The Assisted Outpatient Treatment Jury Trial

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INTRODUCTION

For well over a century, New York has been at the forefront of developing legal frameworks and treatment programs to assist mentally ill individuals.[1] Just over twenty years ago, New York

[*] The author has jury trial experience in Assisted Outpatient Treatment (AOT) cases, federal §1983 cases, as well as municipal negligence cases. He has worked on the AOT program for New York City and Nassau County. The views expressed in this article are solely those of the author and do not represent views, positions, or statement of any government legal office.

[1] *See* BONITA WEDDLE, N.Y. STATE ARCHIVES, MENTAL HEALTH IN NEW YORK STATE, 1945–1988, at 1 (1998), http://www.archives.nysed.gov/common/archives/files/res_topics_health_mh_hist.pdf [https://perma.cc/346E-ZNN6] (Weddle describes that "New York has for more than one hundred years been a pioneer in the development of mental health treatment and research" and "has been unusually rich in the cultural

adopted one of its most ambitious efforts—assisted outpatient treatment ("AOT")—which can mandate court oversight of psychiatric care for mentally ill individuals with a history of noncompliance with treatment leading to hospitalizations or violent acts.

The AOT program was created in 1999 through the enactment of §9.60 of the Mental Hygiene Law and includes an assortment of mental health services. AOT requires some type of case supervision and can include medication, therapy, vocational activities, education, substance abuse treatment, supervision of living arrangements, and other services relating to treating the person's mental illness.[2] While New York did not invent the idea of AOT, it runs the most active and well-funded program in the nation.[3]

The AOT legislation is called "Kendra's Law," after Kendra Webdale, a journalist from Buffalo, was pushed onto Manhattan subway tracks and killed by Andrew Goldstein—who suffered from paranoid schizophrenia and was not taking his psychiatric medication at the time of the incident.[4] Kendra's Law was passed

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resources and political will needed to develop and implement bold reforms.").

[2] *See* N.Y. MENTAL HYG. LAW § 9.60(a)(1) (McKinney 2021).

[3] *See* E. Fuller Torrey & John D. Snook, *Assisted Outpatient Treatment Enters the Mainstream*, 34 PSYCHIATRIC TIMES, no. 4, 2017, https://www.psychiatrictimes.com/view/assisted-outpatient-treatment-enters-mainstream [https://perma.cc/Q8L9-TWQ3]. The first AOT reportedly took place at St. Elizabeth's Hospital in Washington, D.C. in 1972. *Id.* Dr. Richard Peele, a psychiatrist, and Harry Fulton, a chief public defender, entered into an agreement whereby a patient's discharge from a psychiatric ward was conditioned on accepting outpatient medication. *Id.* By 1984, this early version of AOT was reportedly used at St. Elizabeth's Hospital on 293 patients with favorable results and similar programs spread to other states. *Id.* The concept of AOT did not become widely known until New York implemented Kendra's Law. *Id.* Other states adopted outpatient treatment laws but never funded them to the same extent as New York, whose AOT program was passed with a $52 million dollar budget. *See* Mark Fitz, *A Doctor's Fight: More Forced Care for the Mentally Ill*, WALL ST. J. (Feb. 1, 2006), https://www.wsj.com/articles/SB113876185080261746 [https://perma.cc/KG84-5P28]. California implemented "Laura's Law," but it can only be used in counties that choose to enact outpatient programs. *See also* Andrea Reynosa, *Is California Committed?: Why California Should Take Action to Address the Shortcomings of Its Assisted Outpatient Commitment Statute*, 88 S. CAL L. REV. 1021, 1031–32 (2015) ("[A] major shortcoming of the law is that many counties have failed to implement it.").

[4] *See In re* K.L., 806 N.E.2d 480, 482 (N.Y. 2004) (describing the Webdale tragedy and legislative response). Goldstein's attack placed a spotlight on mental health treatment. *See* Ali Watkins, *Horrific Crime on the Subway Led to Kendra's Law*, N.Y. TIMES (Sept. 11, 2018), https://www.nytimes.com/2018/09/11/nyregion/kendras-law-andrew-goldstein-

in an effort to keep outpatients, who are likely to be dangerous to themselves or others, connected to mental health services. AOT balances a mental health outpatient's need for court-supervised mental health services against their liberty interest of determining their own care. Applications should be guided by the principle that AOT orders are intended to be remedial as opposed to punitive. In upholding the constitutionality of Kendra's Law, the Court of Appeals described the law as "adopted in effort to 'restore patients' dignity, and . . . enable mentally ill persons to lead more productive and satisfying lives."[5]

In crafting Kendra's Law, the legislature guaranteed the right to jury review for those placed on the program.[6] While rarely demanded, this ability honors the deep-rooted ideal that one's fellow citizens can serve as a check on government oversight. The practice and procedure of AOT jury trials has received virtually no scholarly attention and this piece sheds light on them. Through discussing jury proceedings this article also provides an overview of the development of an overlooked area of mental health law.

In the initial section, this article discusses the general framework of an AOT investigation, initial court proceedings, and the AOT criteria. Thereafter, the aspects of trial practice unique to AOT trials are discussed. This piece explores each phase of the AOT jury trial from the petitioner's perspective.

I. GETTING TO TRIAL

Before an AOT case reaches court, there is an investigation process that involves gathering relevant records and having the patient attend a psychiatric evaluation. The responsibility of

subway-murder.html [https://perma.cc/8DP7-M3NZ] ("It was a horrific crime that shocked the city and the nation, highlighting deep flaws in the care of mentally ill people."). Goldstein used the insanity defense at both of his trials with the first resulting in a hung jury and the second a conviction. *See* People v. Goldstein, 843 N.E.2d 727, 729 (N.Y. 2005). The conviction was reversed because the judge admitted into evidence hearsay from an expert witness based on interviews with individuals who knew Goldstein. *See id.* at 729–30. Ultimately, Goldstein pled guilty to manslaughter and was sentenced to twenty-three years. *See* Watkins, *supra*. He was released in the fall of 2018 after serving nineteen. *See id.* The New York Times described Goldstein "walked out of a prison and into a mental health system heavily influenced by his crime." *Id.*

[5] *In re* K.L., 806 N.E.2d at 482.

[6] N.Y. MENTAL HYG. LAW § 9.60(m) (McKinney 2021).

investigating and pursuing an AOT petition can be undertaken by various entities, such as a hospital, department of health, department of social services, or a prison administrator.[7] Such entities will secure medical records, which have confidentiality protections under §33.13 of the Mental Hygiene Law, from psychiatric hospitals and other treatment providers.[8] In investigating AOT cases, a petitioner is obligated to comply with HIPPA and provide notice to a patient before seeking their records.[9] Given the use of sensitive records, AOT matters are not traditional civil cases and access to court files require an unsealing order to open.[10] If the candidate's treatment records appear to support an AOT application the petitioner will obtain an assessment of the candidate by a psychiatrist to determine if an AOT petition should ultimately be pursued in court.[11] The subject has the right to counsel at the evaluation and court proceedings from the Mental Hygiene Legal Service, who are advocates employed by the state government and specialize in mental health law.[12] AOT respondents can obtain private counsel, but that is a rare occurrence.

The AOT law dictates that a judge initially decides if a candidate meets the criteria for mandated treatment at a bench hearing.[13] Such hearings primarily involve the judge receiving the testimony of the psychiatrist who evaluated the person alleged to need oversight.[14] Hearings also generally require an exploration of a candidate's mental health history, including

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7 *See* N.Y. MENTAL HYG. LAW § 9.60(e)(1) (McKinney 2021). Petitions are customarily filed by a local government entity, such as a county's mental health department, who also arranges for the development of treatment plans and the delivery of services. *See* Torrey & Snook, *supra* note 3.

8 N.Y. MENTAL HYG. LAW § 33.13(c)(12) (McKinney 2021). The purpose of this provision is to allow access to mental health records only after a judge passed on the propriety of requested inspection to protect those involved in mental health treatment from "humiliation, embarrassment, and disgrace." *See* Munzer v. Blaisdell, 49 N.Y.S.2d 915, 916 (1944).

9 *See In re* Miguel M., 950 N.E.2d 107, 110 (N.Y. 2011) (holding access to mental health records must be predicated on notice to patient so patient is afforded chance to object to disclosure).

10 *See* N.Y. MENTAL HYG. LAW § 9.31(f) (McKinney 2021); Mickey Keane & Gerald Lebovits, *Mental Hygiene Hearing in New York*, 88 N.Y. ST. B. ASS'N J., June 2016, at 39, 40 (discussing retention cases).

11 *See* N.Y. MENTAL HYG. LAW § 9.60(e) (McKinney 2021).

12 *See* N.Y. MENTAL HYG. LAW § 9.60(g) (McKinney 2021).

13 *See* N.Y. MENTAL HYG. LAW § 9.60(j) (McKinney 2021).

14 *See* N.Y. MENTAL HYG. LAW § 9.60(h) (McKinney 2021) (requiring the examining physician testify at the bench hearing). Additional witnesses for the petitioner at the bench hearing are not customary, however, they are permitted.

admitting into evidence a selection of the aforementioned records. The legal criteria petitioners must establish is defined in §9.60(c). In brief, a petitioner must prove the AOT candidate: (1) has a mental illness; (2) needs AOT supervision to live safely in the community; (3) cannot engage in their own mental health treatment voluntarily; (4) has the requisite history of mental illness to be placed on the program, which includes hospitalizations or violent acts attributable to noncompliance; (5) needs the program to prevent a relapse or deterioration of a candidate's mental state which could lead to serious harm to self or others; and (6) that the candidate will benefit from outpatient supervision.[15]

While AOT jury trials are infrequent, the bench hearings that precede them are commonplace. Along with retention applications and treatment over objection cases, AOT hearings regularly appear on the mental hygiene calendars of state supreme courts.[16]

AOT applications are either classified as initial or renewal

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[15] *See* N.Y. MENTAL HYG. LAW § 9.60(c) (McKinney 2021). The explicit criteria of the law reads:

A person may be ordered to receive assisted outpatient treatment if the court finds that such person:

(1) is eighteen years of age or over; and

(2) is suffering from a mental illness; and

(3) is unlikely to survive safely in the community without supervision, based on a clinical determination; and

(4) has a history of lack of compliance with treatment for mental illness that has:

(i) prior to the filing of the petition, at least twice within the last thirty-six months been a significant factor in necessitating hospitalization in a hospital, or receipt of services in a forensic or other mental health unit of a correctional facility or a local correctional facility, not including any current period, or period ending within the last six months, during which the person was or is hospitalized or incarcerated; or

(ii) prior to the filing of the petition, resulted in one or more acts of serious violent behavior toward self or others or threats of, or attempts at, serious physical harm to self or others within the last forty-eight months, not including any current period, or period ending within the last six months, in which the person was or is hospitalized or incarcerated; and

(5) is, as a result of his or her mental illness, unlikely to voluntarily participate in outpatient treatment that would enable him or her to live safely in the community; and

(6) in view of his or her treatment history and current behavior, is in need of assisted outpatient treatment in order to prevent a relapse or deterioration which would be likely to result in serious harm to the person or others as defined in section 9.01 of this article; and

(7) is likely to benefit from assisted outpatient treatment.

Id.

[16] *See* Keane & Lebovits, *supra* note 10, at 39–40.

proceedings. Initial AOT applications occur when a candidate does not have an order and a petitioner requests they be placed on one. When an AOT order is nearing its end, Kendra's Law requires the patient to be re-examined for the purpose of ascertaining the patient's progress with court-ordered treatment and having a psychiatrist make an assessment of whether the patient should remain in the program.[17] One option upon reassessment is to recommend the subject remain on AOT, in which case a renewal petition will be pursued.[18] The other option is to let the AOT order end. Under MHL § 9.60(j)(2), both initial and renewal orders can last up to a year. Jury trials in renewal proceedings can occur when the AOT patient feels they no longer need the program. Some patients experience their order renewed multiple times and wish to be free from oversight. Others feel they are not benefiting from AOT.

In renewal proceedings, the requisite history of mental illness does not have to be proven.[19] More specifically, under § 9.60(c)(4), petitioner must prove the requisite history of mental illness, which includes two timely hospitalizations, or a timely violent act

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[17] *See* MENTAL HYG. LAW § 9.60(k)(1) (McKinney 2021) ("Prior to the expiration of an order pursuant to this section, the appropriate director shall review whether the assisted outpatient continues to meet the criteria for assisted outpatient treatment.").

[18] *See* MENTAL HYG. LAW § 9.60(k) (McKinney 2021). Once a petition is filed to renew an AOT order, the prior order remains in effect until the petition is adjudicated. *Id.* Adjournments can therefore delay the expiration of an AOT order. *Id.*

[19] *See* MENTAL HYG. LAW § 9.60(k) (McKinney 2021) ("The procedures for obtaining any order pursuant to this subdivision shall be in accordance with the provisions of the forgoing subdivisions of this section; provided that the time restrictions included in paragraph four of subdivision (c) of this section shall not be applicable."). Once a patient is released from an AOT order, the petitioner will be obligated to meet the criteria of § 9.60 all over again should the patient require AOT in the future. *Id.* It is not uncommon for patients to have breaks in between orders. For example, the patient could move out of state, be released from the program, or undergo a lengthy hospitalization that makes an AOT order unnecessary. Hospitalizations used to prove the necessary history of mental illness in a prior application become stale as time passes and move outside of the law's three year look back period. The Kings County decision of *In re Karpati*, 93 N.Y.S. 3d 517, addressed a collateral estoppel argument regarding hospitalizations proven in a prior AOT petition. If the previous hospitalizations are within three years of a new petition said prior court determination can be utilized to establish the requisite history of mental illness. *See* 93 N.Y.S.3d 517, 520 (Sup. Ct. 2014). Justice Bernard Graham held "the respondent's previous non-compliance with mental health treatment is, in the court's opinion, a textbook application of the principle of collateral estoppel." *Id.* at 521.

or threat of a violent act, as the result of a lack of compliance from treatment.[20] Original proceedings are therefore more complicated in that they involve advocacy over whether non-compliance was a significant factor leading to hospitalizations or a violent act.

If a patient wishes to challenge a jurist's determination placing them on AOT, the legislation grants the right to have the matter re-litigated in what the statute describes as an "appeal," but is essentially a traditional jury trial where the party asking for AOT maintains the burden of proof.[21] Despite the rarity of AOT trials, there is a tradition of jury review regarding questions of mental illness dating back to English common law.[22] New York, for well over a century, has allowed hospital patients the right to a trial when they challenge their confinement.[23] The AOT law specifically adopted how patients challenging psychiatric retention can have their orders reviewed by a jury.[24] An AOT respondent can alternatively request a rehearing before another judge. Waiving jury review makes it quicker to get a court date and such proceedings are handled in a fraction of the time.

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20 MENTAL HYG. LAW § 9.60(c)(4) (McKinney 2021).

21 *See* MENTAL HYG. LAW § 9.60(m) (McKinney 2021) (stating that AOT appeals should be heard in the same matter as inpatient psychiatric hospitalization appeals under § 9.35). After the enactment of AOT, the first AOT jury trial took place in Manhattan. *See* Cohen v. Anne C., 732 N.Y.S.2d 534 (Sup. Ct. 2001). Post-trial motions followed and Justice Norman C. Ryp began by stating, "[w]hat are the procedures and standards applicable in the very first 'Kendra's Law' jury appeal under Mental Hygiene Law §§ 9.60(m) and 9.35? Substantial novel issues of first impression exist! Do such differ from a traditional jury trail, under C.P.L.R. Article 41? If so, how?" *Id*. at 535 (alteration in quotation). Much of Justice Ryp's opinion was overturned as advisory but his decision illustrates the uniqueness of this area. *See* Cohen v. Anne C., 753 N.Y.S.2d 500, 502 (N.Y. App. Div. 2003). In the appeal, the First Department clarified that the burden of proof at an AOT trial remains with petitioner. *Id.*

22 *See Cohen*, 732 N.Y.S.2d at 540 ("[T]he United States and specifically New York State have a long history of providing juries of one's peers to determine factual issues of mental illness with respect to competency hearings and the need for involuntary retention."). The use of juries in this area began as a form of advisory assistance to American courts and was borrowed from the British system, which required that for a petitioner to obtain a "*writ de lunatico inquirendo*," a jury must be summoned to determine if the person is in need of confinement or the deprivation of control over their property. *See* Sporza v. German Savings Bank, 84 N.E. 406, 408 (N.Y. 1908).

23 The right to a jury trial on the "fact of lunacy" became a statutory right in New York in 1842. *See* 1842 N.Y. Laws 141. New York's Constitution guarantees a right to trial by jury "in all cases in which it has heretofore been guaranteed by constitutional provision." N.Y. CONST. art. I § 2.

24 *See* N.Y. MENTAL HYG. LAW § 9.60(m) (McKinney 2021).

Further, bench re-hearings permit a less public airing of one's mental health history. Bench hearings and jury trials are open to members of the public at the discretion of each judge.

II. JURY SELECTION

For this section on selection, this article paraphrases how aspects of the program are presented to prospective jurors. The amount of information discussed with panelists differs based upon preferences in discussing topics, objections raised and time restrictions. In general, the nature of the program, medication, and the consequences of refusal to comply with an order are addressed.

Jury selection in AOT cases, as with civil cases in New York, is run by the attorneys.[25] Intervention from a court official is only necessary when there is a dispute, which greatly delays the process. Only in rare instances will a judge supervise jury selection, such as when there is great animosity between the attorneys, or when a respondent wishes to proceed *pro se*.[26]

It is important for attorneys to instruct the panel that there is an open line of communication. The idea is to encourage questions from prospective jurors because jurors are not expected to understand unfamiliar concepts in the mental health field. In fact, when prospective jurors are asked about their knowledge of *Kendra's Law*, few acknowledge familiarity and petitioner's attorney serves as an ambassador for the program. Trial judges who have not covered the mental hygiene part often learn of the intricacies of the program while a trial is proceeding.[27] Occasionally, a description similar to this section must be

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[25] *See* ANN PFAU, NEW YORK STATE UNIFIED COURT SYSTEM, IMPLEMENTING NEW YORK'S CIVIL VOIR DIRE LAW & RULES (2009), http://ww2.nycourts.gov/sites/default/files/document/files/2018-06/ImplementingVoirDire2009.pdf [https://perma.cc/VJC9-DGWB].

[26] There is no prohibition on an AOT respondent representing themselves. The Court of Appeals determined no finding of incapacity is necessary to obtain a Kendra's Law application. *See In re* K.L., 1 N.Y.3d at 370. At times, a court will conduct an inquiry to assess the propriety of permitting a litigant to proceed pro se.

[27] N.Y. MENTAL HYG. LAW § 9.60(r)(2) (McKinney 2021). Section 9.60 of the Mental Hygiene requires the New York State Office of Mental Health, "in consultation with the office of court administration, [to] establish mental health training program[s] for supreme court and county court judges and court personnel," that focus on AOT petitions and "address issues relating to mental illness and mental health treatment." *Id.*

explained to judges during a pretrial conference.

Petitioner's attorney can begin by explaining to jurors that the AOT program aims to provide supervision and treatment to mentally ill individuals who have a history of not complying with treatment. This opens the door to panelists expressing familiarity with the topic of mental illness, which is an opportunity for attorneys to explore biases with regard to beliefs about illnesses the jurors have been exposed to.

Given AOT aims to keep mentally ill individuals from repeat psychiatric admissions, the nature of hospitalizations are discussed. These hospitalizations can take a variety of forms regarding their length of time or the type of supervision required.[28] For example, a patient can be brought to a local hospital for an emergency room visit that lasts hours or endure a relatively short admission of a few days. Furthermore, there can be a longer admission for weeks or months. In the case of long-term treatment, there can be a hospitalization at an institution run by the state government. It can be helpful to jurors if attorneys explain a brief snippet of what life can be like in the in-patient setting.[29]

It is important to convey to jurors that when someone is hospitalized for psychiatric reasons, they are no longer considered "in the community." This concept is significant because the AOT program's mission is to keep psychiatric patients out of the hospital.[30] Potential living situations for AOT patients involve a variety of possibilities in the community, such as living in property the patient owns, living with family, renting, residing in a group home or some type of supervised housing or a shelter.

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[28] *See* N.Y. MENTAL HYG. LAW §§ 9.13, 9.15, 9.27, 9.39 (outlining the four categories of admissions to psychiatric hospitals: Voluntary Admissions, Informal Admissions, Involuntary Admission on Medial Certifications (also known as 2PC), and Emergency Admissions); Jonathan Rabinowitz, et al., *Differential Use of Admission Status in a Psychiatric Emergency Room*, 23 BULL. AM. ACAD. PSYCHIATRY L. 595, 597–98 (1995) (summarizing the four categories of admissions).

[29] *See, e.g.*, BELLEVUE: INSIDE OUT (Teale-Edwards Productions 2001). This 2001 documentary from the America Undercover series, directed by Maryann DeLeo, provides a revealing look at life in a psychiatric ward.

[30] *See* Daniel Yohanna, *Deinstitutionalization of People with Mental Illness: Causes and Consequence*, 15 AMA J. OF ETHICS 886, 886–87 (2013). In the 1960s and 1970s, mentally ill patients were often held in long term institutions or hospitals for longer periods of time than were necessary or moral. *Id.* In the last few decades, there has been an effort, which AOT is part of, to allow those afflicted with mental illness to live more productive lives outside of the hospital setting. *Id.*

The AOT program should be described in terms of what it means to the typical patient while avoiding the specifics related to the litigant. AOT involves the provision of mental health services by a treatment team, often consisting of social workers, therapists, nurses, and physicians, who meet with the patient at intervals to monitor compliance with treatment and medication. The treatment providers can also assist with transportation needs as well as exploring educational or vocational aspirations. AOT programs may also include housing supervision, where providers serve as a liaison toward ensuring the patient has a place to live. It can also be helpful to describe how typical patients come to the attention of the AOT program, and the work performed to investigate candidates.

A. Discussion of the Examining Psychiatrist

The psychiatrist assigned to evaluate the candidate for AOT becomes familiar with the patient's background through review of the records the petitioner obtains. At the evaluation, there is a question-and-answer session revolving around the person's illness, history, and medications. Thereafter, the examining doctor makes a decision whether to recommend AOT. The evaluating psychiatrist is petitioner's principal witness. In some trials, this doctor will be the only witness called by petitioner. It is therefore necessary to explore biases panelists may have towards the field of psychiatry. If a juror is distrustful of the discipline, they must be questioned on the depth of any prejudicial feelings.

The evaluating psychiatrist is obligated to evaluate the patient and ultimately testify how the candidate meets the criteria for AOT. Each panelist should express confidence they can cogently evaluate the elements of §9.60(c). Prospective panelists occasionally reveal discomfort with their ability to critique the medical determinations of the evaluating psychiatrists. Some express the doctor's opinion is something they do not have the competence to review. Such panelists are too biased in favor of the petitioner to be permitted to serve.

B. Medication

The concept of psychiatric medication should be discussed as medications are customarily part of AOT orders. A patient on AOT is ordinarily required to be seen by a psychiatrist at intervals to assess the patient's status and the effectiveness of the type and dosage of any medication. AOT can also involve checking blood levels to ensure medications are taken within the therapeutic range. The jury panel should be asked whether they can accept that a court has the ability to order that a patient accept medication when a respondent believes he does not need it. A proper balance is sought in jurors as the petitioner's counsel will respect a juror who believes an AOT patient should have the right to make an informed decision concerning their medical choices.

The interests a jury will balance were discussed, in a different context, in the Court of Appeals decision, *Rivers v. Katz*.[31] In *Rivers*, the court addressed a challenge from mentally ill patients to enjoin the non-consensual administration of anti-psychotic drugs during psychiatric hospitalizations. [32] *Rivers* held that the fundamental right to control one's treatment, in terms of taking prescribed psychiatric medication, can yield to the government in

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[31] Rivers v. Katz, 495 N.E.2d 337 (N.Y. 1986).

[32] *Id.* at 339. In *Rivers v. Katz*, mentally ill petitioners sought to enjoin the nonconsensual administration of antipsychotic drugs during the time they were committed to hospital and to obtain a declaration of their rights to refuse medication. *Id.* The Court held that while the due process clause of the New York State Constitution affords patients a fundamental right to refuse medical attention, this right is not absolute and may yield when there are compelling state interests. *Id.* at 341–43. The Court stated, "[i]t is a firmly established principle of the common law of New York that every individual 'of adult years and sound mind has a right to determine what shall be done with [their] own body.'" *Id.* at 341 (citing Schloendorff v. Soc'y of N.Y. Hosp., 105 N.E. 92, 93 (N.Y. 1914)). *Rivers* found that neither the fact that a person is mentally ill, nor that they have been involuntarily committed, constitutes a basis to conclude they lack the capacity to refuse medication. *Id.* at 342–43. *Rivers* further described that the state's police power justifies forced medication in an emergency situation where the patient is an imminent danger, a power which lasts as long as the emergency persists. *Id.* at 343. For those not in imminent danger, a court proceeding is required before drugs can be forcibly administered. *Id.* at 343–44. At the proceeding, patients are afforded counsel and the petitioner bears the burden of proving that the patient lacks capacity. *Id.* at 344. The Court continued "due process requires that a court balance the individual's liberty interest against the State's asserted compelling need on the facts of each case to determine whether such medication may be forcibly administered." *Id.* at 345.

the appropriate instance.[33] This is a fair guiding principle in selecting panelists for an AOT trial. Namely, a juror should be able to conclude that if presented with sufficient proof, the juror can make a finding that an AOT candidate needs mandated outpatient treatment.

The AOT program never involves the physically forced administration of medication. In other words, treatment providers cannot attempt to force a pill down a patient's throat or administer an injectable medication by physical force. Decisions to force medication can only be made in circumstances discussed in *Rivers*, namely in emergency circumstances, or when a patient has been admitted to a hospital and has been adjudicated as incapable of making their own medical decisions.[34] The AOT law also makes clear that the failure to comply with an order shall not be grounds for a finding of civil contempt.[35] However, the law permits, in a case of non-compliance, transporting the patient to a hospital for an assessment of the patient's safety.[36]

C. Removal

If an AOT patient refuses or finds themselves unable to comply with mandated treatment, the force of the order may come into play. Counsel should explore if the juror can accept a process called "removal" as an aspect of the program. Critics of AOT view removal as lamentable coercion.[37] Nevertheless, the

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[33] *Id.* at 492. Jury review was not available during this forced medication proceeding. *See id.* at 498.

[34] *Rivers*, 495 N.E.2d at 343. The *Rivers* decision noted, "[t]he most obvious example" of the right to override a patient's objection to medication "is an emergency situation, such as when there is imminent danger to a patient or others in the immediate vicinity." *Id.* An example would be a patient trying to assault members of the hospital staff, "[u]nder these circumstances, the state's police power would justify forced medication, albeit temporary—continuing only as long as the emergency persists." *Id.*

[35] N.Y. MENTAL HYG. LAW § 9.60(n) (McKinney 2021).

[36] N.Y. MENTAL HYG. LAW § 9.60(n) (McKinney 2021).

[37] *See* Michael L. Perlin, Deborah A. Dorfman & Naomi Weinstein, *"On Desolation Row": The Blurring of The Border Between Civil and Criminal Mental Disability Law, and What it Means to All of Us*, 24 TEX. J. ON C.L. & C.R. 59, 65 (2018) ("Laws such as [AOT] enforce social control in punitive ways, often under the guise of the beneficence of civil commitment"); Emily S. Huggins, *Assisted Outpatient Treatment: An Unconstitutional Invasion of Protected Rights or A Necessary Government Safeguard*, 30 J. LEGIS. 305 (2004) ("[T]here are many who fear that Kendra's Law unconstitutionally infringes on the right of all citizens to refuse medical treatment and to be free from unwanted physical restraint.").

constitutionality of the law was unanimously upheld in *In re K.L.* In writing for the Court, former Chief Judge Judith Kaye held the restriction an AOT order imposes on a patient's freedom is "minimal," especially when compared to the complete deprivation of freedom a patient suffers when they are involuntarily committed.[38] The Court of Appeals went on to highlight that,

> [A]ny restriction of one's liberty interest as a result of the legal obligation to comply with an AOT order is far less onerous than the complete deprivation of freedom that can become necessary if the patient were to be or remain involuntarily committed in lieu of being released on condition of compliance with treatment.[39]

The Court further described the state's interest in the exercise of its police power as greater when the patient is in the community, as opposed to situations where a patient is in a hospital under supervision.[40] This is because hospitalization naturally reduces the risk of danger the patient may pose.

Non-compliance with treatment is not enough to remove an AOT patient to the hospital.[41] There has to be accompanying clinical signs of decompensation and attempts to secure compliance.[42] In essence, a physician working for the health or social services department monitoring AOT must confirm that attempts to secure compliance have been made and then determine whether the patient has decompensated to the point they appear to be in need of involuntary hospitalization.[43] If a physician makes such a finding, the physician can order that the subject be brought to the hospital pursuant to Mental Hygiene Law section 9.60(n). Once an AOT subject is brought to a facility, hospital physicians make a determination whether established standards for inpatient admission under the Mental Hygiene Law are satisfied.[44]

It is prudent to introduce that the program can involve sending law enforcement officials into the community to retrieve someone who is believed to be a danger to self or others. Removal can

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38 *In re* K.L., 806 N.E.2d 480, 485 (N.Y. 2004).

39 *Id.*

40 *Id.*

41 *See* N.Y. MENTAL HYG. LAW § 9.60(n) (McKinney 2021).

42 *See* N.Y. MENTAL HYG. LAW § 9.60(n) (McKinney 2021); *In re* K.L., 806 N.E.2d at 486.

43 *In re* K.L., 806 N.E.2d at 486.

44 *Id.*

result in being held in a psychiatric hospital for up to seventy-two hours, awaiting an evaluation by physicians.[45] If the assessment leads to a finding that the subject is a danger to themselves or others under traditional hospital admission criteria, the patient will be admitted. It is possible this aspect of the law may trouble some jurors, and attention must be paid as to whether panelists with such reservations can be objective.

D. Challenges

The aforementioned areas of inquiry are used to ascertain whether panelists have objections to the program. It is wise to challenge, for cause, those who demonstrate they will likely rule against the petitioner even if all the elements are proven. More specifically, people who acknowledge a high level of bias against the level of supervision AOT provides are optimum cause challenges. People who present overt skepticism toward the field of psychiatry can also present grounds for a successful challenge.

Preemptory challenges can be used on individuals who appear not to care about the patient, who appear not to want to listen, or lack the ability to follow along with the proceedings. Such challenges can also be effectively utilized against individuals who voice sufficient animosity toward government programs in general. A goal should be to sit people who are interested in the program and the patient and provide encouraging responses in terms of their willingness and ability to follow the issues. The AOT trial is one of the few trials in civil court that do not involve a petitioner asking for money. Nor do these trials involve criminal sanctions. Therefore, it is important to gauge whether a juror believes the decision they will make is important to the parties.

In New York, there is leeway on what you can say and how you select panelists in civil trials. There are the Struck & White methods, which are defaults based upon the venue. These classic methods involve questioning and excluding jurors for a myriad of reasons. Since selection is run by the attorneys, an attempt can be made to reverse the method, and after rounds of questioning make jury selection a process of inclusion instead of exclusion. Instead of exercising challenges and being left with a panel of what is left, a suggestion to opposing counsel can be made to

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[45] N.Y. MENTAL HYG. LAW § 9.60(n) (McKinney 2021).

select the people believed to be "in the middle," in terms of being fair to both sides. It speeds the process and fosters collegiality.

III. OPENING ARGUMENT

A ten to fifteen-minute opening statement is ideal as AOT trials are relatively short and involve only a handful of witness. Trials customarily last from two to three days after a jury is selected. During selection, a great deal is explained to the jury about the nature of AOT and there is little need to rehash a lengthy program description. Openings are the first opportunity to make the AOT patient's need for treatment the center of attention while also providing a guideline of what the evidence will show. Focusing on the patient, as opposed to redundant information about the program, goes a long way in keeping interest.

Petitioner's counsel should begin with a one-sentence thesis of the case. It can take the form of, "The respondent continues to need AOT as it provides the structure the patient needs to cope with his mental illness." Next, the mental illness that the patient allegedly suffers should be introduced. The illness can vary, though the most common diagnosis of an AOT patient is schizophrenia, while the second most common is bipolar disorder.[46] Petitioner should reveal how the patient's illness will be described by their medical expert. For example, schizophrenia can be introduced as a chronic and severe illness that affects how a person absorbs information and behaves.[47] It is considered non-

[46] *AOT Program Status*, N.Y. OFF. OF MENTAL HEALTH, https://www.omh.ny.gov/omhweb/kendra_web/interimreport/aotstatus.htm [https://perma.cc/69CM-LHTE] (last visited Mar. 6, 2021). In 2003, the New York State Office of Mental Health (OMH) released a study of the first few years of Kendra's Law which found that seventy percent of those subject to an AOT court order carried a diagnosis of schizophrenia and thirteen percent had a primary diagnosis of bipolar disorder. *Id.* Further, A majority of AOT patients, sixty percent, were reported to have a substance abuse condition in addition to their primary diagnosis. A similar 2009 review by OMH determined that seventy-three percent of those with AOT orders suffered schizophrenia and eighteen percent had a primary diagnosis of bipolar disorder. Forty-seven percent had a co-occurring mental substance abuse condition. *New York State Assisted Outpatient Treatment Program Evaluation*, N.Y. OFF. OF MENTAL HEALTH, https://www.omh.ny.gov/omhweb/resources/publications/aot_program_evaluation/ [https://perma.cc/75GP-CM66] (last visited Mar. 6, 2021).

[47] *See generally Schizophrenia*, NAT'L INST. OF MENTAL HEALTH, https://www.nimh.nih.gov/health/topics/schizophrenia/index.shtml/

curable but can be managed by medication and therapy.[48] Examples should be given of how the illness affects the patient when they are non-compliant with treatment.

Opening statements are also the time to describe the services the patient receives with AOT. This explanation will describe the professionals who make up the patient's treatment team. The team can be an Assertive Community Treatment Team ("ACT Team" or "ACT"), which usually consists of a psychiatrist, therapist, nurses, social workers, and administrative staff who provide care to the patient. ACT describes itself as psychiatric services provided by a multi-disciplinary team that can include outreach, mental health treatment, vocational support, integrated dual disorder treatment, family education, wellness education, community linkages, and peer support. [49] Further, some detail can be provided on the frequency the patient meets with their team. Many AOT patients with a primary diagnosis of schizophrenia or bipolar disorder also carry a substance abuse disorder.[50] Consequently, opening statements in appropriate cases will provide an explanation of substance abuse services the patient can receive.

If the AOT candidate's condition does not require ACT, the services provided can involve a lesser degree of supervision services called "care coordination" or "case management." Such

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[https://perma.cc/2Y9K-TC64] (last visited Apr. 2, 2021). The National Institute of Mental Health website defines schizophrenia as a chronic and severe mental disorder that affects how a person thinks, feels, and behaves. *Id.* Those with schizophrenia can seem like they have lost touch with reality. *Id.* The symptoms can become disabling. *Id.* The psychotic symptoms can include hallucinations, delusions, as well as thought disorders. *Id.* The negative symptoms can include a flat affect, reduced speaking and difficulty beginning and maintaining activities. *Id.* Cognitive deficits can include the inability to understand information and use it to make decisions or to have trouble focusing or paying attention, and problems with memory. *Id.*

[48] *See Schizophrenia*, MAYO CLINIC, https://www.mayoclinic.org/diseases-conditions/schizophrenia/diagnosis-treatment/drc-20354449/ [https://perma.cc/P364-LWPZ] (last visited Apr. 2, 2021). The Mayo Clinic website states that schizophrenia requires lifelong treatment, even when symptoms have subsided. *Id.* The treatment can consist of medications, hospitalization, and psychosocial therapy. *Id.*

[49] *Assertive Community Treatment (ACT)*, N.Y. OFF. OF MENTAL HEALTH, https://omh.ny.gov/omhweb/act/ [https://perma.cc/3WNG-5TAD] (last visited Apr. 2, 2021) (providing a description of ACT Services and describes ACT as "an evidence-based practice that offers treatment, rehabilitation, and support services, using a person-centered, recovery-based approach, to individuals that have been diagnosed with a serious mental illness.")

[50] *See AOT Program Status*, *supra* note 45.

services involve the patient being visited, but not as intensely as with an ACT Team. At minimum, an AOT order must include care coordination services.[51]

The opening statement should map out how the evidence will show the patient meets the additional AOT criteria under §9.60. Therefore, it is essential to outline what the jury will learn in this regard from the doctor who evaluated the patient. This information should be presented in broad strokes and never get lost in medical jargon.

After the patient's mental illness is introduced, petitioner's counsel should relay how the evidence will establish the respondent is in need of the program to live safely in the community. This discussion can highlight how the patient had their lives interrupted by hospitalizations and concerning behavior due to non-compliance. This is an excellent opportunity to describe conduct that has drawn the attention of law enforcement, social workers and ultimately the AOT program. The opening argument should have a clear statement that the patient requires AOT to prevent a relapse of deterioration of their mental state which is likely lead to harm to self or others. Practically, this prong of the AOT criteria can sound similar to the "safely in the community" element, and similar information is often used to prove both criteria.

The opening statement should further include a description of why the AOT subject cannot be expected to engage in their own treatment voluntarily. This will often take the form of a description of the patient's insight, which can be understood as the patient's awareness as to whether they believe they have a mental illness that requires treatment. In a given case, it can be helpful to describe the AOT patient's statements to treatment providers about whether they believe they have an illness, their willingness or reluctance to accept treatment, and whether the patient believes services and medication helps them.

The jury should also be told how the patient will benefit from AOT. Petitioner's counsel can discuss that AOT will work to ensure the patient has regular contact with mental health professionals who are skilled in the detection of the early signs of decompensation and who have the means to address potentially dangerous instances of non-compliance.

If a member of the treatment team will testify, the reason the

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[51] *See* N.Y. MENTAL HYG. LAW § 9.60(a)(1) (McKinney 2021).

individual is testifying should be explained. For example, a team member may be used to describe how the patient frequently reports manifesting symptoms or a reluctance to take medication. It is one thing to introduce such statements from a monitoring report admitted as a business record, and another for the jury to hear the information from the social worker who observed such statements. The latter has more impact. Further, a team member can be used to explain whether the program has resulted in positive gains such as attending school, securing employment, maintaining stable housing, and improved relationships with family.

For patients doing well and challenging a renewal order, it is advisable to acknowledge that the jury will hear about someone who received encouraging monitoring reports. Often the petitioner will wish to show that the success of the patient is attributable to the structure of AOT. Petitioner's counsel may proffer that without supervision, the evidence will establish respondent can be expected to revert to the non-compliance that led the person to being hospitalized. Respondent's counsel will naturally do the opposite and make the case that it is time for the patient to engage in whatever treatment they see fit.

The petitioner's attorney should respect the AOT subject's dignity in each representation made, from opening statements to closing statements. The program is intended to be remedial, and arguments should not inhibit the person's self-esteem more than necessary. There is always a balance of showing the need for treatment and not presenting information that is unnecessarily embarrassing. Jurors will never take kindly to unnecessarily beating up on a patient with a mental health problem.

IV. PRESENTATION OF EVIDENCE/CASE IN CHIEF

Majority of effort in an AOT trial is dedicated toward presenting petitioner's case in chief. In the preparation stage, it is important to decide the amount of evidence likely to satisfy the applicable burden of proof when planning the witnesses and documentary evidence to utilize.

A. Burden of Proof

Instead of the preponderance of the evidence standard, the petitioner has the challenge of meeting the higher burden of proof

of clear and convincing evidence.[52] The 1979 Supreme Court case of *Addington v. Texas* held that the clear and convincing evidence standard applies to applications where hospitals attempt to commit a patient to its facility.[53] Chief Justice Warren Burger stated that the applicable burden of proof in such cases should reflect that the psychiatric patient's interest in liberty is greater than a traditional lawsuit involving pursuit of a monetary remedy.[54] Justice Burger, citing Justice John Marshall Harlan, described,

> The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication."[55]

Considering a hospital can retain a patient when medically necessary under the clear and convincing evidence standard, it follows that a government can mandate a less restrictive alternative to inpatient commitment, namely AOT, under the same standard.[56]

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[52] N.Y. MENTAL HYG. LAW § 9.60(j)(1) (stating, "[i]f after hearing all relevant evidence, the court does not find by clear and convincing evidence that the subject of the petition meets the criteria for assisted outpatient treatment, the court shall dismiss the petition."). Pattern Jury Instruction 1:64 articulates the clear and convincing evidence standard. *See* N.Y. PATTERN JURY INSTR.—CIVIL 1:64.

[53] *See* Addington v. Texas, 441 U.S. 418, 433 (1979). The *Addington* decision involved the mother of schizophrenic person filing a petition for indefinite commitment in accordance with Texas law. *Id.* at 420–21. The patient, Frank Addington, challenged the petition by way of a jury trial that lasted six days. *Id.* at 420. The jury examined whether Addington was mentally ill and whether he required hospitalization for his own welfare or the protection of others. *Id.* at 420. A preponderance of the evidence standard was utilized while Addington argued the beyond the reasonable doubt standard should have governed. *Id.* at 421–22. Addington posited any lesser standard violated procedural due process rights. *Id.* The Court, in an 8–0 decision, held the standard of proof required by the 14th Amendment in a civil proceeding to commit an individual for an indefinite period is clear and convincing evidence given commitment constitutes a significant deprivation of liberty. *Id.* at 425–33.

[54] *Id.* at 432–33. Justice Burger described, "standards of proof are important for their symbolic meaning as well as for their practical effect." *Id.* at 426.

[55] *Id.* at 423 (citing *In re* Winship, 397 U.S. 358, 370 (1970) (Harlan, J. concurring)).

[56] *See In re* K.L, 806 N.E.2d 480, 486 (N.Y. 2004) (holding that in requiring AOT criteria to be proven by "clear and convincing evidence . . . the statute's procedure for obtaining an AOT order provides all the process that is

B. Witnesses

The AOT legislation mandates a psychiatrist examine the candidate and if the doctor recommends AOT, testify at the initial judicial hearing as well as the jury trial.[57] Petitioners designate the psychiatrists who review the patient's records, evaluate the patient, and make determinations as to whether AOT is recommended. When a petitioner is a local health or social services department, the doctor who evaluates AOT candidates is not usually a member of the patient's treatment team that monitors the patient over the course of an order. This arrangement prevents acrimony that can arise if the patient's treating doctors are frequently requested to make determinations the patient can be resistant towards. Further, the treating doctors' schedules would be inhibited with frequent court proceedings if they regularly performed AOT evaluations.[58] In contrast, when hospital designees serve as the petitioner in AOT cases, as is often the case when there is an application to have a patient placed on AOT upon a patient's release from a facility, the testifying doctors have usually followed the patient's treatment throughout their hospitalization.[59] Pursuant to Mental Hygiene Law section 9.60(h)(2), the evaluating physician is obligated to testify to "the facts and clinical determinations which support the allegation that the subject of the petition meets each of the criteria for assisted outpatient treatment."[60] Outlines can be used to keep track of whether the criteria were sufficiently presented and list the documentary evidence to utilize in trial. Posterboards or overhead projectors are also effective ways to present informative medical records and progress notes that are entered into evidence.

The doctor who performed the psychiatric evaluation is usually the only witness to testify for the petitioner at the bench hearing,

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constitutionally due.").

[57] N.Y. MENTAL HYG. LAW §§ 9.60(e)(2)(3), 9.60(h)(2)(3)(4) (McKinney 2021).

[58] *Cf.* Keane & Lebovits, *supra* note 10, at 40 ("[A]lthough it is up to the hospital attorneys to prepare their cases properly, requiring numerous hospital employees to testify may force the hospital to interrupt operations temporarily.").

[59] *See In re* Kendall B., 956 N.Y.S.2d 157, 159 (N.Y. App. Div. 2012) (illustrating designated physician of petitioner, a hospital, was a doctor who worked at said hospital, St. Francis, and followed the patient).

[60] N.Y. MENTAL HYG. LAW § 9.60(h)(2) (McKinney 2021).

and the testimony is streamlined as much as possible. A more thorough presentation of the doctor's rationale is necessary when the AOT patient requests the case be presented to jurors who know little of the mental health system.

C. General Discussion of AOT

The psychiatrist should present background information about the program. The range of material explained in jury selection will guide the areas to present, in an effort not to be duplicative. In general, the following areas can be addressed: how clients come to the attention of the program; the type of illnesses the program commonly treats; a brief history of the program; how a treatment team serves a client; how a client is monitored; how medication is used to treat mental illness; how doctors conduct their evaluations; how a petitioner obtains an AOT evaluation; the concept of insight into mental illness; medication management; and the concept of removal.

The psychiatrist should also address how the bond between the treatment team and the patient is established by law and is therefore not easily terminated. Mental health outpatients not on AOT are obviously free to terminate any treatment they do not wish to continue. AOT patients must be monitored even when they dislike the oversight. Correspondingly, a team cannot drop a patient from its roster despite the patient being a challenge to engage. A patient can be transferred to a different service provider, but under AOT, a treatment relationship is established by law.

D. Focus on the AOT Patient

A crucial segue comes when the examining doctor's attention is directed to the specifics of the AOT subject. Initially, the doctor should convey when the patient was examined and describe the patient's history with the AOT program. The patient's social structure is brought up, including his housing and whether he has a support system of friends, family, or personal physicians.

There will be a description of the records the doctor reviewed in preparing to evaluate the patient, which customarily includes AOT chart notes and hospital records.[61] The candidate's most

[61] *In re* Dolan, 943 N.Y.S.2d 737, 740 (N.Y. Sup. Ct. 2012) (showing Syosset

recent records are expected to include observations such as whether the patient accepted their medication, consistently met with their treatment team, and whether there are any treatment concerns. If the patient has been symptomatic by reason of noncompliance or expresses reluctance to take medication, such observations can be effective in proving the need for AOT.

As referenced, the psychiatrist often reviews psychiatric hospital records, which contain the reasons a patient required admission and the course of treatment leading to stabilization and discharge. These records can inform the evaluating doctor how the patient can be expected to conduct themselves should they become non-compliant with treatment. Petitioner will seek to admit records believed to be professionally reliable and which meet the requirements for admissibility.[62] These materials, along with the observations from the interview, form the basis of the doctor's decision. Medical records and progress notes often meet exceptions to hearsay rules.[63] The admission of documentary evidence, such as business and medical records, can differ dramatically according to the standards of each trial judge.

For renewal trials, the psychiatrist will describe the number of times a patient's AOT order has been renewed. The doctor will also focus on the patient's compliance with treatment over the previous order. The patient's level of compliance can be compared to previous AOT orders as well as occasions where the patient has not been supervised. If the respondent experienced recent hospitalizations or other significant events, such as an arrest or altercation that has come to the attention of the treatment team, the significance of those events will be discussed.

The psychiatrist will ultimately inform the jury that AOT is being recommended. The doctor will then describe, at length, the basis of their belief that the patient meets each element under MHL §9.60(c).

Hospital records and treatment records from Central Nassau Guidance were admitted into evidence).

[62] *See In re* Kendall B., 956 N.Y.S.2d at 159 (noting evaluating doctor's testimony was informed, in part, by "certain professionally reliable out-of-court material").

[63] *See In re* Anthony H., 919 N.Y.S.2d 214, 217 (N.Y. App. Div. 2011) (holding diagnoses in an AOT subject's medical records, which stated a patient's hospitalizations were caused by the failure to take medications, "were admissible under the business record exception to the hearsay rule because the diagnoses were relevant to his treatment and could be used to develop a discharge plan that would ensure his safety.").

The doctor must address whether the patient suffers from a mental illness.[64] In this effort, an understandable definition of the patient's illness must be relayed. If the illness is schizophrenia, the most common for patients on AOT,[65] the physician will describe something along the line of schizophrenia being a severe cognitive mental disease that does not have a known cure and also that the standard of care is to prescribe medication and other therapies to manage symptoms.[66] Bipolar disorder, the second most common order for AOT patients, may be described as an illness that causes unusual shifts in mood, ranging from elation to hopelessness, as well as shifts in energy, concentration, and the ability to carry out tasks.[67]

A description of how the AOT patient behaves when symptomatic can follow. For example, a schizophrenic patient may isolate themselves, not eat, or not respond to service providers trying to contact the patient. The information relating to each patient is learned from the patient's records and observations made during the examination. If a patient has been hospitalized on multiple occasions for similar reasons and has a consistent diagnosis, relevant hospital records will provide strong evidence the patient suffers from the illness diagnosed. At times, this element is not submitted for consideration as some respondents determine challenging whether they are mentally ill would undermine their credibility before the jury.

In an effort to progress through the elements, the evaluating doctor is obligated to describe why the patient needs AOT to live safely in the community.[68] Frequently, this takes the form of the psychiatrist describing that without mandated treatment, the patient will likely stop medication and disrupt their connection to services and can be expected to manifest symptoms of their illness, which will lead the patient to being unable to care for themselves and becoming dangerous. In cases where the

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64 *See* N.Y. MENTAL HYG. LAW § 9.60(c)(2) (McKinney 2021). Under this provision, the person must be suffering from a mental illness to be placed on AOT.

65 *See AOT Program Status*, *supra* note 46.

66 *See* MAYO CLINIC, *supra* note 48.

67 *See Bipolar Disorder*, NAT'L INST. OF MENTAL HEALTH, https://www.nimh.nih.gov/health/topics/bipolar-disorder/index.shtml [https://perma.cc/446Y-8L6H] (last visited Apr. 2, 2021) (explaining that all types of bipolar disorder can involve changes in mood, energy, and activity level which can range from extremely elated to hopeless).

68 *See* N.Y. MENTAL HYG. LAW § 9.60(c)(3) (McKinney 2021).

patient's compliance has been positive, the doctor may testify the patient's success is attributable to the supervision of the AOT program.

The doctor must also detail why it is not believed the patient cannot engage in their own treatment voluntarily.[69] There is often significant debate over this issue. Patients will customarily argue they are prepared to take their treatment into their own hands. The doctor can also discuss whether the idea of a "voluntary agreement" was contemplated. The voluntary agreement is a gentlemen's agreement that serves as one way patients come off AOT orders.[70] The agreements have no legal consequences if not adhered to, but there are consequences for attempting to have a patient agree to accept the same treatment as an AOT Order. A goal of the program is to put the patient in a place where they no longer need a court order and can engage in treatment on their own. The program is not intended to keep patients on orders endlessly.

The psychiatrist is also obligated to describe why the patient needs AOT to prevent a relapse or deterioration of their mental state that can result in serious harm to self or others.[71] It can be proven by establishing how the patient has acted when not in compliance with treatment. For example, if a patient has a history of self-harm attempts prior to an AOT Order, the doctor may testify that supervision remains necessary to best prevent such attempts in the future. If a given patient committed a serious assault, served prison time, and still has little recognition

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69 *See* N.Y. MENTAL HYG. LAW § 9.60(c)(5) (McKinney 2021).

70 Monroe County's website describing Kendra's Law indicates "[s]ome individuals may be court-ordered to comply with treatment and supportive services. Others may enter into a voluntary agreement with the county." *Kendra's Law*, MONROECOUNTY.GOV, https://www.monroecounty.gov/mh-kendraslaw [https://perma.cc/X8DY-PC7B] (last visited Apr. 3, 2021).

71 *See* N.Y. MENTAL HYG. LAW § 9.60(c)(6) (McKinney 2021). The petitioner must prove that in view of his or her treatment history and current behavior, the candidate is in need of assisted outpatient treatment in order to prevent a relapse or deterioration which would be likely to result in serious harm to the person or others. Section 9.01 defines "likelihood to result in serious harm" or "likely to result in serious harm" as:

(a) a substantial risk of physical harm as manifested by threats of or attempts at suicide or serious bodily harm or other conduct demonstrating that the person is dangerous to himself or herself, or

(b) a substantial risk of physical harm to other persons as manifested by homicidal or other violent behavior by which others are placed in reasonable fear of serious physical harm.

N.Y. MENTAL HYG. LAW § 9.01 (McKinney 2021).

of any culpability for their conduct, discussing such level of insight is effective in establishing this element. Additionally, the doctor may highlight how a patient has repeatedly told his treatment team that once an order is lifted the patient will stop taking medication all together or at a therapeutic dose.

The doctor must also reveal how the patient will benefit from AOT.[72] This involves showing how monitoring the patient's treatment and safety will lead to the patient having a more productive life. The monitoring can be presented as a necessary alliance to battle the patient's illness. In layman's terms, the law is an assurance that the patient does not "fall through the cracks." The doctor can also testify that it will be a benefit to the patient to place the candidate on a program that aims to keep them from cycling in and out of the hospital. It permits mental health professionals to act when non-compliance appears to be leading to a dangerous situation.

In initial AOT proceedings, the direct case will include the petitioner being obligated to prove that the patient was hospitalized twice within thirty-six months of the application due to non-compliance with treatment, or having committed a violent act, or threatened a violent act by reason of non-compliance.[73] The evaluating doctor is obligated to link hospitalizations or violent acts to non-compliance. This is customarily accomplished by introducing certified records of hospitalizations that establish the fact that non-compliance has been a significant factor leading to past hospitalizations.[74] The hospital physicians who treated the patient in a facility are generally not called as witnesses, as they could not be expected to remember the respondent from the many they treat while working in a psychiatric unit. There can be great debate at trial as to whether non-compliance caused the conduct that led to hospitalization. A respondent's attorney may offer that the candidate was fully complying with treatment and that medication was ineffectively treating their illness. A respondent may also offer that a given hospitalization was caused by some health condition rather than a result of non-compliance.

Direct examination of the examining doctor will usually be the longest part of the trial. Overall, it is important to let the physician do the talking and keep the questions short.

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72 *See* N.Y MENTAL HYG. LAW § 9.60(c)(7) (McKinney 2021).
73 *See* N.Y MENTAL HYG. LAW § 9.60(c)(4) (McKinney 2021).
74 *See In re* Anthony H., 919 N.Y.S.2d 214, 214 (N.Y. App. Div. 2011).

E. Additional Witnesses

Jurors tend to be enlightened by hearing from a witness with a closer relationship to the AOT patient than the evaluating physician. Therefore, it is helpful, in certain cases, to call a witness or two from the treatment team.[75] Members of the team have often followed the patient for months or even years. The team members called to testify can include the patient's social worker, nurse, therapist, or treating psychiatrist.

At times, there is a particular worker on the treatment team who has the most contact with the patient. On other occasions, a rotation of staff visits the patient, and there is not necessarily one staff member who sees the patient more than others. It is necessary to investigate what role each staff member has on the team and choose who can best relay the patient's case.

The people that make up treatment teams vary in their readiness to testify. Some get nervous when they hear about the prospect of a jury trial while those who have appeared in court in other areas of their employment are less apprehensive. Experience demonstrates that jurors benefit from their participation. If a team member believes the patient needs the program, but is adverse in attitude to participating, the team member will not be called to testify, and the result is that the case is weaker.

Jurors after AOT trials have expressed that members of the treatment team were critical witnesses. Such individuals chose a profession of caring and public service and this comes across during the trial. Team members can relay a situation, such as where they accompanied an AOT patient to a hospital because it was necessary to protect the patient's safety, in a manner that keeps the jury's attention. They can relay the highs and lows of the patient's progress in a way the examining doctor cannot. Further, dry records that can be read to the jury are never a substitute for a health care professional who has a relationship with the patient, and who can relay their observations.

The AOT subject's family may also wish to appear as witnesses. They can appear for either side, depending on

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[75] *See* Cohen v. Anne C., 732 N.Y.S.2d 534, 537 (N.Y. Sup. Ct. 2001), *vacated,* 753 N.Y.S.2d 500 (N.Y. App. Div. 2003) (illustrating number of witnesses called by petitioner included examining psychiatrist, a treating physician at a hospital where patient was hospitalized, the Medical Director of the patient's treatment team, as well as the man who shared a child with respondent).

whether they support the application. The family members have often observed the patient's conduct while on and off treatment and occasions where the AOT subject manifests reluctance to adhere with treatment. Family members may also wish to tell the jury that they are prepared to assume the care for the patient. They can voice a view that services are necessary toward keeping their loved one in a healthier state, or conversely, that they do not believe the program is effective. Whether they are in favor or against AOT, they are powerful witnesses.

V. CROSS EXAMINATION

The AOT patient commonly takes the stand in the AOT jury trial and it is paramount for petitioner's attorney to handle cross examination with empathy. There is no honor in a trained legal professional making a mentally ill individual feel overwhelmed. Jury members will hold it against the examiner if they perceive the patient is being beaten up unnecessarily. This contrasts with traditional criminal and civil proceedings, where a tenet of the adversary system is aggressively challenging adverse witnesses. Cross examination of the AOT subject involves the balancing of the obligation to show what is necessary to prove the requisite criteria while taking care to respect their dignity.

Cross examination of the AOT subject is often the shortest phase for the petitioner's attorney. Yet preparation is pivotal in creating questions with the necessary tone of sensitivity. Common questions and areas to explore include asking the patient whether he believes he has an illness, whether he believes psychiatric medication can help, whether he can link treatment to a period of staying out of the hospital and inquiring about the circumstances the patient believes led them to be hospitalized. It is common for patients to deny any illness, even after multiple hospitalizations where patients have received the same diagnosis.[76] Therefore, eliciting the patient's denial as to an illness and need for medication, in the face of evidence of a

[76] Courts attach significance with respect to a patient's insight into their illness and need for treatment. *See In re* Kendall B., 956 N.Y.S.2d 157, 158 (N.Y. App. Div. 2012) (upholding AOT for schizophrenic patient when patient had history of non-compliance and refused to take recommended medication). *See also In re* Thomas G., 857 N.Y.S.2d 631, 632 (N.Y. App. Div. 2008) (overturning release of patient in retention application where patient denied suffering from mental illness and refused to accept recommended dose of antipsychotic medication).

consistent diagnosis and decompensation without medication, can be an effective way to illustrate the patient's ability to care for themselves without a structured program.

Further, questions can be used to highlight how the program has been helping the AOT patient. For example, the patient can be asked how long they have been able to stay out of the hospital since being on court-mandated treatment, what their understanding is regarding the services they receive, how their medication is monitored, and if they receive any assistance from the treatment team in securing public benefits, assistance with transportation needs, or with vocational or educational aspirations.

Observing whether the patient is becoming overly stressed during questioning is critical in determining whether to back off. It should never be lost that the AOT program exists to support mentally ill individuals. The tone of questioning should never appear harsh. In the majority of bench hearings that precede the patient's request for a jury trial, cross examination of the patient is not necessary. The patient's opportunity to take the stand is most often used as the time for the patient to have their say. Objections are rarely made even when the patient discusses matters unresponsive to the questions or testifies in a lengthy narrative. At times, the patient has been to court numerous times, in various types of mental health proceedings, and their background and history are known to the court, so it is unnecessary to question their background and history before a jury, who has no familiarity with the patient.

In both the initial bench hearing and jury trials, the AOT patient customarily takes the witness stand after the petitioner rests. Often, the patient believes it will benefit the jury to hear their testimony on why AOT is not necessary or is an intrusion. Jury members can be affected by the sincerity of the patient and such testimony can have a positive effect in fighting the necessity of the program.

A. Calling the AOT Subject as Petitioner's Witness

There is an open question as to whether the AOT patient can be obligated to take the stand upon request from petitioner's counsel, an issue which comes up when petitioner's counsel suspects the defense will rest without calling the AOT patient. In such circumstances, the petitioner may wish to call the

respondent as a witness during their own case. In civil cases, it is a well-established right to call any witness, even an adverse party, if his testimony is relevant to the issues in the case.[77] The Court of Appeals has held the availability of calling an adverse party in a civil trial is not considered a shifting of the burden of proof and is consistent with the tenants of our adversary system.[78] Specifically, petitioner's counsel may feel it necessary to show the jury that a subject has no interest in accepting mental health treatment and will not comply with the recommended treatment. Having a respondent concede their lack of any interest in engaging in treatment a medical expert has recommended is an effective means of establishing the patient is not likely to remain safe in the community without an order.

Meanwhile, the patient's attorney can be expected to make the argument that the respondent cannot be compelled to testify under the Fifth Amendment or New York's equivalent.[79] This position was successful in a retention application in the 1985 Monroe County case, *Kenneth M. v. Rochester Psychiatric Center*, where the hospital's attorney attempted to call the patients as a witness.[80] In *Kenneth M.*, the trial judge noted that the question was a matter of first impression within the state, and held that civil retention involves such a potential deprivation of liberty that a witness cannot be compelled to be a witness against oneself.[81] The Monroe County court judge acknowledged this decision was contrary to holdings in various other jurisdictions.[82]

However, when the same issue arose in Queens County, the court decided differently, namely that a patient could not refuse

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[77] McDermott v. Manhattan, Eye, Ear & Throat Hosp., 203 N.E.2d 469, 472–73 (N.Y. 1964) (citing N.Y. C.P.L.R. 4501 (McKinney 2021); N.Y. C.P.L.R. 4512 (McKinney 2021)).

[78] *Id.* at 474.

[79] *See* U.S. CONST. amend. V; N.Y. C.P.L.R. 4501 (McKinney 2021).

[80] *In re* Kenneth M., 495 N.Y.S.2d 131, 133 (N.Y. Sup. Ct. 1985).

[81] *Id.*

[82] *Id.* (citing Lynch v. Baxley, 386 F. Supp. 378, 394 (M.D. Ala. 1974) (finding that due process requires that the rules of evidence applicable in other judicial proceedings be followed in involuntary commitment proceedings); *In re* Field, 412 A.2d 1032, 1035 (N.H. 1980) (holding patient can be compelled to submit to a psychiatric examination in retention hearing so long as the proceeding does not seek to elicit evidence that may result in prosecution); Commonwealth v. Barboza, 438 N.E.2d 1064, 1070 (Mass. 1982) (finding the Fifth Amendment will not prevent statements made in psychiatric evaluations from being used in civil commitment proceedings where allegation is that the respondent is a sexually dangerous person)).

to take the stand in a proceeding involving a commitment.[83] The judge in *Saribeyoglu* reviewed relevant cases from around the country and found that since civil commitment has the purpose of care and treatment, it cannot be equated to a criminal prosecution.[84] The Court stated that while the patient may not refuse to take the stand, he or she can refuse to answer any particular question would implicate him or herself in criminal activity.[85]

The *Saribeyoglu* decision captures the legal standard applicable to present day applications in that, outside of a criminal court case, the Fifth Amendment inquiry is interpreted as transactional in nature, meaning that any individual question to a patient can be objected to, in any legal proceeding.[86] For example, a respondent can refuse to answer questions regarding an unresolved criminal matter if given answers could potentially subject the person to criminal penalties. There appears to be no blanket right to not testify in retention matters. Trial courts have not yet reported on this issue in the context of AOT cases.

New York's Court of Appeals has characterized the liberty interests involved in AOT proceedings and its phraseology does not appear to implicate self-incrimination protections. In *Matter of K.L.*, Chief Judge Kaye described, "[t]he restriction on a patient's freedom effected by a court order authorizing assisted outpatient treatment is minimal, inasmuch as the coercive force of the order lies solely in the compulsion generally felt by law-abiding citizens to comply with court directives."[87] Therefore, a petitioner has a strong argument that an AOT patient must take the stand upon a demand. Absent appellate authority with respect to AOT cases, each trial judge will be vested with balancing the interests and making a decision specific to the case at hand.

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[83] People *ex rel.* Anonymous v. Saribeyoglu, 501 N.Y.S.2d 286, 287–89 (N.Y. Sup. Ct. 1986) (citing supporting cases from around the country including Michigan, New Hampshire, Colorado, Nebraska, Oregon and Texas).

[84] *Id.* at 648–50.

[85] *Id.* at 650.

[86] *See* 5 ROBERT A. BARKER & VINCENT C. ALEXANDER, N.Y. PRACTICE, EVIDENCE IN N.Y. STATE AND FEDERAL COURTS §5:46 (2d ed. 2011).

[87] *See In re* K.L., 806 N.E.2d 480, 485 (N.Y. 2004).

B. Missing Witness Charge

If the petitioner rests without calling the respondent as their own witness, the petitioner can ask for an adverse witness and it will be up to the trial judge to decide whether to grant such a request.[88] This charge indicates that when a party would be expected to testify and does not, the jury can infer an adverse inference.[89] Petitioners can argue that the patient is certainly under his own control and would be expected to testify that he does not need the program. The same Fifth Amendment arguments can be brought up in relation to opposing a missing witness charge, and whether to grant such a charge remains a matter within the discretion of the trial judge.

C. Cross-Examining Family Members

Members of the AOT candidate's family are, on occasion, called by the respondent as part of their case. Cross-examination of the subject's family members is another area where sensitivity is needed. Family members often have the life-long challenge of living with or supporting a loved one with mental illness and should be treated with respect. They are not adversaries to be overwhelmed.

A family member who objects to the program may feel AOT has sufficiently served its purpose or ties up the subject's life too much. The tone of cross should not be adversarial, but questioning should be geared toward whether the witness has a history of assisting the patient and has a basic understanding of the illness. This can include queries on the witness' knowledge of the subject's need for medications and the witnesses' understanding of the subject's history of compliance with treatment. An effective examination can also be geared to asking whether the family member is equipped to provide support for their relative if they notice behavior that endangers the patient

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[88] In an AOT case, a petitioner can ask that the jury be permitted to infer that a respondent did not testify because the testimony of respondent would hurt respondent's case. *See* Devito v. Feliciano, 1 N.E.3d 791, 795–96 (N.Y. 2013) (civil case involving medical experts retained but not called by defense counsel, holding that a missing witness charge instructs a jury that it may draw a negative inference when an opponent fails to call a witness who would usually be called to support that party's version of events) (citing charge contained in New York Patten Jury Instructions 1:75).

[89] *Id.*

or community.

D. Cross-Examination of Petitioner's Witnesses

Traditional cross-examination is hardly absent from AOT trials and arises when petitioner's witnesses are thoroughly examined by the AOT patient's attorney.[90] The petitioner's case must always include the examining doctor and, at times, a member or two from the patient's treatment team. Consequently, preparing witnesses is a key component of trying an AOT case. Preparation takes the form of addressing what aspects of the case history and patient's record the witness should be familiar with. Such witnesses are subject to scrutiny of their examinations, opinions, recollections, and credibility. It is important to stress to witnesses that they should strive to keep the same disposition on cross as on direct.

Cross-examinations of the evaluating physician can be extensive. The doctor will be pressed on why they believe the patient cannot be trusted to engage in their own treatment, why the patient would deteriorate to the point that serious harm to self or others could occur, and why the patient would not be safe in the community without AOT. Further, the doctor will be expected to know about the patient's support system and whether family members would be expected to notice decompensation and get the patient assistance. A superior presentation comes through having a thorough command of the patient's history. While a patient may be doing well under an order, the doctor must make the connection that without continued AOT, the patient can be expected to behave in a manner that is unsafe. Of course, the respondent can retain their own physician to support their case, but this is rare.

VI. CLOSING ARGUMENT

In New York civil court proceedings, the respondent presents their closing first and the party with the burden of proof goes

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[90] *See* Keane & Lebovits, *supra* note 10, at 40 (explaining that in most cases AOT patients are represented by the Mental Hygiene Legal Service, who are attorneys employed by the New York State court system; that patients also have the right to hire their own counsel; and that there are occasions where patients choose to represent themselves in hearings or jury trials).

last.[91] Therefore, petitioner's counsel gets the benefit of speaking first during opening statements, sometimes called "primacy," as well as the chance to speak last, called "recency," which is an undeniable advantage.[92]

It is optimal to have an impassioned closing that connects with the jury while using as few notes as possible. Petitioner's counsel should begin by reminding the jury what they are being asked to do and why—namely to grant or extend an AOT Order. Subsequently, the jury should be reminded that the central dispute involves whether an allegedly mentally ill person should be placed under supervision. It is a decision that will affect the patient as well as the community therefore it is one that should be taken seriously. Reiterating the patient's relationship with treatment providers and how it is established by law should also be at the forefront of the closing. More specifically, it is helpful to reinforce that the AOT order mandates the program, which consists of skilled mental health professionals trained to notice early signs of decompensation and monitor the patients to ensure they do not fall through the cracks. When members of a treatment team notice non-compliance, such as a patient not taking medication or concerning behavioral changes, the team is obligated to encourage treatment compliance to avoid hospitalization. Illustration of this level of aid in an AOT subject's life is especially effective when a candidate does not have any support structure, such as family and friends, in their orbit.

Petitioner's counsel must have an effective argument that the candidate meets all the criteria. Articulating how the patient has exhibited certain behavior, namely the behavior that led to hospitalizations, arrests, or calls to the authorities, while being non-compliant with treatment, will help make the case that the patient needs the program to remain safely in the community and prevent a deterioration of their mental state that can lead to serious harm to self or others. Petitioner must also demonstrate that the AOT candidate cannot voluntarily engage in their own

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[91] *See* N.Y. PATTERN JURY INSTR.—CIVIL 1:5 ("Under our system, the defendant sums up first, followed by the plaintiff.").

[92] *See* Michael F. Colley, *Friendly Persuasion: Gaining Attention, Comprehension, and Acceptance in Court*, 17 TRIAL 42, 46 (1981) ("Plaintiffs have the advantage of both primacy and recency because they have the burden of proof. At the start of the trial, they speak first, and, in most jurisdictions, they speak first and last in closing arguments.").

treatment, which is one of the elements juries can struggle with in deliberation. During testimony, some patients concede a reluctance to comply with treatment. In other cases, respondents completely deny having any mental health problem. In such instances, counsel can effectively argue a patient cannot be expected to take medication for an illness they do not believe they have. Counsel should also point out how the person would benefit from continued treatment, by making the point that the supervision and structure of the program allows the subject the optimum chance to stay out of the hospital. Further, it can be argued that the program is expected to keep the person connected to services that are positive forces in the patient's life, such as maintaining family connections, progressing in school or vocational training, and perhaps obtaining employment.

From the respondent's perspective, the AOT trial might involve a person who has been on the program for some time and wishes to avoid further oversight. The closing argument from the patient's attorney can be compelling in these circumstances and involve a suggestion that the program has served its purpose and that the subject deserves a chance to be left to their own devices.

VII. JURY CHARGE

Pattern jury instructions (PJIs) have not been created for AOT trials. This is one of the few practice areas in New York where there are no recommended charges. Attorneys involved in AOT trials must submit proposed jury instructions to the assigned judge for consideration. Trial judges are often surprised to learn about the lack of guidance in the state PJIs. Nevertheless, the need to approve charges focuses the court's attention on learning a specialty they are unfamiliar with. As between trials with separate judges, there can be variety in the jury instructions approved.

Pattern jury instructions exist in other mental health proceedings, including hospital retention cases, which are governed by §MHL 9.35.[93] After twenty years of guaranteeing the right to a jury trial for AOT patients, the New York State Bar Association's Committee on Pattern Jury Instructions should consider taking up the matter and publishing recommended

[93] *See* N.Y. PATTERN JURY INSTR.—CIVIL 8:7. *See generally* N.Y. MENTAL HYG. LAW § 9.35 (McKinney 2021).

instructions after its own study of the statute and caselaw.

VIII. CONCLUSION

The AOT trial is not an adversary proceeding in the traditional sense. In such proceedings petitioner's counsel is not "against" the AOT candidate. Both petitioner's and respondent's counsel are obligated to do their best for the candidates' benefit. The petitioner's attorney will argue for a program he or she believes necessary to protect the safety of the respondent and any community members respondent will encounter as an outpatient. On the other hand, the patient's attorney will provide vigorous advocacy with regard to a client's desire to be free from government supervision. From speaking to jurors after AOT trials, panelists often demonstrate appreciation for learning about a local program that attempts to help one's fellow citizens as well the respondent's objections to a type of care they do not believe they need. Panelists have proved extremely sensitive to the need for care and the value of autonomy. Whatever way they decide, panelists almost uniformly express deep empathy for the person at the center of the proceeding. Through AOT trials, New York has adopted a mechanism whereby respect is paid to the concept of due process for those challenging government oversight of their mental health treatment.