CLAS Mental Health Law Program

Representing Your Client at a Hearing of the Mental Health Review Board

— *A guide for lawyers & legal advocates*

Updated: April 2017

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1. Your client's situation

Your client — an involuntarily detained patient — seeks help to exercise their right to a hearing before the Mental Health Review Board (review panel). This right is set out in section 25 of the *Mental Health Act* (MHA). The review panel will decide if your client can leave the hospital or designated facility.

How your client came to be an involuntary patient

Your client has been involuntarily detained under section 22 of the MHA in a hospital or designated facility, or your client is required to attend an outpatient clinic while on leave in the community. Even if your client is on leave or lives in an approved home, they remain an involuntary patient — under section 39 of the MHA — and face the same forced psychiatric treatment as someone held in a designated facility such as a psychiatric unit. In these circumstances, your client is still entitled to a hearing to review their detention and treatment.

The process for detaining — or "certifying" — your client started with a medical certificate (Form 4) filled out by a doctor who examined your client. That doctor found that your client met the four criteria for involuntary admission. Section 1 of the MHA defines the first of the four criteria:

> **"person with a mental disorder"** means a person who has a disorder of the mind that requires treatment and seriously impairs the person's ability
>
> (i) to react appropriately to the person's environment, or
> (ii) to associate with others.

The three remaining criteria — set out in section 22(3)(c) — describe the patient as someone who:

> (i) requires treatment in or through a designated facility,
> (ii) requires care, supervision and control in or through a designated facility to prevent the person's or patient's substantial mental or physical deterioration or for the protection of the person or patient or the protection of others, and
> (iii) cannot suitably be admitted as a voluntary patient.

Within 48 hours of that first medical certificate, a different doctor completed a second medical certificate (Form 4) that confirmed the first doctor's assessment that your client met the criteria for involuntary admission. As a result of this second certificate, your client was admitted as an involuntary patient for up to a month.

Seriously impairing mental disorder

"Disorder of the mind" encompasses a range of diagnoses affecting the mind. This includes major mental illnesses such as schizophrenia or bipolar affective disorder, as well as traumatic brain injuries or developmental disorders. Although the *Diagnostic and Statistical Manual of Mental Disorders,* 5th ed., (DSM-V) incorporates addictions as "substance use disorders," the Mental Health Review Board (MHRB) has not recognized addiction alone as a disorder of the mind for the purposes of continued detention. However, the MHRB has recognized that substance abuse that triggers psychotic symptoms is a disorder of the mind.

Your client must also be seriously impaired by the disorder. In some cases, however, a client may experience life outside societal norms but can still function. Arguably, this is not a serious impairment. For example, a paranoid client may block their windows, isolate themselves, and behave somewhat bizarrely — but still look after themselves and not interfere with others.

The facility's position is that serious impairment applies even when an acute illness has been stabilized.

Need for safe and effective psychiatric treatment

Section 1 of the MHA describes treatment as "safe and effective psychiatric treatment." In all cases, the facility's position is that the client who is doing well is following their treatment, and that deterioration results from not complying with the treatment.

But the effectiveness of treatment may not be clear. Your client may be doing well for other reasons such as secure and safe housing, supportive friends and professionals, or abstinence from substances. CLAS takes the position that effective treatment has to be established on an individual basis and that federal approval of medication is not enough evidence of effectiveness. In addition, the side effects of medication may adversely affect a patient's safety to such an extent that the safety concerns outweigh the benefits. Here are some examples:

- People with dementia, which cannot be reversed by treatment, on neuroleptics
- People with or pre-disposed to diabetes or cardiovascular disease on olanzapine
- People on neuroleptics who have developed tardive dyskinesia, which is irreversible

Avoiding substantial deterioration and protecting the self or others

The facility will take the position that it must care for, supervise, or control your client to prevent physical or mental deterioration and to avoid harm. However, your client may be able to care for themselves, or have family or friends who provide care and supervision. Evidence of self-care, adequate financial management, and addressing physical conditions — even when mentally unwell — may establish that your client does not need care, supervision, or control.

This criterion breaks down into four circumstances in which the facility's care, supervision, or control is deemed necessary. Only one of these circumstances is enough:

- **Substantial mental deterioration**: The facility often argues that non-compliance with treatment will result in mental deterioration. However, clients must be assessed individually. The expected deterioration might not be "substantial." It might happen over months or years, based on your client's history. While not binding on the MHRB, the Ontario Care and Capacity Board has interpreted "substantial" to mean "ample, considerable, significant, sizeable," which has been accepted by the Ontario Supreme Court.
- **Substantial physical deterioration:** The facility may argue that your client isn't capable of self-care (such as not eating or sleeping), or ignore a serious physical medical condition. Consider whether your client's medical condition has been stable over time.
- **Protection of self:** The facility raises this argument when your client has attempted suicide or self-harm. Consider whether your client has recently tried to harm themselves. Historical attempts do not necessarily reflect your client's current situation.
- **Protection of others:** The facility raises this argument when it's alleged that your client has harmed or threatened someone. However, medical records often rely on hearsay — and misunderstandings do arise. Consider your client's version of events, and find out if direct witnesses are available to give evidence on the circumstances of the allegation. Also look for any related information. For example, police and admission records noting that your client cooperated may cast doubt on allegations that your client was violent or threatening. In addition, your client's behaviour in the community may differ from their behaviour in the hospital. Your client may become unsettled not because of their mental illness but because they are being involuntarily detained.

The voluntary patient

A powerful argument against certification is that your client accepts mental health treatment. Your client should be prepared to testify that they understand their diagnosis, symptoms, and need for treatment. Your client should also understand their early warning signs and the plan for preventing relapses. A support network of friends and family may also help.

The voluntary patient need not have a perfect understanding of their illness. Clients may use the wrong terms, or have only a vague sense of how they become ill. They may not fully recognize the benefits of medication. A client who testifies credibly that they benefit from medication — and are willing to follow their treatment or accept a psychiatrist's help — may be suitable as a voluntary patient. But also suitable as a voluntary patient may be someone who — while denying that they have a mental illness — wants to keep taking the anti-psychotic because it helps them sleep at night.

How your client applied for a review panel hearing

Either your client — or someone on their behalf — applied for a review panel hearing. (A youth under 16, admitted under section 20 of the MHA, may also apply.) Your client filled out a Form 7 — Application for Review Panel Hearing — found in the Mental Health Regulation.

How your client's illness may affect their capacity to instruct you

You must assess your client's capability to instruct you throughout the stages leading up to the hearing. Case law and legislation do not clearly describe the standard for determining capability, but the level of your client's capability to instruct for a review panel hearing need not be high. The definition of "unfit to stand trial" in section 2 of the *Criminal Code* may help to guide you:

> "Unfit to stand trial" means unable on account of mental disorder to conduct the defence at any stage of the proceedings before a verdict is rendered or instruct counsel to do so, and, in particular, unable on account of mental disorder to
>
> (a) understand the nature or object of the proceedings,
> (b) understand the possible consequences of the proceedings, or
> (c) communicate with counsel.

If your client says that they applied for the hearing to get out of the hospital — and that they want your help to do so — your client understands the nature of the proceedings

and the possible outcomes. But if you aren't sure of your client's ability to instruct you, discuss their situation — and the hearing — with them to see if they understand the following:

- Your client will have to answer your questions to prepare for the hearing.
- Your client will have to answer questions at the hearing itself.
- You will need your client's permission to review their medical records.
- You will ask your client's doctor — and other witnesses — questions at the hearing.

In general, if your client answers your questions directly, they are capable of instructing you. But your client may need plenty of time to respond to your questions. Your client may suffer from a cognitive deficit, may be distracted by hallucinations, or may be sedated by medication. Your client's ability to communicate may improve as your meeting progresses. Some clients sit in silence for a long time before answering. Your client's struggle to communicate isn't the same as incapacity to instruct.

What if your client is incapable?

If you decide that your client is incapable of providing instructions, you will have to withdraw from representing them. Send your client a letter explaining your withdrawal. Then notify either the Mental Health Law Program — if you are ad hoc counsel for their clients — or the Mental Health Review Board — if you are acting privately for your client — that you will no longer be representing the patient.

2. First interview with your client

As soon as possible, call your client to set up a meeting at their hospital ward, designated facility such as outpatient clinic, or your office. Make sure your client doesn't have medical tests or other appointments at the same time. Ask for a private interview room. Keep safety in mind: allow your client enough space, and sit closest to the door. Your client may not be able to tolerate long interviews, so you may want them to sign early in the interview an Authorization for Release of Health Records (consent form).

What your client needs to know from you

At this first meeting, tell your client about the following:

- Your relationship as a lawyer or legal advocate to your client. Discuss solicitor confidentiality and the limitations on it.
- How you can accommodate your client's needs (and also manage their expectations).

- That the review panel decides only if your client should continue to be detained, and that it does not make decisions about your client's —
    - medications
    - extended leaves
    - duration of stay
    - therapists
    - finances
    - place to live
- The steps you'll follow with your client leading up to the review panel hearing, that is, the two subsequent interviews and what they'll accomplish.

At this point in the interview, you may want your client to sign the consent for the release of their medical and legal records. Explain that you'll need to review their records to prepare for their hearing.

You may also want to give your client copies of the following guides to review after the interview:

- Client Information Sheet
- So You Are Going to a Review Panel

What you need to know about your client

Also at this first meeting, learn as much as you can about your client. (You may want to use this Interview Questionnaire as a guide.) Invite your client to tell you about themselves. Here are some sample questions:

About being in a designated facility

- What happened just before you were admitted to the facility?
- Did you go voluntarily?
- What were your experiences at the facility?
- Are you on a locked ward? Do you have grounds privileges?
- Are you taking any medication? Does it help? Does it have side effects?
- Were you seeing a community care team, treatment team, or ACT team before you went to the hospital?
- What does your care team do for you?

About possibly being discharged

- If you were discharged, how would you support yourself?
- How much money do you get a month on welfare, disability, or your job?
- Would you be able to manage on that money?
- Where would you live if you were discharged?
- How much would the rent be?

- What expenses do you have other than food and rent?
- Do you have a financial aid worker?
- Do you have a family member or friend you could contact for help?

At the end of the meeting, ask your client to sign the consent form — if you haven't already done so — so that you can look at their medical and legal records.

3. Reviewing your client's medical records

Bring your client's consent form to the ward staff of the hospital or to the outpatient clinic, and ask to review and make copies of your client's records. You may also present a letter from the chair of the MHRB that states you have the authority to review and copy your client's medical records. Different facilities have different procedures for getting medical records. (The four different procedures are listed in the CLAS handout Access to Medical Records for MHA Review Panel Hearings.) Some will allow you to make copies at the nursing station. Others require a list of requested documents and an appointment with the medical records department. Use the CLAS form Request for Copies and the CLAS sample Records Request Letter. Most facilities will not allow your client to be with you to see the file.

Under the *Freedom of Information and Protection of Privacy Act* (FIPPA), the facility must say what they have not disclosed and why. However, the position of the chair of the MHRB has been that access to the medical records for review panel hearings falls under the MHA, not FIPPA. If documents are missing from the medical records — or the facility insists that FIPPA applies — approach the MHRB chair for help to get complete copies of the medical records.

Contents of your client's medical record

Your client's medical records may include the following:

- physician's order chart
- physician's progress notes
- physician's note to review panel
- nurses' notes and nursing care plan
- graphic chart
- consultations and discharge summaries
- admission histories and clinical notes
- social work notes
- social work note to review panel

- therapies
- lab results and X-rays
- legal documents:
    - medical certificates (Form 4's)
    - renewals (Form 6's)
    - consent to treatment
    - certificate of incapability under other legislation (e.g., *Patients Property Act*)
    - previous review panel decisions

Physician's order chart

This chart contains the doctor's orders on medications, dosages, seclusion, special attention, PRNs (medication given as needed to settle patients), and privileges such as day passes.

Physician's progress notes

These handwritten notes of interviews contain observations on your client. Sometimes they are based on comments from other members of the treatment team or on medical records from other facilities. The attending physician's diagnosis will usually be classified according to the DSM-V. The categories are as follows:

- clinical disorders and other conditions that may be a focus of clinical attention
- personality disorders and mental disability
- general medical conditions
- psychosocial and environmental problems
- global assessment of functioning

In this section of the file, you might also find the report that the doctor will provide to the review panel. Compare these notes to the information in other sections or other doctors' reports to find inconsistencies or to understand the conclusions.

Nurses' notes

This section includes admission information and daily comments on medication, and the patient's behaviour and statements. Usually included is a Nursing Care Plan — reviewed and updated weekly or monthly — that outlines problems and strategies for nursing staff. Useful information that you can often find in this section includes:

- patterns of good behaviour
- positive comments
- reported incidents that you may need to clarify with your client

- use of PRN medications as needed
- use of seclusion
- compliance with medications
- deletions and additions to nursing care plans

Consultations & discharge summaries

This section contains reports from other professionals to whom the patient has been referred, such as other psychiatrists, psychologists, neurologists, and dentists. If your client has been discharged from another hospital, there may be a discharge summary of their time in that hospital and their mental condition when discharged.

Admission histories & clinical notes

This section generally contains typed reports by the treating psychiatrist and information from other facilities. It includes admission history, ongoing diagnosis, and any discharge plans. The attending physician's diagnosis will usually follow the DSM-V classification discussed above. If the treating psychiatrist provides a written report to the review panel, you may find it in this section.

Social work notes

This section contains a social history, interviews with the patient, and the social worker's report to the review panel. The social worker deals mainly with family history, living arrangements, financial issues, community activities, and therapeutic follow-ups at mental-health centres. The social worker may be in contact with your client's family members, landlord, or neighbours.

More so than other reports, these rely heavily on discussions with third parties, such as family members, landlords, friends, and community caregivers. Your client may feel considerable anxiety, embarrassment, frustration, or anger because of these reports.

Tell your client about what's in these reports. If inconsistencies arise or if incidents are described in an inflammatory way, ask for your client's permission to talk with the relevant third party and arrange, if possible, for evidence to refute the evidence in the social worker's report — in case it's introduced at the hearing.

Therapies

This section contains reports from occupational therapists and rehabilitation therapists, and education and training reports (e.g., on substance abuse, money management, anger management, living skills). These reports may help to establish your client's living skills and other positive attributes.

Lab results & x-rays

This section includes the results of drug-testing for levels of prescribed medication, as well as for alcohol and cannabis. You may be able to cross-reference medication levels with behaviour problems on the ward. A patient's mental condition may deteriorate or improve as a result of changes in medication.

Legal

This section contains the client's initial involuntary detention medical certificates (Form 4's) and any medical certificate renewals (Form 6's). It may also contain a consent-to-treatment form, a certificate of incapability under the *Patients Property Act*, warrants, second medical opinion reports, notification of rights to involuntary patients, and past review panel decisions.

What to look for in your client's medical record

As you review the sections of your client's medical record, look for the following:

- issues and evidence to discuss with your client — to prepare to deal with those issues that may arise at the review panel hearing
- inconsistent allegations or unsubstantiated conclusions that you should challenge at the hearing
- evidence in favour of your client that you may want to present at the hearing or read into the record

Comparing different sections of your client's file can reveal inconsistencies to challenge at the hearing. Information in one section can also help to explain information in another. For example, aggressive behaviour described in the nursing notes may relate to a change in medication described in the doctor's order chart.

What if your client's medical record is stamped confidential?

A client's medical record may be stamped "confidential — not to be disclosed to the patient" — or may include instructions from the doctor not to disclose a specific letter or report to your client. If so, refer to the process — outlined in section 25(2.6) of the MHA — for disclosing relevant information to your client that will come up at review panel hearings. This section allows the panel chair to exclude your client from attending part of the hearing, if it's in your client's best interest. However, a pre-hearing motion usually deals with this issue.

If you aren't successful in getting approval to disclose the confidential information to your client, you must not read the information without your client's consent. However,

your client must understand that giving their consent doesn't mean that you'll be able to reveal the confidential information to them.

4. Second interview: Preparing your client for the hearing

Now that you've reviewed your client's medical record and know the issues that will form the facility's case, set up a second meeting. Ask your client about the evidence collected by the facility that seems to support certification. Discuss the following topics with your client.

- Your client's medical records
- Your client's discharge plan
- Potential witnesses, friends or family, who will support your client's discharge
- The questions you plan to ask your client, witnesses, and the facility presenter
- How your client should respond to your questions — as well as any potential questions from the presenter and members of the review panel
- Decisions that the review panel members may make and their effect on your client

In addition to preparing the case with your client based on the topics listed above, you will need to tell your client about the review panel hearing itself — who participates and what happens at the hearing.

Who will participate at the hearing?

Tell your client about the people who will participate in their review panel hearing:

- the three members of the panel, each appointed by the Ministry of Health:
    - a chairperson who is a member in good standing with the Law Society of British Columbia, or someone with equivalent training
    - a medical practitioner
    - someone who isn't a medical practitioner or a lawyer

- the facility presenter (usually your client's physician, psychiatrist, or case manager)
- your client
- you as your client's lawyer or legal advocate
- witnesses for your client or the facility

What happens at the hearing?

Tell your client that if they want to postpone their hearing, they must do so at least 48 hours before the hearing. Otherwise, the MHRB chair may not allow the postponement.

If the chair doesn't allow it, your client can either proceed with the hearing or cancel. Either way, your client may not reapply until their next renewal-of-certification period.

If you haven't already done so, review the MHRB's Rules of Practice and Procedures. Tell your client about the stages of a review panel hearing.

- The chairperson introduces everyone and briefly explains the process.
- Your client's medical certificates are read out
- The facility presenter or you may raise a motion.
- The facility presenter and you make opening statements.
- The facility presenter presents evidence by providing written reports, reading parts of the medical chart, and giving their own oral evidence or that of other witnesses (who may give evidence in person or by telephone).
- You cross-examine the facility presenter and the facility witnesses.
- The review panel asks the facility presenter questions.
- You present evidence by providing written documents, reading the medical chart, and directing oral evidence from the client or other witnesses (who may give evidence in person or by telephone).
- The facility presenter may cross-examine your client and their witnesses.
- The review panel questions your client and the client's witnesses.
- The facility presenter and you make closing arguments.

5. How to prepare for the review panel hearing

Contact witnesses

Now that you have discussed potential witnesses with your client, contact them to determine which ones will be helpful. Arrange for them to appear at the hearing, to give evidence by phone, or to provide evidence in writing. Discuss the content of the letters with witnesses who will provide them. Discuss the following with witnesses who give evidence either by letter or in person:

- Procedure at the hearing
- Questions you will ask them
- Questions others may ask them

Prepare your client's case

After meeting with your client a second time, prepare the following:

- Brief opening statement
- List of questions for the presenter
- List of questions for your client
- List of questions for your witnesses
- Closing argument

As you draft your statements and questions, keep in mind the detaining facility's position on the following issues:

- issues of serious impairment
- safe and effective psychiatric treatment
- need for care, supervision, and control to:
    - prevent substantial mental and physical deterioration
    - protect your client
    - protect others
- unsuitable as a voluntary patient

Brief opening statement

Sometimes panel chairs forget to give lawyers and advocates time to make an opening statement. Before the hospital presenter starts reading out the Form 4's and Form 6's, ask to make an opening statement.

In your opening, outline what the evidence will show and which criteria under sections 1 and 22 of the MHA do not apply to your client. Since your client must meet all the criteria to be certified, draw the review panel's attention to those criteria that may not apply to your client. If you have witnesses or exhibits, outline the information you intend to present later in the hearing.

List of questions for the presenter

Your questions should challenge the evidence that the expert is relying on.

List of questions for your client

Your client's evidence at the hearing usually carries the most weight in the decision of the review panel. With good questions and thorough preparation, you and your client may convince the review panel that your client is ready to be discharged.

Since your client must listen to the case against them — for sometimes up to an hour — before being able to respond, start with easy questions to put your client at ease. For example, ask your client about their hobbies, where they lived before being admitted, and where they would live if they were discharged. Keep your questions short and simple.

Knowing the details of your client's story — even if you don't present them all at the hearing — will make it easier for you to redirect your client, if necessary, with new follow-up questions.

While the facility presenter's evidence will be heard first, it may be helpful to provide your client with a pen and some paper to make notes of evidence that they'd like to respond to later.

List of questions for your witnesses

Your questions should prompt witnesses to confirm your client's evidence and your client's credibility. Invite witnesses to talk about their relationship with the client, the length of that relationship, their knowledge of the client's situation, and the support they can offer if your client is discharged. Your questions should also introduce evidence that your client has additional support in the wider community.

Closing argument

The closing argument gives you the chance to be creative and persuasive in advocating for your client's discharge. Summarize the evidence that suggests your client does not meet one or more of the criteria under sections 1 and 22 of the MHA. Highlight your client's evidence that could prove that a criterion for certification does not apply to them. Use your closing argument to critique the hospital's presentation and to highlight inconsistencies. Remember that you can't introduce new evidence in your closing argument.

Even though you drafted your closing argument before the hearing, you must be prepared to change it to deal with unexpected evidence and impressions that come up during the hearing.

6. Third and final interview: The day of the hearing

Review panel hearings are held in meeting rooms in the hospital where your client lives or in their outpatient clinic. The panel members, facility presenter, you, and your client will sit around a table that may be small.

Meet with your client before the hearing with enough time to respond to any new concerns your client may have and to go over any last-minute reports the facility presenter may use at the hearing. Here are some suggested strategies for this final interview.

- Rehearse the questions with your client
- Review the presenter's notes to the review panel, and discuss them with your client
- Remind your client how to conduct themselves (taking notes, etc.)
- Prepare for potential changes to your client's evidence

7. At the review panel hearing

Privacy and observers at the hearing

The hearing must be held in private — unless otherwise authorized by the panel's chair according to section 25(2.5) of the *Mental Health Act* or Rule 16.1 of the MHRB's Rules of Practice and Procedures. The review panel limits the observers who can attend to only two who are there for training purposes. The review panel has to be notified of any potential observers.

Motions

At the start of a review panel hearing, the parties may raise motions on the following:

- A review panel member ought to be recused due to an apprehension of bias (this results in an adjournment and re-scheduling).
- Your client should be excluded from part of the hearing, due to their best interest.
- A witness should not be allowed to give evidence — e.g., because the evidence is already in the medical record, or is not relevant, or its relevance is outweighed by its prejudice to your client.
- A piece of evidence should be excluded for the reasons given above, or because the statement is hearsay and its author isn't available as a witness. (If these objections are overruled and the facility presents the evidence, you may suggest that the review panel give less weight to the document because the information may not be as reliable as first-hand information from someone who can be questioned.)
- The lawyer should be allowed to call a witness before the facility presents its case. Although the facility usually presents its evidence first, the chair may allow a witness for your client to go first if that witness is under time constraints.

You may not know about the need for a motion until the hearing is underway — e.g., a motion to exclude your client for part of the hearing if they become anxious, or a motion to exclude evidence that you didn't know the facility would present.

Facility presenter's case

Your client's physician or psychiatrist usually presents the facility's case, although a case manager may also be the facility's presenter. If the hearing is at a community mental health clinic, two members of the treatment team — your client's psychiatrist and case manager — may both present the facility's case. You can ask for these witnesses to present evidence separately so that you can cross-examine the first witness before moving on to the second one.

Presenter's evidence

Facility presenters provide evidence to support the opinion of the treatment team. They do this by reading from the medical record, and by presenting witnesses such as the treating physician or psychiatrist, social worker, case manager, or nurse. Medical reports back up their opinions.

Facility presenters must provide you and your client with copies of any written material entered into evidence to panel members that isn't already in the medical record. Facility presenters can also read in these documents instead of providing panel members with copies. As the evidence is read in, you may want to follow along with a copy to ensure that it's accurately presented. You can also ask that the document's author attend the hearing, in person or by phone, to be cross-examined.

As the facility presenter, your client's psychiatrist may tend to go beyond presenting the facility's case. At the start of the hearing, you may want to clarify that the presenter's role is limited to presenting evidence, and doesn't include giving personal opinions. Then during the hearing — if the presenter tries to present evidence that goes beyond the medical records — you may want to object since you and your client have had no notice of this evidence. If the review panel allows the evidence, you could ask for an adjournment to discuss the evidence with your client and to decide whether to challenge it or to find witnesses to testify to the contrary. (Failing to grant an adjournment may be grounds for judicial review.)

Identify evidence favourable to your client in the facility presenter's evidence and prepare to address any unfavourable evidence during the hearing.

Presenter's witnesses

The facility presenter has a right to call witnesses. The presenter may also submit third-party evidence in writing (e.g., a letter from a family member). If the facility presenter does call witnesses, you have the right to cross-examine them. If you know in advance that the presenter will call witnesses, prepare a list of questions.

Your questions will emphasize evidence favourable to your client and attempt to minimize the significance of unfavourable evidence. For example, if your client's parents testify against your client, you may want to point out that they haven't seen your client for some time and don't really know how your client is doing.

Presenting your client's case

Your client's demeanor is important throughout the hearing — not just while giving evidence. Sitting through an hour of reports without the chance to respond is stressful for your client. If your client expresses anger or frustration and creates a negative impression, you may need to ask for a short recess. A chat, a short walk, a drink of water, or a cigarette may help your client regain composure.

Your client's case will include —

- your client's oral evidence
- the oral or written evidence of witnesses who support your client's position
- favourable excerpts from the medical record that you read into evidence

Since you've already discussed your questions with your client and the witnesses, there should be few surprises. However, if the facility presenter raises something you haven't already discussed with your client, ask for a brief recess to talk to your client.

The facility presenter will have the chance to cross-examine your client and their witnesses. The presenter may also question the admissibility or weight of written evidence.

Review panel members may also ask your client questions. You may then re-examine your client to clarify evidence and to correct wrong impressions that your client may have created while answering questions from the facility presenter or panel members. Re-examination is usually confined to new issues raised on cross-examination.

Witnesses called to the hearing unexpectedly

Someone who satisfies the panel that they have a material interest in the hearing may give evidence or make submissions. However, if family members show up unexpectedly

at the hearing, you, the facility presenter, or the review panel may decide to call them as witnesses. If the panel calls the person, you and the facility presenter can challenge their admissibility.

If the facility presenter calls a witness you had no notice of, you have a right to speak to that witness before the hearing or to ask for a recess or, if necessary, an adjournment.

Rule 15 of the Rules of Practice and Procedures states that witnesses must wait outside the hearing room, and can enter only to give evidence and to be cross-examined.

8. After the review panel hearing

Review panel decision

After all the submissions, the panel members deliberate in private. They must determine if your client will be discharged or continue to be detained. They do not have jurisdiction to make other recommendations to the patient or the director (e.g., on transfers or leaves). The decision will be recorded on Form 8 of the MHA Regulation, and must be based on the statutory criteria. If the panel considers other criteria in its decision, you may want to consider a judicial review.

The review panel must make its decision within 48 hours. However, it usually delivers its decision orally before the parties leave for the day. The chair must deliver a copy of the decision to the director and your client or you. The review panel must give written reasons for its decision within 14 days. If ad-hoc lawyers are representing MHLP clients, the Mental Health Review Board sends copies of the reasons to the MHLP, who forward the reasons to its clients and their ad-hoc lawyers.

Effects of the panel's decision

If the review panel orders that your client continue to be detained, your client remains certified until the treating psychiatrist discharges them. If the panel orders that your client's involuntary detention should end, the director must discharge your client. If your client is in the hospital and it is late in the day, your client may be asked to go back to the ward voluntarily until the next day when follow-up medication, treatment, finances, and appointments can be arranged.

Even if your client is discharged, two physicians may immediately re-assess and re-certify your client — although this is not common. And even if discharged your client may decide to stay in the facility. If so, your client may be asked to sign a consent to treatment and to remain as a voluntary patient under section 20 of the MHA.

Judicial review of the panel's decision

As an administrative tribunal, the review panel is bound by the principles of natural justice and procedural fairness. You may raise an objection if there's a violation. The panel may remedy the problem. If not, your objection becomes part of the record and may form the basis for an application for judicial review.

If the panel's decision is to detain your client, consider if there are grounds for judicial review. If a review succeeds and the panel's decision is quashed, the court may refer the matter for a re-hearing. If you recommend a judicial review to your client, consider the applicable standards of review as described in section 59 of the *Administrative Tribunals Act* and as referred to in section 24.2 of the MHA.

When this guide was written, the time limit for filing a notice of judicial review was 60 days from the day the decision was issued. After they've received the reasons for the decision, lawyers and clients may contact the Community Law Program of CLAS if they believe that an error was made or that a procedure was unfair. The Community Law Program's BC Judicial Review Self-Help Guide provides information on the steps to follow.

Tape-recording of the hearing

The *Mental Health Act* and the Regulation do not require review panel hearings to be tape-recorded. However, in 1989 the Ministry of Health adopted a tape-recording policy. The recording includes the full proceedings and the panel's oral decision, and will be kept at the MHRB office for at least a year.

You or your client may ask the chair for a copy of the recording in writing, stating the reason for the request — for example, to prepare for a judicial review. In some circumstances, the chair may waive the $20 fee for forwarding the recording to you or your client.

Certification timelines and the next hearing

If your client remains involuntarily detained or certified, they have the right to apply for a hearing during each period of involuntary detention or certification, as follows:

- Initial certification period for one month (2 Form 4's): hearing within 14 days from when the MHRB office receives an application (Form 7)
- Renewal for another month (Form 6): hearing within 14 days from when the MHRB office receives an application

- Renewal for three months (Form 6): hearing within 28 days from when the MHRB office receives an application
- Renewal for six months (Form 6): hearing within 28 days from when the MHRB office receives an application — as long as 90 days have passed since the last hearing or a new six-month certification has been completed, whichever is longer

The MHRB's chair may shorten the time period during a six-month renewal period, if the chair considers it to be in the patient's best interest, or if new information becomes available.

9. Resources

Access to Medical Records for MHA Review Panel Hearings, CLAS Handout

Authorization for Release of Health Records (consent form)

Client Information Sheet, CLAS Handout

Guide to the Mental Health Act, 2005 Edition, BC Ministry of Health

Interview Questionnaire, CLAS Handout

Letter from Margaret Ostrowski, QC, Board Chair, Mental Health Review Board, re: access to records

Mental Health Act

Mental Health Regulation

Records Request Letter, CLAS Handout

Request for Copies, CLAS Handout

Rules of Practice and Procedures, Mental Health Review Board

So You Are Going to a Review Panel, CLAS guide for self-represented clients