Chapter 3

Involuntary Commitment of Adults and Minors for Substance Abuse Treatment

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3.1 Substance Abuse Commitment

Involuntary commitment for substance abuse treatment is the judicial procedure to compel a substance abuser to submit to treatment. While many of the procedures are the same as or similar to those for involuntary commitment for mental health treatment, there are differences in the statutes allowing treating professionals to tailor treatment for substance abusers. This chapter will focus on the statutes applicable specifically to substance abuse commitment, while noting procedures that parallel those for mental health commitment.

The major substantive difference between substance abuse commitment and commitment for mental health treatment is that the respondent in a substance abuse proceeding is committed to the care of the area authority or a physician, rather than to a 24-hour facility. The commitment term may be up to 180 days, during which treatment may be either on an inpatient or outpatient basis, as determined by the area authority or physician. The area authority or physician must, however, request a supplemental hearing for court review of any proposed inpatient treatment period exceeding forty-five consecutive days.

A substance abuse commitment, unlike a mental health commitment, must be reported to the North Carolina Department of Motor Vehicles. *See infra* § 3.6C. This can result in the client's loss of driving privileges, a collateral consequence that threatens the client's future ability to maintain employment, maintain a household, and maintain appointments with a community treatment provider. It is important that this information be provided to a client facing a substance abuse commitment.

3.2 Terminology Used in this Chapter

"Area authority" is the area mental health, developmental disabilities, and substance abuse authority. N.C. GEN. STAT. § 122C-3(1) (hereinafter G.S.). The area authority is a statutory creation that is the "locus of coordination among public services for clients of its catchment area." G.S. 122C-101. The catchment area may be a single county, which is referred to as a "county program," or a combination of two or more counties. *See* G.S. 122C-3(5), (10a). The term "local management entity" or LME is also used to describe an area authority or county program. LME is a collective term that refers to functional responsibilities rather than governance structure. G.S. 122C-3(20b). The area authority or LME is charged with implementing and monitoring community-based mental health and substance abuse services as well as coordinating the care of individual clients to ensure care is appropriate. *See* G.S. 122C-115.4, 122C-117.

"Dangerous to self" and "dangerous to others." *See supra* § 2.2.

"Eligible psychologist" is a licensed psychologist with at least two years' clinical experience who "holds permanent licensure and certification as a health services provider psychologist issued by the North Carolina Psychology Board." G.S. 122C-3(13d).

"Qualified professional" is "any individual with appropriate training or experience as specified by the General Statutes or by rule of the Commission [for Mental Health, Developmental Disabilities, and Substance Abuse Services] in the fields of mental health or developmental disabilities or substance abuse treatment or habilitation, including physicians, psychologists, psychological associates, educators, social workers, registered nurses, certified fee-based practicing pastoral

counselors, and certified counselors." G.S. 122C-3(31).

"Responsible professional" is "an individual within a facility who is designated by the facility director to be responsible for the care, treatment, habilitation, or rehabilitation of a specific client and who is eligible to provide care, treatment, habilitation, or rehabilitation relative to the client's disability." G.S. 122C-3(32).

"Substance abuse" is "the pathological use or abuse of alcohol or other drugs in a way or to a degree that produces an impairment in personal, social, or occupational functioning. 'Substance abuse' may include a pattern of tolerance and withdrawal." G.S. 122C-3(36).

"Substance abuser" is "an individual who engages in substance abuse." G.S. 122C-3(37).

"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.

3.3 Involuntary Substance Abuse Commitment

A. Affidavit and Petition Before Clerk or Magistrate

Involuntary substance abuse commitment begins with an individual appearing before either the clerk of superior court or a magistrate to petition by affidavit for a person believed to be a substance abuser and dangerous to self or others to be taken into custody for an examination. The affidavit must include the facts on which the affiant's opinion is based. G.S. 122C-281(a).

This statute tracks the provisions for mental health commitment in G.S. 122C-261(a), except that there is no requirement that the affiant state whether the respondent is believed to be mentally retarded. G.S. 122C-281(a); s*ee infra* Appendix A, Form AOC-SP-300. Counsel should review the treatment provider's justification for maintaining a client with mental retardation on any type of involuntary commitment. When the justification does not meet the legal standard for a waiver or other exception allowing involuntary commitment, counsel should seek to have the client removed from involuntary status. For a discussion of commitment of individuals with mental retardation, see *supra* § 2.3N.

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 *Ingram* case contains two important holdings concerning the sufficiency of the affidavit and petition:

- failure of the petition to be sworn to under oath is ground for dismissal of the

petition; and
- failure of the petition to state sufficient facts supporting the allegations that the respondent is mentally ill and dangerous to self or others is ground for dismissal of the petition.

For a more complete discussion of the case, see *supra* § 2.3A.

B. Custody Order for Examination

The clerk or magistrate must review the petition to determine if there are "reasonable grounds to believe that the facts alleged in the affidavit are true and that the respondent is probably a substance abuser and dangerous to himself or others." G.S. 122C-281(b). If so, 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. The clerk has no duty to contact the area authority regarding a respondent who might be mentally retarded. *But cf. infra* Appendix A, Form AOC-SP-302 (indicating that the area authority must be contacted if a respondent who is mentally ill is also mentally retarded).

C. Transportation Procedures

The general provisions for transportation of respondents in involuntary substance abuse proceedings are the same as the transportation provisions applicable to mental health commitment proceedings discussed *supra* in § 2.3C. *See* G.S. 122C-251.

D. Custody and Transport to First Examination

Procedures for a law enforcement officer or other authorized individual to assume custody of and transport a substance abuse respondent for examination are contained in G.S. 122C-281(e) and 122C-283(a) and generally mirror the procedures governing mental health commitments found in G.S. 122C-261(e) and 122C-263(a). *See supra* § 2.3D. Unlike the mental health statute, the substance abuse statute does not provide for temporary detention in a state facility for the mentally ill pending the first examination. *Compare* G.S. 122C-283(a) (substance abuse statute) *with* G.S. 122C-263(a) (mental health statute).

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.

The examiner must assess the following:

> "(1) Current and previous substance abuse including, if available, previous treatment history; and
> (2) Dangerousness to himself or others . . . ."

G.S. 122C-283(c).

Although substance abuse commitment usually involves outpatient treatment, the substance abuse statute does not require the determination that "the respondent is in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness," which is necessary for a mental health outpatient commitment. *See* G.S. 122C-263(d)(1)c. (mental health statute); *see also supra* § 2.3E. In addition, for a substance abuse commitment, there is no provision for first examination via telemedicine. *See supra* § 2.3F.

Recommendation. If the examiner finds that the respondent is a substance abuser and is dangerous to self or others, commitment must be recommended. Unlike mental health commitment procedures, there is then an additional determination. The examiner must recommend whether the respondent should be released or held at a 24-hour facility pending hearing. G.S. 122C-283(d); *see infra* Appendix A, Form DMH 5-72-01, Section III. If the examiner recommends that the respondent be held, the law enforcement officer or other designated individual must transport the respondent to a 24-hour facility. G.S. 122C-283(d). This detention at the facility pending hearing is distinguished from the substance abuse commitment itself; substance abuse commitment is not commitment to a facility, but rather to the care of the area authority or a physician.

If the examiner does not recommend that the respondent be held at a 24-hour facility pending hearing, the respondent must be released pending the hearing. G.S. 122C-283(d)(1).

If the examiner finds that the respondent is not a substance abuser and dangerous to self or others, the respondent must be released and the proceedings terminated. G.S. 122C-283(d)(2).

Temporary waiver of requirement of physician or eligible psychologist to perform first examination. A bill enacted on July 1, 2003, S.L. 2003-178, and extended periodically allows the Secretary of Health and Human Services, on the request of a 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" on request and if certain criteria are met. A maximum 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.

Note: If recommending commitment, the examiner is not required to recommend

either inpatient or outpatient commitment. A substance abuse commitment is to the physician or area authority that will be supervising and managing treatment and determining what portion of the treatment, if any, will be in a 24-hour facility. The examiner recommends only whether the respondent will be held in a 24-hour facility pending hearing.

F. Alternative Procedure: Affidavit by Physician or Eligible Psychologist

As in the mental health commitment procedures, a physician or eligible psychologist who has examined the respondent may petition for substance abuse commitment without appearing before the clerk or a magistrate. *See supra* § 2.3H. The physician or eligible psychologist must conduct the examination in compliance with the requirements of the first examination described *supra* in § 3.3E and then execute the affidavit before any official authorized to administer oaths. G.S. 122C-281(d).

The legislature has not amended this statute to allow filing of the affidavit with the clerk or magistrate by facsimile transmission as of this writing. The parallel section in the mental health commitment section, G.S. 122C-261(d), was amended in 2005 to allow filing by facsimile transmission.

G. Second Examination

A second examination is required only when substance abuse commitment is recommended by the first examiner *and* the respondent is held in a 24-hour facility pending hearing. This examination must occur within twenty-four hours of the respondent's arrival at the facility. G.S. 122C-285(a). If the first examination occurred at the "same facility in which the respondent is held, the second examination must occur not later than the following regular working day." G.S. 122C-285(b).

The second examination must be performed by a physician if the first examination was conducted by an eligible psychologist. If a physician performed the first examination, however, the second examination may be conducted by a "qualified professional," which includes a wide range of professionals. G.S. 122C-285(a); *see supra* § 3.2.

The examiner must use the same assessment criteria used for the initial examination. If the examiner finds that the respondent is a substance abuser and is dangerous to self or others, the examiner must hold the respondent for treatment pending a hearing. The examiner has the option of either holding the respondent at the 24-hour facility or designating other treatment pending the hearing. G.S. 122C-285(a).

If the second examiner does not find that the criteria for substance abuse commitment exist, the respondent must be released and the proceeding

terminated. The individual who transported the respondent to the facility must return the respondent to the originating county. The examiner is required to report the reasons for the release in writing to the clerk of court of the county in which the custody order originated. G.S. 122C-285(a).

H. Duties of the Clerk of Superior Court

On receipt of a recommendation of substance abuse commitment from a physician or eligible psychologist, the clerk, on direction of a district court judge, must assign counsel, calendar the case for hearing, and give notice to the respondent, the respondent's counsel, and the petitioner of the time and place of the hearing. As in mental health commitment proceedings, the petitioner may file a written waiver of the right to notice of the hearing. G.S. 122C-284(a).

If the respondent was released pending hearing, the clerk of the county where the petition originated is responsible for these duties. If the respondent is held in a 24-hour facility pending hearing, the clerk of the county where the facility is located is responsible. *Id.*

3.4 Attorney Representation

A. Attorney for Respondent

Representation of respondents in substance abuse proceedings is generally provided under G.S. 122C-270, under Chapter 122C, Article 5, Part 7 of the North Carolina General Statutes concerning mentally ill individuals, although there are some specific provisions in Chapter 122C, Article 5, Part 8 applicable only to substance abuse commitments. There is statutory provision for representation of all respondents throughout the substance abuse commitment process regardless of whether they are currently being treated in a 24-hour facility because they *may* be treated on an inpatient basis at any time during the commitment.

Special Counsel represents all indigent respondents at a state facility. *See generally* 122C-270(a). Although this section addresses representation of the mentally ill, it presumably applies to representation of substance abusers admitted to these state facilities.

Appointment of counsel for indigent respondents must be made in accordance with rules adopted by the Office of Indigent Defense Services. G.S. 122C-286(d). No specific rules have been adopted by IDS as of this writing, and attorney appointments are made pursuant to local rules or practice. The clerk of court generally assigns counsel for respondents not represented by Special Counsel. The clerk of court, on direction of a district court judge, must assign counsel on receipt of a recommendation for substance abuse commitment from a physician or eligible psychologist. G.S. 122C-284(a). If the respondent is held pending hearing

in a 24-hour facility that is not a state facility, counsel is assigned by the clerk of the county where the facility is located. If the respondent was released pending hearing, counsel is assigned by the clerk of the county in which the petition originated. *Id.*

Respondents who are not indigent are entitled to be represented by privately-retained counsel of choice. G.S. 122C-286(d). Presumably a non-indigent respondent who refuses to hire counsel will be appointed counsel pursuant to the statute in Article 5, Part 7 of Chapter 122C. *See* G.S. 122C-268(d). An indigent respondent may also arrange for private representation.

For more on the role and responsibilities of counsel, see *infra* Appendix C, "Working with Clients."

B. Attorney for Petitioner

The attorney from 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 is specifically designated to represent the state's interest at all commitment hearings held at the facility. G.S. 122C-270(f). Although it appears that the Attorney General's office *may* represent the state's interest in substance abuse proceedings held outside the state facilities (s*ee* G.S. 122C-268(b)), the office does not have sufficient staff to represent the state's interest, if any, at hearings outside the state facilities. Because a county agency may be the substance abuse treatment provider, an attorney from the District Attorney's office or the County Attorney's office may choose to represent the petitioner's interest.

Private substance abuse treatment facilities generally retain an attorney to provide representation in support of commitment.

There are no other statutory provisions for representation of either the state or the petitioner in Article 5, Part 8 of Chapter 122C concerning substance abuse proceedings. For a further discussion of the question of representation of the petitioner's interest, see *supra* § 2.5B.

3.5 Hearings

A. Time Limit for Hearing

A hearing must be held in district court within ten days of the respondent being taken into custody if substance abuse commitment is recommended. G.S. 122C-286(a). The hearing must occur regardless of whether the respondent is in a 24-hour facility or released pending hearing. The time limitation for the district court hearing is the same as that for involuntary mental health commitment.

For a further discussion of issues pertaining to hearings, see *infra* Appendix C, "Working with Clients."

B. Venue and Transfer of Venue

Respondent held pending hearing. When the respondent is held pending hearing, the hearing is held in the county where the 24-hour facility is located. On the respondent's objection, the hearing must be held in the county where the petition originated. G.S. 122C-286.1(a).

Respondent released pending hearing. When the respondent is released pending hearing, the hearing is held in the county where the petition originated. G.S. 122C-284(a).

C. Continuance

A continuance of up to five days may be granted on motion of the court, the respondent, or the State. In addition, the "responsible professional" may also move for a continuance. G.S. 122C-286(a). Because many district courts hold commitment hearings only once a week or on two consecutive days, a five-day continuance is unworkable. It is common practice for the court to allow a seven-day continuance on consent of the parties. For a discussion of potential benefits of continuing the case, see *supra* § 2.6E.

D. No Waiver of Respondent's Appearance

The respondent's appearance at the hearing may *not* be waived. G.S. 122C-286(b). The statute provides that a subpoena may be issued to compel the respondent's appearance, but it does not specify who is responsible for obtaining the issuance of the subpoena. *Id.*

This mandatory appearance potentially creates a problem for a respondent when the treating physician recommending substance abuse commitment arranges a discharge before the respondent's court date. The respondent may obtain release before the court date because bed space is available at a rehabilitation facility or because the respondent's condition has stabilized. Often, a respondent who has been released from involuntary inpatient care will either refuse or be unable to attend a future court hearing in spite of the mandatory appearance requirement.

In these circumstances, counsel for respondents have sometimes agreed to a waiver of the respondent's appearance in negotiating the respondent's release before the commitment hearing, and courts have allowed the waiver and entered a substance abuse commitment when later sought by the physician. No appellate decisions have yet addressed this practice. Before considering such a waiver, counsel should advise the respondent of the statutory appearance requirement, the collateral consequences of a substance abuse commitment, and the respondent's

obligations if served with a subpoena for a future court date. Counsel should document these efforts in the office case file for future reference.

E. Not Contesting/Not Resisting Commitment

Not contesting. There are no statutory provisions for respondents to accept the recommendation of substance abuse commitment or to "not contest." In practice, however, many respondents are in agreement with their attending physicians on the need for substance abuse treatment and do not contest the allegations in the petition. Counsel may, after advising the client of the possible consequences of substance abuse commitment, inform the client of the option to "not contest." *See infra* § 3.6C (discussing potential license consequences) and Chapter 12 (discussing various collateral consequences of commitment). An alternative possibility with a cooperative respondent, if the attending physician agrees, is not contesting an involuntary mental health commitment. This would allow a period of inpatient treatment without incurring the possible consequences of a substance abuse commitment.

By not contesting, the respondent can avoid an adversarial hearing. Although the respondent's appearance cannot be waived in a substance abuse commitment proceeding, the hearing could proceed by abbreviated testimony 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.

Not resisting. In substance abuse cases, a period of detoxification may be necessary before the respondent is able to understand the issues involved in a substance abuse commitment. A short-term continuance could address this problem.

The respondent may, however, exhibit serious symptoms resulting from long-term substance abuse or of a concurrently existing mental illness that interfere with the ability to express a decision whether to contest the commitment. There are no statutory provisions to guide counsel when the client is unable to express a decision on whether to contest. 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.

In the cases where the client has not expressed a desire to contest and there is little or no chance for improvement or of the respondent prevailing 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. As with an uncontested case, the hearing may then proceed with abbreviated

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.

F. Criteria for Commitment

To order commitment, the court must find "by clear, cogent, and convincing evidence that the respondent is a substance abuser and is dangerous to himself or others." G.S. 122C-287(1).

There are no North Carolina appellate opinions addressing the evidence necessary to support a finding that the respondent is a substance abuser.

For a discussion of cases addressing the courts' interpretation of the standard of danger to self or others, see *supra* § 2.6H.

G. Evidence

Admissible certified copies. "Certified copies of reports and findings of physicians and psychologists and medical records of previous and current treatment are admissible in evidence . . . ." G.S. 122C-286(c). As with mental health commitments, the respondent retains the right to confront and cross-examine witnesses. *Id.* For a discussion of the issues involved in this provision, see *supra* § 2.6J.

Burden of proof. The court must find that the respondent is a substance abuser and is dangerous to self or others by clear, cogent, and convincing evidence. G.S. 122C-287(1).

There are no North Carolina appellate cases addressing the evidence necessary to support a finding that a respondent is a substance abuser. Depending on the evidence presented, counsel may be able to make an argument that even if there is evidence of substance use, it does not support a finding that the respondent suffers from "an impairment in personal, social, or occupational functioning," as required by the statutory definition. *See* G.S. 122C-3(36).

As with some mental health commitments, the petitioner may not be present or may be unrepresented at the hearing. For a discussion of the challenges in handling such hearings, see *supra* § 2.5B.

Witnesses and hearsay. *See supra* § 2.6J.

3.6 Disposition

A. Dispositional Alternatives

Recommendation for substance abuse commitment. If the court finds that the respondent is a substance abuser and dangerous to self or others, it may order up to 180 days commitment to and treatment by an area authority or physician. The area authority or physician is responsible for the management and supervision of the respondent's treatment during the term of the substance abuse commitment. G.S. 122C-287(1).

During the term of commitment, the area authority or physician may prescribe or administer reasonable and appropriate treatment on either an inpatient or outpatient basis, with the proviso that a supplemental hearing must be requested if inpatient treatment is to exceed forty-five consecutive days. G.S. 122C-290(a), (b). There is no case law or formal opinion from the Attorney General concerning intermittent inpatient treatment within the same substance abuse commitment of 180 days.

If the court finds that the respondent does not meet the commitment criteria, the respondent must be discharged and the facility at which the respondent was last treated must be notified of the discharge. G.S. 122C-287(2). The statute does not specify who must provide this notice, but presumably it would be the clerk of superior court of the county in which the hearing was held.

Negotiating outpatient mental health commitment as an alternative. Because of the possible collateral consequence of loss of driving privileges resulting from a substance abuse commitment discussed *infra* in § 3.6C, counsel may advise the client to agree instead to a mental health outpatient commitment. If the client is agreeable, counsel may approach the attending physician or opposing counsel, as appropriate, to negotiate an agreement to present to the court.

Outpatient commitment will give the treating physician authority to compel treatment without endangering the client's driver's license. If the attending physician believes that the respondent requires further inpatient treatment, there are two possibilities. First, if the respondent consents, a continuance may be requested. This would allow the inpatient treatment to be received pending the hearing, without subjecting the client to a substance abuse commitment. Second, as part of the outpatient commitment order, the court may allow the treating physician to hold the respondent at the facility for seventy-two hours while outpatient treatment is arranged. G.S. 122C-271(b)(4).

B. Order

To order commitment, the court must find by "clear, cogent, and convincing evidence that the respondent is a substance abuser and is dangerous to himself or

others." G.S. 122C-287(1). The underlying facts supporting these findings must be set forth in the order. Additionally, the order must identify the area authority or physician responsible for the management and supervision of the respondent's treatment. G.S. 122C-286(h); *see infra* Appendix A, Form AOC-SP-306.

Case law: The respondent must meet the criteria for substance abuse commitment for treatment to be ordered.

In re Royal, 128 N.C. App. 645 (1998). The *Royal* case presents the unusual instance of the State appealing from an order requiring inpatient treatment for substance abuse. In this case, the respondent had complained to the district court that he was not provided adequate inpatient treatment before being discharged. He asserted that the past practice of the hospital had been to transport him to the Alcohol Treatment Center for evaluation prior to the hearing and before he received treatment. He stated further that he would then be placed on a waiting list and released without treatment. *Id.* at 646.

The North Carolina Court of Appeals considered the appeal of the State from the trial court's order that required the 24-hour facility to "provide [the respondent] appropriate treatment until such time as other more appropriate, less restrictive, long-term residential treatment is arranged and ready for [the respondent]." *Id.* at 646. The court did not directly address the issue raised by the respondent—whether a facility can be compelled to provide substance abuse treatment rather than to transfer or discharge a patient. The court instead focused on the failure of the district court to include in the order the condition that the respondent must continue to meet the criteria for substance abuse commitment. The court of appeals vacated the order on this ground, although it stated that the district court had authority to order treatment "while [the respondent] was lawfully committed to the facility." *Id.* at 647.

C. Report of Substance Abuse Commitment to Department of Motor Vehicles

The North Carolina statutes require that a report of an involuntary commitment for "treatment of alcoholism or drug addiction" be made to the North Carolina Division of Motor Vehicles (DMV). G.S. 20-17.1(b). The clerk of court in the county of adjudication must send a certified copy of an abstract of the order to the DMV. *Id.* Note that these provisions appear in Chapter 20, the chapter of the North Carolina General Statutes dealing with motor vehicle laws, rather than in Chapter 122C.

On receipt of this notice, it is the duty of the DMV Commissioner to investigate whether the person is competent to drive. The person's license must be revoked unless the Commissioner is "satisfied" that the person is a fit driver. G.S. 20-17.1(a). On receipt of notice of revocation, the person may file a written request for a hearing and is allowed to keep the license pending the hearing. If the license

is revoked after a hearing, an appeal may be filed with the review board of the DMV. *Id.*

It appears that the DMV may revoke the license on receipt of the notice of commitment and, in effect, require the respondent to file a request for a hearing and prove fitness to drive.

See infra Chapter 12 (discussing various collateral consequences of commitment).

D. Follow-Up on Commitment Order

Ongoing treatment. The area authority or physician to whom the respondent is committed is required to be closely involved with the respondent's treatment. The area authority or physician is responsible for the management and supervision of the respondent's treatment when treatment is received in a 24-hour facility and when it is provided on an outpatient basis. "Reasonable and appropriate treatment" must be prescribed and administered throughout the term of commitment. G.S. 122C-290(a). This differs from a mental health commitment in that a respondent released and committed to outpatient treatment is no longer the responsibility of the treatment provider at the 24-hour facility.

Failure to comply, escape, or breach of conditions. The area authority or physician may request the clerk or magistrate to issue an order for the respondent to be taken into custody for an examination if:

- the respondent "fails to comply with all or part of the prescribed [outpatient] treatment after reasonable effort to solicit the respondent's compliance";
- the respondent has been discharged from a 24-hour facility after escaping; or
- the respondent breaches the conditions of release from a 24-hour facility and does not return to the 24-hour facility.

G.S. 122C-290(b), 122C-205.1(b); *see infra* Appendix A, Form AOC-SP-223.

On receipt of this request, the clerk or magistrate must issue an order to a law enforcement officer to assume custody of the respondent. G.S. 122C-290(b); *see infra* Appendix A, Form AOC-SP-223. Upon assuming custody the law enforcement officer must deliver the respondent to the area authority or physician to conduct an examination. The examiner will determine whether to release the respondent or to have the respondent taken to a 24-hour facility. G.S. 122C-290(b). There is no requirement that a new substance abuse commitment proceeding be instituted if the respondent is taken to a 24-hour facility. A request for a supplemental hearing must be made, however, if it appears that the respondent will need treatment in a 24-hour facility for more than forty-five consecutive days. *Id.*

Treatment in 24-hour facility to exceed forty-five consecutive days. A supplemental hearing *must* be requested if the area authority or physician determines that the respondent requires treatment for more than forty-five consecutive days in a 24-hour facility. G.S. 122C-290(b). The area authority or physician must notify the clerk of court by the thirtieth day of the inpatient stay and request a supplemental hearing. *Id.*; *see infra* § 3.7.

Respondent intends to move or moves to another county within the state. If the respondent intends to move or has moved to another county within the state, the area authority or physician *must* notify the clerk of court in the county where the commitment is being supervised and request a supplemental hearing. G.S. 122C-290(c); *see infra* § 3.7.

Respondent moves to another state or to an unknown location. The clerk of court of the county where the commitment is supervised must be notified by the treatment supervisor if the respondent moves to another state or to an unknown location. The substance abuse commitment is then terminated. G.S. 122C-290(d).

Respondent no longer meets commitment criteria. At any time a committed respondent no longer meets the criteria for substance abuse commitment, the area authority or physician supervising treatment must unconditionally discharge the respondent. The clerk of court must be given notice of the discharge and receive a written report stating the reasons for release. G.S. 122C-293.

3.7 Supplemental Hearings

A. Requests for Supplemental Hearings

Supplemental hearing distinguished from rehearing. A supplemental hearing is held during the term of a substance abuse commitment if the respondent has moved to another county, out of state, or to an unknown location or the respondent is in need of treatment exceeding forty-five consecutive days at a 24-hour facility. These are matters concerning the terms of the existing commitment.

A rehearing is held on a request to *extend* the current substance abuse commitment. For example, a rehearing may be held on request of the attending physician for an additional forty-five days of substance abuse commitment following a 180-day commitment.

A respondent may seek discharge from a substance abuse commitment by filing a written application for a supplemental hearing with the clerk of court. G.S. 122C-291(d). There is no AOC form for the respondent's use.

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

Mandatory requests. The area authority or physician *must* request a supplemental hearing if the respondent intends to move or has moved to another county within the state. G.S. 122C-290(c).

Additionally, the area authority or physician *must* request a supplemental hearing if inpatient treatment in a 24-hour facility will exceed forty-five consecutive days. The clerk must be notified by the thirtieth day of the inpatient treatment of the need for the supplemental hearing. G.S. 122C-290(b).

B. Scheduling of Supplemental Hearing and Notice

On receipt of a request for a supplemental hearing, the clerk must calendar a hearing to be held within fourteen days. The clerk must also give notice at least seventy-two hours before the hearing to the petitioner, the respondent, the respondent's attorney, if any, and the area authority or physician. G.S. 122C-291(a).

The statute requires that the respondent be served with notice as provided in Rule 4(j) of the North Carolina Rules of Civil Procedure (principally, by personal delivery or leaving at the respondent's "usual place of abode with some person of suitable age and discretion then residing therein," by delivery to an authorized agent, or by mailing a copy by registered or certified mail, return receipt requested). All others are to receive notice by first-class mail, postage prepaid. G.S. 122C-291(a), 122C-284(b).

C. Supplemental Hearing Procedures

The supplemental hearing is held in district court pursuant to the procedures for the initial substance abuse commitment hearing. G.S. 122C-291(a); *see also* G.S. 122C-286. As with the initial hearing, the respondent's appearance may not be waived.

D. Disposition

Respondent's request for discharge. The statute provides that the court is to determine whether the respondent continues to meet the criteria for commitment. G.S. 122C-291(d). The statute does not state whether the burden of proof is on the moving respondent. It presumably would be up to the respondent to prove that the criteria for substance abuse commitment are no longer present because the supplemental hearing is held during the term of the existing commitment.

Respondent has moved or intends to move to another county within the state. The court must determine first whether the respondent continues to meet the criteria for commitment. If not, the respondent must be discharged and the case dismissed. If the respondent continues to meet the commitment criteria, the court must continue the commitment but designate an area authority or physician within

the respondent's new county of residence to provide treatment. Venue for further court proceedings is changed to the new county providing supervision of treatment. The clerk of court in the original county must transfer the records to the clerk of the county to which venue has been transferred. G.S. 122C-291(b).

Inpatient treatment to exceed forty-five consecutive days. The court must first determine whether the respondent continues to meet the criteria for substance abuse commitment. If not, the respondent must be released and the case dismissed. G.S. 122C-291(c). If the respondent continues to meet the commitment criteria, the court must determine whether further treatment in the 24-hour facility is necessary. If so, the court may order continued inpatient treatment for up to ninety days. If the court finds that the respondent continues to meet the commitment criteria, but is not in need of continued inpatient treatment, it may continue the commitment but order the release of the respondent from the 24-hour facility. G.S. 122C-291(c).

Order. *See infra* Appendix A, Form AOC-SP-206.

3.8 Rehearings

A. Rehearing Distinguished from Supplemental Hearing

See supra § 3.7A.

B. Notice to Clerk by Facility

The area authority or physician must send a request for a rehearing to the clerk at least fifteen days before the end of the commitment period. This notice is sent to the clerk of the county where the respondent's treatment is being supervised. G.S. 122C-292(a).

C. Calendaring of Hearing Notice

The clerk must calendar the hearing at least ten days before the end of the commitment period. Notice is to be provided in accord with the requirements for the initial hearing. G.S. 122C-292(a), (b); *see infra* Appendix A, Form AOC-SP-301.

D. Hearing Procedures

Rehearings for substance abuse commitment are held in accord with the procedures for the initial hearing. The respondent is afforded the same rights, including the right to appeal. G.S. 122C-292(b); *see supra* §§ 3.5, 3.6.

E. Disposition

At any rehearing, if the court determines that the respondent continues to meet the criteria, it may order commitment for up to 365 days. If the court finds that the respondent no longer meets the criteria, it must order unconditional discharge. G.S. 122C-292(c).

F. No Waiver by Respondent of Right to Rehearing

The respondent is not allowed to waive the right to a rehearing in a substance abuse commitment proceeding. G.S. 122C-286(b), 122C-292(b). This differs from a mental health commitment, in which the respondent may waive the right to second and subsequent rehearings. *See* G.S. 122C-276(f).

3.9 Discharge by Area Authority or Physician

The area authority or physician must discharge a respondent unconditionally from a substance abuse commitment at any time the criteria for commitment no longer exist. G.S. 122C-293.

3.10 Emergency Procedure for Violent Individuals

A. Custody by Law Enforcement Officer

A law enforcement officer may take into custody a person who meets the criteria for substance abuse commitment *and* is violent and requires restraint. This procedure may be used only when the delay in taking the person for examination would be likely to endanger life or property. The law enforcement officer must immediately take the respondent before a magistrate or clerk to execute the affidavit required to initiate a substance abuse commitment. G.S. 122C-282; *see infra* Appendix A, Form AOC-SP-909M. The affidavit must include the facts concerning violence, need for restraint, and the danger posed by the delay. G.S. 122C-282.

Substance abuse emergency procedure distinguished from mental health emergency procedure. The substance abuse emergency procedure differs from the mental health emergency procedure in that the mental health procedure may be initiated by anyone with knowledge of the facts supporting the affidavit rather than only by a law enforcement officer. In addition, the mental health emergency procedure bypasses the clerk or magistrate and authorizes the initiating person to take the respondent directly to an examiner.

B. Determination by Clerk or Magistrate

The clerk or magistrate must determine by clear, cogent, and convincing evidence if the allegations in the affidavit are true, the respondent is violent and requires restraint, and the delay caused by taking the respondent to a physician or eligible psychologist for examination would endanger life or property. On making these findings, the clerk or magistrate must order the law enforcement officer to transport the respondent directly to a 24-hour facility. G.S. 122C-282; *see infra* Appendix A, Form AOC-SP-909M (back).

The statute does not address the alternatives if the clerk or magistrate finds that the criteria for the emergency procedure are not met. It appears that the law enforcement officer could proceed as if filing a regular petition and request a custody order for transport for an examination by a physician or eligible psychologist. The clerk or magistrate could issue the custody and transport order or could find the allegations insufficient and terminate the proceeding.

C. Duties of 24-Hour Facility

A respondent transported to a 24-hour facility pursuant to an order of the clerk or magistrate is to be examined pursuant to the procedures for a regular substance abuse commitment, discussed *supra* in § 3.3E. G.S. 122C-282.

3.11 Appeal

A. Statutory Provision

The section on appeal in substance abuse proceedings tracks nearly verbatim the provisions for appeal in mental health proceedings. G.S. 122C-288; *see also supra* § 2.12. Appeal is to the North Carolina Court of Appeals.

B. Representation of Respondent

Any party on the record may appeal as in civil cases. Appeal by the respondent's counsel is at the direction of the respondent. Pursuant to G.S. 122C-289, 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-289.

C. 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 are also confidential proceedings. *See* N.C. R. APP. P. 3.1(b). 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 must 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.

D. Rehearing or Discharge

Although an appeal is not rendered moot by the respondent's subsequent discharge, counsel should advise the client of the time generally required to receive an opinion from the North Carolina Court of Appeals. The client should be informed of the likelihood of discharge from the substance abuse commitment before an appellate decision is handed down.

A rehearing must be held before the end of substance abuse commitment being appealed if the respondent has not been discharged. This would usually occur before the appeal is decided. If recommitted, the respondent would not be released except by the attending physician or the district court judge even if victorious on appeal.

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

See supra § 2.12E.

3.12 Public Intoxication

A. Alternatives for Law Enforcement Officers to Address Public Intoxication

"Public Intoxication," Chapter 122C, Article 5, Part 9, provides a variety of alternatives for law enforcement officers dealing with an intoxicated individual, including substance abuse commitment. G.S. 122C-301(a). In addition to substance abuse commitment, other publicly-funded programs might include a voluntary residential treatment facility, provision of counseling and group programs, and referral to group programs such as Alcoholics Anonymous and Narcotics Anonymous. Private counseling and residential treatment programs are available to those able to pay. The public intoxication statutes provide options for law enforcement officers dealing with the immediate problems resulting from public intoxication and are directed toward providing emergency medical care and a place to sober up rather than ongoing treatment.

B. Substance Abuse Commitment

Law enforcement officers may initiate substance abuse commitment proceedings for those who meet the commitment criteria. G.S. 122C-301(a)(5). The right to appointment of counsel under Chapter 122C attaches only after a substance abuse commitment petition is filed and commitment has been recommended.

C. 24-Hour Detention by Shelter or Medical Facility

The law enforcement officer may transport an intoxicated person in need of food, clothing, or shelter, but not in need of immediate medical care, to a private or public shelter. An intoxicated person in need of immediate medical care may be transported to an area facility, hospital, physician's office, or other appropriate health care facility until sober or for a maximum of twenty-four hours. G.S. 122C-301. Counsel should be aware of this legally allowed detention without process because a distressed potential client might call while being detained.

D. Use of Jail

An officer may transport an intoxicated individual to a city or county jail in limited circumstances, which can never be done during a mental health commitment. The person must be in need of food, clothing, or shelter, but not in need of immediate medical care, and no other facility is "readily available." G.S. 122C-303. Again, the person may be detained only until sober or for a maximum of twenty-four hours. *Id.*

Appendix 3-1
Involuntary Commitment for Substance Abuse 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 from 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-281(a).
- ❑ Was the petition properly clocked in with a date and time stamp?
- ❑ Is box 2, alleging substance abuse 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 a substance abuser and is dangerous to self or others?
- ❑ 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 2, alleging substance abuse and danger to self or others under "Findings," checked?
- ❑ Is either 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 custody by a 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 does not merely repeat the allegations of the petition?
- ❑ Do the findings of the examiner support the conclusion of a diagnosis of substance abuse?
- ❑ Do the findings of the examiner support the conclusion of a finding of danger to self or others?
- ❑ Does the examiner's report recommend substance abuse commitment? Recommendation: _____
- ❑ Did the examiner recommend that the respondent be held at a 24-hour facility pending hearing? ____ yes ____ no

Affidavit of Physician When Respondent Held Pending Hearing—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 substance abuse?
- ❑ Do the findings of the examiner support the conclusion of a finding of danger to self or others?
- ❑ Does the examiner's report recommend substance abuse commitment? Recommendation: _____

Medical Records Review: Respondent Held Pending Hearing

- ❑ Review records in the patient's chart(s) at the 24-hour facility.
- ❑ Do Progress Notes contain staff observations of manifestation of symptoms of substance abuse?
  _____
- ❑ 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 or past convictions noted in the record?
  _____

Medical Records Review: Respondent Released Pending Hearing

- ❑ Consult with client regarding existence of treatment records and obtain client's consent to review or copy records.
- ❑ Contact medical records clerk and arrange to review or copy records.
- ❑ Results of drug testing: _____
- ❑ Current medications:_____
- ❑ Psychological examination or other special examinations or reports? _____
- ❑ Any pending criminal charges or past convictions noted in record? _____

Interview with Client

Attorney role:

- ❑ Meet with client as soon as possible; contact client to arrange appointment if released pending hearing
- ❑ 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 respondent held in 24-hour facility pending hearing and petition initiated in another county
- ❑ No waiver of appearance
- ❑ Witnesses for State and for client may be called
- ❑ Continuance may be requested by client, State, or responsible professional, or may be on motion of the court

Discussion of case:

- ❑ Review allegations of petition—get client's side of events (attach interview notes)
- ❑ Discuss medical evidence
- ❑ Ask what treating treatment provider has told client about treatment recommendation
- ❑ Ask client if there are prior commitments or other information on substance abuse or danger that might be raised by State's witnesses

- ❑ Explain consequences of substance abuse commitment: ____ driver's license ____ firearms ____ military
- ❑ Does client have alternative plan to substance abuse commitment (voluntary treatment program, attendance at AA or NA meetings, etc.)?
- ❑ Client states would agree to (sign as voluntary, continuance if pending unconditional discharge, 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 (if held pending hearing)

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

____ Move to continue Reason: _____

Follow-up to Client Interview

- ❑ Notify opposing counsel, appropriate court personnel of result (contest/not contest)
- ❑ 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

____ Not contested: ____ Client appear

____ Not appear

Client agrees to:

____ Inpatient
____ Outpatient
____ Split: ____ Inpatient stay ____ 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* substance abuse commitment without rehearing and that can be discharged from commitment sooner
- Commitment is to treatment of area authority or physician, not facility—importance of cooperation
- Maximum of 45 consecutive days of inpatient treatment without supplemental hearing
- 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)