2.6 Initial Hearing

A. Time Limit for Hearing

A hearing must be held in district court within ten days of the respondent being taken into custody. G.S. 122C-268(a). For additional discussion of issues pertaining to hearings, see *infra* Appendix C, "Working with Clients."

Case law: A hearing held on the following weekday is within the time limit when the tenth day falls on a Saturday, Sunday, or legal holiday.

In re Underwood, 38 N.C. App. 344 (1978). In *Underwood,* the respondent was taken into custody on August 4, 1977, with the tenth day following being a Sunday. The involuntary commitment hearing was held on Monday, the eleventh day.

The North Carolina Court of Appeals noted that involuntary commitment proceedings are of a civil nature and thus are governed by the pertinent rules of the North Carolina Rules of Civil Procedure. Rule 6(a) provides that when the last day of a time prescribed by statute falls on a Saturday, Sunday, or legal holiday, the period runs to the next day that is not a Saturday, Sunday, or legal holiday. The court held that the hearing was held in due time under the Rules because the tenth day was a Sunday. 38 N.C. App. at 347.

Statutory amendment of definition of legal holiday. Rule 6 of the North Carolina Rules of Civil Procedure was amended effective October 1, 2003, regarding the definition of "legal holiday" for the purpose of calculating statutory time requirements. The amendment clarifies that the time period is extended only when the last date an action is required falls on a legal holiday *and* the courthouse is closed. If the courthouse is open on a legal holiday, such as Columbus Day, the time is not extended to the next day.

B. Venue and Transfer of Venue

Inpatient. Venue is the judicial district in the state in which a case is properly heard. In the involuntary commitment context, the respondent has a choice of venue when inpatient treatment is requested. The district court hearing is held in the county in which the 24-hour facility is located in all cases where the respondent is held pending hearing. If the respondent objects to venue, the hearing is held in the county where the petition was filed. G.S. 122C-269(a); *see infra* Appendix B, "Notice of Objection to Venue and Order Transferring Venue."

Counsel should inform a client who is in a facility outside the county where the petition was filed of the option of moving to transfer venue. The pros and cons to transfer of venue should be discussed with the respondent. Possible benefits of transfer are increased availability of witnesses favorable to the client and the decreased likelihood of testimony from treatment providers from the out-of-county facility. Possible detriments are the need for appointment of local counsel, delay in the hearing caused by scheduling difficulties and appointment of new counsel, the need for transportation of the respondent to the

hearing by law enforcement, increased availability of witnesses who observed the events alleged in the petition, and availability of expert witnesses who may have long-term experience with the client.

Possible benefits of not transferring venue are an earlier hearing date, availability of treatment team members for consultation and negotiation of terms of commitment, continuity of legal representation, and the decreased likelihood of witnesses from the initiating county who observed the events alleged in the petition.

Outpatient. The district court hearing is held in the county in which the petition for outpatient commitment was initiated. G.S. 122C-261(d), 122C-264(a). There is no provision for transfer of venue, as the county of origination is the same county where the proposed outpatient treatment would occur.

There is a provision to change venue for further court proceedings when a respondent who has been held in a 24-hour facility is then committed to outpatient treatment in a different county. The court must order that venue be transferred to the county where the outpatient treatment will be supervised. G.S. 122C-271(b)(4).

C. Place of Hearing

Inpatient. The hearing may be held in "an appropriate room not used for treatment" at the facility if it is located within the district of the presiding judge. Proceedings also may be held in the judge's chambers. If the respondent objects, the hearing may not be held in a regular courtroom, unless the judge determines that no more suitable place is available. G.S. 122C-268(g). Unless the respondent requests that it be open, the hearing is closed to the public. G.S. 122C-268(h).

If the hearing is held outside of the 24-hour facility, counsel should tell the client where the hearing will be held, describe the waiting area and courtroom, and inform the client of transportation arrangements. Respondents going to out-of-county hearings should be advised that law enforcement provides transportation. Private facilities may arrange for transportation and supervision of their patients having hearings outside the treatment facility.

Outpatient. Hearings may be held either at the area facility providing outpatient treatment, if within the judge's district, or in the judge's chambers. As with proceedings for inpatient commitment, the hearing may not be held in a regular courtroom over the respondent's objection, unless the judge determines that no more suitable place is available. G.S. 122C-267(e). The hearing is also closed to the public, unless the respondent requests otherwise. G.S. 122C-267(f).

D. Discharge Pending Hearing

The attending physician must release any respondent who no longer meets the criteria for involuntary inpatient or outpatient commitment, except for certain cases referred through

the criminal justice system. *See infra* Chapters 7, 8, and 9. Notice of the release is to be given by the attending physician to the clerk of court, and "the proceedings shall be terminated." G.S. 122C-266(d).

In an effort to obtain a discharge pending hearing, the respondent, through counsel, may consent to a physician recommendation for outpatient commitment. On such an agreement, the attending physician may release the respondent from involuntary inpatient services prior to the district court hearing. To effectuate the respondent's agreement at the district court hearing, counsel would waive the respondent's appearance, stipulate that the conditions for outpatient commitment exist, and consent to an order being entered that requires the respondent to receive outpatient services for mental health treatment.

E. Continuance

Inpatient. A continuance of up to five days may be granted on the motion of the court, the respondent's counsel, or the State. The State must move for a continuance "sufficiently in advance to avoid movement of the respondent." G.S. 122C-268(a).

Outpatient. A continuance of up to five days may be granted on the motion of the court, the respondent, or the proposed outpatient treatment physician. G.S. 122C-267(a).

Factors to consider. Many district courts hold commitment hearings only once a week or on two consecutive days, so a five-day continuance may not be workable. It is common practice for the court to allow a seven-day continuance on consent of the parties.

There are many practical reasons a respondent might benefit from a continuance, though it might seem only to extend the respondent's hospital stay. Some clients are suffering most acutely from symptoms of mental illness in the first week or two of admission. A continuance may allow for improvement of symptoms, leading to more effective communication between attorney and client, better decision-making by the client, and more persuasive presentation by the client at the later hearing. Another benefit can result if the client improves enough to be either discharged or allowed to sign in as a voluntary patient. This may be particularly important to someone who has never been committed, as it may avoid the collateral consequences of commitment, such as the inability to own or possess a gun legally. *See infra* Chapter 12.

Counsel sometimes has to make the decision to ask for a continuance without agreement from a client who is too acutely ill to be able to discuss the issues. The attorney should review the respondent's psychiatric history and talk with treatment providers to determine whether the client is likely to improve enough to participate in the hearing process in the near future or whether the hearing will proceed without meaningful assistance from the client. *See infra* § 2.6F.

In addition, a client who is demanding that venue be transferred to the county from which the petition originated should be advised by counsel of the need for the court transferring venue to continue the case to accommodate the client's request. At the new venue, a

delay in excess of seven days may be reasonable given the responsibilities of the clerk in assigning new counsel, in scheduling a judge to hear the matter, in scheduling an appropriate hearing location and hearing time, and in serving notices of the hearing.

Case law: Granting of seven-day continuance over objection of respondent was improper.

In re Jacobs, 38 N.C. App. 573 (1978). In *Jacobs*, the court file containing the petition and custody order from the originating county had not been transferred as of the hearing date to the clerk of superior court of the county where the commitment hearing was being held. The lower court therefore continued the respondent's initial commitment hearing on its own motion for seven days, over the respondent's objection. This resulted in the district court hearing being held more than ten days from the date the respondent was taken into custody.

The North Carolina Court of Appeals noted that the State failed to present any evidence on the date the hearing was originally scheduled. The court held that a seven-day continuance under these circumstances constituted a denial of the respondent's right to a hearing within ten days of being taken into custody. *Id.* at 575–76.

Note: This case was decided under the former statute G.S. 122-58.7(a), which provided for a continuance of five days only on motion of the respondent's counsel.

F. Not Contesting/Not Resisting Commitment

Not contesting. There are no statutory provisions for respondents to accept the recommendation of commitment, that is, to "not contest." In practice, however, many respondents are in agreement with their attending physicians on the need for inpatient treatment and do not contest the allegations in the petition. Even so, the attending physician may not allow the respondent to become a voluntary patient because of concerns that the respondent might want to leave prematurely or might stop cooperating with recommended treatment. Counsel may, after advising the respondent of the possible consequences of involuntary commitment, inform the client of the option to "not contest." *See infra* Chapter 12.

By not contesting, the respondent can avoid a hearing with potentially upsetting testimony from family, friends, and the treatment team. An uncontested commitment hearing could proceed with testimony from the petitioner's witnesses or by stipulation of the respondent's counsel. Counsel may stipulate to the facts alleged in the petition and in the Qualified Physician's Examination report (for a definition of this report, see *supra* § 2.2), or stipulate that the information in those documents would be the testimony of the authors.

A respondent who is not contesting may wish to attend the hearing and has the right to do so. Counsel should explain the abbreviated nature of the proceedings so that the respondent will know what to expect. Respondents who are not contesting often prefer

not to attend the hearing. A motion for waiver of appearance should be filed so that the respondent is not compelled to attend. *See infra* § 2.6G.

Not resisting. Because involuntary commitment involves allegations of mental illness, it is not unusual to have a client who is manifesting acute symptoms of a mental illness. For example, one respondent might be catatonic and completely unresponsive, while another is manic and unable to stop talking long enough to comprehend or to respond to information presented. There are no statutory provisions to guide counsel when the client is unable to express a decision on whether to contest the commitment.

In these cases, counsel should review the respondent's medical and psychiatric records and consult with the attending physician to better understand the respondent's prognosis. If a respondent has suffered from a disease for a long time with no improvement, or with progressive decline, counsel may determine that there is little chance for future meaningful communication. Because of the nature of involuntary commitment, the inability to communicate effectively with the client is not treated as it is in other types of cases. This problem may be an integral part of the reason the client was committed and is therefore not grounds for the case to be postponed due to the respondent's incapacity.

In cases where there is little or no chance for improvement or for the respondent to prevail at the commitment hearing, counsel may report to the court that the respondent is "not resisting." This means that the respondent is unable to understand and discuss the issues enough to contest the commitment, but is equally unable to decide not to contest. This is in contrast to the client who is able to express in any way a desire whether or not to contest. As with an uncontested case, the hearing may then proceed with testimony from the petitioner's witnesses or by stipulation of the respondent's counsel. Counsel may stipulate to the facts alleged in the petition and in the Qualified Physician's Examination report (for a definition of this report, see *supra* § 2.2), or stipulate that the information in those documents would be the testimony of the authors.

A motion for waiver of appearance is filed in virtually every case of commitment for treatment of mental illness in which a respondent is not resisting. This is because the respondent is also unable to make a decision regarding an appearance and would be unable to understand or to benefit from attending court proceedings.

Note that although the same considerations may exist in a substance abuse commitment proceeding, the substance abuse statutes do not allow a waiver of the respondent's appearance. *See infra* § 3.5D.

Continuance. If a respondent appears likely to improve soon, counsel should continue the case with the hope of having a meaningful discussion of the case. For example, a respondent with a diagnosis of bipolar disease who is acutely manic might have a history of responding quickly to medication. This is a good case to continue, with follow-up on the respondent's progress each week. There are no guidelines on what is a reasonable amount of time to pursue this approach. It is best to err on the side of a continuance if

there is some prospect of the respondent recovering enough to participate in the hearing. *See supra* § 2.6E.

G. Waiver of Appearance

Inpatient. Counsel may waive in writing the appearance of the respondent at the hearing, although the court must approve. G.S. 122C-268(e); *see infra* Appendix B, "Waiver of Appearance and Order Allowing Waiver of Appearance."

Some of the same considerations discussed above in deciding whether to request a continuance may be involved in deciding whether to waive the client's appearance. Counsel should advise the respondent of the benefits of appearing at the hearing in a contested case. The judge has an opportunity to observe and hear from the respondent. There can be consultation with the client concerning the testimony of the witnesses for the petitioner and the opportunity to present rebuttal testimony.

Some clients are reluctant to appear at the hearing because of fear of the unknown or past unpleasant experiences in other judicial proceedings. Counsel should advise that the hearing will not be in a regular courtroom and that anyone not directly involved in the case can be excluded from the hearing room. Reassurance that this is not a criminal proceeding and going to jail is not a possibility may be helpful.

Outpatient. The statute provides that the presence of the respondent at the hearing for outpatient commitment may not be waived. It further states that a subpoena "may be issued" to compel the respondent's attendance, but does not specify who is responsible for issuing the subpoena. G.S. 122C-267(b).

H. Criteria for Involuntary Commitment: Inpatient Treatment

The court must "find by clear, cogent, and convincing evidence that the respondent is mentally ill and dangerous to self . . . or dangerous to others." G.S. 122C-268(j). The statutory definitions of "dangerous to self" and "dangerous to others" are listed *supra* in § 2.2. The following case summaries are provided so that counsel may follow the progression of the courts' analysis of the dangerousness standards. As counsel will find from a review of these summaries, the outcome of a commitment case will depend on whether the basis for commitment is dangerousness to self or dangerousness to others and whether specific evidence is presented on the required prongs of the dangerousness definitions.

The cases are arranged in the following order based on their general impact:

- The first three cases—*Hatley*, *Hogan*, and *Frick*—were decided under the dangerousness definitions in former Chapter 122, but they still offer guidance to practitioners in litigating dangerousness allegations.
- The next cases—*Monroe* and *Crainshaw*—reflect an early emphasis on the need for specific findings on the required prongs of the dangerousness definitions.

- Cases from the next period—*Medlin, Lowrey,* and *Zollicoffer*—reflect a willingness by the courts to tolerate broader and less specific allegations of dangerousness as a basis for commitment. (*Crouse,* which questions *Crainshaw* and is discussed in connection with that decision, is also from this period.)
- Two recent unpublished opinions—*McCray* and *Church*—question the *Medlin* line of decisions and return to a closer interpretation of the statutory requirements.
- The last decision—*Hayes*—addresses one aspect of the dangerousness definition, the meaning of the phrase "in the relevant past."

Case law: Danger to self or others.

In re Hatley, 291 N.C. 693 (1977). The North Carolina Supreme Court in *Hatley* examined the evidence required to support a finding of danger to self or others under former Chapter 122. In *Hatley*, the only witness testifying on behalf of the State was the petitioner, who was the respondent's mother. The court also admitted into evidence, apparently without objection, the sworn affidavit of the first examining physician, Dr. Wilson.

The court noted that the lower court relied in part on the testimony of the respondent's mother, who testified that the respondent went into the house of a neighbor while no one was home, that she had heard that the respondent threatened a relative with a brick, and that she felt that the respondent sometimes drove in an unsafe manner. The respondent's mother admitted that she did not know whether the neighbor was home at the time the respondent went in, that she did not witness an incident in which the respondent threatened someone with a brick, and that she did not know of any instances in which the respondent had an automobile accident or disobeyed traffic laws. 291 N.C. at 696–97.

In finding the testimony of the respondent's mother insufficient to support commitment, the court stated, "We find nothing in the testimony of [the respondent's mother] which would even support a reasonable inference that [the respondent] was imminently dangerous to herself or others." *Id*. at 699. [The standard "imminently dangerous" applied by the court in *Hatley* is no longer valid. The pertinent portion of the current "dangerous to others" standard in G.S. 122C-3(11)b. requires that the respondent have "inflicted or attempted to inflict or threatened to inflict serious bodily harm on another" and that there be "a reasonable probability that this conduct will be repeated." The pertinent portion of the current "dangerous to self" standard in G.S. 122C-3(11)a. requires that the respondent be unable, without supervision, to exercise judgment and discretion in the context of daily responsibilities to satisfy her need for self-protection and safety and that there be a reasonable probability that she will suffer serious physical debilitation within the near future unless adequate treatment is given.]

Although the affidavit of the first examining physician was also admitted into evidence, the court observed that, based on review of the affidavit, the conclusions as to mental illness and danger were merely recitations of the information related by the respondent's mother and were not derived from the examination. The court stated that "insertion of these same facts in a medical report does not give them greater force or dignity than the

sworn testimony presented in the District Court." *Id*. at 699.

Note: This case illustrates both the need to object to hearsay and to question the source of the witness's information as well as the sort of testimony that does *not* support a finding of danger to self or others. It is also important to challenge information that comes in solely through an examiner's report (or testimony) without first-hand knowledge of the examiner.

In re Hogan, 32 N.C. App. 429 (1977). The North Carolina Court of Appeals reached a result contrary to *In re Frick*, discussed next. Although the facts of the case do not reveal the respondent's living situation, her behavior was similarly at issue. The court held, however, that the evidence of the respondent's mental illness and bizarre behavior was insufficient to support an involuntary commitment.

In *Hogan,* the State presented as its only evidence an affidavit from the physician who performed the second examination of the respondent, which was admitted over the objection of the respondent. Although the appellate court held that the affidavit should not have been admitted because the respondent did not have the opportunity to confront and cross-examine the physician, the court proceeded to review the record to determine if any evidence supported the findings of the lower court. *Id.* at 432–33.

The respondent presented the testimony of Dr. Russ, the psychiatrist who performed the first examination of the respondent at the local mental health center. Dr. Russ testified that the respondent was preoccupied with religion and preached on the streets of Gastonia without the requisite license, accosting strangers and trying to convert them. He found impaired judgment and lack of insight but did not find her to be aggressive. Dr. Russ instead felt that the danger the respondent posed to herself resulted from possibly inciting others to react aggressively to her because of her preaching. *Id.* at 431.

The appellate court held that this testimony did not support a finding that the respondent was dangerous to herself. Rather, it stated that if this scenario did occur, "it would seem more appropriate to commit her aggressor rather than the respondent." *Id.* at 434. The court further held that findings of fact that she had delusions about the Ku Klux Klan, "that she misinterpreted stimuli, and that she was out of touch with reality," even if they had been supported by the evidence, were not sufficient to support a finding of danger to self or others. *Id.* at 433–34.

Note: This case is useful in arguing cases in which a person exhibits symptoms of mental illness, resulting in bizarre behavior and unusual ideas. The court recognized that the person who reacts to non-aggressive behavior in an aggressive way is the one who poses a danger to the community.

In re Frick, 49 N.C. App. 273 (1980). The North Carolina Court of Appeals addressed the issue of danger to self in this case. The respondent was a homeless woman who was diagnosed with a mental illness. She often stayed in her car until it was impounded after her arrest for trespassing at the home of her former husband. The respondent testified that

she sometimes stayed in the motel rooms of men she had just met, and on one occasion agreed to have sex with a man for $20.00, but took the money without performing the sexual act. *Id.* at 273–74.

The respondent argued on appeal that the findings of fact did not support the finding that she was a danger to self. The appellate court disagreed, citing evidence relating to the respondent's mental condition and her inability to formulate a plan for self-care. The court noted that the lower court found that the respondent had exhibited both a thought disorder and a psychotic mood disorder with symptoms of pressured speech, loose associations, tangential thinking, and labile, or unstable, emotions. Her treating physician at Dorothea Dix, where she was committed, testified that she was at risk to decompensate and become psychotically manic if not involuntarily committed for treatment. This evidence was sufficient to support the conclusion that the respondent was a danger to self because of inability to provide basic necessities for herself and the probability of decompensation without inpatient treatment, leading her to place herself in dangerous situations. *Id.* at 276–77.

Note: This case illustrates the difficulty of representing a homeless person with mental illness. Although the respondent had found shelter for herself, and apparently had adequate nutrition, the places and situations she put herself into could have been dangerous. This, along with the diagnosis of mental illness, was sufficient to prove danger to self, without evidence of actual harm.

In re Monroe, 49 N.C. App. 23 (1980). The North Carolina Court of Appeals considered both danger to self and danger to others in this case. The State presented evidence that the respondent was irregular in his sleep routine, getting up three to six times per night, that he had unusual eating habits, fasting at times then eating a whole loaf of bread or a whole chicken, and eating about five pounds of sugar every two days. The court stated that this may be evidence of mental illness and might satisfy the first prong of the definition of "danger to self," an "inability to 'exercise self-control, judgment, and discretion in the conduct of his daily responsibilities.'" The second prong of the test, reasonable probability of serious physical debilitation within the near future without adequate treatment, however, was not met. *Id.* at 29 (relying on G.S. 122-58.2(1)a.1.I., now codified as amended at G.S. 122C-3(11)a.).

The court found that evidence of the respondent's calling out to strangers passing by his home likewise did not meet the test of behavior resulting in harm to himself. 49 N.C. App. at 29–30.

The *Monroe* court then addressed the issue of danger to others. Evidence presented by the State showed that the respondent was off his medication, resulting in behavior that was uncontrollable at times, that he made statements to family members that "I'm gonna get you all yet," that he was suspicious of his family and felt that he had been sexually abused by them, and that he was "ready to fight" if family members attempted to correct his behavior. *Id.* at 31. The court found that these facts supported the lower court's conclusion of law that the respondent was dangerous to others by acting "'in such a

manner as to create a substantial risk of serious bodily harm to another.'" *Id.* at 31–32.

In re Crainshaw, 54 N.C. App. 429 (1981). In *Crainshaw*, the State's evidence indicated that the respondent had forgotten to turn off the stove when cooking, causing her to burn pots and pans and a Formica countertop. She also was forgetful, talked to the wall, and appeared unaware of her surroundings. *Id*. at 430. Based on this evidence, the lower court found that the evidence "rais[es] a strong inference that she is unable to care for herself," and concluded as a matter of law that she was mentally ill and dangerous to herself. *Id*. at 430. On the respondent's appeal on the issue of danger to self, the appellate court held that the findings of fact did not support either prong of the test for danger to self. The court added that even if the facts were "indicative of some danger," they still would not support the second prong of the test requiring a reasonable probability of serious physical debilitation within the near future without adequate treatment. *Id.* at 432. [In the *Crainshaw* opinion, the court of appeals stated that the second prong of the dangerous to self test "mandates a specific finding of a probability of serious physical debilitation resulting from the more general finding of lack of self-caring ability." *Id.* at 431. In the later case of *In re Crouse*, 65 N.C. App. 696 (1983), the court of appeals explained that it believed such language was dictum and that only a finding that the respondent was mentally ill and dangerous to self was necessary to support an inpatient commitment order.]

In re Medlin, 59 N.C. App. 33 (1982). The *Medlin* case focused on the two-pronged test of danger to self in upholding the commitment of the respondent. The respondent was diagnosed with paranoid schizophrenia and psychotic depression on admission to John Umstead Hospital. The respondent's daughter testified at the commitment hearing that her mother had been unemployed for about a year and that she had been living in her car for the past two weeks in cold weather. *Id*. at 34. The court noted that it appeared the only food that the respondent received was brought to her by her daughter and that her daughter feared she would die of carbon monoxide poisoning if she continued to live in the car. *Id*. at 37.

The respondent did not appeal the finding of mental illness but argued that the evidence did not support a finding of danger to self. The court noted that the test for danger to self has two prongs: an inability to provide for one's own basic needs; and "a reasonable probability of serious physical debilitation to him within the near future unless adequate treatment is afforded pursuant to this Article." *Id*. at 36 (citing and quoting G.S. 122-58.2(1), now codified as amended at G.S. 122C-3(11)a.). The court found that the facts of the respondent's living situation supported the first prong of the test and that failure "to properly care for her medical needs, diet, grooming and general affairs would meet the required test of dangerousness to self." *Id*. at 38. The court further noted that the test did not require "a showing that violent danger is threatened by respondent to herself," and that the facts of the case indicated that the respondent was likely to incur death or injury "by uneventful slow degrees or by misadventure" without adequate treatment. *Id.* [In an unpublished opinion, *In re McCray*, ___ N.C. App. ___, 697 S.E.2d 526 (2010), discussed below, the court of appeals questioned its ruling in *Medlin*, explaining that a provision of G.S. 122-58.2(1) cited by the *Medlin* court—namely "[t]he phrase

'dangerous to himself' includes, but is not limited to, those mentally ill or inebriate persons who are unable to provide for their basic needs for food, clothing, or shelter"—has been repealed, with no comparable language in the current statute, and further that the provision had been superseded prior to the *Medlin* decision and thus *Medlin* relied on an obsolete statute.]

In re Lowery, 110 N.C. App. 67 (1993). This case supports the proposition that even though there is evidence that a mentally ill respondent could be treated outside of a hospital setting, inpatient commitment is appropriate if the respondent refuses placement recommended as necessary for outpatient treatment to succeed.

In *Lowery*, the respondent was diagnosed with chronic mental illness and polysubstance abuse. His attending psychiatrist from an immediately prior inpatient commitment to the mental health center testified that he refused anti-psychotic medicines, did not eat properly, could not return to his mother's home, and could not properly care for himself. He further testified that the respondent could receive treatment on an outpatient basis if he were in a rest home, but that the respondent refused such placement. The respondent testified that he had lived alone, that he knew how to use food stamps to buy food, and that he was refusing rest home placement. *Id.* at 68–69.

The court held that the State's evidence was sufficient to support the order of inpatient commitment. Citing *In re Medlin*, discussed above, the court stated, "We have held specifically that the failure of a person to properly care for his/her medical needs, diet, grooming and general affairs meets the test of dangerousness to self." *Id.* at 72. The respondent's refusal to accept placement deemed necessary by his psychiatrist for his safety outside the hospital, coupled with his failure to present a viable alternative placement, defeated his argument that outpatient commitment was appropriate. *Id*. at 72–73. [In an unpublished opinion, *In re McCray*, ___ N.C. App. ___, 697 S.E.2d 526 (2010), discussed below, the court of appeals questioned its ruling in *Lowery*. The court observed in footnote 2 of *McCray* that *Lowery* had been based on *Medlin*, which depended on a definition of "dangerous to self" in G.S. 122-58.2 that was obsolete at the time *Medlin* was decided.]

In re Zollicoffer, 165 N.C. App. 462 (2004). This more recent case upheld the lower court's finding of danger to self, despite the lack of evidence in the record of any actual harm suffered by the respondent.

In *Zollicoffer*, the State's evidence consisted of an affidavit from the respondent's treating psychiatrist, Dr. Soriano, apparently admitted into evidence without objection. Dr. Soriano wrote that the respondent had a history of paranoid schizophrenia, admitted to not taking medicine resulting in "high risk for mental deterioration," did not cooperate with treatment providers, and "requires inpatient rehabilitation to educate him about his illness and prevent mental decline." *Id.* at 469. In upholding the lower court's finding that this evidence supported a finding of danger to self, the court quoted *In re Lowery*, 110 N.C. App. 67, 72 (1993): "'We have held specifically that the failure of a person to properly care for his/her medical needs, diet, grooming and general affairs meets the test

of dangerousness to self.'" 165 N.C. App. at 469. [In an unpublished opinion, *In re McCray*, ___ N.C. App. ___, 697 S.E.2d 526 (2010), discussed below, the court of appeals questioned its ruling in *Lowery*. The court observed in footnote 2 of *McCray* that *Lowery* had been based on *Medlin*, which depended on a definition of "dangerous to self" in G.S. 122-58.2 that was obsolete at the time *Medlin* was decided.] The court did not address the failure of the record to reflect that this respondent had neglected any areas of self-care.

This case stands in contrast to *In re Hogan*, above, as it seems to rest solely on evidence of mental illness and the psychiatrist's conclusory statements of danger to self.

In re McCray, ___ N.C. App. ___, 697 S.E.2d 526 (2010) (unpublished). In *McCray*, the court of appeals reviewed the evidence before the trial court that the respondent cocked her fist, poured a pitcher of juice on a nurse, and demonstrated loud and aggressive behavior while being escorted to the "quiet room," i.e., isolation. The court of appeals found the incidents insufficient to find the respondent dangerous to others because there was no evidence supporting a "reasonable probability that the conduct would be repeated" as required by G.S. 122C-3(11)(b). Likewise, the court of appeals found the respondent's refusal of blood pressure, thyroid, and psychotropic medications insufficient to constitute a "reasonable probability of . . . suffering serious physical debilitation within the near future," as required to prove dangerousness to self under G.S. 122C-3(11)(a).

In re Church, ___ N.C. App. ___, 698 S.E.2d 200 (2010) (unpublished). In *Church*, the court reversed a district court order of commitment that lacked sufficient findings in support of its conclusions as to dangerousness to others. The court of appeals was not persuaded that the respondent was dangerous to others by the treating psychiatrist's allegation that the respondent would decompensate and become dangerous if the respondent did not receive treatment. The court made clear that a pending charge of murder, standing alone, is not sufficient to conclude that the respondent is dangerous to others. The murder charge is based on a finding of probable cause, which does not rise to the standard of clear, cogent, and convincing evidence required for a finding of dangerousness in the commitment context.

In re Hayes, 151 N.C. App. 27 (2002). The North Carolina Court of Appeals in *Hayes* addressed the interpretation of the statutory definition of danger to others in G.S. 122C-3(11)(b), particularly the meaning of the phrase "in the relevant past" in regard to past acts of the respondent in assessing current danger to others. In *Hayes*, the respondent was found not guilty by reason of insanity for homicides and felonious assaults committed in July of 1988. The recommitment hearing being reviewed on appeal was held in January 2001. The court of appeals found that the standard of review on appeal is "whether there is competent evidence to support the trial court's factual findings and whether these findings support the court's ultimate conclusion that respondent still has a mental illness and is dangerous to others." 151 N.C. App. at 29–30. Despite the lapse of time between the respondent's acts and the hearing, the appellate court held that competent evidence supported the finding of the lower court that:

> "The four homicides and seven felonious assaults committed by the respondent on July 17, 1988, are episodes of dangerousness to others *in the relevant past* which in combination with his past and present mental condition, his multiple mental illnesses, and his conduct since admission to Dorothea Dix Hospital since 1989, and up to and including his conduct in the hospital during the previous year indicates there is a reasonable probability that the respondent's seriously violent conduct will be repeated and that he will be dangerous to others in the future if unconditionally released with no supervision at this time."

Id. at 31 (emphasis added).

In so holding, the court rejected the respondent's argument that under this interpretation of "in the relevant past," a homicide defendant found not guilty by reason of insanity would never be released from psychiatric inpatient commitment. The court noted that even though the respondent would be "presumed dangerous to others" and that this was a "high hurdle for the respondent to overcome," this burden was proper and the lower court's findings and conclusions must be upheld. *Id.* at 38–39.

Note: When objecting to testimony involving danger to others based on remoteness in time, counsel should be prepared to distinguish *Hayes* from the respondent's case. Although the *Hayes* court did not limit its interpretation of the statutory definition of "danger to others" to cases originating under Chapter 15A, the outcome appears linked to the extraordinary facts. The respondent's acts included seven felonious assaults and caused four deaths, resulting in the court's finding that their occurrence was within the "relevant past." Because "relevant past" is not statutorily defined, counsel can argue that less harmful, remote acts of a respondent are not material in assessing current dangerousness.

I. Criteria for Involuntary Commitment: Outpatient Treatment

The physician or eligible psychologist must recommend outpatient commitment if the following criteria are present:

> "a. The respondent is mentally ill;
> b. The respondent is capable of surviving safely in the community with available supervision from family, friends, or others;
> c. Based on the respondent's psychiatric history, the respondent is in need of treatment in order to prevent further disability or deterioration that would predictable result in dangerousness . . . ; and
> d. The respondent's current mental status or the nature of the respondent's illness limits or negates the respondent's ability to make an informed decision to seek voluntarily or comply with recommended treatment."

G.S. 122C-263(d)(1).

J. Evidence: Inpatient Commitment

Burden of proof. The Attorney General staff member assigned to a state facility or the UNC Hospitals psychiatric services will present evidence on behalf of the State. G.S. 122C-268(b). As noted *supra* in § 2.5B, there is no statutory mandate for representation of the petitioner at other facilities. The burden is on the petitioner, however, to prove by "clear, cogent, and convincing evidence that the respondent is mentally ill and dangerous to self . . . or dangerous to others." G.S. 122C-268(j).

Admissible certified copies. The petitioner is allowed to present "[c]ertified copies of reports and findings of physicians and psychologists and previous and current medical records." G.S. 122C-268(f). A respondent has the right, however, to confront and cross-examine witnesses. *Id.* It is unclear whether a petitioner can initially offer certified documents only, forcing the respondent to object. If so, who is then responsible for subpoenaing the witness? If the petitioner can first offer the documents without the witness, the proceeding will likely have to be continued to give the witness time to appear. This scenario forces the respondent to endure a delay in the hearing to enforce the right to cross-examine.

Inadmissibility of voluntary admission. The statutes specifically prohibit the admission of evidence regarding a voluntary admission in a hearing on involuntary inpatient commitment. G.S. 122C-208.

Case law: The admission of a physician's report when the physician does not appear at the hearing constitutes a denial of the respondent's right to confront and cross-examine the witness.

In re Mackie, 36 N.C. App. 638 (1978). The North Carolina Court of Appeals addressed the issue of admission of a physician's written report without his appearance. In *Mackie*, the petitioner testified at the respondent's rehearing and stated that she had not seen the respondent in almost eight months. The only other evidence presented by the State was the written report of a physician at Broughton Hospital.

The court held that the admission of the physician's report without the physician's appearance at the hearing constituted a denial of the respondent's right to confront and cross-examine witnesses. As the only other evidence presented was the testimony of the petitioner, there was no evidence supporting the lower court's findings of mental illness and danger to self or others, and the order was reversed. *Id.* at 640.

In re Hogan, 32 N.C. App. 429 (1977). In *Hogan*, the State's only evidence was the written report of the physician who performed the second examination of the respondent, admitted over the respondent's objection. The respondent called as a witness the psychiatrist who performed the first examination.

The court stated that because the physician who wrote the report that was admitted into evidence did not appear and testify at the hearing, the respondent was "clearly denied her

right to confront and cross-examine him." *Id.* at 432. The court stated that this denial would "at least entitle respondent to a new hearing." *Id.* at 433. The court reversed the order, however, on the ground that the findings of fact in the order did not support the finding that the respondent was imminently dangerous to herself or others (under the old statute) and that there was not any competent evidence to support that finding. *Id.* at 433–34.

Hearsay. Counsel for the respondent must be vigilant in objecting to hearsay testimony. Admission of a written report over the objection of the respondent is grounds for reversal of an order of commitment absent other competent supporting evidence, as illustrated by the above cases.

Other hearsay evidence may be harder to recognize. A staff person may begin to testify to an incident illustrating a danger to self or others without having witnessed the occurrence. The respondent's attorney may have to object when the testimony begins in order to ascertain whether the witness's knowledge is first-hand. A physician may be allowed to testify to hearsay contained in the medical records as part of the basis of a psychiatric diagnosis. Counsel should still object and request that, if the court allows the testimony, it be admitted for the limited purpose of explaining the diagnosis and that it not be considered on the issue of danger.

Witnesses. The respondent's attorney must determine, in consultation with the respondent as appropriate, who to call as a witness and what documents to subpoena. Some of these decisions may depend on the strength of the petitioner's case. For example, if the petitioner presents a weak case, counsel might recommend that the respondent not testify and thus not be subject to cross-examination. Some respondents will feel that their cases have not been fully presented if they have not testified. If the client insists on exercising the right to testify, counsel should make a written note in the file of the advice given not to testify.

K. Evidence: Outpatient Commitment

Burden of proof. As noted *supra* in § 2.5B, the petitioner may be unrepresented or not be present at the hearing. The court still must find by "clear, cogent, and convincing evidence that the respondent meets the criteria specified in G.S. 122C-263(d)(1)." G.S. 122C-267(h).

Certified copies admissible. The statute specifies that "[c]ertified copies of reports and findings of physicians and psychologists and medical records of previous and current treatment are admissible in evidence." G.S. 122C-267(c). Unlike the provisions regarding inpatient commitment, there is no specified right to confront and cross-examine witnesses, and evidence of a voluntary admission may be considered as a part of treatment history. G.S. 122C-208.

Witnesses and hearsay. The statute appears to provide for only a limited judicial review of the physician's recommendation for outpatient commitment. The court may review

what would otherwise be hearsay statements in medical records and may hear testimony from only the respondent. If the respondent is unrepresented, the court may need to pose questions to the respondent (and to any other witnesses) and decide what weight, if any, to give hearsay testimony.