

# The Probate Judge and Involuntary Civil Commitment in South Carolina

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Previous studies have scrutinized the decision-making process of physicians involved in the civil commitment of mentally ill persons, but few have examined the process used by probate judges when deciding to issue orders of detention and when conducting commitment hearings. This study consisted of a written survey sent to all probate court judges ( $n = 68$ ) in South Carolina. Factors examined in the survey included the education and experience of the judges, their approach to the decision-making process, their view of lay and expert testimony at commitment hearings, and their knowledge about four items: two common psychiatric terms (delusion and psychosis), the leading suicide risk factor (previous attempt), and the standard of proof required for civil commitment (clear and convincing evidence). We attempt to analyze existing training standards for South Carolina probate judges and to explore possible areas for improvement so that proper dispositions of emergency psychiatric detainees are made and overcrowded emergency centers are less burdened.

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Civil commitment in the United States has evolved since the opening of the Pennsylvania Hospital in 1750.<sup>1</sup> At that time, hospitalization procedures often ignored the individual's constitutional rights and liberty interests. Mentally ill persons could be confined if a family member and a physician determined that there was a need for involuntary hospitalization. Over the following 200 years, most states passed legislation formalizing specific procedures for civil commitment of persons with mental illness who were in need of treatment. With the 1960s civil rights movement and increased attention to the rights of all citizens, awareness of the liberty interests of mental patients came to the forefront and culminated in the passage of the Lanterman-Petris-Short Act (LPS) of 1969 by the California legislature.<sup>2</sup> This law required a demonstration of mental illness, overt dangerousness, or disability so grave that an individual would be at risk of physical harm if not hospitalized. Within

a decade, essentially every state had revised commitment statutes to incorporate similar changes.<sup>3</sup>

In civil commitment proceedings, the finder of fact (in most states a probate judge or his designee) reviews the allegations and usually hears testimony from family members, the alleged mentally ill detainee, and professionals who have evaluated the detainee. After hearing all testimony, the fact finder applies, at minimum, a clear and convincing standard to determine if the detainee meets the jurisdiction's standard for civil commitment.<sup>4</sup> Research into how the fact finder makes such a decision is limited. One study found that judges commit the detainee when there are reports of dangerous behavior and it is the evaluating psychiatrist's recommendation that the detainee be committed.<sup>5</sup> A published report of consecutive commitment hearings in California revealed that detainees were more likely to be released if the judge had a formal legal education.<sup>6</sup> In general, the attitudes of judges toward the commitment process and their likely practices within the process remain obscure.

The purpose of this survey was multifold:

To measure the experience and educational level of probate judges in South Carolina.

To evaluate the extent of their legal and mental health training and their satisfaction with their training.

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To determine how they approach decision-making when issuing detention orders and when deciding whether to commit detainees at hearings.

To measure how they view both professional and lay testimony at commitment hearings.

To assess briefly their knowledge of the following: two common psychiatric terms (delusion and psychosis), the leading risk factor for suicide in adults (prior suicide attempt), and the standard of proof required to commit a detainee in South Carolina (clear and convincing evidence).

To assess their overall satisfaction with the civil commitment process.

### South Carolina Probate Court System

Each of the 46 counties in South Carolina has its own probate court. These courts handle wills and estates, conservator and guardianship proceedings, and commitment to psychiatric hospitals and addiction treatment facilities. In South Carolina, probate judges must be U.S. citizens over the age of 21 and qualified electors in the county they serve. They must have a bachelor's degree or four years' experience as an employee in a probate judge's office in this state. Therefore, it is possible to be elected a probate judge with only a high school education.<sup>7</sup> Three counties do not conduct civil commitment hearings, but pay another county's probate court to conduct them.

### South Carolina Civil Commitment Statutes

South Carolina utilizes two models for civil commitment: a police powers model and a *parens patriae* model. Both models require a commitment hearing in a probate court in the county where the person is located; however, only the police powers model allows for immediate detention.

Under the police powers model, a probate judge, after receiving an affidavit from a family member or another party concerned about a person's welfare, may issue a detention order that allows police to take the alleged mentally ill person into custody and transport him to a local mental health center or emergency room for evaluation. After evaluation, the person may be immediately detained in a psychiatric hospital if the following criteria are met:

There is a written affidavit under oath by a witness stating a belief that the person is mentally ill

and that because of the illness, the person is likely to cause serious harm to himself or others if not immediately hospitalized; the specific type of serious harm thought probable; and the factual basis for this belief.

A certification by a licensed physician stating that the person is mentally ill and that, because of his mental illness, he is likely to harm himself through neglect, inability to care for himself, personal injury, or otherwise, or to harm others if not immediately hospitalized. The certification must contain the grounds for the opinion.<sup>8</sup>

The court appoints two designated examiners to examine the detainee within seven days after his arrival at the psychiatric facility. At least one examiner must be a licensed physician. If the designated examiners agree that the person does not require immediate hospitalization, the court orders his immediate release. If one or both examiners believe the detainee requires commitment, the court appoints the detained person an attorney and a commitment hearing is held within 15 days of the date of admission.

### Methods

This research project was granted exemption from Institutional Review Board approval by the Office of Research Compliance of the University of South Carolina and the Institutional Review Board of the Palmetto Health Alliance, the teaching hospital associated with the University of South Carolina School of Medicine. A preliminary telephone survey of the 46 counties in South Carolina was conducted to determine the number of probate judges who participate in civil commitment proceedings for mental illness ( $n = 68$ ). A 33-item questionnaire (see the Appendix) was subsequently mailed to these 68 probate judges. The recipients were asked to answer each of the multiple-choice questions without consulting books, colleagues, or other materials. Follow-up letters were mailed to the nonresponders after one month and six months. The first portion of the survey contained a series of questions regarding education, job experience, legal training, and mental health training. The participants also responded to questions regarding their experiences, preferences, and perceptions regarding various stages of the civil commitment process. The questionnaire concluded with a brief quiz regarding the legal and mental health areas.

**Results**

Forty-six questionnaires were returned for a 67.6 percent initial response rate. Two of the surveys were discarded because the respondents answered fewer than half of the questions. The data were analyzed on the remaining 44 surveys, for a final response rate of 64.7 percent. Of the 43 South Carolina counties that conduct civil commitment hearings, 17 counties had no response. These counties were scattered geographically throughout the state, predominantly in rural and less populated areas (14 of 17). Approximately two-thirds of respondents were women and 68 percent were over the age of 50 (Table 1).

**Education and Experience**

Thirty-four percent of the probate judges who responded to our survey indicated that their highest level of education was a law degree (Table 1). Two (4.5%) respondents indicated that they had a graduate degree, 9 (20.5%) reported having a college degree, and 12 (27.3%) indicated that they had some college education before assuming the role of probate judge. Six (13.6%) individuals responded that a high school diploma was their highest academic degree.

Over half (56.8%) of our survey group reported that they had served as probate judge for more than 10 years (Table 1). None of the respondents had less than one year of experience, but 9 (20.5%) of the 44 had been in office less than five years. Some South

Carolina probate judges participate in few, if any, civil commitment proceedings, but among our participants, approximately half reported that they receive at least six requests per month.

**Mental Health Training**

Although 82 percent of our sample group indicated that they had some form of legal training before their first term in office, only a fraction (20.5%) claimed any mental health training before assuming the responsibilities of a probate judge. Almost two-thirds of respondents reported having some form of mental health training during their tenure. The majority of this subgroup cited continuing legal education (CLE) and other seminars as their primary source of legal and mental health training.

Seventy-five percent of participants indicated that they need more training in mental health and/or mental health law. Within this subset, 44 percent indicated that such training would be extremely important. When this group was asked to choose the approach they thought would be most conducive to learning, 1 chose self-guided study materials, 5 selected Internet- or DVD-based tutorials, 15 selected live instruction from mental health professionals, and 4 chose live instruction from legal professionals. Eight respondents indicated that live instruction from mental health and legal professionals would be preferable. Unfortunately, one-third of our entire sample group indicated that courses in mental health law are not made available to them.

**Decision-Making Process**

South Carolina law contains legal guidelines for the petition and preliminary detention of mentally ill persons, but a sizable minority (25%) of our survey respondents indicated that they do not rely on specific criteria when deciding whether to authorize a request for emergency detention. Although the results were not statistically significant, our analysis suggests that there is a correlation between having a law degree and the likelihood of using specific criteria for determining whether to issue these detention orders ( $p = .064$ ).

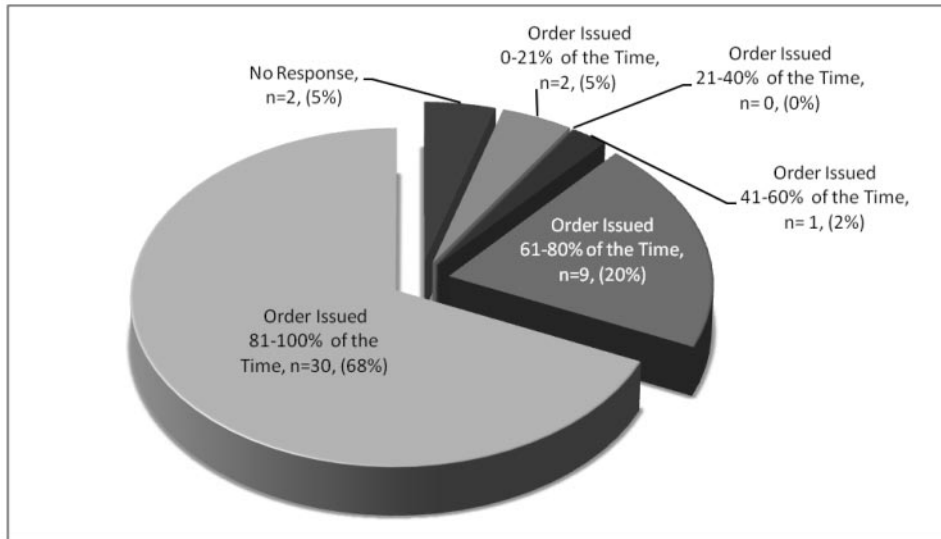
Fifty-seven percent of participants indicated that they are unaware of alternatives to emergency civil commitment for individuals experiencing a mental health crisis in their community. Twenty-four (54.5%) of 44 respondents indicated that a lack of alternatives makes them more likely to issue an order

**Table 1** Survey Respondent Demographics

	<i>n</i>	%
<b>Age</b>		
21–30 y	1	2.3
31–40 y	5	11.4
41–50 y	8	18.2
51–60 y	22	50.0
>60 y	8	18.2
<b>Sex</b>		
Male	16	36.4
Female	28	63.6
<b>Education</b>		
High school	6	13.6
Some college	12	27.3
College degree	9	20.5
Graduate degree	2	4.5
Law degree	15	34.1
<b>Length of service</b>		
<1 y	0	0.0
1–5 y	9	20.5
6–10 y	10	22.7
>10 y	25	56.8

Data are the number of respondents and the percentage of the total group ( $N = 44$ ).

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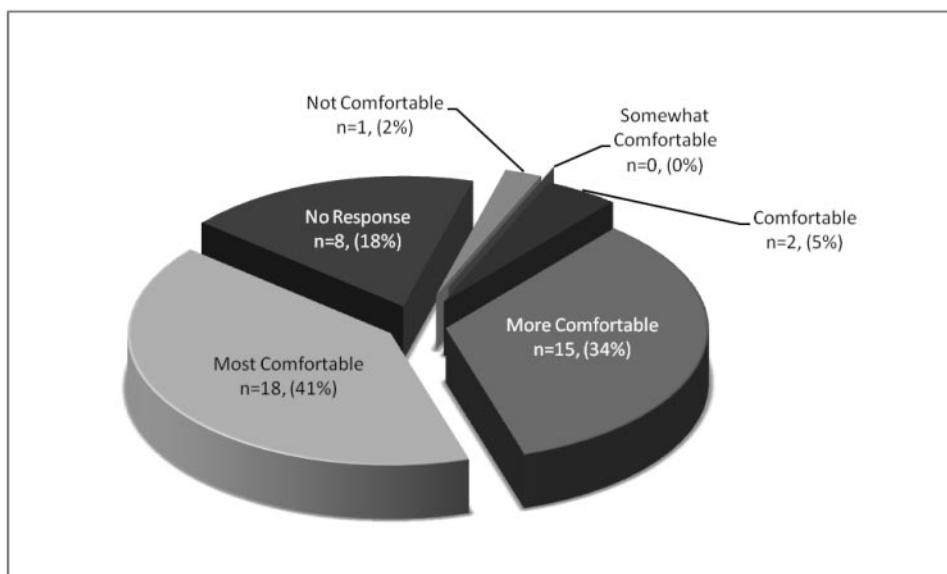
**Figure 1.** Percentage of times that probate judges issue orders of detention after a request from family or other.

of detention. This, in conjunction with South Carolina's low threshold for emergency detention (i.e., probable cause), may explain why over two-thirds of our respondents reported that they issue detention orders more than 80 percent of the time after review of preliminary affidavits (Fig. 1). Compared with their colleagues with less than 10 years of probate service, we found that respondents who have served more than 10 years were not as likely to issue orders of detention as a result of believing that there are no alternatives to emergency civil commitment in their communities ( $p = .025$ ). Furthermore, respondents

with a law degree appeared less likely to be influenced by the relation to the individual of the person (e.g., family member, social worker) petitioning for emergency detention ( $p = .035$ ).

### Perception of Professional and Lay Testimony

A large majority (80%) of survey respondents indicated that they are comfortable presiding over commitment hearings (Fig. 2). Only 34 judges answered the question about how frequently they commit patients during probate court hearings, but of those, a majority (67.6%) indicated that they com-



**Figure 2.** Comfort in presiding over civil commitment hearings.

mit patients more than 60 percent of the time. Twenty-eight (64%) of the 44 respondents identified the testimony of psychiatrists as most useful when deciding whether to commit an individual for treatment and almost three-fourths of the group indicated that it is their experience that psychiatrists provide good or excellent testimony. Two (4.5%) judges indicated that family members' testimony is most influential, while one (2%) selected the social worker's testimony and one selected the patient's. Three (7%) selected multiple answers (even though instructed to select only one answer), and nine (20%) did not respond to this question.

### **Knowledge Regarding Civil Commitment**

Few respondents (13%) achieved a perfect score on the brief (four-item) multiple-choice quiz pertaining to mental health and civil commitment law (questions 26–29). Those with a law degree were significantly more likely ( $p < .001$ ) to perform better on the quiz. Fifty-nine percent selected the correct definition of delusion and 75 percent selected the correct definition of psychosis. Only seven participants (15.9%) recognized that a prior suicide attempt is the leading risk factor for suicide in adults. Seventy-three percent of our sample group recognized that clear and convincing evidence is necessary for civil commitment of a mentally ill person.

### **Discussion**

The judges conducting civil commitment hearings in South Carolina are a diverse group in both formal education and practical on-the-job experience. Consequently, the methods they use in decision-making are likely to be diverse as well. It is unclear if the survey respondents are an accurate representation of South Carolina probate judges, because we do not have data on the ages of nonresponders and only educated guesses can be made about the sex of some nonresponders based on their first names (e.g., Kelly, Caroll). Most of the nonresponders were from rural, less populated counties. This survey sample indicates that there may be some degree of job stability among the study participants, as the majority had been a judge or assistant judge for over 10 years. Given this degree of experience, their poor performance on the question assessing knowledge of the criterion for civil commitment was surprising. Those with a law degree performed better, suggesting that educational level may be more rele-

vant than experience. However, regardless of educational level or experience, judges were very likely to issue orders of detention, as almost 70 percent of judges issued them 81 to 100 percent of the time. At actual commitment hearings, judges with a law degree appear more protective of individuals' liberty interests and are less likely to rubber stamp involuntary hospitalization on the basis of information from family members or others. They are also more likely to utilize specific criteria in the decision-making process. While respondents indicated a propensity to commit in the large majority of cases, their response to this question was an estimate and may have been inaccurate. An argument could be made for the need for probate judges to hold a law degree or, at the very least, to be provided formal education about mental health law and demonstrate competency through examination or peer review.

Most respondents desired more mental health training, yet they felt that the training was not currently available to them. There was a preference for live instruction from mental health professionals, and since forensic psychiatrists have specialized training in the legal aspects of mental health treatment, they would be particularly suited to address this need. As the field of forensic psychiatry continues to grow, the manpower needed to provide this instruction should become increasingly available. Consideration should be given to include training in the field in the continuing legal education (CLE) program for probate judges.

Probate judges in South Carolina indicated that they rely heavily on the testimony of psychiatrists at commitment hearings and that they have been very pleased with the quality of psychiatric testimony that they have received. In our experience, civil commitment hearings in South Carolina are rarely adversarial, and it is uncommon for a probate judge to make a decision that is contrary to the recommendation of the evaluating psychiatrist. In part, it may be that judges feel uncomfortable with their own level of training. It could be argued that relying on the psychiatrist makes the clinician the decision-maker and that probate judges merely rubber stamp the psychiatrist's opinion rather than independently consider evidence from the medical record or the patient's testimony. This phenomenon is likely to be jurisdiction specific, as commitment hearings in other states may be more attentive to an individual's liberty interests. In addition, in South Carolina, patients are

provided one legal representative who wears the potentially conflicting hats of both attorney and guardian *ad litem*. Having the role of guardian as well as attorney may confound the attorney's ability to advocate for those patients who desire release. This duality may diminish their impact on the ultimate dispositional outcome and may also explain why a large percentage of patients end up being committed.

This study has several limitations. Because the judges knew that the surveyors were psychiatrists, they may have been more likely to report favorably about the role of psychiatrists at commitment hearings so as to not offend the surveyors. Our survey group was also relatively small ( $N = 44$ ), in part because only 68 probate judges preside over civil commitment hearings in a state with more than 4 million citizens. A study in a larger jurisdiction may yield more statistically significant findings. Future research comparing the differences in civil commit-

ment procedures across jurisdictions could help identify the process that ideally balances the state's need for police powers with individuals' liberty interests. Future research could also focus on developing a model for the training of probate judges and verifying that such a model is effective.

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8. S.C. Code Ann. § 44-17-410 (1976)

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### Appendix

Please answer the following questions based on your working knowledge and without consulting books, colleagues, or other materials. Choose only one answer for each question. Thank you.

1. How long have you served as a probate judge or associate probate judge?  
A) <1 year      B) 1-5 years      C) 6-10 years      D) >10 years
2. What is the highest educational degree you obtained before beginning your term as probate judge or associate probate judge?  
A) < High School  
B) High School  
C) Some College  
D) College degree  
E) Graduate degree  
F) Law degree
3. If not answered by question 2, did you have any legal training prior to serving as a probate judge or associate probate judge?  
A) Yes      B) No  
If yes, what type? \_\_\_\_\_
4. If not answered by question 2, did you have any mental health training prior to serving as a probate judge or associate probate judge?  
A) Yes      B) No  
If yes, what type? \_\_\_\_\_
5. Have you received any formal legal training **during** your term?  
A) Yes      B) No  
If yes, what type? \_\_\_\_\_
6. Have you received any formal mental health training **during** your term?  
A) Yes      B) No  
If yes, what type? \_\_\_\_\_

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7. In an average month, how many requests for emergency detention and evaluation for involuntary mental health commitment do you receive?  
A) 0–1      B) 2–5      C) 6–10      D) >10
8. Following a request for emergency detention, do you utilize specific criteria to determine when to sign off on a detention order?  
A) Yes      B) No
9. If you answered YES to question 8, what criteria do you use to make your decision? \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
10. Does a consideration of who initiated a petition (e.g., family, police, or physician) influence your decision to sign off on a detention order?  
A) Yes      B) No
11. If you answered YES to question 10, whose request for an order of detention tends to be most persuasive?  
A) Family member      B) Police      C) Mental Health provider      D) Acquaintance
12. In what percentage of requests for detention do you estimate you issue an order of detention?  
A) 0–20%      B) 21–40%      C) 41–60%      D) 61–80%      E) 81–100%
13. Are you aware of any alternatives in your community for mental health crisis intervention other than petition for emergency admission?  
A) Yes      B) No
14. If you answered YES to question 13, what percentage of the time do you discuss these alternatives with the petitioner?  
A) 0–20%      B) 21–40%      C) 41–60%      D) 61–80%      E) 81–100%
15. If your community lacks alternatives to civil commitment for crisis stabilization, does this make you more likely to issue an order of detention?  
A) Yes      B) No      C) Not applicable (my community has alternatives)
16. In comparison to your other duties, how comfortable are you in reviewing petitions for emergency detention orders? (scale of 1–5 with 1 = least comfortable, 5 = most comfortable)  
1      2      3      4      5
17. In comparison to your other duties, how comfortable are you at a commitment hearing in deciding whether or not to commit the person? (scale of 1–5 with 1 = least comfortable, 5 = most comfortable)  
1      2      3      4      5
18. In what percentage of hearings do you involuntarily commit the person?  
A) 0–20%      B) 21–40%      C) 41–60%      D) 61–80%      E) 81–100%
19. Regarding testimony at civil commitment hearings, which of the following testimony is **most** useful in making a decision as to whether the person should be committed? (Choose one only)  
A) Family member      B) Psychiatrist      C) Social Worker      D) Patient
20. How would you rate the overall quality of the written designated-examiner reports that you have encountered?  
A) Poor      B) Fair      C) Good      D) Excellent
21. How would you rate the quality of designated-examiner testimony at commitment hearings?  
A) Poor      B) Fair      C) Good      D) Excellent
22. Do you believe you need more training in mental health and/or mental health law?  
A) Yes      B) No

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23. If you answered YES to question 22, how important do you think this training would be? (1 = not very important, 5 = extremely important)
- 1            2            3            4            5
24. If you answered YES to question 22, what format would be most conducive to practical learning?
- A) List of reference materials for self guided study
  - B) Internet- or DVD-based tutorial
  - C) Live instruction from mental health professionals
  - D) Live instruction from legal professionals
25. Are courses in mental health law made available to you as probate judge?
- A) Yes            B) No
26. Which of the following correctly describes a **delusion**?
- A) A false belief which is firmly held despite evidence to the contrary
  - B) A false sensory perception such as seeing or hearing things that are not present
  - C) Impairment of thinking where a patient becomes disoriented to time, place, or events
  - D) Fragmentary thoughts or speech that changes direction and speed frequently
27. Which of the following correctly describes **psychosis**?
- A) A loss of contact with reality
  - B) Rapidly shifting mood states
  - C) Repetitive, uncontrollable behaviors such as counting or hand washing
  - D) An extreme elevation or euphoria in mood
28. Which of the following is the leading risk factor for suicide in adults?
- A) Recent divorce or job loss
  - B) Major depressive disorder
  - C) Previous suicide attempt
  - D) Psychotic behavior
29. What standard of proof do you require in order to civilly commit a mentally ill person?
- A) Probable cause
  - B) Preponderance of the evidence
  - C) Clear and convincing evidence
  - D) Beyond a reasonable doubt
30. How satisfied are you with the civil commitment process in South Carolina? (1 = not at all satisfied, 5 = very satisfied)
- 1            2            3            4            5
31. If you could make changes to the civil commitment process, what would they be?

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32. What is your gender?
- A) Male            B) Female
33. What is your approximate age?
- A) 21–30            B) 31–40            C) 41–50            D) 51–60E) >60

Thank you for your time! Please return survey in the stamped enclosed envelope.

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