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TO: MEMBERS OF SENATE COMMITTEE ON HEALTH AND WELFARE

FROM: ROBERT APPEL, ATTORNEY

RE: S. 287—RELATING TO INVOLUNTARY TREATMENT AND  
MEDICATION

DATE: FEBRUARY 11, 2014

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**The Proposed Bill, if Enacted, Would Dramatically Lower the Bar that Vermont has Consistently Maintained that We, as a Community, Maintain a Mental Health Service System WITHOUT Coercion**

At the strong insistence of the late Senator Sally Fox of this Committee, Sec. 33 (a)(1) was included in the passage of Act 79 (2012) reads as follows:

(1) Recommend whether any statutory changes are needed to preserve the rights afforded to patients in the Vermont State Hospital. In so doing, the commissioner shall consider 18 V.S.A. §§ 7705 and 7707, the Vermont Hospital Patient Bill of Rights as provided in 18 V.S.A. § 1852, the settlement order in Doe, et al. v. Miller, et al., docket number S-142-82-Wnc dated May 1984, and other state and federal regulatory and accreditation requirements related to patient rights.

**LEGISLATIVE INTENT**

By importing the then existing procedural and legal safeguards at the now defunct Vermont State Hospital, the Legislature clearly stated its intent not to weaken existing protections against involuntary intrusion into the constitutionally protected liberty interests of citizens to be free of state forced treatment and medication without extraordinary circumstances and full due process. Such legislative intent is consistent with the longstanding policy set forth by the Legislature 15 years ago with the inclusion of the following language in Act 114 (1998), now 16 years ago, at 18 VSA Sec. 7629 (c):

**(c) It is the policy of the general assembly to work towards a mental health system that does not require coercion or the use of involuntary medication.**

Emphasis added. Clearly, the consistently announced intent of the Vermont Legislature was, and hopefully remains, to reduce the use and easy administration of medication on an involuntary basis.

The Legislature's Joint Mental Health Oversight Committee addressed this controversial topic in its report filed on 1/16/14 cogently by stating:

*H. Effect of the Judicial Process on Patient Care*

The General Assembly believed that strengthening the community system would allow the State to reduce the number of level 1 beds in the mental health system. This year saw the opening of the Green Mountain Psychiatric Care Center, the secure residential recovery facility, and additional intensive residential recovery beds, and yet waitlists for level 1 beds persist. The anticipated reduction in emergency room waits as a result of more robust community resources has not yet come to pass.

While the Committee did not focus on this topic, it heard anecdotally from the administration, judges, attorneys for patients and the State, family members, and former patients as to why they believed waitlists for level 1 beds existed after the opening of new facilities within the system.

The witnesses were divided about the causes for delay, and whether there is a problem with the relevant statutes or their implementation. Some witnesses attributed this phenomenon to delays created by waiting for orders for involuntary medication; others disagreed. Efforts are under way to improve judicial processes, which have been exacerbated by the fact that there are currently five locations for hearings on involuntary treatment and medication, as opposed to one prior to Tropical Storm Irene. The Committee also heard testimony that the ability to provide safe and therapeutic care for all patients was impacted by other patients' violent symptoms, some of which might be addressed by medication.

**Recommendation**

As this issue crosses multiple committees' jurisdiction, the Committee recommends that the committees of jurisdiction focusing on judiciary and human services issues work collaboratively to address this subject. **Although this is an emotional subject, the General Assembly must remain mindful of two things: first, that statutory changes affect everyone in the system, and second, that the current laws balance constitutional rights against the need for certain types of psychiatric treatment.**

**IT IS PREMATURE TO RADICALLY REWRITE PATIENTS' RIGHTS DURING A TIME OF TRANSITION FOR VERMONT'S MENTAL HEALTH SYSTEM**

This proposal, if passed, would stand the philosophy of our mental health system on its head. Given that the diaspora of services created by Irene is yet to be fully resolved, it seems to be opportunistic for proponents of reducing patient rights in the name of treatment to seize this difficult time to advance their controversial agenda. Presently, a number of private hospitals are being compelled to provide treatment to very difficult patients for which, with all due respect, they have neither the primary

purposed or the facilities to accommodate as opposed to a state-run, state-of-the art, built from scratch mental hospital which will be on-line shortly. Private hospitals must be concerned with the milieu between voluntary and involuntary psychiatric patients, not to mention the remainder of their physical care patients. Once the Berlin facility opens, the most difficult involuntary patients will likely gravitate to that setting, much like VSH. The former state hospital with all of its archaic shortcomings managed this difficult population fairly well, and with a minimum of involuntary medication applications.

The opening of Berlin will also ease the judicial challenges inherent in having to hold proceedings in five different locations without any increase in staffing for the judiciary, the Attorney General or Vermont Legal Aid. There has been some discussion of a culture of nay saying by counsel for patients subject to commitment and involuntary medication orders. It is critical that policy makers fully understand the obligation of appointed counsel in those matters. Vermont Professional Conduct Rule 1.14 clearly states that:

Rule 1.14. Client with Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

Therefore, it is counsel's obligation to advance the state interest of the client which may or may not be in the client's best interest. The other players in the adjudicatory system are guided by the best interest standard, but not counsel for the individual who is the subject of the proceeding.

## **STAY PENDING APPEAL**

Not to delay the execution of an involuntary medication order until AFTER appellate review is akin to slamming the barn door after the horse has bolted. All of the policy reasons that others have cited, building a therapeutic relationship with the mental health providers, avoiding retraumatization, not having one's intimate thought processes chemically altered, are all for naught should an appeal reverse an involuntary medication order.