REPORT TO THE COMMISSION ON MENTAL HEALTH LAW REFORM

From the Task Force on Training and Implementation

December 19, 2008

PREFACE

The Commonwealth of Virginia Commission on Mental Health Law Reform ("Commission") was appointed by the Chief Justice of the Supreme Court of Virginia, the Honorable Leroy Rountree Hassell, Sr., in October 2006. Commission members include officials from all three branches of state government as well as representatives of many private stakeholder groups. The Commission was directed by the Chief Justice to conduct a comprehensive examination of Virginia's mental health laws and services and to study ways to use the law more effectively to serve the needs and protect the rights of people with mental illness, while respecting the interests of their families and communities. Goals of reform include reducing the need for commitment by improving access to mental health services, avoiding the criminalization of people with mental illness, making the process of involuntary treatment more fair and effective, enabling consumers of mental health services to have greater choice regarding the services they receive, and helping young people with mental health problems and their families before these problems spiral out of control.

During the first phase of its work, the Commission was assisted by five Task Forces charged, respectively, with addressing gaps in access to services, involuntary civil commitment, empowerment and self-determination, special needs of children and adolescents, and intersections between the mental health and criminal justice systems. In addition, the Commission established a Working Group on Health Privacy and the Commitment Process ("Working Group"). Information regarding the Commission, its Task Forces and its Reports is available at http://www.courts.state.va.us/cmh/home.html.

The Commission also conducted three major empirical studies during 2007. The first was an interview study of 210 stakeholders and participants in the commitment process in Virginia. The report of that study, entitled *Civil Commitment Practices in Virginia: Perceptions, Attitudes and Recommendations*, was issued in April 2007. The study is available at http://www.courts.state.va.us/cmh/civil_commitment_practices_focus_groups.pdf.

The second major research project was a study of commitment hearings and dispositions (the "Commission's Hearings Study"). In response to a request by the Chief Justice, the special justice or district judge presiding in each case filled out a 2-page instrument on every commitment hearing held in May 2007. (There were 1,526 such hearings). Findings from the Commission's Hearing Study served an important role in shaping the Commission's understanding of current commitment practice. The study can be found at http://www.courts.state.va.us/cmh/2007_05_civil_commitment_hearings.pdf.

Finally, the Commission's third project was a study of every face-to-face emergency evaluation conducted by Community Service Board ("CSB") emergency services staff during June 2007 (the "Commission's CSB Emergency Evaluation

Study"). (There were 3,808 such evaluations.) The final report of the CSB Emergency Evaluation Study was released in late 2008 and can be found at http://www.courts.state.va.us/cmh/2007_06_emergency_eval_report.pdf.

Based on its research and the reports of its Task Forces and Working Groups, the Commission issued its *Preliminary Report and Recommendations of the Commonwealth of Virginia Commission on Mental Health Law Reform* ("Preliminary Report") in December, 2007. The Preliminary Report, which is available on-line at http://www.courts.state.va.us/cmh/2007_0221_preliminary_report.pdf, outlined a blueprint for comprehensive reform ("Blueprint") and identified specific recommendations for legislative consideration during the 2008 session of Virginia's General Assembly that focused primarily on the commitment process.

After the General Assembly enacted a major overhaul of the commitment process in 2008, the Commission moved into the second phase of its work. Three new Task Forces were established – one on Implementation of the 2008 Reforms, another on Future Commitment Reforms and one on Advance Directives. In addition, the Commission created a separate Working Group on Transportation. Each of these Task Forces and Working Groups presented reports to the Commission, together with recommendations for the Commission's consideration. In December, 2008, the Commission issued a *Progress Report* on mental health law reform in Virginia in 2008. It summarizes the changes adopted by the General Assembly in 2008, reviews the steps taken to implement them, presents the Commission's recommendations for consideration by the General Assembly in 2009, and identifies some of the important issues that the Commission will be addressing in the coming year. It can be found at http://www.courts.state.va.us/cmh/2008_1222_progress_report.pdf.

The accompanying report is the Report of the Task Force on Training and Implementation. The recommendations of the Task Force were embraced by the Commission in its *Progress Report.* However, the report should not be construed as reflecting the opinions or positions of the Chief Justice, the individual Justices of the Supreme Court of Virginia, or of the Executive Secretary of the Supreme Court. Any recommendations or proposals embraced by the Court itself will lie exclusively within the judicial sphere.

Richard J. Bonnie
Chair, Commission on Mental Health Law Reform
December 2008

Participants on the Task Force

Gregory E. Lucyk, Esquire, Chair
Chief Staff Attorney, Supreme Court of Virginia

Honorable Humes J. Franklin, Jr.
Chief Judge
Staunton Circuit Court

Joanne Rome, Esquire
Staff Attorney, Supreme Court of Virginia

Jane Hickey, Senior Assistant Attorney General and Chief
Office of the Attorney General

Allyson Tysinger, Senior Assistant Attorney General
Office of the Attorney General

Bonnie Neighbor, VOCAL

Mira Signer, NAMI

Kate Acuff, UVA Institute of Law, Psychiatry and Public Policy

James Reinhard, Commissioner
DMHMRSAS

Ray Ratke, DMHMRSAS

Jim Martinez, DMHMRSAS

Jane Yaun, DMHMRSAS

Ruth Anne Walker, DMHMRSAS

Mary Ann Bergeron, VACSB

Jennifer Faison, VACSB

Kaye Fair, VACSB

Rebecca Bowers-Lanier, Esquire, Macaulay & Burtch, P.C.

Betty Long, Esquire, Virginia Hospital and Healthcare Assoc.

Susan Ward, Esquire, Virginia Hospital and Healthcare Assoc.

Keith Hare, Medical Society of Virginia

Cal Whitehead, Psychiatric Society of Virginia

The following staff of the Office of Executive Secretary are not members of the Task Force, however, they participated in the meetings in order to provide information and did not take a position on the proposals and recommendations described in this report:

Jody Hess
General District Court Division
Judicial Services Department

Bobby Lewis, Esquire
Magistrate Coordinator Division
Judicial Services Department

Caroline E. Kirkpatrick, Director
Department of Educational Services

Sandra Karison, Esquire
Assistant Director
Legal Research Department

INTRODUCTION

This Task Force was assembled initially in December of 2007 as an ad hoc group of several stakeholders in the mental health law reform effort to coordinate legislative advocacy efforts during the 2008 General Assembly Session. The goal of the Task Force was to bring together members of the various agencies and interest groups who were also participants in the Chief Justice's Commission on Mental Health Law Reform, to review and discuss draft legislation and to provide a united voice, as appropriate, on the proposed reforms. Task Force members met with Delegates and Senators, attended legislative committee meetings and hearings, prepared and submitted position papers and talking points, drafted language for proposed amendments, and offered testimony to the legislative committees considering the proposed legislation.

During the 2008 General Assembly Session, more than 120 mental health related bills were submitted by 43 different Delegates and Senators. The resulting, comprehensive legislative package codified sweeping changes in Virginia's mental health laws. Once the Session concluded, the Task Force turned its attention to the need for providing comprehensive training to the numerous stakeholders involved in the implementation of this legislation, and in coordinating implementation efforts at the local level. The Task Force participants collaborated on the preparation of training materials and "cross-training" efforts so that all of those involved would receive similar information and advice for implementing the reforms. The Task Force members organized and participated in training events for CSB personnel, district and juvenile court judges, court clerks, magistrates, and special justices, among others. Task Force members also provided comments to the Office of Executive Secretary's Legal Research Department on the creation of new forms and revision of existing district court forms used in the involuntary commitment process. Before the 2008 amendments were enacted, there were 8 district court forms applicable to involuntary commitment. Under the new provisions, there are now some 26 district court forms relating to these procedures.

After the legislation became effective on July 1, 2008, the Task Force began gathering information on the implementation of the new procedures in order to gauge the extent to which the new legislation was accomplishing the goals of the Commission and the General Assembly. The Task Force identified a number of problems that have been encountered in implementing the new legislation, either as a result of drafting, interpretation or training issues, and has developed recommendations for addressing these problems. The Task Force also has identified other areas of potential concern that require further monitoring before recommendations may be offered.

The Task Force also examined two additional issues for consideration of legislative recommendations in the 2009 session. The first concerned the duties imposed on Independent Examiners (IEs) in the commitment process, in comparison to their compensation. Before the 2008 amendments, anecdotal evidence suggested that IEs ordinarily spent much less than an hour in conducting the examination and preparing the report for the involuntary commitment hearing, and were not obliged to attend the commitment hearing. Under the new procedures, estimates suggest that the typical

examination now requires an estimated minimum two hours (including talking to collateral sources, reviewing records, etc.) and that preparing the report likely will take another hour. On top of this, IEs must attend the hearing in person or by audio/video, or otherwise be available by telephone to provide testimony or answer questions. The compensation rates for IEs ($75 per hearing), however, were not changed during the 2008 session, and given the budget shortfall facing the Commonwealth in the upcoming biennium, it is highly unlikely there will be any change considered in the 2009 session. This disjunction between what IEs are now expected to do and what they are paid could result in the flight of these professionals from participation in the system. The Task Force, with input from the Medical Society of Virginia and other physicians groups, is taking steps to monitor this situation and coordinate its findings with DMHMRSAS so the Department can determine what remedial steps, if any, might be advisable.

The second additional issue studied by the Task Force concerned the appointment, oversight, support and training of the special justices who conduct involuntary commitment hearings. Special justices are independent judicial officers who serve under the supervision and at the pleasure of the chief circuit court judge. See Code § 37.2-803. The Executive Secretary of the Supreme Court is the administrator of the circuit court system and assists the chief judges in the performance of their administrative duties. See Code § 17.1-502. Special justices also are under the jurisdiction of the Judicial Inquiry and Review Commission, and are subject to discipline or removal for actions violating the Canons of Judicial Conduct. While special justices appointed to conduct commitment hearings are in every sense of the word "judges," who exercise all the powers and duties of judges in the cases over which they preside, ordinary models of "oversight" or "supervision" are not directly applicable to these judicial officers. The Task Force has developed talking points for consideration by the Executive Secretary and the Commission to address this issue, and those views are discussed in the last section of this report.

The Task Force met regularly and often weekly in the month before and then during the 2008 General Assembly session, and continued to meet every two to three weeks since the session ended. The Task Force last met on Friday, September 19, 2008 to discuss and consider the proposals contained in this report, and these matters were taken up before the full Commission at its meeting in Williamsburg on October 30, 2008. This is the Final Report of the Task Force for this year and the report will be made available before the 2009 Session of the Virginia General Assembly. This report represents the views and recommendations of the members of the Implementation Task Force as considered and endorsed by the Commission on Mental Health Law Reform. It should not be construed as reflecting the opinions or positions of the Chief Justice, the individual Justices, the Supreme Court of Virginia or the Court's Office of Executive Secretary.

IMPLEMENTATION GAPS AND PROBLEMS FOR WHICH LEGISLATIVE ACTION IN 2009 IS RECOMMENDED

The Task Force identified several implementation problems for which legislative action in the 2009 General Assembly Session is recommended. It should be noted that the recommendations set forth after the problems identified below are not necessarily supported or endorsed by every participant on the Task Force or the Commission. Rather, the recommendations represent a consensus view of the participants.

A) Renewal of "Paperless ECOs". There is an apparent omission in the statutory language in § 37.2-808 in that it fails to provide for a 2-hour extension to be applied to "paperless" emergency custody initiated by law enforcement as provided in Code § 37.2-808(G). The 2008 amendments also resulted in the unintended consequence of eliminating the four-hour time limit on law enforcement initiated custody. Thus, under the new law, there is no time limit for law enforcement initiated emergency custody.

Recommendations:

1) Add a two-hour extension language similar to that in § 37.2-808(I) at the end of § 37.2-808(G), e.g., "but the period of custody shall not exceed four hours from the time the person is taken into custody. However, upon a finding by a magistrate that good cause exists to grant an extension, the magistrate shall issue an order extending the period of emergency custody one time for an additional period not to exceed two hours, [etc.]"

2) There should be some paper record to indicate when the period of law enforcement custody actually commenced, and to show that a magistrate has approved a two-hour extension. Accordingly, OES should consider preparing an additional form for the renewal of law enforcement emergency custody, or revising the existing ECO form to incorporate this procedure.

3) In addition, the OES Magistrate Advisors have suggested that all of the two hour extension provisions should be expressed in an active voice, so that the language actually directs the magistrate to issue the extension if good cause exists. Accordingly, the two-hour extension provision in § 37.2-808(I) should be amended to state: "However, upon a finding by a magistrate that good cause exists to grant an extension, [an emergency custody order may be renewed] the magistrate shall extend the emergency custody order one time for a second period not to exceed two hours."

B) Renewal of ECOs for persons found not guilty by reason of insanity. It does not appear that the 2-hour ECO renewal language applies to ECOs entered under § 19.2-

182.9 for persons found not guilty by reason of insanity and who are on conditional release.

Recommendation:

Amend § 19.2-182.9 by adding a clause to the fifth sentence of that section, as follows: "The acquittee shall remain in custody until a temporary detention order is issued or until he is released, but in no event shall the period of custody exceed four hours, unless the period of custody has been extended by a district judge, special justice or magistrate in accordance with the procedures set forth in § 37.2-808(I)."

C) CSB/Independent Examiner Attendance at Hearings: Members of the Task Force reported that CSB representatives attending hearings as required by the statutes, but who also were present to provide testimony as witnesses, were being "sequestered" by the special justices and required to wait outside the hearing room. This defeats the purpose of having the CSB representative available to provide immediate input and address concerns, and also limits the ability of the CSB representative to be fully informed about disposition and ordered treatment. In addition, special justices in several jurisdictions are requiring that the CSB representative attending the hearing must be the same person that prepared the preadmission screening report. While the statutory language does not appear to require attendance by the person who prepared the report, some clarification will be helpful. Finally, the Commission heard reports at its October meeting that Independent Examiners also are being sequestered from commitment hearings. The Commission recommends legislation to address these issues as follows.

Recommendation:

Add language after the first sentence of § 37.2-817(B) as follows: "B. An employee or designee of the local community services board . . . shall attend the hearing in person or, if physical attendance is not practicable, shall participate in the hearing through a two-way electronic video and audio or telephonic communication system as authorized in § 37.2-804.1. Any such employee or designee of the community services board attending or participating in the hearing need not be the same person that prepared the preadmission screening report, and such employee or designee shall not be excluded from the hearing pursuant to an order of sequestration of witnesses. "

In addition, the Commission recommends that language be added after the last sentence of § 37.2-815(C) as follows: "C. . . . The examiner's written certification may be accepted into evidence unless objected to by the person or his attorney, in which case the examiner shall attend in person or by electronic communication. When the examiner attends a hearing in person or by electronic communication, the examiner shall not be excluded from the hearing pursuant to an order of sequestration of witnesses."

D) Admission into evidence of preadmission screening reports: The Task Force was informed that several special justices have refused to admit the preadmission screening report into evidence. This undermines the purpose of ensuring that these reports are available for additional or subsequent proceedings, such as enforcing compliance with outpatient treatment. The Task Force also is examining whether this problem is affecting the admission and availability of the Independent Examiner's report, and an additional recommendation on this issue may be forthcoming.

Recommendation:

Amend the language in the second sentence of Code § 37.2-816 as follows: "The report shall be admitted [admissible] as evidence of the facts stated therein . . ." Additional language should be added at the end of the third sentence in this code section as follows: "The board shall provide the preadmission screening report to the court prior to the hearing, and the report shall be admitted into evidence and made a part of the record of the case."

E) CCRE Reporting: Many district court clerks have had problems with the new CCRE reporting requirements. The clerks are required to notify CCRE by the close of business on the day they receive an order by faxing a copy of the SP-237 form with the commitment order attached to the Virginia State Police (VSP). Difficulties have been encountered, however, with the VSP fax machine being overwhelmed and with special justices bringing numerous orders to the clerk shortly before close of business, making it nearly impossible for the clerks to meet this statutory deadline. OES is working with State Police to create some type of electronic interface that will be more efficient than the fax machine. In addition, the VSP has agreed to accept the SP-237 form only without requiring Clerks to include the four page commitment order with their submissions. Clerks are also attempting to work with their special justices so they do not receive these orders at the end of the day. Notwithstanding these state and local efforts, the Task Force has concluded that the problem is ongoing and serious enough to warrant consideration of legislative action.

Recommendation:

Amend the several relevant sections of the statute, including § 37.2-819(A) and (B), to give the Clerks until close of business "on the next following business day" to forward the order to the CCRE. Example:

"§ 37.2-819(A). Upon receipt of any order from a commitment hearing issued pursuant to this chapter for involuntary admission to a facility or for mandatory outpatient treatment, the clerk of court shall, [prior to] as soon as practicable but no later than the close of [that business day] business on the next following business day, certify and forward to the Central Criminal Records Exchange . . ."

F) Emergency Clause Recommended: The recommendations set forth in paragraphs A, B, C, D and E above address matters of urgent concern, and remedial measures should be implemented as soon as practicable before July 1, 2009. Accordingly, the Task Force recommends that these five legislative recommendations should be enacted with an emergency clause, so the amendments will become effective immediately upon passage.

G) Law Enforcement Extraterritorial Authority: One Central Virginia Sheriff's Department has reported that there is a problem for rural agencies when a person initially volunteers for hospitalization or treatment but later revokes his or her consent. For example, Fluvanna County deputies may transport a person on a voluntary basis to Charlottesville to either the Region 10 office or the UVA Medical Center after hours. Once outside of Fluvanna County, it is unclear whether the Deputy may initiate emergency custody should the person revoke consent, whereupon the officer may be required to take immediate custody to protect himself or others. While the Code explicitly grants statewide jurisdiction for law enforcement officers to "execute" an emergency custody order in § 37.2-808(F), it does not address that authority to initiate emergency custody under these circumstances in § 37.2-808(G).

Recommendation:

Add language to § 37.2-808(F) so that subsection will read as follows:

"F. A law-enforcement officer may lawfully go to or be sent beyond the territorial limits of the county, city or town in which he serves to any point in the Commonwealth for the purpose of executing an emergency custody order pursuant to this section, or for obtaining the assessment provided for in subsection (G) of this section for any person who is already in the officer's custody, whether on a voluntary or involuntary basis."

H) Appointment of Special Justices: Under existing law, special justices are appointed by the Chief Circuit Judge of the Judicial Circuit. For example, the 11th Judicial Circuit consists of the counties of Powhatan, Amelia, Nottoway, Dinwiddie and the City of Petersburg. Any special justice serving any of the courts in that circuit serves "under the supervision and at the pleasure of the chief judge making the appointment" for a period of up to six years, and is subject to reappointment for one or more additional six year terms, again, "at the pleasure" of the chief judge. In many areas, the chief judge position rotates among the judges in the judicial circuit. What if the current chief judge is not the same person who appointed the special justice some years ago? What if the former chief judge is now retired or deceased? Existing law can be read to conclude that a new chief judge may be without authority to supervise or remove the special justice appointed by his or her predecessor. This should be clarified, as follows:

Recommendation:

Amend the third sentence in the statute to make clear that the current sitting Chief Judge has the authority to appoint, supervise and remove any special justice in the Judicial Circuit.

*"§ 37.2-803 * * * The special justice shall serve under the supervision and at the pleasure of the chief judge [making the appointment] of the judicial circuit for a period of up to six years."*

I) Preparation of DMH 1006: Code § 37.2-801(B) requires DMHMRSAS to prepare the form used in involuntary commitment proceedings. For years, this form was one large document that included the petition, the examiner's report, and the disposition order. In 2008, this form was separated into three separate parts - the petition, the examiner's report, and the disposition order. The petition and the order are court forms, and are the only court forms not prepared by the Office of the Executive Secretary. This has the potential to create inconsistency in the content of the forms, as well as administrative complications in the distribution of these forms to district court personnel.

Recommendation:

Section 37.2-801(B) should be amended so that OES is responsible for creating and distributing the Involuntary Commitment Petition and Dispositional Order. DMHMRSAS should continue to be responsible for the examiner's report, as this form requires clinical knowledge.

"B. The [Board] Office of the Executive Secretary of the Supreme Court of Virginia shall [prescribe and the Department shall] prepare the petitions, orders and such other legal forms as may be required in proceedings for custody, detention and involuntary admission under §§37.2-808 through 37.2-818, [.These forms, which shall be the legal forms used in admissions, shall be approved by the Attorney General and distributed] and shall distribute these forms [by the Department] to the clerks of the general district courts and the juvenile and domestic relations district courts of the Commonwealth. [and to the directors of the state facilities.] The Department shall prepare the preadmission screening report, examination and such other clinical forms as may be required in the proceedings for custody, detention and admission provided for herein, and shall distribute these forms to community services boards, mental health providers and the directors of the state facilities.

J) Expenses for Special Justices: Code § 37.2-804 sets forth the fees and expenses that may be received by Independent Examiners, attorneys and special justices who

attend hearings and provide services in the commitment process. The statute is inconsistent, however, in that it allows Independent Examiners and attorneys to receive a statutory fee "and necessary expenses" for each hearing, while special justices are permitted to receive only the statutory fee "and necessary mileage" for each hearing. This "mileage" limitation has been construed as not permitting special justices to obtain reimbursement for postage (e.g., for mailing orders and records to the clerks offices), parking lot fees, and other hearing related expenses. The statute should make clear that a special justice may not seek reimbursement for equipment costs (such as the cost of a tape recorder), but that other routine hearing related expenses should be recoverable. The Task Force has been advised by OES that this change would have a fiscal impact of about $75,000.00 annually.

Recommendation:

Code § 37.2-804 (A) should be amended to provide that a special justice shall receive "a fee of $86.25 for each hearing thereunder and his necessary mileage, parking, tolls and postage and $43.25 for each certification hearing and each order under Chapter 11 (§ 37.2-1100 et seq.) ruling on competency or treatment and his necessary mileage, parking, tolls and postage.

K) Retroactivity of Reforms: The General Assembly did not specify whether the revisions to the civil commitment statutes enacted in 2008 were retroactive. As such, there was confusion at the outset regarding whether the new procedures for monitoring and enforcing mandatory outpatient treatment applied to MOT orders already in effect on July 1, 2008. Under the prior version of Code § 37.2-817, there was no time limit on the duration of mandatory outpatient treatment orders, whereas there is a 90-day limit under the new law. However, persons subject to those earlier orders are now being advised that they may petition to have the orders rescinded in accordance with the new procedure adopted at Code § 37.2-817.3. Accordingly, the question of which law applies has been resolved, and there is no need for legislative action to address this specific issue relating to adult commitments.

On the other hand, it is important to remember that retroactivity may be an issue as future reforms are crafted. For example, it is expected that the Children and Adolescents Task Force will propose new procedures for monitoring and enforcing juvenile MOT orders. While the duration of juvenile outpatient treatment orders likely will not be changed in the new legislation, there might be some question whether any new procedures for monitoring and enforcing compliance with outpatient treatment will be applicable to outpatient commitments ordered under the old law. Accordingly, in order to avoid confusion and to make clear that the new law is applicable to previously ordered outpatient commitments, it might be prudent to address the issue of retroactivity in the proposed juvenile outpatient treatment legislation.

POTENTIAL IMPLEMENTION PROBLEMS THAT ARE BEING MONITORED

The Task Force identified several other potential problems that it will continue to monitor for consideration of additional action. At this time, these issues do not appear to require legislative attention in 2009, but the Task Force will continue to examine these issues and provide a recommendation if it is determined that further action is required.

A) No petitioner: There have been some special justices who have dismissed cases because there was no petitioner listed on the TDO, or because the named petitioner does not appear at the hearing. In these instances, the CSB should be able to serve as the petitioner. There was initially some confusion over whether the CSB could do so, but this appears to have been resolved. The Task Force will continue to monitor this issue.

B) 12-hour notice to CSBs: Certain courts have had difficulty providing the required the 12-hour notice of hearings to the CSBs. In locales that hold numerous hearings a day, some courts have entered standing orders notifying the CSBs of when the hearings are regularly scheduled. There is some question whether these standing orders comply with the requirements of the Code, and while they may be adequate to provide some form of notice to a local CSB or BHA, such standing orders are not adequate to provide notice to out of town CSBs or BHAs. The Task Force will continue to monitor this issue in order to determine if this is a problem, and if so, how it might be addressed.

C) Social Security Numbers for CCRE Reports: The CCRE form requires a social security number for each respondent being reported, in order to ensure accuracy in reporting (i.e., to avoid the wrong John Smith or Mary Jones being entered into the system). However, there is no space in the petition or order to record a respondent's social security number. The Task Force understands that this omission may be a product of privacy statutes or Freedom of Information requirements that do not permit maintaining records of social security numbers, but this has created a problem for the clerks of court who are expected to provide social security information when submitting a report to the CCRE. The Task Force does not have a recommendation to address this issue, but suggests that the matter warrants further study in order to reconcile these competing requirements.

D) Preadmission Screening Form: It appears that the revised prescreening form that went into effect this past year caused some problems in the juvenile setting. This issue was brought to the attention of appropriate officials at DMHMRSAS, and the Task Force has been advised that a modified form has been developed to address these concerns.

E) Definitions: There is some confusion over the use of the terms "court," "judge" and "special justice" in the statutes. For instance, when the statute says "filed with the court", does that mean filed with the Clerk of the Court? Or filed with the judge or special justice? On the one hand, it would promote certainty and consistency in the proceedings if the statutes were more specific as to which should be the recipient of the papers. On the other hand, there is some benefit to having flexibility in the procedures to

accommodate exigencies and local practices. It is essential, however, that petitions and other papers related to any commitment proceeding be filed with the appropriate clerk's office, preferably at the commencement or outset of a case. Where that is not possible or practicable, then the petition and other papers should be filed with the clerk as soon as possible. The clerk, and not the judge or special justice, is the custodian of the file. The Task Force is examining this issue to determine whether the problem is significant enough to propose legislative amendments, or whether it can be addressed through training or guidance materials.

F) Communication Issues Between CSBs and Emergency Room Physicians: The Task Force has received reports of tension and possible misunderstandings between the CSBs and Emergency Room physicians in two localities in Central Virginia and the Peninsula/Tidewater area. The CSBs are reporting that the physicians are contacting the CSBs to perform pre-screenings for voluntary patients, so these persons will become the responsibility of the CSB and the CSB will then be responsible for payment for the hospital admission. The physicians, on the other hand, are reporting that the problem occurs when police officers bring persons in under law enforcement initiated custody. When the CSB is called in to conduct the evaluation, the pre-screener will prod/convince the person that what they really want is a voluntary admission. Once the person agrees and says yes to the voluntary admission, the CSB concludes its involvement and notifies the hospital that the patient is the hospital's responsibility. The Task Force believes this may be the result of a lack of communication, and an insufficient understanding among the participants in the process about their respective roles and responsibilities. Accordingly, the Task Force concluded that a round table discussion among all the parties should be convened to explore and work through these issues. The Commissioner of DMHMRSAS offered to assist in facilitating these discussions, and a meeting was held on December 17, 2008 to initiate these discussions.

G) Shortage of Attorneys: The Task Force heard that in some jurisdictions, particularly in rural localities, juvenile courts are having a difficult time finding both appointed counsel and a guardian ad litem for each commitment hearing now that both are required by statute. One possible remedy is to work with the Virginia State Bar to increase attorney recruitment in this specialty. However, at least one juvenile judge and a special justice in the Valley region thought the problem was serious enough to ask that the Code be amended to make it discretionary with the court as to whether both an attorney *and* a guardian ad litem should be appointed in any case. The Commission was divided on this issue, however, and could not reach a consensus. It appears that the unavailability of counsel is not a problem in many areas of the Commonwealth, and there is a strong view that juveniles have a right to be represented by counsel and by a guardian ad litem in these cases to ensure their interests are fully protected. Accordingly, the Commission determined to take no position on the proposed legislative amendment at this time, but will continue to study the matter, and will encourage the Virginia State Bar and Virginia CLE to offer additional programs calculated to increase attorney recruitment in this specialty.

APPOINTMENT, OVERSIGHT, SUPPORT AND TRAINING OF SPECIAL JUSTICES

This subject currently is governed by Code § 37.2-803. That code section provides as follows:

§ 37.2-803. Special justices to perform duties of judge.

The chief judge of each judicial circuit may appoint one or more special justices, for the purpose of performing the duties required of a judge by this chapter, Chapter 11 (§ 37.2-1100 et. seq.), and §§ 16.1-69.28, 16.1-335 through 16.1-348, 19.2-169.6,19.2-174.1, 19.2-177.1, 19.2-182.9, 53.1-40.2, and 53.1- 40.9. Each special justice shall be a person licensed to practice law in the Commonwealth or a retired or substitute judge in good standing and shall have all the powers and jurisdiction conferred upon a judge. The special justice shall serve under the supervision and at the pleasure of the chief judge making the appointment for a period of up to six years. The special justice may be reappointed and may serve additional periods of up to six years, at the pleasure of the chief judge. Within six months of appointment, each special justice appointed on or after January 1, 1996, shall complete a minimum training program prescribed by the Executive Secretary of the Supreme Court. Special justices shall collect the fees prescribed in this chapter for their service and shall retain those fees, unless the governing body of the county or city in which the services are performed provides for the payment of an annual salary for the services, in which case the fees shall be collected and paid into the treasury of that county or city.

Appointment, Oversight, Support and Training

As noted previously in this report, the existing law should be amended to ensure that the sitting Chief Judge of the Judicial Circuit has authority to appoint, remove and supervise the special justices serving in his or her Judicial Circuit. That recommendation is set forth above. (See p. 9-10, para. H).

Officials from the Office of Executive Secretary (OES) met with the Task Force at its September meeting and reported that new Training Standards and Appointment Guidelines for special justices conducting both adult and juvenile civil commitment hearings were presented to the Judicial Council, the primary policy making body for the Judicial Branch, and the proposed standards and guidelines were approved by the Judicial Council on October 20, 2008. The proposed Appointment Guidelines and Training Standards require, among other things, that each new special justice must complete a certification training program within six months of appointment, and in addition, must complete six hours of additional continuing legal education every two years on any topic related to handling civil commitment hearings. For special justices seeking appointment to hear juvenile cases, the special justice must first obtain a written recommendation from an active juvenile and domestic relations district court judge. These proposals are consistent with the recommendations contained in the report of the Commission's Civil Commitment Task Force produced earlier this year. Having been approved, these newly

adopted Standards and Guidelines will be communicated to the chief judges for implementation.

In view of these initiatives by the Office of Executive Secretary, the Task Force has determined at this time to defer to the OES on matters relating to appointment, oversight, support and training of special justices. Accordingly, aside from the corrective legislation proposed above, the Task Force makes no other recommendations for additional legislative proposals at this time.

During the course of its deliberations, the Task Force discussed a number of aspirational goals and proposals for improving oversight, support and training for special justices, and for attorneys providing representation to respondents and petitioners in the civil commitment process. However, in view of the state budget shortfall and in recognition of the need to allow state agencies to determine their own priorities for resource allocation and new initiatives, the Task Force includes these goals and proposals in this report only in the event that changing circumstances might allow additional measures to be considered by OES, or any other body studying mental health law reform, to enhance oversight, support and training. Among these aspirational goals and proposals are the following.

1. Appointment of Special Justices.

a. The appointment process should involve an open recruitment, so attorneys can apply for the position, and the Chief Circuit Judge can appoint the best-qualified person based upon interviews and recommendations.

2. Oversight and Supervision.

a. Consideration should be given to establishing an evaluation process, where the chief judge of a judicial circuit would solicit input from local attorneys, CSBs, clerks of court, mental health consumers, advocates and others on a periodic basis in order to measure the performance of the specials justices serving in the judicial circuit.

b. Consideration should be given, assuming adequate program structure and resources, to bring special justices under the Judicial Performance Evaluation (JPE) program.

3. Support and Training for Special Justices.

a. Unlike sitting judges and magistrates, special justices have no support network in the OES or anywhere else to obtain research assistance or guidance on mental health related issues and procedures. Accordingly, the Supreme Court should consider establishing a position of “Special Justice Advisor” in the OES to serve as a resource and provide guidance to special justices, and also to implement and coordinate conferences, certification programs and training events for special justices.

b. The OES should consider sponsoring a statewide conference for special justices once every two years in order to provide special justices with the opportunity to obtain updates on the law and the latest initiatives in mental health clinical practice and administration, and to discuss issues they encounter as special justices.

c. The OES should consider establishing an Advisory Committee of special justices, attorneys, public and private mental health professionals, consumers and family members to assist in planning and presenting training events for special justices and others and to review and monitor the effectiveness of such training programs.

4. Support and Training for Attorneys Representing Petitioners and Respondents.

a. The Virginia State Bar and Virginia CLE should establish a curriculum of regular programs and CLE events to provide certification and training for attorneys and guardians ad litem providing representation to petitioners and respondents in adult and juvenile civil commitment cases.