

## **Appendix 2-2**

### **Memorandum to Magistrates\***

The shortage of suitable 24-hour facilities for persons in need of mental health evaluation and treatment has received significant attention in recent months. The purpose of this memo is to inform magistrates about recent legislation enacted to address one aspect of this problem, and to caution magistrates to avoid a practice, currently relied upon in some parts of the State, that is not authorized by law.

#### **New Law**

Session Law 2009-340 (House Bill 243), effective October 1, 2009, is a legislative acknowledgement that many persons who are found mentally ill and dangerous to self or others at the first commitment examination are not proceeding to the next step in the commitment process in a timely manner. Statutory law requires that these persons (known as “respondents”) be taken to a 24-hour psychiatric facility for a second examination and treatment pending a commitment hearing in district court. This hearing must take place within 10 days from the time the respondent was taken into law enforcement custody at the beginning of the commitment process. Because the state-operated psychiatric hospitals do not have sufficient bed space, many respondents are kept waiting in community hospital emergency rooms for several days. By the time some of these respondents arrive at a state hospital, the clerk of court does not even have time to calendar a hearing within the 10-day time frame.

This 10-day hearing requirement is one of North Carolina’s statutory mechanisms for assuring that a respondent is not deprived of liberty without the due process guaranteed by the U.S. Constitution. The new law is a response to the concern that delays in transporting respondents to psychiatric inpatient facilities may deprive some respondents of statutory and constitutional due process. S.L. 2009-340 amends G.S. 122C-261(d) and -263(d) to provide that, with respect to respondents who have been found to meet the inpatient commitment criteria, if a 24-hour facility is not immediately available or medically appropriate seven days after issuance of the custody order, a physician or psychologist must report this fact to the clerk of superior court and the proceedings must be terminated. If this happens, a new commitment proceeding may be initiated, but affidavits filed and examinations conducted as part of the previous commitment proceeding may not be used to support a new commitment. Certainly, some of the facts considered by the magistrate in deciding to issue the first custody order may be relevant in making the new determination, but any papers filed and examinations conducted in support of a new proceeding must also be new.

In situations where a respondent is temporarily detained at the site of first examination because a 24-hour facility is not immediately available or medically appropriate, S.L. 2009-340 also permits a physician or psychologist to terminate the inpatient commitment proceeding and discharge the respondent (or recommend outpatient commitment), upon finding that the respondent’s condition has improved to the point that he or she no longer meets the criteria for inpatient commitment. Any such finding must be documented in writing and reported to the clerk of superior court.

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\* This memorandum was written by UNC School of Government faculty member Mark F. Botts, on November 15, 2009.

### **A Practice to be Avoided**

It is not at all surprising that legal and medical professionals confronted with the current crisis presented by a shortage of available 24-hour facilities craft creative responses in an effort to improve the way the system responds to citizens in need of help. One practice currently being employed by some magistrates, however, is inconsistent with the law and presents significant problems for other participants in the system. This practice consists of holding a commitment petition and not issuing a custody order until the availability of a particular 24-hour facility has been confirmed. The result is that the facility performing the first evaluation must hold a respondent for the period—sometimes days, as discussed above—**without this hold being authorized by a custody order**. Without a custody order, this hold is without legal authority (subject to an exception not relevant to magistrates), raising serious issues about the due process rights of the respondent as well as questions about the potential liability of the facility exerting custodial control over the respondent. Accordingly, magistrates should not engage in this modification of the statutory procedure. When a magistrate receives a petition and makes a determination that reasonable grounds exist to believe that an individual meets the statutory criteria for commitment, the law is clear that a magistrate must issue a custody and transportation order. The commitment statutes do not authorize a magistrate to delay issuance of a custody order pending the receipt of other information. Nor do the statutes permit a magistrate to make his or her decision subject to criteria not identified in the commitment statutes. In the space on the custody order for designating a 24-hour facility, the magistrate should enter the name of the facility normally used by the jurisdiction, followed by the words “or any state-approved facility.” This allows the commitment process to proceed without delay and permits the involuntary detention of the respondent throughout all phases of the commitment process, including during the time it takes following the first examination to identify an available 24-hour facility. Moreover, some 24-hour facilities will not agree to accept an involuntary patient until *after* a custody order has been issued. The magistrate’s role in this process is critically important, and it is absolutely essential that magistrates follow the statutory procedure in carrying out their responsibilities.

If you have questions or concerns about any of the information in this memo, contact the School of Government faculty member specializing in mental health law, Mark Botts. Mark can be reached by telephone (919-962-8204) or email ([botts@sog.unc.edu](mailto:botts@sog.unc.edu)).