

Mental Illness and the Law: A Guide for Legal Professionals



Virginia Department of Behavioral Health & Developmental Services
(DBHDS)

Module 4:

Evaluation of Sanity at the Time of the Offense

§19.2-169.5

&

Finding of Not Guilty by Reason of Insanity

§ 19.2-182.2



Purpose of the Insanity Defense



- Focuses on defendant's mental condition at the time of offense and asks whether the defendant was so impaired as to be not criminally responsible (e.g., not an appropriate subject for penal sanctions).
- Designed to protect against the conviction and punishment of morally blameless persons.
- Serves as the exception to the rule that people exercise free will and therefore may legitimately be punished when they do wrong.

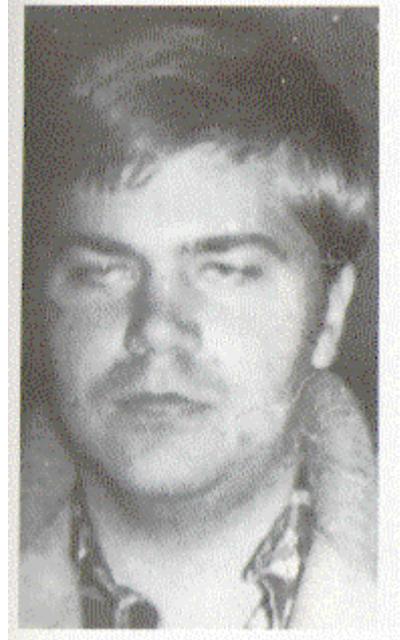
Frequency of Insanity Defense



- Insanity defense raised in about 1% of criminal cases nationally and as low as 0.1% in some states.
- Successful only about 25% of the time (nationally) when the insanity defense is raised.
- Most recent data suggests similar trends in Virginia.

Virginia Insanity Test

- Defendant was insane at the time of the offense, as a result of mental disease or defect (MDOD), if the defendant:
 - Did not understand the nature, character, and consequences of his or her acts or
 - Was unable to distinguish right from wrong, or
 - Was unable to resist the impulse to commit the act.



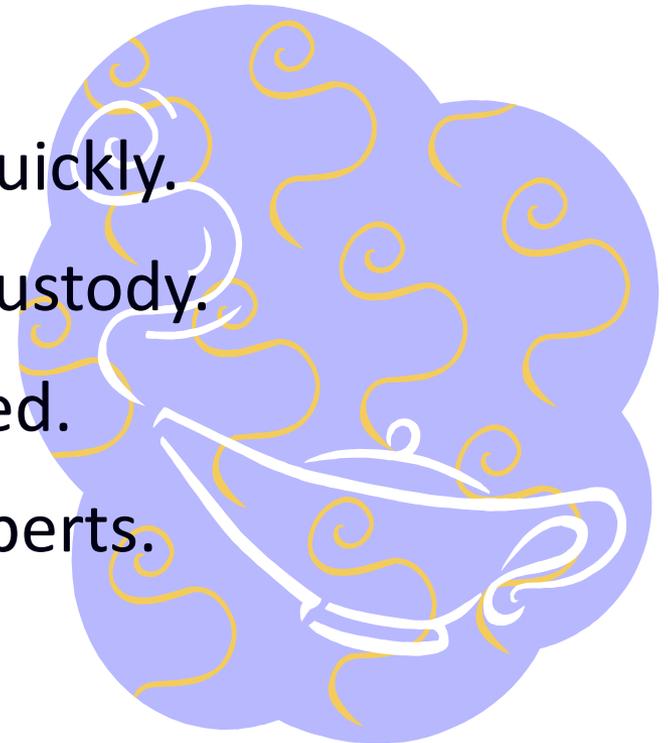
Virginia Insanity Test (cont.)

- Insanity defense not defined in statute.
- MDOD must cause substantial impairment.
- Mental retardation may qualify.
- Intoxication does not qualify, but “settled insanity” may.
- Does not say if “morally” or “legally” wrong.
- Irresistible impulse, not just passion.
- Must be impulse, not planned.
- Burden on Defendant – sane until proven insane.



Myths About the Insanity Defense

- Overused.
- Used only in murder cases.
- There is no risk to defendant.
- NGRI acquittees are released quickly.
- Acquittees spend less time in custody.
- Most insanity defenses are faked.
- Most trials include battle of experts.
- Used to beat the rap.



Who is Qualified to Conduct Sanity Evaluations?

Per (§19.2-169.5) (A)

a psychiatrist, a clinical psychologist, or an individual with a doctorate degree in clinical psychology who has successfully completed forensic evaluation training as approved by the Commissioner of Behavioral Health & Developmental Services and qualified by specialized training and experience to perform forensic evaluations.

Who is Qualified to Conduct Sanity Evaluations? (cont.)

Virginia Code (§54.1-3600) defines a clinical psychologist as
an individual licensed to practice clinical psychology.



Sanity Evaluation - Training

The Commissioner of Behavioral Health & Developmental Services has designated the five-day long

Basic Forensic Evaluation: Principles and Practice

training offered by the Institute of Law, Psychiatry and Public Policy (ILPPP) at the University of Virginia as satisfying the minimum standard requirement required by this section of the Code.

A list of appropriately trained evaluators can be found at:

<http://ilppp.virginia.edu/>

You may also contact your local CSB about trained evaluators.

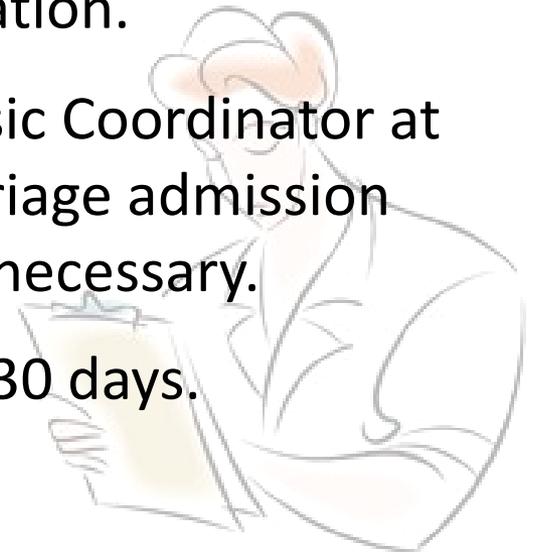
Location Sanity of Evaluation

- Per (§19.2-169.5) (B)

The evaluation SHALL be performed on outpatient basis unless the court specifically finds that outpatient services are unavailable or unless the results of outpatient evaluation indicate that hospitalization of the defendant for evaluation of his sanity at the time of the offense is necessary.

Location of Evaluation (cont.)

- If ordered for an **outpatient** sanity evaluation.
 - ☞ make sure order and collateral are immediately sent to evaluator.
- If ordered for an **inpatient** sanity evaluation.
 - ☞ send order and collateral to Forensic Coordinator at your local state hospital who will triage admission and make appropriate referrals as necessary.
 - ☞ Hospitalization should not exceed 30 days.



Attorney's Role in Sanity Evaluation

- Provide collateral materials

- Per 19.2-169.5 (c)

to include warrant, police investigative reports, defendant's prior mental health treatment records, prior arrest record, victim, witness, and defendant statements to law enforcement.



Attorney's Role in Sanity Evaluation (cont.)

- Evaluator likely will want to speak with
 - family members and/or,
 - others who know defendant well;
 - have contact information available.
- If there were witnesses or victims the evaluator may also want to speak with them so have their contact information available.



What to look for in Sanity at the Time of the Offense report

- Clear explanation of what defendant's mental status likely was like at time of the offense.
 - This description should, to the degree possible, include corroborating details from family, victims, witnesses, and mental health records.
- Clear examples of how the defendant's symptoms (if present) affected their perceptions, thinking, and judgment.



What to look for in Sanity at the Time of the Offense report (cont.)

- A clear description of the defendant's account of the offense
 - including how they were thinking, feeling, and perceiving.
- A clear linkage between the defendant's
 - illness (if present),
 - symptoms (if present), and
 - impairment in one of the NGRI prongs (if present).



What to look for in Sanity at the Time of the Offense report (cont.)

- Alternative hypotheses for why incident may have occurred.
- Explanation of what factors support insanity defense and what factors don't support an insanity defense.



Evaluation on Motion of the Commonwealth after Notice -19.2-168.1

- Provides opportunity for second opinion on issue of sanity.
- Qualifications of evaluator are same.
- Commonwealth Attorney is responsible for providing collateral materials.
- Helpful if first opinion is inconclusive, if the original report is “weak,” or if there continues to be lingering doubt about defendant’s sanity.
- If defendant refuses to participate, then original sanity evaluation may be excluded.

NGRI Acquittal Rate during FY 03-13 and Current Insanity Acquittee Numbers

- NGRI Acquittal Rate for FY 03-13 is _____ acquittals
- Current Acquittees in the state hospital is _____
- Current Acquittees in the community is _____

Facts about NGRIs in Virginia



Disposition of NGRI Acquittees



- Not subject to penal sanctions (e.g., can't be incarcerated because they are acquitted).
- They can be committed to DBHDS for “indeterminate period” (except misdemeanants) after temporary custody.
- Trial Court maintains jurisdiction over case until released unconditionally and NGRI status is removed.

Disposition of NGRI Acquittees (cont.)

- They will continue to require ongoing legal representation throughout process.
- Placed in DBHDS custody – usually at CSH – for Temporary Custody evaluations.
- Average Length of Stay in DBHDS hospital for Insanity Acquittee is 6 ½ years.
- Average Length of Stay on Conditional Release is 3 years.

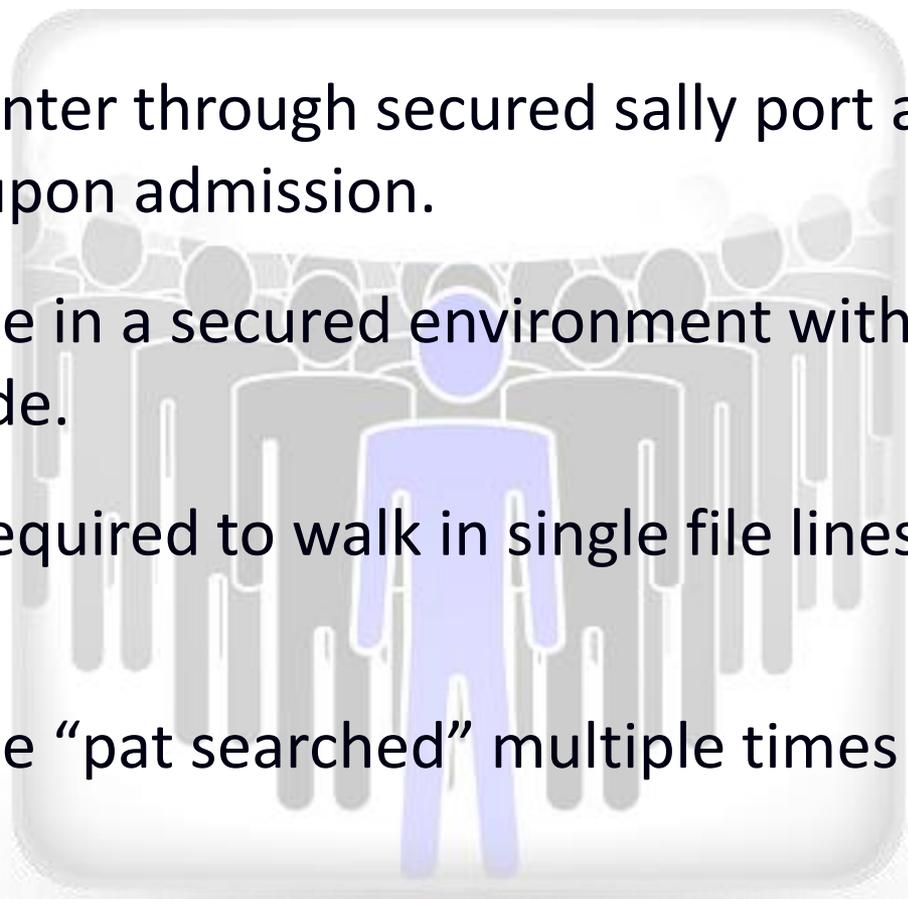


CSH – Maximum Security

- Accredited psychiatric facility with increased security.
- Emphasis on both security and treatment.
- Large volume with frequent admissions/discharges.
- Each acquttee assigned a team composed of Psychiatrist, Psychologist, Social Worker, Nurse, and other needed staff.

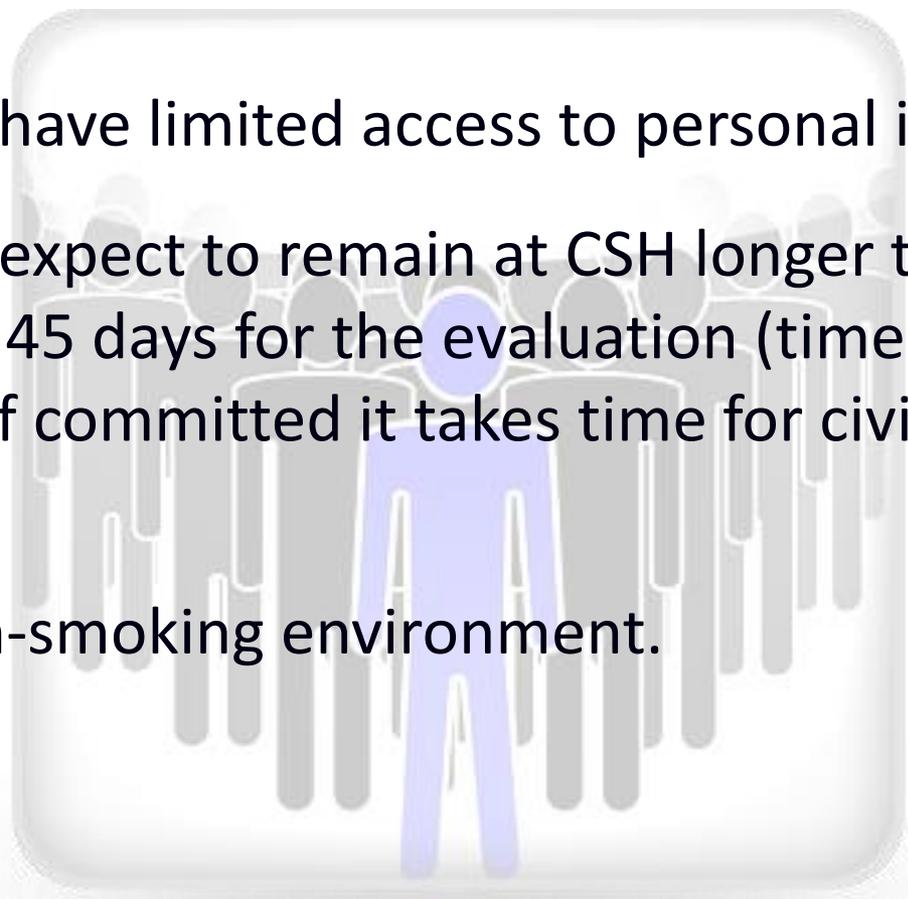
What Patients Can Expect While at CSH

- They will enter through secured sally port and be searched upon admission.
- They will be in a secured environment with little contact with outside.
- They are required to walk in single file lines to and from activities.
- They will be “pat searched” multiple times a day.



What Patients Can Expect While at CSH (cont.)

- They will have limited access to personal items.
- They can expect to remain at CSH longer than the allocated 45 days for the evaluation (time to schedule hearing, if committed it takes time for civil transfer, etc).
- It is a non-smoking environment.



Temporary Custody Evaluations - §19.2-182.2

- Does not matter if felony or misdemeanor acquittal, on bond or not, must come “into custody” of DBHDS to have evaluations completed.
- Code allows 45 days to complete after admission – however there often is a delay between NGRI finding and actual admission.
- 2 Evaluators appointed (1 Psychiatrist and 1 Psychologist).
- Majority of evaluations are done at CSH.



Temporary Custody Evaluations (cont.)

- Evaluators can recommend Commitment (most), Conditional Release (some) or Unconditional Release (very few) to the Court.
- Initial Analysis of Aggressive Behavior (AAB) is completed by CSH psychologist during the temporary custody period .
- Following evaluations, the Court shall schedule a hearing on an expedited basis.



Temporary Custody Evaluations (cont.)

- If one or both evaluators recommend Conditional Release:

DBHDS will request the period of Temporary Custody be extended for a minimum of 45 more days so that a Conditional Release Plan can be developed by the treatment team and CSB.



Results of Temporary Custody Evaluations

- Acquittee returns to court.
- Court decides one of the following:
 - Commitment (initial)
 - Conditional Release
 - Unconditional Release



Approximately 25% of NGRIs are Conditionally Released out of Temporary Custody. The remaining 75% are committed to DBHDS custody.

NGRI Commitment to DBHDS - §19.2-182.3

- While there is much variability in length of stay in DBHDS custody, the average length of stay for NGRI acquttees (not Conditionally Released out of Temporary Custody) is 6 ½ years.
- Persons adjudicated NGRI for misdemeanor offenses can only be committed under §19.2-182.3 for 1 year, post adjudication. They must then either be Conditionally Released, Unconditionally Released, or be recommended for civil commitment.

NGRI Commitment to DBHDS - §19.2-182.3 (cont.)

- While most defendants will initially stay at CSH Maximum Security, they will eventually be transferred to a state hospital or non-maximum security unit closer to their home.
- The NGRI acquittee must work their way through a series of graduated privileges as part of DBHDS' "demonstration model" of risk management.

Graduated Release Process

- Behavioral/Demonstration model of clinical risk management.
 - Thoughtful progression in transitioning from maximum security to reintegration into the community.
 - Gradual increases in freedom based on successful completion of the previous, more restrictive level of privileges.

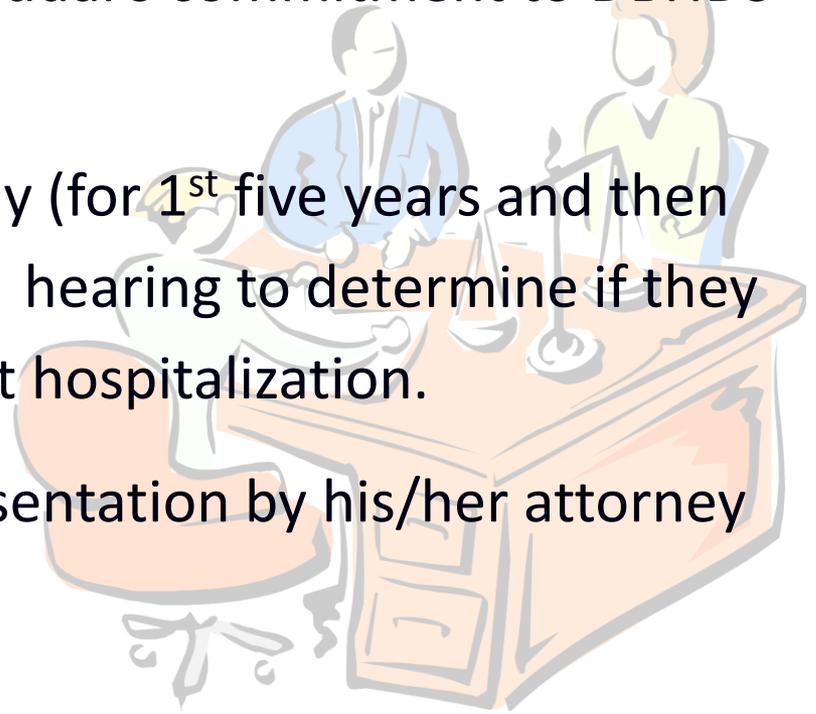
Privilege Levels

- Transfer to civil hospital
- Escorted grounds
- Unescorted grounds
- Escorted community visits
- Unescorted community visits (not overnight)
- Unescorted community visits (up to 48 hours)
- Trial visits for greater than 48 hours (with court approval)
- Conditional release (with court approval)
- Unconditional release (with court approval)



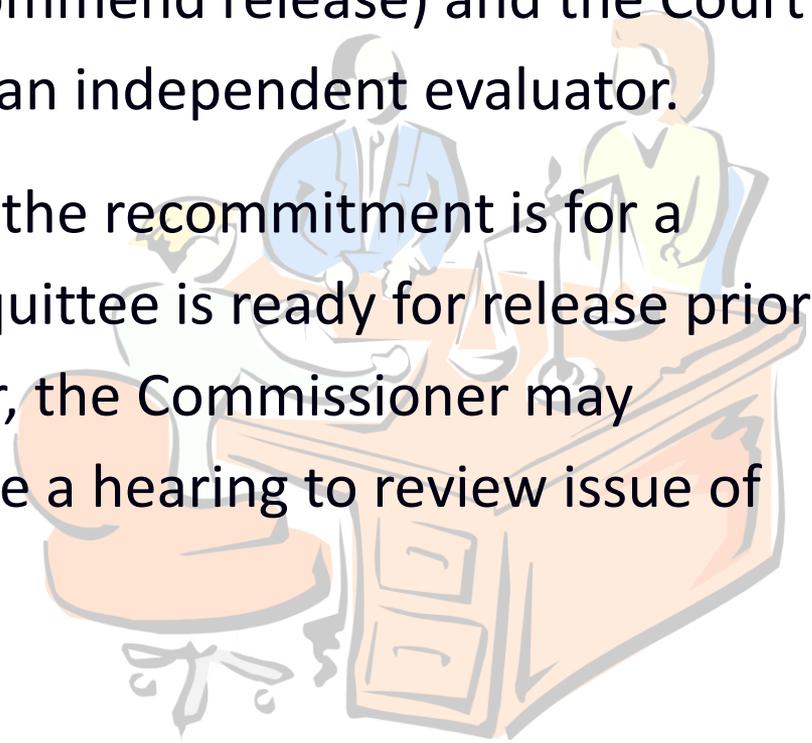
Annual NGRI Commitment Review: §19.2-182.5

- Hospital will submit reports to the Court with copies to the Commonwealth Attorney and Defense Attorney yearly for the duration of the individual's commitment to DBHDS custody.
- Individual is entitled to yearly (for 1st five years and then every other year thereafter) hearing to determine if they continue to require inpatient hospitalization.
- Acquittee guaranteed representation by his/her attorney for that hearing.



Annual NGRI Commitment Review: §19.2-182.5 (cont.)

- Acquittee (through attorney) may petition for release (even if his/her team does not recommend release) and the Court can order DBHDS to appoint an independent evaluator.
- If acquittee is re-committed, the recommitment is for a maximum of 365 days. If acquittee is ready for release prior to the expiration of the order, the Commissioner may petition the Court to schedule a hearing to review issue of Conditional Release.



Conditional Release: §19.2-182.7

- Conditional Release is often equated with “mental health probation.”
- Conditional Release requires a comprehensive discharge plan with prescribed outpatient services specifically geared to address the individual’s risk factors.
- The plan is developed by the Community Services Board with input from the state hospital and the acquittee.
- The plan is designed to provide adequate services to maximize the probability of the individual remaining well and/or to set up sufficient supports to catch the individual before they get so ill they become a danger.

Conditional Release Plan (CRP) Must be Based on Risk Factors Identified in the AAB

- Examples include:
 - Significant alcohol abuse history
 - Medication non-compliance



General Conditions Summary



- ✓ The client agrees to follow all laws.
- ✓ Not to leave the Commonwealth without court permission.
- ✓ Abstain from alcohol and illicit drugs or medication that is not prescribed.
- ✓ Acknowledges they remain under the jurisdiction of the court and the supervision of the CSB and agrees to follow CSB directives and treatment plans and to make themselves available for supervision.

General Conditions Summary, (cont.)

- Follow their conditional release plan and conduct themselves in a manner that maintains their mental health.
- Acknowledges that they can be returned to the state hospital if they violate a condition or if their mental health deteriorates (even if it is not their fault).
- Agrees to pay for MH and SA services according to the sliding scale.
- Not to own firearms or illegal weapons or associate with persons or places that do.
- Agrees to release information as requested.



Special Conditions

- Individualized to fit acquittee's mental health needs.
- Individualized to manage acquittee's risk factors.
- Attention to family dynamics.
- Residential placement.
- Therapeutic/vocational activities.



The Acquittee Moves from the Hospital to the Community

It's Time to Implement the CRP

- Court-ordered CRP for acquittee and CSB.
- Acquittee cannot be released until hospital has received signed order.



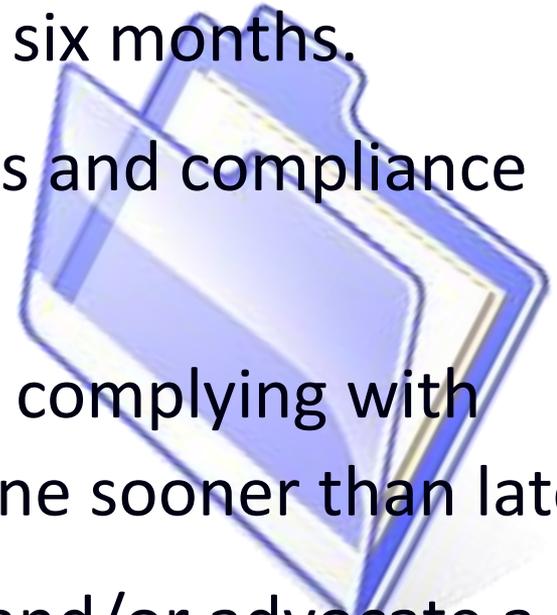
Stages of Compliance and Non-compliance



- Acquittees are on conditional release for an indeterminate length of time.
- Anticipate there will be “ups” and “downs” with compliance.
- The time spent on conditional release is very individualized, depending on acquittee’s compliance with the CRP.
- On average, individuals remain on Conditional Release for 3 years.

Six-month Reports to the Court

- While acquittee is on Conditional Release, CSB will file reports with the Court every six months.
- Report will address mental status and compliance issues.
- If your acquittee is having issues complying with conditions, it is better to intervene sooner than later.
- Encourage ongoing compliance and/or advocate a compromise/modification of conditions with the CSB.



NON-COMPLIANCE IN THE COMMUNITY



**Most Acquittees Do Extremely Well on
Conditional Release...**

**HOWEVER...there are
exceptions to every rule!**

Managing Non-compliance

- CSB will assess the type of non-compliance:
 - Psychiatric Issues
 - Substance Abuse Issues
 - Other (housing problems, missed appointments, etc.)
- CSB will make recommendations for managing non-compliance.



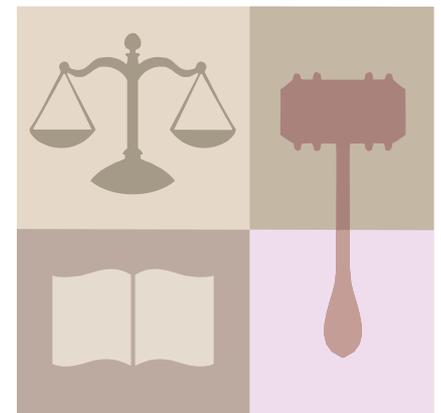
How Serious is the Non-compliance?

- Decompensation or relapse may occur.
- Does the CSB have to revoke the acquittee?
- Can the CSB manage the risk safely?
- Is the acquittee willing to cooperate with outpatient or community-based hospitalization recommendations?



So...what are the legal interventions for non-compliance?

- ✓ § 19.2-182.11 Modification of CRP
- ✓ § 19.2-182.8 Revocation (non-emergency)
- ✓ § 19.2-182.9 Emergency Revocation
- ✓ § 19.2-182.7 Contempt of Court



Modification of the CRP - §19.2-182.11

- Addition or adjustment of treatment interventions.
- Must be court-approved, if not specified in the original CRP.
- CSB will either file a petition or will include recommendations in their 6 month report.



REVOCACTION

- ✓ § 19.2-182.8 Non-Emergency
- ✓ § 19.2-182.9 Emergency



Regular Revocation (Non-emergency)

§19.2-182.8

- Used in non-emergency situations.
- CSB must petition the court.
- Judge will appoint an independent evaluator.
- After evaluation is completed, the Judge will determine if revocation is warranted.



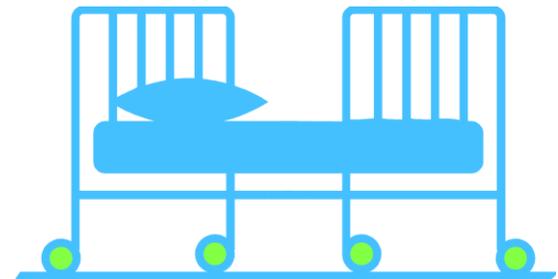
This process is rarely used

Emergency Revocation - §19.2-182.9

- Used in emergency situations.
- Uses the same ECO and TDO process; **however, the criteria are different than the civil commitment criteria.**
- Sometimes this is difficult for the Special Justices to understand this code section.
- Acquittee will have an attorney for revocation commitment hearing but attorney of record still handles NGRI case.
- If acquittee can be stabilized rapidly, they can be re-released as if revocation never occurred.

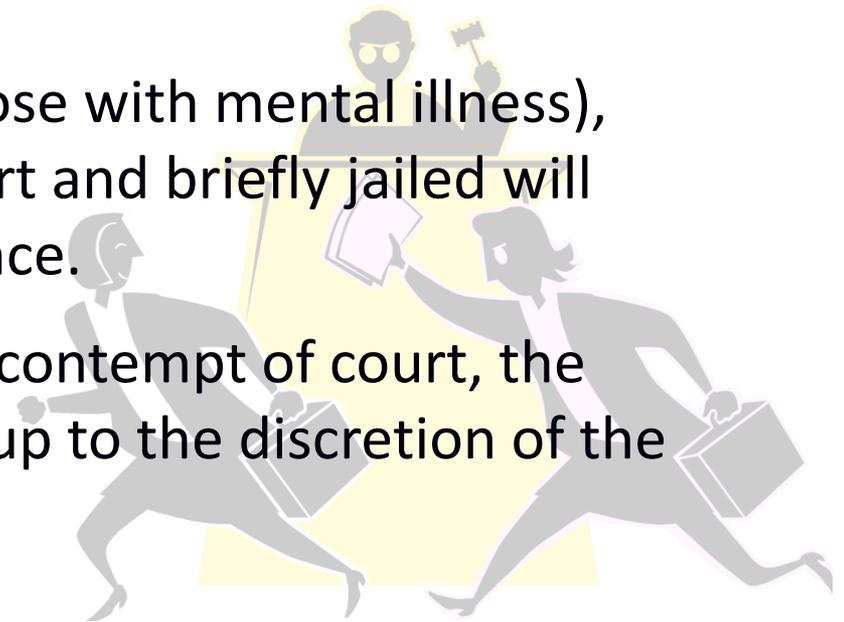
Revocation Criteria For the Acquittee

- ✓ Has violated the conditions of his release or is no longer a proper subject for conditional release based on application of the criteria for conditional release;
AND
- ✓ Is mentally ill or mentally retarded and requires inpatient (DBHDS) hospitalization.



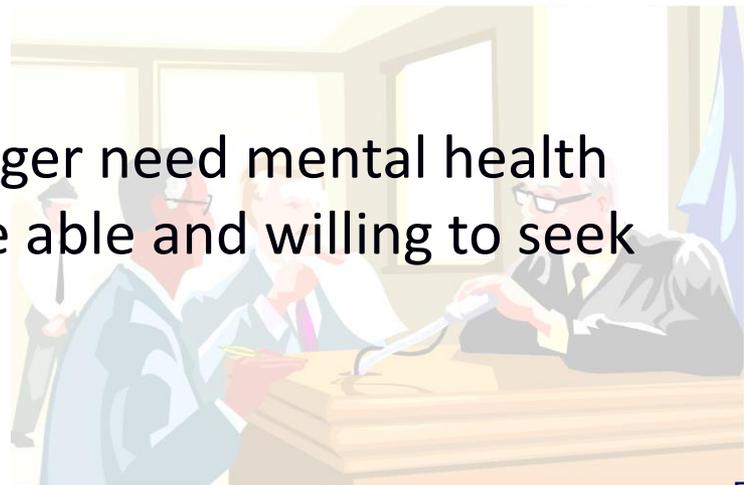
Contempt of Court - §19.2-182.7

- Used when acquttee has violated CRP, but does NOT need inpatient hospitalization.
- CSB will inform the court of the non-compliance and suggest this intervention.
- For some individuals (even those with mental illness), being held in contempt of court and briefly jailed will enhance their future compliance.
- If the Judge finds acquttee in contempt of court, the consequences are varied and up to the discretion of the Judge.



Unconditional Release - §19.2-182.11

- 50% of acquittees who have been Conditionally Released have eventually been Unconditionally Released.
- Ideally, Unconditional Release should be proposed when acquittees condition is stable enough and risk factors can be sufficiently managed without court mandated treatment.
- This does not mean they no longer need mental health care, but simply means they are able and willing to seek care voluntarily.



Unconditional Release - §19.2-182.11 (cont.)

- It is the final step of the graduated release process and should occur after thoughtful, progressive removal of conditions.
- Attorney may need to advocate for client and encourage CSB to consider removal of 1 or 2 conditions each year and then ultimately encourage Unconditional Release.
- As long as individual remains on Conditional Release, he will continue to require your representation.

