Chapter 2

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2.1 Overview of Involuntary Commitment Process

A. Right to Counsel

Involuntary commitment is the judicial procedure for compelling people to receive mental health treatment, either on an inpatient or outpatient basis. In the majority of proceedings for involuntary commitment, respondents are represented by appointed attorneys. Counsel is appointed because the process represents a significant infringement on a respondent's liberty interest. In addition, the process restricts a respondent's freedom of movement, making it potentially difficult for an otherwise financially capable respondent to make appropriate contacts for the purpose of hiring counsel.

In inpatient proceedings, Special Counsel or an appointed attorney represents all respondents who have not arranged for private representation. They represent respondents at private hospitals, state psychiatric hospitals, and treatment centers throughout the state. Section 122C-270(a) of the North Carolina General Statutes (hereinafter G.S.) provides that Special Counsel represents "all indigent respondents at all hearings, rehearings, and supplemental hearings" held at state facilities. *See also infra* § 2.5A.

A respondent has the right to counsel through all stages of the proceedings for involuntary inpatient commitment. On appeal from a district court involuntary

commitment order, counsel is assigned by the Office of the Appellate Defender.

Generally, in involuntary inpatient proceedings, counsel is appointed after the respondent's second evaluation. It is after the second evaluation that the respondent is admitted to the facility, thereby establishing venue of the district court hearing according to the location of the inpatient facility. Appointment after the second evaluation and admission to a 24-hour facility has been the most feasible time after custody for effectuating the right to counsel established in G.S. 7A-451(b) for commitment proceedings, but delays may occur, as discussed below.

Appointment of counsel for indigent respondents in outpatient commitment proceedings is discretionary with the court. Respondents who are not indigent have the right to hire private counsel for outpatient commitment proceedings.

B. Possible Delays in Appointment of Counsel

A potential deviation from the general practice of appointment of counsel for inpatient commitment proceedings may be caused by G.S. 122C-263(d)(2). This statute allows the first evaluator to detain a respondent up to seven days after the issuance of a custody order if a 24-hour facility is not immediately available or appropriate to the respondent's medical condition. If detention is to extend beyond the seventh day, the evaluator must notify the clerk to terminate the proceedings. If deemed necessary, the evaluator can begin the commitment process with a new petition and affidavit and new allegations.

This creates a possibility of consecutive seven-day detentions, without appointment of counsel, as delays may occur in placing the respondent at a 24-hour facility. In light of this potential delay, a respondent arguably has the right to have counsel appointed upon the filing of a second petition resulting in another first evaluation rather than after a second evaluation and admission to a 24-hour facility. Appointment of counsel is determined according to rules adopted by the Office of Indigent Defense Services (IDS), but the rules currently do not address this situation. Local rules also may address the timing of appointment. For a discussion of possible responses to this situation, see *infra* § 2.3J.

C. Statutory Procedures

The statutory involuntary commitment procedures apply to both adults and minors. Chapter 122C of the North Carolina General Statutes outlines the typical commitment procedures:

- initiation of the process by petition before a magistrate or the clerk of superior court;
- custody and transport of the respondent for an initial examination by a physician or eligible psychologist;

- a second examination if inpatient commitment is initially recommended by the first examiner; and
- district court review of all involuntary commitments within ten days of the date the respondent is taken into law enforcement custody.

D. Responsibilities of Counsel

Generally, counsel is assigned upon the respondent's admission to a 24-hour facility. *See supra* § 2.1A (discussing right to counsel). Upon receiving a case, the attorney should review all court documents for compliance with the statutory requirements discussed in this chapter. A meeting with the client is most important in preparing the case, with follow-up meetings as necessary. The attorney must explain the legal procedures involved, discuss the underlying facts with the client, explore dispositional alternatives (what the client might agree to, what the attending physician recommends, and what the court might order), and determine whether the client wants to contest commitment at the district court hearing. Other responsibilities of the attorney include reviewing the client's medical/psychiatric records, consultation with treatment providers, and talking with potential witnesses and opposing counsel.

E. Outpatient Commitment

A court order requiring an individual to receive psychiatric treatment outside a residential facility is an outpatient commitment. An outpatient commitment may be initiated by request of a physician or eligible psychologist or may be recommended by an examiner at any point in the commitment process. Outpatient commitment also may be recommended after the individual has been admitted to a 24-hour facility. Because the possibility of outpatient commitment exists throughout the commitment process, references to outpatient commitment, also involuntary, recur throughout this chapter. Counsel should be alert for opportunities to resolve a case by agreement to outpatient commitment, which involves less restriction of freedom and fewer collateral consequences than an inpatient commitment.

F. District Court Hearing

A district court hearing must be calendared and held within ten days of the respondent being taken into custody pursuant to a petition for involuntary commitment. An evidentiary hearing, with findings of fact and conclusions of law, is held in every case. If the respondent is not contesting, this hearing may consist only of the court reviewing the physician's affidavit by stipulation. Upon finding that the statutory criteria are met, the court may order outpatient commitment, inpatient commitment, a combination of inpatient commitment followed by outpatient commitment, or unconditional discharge of the respondent.

2.2 Terminology Used in this Chapter

"'Area authority" is the "area mental health, developmental disabilities, and substance abuse authority." G.S. 122C-3(1). For a more detailed discussion of area authorities, see *infra* § 3.2.

"Area facility" is "a facility that is operated by or under contract with the area authority or county program." G.S. 122C-3(14)a. An area facility is part of a local program of services and cannot be a state facility.

"Custody order" is the order signed by the clerk of superior court or a magistrate authorizing a law enforcement officer or other authorized person to take a respondent into custody for examination or to provide other transportation required within the commitment process.

"Dangerous to self" means that within the relevant past:

"1. The individual has acted in such a way as to show:

I. That he would be unable, without care, supervision, and the continued assistance of others not otherwise available, to exercise self-control, judgment, and discretion in the conduct of his daily responsibilities and social relations, or to satisfy his need for nourishment, personal or medical care, shelter, or self-protection and safety; and

II. That there is a reasonable probability of his suffering serious physical debilitation within the near future unless adequate treatment is given pursuant to this Chapter. A showing of behavior that is grossly irrational, of actions that the individual is unable to control, of behavior that is grossly inappropriate to the situation, or of other evidence of severely impaired insight and judgment shall create a prima facie inference that the individual is unable to care for himself; or

2. The individual has attempted suicide or threatened suicide and that there is a reasonable probability of suicide unless adequate treatment is given pursuant to this Chapter; or

3. The individual has mutilated himself or attempted to mutilate himself and that there is a reasonable probability of serious self-mutilation unless adequate treatment is given pursuant to this Chapter.

Previous episodes of dangerousness to self, when applicable, may be considered when determining reasonable probability of physical

> debilitation, suicide, or self-mutilation."
>
> G.S. 122C-3(11)a.

"Dangerous to others" means that:

> "within the relevant past, the individual has inflicted or attempted to inflict or threatened to inflict serious bodily harm on another, or has acted in such a way as to create a substantial risk of serious bodily harm to another, or has engaged in extreme destruction of property; and that there is a reasonable probability that this conduct will be repeated. Previous episodes of dangerousness to others, when applicable, may be considered when determining reasonable probability of future dangerous conduct. Clear, cogent, and convincing evidence that an individual has committed a homicide in the relevant past is prima facie evidence of dangerousness to others."

G.S. 122C-3(11)b.

"Local management entity" or "LME" means an area authority, county program, or consolidated human services agency that contracts with an area facility for services. *See* G.S. 122C-3(20b).

"Qualified Physician's Examination report (QPE)" is the term commonly used to refer to the Department of Health and Human Services form completed by an examining physician when prepared for use in court. *See infra* Appendix A, DMH Form 5-72-01. It is forwarded to the clerk of court when involuntary commitment is recommended following the filing of a petition or when a rehearing on commitment is requested by the attending physician.

"Special Counsel" is the attorney assigned to represent all indigent respondents at state facilities for the mentally ill. The attorney is a state employee of the Office of Indigent Defense Services with an office at the state facility. G.S. 122C-270(a), (b); *see also infra* § 2.5A.

"State facility" is a facility under the supervision of the Secretary of the Department of Health and Human Services for the provision of "services for the care, treatment, habilitation, or rehabilitation of the mentally ill, the developmentally disabled, or substance abusers." G.S. 122C-3(14), 122C-3(14)f.

"24-hour facility" is a "facility that provides a structured living environment and services for a period of 24 consecutive hours or more." G.S. 122C-3(14)g. A "'residential facility,' which is a 24-hour facility that is not a hospital, including a group home," is included in this definition. G.S. 122C-3(14)e.

2.3 Involuntary Commitment: Prehearing Procedures

It is important for counsel to be familiar with the statutory requirements of the first and second evaluation and other prehearing procedures, even if counsel did not represent the respondent at that time, in order to identify defects in legal process that might be raised in a later motion to dismiss.

A. Affidavit and Petition Before Clerk or Magistrate

Affidavit and petition. Involuntary commitment begins with an individual appearing before either the clerk of superior court or a magistrate to file a petition seeking to have another person taken into custody for an examination to see if that person should be involuntarily committed. The petition is filed in the county in which the respondent either resides or is present. The petitioner must have knowledge that the person "is mentally ill and either (i) dangerous to self . . . or dangerous to others . . . or (ii) in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness." G.S. 122C-261(a). An affidavit containing the underlying facts supporting the request for commitment is executed by the petitioner. *See infra* Appendix A, Form AOC-SP-300.

The statute also requires the affiant to state if there is reason to believe the respondent is also mentally retarded. G.S. 122C-261(a). This is necessary because state policy is to treat people who are mentally retarded in facilities separate from those dedicated to treating people with mental illness alone. The clerk or magistrate must therefore contact the area authority prior to issuing a custody order for a person alleged to be mentally retarded, and the area authority must designate the facility to which the person will be taken for examination. G.S. 122C-261(b).

Case law: An unsworn petition and a petition without facts supporting conclusory statements are grounds for dismissal.

In re Ingram, 74 N.C. App. 579 (1985). The North Carolina Court of Appeals held that the failure of a petition to be signed by oath or affirmation before a duly authorized certifying officer when required by statute is a jurisdictional defect and is grounds for dismissal of the petition. The statutory requirements for the signing of the petition under oath must be "followed diligently," and involuntarily committing a respondent without the required oath deprives the respondent of "liberty without legal process."

Although a motion to dismiss based on an unsworn petition should be granted, counsel should advise the respondent of the possible consequences. Because an order of dismissal on this basis is not res judicata, the original petitioner or a current treatment provider may file a sworn petition that could initiate a new involuntary commitment proceeding. Prevailing on the motion to dismiss could

serve in effect as an unwanted continuance because the new petition could be filed before the respondent is released from custody and the new ten-day period for a hearing would start from the date the new petition was filed, thus extending the time the respondent would be in custody prior to a hearing on the merits.

No facts supporting conclusory statements. The petition must contain facts supporting the allegations that the respondent is mentally ill and dangerous to self or others. In *Ingram,* the petition stated:

> "Respondent has strange behavior and irrational in her thinking. Leaves home and no one knows of her whereabouts, and at times spends night away from home. Accuses husband of improprieties."

74 N.C. App. at 579.

The court held that the paragraph quoted above contained conclusory statements and statements that did not provide facts illustrating mental illness and danger to self or others. These statements did not form a sufficient basis for a determination of reasonable grounds for issuance of a commitment order. *Id.* at 581.

Filing a motion to dismiss based on the insufficiency of the allegations in the petition may be a better strategy than moving to dismiss because of an unsworn petition, as it is based more on the substance of the case. The petitioner would not be allowed to refile a petition with the same allegations, and the original petitioner might not have observed the more recent actions of the respondent. On the other hand, the attending physician at the facility might have sufficient information on which to file a new petition. This might lead to a delay in the hearing, just as with a dismissal based on the technical insufficiency of the petition. Counsel should advise the client of the possibility of the petition being refiled and discuss the pros and cons of filing a motion to dismiss with the client to enable the client to make an informed decision on how to proceed.

Case law: A petition may be based on hearsay.

In re Zollicoffer, 165 N.C. App. 462 (2004). The North Carolina Court of Appeals affirmed that it is permissible for a petition for involuntary commitment to be based on hearsay information. In *Zollicoffer,* the respondent appealed the failure of the lower court to grant his motion to dismiss the petition based on the hearsay contained therein. The court held that there was no requirement that the petition be based on first-hand knowledge and that the petition before the magistrate [or clerk of superior court], which the court characterized as a hearing, was not subject to the rules of evidence.

B. Custody Order for Examination

The clerk or magistrate must first review the petition to determine if there are

"reasonable grounds to believe that the facts alleged in the affidavit are true." G.S. 122C-261(b). There must be a determination of whether the respondent is "probably mentally ill and either (i) dangerous to self . . . or dangerous to others . . . or (ii) in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness." *Id.* If these conditions are met, the clerk or magistrate must issue an order to a law enforcement officer, or other authorized person, to take the respondent into custody for examination by a physician or eligible psychologist. *Id.*; *see infra* Appendix A, Form AOC-SP-302.

Where reasonable grounds are not found, the respondent is free from the threat of detention for involuntary commitment based on the petitioner's current allegations. This is the first of four opportunities prior to the district court hearing for the commitment process to end and for the respondent to be released from further involuntary detention. The respondent also may be released by the examining practitioner at either the first or second examinations or by the treating physician prior to the district court hearing.

On issuance of a custody order, the clerk or magistrate must provide the petitioner and respondent, if present, with specific information regarding the next steps that will occur. G.S. 122C-261(b).

Practice note: If the petitioner reports not knowing that he or she was requesting an involuntary commitment from the clerk or magistrate, counsel should inquire as to what information about the proceedings was provided to the petitioner by the clerk or magistrate when that official took the petitioner's affidavit. In a contested case, if it appears that no official notified the petitioner that he or she was requesting involuntary commitment, this violation of the requirements of G.S. 122C-261(b) should be brought to the attention of the court in support of the respondent's request for discharge.

G.S. 122C-261(b) presumes that the magistrate will issue the custody order within a reasonable time after presentation of the affidavit and petition. However, a significant delay in issuance of the custody order may subject the entire process to dismissal at the district court hearing, particularly when the length of delay indicates that the magistrate is accommodating non-statutory interests. *See infra* Appendix 2-2, Memorandum to Magistrates from Mark Botts (Nov. 15, 2009).

C. Transportation Procedures

Although the respondent's attorney is not involved in transportation arrangements for the client, counsel may be asked to answer questions concerning transportation to the hospital, between hospitals, to court, and home after discharge. Transportation considerations also may affect commitments. For example, an involuntary commitment petition might be filed by a law enforcement officer primarily to secure transportation for a cooperative person from a mental health

center to a hospital. Additionally, counsel may need to address systemic problems with transportation, such as the repeated failure to provide an escort of the same sex as the respondent being taken into custody.

Within a county. Transportation of a respondent for involuntary commitment proceedings within a county is generally provided by either the city or the county. The city must transport a city resident as well as any person taken into custody within the city. The county transports non-city residents and those taken into custody outside city limits. G.S. 122C-251(a).

Between counties. Transportation of a respondent between counties for admission to a facility is generally provided by the county where the respondent was taken into custody. The sheriff is allowed to cross county lines for the purpose of assuming custody pursuant to a petition and for the purpose of transporting a patient to a facility. *See* G.S. 122C-261(e). The county where the petition was initiated must transport a respondent who requests a change of venue back to the initiating county for the district court hearing. G.S. 122C-251(b). The county of the respondent's residence must provide transportation between counties upon the respondent's discharge from the facility, although the respondent may arrange for private transportation and assume any expense thereof. *Id.*

Other provisions. Counties and cities may use their own vehicles or may contract to use private vehicles. Law enforcement officers are to wear plain clothes and drive unmarked vehicles "[t]o the extent feasible." G.S. 122C-251(c). They also must advise respondents being taken into custody, "to the extent possible," that they are being taken for treatment for the safety of themselves and others and are not being arrested and have not committed a crime. *Id.* The city or county must provide either a driver or attendant of the same sex as the respondent, unless a family member is allowed to accompany the respondent. G.S. 122C-251(d).

In addition to using law enforcement personnel, cities and counties may use trained volunteers and personnel from public and private agencies, including private hospital staff, to provide all or part of the transportation required. The training must ensure the safety and protection of both the public and the respondent. G.S. 122C-251(g).

Costs. The county of the respondent's residence is generally responsible for the costs of transportation and must reimburse the state, another county, or a city that has transported the respondent pursuant to the commitment statutes. The county of residence, after giving proper notice and opportunity to object, may seek reimbursement from: 1) a non-indigent respondent; 2) a person or entity with sufficient assets who is legally liable for the respondent's support; 3) a person or entity that is contractually responsible for the cost; or 4) any person or entity otherwise liable for the cost under federal, state, or local law. G.S. 122C-251(h).

Qualified immunity for law enforcement officers. Law enforcement officers providing transportation are allowed to use "reasonable force to restrain the respondent" for the safety of the respondent and others. G.S. 122C-251(e). If "reasonable measures" are employed, the law enforcement officer cannot be held criminally or civilly liable for assault, false imprisonment, or other torts or crimes in carrying out statutory duties. *Id.*

D. Custody and Transport to First Examination

The law enforcement officer or other authorized person is to take the respondent into custody within twenty-four hours after the order is issued. G.S. 122C-261(e). A new custody order must be obtained if the time expires without custody being assumed. The law enforcement officer has no authority to assume custody after the order expires, and a respondent taken into custody without a valid order would have grounds to move to dismiss the petition.

After being taken into custody, the respondent must be transported to an area facility for a first examination by a physician or eligible psychologist. G.S. 122C-263(a). After the magistrate's review of the affidavit, the first examination is the next opportunity available for the respondent to be released from involuntary detention during the commitment process. If there is no physician or eligible psychologist at the area facility available to perform the examination, the respondent may be taken to any physician or eligible psychologist in the local area. Occasionally, neither a physician nor an eligible psychologist is immediately available, in which case the respondent may be temporarily detained pending examination. Temporary detention is allowed in an area facility if available, in the respondent's home under appropriate supervision, in a private hospital or clinic, in a general hospital, or in a state facility for the mentally ill. The statute specifically provides that the temporary detention may not be in a jail or other penal facility. *Id.*

E. First Examination Requirements

Factors to be evaluated. The physician or eligible psychologist must perform the examination as soon as possible and no later than twenty-four hours after the respondent's arrival. G.S. 122C-263(c).

The examiner must evaluate four factors:

"(1) Current and previous mental illness and mental retardation including, if available, previous treatment history;
(2) Dangerousness to self . . . or others . . . ;
(3) Ability to survive safely without inpatient commitment, including the availability of supervision from family, friends or others; and
(4) Capacity to make an informed decision concerning treatment."

Id.; *see infra* Appendix A, Form DMH 5-72-01.

Criteria for inpatient commitment. The examiner must find that the respondent is mentally ill and dangerous to self or others in order to recommend inpatient commitment. G.S. 122C-263(d)(2).

Criteria for outpatient commitment. The examiner must make the following determinations for recommendation of outpatient commitment:

> "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 predictably result in dangerousness as defined by G.S. 122C-3(11); and
> d. The respondent's current mental status or the nature of 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).

Temporary waiver of requirement for physician or eligible psychologist to perform first examination. A bill effective July 1, 2003, S.L. 2003-178, and extended periodically allows the Secretary of Health and Human Services, on the request of a local management entity (LME), to waive temporarily the statutory requirement that either a physician or eligible psychologist perform the initial examination. Session Law 2010-119 continues this program until October 1, 2012. The waiver applies only on a "pilot-program basis" upon request and if certain criteria are met. A maximum number of twenty programs may receive a waiver, which would allow the first examination to be performed by a licensed clinical social worker, a masters level psychiatric nurse, or a masters level certified clinical addictions specialist.

F. First Examination via Telemedicine

G.S. 122C-263(c) provides that when the first examination is performed by a physician or eligible psychologist, the respondent either may be in the physical presence of the physician or eligible psychologist or may be examined using telemedicine equipment and procedures. For the purpose of this part of the statute, "telemedicine" is "two-way real-time interactive audio and video between places of lesser and greater medical capability or expertise . . . when distance separates participants who are in different geographical locations." G.S. 122C-263(c). The examiner "must be satisfied to a reasonable medical certainty that the determinations made . . . would not be different" if done face to face. *Id.* If not so

satisfied, the examiner must indicate that in writing on the first examination report. The respondent then must be transported for a face-to-face examination. The statute does not expand the twenty-four hour limitation provided for the first examination to occur.

If these conditions are met, G.S. 122C-263(c) supersedes *McLean v. Sale***,** 54 N.C. App. 538 (1981), in which the North Carolina Court of Appeals held that the examiner has an affirmative duty to personally examine the respondent prior to forming and putting in writing a recommendation.

If the respondent reports that the professional who signed the examination report did not perform an examination—whether face-to-face or via telemedicine—counsel should discuss the pros and cons of moving to dismiss, discussed *supra* under the case law portion of § 2.3A. Counsel should also advise the respondent of the need to seek private counsel if the respondent plans to bring a cause of action for breach of the examiner's affirmative duty.

G. Determination by Physician or Eligible Psychologist

At the conclusion of the first examination, the physician or eligible psychologist must determine whether the respondent meets the criteria for inpatient commitment, outpatient commitment, or neither, in which case the respondent must be released. G.S. 122C-263(d).

Inpatient. If the examiner determines that the respondent is mentally ill and dangerous to self or others and cannot be treated on an outpatient basis, inpatient commitment must be recommended and noted on the examination report. If inpatient commitment is recommended, the law enforcement officer or other designated person must transport the respondent to a 24-hour facility for the custody and treatment of involuntary clients pending a district court hearing or, if there is no such 24-hour facility and if the respondent is unable to pay for care at a private 24-hour facility, to a state facility for the mentally ill for "custody, observation, and treatment and immediately notify the clerk of superior court of this action." G.S. 122C-263(d)(2).

Outpatient. If the examiner finds that the respondent can be treated on an outpatient basis, this must be recorded and recommended on the examination report. The examiner must show on the report the name, address, and telephone number of the proposed outpatient physician or treatment center. The law enforcement officer or other designated person must take the respondent home, or with the consent of all, to the residence of an individual located in the county where the petition was filed. G.S. 122C-263(d)(1).

If the examiner is not the proposed outpatient provider, the respondent must be given in writing the name, address, and telephone number of the proposed outpatient treatment physician or center. The respondent also must receive a

written notice listing the date and time to appear for an appointment with the proposed treatment provider. The examiner is required to telephone the proposed treatment provider prior to the appointment date, as well as send a copy of the notice and examination report. G.S. 122C-263(f).

H. Alternative Procedure to Petition Before Clerk or Magistrate: Affidavit by Physician or Eligible Psychologist

Rather than going before a clerk or magistrate to file a petition, a physician or eligible psychologist may perform an examination of the respondent in compliance with the criteria discussed *supra* in § 2.3E, and then appear before "any official authorized to administer oaths," including a notary public, to execute an affidavit. G.S. 122C-261(d); *see infra* Appendix A, Forms DMH 5-72-01-A and DMH 5-72-01-B.

The affidavit may be transmitted via fax to the clerk or magistrate as long as the original is mailed to that official within five days. The clerk or magistrate reviews the affidavit and, if the commitment criteria are met, issues a custody order for the respondent to be transported to a 24-hour facility. The examination and affidavit of the physician or eligible psychologist substitute for both the petition before a clerk or magistrate and the statutorily-mandated first examination after a petition is filed.

I. Transport to 24-Hour Facility for Inpatient Treatment

If the physician or eligible psychologist who performed the first examination determines that the individual meets the criteria for inpatient commitment, the law enforcement officer or other designated person must then transport the respondent to a 24-hour facility pending the hearing to review the commitment. An area 24-hour facility is the preferred placement, with a private hospital being the next choice if the respondent is able to pay. If there is no area facility and the respondent is indigent, the respondent is taken to a state facility for the mentally ill. The clerk of superior court is to be notified immediately by the law enforcement officer or other designated person of the admission to a state facility. G.S. 122C-263(d)(2).

J. First Examination Detention Limited to Seven Days

According to G.S. 122C-263(d)(2), the respondent may be "temporarily detained" at the place of the first examination while waiting for transport to the 24-hour facility. Until the revision of G.S. 122C-263(d)(2) in 2009, temporary detention had not been defined, nor had there been a statutory remedy when the detention appeared excessive. According to the new version of G.S. 122C-263(d)(2), if the respondent is temporarily detained and a 24-hour facility is not available or medically appropriate seven days after issuance of the custody order, a physician

or eligible psychologist must report this to the clerk and the proceedings must be terminated.

Termination of the proceedings does not necessarily preclude initiation of new involuntary commitment proceedings. However, re-petitioning for commitment is only allowed on certain conditions that preserve a modicum of rights for the respondent. A new petition is allowed only if subsequent supporting affidavits are based on a new examination of the respondent and do not contain any of the information relied on in the previous filing. Bear in mind that 122C-270(a) provides counsel only for initial hearings, rehearings, and supplemental hearings. Generally, counsel is appointed after the respondent's admission to the 24-hour facility. *See supra* § 2.1 (right to counsel). Therefore, the respondent may not have benefit of counsel during this potentially lengthy prehearing detention. Procedural relief for respondents at this juncture would require extraordinary measures, e.g., a writ of habeas corpus.

Practice note: A new filing could potentially result in an additional seven-day waiting period for bed space at a 24-hour facility. Once appointed, respondents' counsel should ask clients about the length of time they were held in the hospital waiting for a bed at the 24-hour facility. Violations of the statute warrant dismissal. In addition, attorneys who regularly represent respondents in commitment proceedings should ask commitment clerks to notify them when a first examiner terminates a commitment and then re-files new commitment papers based on the seven-day rule. If so notified by the clerk's office, respondents' counsel should bring any violation of a respondent's due process rights to the attention of the commitment court through appropriate motion. In addition, a respondent's attorney should address any chronic systemic problems with successive seven-day holds with their supervisor or with the chief district court judge.

K. Second Examination by Physician

A physician must perform a second examination within twenty-four hours of the respondent's arrival at a 24-hour facility. The examiner cannot be the physician who performed the first examination or an eligible psychologist. The second examination provides another opportunity prior to the ten-day hearing at which the respondent may be released from involuntary detention. As with the initial examination, the respondent must be assessed to determine if the criteria for inpatient or outpatient commitment are present. Again, if the criteria for neither are present, the respondent must be released. G.S. 122C-266(a); *see infra* Appendix A, Form DMH 5-72-01.

Inpatient. If the criteria for inpatient commitment are met, the respondent is held at the 24-hour facility pending the district court hearing. G.S. 122C-266(a)(1). The treating physician may release the respondent at any time during the process if the respondent no longer meets the criteria for commitment, except for certain

cases referred through the criminal justice system. G.S. 122C-266(a)(3); *see also infra* Chapters 7, 8, and 9.

Outpatient. If the criteria for outpatient commitment are met, the respondent must be released pending the district court hearing. The examiner must provide the respondent, and show on the written examination report, the name, address and telephone number of the proposed outpatient treatment physician or center. In addition, the respondent must be given the date and time for the first outpatient appointment. It is the examiner's responsibility to send a copy of the examination report to the proposed outpatient treatment physician or center, as well as to notify the physician or center by telephone. G.S. 122C-266(a)(2).

Case law: The failure to obtain a second physician examination requires that the commitment order be vacated.

In re Barnhill, 72 N.C. App. 530 (1985). Failure to obtain a second examination by a physician is a fatal procedural error requiring that the commitment order be vacated. In *Barnhill*, a physician petitioned for the issuance of a custody order under former statute G.S. 122-58.3. The North Carolina Court of Appeals noted that the record contained no evidence that a second examination was performed as required under the former statute, a requirement now codified in G.S. 122C-261(d) and 122C-266. The court held that the statutory requirements must be followed diligently and vacated the order of commitment for failure to comply. 72 N.C. App. at 532.

L. Outpatient Commitment: Examination and Treatment Pending Hearing

Prehearing examination. When outpatient commitment is recommended by an examiner and the respondent is released pending the district court hearing, the respondent is required to attend an appointment with the proposed outpatient treatment provider. If the respondent does not appear as scheduled, the proposed treatment provider must notify the clerk of superior court. The clerk is required to issue an order for a law enforcement officer or other designated person to take the respondent into custody and transport the respondent for an evaluation. G.S. 122C-265(a); *see infra* Appendix A, Form AOC-SP-224.

Treatment. The proposed outpatient treatment provider may prescribe appropriate medications but may not physically force the respondent to take the medications. Other appropriate treatment may also be prescribed, but the respondent may not be forcibly detained for purpose of treatment. G.S. 122C-265(b), (c).

Change of recommendation. If the outpatient physician or center determines before the district court hearing that the respondent no longer meets the criteria for outpatient commitment, the respondent must be released and the clerk of court notified of the action. The outpatient proceedings are then terminated. G.S. 122C-265(d).

If the outpatient physician or center determines that the respondent now meets the criteria for inpatient commitment, new proceedings must be initiated by petition or by affidavit of physician or eligible psychologist. G.S. 122C-265(e). Upon initiation of proceedings for inpatient commitment, the clerk in the county where the respondent is being held must send notice to the clerk in the county where the outpatient commitment was initiated, if the counties are different. The outpatient commitment proceeding is then terminated. G.S. 122C-265(f).

M. Duties of Clerk of Superior Court

Inpatient commitment. The clerk of court in the county where the 24-hour facility is located must calendar the district court hearing on receipt of a recommendation from a physician or eligible psychologist for inpatient commitment. G.S. 122C-264(b). The hearing must be held within ten days of the date the respondent was taken into the custody of law enforcement. G.S. 122C-268(a). If the clerk or magistrate determined at the time the custody order was issued that a respondent at a non-state facility is indigent, counsel must be appointed. *See* G.S. 122C-268(d). For respondents at the state psychiatric hospitals, indigency is determined by Special Counsel in accordance with G.S. 7A-450(a), although it is subject to redetermination by the court. G.S. 122C-270(a).

Notice of the hearing is to be provided by the clerk to the respondent, the respondent's counsel, and the petitioner. The petitioner may waive notice by filing a written waiver with the clerk. G.S. 122C-264(b).

Outpatient commitment. The clerk in the county where the petition is initiated must calendar the district court hearing on receipt of a recommendation by a physician or eligible psychologist for outpatient commitment. The clerk is to provide notice of the time and place of the hearing to the respondent, the proposed outpatient treatment physician or center, and the petitioner. The petitioner is allowed to waive notice by filing a written waiver with the clerk of court. G.S. 122C-264(a).

There is no statutory provision for notice to counsel for the petitioner, as there is no requirement that the petitioner be represented.

List of outpatient commitments. The clerk in the county where the outpatient commitment is supervised is required to keep a list of outpatient commitments. The statute also requires the clerk to make a quarterly report listing all active cases, the "assigned supervisor" (which is not defined), and the disposition of all hearings, supplemental hearings, and rehearings. G.S. 122C-264(e). There is no direction as to who is to receive this report. Confidentiality requirements would mandate that this not be a public document.

N. Special Provisions for Mentally Retarded Individuals

It is state public policy that individuals with mental retardation not be treated in state facilities for the mentally ill, if possible. *See* G.S. 122C-263(d)(2) (second paragraph).

"Mental retardation" is defined in 122C-3(22) as significant "subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before age 22." "Significantly subaverage general intellectual functioning" is generally identified as an intelligence quotient of less than seventy according to *In re LaRue*, 113 N.C. App. 807 (1994).

Throughout the statutes, there are provisions for the petitioner, clerk, magistrate, and examiners to note if a respondent is known or suspected to be mentally retarded. Those individuals are to be diverted to facilities designed for the treatment of people with mental retardation. *See* G.S. 122C-241.

Chapter 122C specifies exceptions that may be made to this policy:

- Any person charged with a violent crime and found incapable of proceeding must be taken to a state facility. G.S. 122C-263(d)(2)a., 122C-266(b).
- Any person who is committed as a result of being found not guilty by reason of insanity must be taken to a state facility. G.S. 122C-263(d)(2)b., 15A-1321.
- A person for whom a waiver is granted by the Director of the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services or his or her designee, because the individual is "extremely dangerous" so as to be a threat both to the community and to other patients in a non-state facility setting, may be admitted to a state facility. G.S. 122C-263(d)(2)c.
- A person for whom a waiver is granted by the Director of the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services or his or her designee because the individual is "so gravely disabled by both multiple disorders and medical fragility or multiple disorders and deafness that alternative care is inappropriate" may be admitted to a state facility. G.S. 122C-263(d)(2)d.

2.4 Outpatient Commitment Recommended by Physician or Eligible Psychologist Affiant

An involuntary commitment proceeding can begin as a request for outpatient commitment only when a physician or eligible psychologist initiates the process by affidavit. *See supra* § 2.3.H and *infra* Appendix A, Form AOC-SP-305. Under that procedure, the physician or eligible psychologist performs an examination in compliance with the requirements for the first examination under G.S. 122C-263(c) prior to filing the affidavit. The physician or eligible psychologist must provide the respondent with written notice of any scheduled appointment and the

name, address, and telephone number of the proposed outpatient treatment physician or center. G.S. 122C-261(d).

The clerk or magistrate must review the affidavit and determine if there is "probable cause to believe that the respondent meets the criteria for outpatient commitment." If so, an order must issue directing that a district court hearing be held to determine whether the respondent will be involuntarily committed to outpatient treatment. G.S. 122C-261(d).

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.

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.

2.7 Disposition

A. Dispositional Alternatives: Respondent Held in 24-Hour Facility Pending Hearing

Inpatient. If the court finds that the respondent meets the criteria for inpatient commitment—that is, that the respondent is mentally ill and dangerous to self or others—it may order inpatient treatment in a 24-hour facility for up to ninety days. If the commitment proceeding was initiated as the result of the respondent being charged with a violent crime and found incapable of proceeding, this must be noted on the commitment order. *See infra* Chapter 8. If the respondent is currently under an outpatient commitment order, that commitment is terminated. G.S. 122C-271(b)(2).

The subsection on inpatient commitment specifically provides that "no respondent found to be both mentally retarded and mentally ill may be committed to a State, area or private facility for the mentally retarded." G.S. 122C-271(b)(2). There are limited circumstances in which an individual with mental retardation can be committed to a state facility for the mentally ill. G.S. 122C-263(d)(2); *see also supra* § 2.3.N.

Outpatient. If the court finds that the respondent meets the criteria for outpatient commitment, it may order outpatient commitment for up to ninety days. G.S. 122C-271(b)(1); *see supra* § 2.6I. The court also may order that a respondent being held at a 24-hour facility pending hearing be held by the facility up to seventy-two hours to allow the facility time to notify the outpatient physician or center of the treatment needs of the respondent. G.S. 122C-271(b)(4). If the court orders outpatient commitment in excess of the initial ninety days allowed by statute, the order is voidable, not void ab initio, and must be honored until vacated or corrected. *In re Webber*, ___ N.C. App. ___, 689 S.E.2d 468 (2009). The proper remedy in such a case is for the respondent to appeal the erroneous order or request a supplemental hearing pursuant to G.S. 122C-274(e). *Webber*, 689 S.E.2d at 476. The statute requires that if the commitment petition was filed as the result of the respondent being charged with a violent crime, and the respondent was found incapable of proceeding, this must be noted on the commitment order. G.S. 122C-271(b)(1); *see also infra* § 8.10.

The court must make a specific finding of availability of services before ordering outpatient commitment. In addition, the name of the outpatient treatment physician or center responsible for the respondent's treatment must be shown on the order. G.S. 122C-271(b)(4).

Inpatient/outpatient. The statute also allows the court to commit the respondent to a combination of inpatient and outpatient treatment for up to ninety days. G.S. 122C-271(b)(2). For example, the judge may order up to forty-five days of inpatient treatment, followed by up to forty-five days of outpatient treatment. The

outpatient commitment begins on the respondent's release from the inpatient facility. In this example, if the respondent is released on the thirtieth day of inpatient treatment, the forty-five days of outpatient commitment begins then.

The court may feel more comfortable with an earlier release from a facility if an outpatient commitment is ordered. Although a contesting client may object to *any* commitment, counsel may suggest to the client proposing to the court a lesser amount of recommended inpatient time followed by an outpatient commitment, or simply an outpatient commitment.

As with an inpatient order alone, the court must note on the order whether the commitment proceedings were initiated as a result of the respondent being charged with a violent crime. Likewise, any inpatient period of commitment terminates a prior outpatient commitment. G.S. 122C-271(b)(2).

Discharge. If the court does not find that the criteria for either inpatient or outpatient criteria are met, the respondent must be discharged. G.S. 122C-271(b)(3).

B. Dispositional Alternatives: Outpatient Recommendation, Respondent Released Pending Hearing

There are only two possible dispositional alternatives when the affiant physician or eligible psychologist has recommended outpatient commitment and the respondent has been released pending hearing. The court may order an outpatient commitment of up to 90 days if the criteria for outpatient commitment are found by clear, cogent, and convincing evidence. G.S. 122C-271(a)(1). If the court does not find that the outpatient criteria are met, the respondent must be discharged. G.S. 122C-271(a)(2).

C. Order

Inpatient. The court must find by clear, cogent, and convincing evidence that the respondent is mentally ill and dangerous to self or others. The underlying facts supporting these findings must be set out in the order. G.S. 122C-268(j); *see infra* Appendix A, Form AOC-SP-203. The trial court's duty to record facts in support of its findings is "mandatory," and failure to do so requires reversal of the order without regard to the evidence elicited at hearing. *In re Booker*, 193 N.C. App. 433 (2008).

Outpatient. The court must find by clear, cogent, and convincing evidence that the criteria for outpatient commitment are present. G.S. 122C-271(b)(1). The court also must make findings of fact regarding the availability of outpatient treatment and show on the order the name of the supervising outpatient physician or center. If the respondent was held in a 24-hour facility pending the hearing, the court may order that the respondent be held by the facility for up to seventy-two

hours to notify the outpatient treatment provider of the respondent's treatment needs. G.S. 122C-271(b)(4). The form used for an inpatient commitment, AOC-SP-203, is also used for an outpatient commitment. *See infra* Appendix A.

D. Duties of Physician for Follow-Up on Inpatient Commitment Order

General duties. There is only a brief statutory paragraph regarding duties for follow-up on an inpatient commitment order. The statute directs that the attending physician "may administer to the respondent reasonable and appropriate medication and treatment that are consistent with accepted medical standards." G.S. 122C-273(d).

Release and conditional release. Subject to exceptions concerning patients involved with the criminal justice system, the attending physician must discharge any respondent held pursuant to an inpatient commitment order upon determination that the criteria for inpatient treatment are no longer met. If the criteria for outpatient treatment are met, the attending physician may file a request with the clerk for a supplemental hearing on the issue of outpatient commitment. G.S. 122C-277(a).

The attending physician also may conditionally release a respondent for up to thirty days on "medically appropriate conditions." G.S. 122C-277(a). Conditional release is used for patients who have improved but still meet the commitment criteria. Often called a "trial visit," a conditional release affords the respondent an opportunity to demonstrate the ability to function safely in the community while still under the commitment order. The use of a trial visit has decreased recently because of concerns about hospital and physician liability for a respondent's acts while out of the facility.

Conditions imposed on the release may include taking medicine as prescribed, attending outpatient appointments, and abstaining from dangerous behaviors. The conditional release can range from a visit of a few hours outside the hospital with family or friends, to an overnight or weekend visit home, to the full thirty-day period of conditional release to home. Successful completion of a trial visit should result in unconditional discharge.

If a conditionally released respondent violates the specified conditions, the attending physician may request a law enforcement officer to take the respondent into custody for return to the facility. G.S. 122C-277(a); *see infra* Appendix A, Forms DMH 5-82-02 and DMH 5-83-01.

Notice of discharge or conditional release is to be provided to both the clerk of court in the county where the petition for commitment was originally filed and in the county where the facility is located. G.S. 122C-277(a).

E. Duties of Physician or Center for Follow-Up on Outpatient Commitment Order

Medication and treatment. An outpatient physician may prescribe or administer or an outpatient center may administer "reasonable and appropriate medication and treatment that are consistent with accepted medical standards." G.S. 122C-273(a). Note, however, the respondent may not be physically forced to take medication or be forcibly detained for treatment except in the case of immediate danger to self or others. Forced treatment or detention may only be undertaken in conjunction with the initiation of inpatient commitment proceedings. G.S. 122C-273(a)(3). There is also a mandate for LMEs that no individual may be refused services because of an inability to pay. G.S. 122C-146(a).

Failure to comply or clearly refuses to comply. The treating outpatient physician or center must make "all reasonable effort [sic]" to obtain the respondent's cooperation with treatment. G.S. 122C-273(a)(1). If the respondent "fails to comply or clearly refuses to comply" with treatment recommendations, the treatment provider *must* report the efforts made, along with a request for a supplemental hearing. *Id.; see infra* Appendix A, Form AOC-SP-221. The form is filed with the clerk of superior court, who is responsible for calendaring the supplemental hearing.

Failure to comply, but does not clearly refuse to comply. The treatment provider must make reasonable efforts to engage the respondent in prescribed treatment. If the respondent does not comply, but does not clearly refuse prescribed treatment, the treatment provider *may* request that the respondent be taken into custody for the purpose of examination. G.S. 122C-273(a)(2); *see infra* Appendix A, Form AOC-SP-220. The form is filed with the clerk of superior court, not a magistrate, who *must* issue an order (included on the request form) for a law enforcement officer to take the respondent into custody for transport to the outpatient physician or center for examination. G.S. 122C-273(a)(2).

After examination, the outpatient treatment provider must release the respondent unless inpatient commitment proceedings are instituted. If inpatient commitment proceedings are instituted, the examination substitutes for the first examination ordinarily required for commitment. The clerk or magistrate must issue a custody order within six hours of the examination if this procedure is pursued. G.S. 122C-273(a)(2).

This provision allows the treatment provider to use law enforcement to force the respondent to submit to an examination. Unlike the procedure for a respondent who clearly refuses to comply, however, there is no concurrent request for and scheduling of a supplemental hearing.

Respondent no longer meets outpatient commitment criteria. At any time that the respondent no longer meets the criteria for outpatient commitment, the court

must be notified and the case terminated. There is an exception for a respondent first committed as a result of being charged with a violent crime and found incapable of proceeding. In that case, the treatment provider must notify the clerk that discharge is recommended. The clerk must schedule a supplemental hearing for the court to determine whether the respondent is to be released from outpatient commitment. G.S. 122C-273(a)(4); *see infra* § 8.12.

Respondent moves to another state or to unknown location. The clerk of superior court of the county supervising outpatient treatment must be notified by the treatment provider if the respondent moves to another state or to an unknown location. The outpatient commitment is then terminated. G.S. 122C-273(c).

Respondent becomes dangerous to self or others. Anyone who has knowledge that a person under outpatient commitment has become dangerous to self or others may initiate a petition for inpatient commitment. If the respondent is committed on an inpatient basis, the prior outpatient commitment is terminated. G.S. 122C-273(a)(5).

2.8 Outpatient Commitment Supplemental Hearings

A. Request for Supplemental Hearing

Supplemental hearing distinguished from rehearing. A supplemental hearing is held during the term of an outpatient commitment if the respondent fails to comply or clearly refuses to comply with treatment, or if the respondent moves or intends to move to another county within the state. These are matters concerning the terms of the existing commitment.

A rehearing is held on a request to *extend* the current outpatient commitment. For example, a rehearing may be held on request of the attending physician for an additional ninety days of outpatient commitment following a ninety-day commitment.

There is no statutory definition for either "supplemental hearing" or "rehearing."

Mandatory requests. A supplemental hearing must be requested by the treatment provider in the following instances:

- when the respondent "fails to comply or clearly refuses to comply" with recommended treatment (G.S. 122C-273(a)(1); *see infra* Appendix A, Form AOC-SP-221); or
- when the respondent moves or intends to move to another county within the state. G.S. 122C-273(b).

Discretionary requests. A supplemental hearing may be requested:

- by the treatment provider if the respondent "fails to comply, but does not clearly refuse to comply" with recommended treatment (G.S. 122C-273(a)(2), 122C-274; *see infra* Appendix A, Form AOC-SP-220); or
- by the respondent at any time in writing seeking discharge from outpatient commitment. G.S. 122C-274(e).

An attending physician for an inpatient respondent may request a supplemental hearing for the purpose of transferring the respondent to an outpatient commitment. G.S. 122C-277(a). There are no separate statutory provisions for a supplemental hearing for inpatient commitment.

B. Calendaring of Supplemental Hearing and Notice

The clerk of superior court of the county supervising the outpatient commitment must calendar a supplemental hearing within fourteen days of receipt of a request. Notice to the petitioner, the respondent's attorney, if any, and the designated outpatient treatment provider must be given by the clerk by first-class mail, postage prepaid, at least seventy-two hours prior to the hearing. The respondent must be personally served with an order to appear at least seventy-two hours before the hearing. G.S. 122C-274(a).

C. Supplemental Hearing Procedures

The supplemental hearing is held in district court pursuant to the procedures provided for the initial outpatient commitment hearing. G.S. 122C-274(b); *see also* G.S. 122C-267. As with the initial hearing, the appearance of the respondent may not be waived, and the court may consider certified medical documents that would otherwise be considered hearsay evidence.

D. Disposition

Alleged failure to comply. The court must first determine whether the respondent has failed to comply with outpatient treatment. If the respondent is in compliance, presumably the proceeding is terminated and the original outpatient commitment continues, although this is not stated in the statute. *See* G.S. 122C-274(c).

If the respondent is found not to be in compliance, the court may order one of three alternatives:

- if the court finds "probable cause to believe that the respondent is mentally ill and dangerous to himself . . . or others . . . ," it may order an examination by the outpatient or other physician or an eligible psychologist to determine the need for continued outpatient commitment or for inpatient commitment;
- it may reissue or change the outpatient commitment order in accordance with

the initial dispositional criteria and order outpatient commitment of up to ninety days; or

- it may discharge the respondent from outpatient commitment and dismiss the case.

G.S. 122C-274(c)(1)–(3); *see infra* Appendix A, Form AOC-SP-206.

Respondent has moved or intends to move. The court is required to determine first whether the respondent continues to meet the criteria for outpatient commitment, even though the supplemental hearing has been requested pursuant to a move or planned move. If the respondent continues to meet the criteria, the court must continue in effect the outpatient commitment and designate a treatment provider in the new county of residence to supervise the outpatient treatment. The court must order that the respondent appear at the address provided for the new treatment provider for continued outpatient treatment. In addition, the court is required to transfer venue of the case to the county of the provider supervising the outpatient treatment. G.S. 122C-274(d); *see infra* Appendix A, Form AOC-SP-206.

Respondent's request for discharge. On the respondent's request for a supplemental hearing, the court must "determine whether the respondent continues to meet the criteria specified in G.S. 122C-263(d)(1) [outpatient commitment]. The court may either reissue or change the commitment order or discharge the respondent and dismiss the case." G.S. 122C-274(e); *see infra* Appendix A, Form AOC-SP-206.

Attending physician's request to transfer respondent from inpatient to outpatient commitment. The court is first required to determine whether the respondent continues to meet the criteria for inpatient commitment. If so, it must order that the original inpatient commitment be continued. If the court finds that the respondent meets the criteria for outpatient commitment, it must order outpatient commitment of up to ninety days. The respondent must be discharged and the case dismissed if the respondent does not meet the criteria for either type of commitment. G.S. 122C-274(f).

2.9 Rehearings for Inpatient Commitment

A. Notice to Clerk by Facility

If the attending physician determines that an additional period of inpatient treatment will be required, notice of the need for a rehearing must be provided to the clerk at least fifteen days before the end of the commitment. This notice is given to the clerk of the county where the facility is located. G.S. 122C-276(a); *see infra* Appendix A, Form DMH 5-76-01.

B. Scheduling of Hearing and Notice

The clerk is to calendar the rehearing at least ten days before the end of the inpatient commitment hearing. Except for respondents committed as a result of being charged with a violent crime, discussed *infra* in § 8.11, notice is to be provided in accord with the requirements for the initial hearing. G.S. 122C-276(d); *see infra* Appendix A, Form AOC-SP-301.

C. Hearing Procedures

Rehearings for inpatient commitment are held in accord with the procedures set forth for the initial hearing. The respondent is afforded the same rights, including the right to appeal. G.S. 122C-276(d), (f); *see supra* § 2.6. The North Carolina Court of Appeals has held that G.S. 122C-276(d) does not require that the respondent be examined by a second physician, as required for the initial commitment proceeding. The examination of the attending physician who requested the rehearing is sufficient to satisfy statutory requirements. *In re Lowery*, 110 N.C. App. 67, 70 (1993).

D. Disposition

At the first rehearing, the court has the same dispositional alternatives as at the initial hearing, except that a second period of inpatient commitment may be for up to 180 days. G.S. 122C-276(e); *see also* G.S. 122C-271(b). Additionally, if the court finds that the criteria for outpatient commitment are met, an outpatient commitment of up to 180 days may be ordered. G.S. 122C-276(g). The court may also commit a respondent for a combination of both inpatient and outpatient days, i.e. a "split commitment." However, the total number of days committed cannot exceed 180 days.

At second and subsequent rehearings, if the court finds that the criteria are met, it may order inpatient commitment for up to one year. G.S. 122C-276(f). The court may also order outpatient commitment of up to 180 days at any subsequent rehearing. G.S. 122C-276(g). The court also may combine inpatient and outpatient commitment days for a total maximum of 365 days, although this is rarely, if ever, done.

In re Hayes, ___ N.C. App. ___, 681 S.E.2d 395 (2009), is one in a lengthy series of cases regarding the possible discharge of Michael Hayes, a defendant found not guilty by reason of insanity. *See supra* § 2.6H (discussing the underlying facts of the case). Although the case is specific to G.S. 122C as it relates to individuals who are found not guilty by reason of insanity, the case is also important for its discussion of the court's disposition options at a rehearing. Essentially, the case holds that the trial court on rehearing may order any disposition allowed by Chapter 122C regardless of the specific relief requested by the treating physician. 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.

E. Respondent's Waiver of Right to Second and Subsequent Rehearings

The attending physician must notify the respondent, the respondent's counsel, and the clerk in the county where the facility is located, if inpatient treatment beyond the second inpatient commitment is recommended. The respondent may file with the clerk, through counsel, a written waiver of the right to a rehearing. G.S. 122C-276(f).

2.10 Rehearings for Outpatient Commitment

A. Notice to Clerk by Treatment Provider

The outpatient treatment physician or center must notify the clerk of superior court at least fifteen days before the end of initial or subsequent outpatient treatment if an additional period of outpatient commitment is required. Additionally, the treatment provider must notify the clerk if a respondent no longer meets the criteria for outpatient commitment. The clerk must then dismiss the case, unless the respondent was committed as a result of being charged with a violent crime and being found incapable of proceeding. In that case, the clerk also must schedule a hearing before the district court. G.S. 122C-275(a). This procedure is discussed *infra* in § 8.12.

B. Scheduling of Hearing and Notice

The clerk must calendar the hearing at least ten days before the end of the outpatient commitment period. Notice is to be provided in accord with the requirements for the initial hearing. G.S. 122C-275(a), (b); *see also supra* § 2.3M.

C. Hearing Procedures

Rehearings for outpatient commitment are held in accord with the procedures set forth for the initial hearing. The respondent is afforded the same rights, including the right to appeal. G.S. 122C-275(b).

D. Disposition

The court has two dispositional alternatives at a rehearing on an outpatient commitment. First, if the court finds that the respondent no longer meets the

criteria for outpatient commitment, the respondent must be unconditionally discharged. The clerk must transmit a copy of the discharge order to the outpatient treatment provider. G.S. 122C-275(c).

If the court finds that the respondent continues to meet the criteria for outpatient commitment, it may order outpatient commitment to continue for up to 180 days at each rehearing. G.S. 122C-275(c).

2.11 Special Emergency Procedure

A. Transportation for Examination for Immediate Hospitalization

A person in need of immediate inpatient commitment to prevent harm to self or others may be transported by anyone with knowledge of the circumstances, including a law enforcement officer, for examination by a physician or eligible psychologist. The individual may be taken to an area facility or other place, including a state facility for the mentally ill, for this examination. G.S. 122C-262(a).

B. Certification by Examiner of Need for Immediate Hospitalization

If the physician or eligible psychologist finds after examination that the individual meets the criteria for immediate hospitalization, the examiner must so certify in writing before an officer authorized to administer oaths. The certificate must state the reasons immediate hospitalization is necessary, as well as any information regarding whether the person is mentally retarded. G.S. 122C-262(b); s*ee infra* Appendix A, Forms DMH 5-72-01-A and DMH 5-72-01-B.

C. No Appearance Before Magistrate

The certification of need for immediate hospitalization obviates the need for an appearance by the physician or eligible psychologist before a magistrate. A copy of the certificate must be sent by the physician or eligible psychologist to the clerk "by the most reliable and expeditious means." If it appears that the certificate will not be delivered within twenty-four hours, the findings also must be communicated to the clerk by telephone. G.S. 122C-262(c).

D. Transportation to 24-Hour Facility Pending Hearing

The certificate of the physician or eligible psychologist serves as the custody order for the person to be transported to a 24-hour facility. Pending the district court hearing, the individual may be transported by anyone, including a law enforcement officer, to the facility. If there is no area 24-hour facility, and the respondent is indigent and cannot pay for care at a private facility, the respondent may be transported to a state facility for the mentally ill. G.S. 122C-262(d).

E. Chief District Court Judge to Examine Certificate

The clerk of superior court must submit the certificate of the physician or eligible psychologist immediately upon receipt to the chief district court judge for review. The chief district court judge reviews the certificate under the same standard used by the clerk or magistrate reviewing a petition under G.S. 122C-261(b)—that is, that there are "reasonable grounds to believe that the facts alleged in the affidavit are true and that the respondent is probably mentally ill and either (i) dangerous to self . . . or dangerous to others . . . or (ii) in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness." G.S. 122C-261(b), 122C-264(b1).

The judicial review of the certificate is to occur within twenty-four hours, excluding Saturdays, Sundays, and holidays. The clerk must then notify the treatment facility of the findings of the court by telephone. G.S. 122C-264(b1). If the court does not find that reasonable grounds exist, presumably the respondent must be released.

F. Further Proceedings

Upon determination by the court that reasonable grounds exist for immediate hospitalization, the clerk proceeds as in a case initiated by petition or physician's affidavit. G.S. 122C-264(b1). Procedures for further examination and court hearings are also in accord with cases initiated by petition or affidavit. G.S. 122C-262(e); *see also supra* § 2.3H.

2.12 Appeal

A. Appeal to North Carolina Court of Appeals

The district court has exclusive original jurisdiction over civil commitments and admissions requiring judicial review. Appeal from a district court order is directly to the North Carolina Court of Appeals. An appeal does not stay the order of the district court, which retains jurisdiction to hear all reviews, rehearings, or supplemental hearings allowed or required by statute. G.S. 122C-272.

It is important for counsel to stress to the respondent that appealing does not result in immediate release from the hospital. In most cases, the respondent will be either discharged or recommitted prior to issuance of an opinion from the court of appeals. Although discharge of the client does not render the appeal moot (*see infra* § 2.12E), if the client is recommitted pending resolution of the appeal, winning the appeal does not result in discharge from the current commitment.

B. Who May Appeal

The statute allows the state or "any party on the record as in civil cases" to appeal. G.S. 122C-272. It is not specified who, other than the respondent, would be a party of record. There is no case law on this point.

C. Representation of Respondent

Chapter 122C provides for attorney representation of a respondent through any appellate proceedings. G.S. 122C-270. Appeal by the respondent's counsel is at the direction of the respondent. Pursuant to G.S. 122C-270(a) and (e), assigned counsel represents respondents through all proceedings in the district court. Presumably, this covers notice of appeal, which is required to be given at the district court level. Counsel appointed by the Office of the Appellate Defender represent respondents through the conclusion of any appeal. G.S. 122C-270(e).

D. Confidentiality on Appeal

There is no provision in the North Carolina Rules of Appellate Procedure for using the initials of a respondent in appellate documents to preserve patient confidentiality. Recent amendments to the Rules, however, mandate the use of initials for most records in juvenile proceedings, which also are confidential proceedings. Counsel should consider filing a motion with the court requesting to be allowed to use initials, citing the rule for juvenile cases as analogous. If the motion is granted, the respondent's name would be redacted from *all* records designated by the court, including the transcript and all exhibits.

Counsel should advise a client who is considering an appeal that confidentiality of the proceeding may be sacrificed as a consequence of appealing. This might be an important factor to some clients.

E. Appeal Not Moot

An appeal is not rendered moot by the discharge of the respondent pending the resolution of the appeal.

Case law: An appeal is not moot if the respondent is discharged or the term of commitment has expired.

In re Hatley, 291 N.C. 693 (1977). An appeal is not rendered moot because the term of commitment ordered by the lower court has expired. In *Hatley*, the North Carolina Supreme Court considered the possible consequences of being adjudged mentally ill, such as the finding or order being used adversely against the respondent in future civil or criminal proceedings. The court also noted that in the instant case, the lower court based its order in part on the respondent's record of prior commitments. Because there were possible collateral legal consequences,

the court held that the respondent's appeal was not moot. *Id.* at 694–95.

In re Hogan, 32 N.C. App. 429 (1977). In *Hogan*, the North Carolina Court of Appeals stated that even though the record contained a certificate indicating that the respondent had been unconditionally discharged from the order of commitment, the appeal was not moot, citing *In re Hatley*, discussed above, and other cases. The court of appeals did not discuss the facts of the case or possible collateral legal consequences. *Id.* at 432.

In re Benton, 26 N.C. App. 294 (1975). The North Carolina Court of Appeals held in *Benton* that the respondent's appeal was not moot even though the commitment period of sixty days had expired. The court did not discuss the facts of the case or possible collateral legal consequences in reaching its holding. *Id.* at 295.

Appendix 2-1
Involuntary Commitment for Mental Health Treatment: Checklist for Respondents' Attorneys

This checklist applies after Special Counsel or the appointed attorney receives notice of the patient's admission. Consult the indicated forms as necessary.

Receipt and Review of Documents

- ❑ Receive the petition or affidavit of the physician or eligible psychologist, accompanied by the affidavit(s) of the examiner. This will occur by different methods depending on local practice. Counsel should inquire of the clerk of court and the records clerk of the facility to determine local practice.
- ❑ Review documents for compliance with statutory requirements.

Affidavit and Petition for Involuntary Commitment (Form AOC-SP-300)

- ❑ Is the petition signed and sworn before an authorized officer? G.S. 122C-261(a).
- ❑ Was the petition properly clocked in with a date and time stamp?
- ❑ Is box 1, alleging mental illness and danger to self or others, checked?
- ❑ Do the allegations in the petition support on their face a finding of reasonable grounds to believe that the respondent is mentally ill and either dangerous to self or others or in need of treatment to prevent further disability or deterioration that would predictably result in dangerousness?
- ❑ Who does the petition indicate are witnesses to the behaviors and actions alleged in the petition?

Findings and Custody Order Involuntary Commitment (Form AOC-SP-302)

- ❑ Is the custody order properly signed and dated with the time noted by the appropriate court official?
- ❑ Is box 1, alleging mental illness and danger to self or others under "Findings," checked?
- ❑ Is box 1 and/or 2 checked under "Custody Order"?
- ❑ Does the "Return of Service" on the back indicate that the respondent was taken into custody within 24 hours of issuance of the custody order?
- ❑ Did the law enforcement officer complete either Section A, B, C, or D appropriately on the back of the custody order?

Affidavit of Examining Physician or Eligible Psychologist—First Examination Report (Form DMH 5-72-01, Examination and Recommendation to Determine Necessity for Involuntary Commitment)

- ❑ Was the examination performed within 24 hours of the time the respondent was taken into the custody of the law enforcement officer?

- ❑ Was the first examination performed by either a physician or eligible psychologist?
- ❑ Is the examination report properly signed?
- ❑ Does the examination report indicate that the examiner performed a personal examination and did not merely repeat the allegations of the petition? If the examination was via "telemedicine" and not in the examiner's physical presence, did it comply with the requirements of G.S. 122C-263(c)?
- ❑ Do the findings of the examiner support the conclusion of a diagnosis of mental illness?
- ❑ Do the findings of the examiner support the conclusion of a finding of danger to self or others?
- ❑ Does the examiner's report recommend inpatient commitment? Recommendation: _____
- ❑ Was the respondent detained 7 days or less while awaiting transport to a 24-hour facility? If the respondent was detained more than 7 days, was a new commitment petition filed in accordance with the requirements of G.S. 122C-263(d)(2)?

Affidavit of Physician—Second Examination Report (Form DMH 5-72-01, Examination and Recommendation to Determine Necessity for Involuntary Commitment)

- ❑ Was the examination performed within 24 hours of admission to a 24-hour facility?
- ❑ Was the examination performed by a physician?
- ❑ Is the examination report properly signed?
- ❑ Does the examination report indicate that the examiner performed a personal examination and did not merely repeat the allegations of the petition?
- ❑ Do the findings of the examiner support the conclusion of a diagnosis of mental illness?
- ❑ Do the findings of the examiner support the conclusion of a finding of danger to self or others?
- ❑ Does the examiner's report recommend inpatient commitment? Recommendation: _____

Medical Records Review

- ❑ Review records in the patient's chart(s) at the 24-hour facility
- ❑ Do Progress Notes contain staff observations of manifestation of symptoms of mental illness?

  _____
- ❑ Do Progress Notes contain staff observations of dangerous behavior toward self or to others? _____
- ❑ Results of drug testing:

  _____
- ❑ Current medications: _____

- ❑ Psychological examination or other special examinations or reports?
  _____
- ❑ Any pending criminal charges noted in the record?
  _____

Interview with Client

Attorney role:

- ❑ Meet with client as soon as possible
- ❑ Explain you represent client, no one else
- ❑ Inform client that he or she may retain private attorney (explain time parameters, request that retained attorney call you, request to be on stand-by in event retained attorney does not appear)
- ❑ Explain that representation for commitment proceeding only

Explanation of proceeding:

- ❑ Special proceeding reviewing hospitalization, jail not a possibility
- ❑ Hearing before judge, but not in regular courtroom (describe hearing room)
- ❑ Confidential proceeding, hearing, and court file
- ❑ Time and date of hearing
- ❑ Venue—right to transfer if petition initiated in another county and possible need for continuance to facilitate hearing in originating county
- ❑ Waiver of appearance—importance of appearance if contesting
- ❑ Witnesses for State and for client may be called
- ❑ Continuance may be requested by client, by State, or on motion of court

Discussion of case:

- ❑ Review allegations of petition—get client's side of events
- ❑ Discuss medical evidence
- ❑ Ask what treating psychiatrist or social worker has told client about treatment team recommendation on length of stay
- ❑ Ask client if there are prior commitments or other information on mental illness or danger that might be raised by State's witnesses
- ❑ Explain consequences of involuntary commitment: ____firearms ____ military
- ❑ Does client have alternative plan to inpatient care (housing, job, outpatient care, day program, etc.)?
- ❑ Client states would agree to (sign as voluntary, shorter stay, continuance if early discharge pending, etc.) _____
- ❑ Discuss possible witnesses; obtain client consent to contact/subpoena
- ❑ Advise of possible technical motions (e.g., motion to dismiss for failure of petition to be signed but possibility of new petition)

Explanation of hearing procedures:

- ❑ Attorney for State or petitioner to call witnesses—possibly petitioner, psychiatrist, social worker, staff, or family
- ❑ Witnesses for client—discuss allegations, likely witnesses, advisability of client testifying
- ❑ Courtroom demeanor—not get upset, not speak unless testifying, stay seated unless called to testify, whisper quietly or write note if need to communicate with attorney
- ❑ Closing arguments—client should not react or speak during

Client's position:

____ Contest ____ Not contest

____ Agrees to venue ____ Requests change of venue

____ Agrees to: (sign in as voluntary patient, shorter inpatient stay, outpatient commitment, continuance, etc.): _____

____ Appear ____ Not appear

____ Move to continue Reason: _____

Follow-up to Client Interview

- ❑ Notify opposing counsel, appropriate court personnel of result (contest/not contest, appear/not appear)
- ❑ Negotiate with opposing counsel or psychiatrist as appropriate for desired client result (what client would agree to)
- ❑ Contact witnesses to discuss case
- ❑ Subpoena witnesses as necessary
- ❑ Meet with client as necessary to discuss results of negotiation, information from witnesses
- ❑ Prepare for hearing: motions, questions, relevant case law

Action needed:

____ Motion to dismiss Reason: _____

____ Motion to continue Reason: _____

____ Contested hearing: ____ Client appear

____ Not appear ____ Motion to Waive Appearance

____ Not contested: ____ Client appear

____ Not appear ____ Motion to Waive Appearance

Client agrees to:

____ Inpatient
____ Outpatient
____ Split: ____ Inpatient ____ Outpatient
____ Client signed voluntary
____ Client was discharged

Follow-up to Hearing When Client Committed

- Discuss order with client, reiterate that amount of days committed is *maximum* inpatient stay without a rehearing and that can be discharged sooner
- Explain outpatient commitment, if any, importance of attending appointments, and consequences of failure to comply
- Explain that representation continues for duration of commitment and through any appeal
- Advise of appeal right, discuss limitations (length of time to appeal, likely discharge or rehearing well before appeal decided)

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).