

7.8 Discharge or Conditional Release

A. No Discharge or Conditional Release Except Upon Order of Court

A respondent committed as a result of an NGRI verdict may not be discharged except upon order of the court having jurisdiction over the commitment proceedings. G.S. 122C-277(b1). The respondent may not be discharged during the period of automatic commitment ordered by the criminal court. *Id.*

If the attending physician determines that the commitment criteria no longer exist, rather than discharging the respondent, the physician must request a court hearing to present the recommendation to the court. Discharge is not automatic, however, as the burden of proof remains on the respondent.

B. Notice to Clerk of Proposed Discharge or Conditional Release

The attending physician must notify the clerk of superior court fifteen days before the proposed discharge or conditional release. G.S. 122C-277(b1). Notice must be provided so that the clerk may schedule and give notice of the required hearing.

C. Clerk to Calendar Hearing and Give Notice

Upon receiving notice of the proposed discharge or conditional release, the clerk must calendar a hearing before the court with jurisdiction over the commitment. The clerk also must give notice to the same people entitled to notice of the initial hearing and rehearings, within the same time limits. G.S. 122C-277(b1), 122C-264(d1); *see supra* § 7.5F.

D. District Attorney May Represent State's Interests

The district attorney for the criminal trial may represent the state's interests at the commitment hearing regarding discharge or conditional release. G.S. 122C-277(b1); *see supra* § 7.5B.

E. Hearing Procedures

The hearing is conducted according to the same procedures as at the initial hearing and rehearings under Chapter 122C. G.S. 122C-277(b1), 122C-268.1; *see supra* § 7.5.

F. Burden of Proof

The hearing is held according to the same standard of proof as the initial hearing and rehearings under Chapter 122C. G.S. 122C-277(b1). The respondent must prove by a preponderance of the evidence that the respondent no longer has a mental illness *or* no longer is dangerous to others. G.S. 122C-268.1(i); *see supra* § 7.5I.

G. Disposition

There are no dispositional alternatives set out in the statutory section on request for discharge or conditional release. If the respondent prevails, then clearly the court must discharge or conditionally release the respondent. G.S. 122C-271(c)(2), 122C-268.1(i). It is less clear what choices are available to the court if the respondent does not prevail. For example, if the respondent was committed for 180 days at the first rehearing and does not prevail at a hearing on discharge occurring 60 days into the term, may the court commit the respondent for one year? Or does the respondent continue with the remainder of the 180 days and have a rehearing 120 days later? There is a good argument for the latter because the respondent should not be penalized by a longer commitment as a result of the attending physician's request for a discharge hearing.

The trial court on rehearing may order any disposition allowed by Chapter 122C regardless of the specific relief requested by the treating physician. *In re Hayes*, ___ N.C. App. ___, 681 S.E.2d 395 (2009). Therefore, commitment counsel would be well advised to be creative in making recommendations that provide the least restriction on the respondent's liberty as long as the recommendations are within the dispositional alternatives allowed by statute. As always, counsel should advise the respondent of the alternatives available and obtain the respondent's consent before offering dispositional alternatives to the court.