S. 473, *aff'd on rehearing*, 379 F. Supp. 1376 (E.D. Wis. 1974), *rev'd on other grounds*, 421 U.S. 957 (1975). See also Aronson, *Should the Privilege Against Self-Incrimination Apply to Compelled Psychiatric Examinations?*, 26 STAN. L. REV. 55 (1973); Note, *Application of the Fifth Amendment Privilege Against Self-Incrimination to the Civil Commitment Proceeding*, 1973 DUKE L.J. 729.

19. See Note, *Substantive Constitutional Rights of the Mentally Ill*, 7 U.C.D. L. REV. 128 (1974); 24 DRAKE L. REV. 213 (1974).

20. NEB. REV. STAT. § 83-1020 (Reissue 1976) reads as follows:

Mentally ill dangerous person; custody prior to mental health board proceedings; where detained. Whenever any

"in a jail," can take place on a peace officer's whim. Therefore, an attorney must be prepared to look to the area of constitutional law that developed to protect individuals' rights to due process of law prior to a denial of liberty.²¹

Next, an attorney must realize that the subject of a commitment hearing may be deprived of his liberty by the mental health board. This board is a quasi-judicial body. All questions of law and fact are decided by the board alone. The sixth amendment clearly secures the right to trial by jury when the possibility of a deprivation of liberty is present in both federal and state criminal prosecutions.²² The key ingredient in interpreting this right is the *possibility* that one might lose his liberty. If one accepts this as true, should not an individual subjected to a commitment proceeding have the right to choose a jury to decide the issues of fact? Is not an involuntary commitment for an indefinite period of time a substantial depriva-

peace officer believes that any individual is a mentally ill dangerous person and that the harm described by section 83-1009 is likely to occur before mental health board proceedings under this act may be invoked to obtain custody of the individual, such peace officer may immediately take such individual into custody, cause him or her to be taken into custody, or continue his or her custody if he or she is already in custody. When a mental health center or a state hospital, or other government or private hospital, has the capability to detain such an individual in the county in which the individual is found, the individual shall be placed in such facility. When no such facility exists, the individual may be placed in a jail.

It could be argued that this statute is unconstitutional, as violative of the due process clause of the fourteenth amendment. No standards or criteria are set out that a peace officer must meet or apply in arriving at his "belief" that an individual is a "mentally ill dangerous person." There are no limits on the officer's discretion in detaining and holding individuals. There are no provisions for review of the officer's actions prior to his detaining the person. Finally, one must ask whether the constitutional requirement of "probable cause" under the fourth amendment must be met prior to "seizing" an individual and holding him or her to await a commitment hearing. See *Orozco v. Texas*, 394 U.S. 324 (1969); *Beck v. Ohio*, 379 U.S. 89 (1964); *Gior-denello v. United States*, 357 U.S. 480 (1958); *Carroll v. United States*, 267 U.S. 132 (1925).

21. See Comment, 10 SUFFOLK U. L. REV. 76 (1975); 53 J. URBAN L. 305 (1975); 43 TENN. L. REV. 366 (1976). One might also consider the applicability of Nebraska's statutes concerning writs of habeas corpus to clients who are, or have been, detained and held under the provisions of section 83-1020. See NEB. REV. STAT. §§ 29-2801 to 2824 (Reissue 1975).
22. See *Baldwin v. New York*, 399 U.S. 66 (1970); *Duncan v. Louisiana*, 391 U.S. 145 (1968). These cases speak in terms of cases where the possible deprivation of liberty is "substantial" (over six months). See also *Humphreys v. Cady*, 405 U.S. 504 (1972).

tion of liberty within the context of the constitution? It is difficult to accept, in terms of jurisprudential and social policy, that the constitutional right to a jury trial can be asserted in a "criminal" case involving a maximum six month jail term, yet cannot be asserted at a hearing which may culminate in an involuntary commitment for life, simply because the state chooses to classify commitment hearings as "civil" in nature. Such a classification cannot be justified in law, logic or by some form of misdirected social policy. The protection afforded by the constitution should not be denied those facing involuntary confinement simply because the proceeding is said to be in the "best interest" of the one threatened with confinement.

It may be argued that in some involuntary commitment cases the eighth amendment prohibition against cruel and unusual punishment may be violated.²³ Though the concept of "cruel and unusual punishment" has historically been limited to the worlds of criminal law and procedure, it can be argued that it applies to involuntary commitment cases.²⁴ It has been suggested that confining mentally ill persons who are dangerous but not treatable is constitutionally questionable.²⁵ One court has even held that indefinite commitment without adequate treatment may be so inhumane as to constitute "cruel and unusual punishment" or a denial of due process of law.²⁶ This is a very real and persistent problem in state hospitals. This issue will be discussed in relation to appeal and review procedures later in this article.

Finally, the construction and wording of some of the commitment statutes raise due process issues due to their vagueness. At present, the "vagueness principle" has only been applied in cases where criminal statutes have been challenged as too vague and indefinite. It would appear, at first glance, that this constitutional principle does not apply to the standards applicable to commitment hearings. However, it can be reasonably argued that the underlying principle in due process disfavors vague standards because

23. T. SZASZ, LAW, LIBERTY, AND PSYCHIATRY 188-89 (1963).

24. For a discussion of the concept of "cruel and unusual punishment," see *Powell v. Texas*, 392 U.S. 514 (1968) and *Robinson v. California*, 370 U.S. 660 (1962). See also Schwartz, *In the Name of Treatment: Autonomy, Civil Commitment and the Right to Refuse Treatment*, 50 NOTRE DAME LAW. 808 (1975).

25. Note, *Civil Commitment of the Mentally Ill: Theories and Procedures*, 79 HARV. L. REV. 1288, 1290-91 (1966).

26. *Rouse v. Cameron*, 373 F.2d 451, 453 (D.C. Cir. 1966). See also Comment, 27 U. FLA. L. REV. 295 (1974); Comment, 1974 WASH. U.L.Q. 787 (1974).

they allow state officials to arbitrarily decide who shall be confined.²⁷ Logic would suggest that this principle would apply to involuntary commitment standards.

In conclusion, it must be noted that this article has only touched upon a few of the numerous constitutional issues and principles arising from commitment proceedings. This area of law is growing daily. An attorney must keep in touch with these developments because the constitution may prove to be the only effective weapon in saving a client from a lifetime of confinement.

IV. HEARING PROCEDURES

The machinery of a civil commitment proceeding is put into motion by the filing of a petition with the clerk of the district court of the county within the judicial district where the "subject"²⁸ resides or is located.²⁹ Any person may file a commitment petition as long as it is approved by the county attorney. In essence, the petitioner must state or allege that the subject of the petition "is a mentally ill dangerous person."³⁰ The petition must also "include a description of the behavior which constitutes the basis for the petitioner's concluding that the individual is a mentally ill dangerous person."³¹ Further, the petition must allege that neither voluntary hospitalization nor other less restrictive alternatives are available or would suffice to prevent the "harm" described and defined by statute that would or might be the product of the subject's alleged "dangerousness."³² Finally, the petitioner must verify the

27. See *Bouie v. Columbia*, 378 U.S. 347 (1964).

28. NEB. REV. STAT. § 83-1014 (Reissue 1976).

29. *Id.* § 83-1025.

30. *Id.* §§ 83-1024, 1025.

31. *Id.* § 83-1025.

32. The two-fold concept of a "mentally ill dangerous person" does not lend itself to precise definition. However, the Nebraska Legislature has codified its interpretation of this double-edged concept. NEB. REV. STAT. § 83-1009 (Supp. 1977) reads as follows:

Mentally ill dangerous person; defined. Mentally ill dangerous person shall mean any mentally ill person or alcoholic person who presents:

(1) A substantial risk of serious harm to another person or persons within the near future, as manifested by evidence of recent violent acts or threats of violence or by placing others in reasonable fear of such harm; or

(2) A substantial risk of serious harm to himself within the near future, as manifested by evidence of recent attempts at, or threats of, suicide or serious bodily harm, or evidence of inability to provide for his basic human needs, including food, clothing, shelter, essential medical care, or personal safety.

contents of the petition and have it approved by the county attorney.³³

Once the petition is filed stating the county attorney's belief that the immediate taking into custody of the subject is necessary, a warrant will be issued directing the county sheriff to take the subject into custody and hold him pending the preliminary hearing.³⁴ The subject can be held at the discretion of the mental health board in a jail, mental health center, or a private or state hospital.³⁵ However, if the county attorney believes that no need exists to have the subject held prior to the hearing, the clerk of the district court merely issues a summons to be served by the county sheriff on the subject.³⁶ The summons must be served along with a copy of the petition, a list of statutory rights of the subject relative to the proceeding,³⁷ and a list containing the names, addresses, and telephone numbers of the mental health professionals by whom the subject may be evaluated prior to his preliminary hearing.³⁸ Should the subject fail to appear at the preliminary hearing the mental health board may issue a warrant to have the sheriff take him into custody.³⁹

There are certain times when the circumstances will not permit the authorities to go through the summons procedure. This problem often arises in cases where an individual, who is allegedly mentally ill, is involved in acts which may seriously endanger the safety of others or himself. In these cases a "peace officer"⁴⁰ may take the individual into immediate custody.⁴¹ Upon placing the person in a holding facility, the peace officer must execute a written certificate alleging his belief that the person in custody is a mentally ill dangerous person, that harm will come to the subject or others if the subject is not held prior to the hearing, and a summary of the subject's behavior supporting these allegations.⁴² However, the person being held has a right to be evaluated by a "mental health professional,"⁴³ not later than thirty-six hours after being taken into custody to see if there is sufficient reason to hold the person.⁴⁴

33. NEB. REV. STAT. § 83-1026 (Reissue 1976).

34. *Id.* § 83-1028.

35. *Id.*

36. *Id.* § 83-1027.

37. These statutory rights are contained in *id.* §§ 83-1047 to 1067.

38. *Id.* § 83-1027.

39. *Id.* §§ 83-1027, 1028.

40. *Id.* § 83-1011.

41. *Id.* § 83-1020.

42. *Id.* § 83-1021.

43. *Id.* § 83-1010.

44. *Id.* § 83-1023.

If the mental health professional finds that cause does not exist to hold the person, he must be released immediately unless proceedings are initiated or pending before the mental health board.

Once the subject is taken into custody, or served with a summons, the adversary nature of the commitment proceeding becomes apparent. The subject will either be allowed to retain counsel or have an attorney appointed to represent him throughout the pending action.⁴⁵ At this point in time it is very important for the subject's attorney to move quickly in preparing his case. It is suggested that there are two basic goals to be achieved at the outset: First, attempt to interview the subject to obtain all possible information that may have a bearing on his background and mental condition; second, attempt to ascertain whether the subject will agree to some form of voluntary treatment. The second goal rests upon the proper finding of fact that the subject is in need of some form of voluntary treatment. Such treatment might include voluntary admission to a hospital, obtaining out-patient treatment at a mental health center, or an agreement to continue in a previously established treatment program.

Strong emphasis should be placed on the goal of voluntary treatment. There are two primary reasons for this, one medical and the other legal. First, most mental health professionals agree that the potential for success in treating the mentally ill is much higher when the individual voluntarily seeks treatment. Though this is not always a possible or viable alternative, the individual's cooperation in treatment should always be sought. The legal considerations and consequences of voluntary treatment are significant. The primary consequence of such an alternative is the avoidance of the possibility of an indefinite commitment by the mental health board. For example, anyone may apply for voluntary admission to any public or private institution for treatment.⁴⁶ If accepted, the patient has the right to be discharged upon giving twenty-four hours notice of his desire to leave.⁴⁷ Therefore, the patient is insulated from the very real possibility of indefinite confinement in an institution as a consequence of a commitment proceeding. Thus an attorney should always investigate the possibility of voluntary treatment prior to a formal commitment hearing.

The commitment hearing process is two-tiered. The first, or "preliminary" hearing must be held no later than five days after a subject is taken into custody. The second, or "final" hearing

45. *Id.* § 83-1049.

46. *Id.* § 83-1019.

47. *Id.*

must be held no later than fourteen days after the preliminary hearing.⁴⁸ However, the applicable statutes clearly state that both hearings should, if possible, take place within five days of the subject being taken into custody.⁴⁹ In any event, the stated goal is to grant the subject a speedy hearing and disposition of the controversy.

As noted above the preliminary hearing is the initial forum in which to answer the allegations. One may compare it to a preliminary hearing held in a felony case. In essence, it is a "probable cause" hearing. The statutory description of the hearing is as follows:

[A] preliminary hearing shall be held by the mental health board to determine whether there is probable cause to believe that the subject of a petition is a mentally ill dangerous person, and that neither voluntary hospitalization nor other alternatives less restrictive of his or her liberty than a mental health board ordered treatment disposition are available or would suffice to prevent the harm described in section 83-1009. . . .⁵⁰

It can be seen that there is a similarity between the issues presented in such a hearing and a preliminary hearing in a felony case. However, the "elements" that must be shown to exist in a preliminary commitment hearing lack the specificity of those that must be shown to exist in a comparable criminal proceeding.

Essentially, the state must show that there is probable cause to believe that: (1) the subject is mentally ill, (2) due to his or her illness the subject is dangerous relative to the criteria found in section 83-1009,⁵¹ (3) voluntary hospitalization or some other less restrictive alternative is not available, and (4) anything other than board ordered treatment would not suffice to prevent the harm alleged in the petition. The burden of proof rests with the county attorney. If the county attorney fails to sustain the burden of proof as to all four elements the board must dismiss the petition and discharge the subject.⁵² If probable cause is found the case will usually be set for a final hearing.⁵³

However, there appears to be a statutory "catch" in the above mentioned procedure. This catch could be referred to as an alternative to a finding of probable cause:

If the board concludes that there is probable cause to believe that

48. *Id.* §§ 83-1027, 1030.

49. *Id.*

50. *Id.* § 83-1031.

51. *Id.* § 83-1009.

52. *Id.* § 83-1032.

53. *Id.* § 83-1033.

the subject is a mentally ill dangerous person, *but that voluntary hospitalization or other treatment alternatives less restrictive of the subjects' liberty than a mental health board ordered treatment disposition are available and would suffice to prevent the harm described by section 83-1009*, the mental health board may either dismiss the petition and unconditionally discharge the subject, or suspend further proceedings for a period not to exceed ninety days from the date of the preliminary hearing in order to determine the results of voluntary treatment alternatives.⁵⁴

Thus, upon the limited finding that the subject may be a mentally ill dangerous person and that voluntary or other less restrictive treatment alternatives are adequate and available, the subject may be either discharged or the proceedings suspended. If a suspension is ordered the county attorney must file an application of reinstatement within ninety days. If he does not the board must dismiss the petition and discharge the subject.⁵⁵

The "catch" referred to above consists of the lesser standard of probable cause. By making the limited finding described above the board is allowed to retain jurisdiction over the case. Such suspensions are often used to force individuals into treatment with the threat of further commitment proceedings. It could be argued that such a provision violates a subject's rights under section 83-1031,⁵⁶ in that either the county attorney must meet his burden of proof or the petition is dismissed—period. When a client's liberty is at stake, is this an unreasonable expectation? For this reason it is suggested that counsel always move for a dismissal of the petition, in lieu of a suspension.

After a waiver of the preliminary hearing,⁵⁷ or a finding of probable cause at the conclusion of such hearing, the case will be set down for a final hearing. The hearing itself can be compared to a trial in both substance and procedure. The sole issue is whether the petition should be dismissed and the subject of the hearing discharged, or whether the subject should be committed to an institution for what might be the rest of his life. Though the core issue may be stated rather simply, its resolution is a labyrinth of complicated legal and medical concepts that are often so vague as to elude the grasp of the average attorney.

54. *Id.* § 83-1032 (emphasis added).

55. *Id.*

56. See text accompanying note 50 *supra*.

57. Under NEB. REV. STAT. § 83-1064 (Reissue 1976) the subject may waive his or her right to a preliminary hearing. However, it is suggested that one should never enter such a waiver. This suggestion is based on the fact that a preliminary hearing is an excellent opportunity to discover and analyze the amount, type and quality of evidence that underlies the petition.

The material elements to be proven by the county attorney in a final hearing are strikingly similar to those dealt with at the preliminary hearing:

A final hearing shall be held by the mental health board to determine whether there is clear and convincing proof that the subject of a petition is a mentally ill dangerous person and that neither voluntary hospitalization nor other alternatives less restrictive of his or her liberty than a mental health board ordered treatment disposition are available or would suffice to prevent the harm described in section 83-1009.⁵⁸

It is obvious that the same elements that must be shown under the "probable cause standard" at the preliminary hearing must also be established at the final hearing. However, at the final hearing, these elements must be established by "clear and convincing proof." It could be argued that this standard of proof is constitutionally inadequate and that the standard of "beyond a reasonable doubt" should be applied since there is a possibility that the subject may be deprived of his liberty.⁵⁹ Such a deprivation should not be considered any less serious than a comparable loss of liberty under criminal sanctions merely because it takes place at the hands of a mental health board.

To discuss the burden of proof in a commitment hearing in a logical manner requires dealing with each material element separately. In so doing the interdependent relationship of the elements may be clearly seen. The failure to prove any individual element should result, as in criminal cases, in the discharge of the subject.

V. MENTAL ILLNESS

Society's blind reliance on medical judgments as to who is, or is not, mentally ill is misguided. Psychiatry and psychology have not attained the level of a pure science. It can be reasonably argued that psychiatry is more an art than a science.⁶⁰ There are as many concepts of "mental illness" as there are "schools" of psychiatric thought. In essence, the diagnostician has the ability to

58. *Id.* § 83-1035.

59. *Murel v. Baltimore City Criminal Court*, 407 U.S. 355 (1972) (Douglas, J., dissenting); *In re Ballay*, 482 F.2d 648 (D.C. Cir. 1973); *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded on other grounds*, 414 U.S. 473, *aff'd on rehearing*, 379 F. Supp. 1376 (E.D. Wis. 1974), *rev'd on other grounds*, 421 U.S. 957 (1975); *The "Crime" of Mental Illness: Extension of "Criminal" Procedural Safeguards to Involuntary Civil Commitments*, 66 J. CRIM. L. & CRIMINOLOGY 255 (1975).

60. *Ennis & Litwack, Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CAL. L. REV. 693 (1974).

classify nearly any person as being mentally ill, based merely on his own particular concept of mental illness.⁶¹ It has even been suggested that the concept of mental illness is a myth.⁶² However, the issue of whether the subject is mentally ill is the initial element to be proven in a commitment proceeding. Therefore, the attorney must learn the criteria used by psychiatrists in making their diagnosis.

The accepted standards and criteria used in the diagnosis of mental disorders are found in the *Diagnostic & Statistical Manual of Mental Disorders*.⁶³ This slim, loose-leaf manual contains classifications for all mental disorders recognized by the American Psychiatric Association. However, unless the layman is well versed in psychiatric jargon the manual will be of little value. The goal of the attorney should be to discover the precise diagnosis alleged and determine whether it fits within the guidelines set forth in the *Manual*.

At the hearing the examining physician will normally present his diagnosis of the subject's mental condition. This diagnosis will be classified according to the criteria set out in the *Manual*. More often than not, the physician will find that the subject is afflicted with some type of "psychosis." A psychotic disorder is considered to fall within the class of the most severe mental illnesses.⁶⁴ However, the present statutes do not specifically require a finding of psychosis in order to make a finding that a mental illness is present. In fact, section 83-1009 might be applied so as to label almost any form of unconventional or antisocial behavior as "mental illness."⁶⁵ Under a recent revision, section 83-1009⁶⁶ now includes alcoholism

61. Roth, Dayleh, & Lerner, *Into the Abyss: Psychiatric Reliability and Emergency Commitment Statutes*, 13 SANTA CLARA LAW. 400 (1973).

62. T. SZASZ, *supra* note 23, at 11-17.

63. AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS* (2d ed. 1968).

64. L. HINSIE & R. CAMPBELL, *PSYCHIATRIC DICTIONARY* 619-28 (4th ed. 1970).

65. N. KITTRIE, *THE RIGHT TO BE DIFFERENT: DEVIANCE AND ENFORCED THERAPY* (1971); T. SZASZ, *THE MYTH OF MENTAL ILLNESS* (1961).

66. NEB. REV. STAT. §§ 83-1009, 1009.01 (Supp. 1977). Though these statutes have made alcoholics subject to commitment, they are vague as to what degree of this illness must be shown to sustain a commitment. The *DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS*, *supra* note 63, at 41-42, classifies the various forms of alcoholism as "personality disorders" or "non-psychotic mental disorders," not forms of psychotic illness. Three basic forms of alcoholism are classified: episodic excessive drinking, habitual excessive drinking and alcohol addiction. *Id.* at 45. These classifications are, in essence, based upon the degree of use and involvement of alcohol in the individual's life. Under the

as a form of mental illness. These factors should be kept in mind due to the fact that numerous studies have demonstrated the dubious validity and reliability of psychiatric diagnosis of mental illness.⁶⁷

The hinge pin of the state's case will be the psychiatrist's testimony. His opinion concerning a subject's mental condition will be the most important evidence considered by the board. Consequently, the cross-examination of the state's psychiatrist or psychologist is perhaps the most important aspect of the case. An attorney should use cross-examination to test the foundation on which the witness bases his opinions concerning the presence of a mental illness in the subject and the element of dangerousness. Cross-examination also offers an opportunity to establish a foundation for asserting a subject's right to an alternative less restrictive than commitment.

A diagnosis of mental illness by a psychiatrist can be challenged on two distinct grounds: (1) that the reliability of such a diagnosis is exceedingly low due to its unscientific formulation, and (2) that the validity of such a diagnosis is insignificant. In taking the first approach, numerous studies can be cited that demonstrate the lack of uniformity and agreement among qualified clinicians in their evaluation of a person's mental condition.⁶⁸ A series of questions can be devised that demonstrate the potential for inaccurate and mistaken assessments of mental illness or of specific types of mental illness.⁶⁹ When effectively presented, these questions can create a cloud of suspicion over the credibility and validity of the psychiatrist's assessment and opinions. They will often show that the opinions are based only on a cursory examination of the subject, that few if any of the accepted objective tests⁷⁰ used in the field

present statute, what degree of alcoholic illness or "addiction" must be shown as the basis of a commitment? Must it be shown that the subject is "addicted" before he or she can be committed? Since alcoholism is not a form of psychosis, is such an illness an appropriate basis for an involuntary commitment? It is suggested that these questions can only be answered through an appropriate revision of the statutes so as to specify what, in fact, the Legislature had in mind when defining an "alcoholic person" as "a person addicted to the use of alcohol." A layman's concept of "addiction" may be far different from that described in the MANUAL.

67. J. ZISKIN, *COPING WITH PSYCHIATRIC TESTIMONY* (1970); Ash, *The Reliability of Psychiatric Diagnosis*, 44 J. ABNORMAL SOC. PSYCH. 272 (1949).

68. See authorities cited in note 67 and accompanying text *supra*.

69. J. ZISKIN, *supra* note 67, at 224-26.

70. J. DAVIS & J. FOREYT, *MENTAL EXAMINER'S SOURCE BOOK* (1975); M. BLINDER, *PSYCHIATRY IN THE EVERYDAY PRACTICE OF LAW* (1973). Both

were administered, and that certain variables were not considered when forming the opinions.⁷¹ With a carefully designed cross-examination, an attorney can undermine the psychiatrist's assessment that the subject has a mental illness requiring commitment.

VI. PREDICTION OF DANGEROUSNESS

Courts and legislatures across the country have experienced great difficulty in fashioning a valid and reliable test for determining whether a person is able to care for himself. However, in recent years, courts have required a finding of dangerousness as a requisite to an involuntary commitment.⁷² These courts have further required that a prediction or assessment of dangerousness be based on a finding of a recent overt act, attempt or threat to do substantial harm to oneself or others.⁷³ Nebraska's statutory scheme concerning such a finding complies substantially with these court opinions. The Nebraska statute defines the elements of dangerousness as entailing:

(1) A substantial risk of serious harm to another person or persons within the near future, as manifested by evidence of recent violent acts or threats of violence or by placing others in reasonable fear of such harm; or

(2) A substantial risk of serious harm to himself within the near future, as manifested by evidence or recent attempts at, or threats of, suicide or serious bodily harm, or evidence of inability to provide for his basic human needs, including food, clothing, shelter, essential medical care, or personal safety.⁷⁴

It is clear that this statute basically complies with the requirements and criteria set forth by various courts. However, the *meaning* of the above quoted language is deceptively simple. The process of *predicting* the occurrence of such behavior is much more elusive.

of these books are excellent sources of information concerning the various objective tests used in diagnosing mental illnesses. They explain these tests and suggest areas for cross-examination of psychiatrists.

71. J. ZISKIN, *supra* note 67, at 219-24; M. BLINDER, *supra* note 70, ch. XIII.

72. O'Connor v. Donaldson, 422 U.S. 563 (1975); Doremus v. Farrell, 407 F. Supp. 509 (D. Neb. 1975); Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972). The court in *Lynch* specified the minimum findings necessary to support an involuntary commitment: (1) the person to be committed must be found to be mentally ill; (2) the person must pose a real and present threat of substantial harm to himself or others; (3) the danger posed by the person must be evidenced by a recent overt act; and (4) there must be treatment available for the illness diagnosed.

73. See, e.g., Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974).

74. NEB. REV. STAT. § 83-1009 (Supp. 1977).

The major responsibility in determining dangerousness or inability to care for oneself rests on the examining psychiatrist. In essence, he must make a prediction as to future behavior. Such a prediction is, at best, a qualified guess.⁷⁵ This is complicated by the fact that any assessment of behavior is dependent upon the behavior being understood in reference to its social, situational, and environmental context.⁷⁶ Therefore, the state psychiatrist's prediction will often be based upon facts ranging from actual past violent behavior to mere verbal suggestions of less than socially condoned conduct, such as refusing to take prescribed medication. Consequently, an attorney should attack such predictions on the grounds that they are based on vague speculation cloaked in the mystique of psychiatric jargon. Counsel should attempt to dissect the foundation on which the prediction rests. Since the prediction is often based on an accumulation of behavioral components, each of which rests upon mere probability, *each* component should be analyzed as to its validity and reliability in predicting dangerousness. By approaching the issue in this fashion, counsel will quite often find that the psychiatrist does not have personal knowledge⁷⁷ of the facts underlying his prediction. Often the psychiatrist has based his opinion on nursing notes or other medical records. Such records are simply a compilation of "facts" that merely reflect interpretations of a person's behavior by numerous unrelated individuals who may or may not be qualified to make such assessments. Therefore, counsel must carefully probe the psychiatrist's knowledge of the facts on which the prediction rests. An attorney should also continually suggest that such facts lack relevance, materiality, and credibility. By following this line of questioning the psychiatrist's prediction can often be exposed as lacking in substance and credibility.

Finally, an attorney must remember that a mere prediction of dangerousness, without reference to the degree of risk of its future occurrence, is not enough to comply with the statutory criteria. It must be established that the risk of such dangerousness is "substantial."⁷⁸ A mere possibility or probability of such a risk is not enough.⁷⁹ If the risk of dangerousness cannot be established as sub-

75. See Ennis & Litwack, *supra* note 60; Rubin, *Prediction of Dangerousness in Mentally Ill Criminals*, 27 ARCH. OF GEN. PSYCH. 397 (1972).

76. Rubin, *supra* note 75, at 400.

77. If it is established that the psychiatrist-witness is testifying to facts not within his personal knowledge, an objection to such testimony and a motion to strike would be appropriate and should be made. See NEB. REV. STAT. §§ 27-602, 705 (Reissue 1975).

78. NEB. REV. STAT. § 83-1009 (Supp. 1977).

79. In *Millard v. Harris*, 406 F.2d 964, 973 (D.C. Cir. 1968), the court delineated various factors to be evaluated in assessing dangerousness:

stantial by "clear and convincing proof"⁸⁰ the state has not met its burden of proof.

VII. THE NEXUS REQUIREMENT

The concepts of "mental illness" and "dangerousness" within Nebraska's statutory scheme have been briefly discussed. However, they were discussed as separate entities. To perceive them as such would be misleading. The fact that *both* must be present to sustain an involuntary commitment suggests a very special and necessary interdependent relationship. Since mental illness without a showing of dangerousness *may not* be a legally sufficient basis for involuntary commitment, and dangerousness without mental illness is *not* a legally sufficient basis for involuntary commitment, it is evident that there must be a dynamic, causal relationship between the two factors. One without the other cannot be a sufficient basis for a commitment.

The statutory language clearly requires a causal nexus between the elements of mental illness and dangerousness. Therefore, it is reasonable to insist at the hearing that the state prove that the alleged condition of dangerousness be causally related to, *and arise out of*, the mental disorder. In essence, an attorney should force the state to prove that the condition of dangerousness is the "product" of the mental disorder.⁸¹ If no nexus can be established between the two, then logic and reason dictate that the statutory criterion has not been met and the petition must be dismissed.⁸²

VIII. ALTERNATIVES TO COMMITMENT

The underlying philosophy of Nebraska's mental health commit-

"Predictions of dangerousness . . . require determinations of several sorts: the type of conduct in which the individual may engage; the likelihood or probability that he will in fact indulge in that conduct; and the effect such conduct if engaged in will have on others." See also Greenburg, *Involuntary Psychiatric Commitments to Prevent Suicide*, 49 N.Y.U.L. REV. 227 (1974); *Civil Commitment of Heroin Addicts: A Panel Discussion*, 1 CONTEMP. DRUG PROBS. 561 (1972); Note, *supra* note 25; 7 REAL PROP. PROB. & TR. J. 532 (1972); 2 U.C.L.A.-ALASKA L. REV. 68 (1972).

80. NEB. REV. STAT. § 83-1036 (Reissue 1976).

81. See *Carter v. United States*, 252 F.2d 608 (D.C. Cir. 1957), for an excellent discussion of the "product test." This test has, in the past, been most often applied in criminal cases involving the insanity defense.

82. Brenner, *Denial of Due Process and Civil Rights Under Sections 73 and 73a of the Mental Hygiene Law to Aged Seniles without Major Mental Impairment*, 34 N.Y.S.B.J. 19 (1962); DeCain, *Commitment Procedure and the Non-Mentally Ill*, 33 N.Y.S.B.J. 151 (1961).

ment laws places a high priority on treating the mentally ill in an environment that places the least amount of restrictions on the individual's liberty, relative to the requirements of an effective treatment plan. In fact, the stated policy underlying these statutes is to encourage voluntary treatment alternatives.⁸³ Voluntary treatment is the least restrictive alternative to an involuntary commitment for an indefinite duration.⁸⁴ However, the facts of a particular case may not allow the option of voluntary treatment as a realistic alternative. In that event, counsel must be prepared to suggest to the board various alternatives to an involuntary commitment that fall somewhere in between both ends of the spectrum of restrictive environment.

The issue of a possible alternative to commitment could arise during at least two stages of the proceedings. The issue may first arise at or during the preliminary hearing. During this hearing, facts may be developed that point to the inappropriateness of any further proceedings aimed at commitment. Counsel should develop facts that indicate that the subject can receive effective treatment outside an institution and that the subject is willing to pursue such a treatment alternative. If the subject has ever received voluntary, out-patient treatment prior to the hearing, then this fact should be emphasized. If records of such treatment are available they should be introduced into evidence. In essence, counsel should in appropriate cases attempt to present the subject as an individual who may need treatment, but does not need to be committed to receive it. If such a case can be developed at the preliminary hearing stage, counsel should move the board for a continuance⁸⁵ or suspension⁸⁶ of further proceedings to give the subject time to investigate and pursue voluntary treatment alternatives. In doing this counsel may be able to stop the proceedings before they reach the final hearing stage.

This issue may also arise at the final hearing stage of the proceedings. This is the most critical stage of the commitment process. Therefore, it is vital that counsel be prepared to present an argument that commitment should be considered only as a last resort.⁸⁷

83. NEB. REV. STAT. § 83-1001 (Reissue 1976).

84. *Id.* § 83-1019.

85. *Id.* § 83-1054.

86. *Id.* § 83-1032.

87. The trend in court decisions supports the philosophy that involuntary commitment should be considered as a last resort. Many have held that the state must investigate all available alternatives to complete confinement prior to ordering an involuntary commitment. These decisions reflect the judiciary's growing awareness and recognition of the need to vigorously protect the rights of the mentally ill to be

To lay foundation for such an argument, counsel should thoroughly cross-examine the examining psychiatrist as to whether the proposed treatment plan could be effectively carried out through a treatment program in a community setting. Further, if a social or case worker has been assigned to the client, counsel should cross-examine the worker concerning whether less restrictive treatment alternatives have been explored, and whether such alternatives are available within the community. Finally, counsel should be prepared to call as witnesses knowledgeable individuals to establish the existence and availability of such treatment programs. If these facts can be established, counsel should move the board for a continuance or suspension of the final hearing⁸⁸ to investigate these alternatives. If it is clear from the evidence that such alternatives are available and that they constitute an effective and appropriate treatment program, counsel should move to dismiss the petition on the ground that the state has failed to prove that involuntary commitment is necessary to prevent the harm described in section 83-1009.⁸⁹

The importance of investigating less restrictive alternatives to commitment cannot be over-emphasized. This avenue of relief will quite often be the only one open to an attorney and his client. Therefore, counsel should always enter the proceedings with a well-prepared alternative to an involuntary commitment.

IX. POST-COMMITMENT PROCEEDINGS

From the time the petition is filed counsel should be aware of the possibility of an unfavorable decision by the board. Accordingly, he should prepare the case so as to preserve the record for use in any future post-commitment proceedings. Consideration should be given to the preservation of evidentiary objections as well as preserving the record as to matters of law and fact. The goal is to insure appellate or post-commitment review if the need arises.

The subject of a commitment proceeding that culminates in an involuntary commitment has available a host of post-commitment actions to challenge or review his commitment. Some of these are provided under the commitment statutes. Others stem from separ-

free of unnecessary deprivations of liberty during the treatment process. See *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *In re Ballay*, 482 F.2d 648 (D.C. Cir. 1973); *Lake v. Cameron*, 364 F.2d 657 (D.C. Cir. 1967). See also Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives*, 70 MICH. L. REV. 1107 (1972).

88. NEB. REV. STAT. § 83-1036 (Reissue 1976).

89. *Id.* § 83-1009.

ate state and federal statutes. Basically, there are at least six different causes of action that can be used to review or challenge an involuntary commitment.

The first two causes of action to be considered are those found in the commitment act that provide for appellate review.⁹⁰ In essence, the provisions of section 83-1043⁹¹ provide for a two-tier appellate process. First, the final order of the board may be appealed to the district court that has jurisdiction over the county in which the hearing was held.⁹² An unsatisfactory decision by the district court may then be appealed to the Nebraska Supreme Court.⁹³ In relation to these proceedings, two factors must be considered. First, the appeal to the district court is *de novo* on the record.⁹⁴ This fact is further reason to make every attempt to make and preserve a complete record of the board's proceedings. Finally, it must be noted that the statute provides that the appeal procedure applicable to appeals from the district court to the Nebraska Supreme Court must be in accordance with the appeal procedures used in criminal cases.⁹⁵ However, the statute does not state *which* of these procedures apply. Since different criteria and procedures are used in different types of criminal cases it is unclear as to how an attorney should proceed.⁹⁶ This problem might be remedied by an action for declaratory judgment.

Next, counsel might consider the provisions allowing for a review of the subject's treatment disposition.⁹⁷ Though section 83-

90. NEB. REV. STAT. § 83-1043 (Reissue 1976). The relevant portion of this section reads as follows:

The subject of a petition or the county attorney may appeal a final order of the mental health board to the district court. Such appeals shall be *de novo* on the record. A final order of the district court may be appealed to the Supreme Court in accordance with the procedure in criminal cases.

The procedure for the review of judgments in criminal cases may be found at NEB. REV. STAT. §§ 29-2301 to 2319 (Reissue 1975).

91. NEB. REV. STAT. § 83-1043 (Reissue 1976).

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. For example, section 83-1043 does not state whether the procedures used in reviewing misdemeanor cases are applicable, as opposed to the procedures used to appeal felony or homicide cases. Since time is of the essence in appellate procedure, the vague reference to "procedure in criminal cases" creates a real and substantial obstacle to a timely review of an order of commitment.

97. NEB. REV. STAT. § 83-1046 (Reissue 1976). This statute reads as follows:

Whenever it shall be shown, by any person, to the satisfac-

1046⁹⁸ does not provide for what might be described as appellate review in the usual sense of the term, it does provide two grounds on which to challenge a subject's status under an involuntary commitment.⁹⁹ Further, it provides for two types of relief: discharge from confinement, or change of the treatment plan to one that is less restrictive.¹⁰⁰ This cause of action might be most appropriate after exhausting the subject's alternatives under the appeal provisions of section 83-1043. From the language of section 83-1046, it does not appear to require that the action be filed within a specified period of time, nor does it set any limitations on how many times such an action may be filed.¹⁰¹ Its broad language gives it very real value as an alternative to a direct appeal.

Under the commitment statutes, subjects in custody or receiving treatment are accorded a number of specific rights. One such right is that of petitioning for writs of habeas corpus.¹⁰² This provision is similar to those found in Nebraska's rules of criminal procedure,¹⁰³ however, it differs dramatically in its scope. Though it is not uncommon to find a provision for writs of habeas corpus in the statutory schemes of states having model commitment acts, very little law has developed in this area. Such provisions are fertile ground for the advancement of the rights of those committed to institutions.

Finally, there is one other potential avenue open to the subject to challenge his custody and commitment, that of a writ of habeas corpus under the provisions of Nebraska's rules of criminal procedure.¹⁰⁴ The statutes appear on their face to be applicable to persons in the custody of the state under an order of commitment. Though there does not appear to be any judicial precedent on the subject, it may be suggested that a person committed to a state

tion of the mental health board that either cause no longer exists for the care or treatment or a less restrictive alternative exists for a person committed as a mentally ill dangerous person, the mental health board shall order the immediate discharge of that person or change the treatment disposition. When a change in disposition is in issue, due process protections afforded under this act shall attach to the subject.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* § 83-1066 (Reissue 1976). This section reads in part as follows: "Subjects in custody or receiving treatment under this act shall have the right: . . . (9) To file, either personally or by counsel, petitions or applications for writs of habeas corpus for the purpose of challenging the legality of such subject's custody or treatment."

103. NEB. REV. STAT. §§ 29-2801 to 2824 (Reissue 1975).

104. *Id.*

institution may file under these provisions as an alternative to section 83-1066(9).¹⁰⁵ Such actions have been successful in other jurisdictions, both state and federal.¹⁰⁶ The potential for adequate relief through this cause of action is certainly worth exploring.

This article has not attempted to discuss all the possible and potential forms of post-commitment actions and relief. The responsibility of molding the proper cause of action to the relief sought rests with counsel. However, it is suggested that every possible cause of action be considered so as to provide the broadest forum in which to litigate the issues that will inevitably arise in the future.

X. CONCLUSION

Attorneys, in their professional capacities, are accustomed to operating in a variety of diverse settings. They may function as a negotiator, counsellor, or advocate, depending on the demands of the moment. However, due to the unique nature of a mental commitment hearing these functions often blend into one. At best, this can be an uncomfortable situation. Therefore, counsel must consciously strive to always place the role of the advocate above all others. The foregoing discussion was an attempt to very briefly suggest avenues to follow in pursuing this goal. The road that must be traveled in this pursuit is, at times, uncharted. Obstacles will be placed in the attorney's path by "witch doctors" masquerading as psychologists and psychiatrists. Attorneys will be forced to cross the threshold of prisons posing as mental hospitals. At times clients will appear to be from another galaxy. Yet an attorney must not allow these obstructions to divert him from the path, for the goal is too precious to forego—the protection of the spirit and dignity of those alleged to be "mentally ill dangerous persons."

105. NEB. REV. STAT. § 83-1066 (Reissue 1976).

106. *Covington v. Harris*, 419 F.2d 617 (D.C. Cir. 1969); *Dobson v. Cameron*, 383 F.2d 519 (D.C. Cir. 1967); *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966).