2.5 Attorney Representation

There are two primary parties in an involuntary commitment case: the petitioner and the respondent. The respondent is the subject of the petition and is represented by an attorney. The petitioner has the burden of proving the allegations of mental illness and dangerousness by clear, cogent and convincing evidence, yet is often unrepresented.

To prove the allegation of mental illness, various expert witnesses may be required to testify. Psychologists, psychiatrists, social workers, or other mental health workers may be called to testify. These experts are typically employees of the psychiatric hospital where the respondent is being held and treated pending the district court hearing. When further involuntary inpatient treatment is recommended by such experts, the facility holding and treating the respondent has a corresponding interest in maintaining the respondent on involuntary commitment.

In spite of their substantial roles in proving the allegations in support of involuntary commitment, the petitioner and the treatment facility are often without counsel. These participants often lack knowledge of the substantive and procedural rules that apply during the district court hearing. This places an additional burden on the presiding judge and respondent's attorney to ensure that the respondent receives a full and fair hearing before an impartial fact finder.

A. Attorney for Respondent

Inpatient. An indigent respondent, as defined by G.S. 7A-450, is represented by counsel appointed according to the rules of the Office of Indigent Defense Services (IDS). G.S. 122C-268(d). How counsel is appointed depends first on whether the respondent is at a state facility or elsewhere. Special Counsel represents indigent respondents at state facilities "at all hearings, rehearings, and supplemental hearings held at the State facility." G.S. 122C-270(a). The state facility must provide office space for Special Counsel to meet with clients. G.S. 122C-270(b). Because of time and staff limitations, it may be more common for counsel to meet with clients in whatever private space is available in the ward at the time of the meeting.

For respondents at non-state facilities, appointment procedures vary. In some counties, one attorney has been designated to represent all respondents not in a state facility. The clerk maintains an appointment list in other counties, with attorneys on the list assigned on rotation. Attorneys in private practice interested in serving as counsel for respondents in non-state facilities should make inquiry of the local clerk of court, the local bar committee on indigent representation, or IDS.

Appointed counsel for a respondent at a non-state facility is responsible for representation until the respondent is either unconditionally discharged, signs in as a voluntary patient, or is transferred to a state facility. Representation otherwise continues through the proceeding at the trial level until the district court orders that counsel is discharged. If the

respondent appeals, the Office of the Appellate Defender appoints counsel. G.S. 122C-270(a), (e).

Respondents who are not indigent are entitled to be represented by privately-retained counsel of choice. If a non-indigent respondent refuses to hire counsel, however, the statute provides for appointment of counsel pursuant to IDS rules. G.S. 122C-268(d). As of this writing, IDS has not adopted specific rules on appointment of counsel in these circumstances, and attorneys are appointed in each county according to local practice.

For more on the role and responsibilities of counsel, see *infra* Appendix C, "Working with Clients."

Outpatient. There is no statutory requirement that an indigent respondent be represented by counsel at a hearing resulting from an affidavit of a physician or eligible psychologist requesting outpatient commitment. The court may appoint counsel if it

> "determines that the legal or factual issues raised are of such complexity that the assistance of counsel is necessary for an adequate presentation of the merits or that the respondent is unable to speak for himself . . . ."

G.S. 122C-267(d); *see also infra* Appendix A, Form AOC-SP-904M.

B. Attorney for Petitioner

Inpatient. The member of the Attorney General's staff assigned to a state facility or to the psychiatric service of the University of North Carolina Hospitals at Chapel Hill represents the state's interest at all hearings held at the facility. G.S. 122C-268(b). The Attorney General also has discretion to assign a staff attorney to represent the state's interest at hearings held at places other than a state facility. *Id.* The Attorney General may provide representation if venue is transferred for a respondent at a state facility and the hearing is held in the county where the petition was initiated. The Attorney General does not provide representation in cases in which the respondent is not admitted to a state facility. In those cases, the private facility or the petitioner is responsible for hiring an attorney to appear at the hearing or may choose to be unrepresented.

There are non-state facilities, such as general hospitals with psychiatric wings, private psychiatric hospitals, or local mental health inpatient facilities, that do not have representation at the commitment hearings. This affords the respondent's counsel the benefit of presenting evidence without objection and arguing the client's case without response from opposing counsel.

However, having no opposing counsel can be a detriment to the respondent if the judge assumes the role of questioning the petitioner and the petitioner's witnesses or otherwise conducts the hearing in a less formal manner. This makes it difficult for the respondent's counsel to make objections and may result in violations of the respondent's substantive and procedural due process rights. When the respondent's counsel is confronted with the

prospect of such violations occurring, counsel should enter appropriate and timely objections in order to preserve the respondent's right to appeal.

Case law: No prejudice to the respondent was found where the petitioner was not represented and the judge questioned witnesses.

In re Jackson, 60 N.C. App. 581 (1983). In *Jackson*, the hearing for a Dorothea Dix patient was held in Cumberland County. The respondent alleged that the lack of counsel for the petitioner in her involuntary commitment proceeding violated her constitutional rights to due process, equal protection, and a fair and impartial hearing. First, she challenged the constitutionality of G.S. 122-58.7(b) and 122-58.24, former statutes that provided that the state would be represented at hearings held at four regional psychiatric centers in North Carolina but did not guarantee counsel for the state or the petitioner in hearings held in other places. (As noted above, the current statute, G.S. 122C-268(b), gives the Attorney General discretion to provide attorney representation at hearings held outside the state facilities). Second, she alleged that the involuntary commitment statutes were unconstitutional in that they permitted a trial judge to question witnesses at an involuntary commitment hearing at which the judge was presiding. The court of appeals determined that the respondent had suffered no prejudice due to the challenged portions of the involuntary commitment statute and therefore had no standing to challenge their constitutionality.

See also In re Perkins, 60 N.C. App. 592 (1983). In rejecting the same arguments as presented in *Jackson*, the court in *Perkins* explained that it was

> "aware of no *per se* constitutional right to opposing counsel. Nothing in the record indicates language or conduct by the court which conceivably could be construed as advocacy in relation to petitioner or as adversative in relation to respondent. Respondent thus fails to show that he has been adversely affected by the involuntary commitment statutes as applied, and he therefore has no standing to challenge their constitutionality."

Id. at 594.

Jackson and *Perkins* reinforce that counsel for the respondent must make a record of how the respondent was prejudiced by the lack of counsel for the petitioner and the way in which the hearing was conducted. Lack of representation for the petitioner and greater participation by the judge in the proceedings do not themselves establish prejudice.

Outpatient. There is no statutory mandate for representation of a petitioner who initially requests only outpatient commitment. If the proceeding begins as an inpatient commitment and the respondent is admitted to a state facility but is released pending hearing on an outpatient commitment, the statute provides for representation by the Attorney General staff member assigned to the facility. G.S. 122C-268(b). Additionally, the Attorney General has discretion to assign a member of the staff to represent "the State's interest" at any commitment hearing or subsequent hearing held at a place other

than a state facility. *Id.* A county or city attorney could appear to represent the interest of an outpatient treatment provider who is employed by the governmental entity, but such representation is not required by statute.

The statute states that the petitioner "*may* be present and *may* provide testimony." G.S. 122C-267(b) (emphasis added). There is no mention of an attorney for the petitioner in the section on outpatient commitment, and no procedural guidelines are provided for conducting the hearing without either a petitioner or a petitioner's attorney. *See* G.S. 122C-267. In some instances the court has reviewed documents on its own motion and questioned the unrepresented respondent. This scenario puts the court in the position of potentially identifying with the interests of the petitioner. If the petitioner does not appear and present testimony, an objection to hearsay could be made as well as a motion to dismiss for failure to prosecute.