

Mental Health - Constitutional Right of Counsel - Role of Attorney in Civil Commitment Proceedings (State ex rel. Memmel v. Mundy)

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RECENT DECISIONS

Mental Health—Constitutional Right of Counsel—Role of Attorney in Civil Commitment Proceedings—The recent case of *State ex rel. Memmel v. Mundy*¹ considered at length the role of an attorney appointed as “adversary counsel” to represent persons sought to be committed under the new State Mental Health Act.² This decision is more easily understood as a postscript to the landmark case of *Lessard v. Schmidt*.³

I. BACKGROUND DEVELOPMENTS IN MENTAL HEALTH LAW IN WISCONSIN

In 1972 the Federal District Court for the Eastern District of Wisconsin declared the Wisconsin civil commitment procedure unconstitutional because it lacked many of the procedural safeguards which have long been mandatory in criminal trials.⁴ In reaching its decision, the court rejected the twin arguments which are traditionally put forward to justify the less stringent procedural safeguards afforded in civil commitment proceedings, *i.e.*, (1) that the proceeding is for the benefit of the defendant under the *parens patriae* doctrine and (2) that such safeguards do not apply to civil proceedings.⁵

1. 75 Wis. 2d 276, 249 N.W.2d 573 (1977).

2. WIS. STAT. § 51.20(4) (1975).

3. 349 F. Supp. 1078 (E.D. Wis. 1972). *Lessard* was vacated by the Supreme Court, 414 U.S. 473 (1974), and remanded for clarification, 379 F. Supp. 1376 (E.D. Wis. 1974). It was again vacated, 421 U.S. 957 (1975), to be considered in light of a subsequent Supreme Court decision which was found to be inapplicable, 413 F. Supp. 1318 (E.D. Wis. 1976).

4. The court found the Act to be procedurally inadequate in the following respects: [I]t fails to require effective and timely notice of the “charges” under which a person is sought to be detained; fails to require adequate notice of all rights, including the right to jury trial; permits detention longer than 48 hours without a hearing on probable cause; permits detention longer than two weeks without a full hearing on the necessity for commitment; permits commitment based upon a hearing in which the person charged with mental illness is not represented by adversary counsel, at which hearsay evidence is admitted, and in which psychiatric evidence is presented without the patient having been given the benefit of the privilege against self-incrimination; permits commitment without proof beyond a reasonable doubt that the patient is both “mentally ill” and dangerous; and fails to require those seeking commitment to consider less restrictive alternatives to commitment.

349 F. Supp. at 1103.

5. By its terms, the fifth amendment, guaranteeing the rights against self-incrimination and of due process of law, appears to apply only in criminal cases: “nor

The *Lessard* decision adopted a rationale similar to that used by the United States Supreme Court in extending similar due process protection to participants in juvenile court proceedings.⁶ Several courts in other states have reached similar conclusions⁷ and the Supreme Court of the United States has recently ruled that "a State cannot confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends."⁸

With respect to the right of counsel, *Lessard* held that the prior Wisconsin law, providing that the court in a commitment proceeding "may . . . appoint a guardian ad litem for [the patient,]"⁹ was "defective" for two reasons: (1) it did not provide for automatic appointment of counsel, at least for indigents and (2) the guardians ad litem appointed under the law were not sufficiently "adversary"¹⁰ to satisfy the constitutional

shall [any person] be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. Similarly, the rights to a speedy trial, to confrontation with adverse witnesses and to counsel are not specifically guaranteed in civil trials by the sixth amendment: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

6. "[S]tudies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guaranties applicable to adults." *Kent v. United States*, 383 U.S. 541, 552 (1966). "To hold otherwise [than that the fifth amendment applies to juvenile proceedings] would be to disregard substance because of the feeble enticement of the 'civil' label-of-convenience. . . . For this purpose, at least, commitment is a deprivation of liberty. It is incarceration against one's will, whether it is called 'criminal' or 'civil'." *In re Gault*, 387 U.S. 1, 49-50 (1967); *Kent v. United States*, 383 U.S. 541, 555 (1966). However, it should be noted that, in holding as it did, the *Lessard* court did have to limit dicta in *Robinson v. California*, 370 U.S. 660 (1962) to the effect that compulsory treatment of a person with a disease is constitutionally acceptable.

7. See, e.g., *Heryford v. Parker*, 396 F.2d 393 (10th Cir. 1968); *Lynch v. Baxley*, 386 F. Supp. 378 (M.D. Ala. 1974); *Quesnell v. State*, 83 Wash. 2d 224, 517 P.2d 568 (1974); *State ex rel. Hawks v. Lazaro*, 202 S.E.2d 109 (W. Va. 1974).

8. *O'Connor v. Donaldson*, 422 U.S. 563, 576 (1975). The Court specifically declined to deal with procedures required for involuntary commitments.

9. WIS. STAT. § 51.02(4) (1973) (repealed effective September 4, 1976).

10. As a matter of fact, the attorney appointed in *Lessard* perceived his role as nonadversarial and nonrepresentative enough so that, in response to a question relating to adjournment, he stated: "[M]y independent decision . . . is that . . . she should be represented by an attorney." 349 F. Supp. at 1098.

mandate for effective legal representation.¹¹

In response to the *Lessard* decision, Wisconsin enacted a new Mental Health Act¹² which incorporates most of the procedural safeguards required by that decision. In particular, the Wisconsin statute provides for automatic appointment of "adversary counsel" immediately upon the filing of the petition to commit. Indigents are to be provided counsel at county expense.¹³ Although the statute requires that counsel be "adversary," it does not define the role or responsibilities of those appointed under the Act.¹⁴

II. THE CONTROVERSY OVER THE ATTORNEY'S ROLE

All of the constitutionally mandated procedural safeguards are meaningless to a person who is subjected to commitment proceedings unless coupled with effective representation by counsel.¹⁵ Indeed, the adversary lawyer serves as the linchpin upon which the vitality of the factfinding process of the hearing depends. Yet in many places the lawyer's role has been limited to seeing that the proper papers were filed¹⁶ or that the statutory notice requirements were met.¹⁷ This ineffective representation can be attributed to many factors, not the least of which is the confusion over the appointed attorney's role in the proceedings.

Several causes are responsible for this "rolelessness." Often great deference is accorded the testimony of medical and psychological experts regarding the patient's best interests.¹⁸ Un-

11. *Id.* at 1097, 1099.

12. 1975 Wis. Laws, ch. 430.

13. "Legal Counsel. At the time of filing of the petition the court shall appoint adversary counsel unless the subject individual chooses to retain his or her own attorney. If the individual is indigent, the court shall provide counsel at county expense." Wis. STAT. § 51.20(4) (1975).

14. By implication, however, that role is to be more than perfunctory. Counsel is given the power to request postponement of the hearing, to request an additional medical or psychological examination, of access to psychiatric and other reports (not enjoyed by his client), to demand a jury trial, and to move for a closed hearing. Wis. STAT. § 51.20(8)(a), (10)(a), (11)(b), (12), (13) (1975).

15. "[T]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Argersinger v. Hamlin*, 407 U.S. 25, 31 (1972), quoting from *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932).

16. See Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, 44 TEX. L. REV. 424 (1966) [hereinafter Cohen].

17. *Id.* at 440.

18. See Zander, *Civil Commitment in Wisconsin: The Impact of Lessard v. Schmidt*, 1976 WIS. L. REV. 503 [hereinafter Zander], where the author quotes the

fortunately, greater weight than is justified is often given to such evidence. The testimony of these experts is not restricted to scientific facts and empirical data. Rather, it is often laden with speculation and conjecture.¹⁹ Few persons subjected to commitment proceedings have sufficient financial resources to retain their own expert witnesses. Thus, appointed counsel is often forced to listen to the opinion evidence presented against the client, knowing that he is unable to present any competent evidence in rebuttal.

Another cause of this "rolelessness" is that the appointed commitment attorney is often uncertain as to who the client is, and what goals he is to seek for that client. The dangers inherent in any patronage system are present in this situation. Whether the motivation is conscious or subconscious, there is a danger that the judge will tend to appoint attorneys who take a passive role and do not complicate the proceedings. Concomitantly, there is a risk that the appointee will not take an aggressive approach, hoping to satisfy the judge and enhance the prospects for future appointments.²⁰

Even if the attorney correctly concludes that the ends of the defendant are of foremost importance, a problem exists in determining precisely what those ends are. Unlike the criminal lawyer who knows that it is in the client's best interest to "get off," the civil commitment advocate has no clear criterion of success.²¹ A decision must first be made as to what is in the client's best interest. That is, whether the client will best be

following portion of the record from an involuntary commitment hearing held in Milwaukee County in August, 1974:

Defense attorney: . . . [I]t's a little difficult for me to understand how full-time inpatient hospitalization at this time would be the cure

Court: I have the same feeling. However, I'm not expert in psychiatric matters. The experts have testified. My feelings are the same as yours, but I can't disregard the expert testimony.

See also Cohen, *supra* note 16, at 450.

19. See, e.g., Ennis & Litwach, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CAL. L. REV. 693 (1974); Leifer, *The Competence of the Psychiatrist to Assist in the Determination of Incompetency: A Skeptical Inquiry Into the Courtroom Functions of Psychiatrists*, 14 SYRACUSE L. REV. 564 (1963).

20. Andalman & Chambers, *Effective Counsel for Persons Facing Civil Commitment: A Survey, a Polemic and a Proposal*, 45 MISS. L.J. 43, 83 (1974) [hereinafter Andalman & Chambers]. Indeed, in one Arizona county, the advocate actually assisted the court in presenting the case against his client. Wexler and Scoville, *The Administration of Psychiatric Justice: Theory and Practice in Arizona*, 13 ARIZ. L. REV. 1, 53 (1971) [hereinafter Wexler and Scoville].

21. Cohen, *supra* note 16, at 447.

served by commitment or freedom or some other intermediate alternative, such as outpatient treatment.²²

A more fundamental dilemma arises when the lawyer and client disagree as to what are in the client's best interests. This most often occurs when the attorney believes that the client should be committed, and the patient, quite expectedly, opposes confinement. To advocate the client's position in such a case would violate what many lawyers believe is their duty to the client and the public. To fail to do so is to deny the client "adversary counsel" in the commitment proceeding. Whether the attorney in this situation should implement his own notions of what is in the client's "best interests" or assume the "adversary" position of his client is presently an unresolved question in American law.²³

To compound the problem, the civil commitment process in most areas implicitly rejects the possibility of any meaningful advocacy by failing to provide the defending attorney with any of the normal opportunities and incentives to perform well. Often the attorney is paid a flat rate, and more often than not, that rate is far lower than that received for defending an indigent in a criminal case.²⁴ In many places, the attorney is saddled with a workload which makes it impossible to adequately prepare each case.²⁵

As a consequence of this "rolelessness," many writers have called for the enactment of a statutory role for the commitment attorney.²⁶ The *Memmel* decision attempts to deal with this problem by judicial action.

22. *Id.* at 451-52.

23. See, e.g., Note, *The Role of Counsel in the Civil Commitment Process: A Theoretical Framework*, 84 YALE L.J. 1540, 1541 (1975) [hereinafter *The Role of Counsel*].

24. A few examples are illustrative. A flat rate of \$10 was paid in Texas in 1966. Cohen, *supra* note 16, at 445. Similarly, Maricopa County in Arizona allowed \$10 per case in 1971. Wexler and Scoville, *supra* note 20, at 55. However, this is by no means universal. Dane County in Wisconsin pays its court appointed attorneys \$35 per hour. Zander, *supra* note 18, at 514.

25. In one afternoon session in Texas in 1966, 40 patients were committed in approximately 75 minutes. Cohen, *supra* note 16, at 430.

26. See Andalman & Chambers, *supra* note 20, at 78-79; Cohen, *supra* note 16, at 436 n.58; Brunett, *The Right to Counsel, Waiver Thereof, and Effective Assistance of Counsel in Civil Commitment Proceedings*, 29 Sw. L.J. 684, 712 (1975).

III. EVENTS LEADING UP TO THE WISCONSIN SUPREME COURT'S DECISION IN *State ex rel. Memmel v. Mundy*

Despite the *Lessard* court's ruling that a guardian ad litem does not provide sufficient representation to satisfy the constitutional right of counsel,²⁷ and despite the incorporation of the phrase "adversary counsel" into Wisconsin's Mental Health Act,²⁸ the Wisconsin bar was still uncertain in 1976 whether to adopt the "best interests" role or the "adversary" role as a prototype in civil commitment proceedings. According to one study, eighty percent of the surveyed Wisconsin judges still endorsed the "best interests" role, whereas only twelve percent adopted the "adversary" position.²⁹ However, a clear majority of the responding practitioners viewed their role as that of an adversary.³⁰

Even after the *Lessard* decision, most of Milwaukee County's commitment hearings were hardly more than perfunctory. The average probable cause hearing³¹ lasted nine minutes, and the average involuntary commitment trial took only thirteen minutes.³²

27. 349 F. Supp. at 1099. See also Gupta, *New York's Mental Health Information Service: An Experience in Due Process*, 25 RUTGERS L. REV. 405, 438 (1974) [hereinafter Gupta].

28. WIS. STAT. § 51.20(4) (1975).

29. The survey asked participants to choose between two role descriptions, either:

(a) The attorney representing a defendant in a commitment proceeding should do everything in his power as an attorney to see that his client is not committed, if his client resists hospitalization, or if his client articulates no opinion

(b) [I]f the defendant articulates no opinion or if the attorney feels that his client is incompetent to make the decision concerning the need for hospitalization, then the attorney should do what he feels is in his client's best interest even if it means involuntary hospitalization.

Zander, *supra* note 18, at 516.

30. Only one of the two Milwaukee County judges who hear commitment proceedings responded to the survey and he endorsed the "best interests" position. Two of the three responding Milwaukee attorneys who regularly handled commitment proceedings favored the "best interests" position and the other chose the "adversary" role.

The responding Dane County commitment judge endorsed the "best interests" position, as did one of the ten Dane County practitioners who replied. The other nine Dane County attorneys favored the "adversary" role. *Id.*

31. A probable cause hearing is required to continue involuntary detention longer than 48 hours. WIS. STAT. § 51.15(4) (1975).

32. Zander, *supra* note 18, at 520, 526. These statistics were stipulated to in the appeal from the habeas corpus proceeding in *State ex rel. Memmel v. Mundy*, 75 Wis. 2d 276, 249 N.W.2d 573 (1976). The comparable figures for Dane County (also stipulated) were 2 hours and 2 1/2 hours for the probable cause and commitment hearings respectively.

The attorneys—automatically appointed for each Milwaukee County commitment proceeding after the *Lessard* decision—were chosen in ninety-nine percent of the cases from a closed panel of six attorneys and their average rate of compensation was \$25.45 per case.³³ The vast majority of the procedural rights guaranteed in *Lessard* were waived in both the probable cause and commitment hearings.³⁴ Furthermore, the attorneys asked an average of less than two questions on cross examination at each type of proceeding.³⁵

As might be expected, a number of habeas corpus proceedings were instituted by persons involuntarily committed under this procedure.³⁶ One of these was a petition for a writ of habeas corpus brought by David Memmel on March 31, 1976, which alleged that he was being illegally restrained by Edwin A. Mundy, director of the Milwaukee County institutions. On April 28, Judith Pagels moved to intervene on behalf of a class of persons involuntarily committed to the Milwaukee County Mental Health Center. The circuit court granted the motion, but the Wisconsin Supreme Court issued temporary writs of prohibition to restrain further proceedings. However, on May 14, these writs were dissolved. On July 12, prior to the final circuit court judgment, the Milwaukee County Board of Judges adopted a new rule for the appointment of “adversary counsel.”³⁷ Rule 640, as it was called, abolished the closed panel system and provided that appointments were to be made from a panel of attorneys presented by the Milwaukee Bar Association and supplemented by the court.³⁸

33. The comparable Dane County figure was \$390 per case. Brief for Appellant at 107, *State ex rel. Memmel v. Mundy*, 75 Wis. 2d 276, 249 N.W.2d 573 (1976).

34. The right to request a transcript of the probable cause hearing and to issue subpoenas were waived in 99% of the cases; the right to file written motions in 100% of the cases; and the rights to a jury trial, to appeal and to petition for a reexamination in all but one case between January 1, 1975 and April 1, 1976. *Id.* at 109-13.

35. *Id.* at 109-11.

36. At the time of the appeal, 15 commitments had been invalidated on the grounds that the defendants had been denied due process of law. *Id.* at 111.

37. This rule was adopted pursuant to statute which empowers the Board of Judges, in counties with a population greater than 200,000, to establish rules of procedure. WIS. STAT. § 257.37 (1975). The effect of the adoption of this rule is dealt with in the text accompanying footnotes 67-72, *infra*.

38. Involuntary Commitment Proceedings. A panel of attorneys will be presented by the Milwaukee Bar Association and supplemented by the court. The court will select attorneys from the panel serially to represent defendants. The list shall be updated periodically by the court and Association, but not less than once a year. 75 Wis. 2d at 280, 249 N.W.2d at 575.

On August 3, the parties filed findings of fact and conclusions of law with the trial court, wherein they stipulated that the petitioners had been denied "the effective assistance of counsel" and "due process of law."³⁹ The trial court issued an order on August 18, directing the release of all petitioners or a rehearing within sixty days of September 1. The defendant was directed to provide immediate office space for the Milwaukee County Legal Aid staff and was required to confer with the county executive, the county board of supervisors and petitioners' attorneys and to formulate and present to the court a permanent plan for representing indigent patients at commitment hearings.⁴⁰ On September 7, the trial court amended the August 18 order and appointed the Legal Aid Society of Milwaukee to represent indigents at commitment proceedings until a permanent plan could be presented to the trial court. The court also directed the Legal Aid Society to hire additional staff, and retained continuing jurisdiction over the case to oversee the implementation of the orders.⁴¹ This order (and not the August 18 order) was appealed by the defendant.

On September 4, prior to the subsequently appealed order of September 7,⁴² the parties to the action, as well as the Chief Judge of Milwaukee County (representing the Milwaukee County Board of Judges) entered a stipulation stating that the Legal Aid Society would be appointed to represent defendants in civil commitment proceedings pursuant to the rule making authority of the Milwaukee County Board of Judges. The stipulation was to remain in effect until the trial court's order was stayed or amended by that court or the Wisconsin Supreme Court.

39. "[T]he Court concludes and determines beyond a reasonable doubt: 1. That petitioner's Sixth Amendment rights to trial by jury and the effective assistance of counsel and petitioner's Fourteenth Amendment right to due process of law have been unlawfully restricted thereby." Brief for Appellant at 114, *supra* note 34.

40. 75 Wis. 2d at 277-78, 249 N.W.2d at 574.

41. a. The Legal Aid Society of Milwaukee shall represent indigent patients at involuntary mental commitment proceedings until a permanent plan to provide such representation can be presented to the trial court.

b. The Legal Aid Society shall hire additional staff to implement the trial court's order.

c. The trial court will retain continuing jurisdiction over the case to oversee the implementation of its orders.

d. [Defendant's] motion to review and/or stay the above order is denied.
Id. at 278-79, 249 N.W.2d at 575.

42. September 4 was also the date the new mental health act became effective.

Thereafter, the defendant successfully moved the supreme court to stay enforcement of the September 7 order. One month later, after receiving a report from the Milwaukee County probate judges that rule 640 was being implemented, the supreme court ordered that pending hearing on the merits of the case, the Milwaukee County courts holding commitment proceedings were to make attorney appointments "seriatim on a case by case basis from the list of attorneys as approved by the Milwaukee County Board of Judges subject to the approval of the appointing judge as to any particular attorney."⁴³

In an attempt to finally resolve the representation question, the supreme court decided to hear a declaratory judgment petition filed by respondents Memmel and Pagels,⁴⁴ who sought a delineation of the role and responsibility of appointed counsel in commitment proceedings.⁴⁵

IV. THE WISCONSIN SUPREME COURT'S DECISION

A. *The Reaffirmation of the Code of Professional Responsibility*⁴⁶

In delineating the role and responsibility of adversary counsel, the court made clear "that such appointed counsel has the same function, duties and responsibilities as he would have if he were retained by the person involved as his or her own attorney."⁴⁷ Consequently, the Code of Professional Responsibility applies⁴⁸ and the commitment attorney's responsibilities include preserving the confidences and secrets of the client,⁴⁹ exercising independent professional judgment on behalf of the client,⁵⁰ and representing a client competently,⁵¹ and zealously within the bounds of the law.⁵² The court saw no reason why the duty of a lawyer should vary with the type of legal proceeding involved.

43. 75 Wis. 2d at 279, 249 N.W.2d at 575.

44. This petition was considered by the court as an exercise of its superintending control over inferior courts. Wis. CONST. art. VII, § 3.

45. 75 Wis. 2d at 280, 249 N.W.2d at 573.

46. 43 Wis. 2d ix to lxxvi-b.

47. 75 Wis. 2d at 283, 249 N.W.2d at 577.

48. *Id.* at 284, 249 N.W.2d at 577.

49. 43 Wis. 2d at xxxvi.

50. *Id.* at xxxix to xlvi (Canon 5).

51. *Id.* at xlix to 1 (Canon 6).

52. *Id.* at li to lxxvii (Canon 7).

One effect of this decision is to make it clear that the commitment attorney's client is the person sought to be protected, not the interests of the judge in streamlining the proceedings and not the interests of the public in confining potentially dangerous individuals. The decision certainly contemplates more of an "adversary" posture in contested commitment proceedings and this necessarily involves more work for the appointed attorney. Rather than merely acquiescing in the petitioning doctor's recommendation,⁵³ the commitment attorney should make any necessary independent investigation of facts in order to challenge the expert testimony.⁵⁴ Where feasible, the attorney should consult with the client to ascertain the client's desires and to advise the client of the available alternatives and their ramifications.⁵⁵ The performance of these duties provides the minimum duties necessary for adequate representation regardless of whether the attorney is privately retained or appointed by the court.⁵⁶

That an adversarial system is essential to preserve the rights guaranteed in *Lessard* cannot be doubted.⁵⁷ A system of involuntary confinement should be skewed toward undercommitment, if at all, in a society which prizes its liberty.⁵⁸ Yet, the *Mommel* decision does not guarantee that such a procedure will be followed. By failing to promulgate any more specific

53. Several writers have noted the tendency of doctors to overpredict, rather than allow a potential murderer or suicide victim to go free. See *The Role of Counsel*, *supra* note 23, at 1553-54. Golten, *Role of Defense Counsel in the Civil Commitment Process*, 10 AM. CRIM. L. REV. 385, 414-17 (1972).

54. It is difficult to imagine a competent attorney representing a client in a personal injury action or in any other case involving medical or technical questions without at least consulting his own professional experts and cross-examining the adverse experts. Indeed, it is disheartening to realize that when we deal not with the liberty-threatening situation of commitment, but deal instead with lucrative cases such as will contests and traumatic neurosis personal injury matters, lawyers hardly seem unduly deferential to—or bewildered by—the damning pronouncements of adverse psychiatrists.

Wexler and Scoville, *supra* note 20, at 52.

55. To do this a lawyer must be familiar with the law in this field. However, one writer has described the commitment lawyer as "a stranger in a strange land without benefit of guidebook, map, or dictionary." Cohen, *supra* note 16, at 424.

56. Precisely what the appointed commitment attorney should do has been the subject of numerous articles. See, e.g., Andalman, *supra* note 20, at 50-54; Cohen, *supra* note 16, at 450-57.

57. See Gupta, *supra* note 27, at 438.

58. Livermore, Malmquist & Meehl, *On the Justifications for Civil Commitment*, 117 PA. L. REV. 75-76 (1968); Andalman & Chambers, *supra* note 20, at 49.

guidelines for the "adversary counsel" the court left each individual attorney with the responsibility to interpret the Code as it applies to a particular commitment case. Indeed, the argument could be made that the Milwaukee County practice before this decision was constitutionally adequate. The Code was in effect throughout its duration, but the court declined to deal with its constitutionality since the original August 18 order, which declared the prior representation practice inadequate, had not been appealed.⁵⁹

Furthermore, the *Memmel* decision did not resolve the controversy over the "adversary" or "best interest" roles. Both the *Lessard* decision⁶⁰ and the new state Mental Health Act⁶¹ require an "adversary" role for commitment counsel. Additionally, the *Memmel* court, in citing the Code's duty of zealous representation⁶² seems to imply that the client's desires are to control the ends the lawyer seeks. However, the Code itself is unclear on this point. In the ethical considerations for Canon VII, it is noted that "the authority to make decisions is exclusively that of the client."⁶³ However, at another point the same Code states that when "the disability of a client and the lack of a legal representative compel the lawyer to make decisions for his client, the lawyer should . . . act with care to safeguard and advance the interests of his client."⁶⁴ Even though the Code advises that in such circumstances the lawyer should "obtain all possible aid"⁶⁵ from his client, is it ever appropriate for a lawyer to decide that his client is incapable of determining his own "best interests" during the course of a proceeding brought to determine precisely that capability?⁶⁶

B. *The Court's Sanction of the Milwaukee County Appointment System*

As an exercise of its power of "superintending control over inferior courts,"⁶⁷ the court approved Rule 640: "We now ex-

59. 75 Wis. 2d at 287, 249 N.W.2d at 579.

60. 349 F. Supp. at 1103.

61. WIS. STAT. § 51.20(4) (1975).

62. 75 Wis. 2d at 284, 249 N.W.2d at 577.

63. 43 Wis. 2d lii (EC 7-7).

64. *Id.* at liv (EC 7-12).

65. *Id.*

66. At least one writer has been prompted to say that the Code "offers little guidance" on this question. *The Role of Counsel*, *supra* note 23, at 1544.

67. WIS. CONST. art. VII, § 3.

pressly hold such rule to be proper under the statute involved, and to establish the procedure to be followed . . . in Milwaukee County."⁶⁸ The court decided the case as a matter of statutory interpretation and chose not to deal with the broader question of public policy.⁶⁹ It was noted, however, that the procedure had "no constitutional infirmity."⁷⁰ Furthermore, any holding with respect to the prior Milwaukee County procedure was avoided, since the failure to appeal the August 18 order rendered that issue moot.⁷¹

Such a holding appears appropriate for a newly adopted procedure. However, it gives no indication of the minimum acceptable standards for implementing the adversary counsel system in commitment proceedings. For example, left unanswered is the question of whether the former average fee for Milwaukee County commitment attorneys, \$25.00,⁷² is sufficient incentive for lawyers to provide their clients with "effective assistance of counsel" mandated by the Constitution in civil commitment hearings. Presumably, the county's former closed panel selection process would be suspect, but not necessarily invalid under the court's holding.

V. CONCLUSION

Rather than setting forth specific standards to govern the role and selection of commitment attorneys, the *Memmel* court chose to rely on the vague guidelines of the Code of Professional Responsibility and the Wisconsin Mental Health Act.⁷³ However, both the Code and the Mental Health Act were in effect prior to the *Memmel* decision and each lacks the requisite specificity to ensure that those subjected to commitment proceedings will be provided with effective assistance of counsel. By failing to articulate meaningful due process requirements, the court has placed the burden of complying with the *Lessard* decision on the shoulders of the participating judges and attorneys, and has therefore left the door open for a recurrence of the conditions which gave rise to the current controversy. The

68. 75 Wis. 2d at 287, 249 N.W.2d at 579 (footnote omitted).

69. *Id.* at 286-87, 249 N.W.2d at 579.

70. *Id.* at 286, 249 N.W.2d at 578.

71. *Id.* at 287, 249 N.W.2d at 579.

72. See text accompanying note 34, *supra*.

73. WIS. STAT. § 51.20(4) (1975).

mere statement that commitment counsel must assume a more active, adversary role does not guarantee that future proceedings will be free of constitutional infirmities. Whether those committed in the future are afforded due process of law remains a question which will have to be determined on a case by case basis.

THOMAS J. NICHOLS

Constitutional Law—Eighth Amendment—Physical Punishment In Public Schools—In *Ingraham v. Wright*,¹ the United States Supreme Court refused to extend the eighth amendment protection against cruel and unusual punishment² to Dade County, Florida school children who were severely beaten by their principal and other school officials. Additionally, while finding that the pupils had a liberty interest in personal security worthy of protection under the fourteenth amendment,³ the Court ruled that the Dade County system of corporal punishment was not itself violative of due process, in view of the common law safeguards and state tort remedies available in cases of abuse.

Ingraham was a class action brought for injunctive and declaratory relief and damages by students in Drew Junior High School on behalf of all students similarly situated in the Dade County, Florida school system. The plaintiffs alleged that respondent school officials inflicted severe and continuing corporal punishment upon students in Drew Junior High in violation of the constitutional prohibitions against cruel and unusual punishment and deprivation of liberty without due process.

The trial court dismissed the action without the presenta-

1. 97 S. Ct. 1401 (1977).

2. The eight amendment states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

3. In part, the fourteenth amendment states,

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.