2.6 Post-Examination Procedure

A. After Examination Finding Defendant Capable to Proceed

G.S. 15A-1002(b) states that a hearing "shall" be held after a court-ordered capacity examination, but some cases indicate that the defendant may waive the right to a hearing by not requesting one. The court must initiate a hearing on its own motion only when the evidence suggests that the defendant is incapable of proceeding. *See, e.g., State v. King*, 353 N.C. 457, 465–67 (2001) (defendant waived statutory right to hearing by failing to question capacity; trial court nevertheless has constitutional duty to institute capacity hearing if there is substantial evidence defendant is incapable of proceeding, but evidence in this case did not require trial court to act on its own motion); *State v. Young*, 291 N.C. 562 (1977) (defendant waived statutory right to hearing by failing to request one following capacity examination finding defendant capable to proceed; no constitutional violation by trial court's failure to hold hearing on own motion); *State v. Blancher*, 170 N.C. App. 171 (2005) (finding that trial court did not err in failing to hold capacity hearing where, other than statement of defense counsel in earlier motion for evaluation, there was no evidence that defendant was unable to assist his counsel); *State v. McRae*, 139 N.C. App. 387 (2000) (although defendant did not request capacity hearing, trial court had duty to conduct such hearing where bona fide doubt existed as to defendant's capacity); *Meeks v. Smith*, 512 F. Supp. 335 (W.D.N.C. 1981) (setting aside state court conviction on ground that incapable defendant may not waive right to capacity determination).

As a practical matter, courts may opt to hold a hearing following an examination in all cases. *See* Ripley Rand, *Guilty Pleas and Related Proceedings Involving Defendants with Mental Health Issues: Best Practices*, at 2 (Superior Court Judges Conference, Fall 2008) (suggesting to superior court judges that they "probably" should hold a hearing following a capacity examination), *available at* www.sog.unc.edu/sites/www.sog.unc.edu/files/2_ripleyrand.pdf. If the court holds a hearing when the defense is not contesting the examiner's finding of capacity, it may be sufficient for the court to review the "covering statement" indicating the examiner's conclusion that the defendant is capable of proceeding to trial. *See* G.S. 15A-1002(d) (requiring that report include covering statement). This approach may avert disclosure of the underlying report to the prosecution. Alternatively, the defense may ask the court to review the full capacity report in camera to limit disclosure of unnecessary information to the prosecutor.

B. After Examination Finding Defendant Incapable to Proceed

A number of alternatives are possible after an examination finding the defendant incapable to proceed.

Dismissal. The prosecutor may agree to take a voluntary dismissal of the criminal case. Arrangement for treatment or other plans to address the defendant's condition may bolster negotiations with the prosecutor for dismissal. *See infra* § 2.8F, Disposition of

Criminal Case While Defendant Incapable to Proceed.

Agreement not to contest incapacity order. The prosecutor may agree not to contest entry of an order finding the defendant incapable of proceeding, which triggers other procedures. For example, the court could issue a custody order requiring that the defendant be examined to determine whether involuntary commitment is appropriate. Further, the court or prosecutor may be willing to dismiss the criminal charges if an order of incapacity and a custody order are issued. *See* AOC-SP-304, "Involuntary Commitment Custody Order Defendant Found Incapable to Proceed" (Sept. 2003) (order combines both an incapacity and a custody order). For a discussion of procedures after the issuance of an order of incapacity to proceed, see *infra* § 2.8, Procedure after Order of Incapacity.

Practice note: If the prosecutor is unwilling to dismiss the criminal case and the defendant is incarcerated, there is ordinarily no reason to delay obtaining an order of incapacity to proceed. Without it, the defendant may languish in jail, unable to stand trial or enter a plea, because the examination indicates that he or she is incapable to proceed.

Hearing on capacity. If capacity is contested, counsel should request a formal hearing on the defendant's capacity to proceed if one is not automatically scheduled. *See infra* § 2.7, Hearings on Capacity to Proceed. If the court finds the defendant incapable of proceeding, the ensuing procedures are the same whether the hearing was contested or uncontested. *See infra* § 2.8, Procedure after Order of Incapacity.

Involuntary commitment. When the examination report indicates that the defendant is incapable of proceeding, G.S. 15A-1002(b1) appears to allow involuntary commitment proceedings to be instituted before the issuance of a court order finding the defendant incapable of proceeding. Such a procedure may result in needed treatment more quickly. Obtaining an early judicial determination of incapacity remains necessary, however, to protect the defendant's rights in the criminal case. *See infra* § 2.8F, Disposition of Criminal Case While Defendant Incapable to Proceed.