

Chapter 12

Advising Clients on Collateral Matters and Consequences of Commitment

12.1 Overview	12-1
12.2 Terminology Used in this Chapter	12-1
12.3 Firearm Ownership and Possession	12-2
12.4 Driving Privileges	12-5
12.5 Restrictions on Patient Rights	12-6
12.6 Expunction of Minors' Records of Admission and Commitment	12-8
12.7 Civil Rights and Remedies	12-8
Appendix 12-1 Involuntary Commitments and Federal Firearms Disabilities	12-10

12.1 Overview

Immediate collateral consequences result from an order for involuntary commitment. In addition to the restrictions on personal liberty inherent in the involuntary commitment process, other restrictions on personal rights and freedoms may be experienced during the term of commitment or admission. Some of the most serious and long-lasting consequences may only affect the respondent many months after release or discharge from the facility. This chapter will explore some of the more serious consequences of commitment or admission both during the inpatient stay and after discharge or release.

12.2 Terminology Used in this Chapter

“Client” is “an individual who is admitted to and receiving service from, or who in the past had been admitted to and received services from, a facility.” N.C. GEN. STAT. § 122C-3(6) (hereinafter G.S.).

“Client advocate” is “a person whose role is to monitor the protection of client rights or to act as an individual advocate on behalf of a particular client in a facility.” G.S. 122C-3(7).

“Human rights committees” are “responsible for protecting the rights of clients . . . at each State facility, for each local management entity, and provider agency.” G.S. 122C-64.B.

“Qualified professional” is the “individual with appropriate training or experience as specified by the General Statutes or by rule of the Commission in the fields of mental health or developmental disabilities or substance abuse treatment or habilitation, including physicians, psychologists, psychological associates, educators, social workers, registered nurses, certified fee-based practicing pastoral counselors, and certified counselors.” G.S. 122C-3(31).

12.3 Firearm Ownership and Possession

Generally. The right to keep and bear arms is guaranteed by the Second Amendment to the U.S. Constitution. The Federal Gun Control Act contains provisions prohibiting the ownership or possession of a firearm by certain persons because they have been committed or have been adjudicated as a “mental defective.” The federal statute provides:

“It shall be unlawful for any person—

. . . .

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

. . . .

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.”

18 U.S.C. § 922(g).

The statute prohibits not only gun ownership but also possession by certain people. Involuntarily committed adults fall under the statutory definition.

Interplay of federal and state law. The National Instant Criminal Background Check System (NICS) is the mechanism by which North Carolina notifies federal authorities of involuntary mental health commitments subject to the Federal Gun Control Act. NICS was established by the Brady Handgun Violence Prevention Act, Public Law 103-159, 107 Stat. 1536 (1993), and it is maintained by the FBI pursuant to 28 C.F.R. § 25.3. Local law enforcement agencies access NICS

through their National Crime Information Center (NCIC) terminal to determine an individual's status.

The North Carolina General Assembly created an exception to the confidentiality ordinarily required for involuntary commitment records to allow the clerk of superior court to notify NICS of any individual who is involuntarily committed and found to be a danger to self or others or any individual who is acquitted by reason of insanity or who is found incapable of proceeding to trial on a criminal charge (apparently without regard to whether the crime alleged is violent or nonviolent). G.S. 122C-54(d1). This statute does not require reporting to NICS of a commitment for substance abuse treatment. In North Carolina, individuals who are involuntary committed for mental health reasons and who therefore must be reported to NICS under North Carolina law are prohibited from purchasing, possessing, or transferring a firearm and, pursuant to 18 U.S.C. § 922(g), are subject to federal punishment, including imprisonment, for a violation. *See* 18 U.S.C. § 924. If reported to NICS, an individual who satisfies the conditions in G.S. 122C-54.1 may petition a state court for removal of the firearm bar. *See infra* Appendix A, Form AOC-SP-211.

Under North Carolina statutory and case law, it appears that an adult's Second Amendment Rights become restricted following a mental health commitment and the clerk's submission of a report to NICS. G.S. 122C-54(d1) (describing circumstances in which the state notifies federal authorities of commitment); *see also Waldron v. Batten*, 191 N.C. App. 237 (2008) (holding under G.S. 14-404(c), which prohibits handgun permits to be issued to those who have been "adjudicated mentally incompetent" or "committed to any mental institution," that a petition, custody order, first evaluation, and admission to a 24-hour facility did not constitute commitment to a mental institution and did not disqualify the petitioner from obtaining a handgun permit). Therefore, a respondent who changes his status to voluntary prior to an involuntary commitment, or a respondent who is released before the hearing on involuntary commitment, might not be subject to operation of the federal statute because in those circumstances the clerk is not required to submit a report to NICS.

The dilemma for the respondent's counsel is that NICS reporting does not finally determine whether federal authorities may charge under the federal statute. Counsel cannot assure a respondent that G.S. 122C-54 provides any limitation to federal action. The federal statute restricts the gun rights of an individual "committed" to an institution or adjudicated as a "mental defective." Federal authorities may pursue respondents under either definition.

Thus, respondents may be exposed to criminal liability under the federal statute as a result of ever having been involved in the involuntary commitment process. Many psychiatric "commitments" predate the relatively new North Carolina reporting statute. It is likely that a respondent who has been adjudicated incompetent and in need of a guardian is "mentally defective" under the federal

statute. Unlike North Carolina's reporting statute, the federal statute presumably encompasses substance abuse commitments as well. In the federal sense, the term "committed" also has been determined to include outpatient commitments. *See U.S. v. B.H.*, 466 F. Supp. 2d 1139 (N.D. Iowa 2006). Although unlikely, even a magistrate's determination of mental illness and dangerousness might be alleged as an adjudication of mental defect.

Whether there is a restriction on the gun rights of minors who suffer commitment or admission to a psychiatric facility is even more complex. The previous discussion applies. However, a juvenile may petition for the expunction of commitment records once the juvenile reaches eighteen years of age. What is the effect of an expunction on the application of the federal statute? Again, there are no definite answers, although it would appear that expunction is not effective to prevent application of the federal statute. *See* Appendix 12-1, E-mail from David C. Lieberman, Assoc. Chief Counsel (Southeast), Bureau of Alcohol, Tobacco, Firearms & Explosives, U.S. Dep't of Justice, to John Aldridge, Special Deputy Attorney Gen., Law Enforcement Liaison Section, N.C. Dep't of Justice (Sept. 7, 2010). Counsel should therefore inform all of these clients of the federal law and its possible application.

Practical concerns. The ability to own or possess a firearm can be important for a number of reasons. Military service and law enforcement are two of a number of professions that require the ability to legally own and possess a firearm. Many people also enjoy hunting, recreational shooting, and gun collecting, while others desire to keep a firearm for personal safety.

Counsel may advise a client who has not been previously committed of the options to sign in as a voluntary patient if a competent adult or to continue the case pending discharge as ways to lessen the potential for being found to be "committed to a mental institution" under the federal statutes. The lack of clarity and the importance of complying with the federal statutes should be emphasized. Counsel should advise the respondent to consult with an attorney outside the hospital if there is an issue of possessing a firearm, obtaining a permit to own a firearm, or keeping a firearm pursuant to an existing permit. The respondent may want to discuss with outside counsel the possibility of relief under G.S. 122C-54.1 from the federal firearm prohibition under the facts of the respondent's case.

Other resources. A further discussion of relevant federal statutes and regulations and state statutes, as well as a review of case law interpreting 18 U.S.C. § 922(g)(4), is contained in a paper entitled "Involuntary Commitment and the Federal Gun Control Act," presented at the Second Annual Civil Commitment Conference (Jan. 23, 2004). The paper is reprinted *infra* in Appendix D. Counsel is referred to this Appendix for additional information concerning the Federal Gun Control Act, particularly section D, "Advising Your Client." *See also* FIREARMS PROGRAMS DIVISION, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, FEDERAL FIREARMS REGULATIONS REFERENCE GUIDE, ATF PUB.

No. 5300.4 (2005), *available at*
<http://www.atf.gov/files/publications/download/p/atf-p-5300-4.pdf>.

12.4 Driving Privileges

Report of involuntary substance abuse commitment to DMV. The North Carolina General Statutes provide that the clerk of court of the county of adjudication must report to the Commissioner of the Division of Motor Vehicles (DMV) “[i]f any person shall be adjudicated as incompetent or is involuntarily committed for the treatment of alcoholism or drug addiction.” G.S. 20-17.1(b).

Determination by DMV. The statute requires the Commissioner to “make inquiry into the facts for the purpose of determining whether such person is competent to operate a motor vehicle.” G.S. 20-17(a). The driving privileges of the person must be revoked unless the Commissioner is “satisfied that such person is competent to operate a motor vehicle with safety to persons and property.” *Id.* There are provisions for appeal of the revocation of driving privileges to the Commissioner, with the “right to a review by the review board . . . upon written request filed with the Division.” *Id.*

Medical report form. The DMV may require a medical evaluation as part of a review of a person’s driving privileges. The DMV has developed a Medical Report Form to be filled out by the physician performing the evaluation. Failure to obtain an evaluation and to return the medical report to the DMV can lead to revocation of driving privileges.

Advising the client. A client facing involuntary commitment for substance abuse treatment should be advised of the possible loss of driving privileges. After involuntary substance abuse commitment, the client may receive a notice of a review by the DMV along with a request to obtain a medical evaluation. In some instances, however, driving privileges have reportedly been revoked by the DMV upon receipt of the notice of substance abuse commitment. The client must then appeal and present evidence of the ability to drive safely. Attorney representation is not required but may be important in prevailing on appeal. Counsel should advise the client that representation on issues related to driving would have to be obtained from a privately-retained attorney.

Because the ability to drive legally can be essential for transportation to work and for independent living, this issue should be stressed to the client. Possible approaches that may avoid the issue are signing in as a voluntary patient, agreeing to an involuntary mental health commitment, and continuing the case from week to week while inpatient treatment is received, followed by either voluntary outpatient treatment or involuntary mental health outpatient commitment, if recommended.

12.5 Restrictions on Patient Rights

Generally. Some statutory rights of patients in an inpatient facility may be limited or restricted under certain prescribed conditions. When discussing an upcoming commitment hearing, counsel may decide not to discuss these rights and the conditions under which they may be limited or restricted unless the client asks about them. The information may be confusing and may divert the client's attention from the issues and decisions to be made in regard to the commitment hearing.

The client more often will contact counsel after a limitation or restriction is imposed. Counsel will need to review the client's patient records, talk with the client, and talk with the appropriate qualified professionals to determine if the limitation or restriction is within the statutory guidelines. If it is not, counsel should talk with the attending physician, the client advocate, or other appropriate persons to address the violation of rights. At state psychiatric hospitals, the violation may be reported to the Human Rights Committee if resolution cannot be reached.

If the restriction or limitation is allowed by statute, counsel should discuss further with the client the circumstances surrounding the limitation or restriction of rights. If the limitation or restriction appears to have been properly imposed, counsel should explain to the client the requirements of the statutes and discuss, perhaps in conjunction with the treatment team, a plan for the client to work toward easing or eliminating the limitation or restriction of a statutory right.

The statutory rights discussed below may be restricted or limited as prescribed by statute. Non-restrictable rights are not included in this discussion.

Forced medication of involuntary patients. Treatment, except for that requiring express written consent, may be given to a person under involuntary commitment in some circumstances despite the refusal of the client, the client's legally responsible person, the health care agent named pursuant to a valid health care power of attorney, or a valid advance instruction. Treatment may be forcibly administered

“in the event of an emergency or when consideration of side effects related to the specific treatment measure is given and in the professional judgment, as documented in the client's record, of the treating physician and a second physician, who is either the director of clinical services of the facility, or the director's designee, either:

- (1) The client, without the benefit of the specific treatment measure, is incapable of participating in any available treatment plan which will give the client a realistic opportunity of improving the client's condition;

- (2) There is, without the benefit of the specific treatment measure, a significant possibility that the client will harm self or others before improvement of the client's condition is realized."

G.S. 122C-57(e).

The following treatment cannot be given without the express written consent of a competent, capable client: electroshock therapy; experimental drugs or procedures; or surgery other than emergency surgery. G.S. 122C-57(f).

Physical restraint or seclusion. A client, however committed or admitted, may be physically restrained or secluded "only when there is imminent danger of abuse or injury to the client or others, when substantial property damage is occurring, or when the restraint or seclusion is necessary as a measure of therapeutic treatment." G.S. 122C-60(a).

Restrictable rights of adults. Certain rights of adult clients enumerated by statute may be limited or restricted by a qualified professional. These are the right to: make and receive confidential telephone calls; receive visitors during times specified by statute; meet by mutual consent with others under appropriate supervision; make visits outside the facility unless committed or admitted in regard to certain criminal proceedings; be outside and have access to exercise facilities several times a week; keep and use personal clothing and possessions legally permitted, unless the person is being held to determine capacity to proceed in criminal court; participate in religious worship; keep and spend a reasonable sum of money; retain a driver's license, unless otherwise prohibited by Chapter 20 of the North Carolina General Statutes (*see supra* § 12.4); and have personal storage space for private use. G.S. 122C-62(b).

The qualified professional responsible for the client's treatment plan must write in the client's record detailed reasons for the restriction or limitation. The restrictions must be reasonable and related to the client's treatment needs. They shall be effective for no more than thirty days and must be reviewed every seven days, but may be renewed by written statement of the qualified professional in the client's record. G.S. 122C-62(e).

Restrictable rights of minors. Certain rights of minors enumerated by statute may be limited or restricted by a qualified professional. These are the right to: make and receive telephone calls; send and receive mail and have access to writing materials, postage, and staff assistance when necessary; receive visitors at times specified by statute under appropriate supervision; receive special education and vocational training in accordance with federal and state law; be outside daily and participate in play, recreation, and physical exercise on a regular basis; keep and use personal clothing and possessions legally permitted, unless the person is being held to determine capacity to proceed in criminal court; participate in religious worship; have individual storage space; keep and spend a reasonable sum of

money; and retain a driver's license, unless otherwise prohibited by Chapter 20 of the North Carolina General Statutes (*see supra* § 12.4). G.S. 122C-62(d).

The qualified professional responsible for the client's treatment plan must write in the client's record the detailed reasons for the restriction or limitation. The restrictions must be reasonable and related to the client's treatment needs. They shall be effective for no more than thirty days and must be reviewed every seven days, but may be renewed by written statement of the qualified professional in the client's record. G.S. 122C-62(e).

12.6 Expunction of Minors' Records of Admission and Commitment

Court records regarding an admission or commitment of a minor may be expunged after the minor has "both been released and reached adulthood." G.S. 122C-54(e). The request may be made by the individual admitted or committed or by the individual's legally responsible person. *Id.* The records of the admission and commitment of minors are confidential special proceedings records maintained by the clerk of court. Records may be maintained in separate counties if petitions were filed or treatment was received in more than one county.

The statute provides that the minor and the legally responsible person "shall be informed in writing by the court of the right provided by this subsection at the time that the application for admission is filed with the court." *Id.* Because application for voluntary admission may be made at the facility or a petition for involuntary commitment may be filed by someone other than the legally responsible person without the minor being present, it is uncertain whether this notice is being accomplished. Counsel should advise minor clients of the right to have the court records expunged (erased), and to seek assistance of the clerk of court to do so after being released and reaching the age of eighteen.

12.7 Civil Rights and Remedies

The statute states that, unless otherwise provided,

"each adult client of a facility keeps the same right as any other citizen of North Carolina to exercise all civil rights, including the right to dispose of property, execute instruments, make purchases, enter into contractual relationships, register and vote, bring civil actions, and marry and get a divorce, unless the exercise of a civil right has been precluded by an unrevoked adjudication of incompetency. This section shall not be construed as validating the act of any client who was in fact incompetent at the time he performed the act."

G.S. 122C-58.

Clients often have legal issues that are beyond the scope of counsel's representation for the admission or commitment. Counsel should advise the client of the need to seek separate counsel for these issues. Special Counsel is not allowed to engage in the private practice of law. G.S. 122C-270(a). Representation by appointed counsel on other legal issues could lead to confusion concerning the attorney's role with both the client and the treatment provider.

Appendix 12-1 Involuntary Commitments and Federal Firearms Disabilities *

From: Lieberman, David C.
Sent: Tuesday, September 07, 2010 3:53 PM
To: Aldridge, John
Subject: RE: involuntary commitments

John, per our phone call and e-mails, I have finished my review of this issue. For your information, I have also run my response by an attorney in ATF HQ who has dealt with similar issues in the past and am advised that HQ concurs with this response. I apologize for the length of this e-mail, but I decided to make it fairly detailed in case you are questioned about this issue in the future.

The question you presented is whether a person who has the record of his or her juvenile involuntary commitment expunged under N.C. Gen. Stat. § 122C-54(e) is subject to Federal firearms disabilities under the Gun Control Act of 1968 (GCA), as amended, 18 U.S.C. Chapter 44. The brief answer is that such an expungement does not remove the disability.

As you know, the GCA makes it "unlawful for any person - who has been adjudicated as a mental defective or who has been committed to a mental institution . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." 18 U.S.C. § 922(g)(4).

While the GCA does not define the term "committed to a mental institution," the implementing regulations define the term to mean a "formal commitment of a person to a mental institution by a court, board, commission or other lawful authority. The term includes a commitment to a mental institution involuntarily. The term includes commitment for mental defectiveness or mental illness. It also includes commitments for other reasons, such as drug use. The term does not include a person in a mental institution for observation or a voluntary admission to a mental institution." 27 C.F.R. § 478.11.

As an initial matter, it is clear that a person who has been involuntarily committed as a juvenile under North Carolina law falls within the definition of someone who has been "committed to a mental institution," as the commitment comes after a hearing in front of a State district court judge. As a result, the person would be subject to the Federal firearms disabilities imposed by 18 U.S.C. § 922(g)(4).

* David C. Lieberman is Associate Chief Counsel (Southeast), Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Department of Justice. John Aldridge is Special Deputy Attorney General, Law Enforcement Liaison Section, N.C. Department of Justice.

In determining whether a subsequent expungement under section 122C-54(e) serves to remove that disability, I reviewed both the GCA and the NICS Improvement Amendments Act of 2007 (NIAA), Pub. L. No. 110-108. For your information, the NIAA provides that a State may set up relief from disabilities programs for persons previously committed to a mental institution as described in the GCA. As set forth below, my opinion is that such an expungement does not remove the firearms disability.

In this regard, while the GCA provides that what constitutes a conviction of a "crime punishable by imprisonment for a term exceeding one year" does not include any conviction "which has been expunged, or set aside, or for which a person has been pardoned or has had civil rights restored," 18 U.S.C. § 921(a)(20), there is no similar language in the definition of the term "committed to a mental institution." Similarly, while the language of the NIAA refers to "relief from disabilities" it does not include language about "expunged" commitments. So, under strict construction principles, it does not appear that a subsequently expunged involuntary commitment such as one addressed in N.C. Gen. Stat. § 122C-54(e) relieves a person of the Federal firearms disabilities contained in 18 U.S.C. § 922(g)(4). Had Congress intended to exclude "expunged" commitments, it would have done so in the NIAA, since it was aware that a person with an expunged conviction was no longer subject to the firearms prohibitions contained in the GCA. Finally, I note that section 122C-54 does not set forth a legal standard for issuance of the expungement. While it is arguable that existence of a statutory standard for granting expungement would make the process more like the relief process envisioned in the NIAA, the lack of such a standard at the present time makes such analysis impossible. Thus, a person who has his or her juvenile commitment expunged under N.C. Gen. Stat. § 122C-54(e) is still subject to Federal firearms disabilities.