

Chris Mullmann

From: Jim Hargreaves [jrhdk@gmail.com]
Sent: Monday, December 19, 2011 1:25 PM
To: Chris Mullmann
Subject: Ethical concerns about attorneys Bob Hermann and Robert Axford

Re: Donn Thomas Spinosa Commitment to Oregon State Hospital

Mr. Mullmann

Before I get to the subject of this note let me quickly introduce myself. I am a Senior Circuit Judge from Lane County. Since leaving the bench a number of years ago I have spent most of my time working as a consultant in court and case management and the introduction of technology into court operations.

During the year 2008 and for part of 2009, at the request of then Governor Kulongoski, I took a detour from my consulting practice to serve as the Governor's Special Master overseeing the first phases of the transformation at the Oregon State Hospital. As part of the transformation process I was charged with acquiring a detailed knowledge of the law in relation to how people get into, move through and eventually leave the Hospital.

Because of my work with the Hospital I was drawn to a story that ran in the Oregonian about a month ago. It was a story about Judge Thomas Kohl sending Mr. Donn Thomas Spinosa to the Oregon State Hospital on a "Mental Illness Magistrate Hold." From my immersion in the intricacies of the forensic commitment process to the Hospital I knew that there was no provision in Oregon law for such an order.

Because of my concern that some sort of serious error in the commitment process had occurred in regard to Mr. Spinosa I obtained copies of various documents related to the proceedings regarding his commitment. I also listened to the audio recording of the proceedings. What I read in the court documents and heard on the audio recording was really quite astounding to me and raised serious ethical concerns about the conduct of the District Attorney, Bob Hermann and Mr. Spinosa's defense attorney Robert Axford. It also raised some issues regarding Judge Kohl as well but those will need to be addressed in a different forum.

Let me give you some background that I have discovered to set the scene.

Donn Thomas Spinosa has a long history with the Hospital. In 1997 in Washington County he was charged with murdering his wife by stabbing her to death. He was found to be incompetent to stand trial and was sent to the hospital. After 3 years the hospital said he was still incompetent to stand trial and would not likely become competent any time in the foreseeable future. Following the statutes, the murder case was dismissed without prejudice and Spinosa was civilly committed.

In 2010 the hospital apparently notified DA Hermann that they were going to put Spinosa in some sort of outpatient community placement. In response to this news DA Hermann re-indicted Spinosa, had him arrested and lodged in jail. Spinosa promptly quit taking his medication and grossly decompensated. There was a hearing in the new murder case at which Judge Thomas Kohl found Spinosa incompetent to proceed and sent him to the hospital for a 90 day evaluation. The evaluation found that he was incompetent to stand trial and would not likely be competent any time in the foreseeable future. Judge Kohl then set another hearing. To that point, everything was kosher. From this point forward is where the wheels came off.

At the October 20, 2011 hearing, DA Hermann, citing no legal authority what so ever, asked the judge to enter an order styled, "Order and Notification of Mental Illness Magistrate Hold." From listening to the audio recording of the hearing I learned that Mr. Spinosa's own attorneys, Bob Axford agreed to this and Judge Kohl entered the order. This order purported to place Mr. Spinosa in the Hospital *indefinitely* and he could only be released on the order of Judge Kohl. Such an order is entirely without legal foundation in Oregon and stripped Mr. Spinosa of all of his rights and protections under ORS 161.360-370. I believe from reading the memo presented to the court by DA Hermann and from his comments at the hearing he knew perfectly well that there was no legal authority for this and that it was an attempt to avoid Oregon law that he did not like. I have no idea if attorney Axford agreed to this order out of ignorance or for some other reason. Axford is an experienced public defender so ignorance seems unlikely. I do have an E-mail from Judge Kohl that could be read to support a theory that the DA, the defense attorney and the judge all planned this in advance.

Let me take a moment to talk about the law in area as it is not something most members of the bar know much about. Commitment of criminal defendants to the Oregon State Hospital is exclusively a statutory process in this state and it is controlled by the provisions of ORS Chapter 161. The only authority a judge has to order a criminal defendant to the Hospital if the person is found not competent to stand trial is found in the provisions of ORS 161.360 through ORS 161.370. There are no other statutory provisions that control this process. The statutes are crystal clear and leave no room for interpretation. Since this is a purely statutory process, there is no "common law" authority; no "inherent power"; nor any "judicial discretion" basis for a judge to forge his or her own processes, procedures or orders for sending a criminal defendant to the Hospital if the person is found not competent to proceed to trial. Simply put, no judge in this state has that power. In Oregon, the statutory way is the only way. There is no doubt in my mind that DA Hermann, attorney Axford and judge Kohl all knew this.

By signing the order sought by DA Hermann and agreed to by defense attorney Axford, the judge effectively deprived Mr. Spinosa of all of his legal rights and protections under ORS 161.360-370. It appears clear that this is exactly what DA Hermann intended. I cannot for the life of me think of any legitimate reason why defense attorney Axford would allow his client to be treated in this fashion without raising vigorous objections. Instead, he agreed.

So, the first issue is that Mr. Spinosa was locked in the Oregon State Hospital at the request of DA Hermann on an undeniably invalid order that seems to have been clearly designed to completely sidestep the provisions of ORS 161.360-370. And, this was agreed to by Mr. Spinosa's own attorney Axford.

But the saga continues.

On October 31, 2011 Judge Kohl entered another order at the request of DA Hermann. This one is styled, "Order Finding Defendant Unfit to Proceed, Order of Dismissal Pursuant to ORS 161.360(9) and Order of Commitment." Among other things, this order dismissed the murder charges against Mr. Spinosa. When Judge Kohl dismissed the murder case, the previous invalid "Order and Notification of Mental Illness Magistrate Hold" became a nullity as well as the case supporting the order no longer existed. So, Mr. Spinosa was then either sitting in or on his way to the Oregon State Hospital with no order (valid or invalid) requiring him to be there. As far as I can determine, defense attorney Axford made no effort to get Mr. Spinosa released from the hospital.

From my discussions with Mr. Bob Joondeph of Disability Right Oregon, he is the one who alerted the Oregon State Hospital to the fact that Mr. Spinosa was in or on his way to the Hospital with no order to support his being there. The Hospital, at Mr. Joondeph's urging, then undertook a civil commitment proceeding and secured a valid court order of commitment in regard to Mr. Spinosa.

Based on the foregoing, I believe that DA Hermann and attorney Axford were each guilty of serious ethical violations during the course of these proceedings. As far as I am concerned this is not a malpractice case; this is an ethics case.

District Attorney Hermann

I believe he clearly and intentionally violated Disciplinary Rule 3.1 which reads in part:

RULE 3.1 MERITORIOUS CLAIMS AND CONTENTIONS

In representing a client... a lawyer shall not knowingly ... assert a position therein... unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law...

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel...

In addition I believe that he also violated Rule 8.4:

RULE 8.4 MISCONDUCT

(a) It is professional misconduct for a lawyer to:

(4) engage in conduct that is prejudicial to the administration of justice; or

(6) knowingly assist a judge... in conduct that is a violation of applicable ... law.

Attorney Axford

I believe he violated the following Rules:

RULE 1.1 COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

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(4) engage in conduct that is prejudicial to the administration of justice; or

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In looking at Axford's conduct it seems to me to be instructive to refer to the Performance Standards for representation in criminal cases. For example:

STANDARD 2.8 Pretrial Motions and Notices; Hearings Regarding Ability to Aid and Assist and Waiver of Juvenile Court Jurisdiction

A lawyer should research, prepare, file, and argue appropriate pretrial motions and notices whenever there is reason to believe the client is entitled to relief. A lawyer should be prepared to provide quality representation and advocacy for the client at any hearings regarding the client's ability to aid and assist...

Under the heading of **Implementation** the standard goes on to say:

2. A lawyer should take the following steps with regard to seeking a determination of the client's ability to aid and assist:

c. At the hearing to determine whether the client is able to aid and assist, a lawyer should protect and exercise the client's constitutional and statutory rights, including cross-examining the state's witnesses, calling witnesses on behalf of the client such as independent experts, and making appropriate evidentiary objections.

d. If an adult client is found to be unable to aid and assist, a lawyer should advocate for the least restrictive level of supervision and the least intrusive treatment.

I have chosen to write to you about these issues because over the years it has become apparent to me that I tend to hold attorneys to a higher ethical standard than the Bar does. I see no point in filing complaints against these two lawyers just to have the Bar blow them off. So, if you are interested in investigating this, this is the situation. Mr. Spinosa is one of member of an underclass of people in our society who are particularly vulnerable to being taken advantage of. In my opinion that certainly happened to him in this case.

I will be happy to discuss this matter with you at your convenience. I will be working out of the country starting January 10, 2012 so if you do wish to talk it would be more convenient to do so before then.

--
Jim

"If the misery of the poor be caused
not by the laws of nature but by
our institutions, great is the sin"

Charles Darwin

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