COMMONWEALTH OF MASSACHUSETTS

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, ss \_\_\_\_\_\_\_ DISTRICT COURT

Case No: \_\_\_\_\_\_\_\_\_\_

Matter of \_\_\_\_

**Respondent’s Motion for Access to Respondent and Medical Records**

Now comes \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, in the above-captioned matter and moves this Honorable Court for 1) copies of {**his/her/their**} electronic medical records in a timely manner; 2) sufficient access to {**his/her/their**} attorney to prepare his/her defense {**insert** – by telephone or video or as requested by in-person meeting}; and 3) confidential communication with {**his/her/their**} attorney.

As grounds for this Motion, Respondent says as follows:

1. The Supreme Judicial Court recently affirmed the fundamental nature of the right to counsel and held that “a robust public defender system not only protects the rights of indigent [clients], but also helps to increase public safety . . . and protect[s] the constitutional rights of all of the Commonwealth’s residents.” Carrasquillo v. Hampden County District Cts., 484 Mass. 367, 395 (2020). Indeed, every judge “must exercise [their] inherent powers as necessary to secure the full and effective administration of justice.” O'Coin's, Inc. v. Treasurer of the County of Worcester, 362 Mass. 507, 514 (1972). This Court has the inherent authority to order the {**facility**} to do what is needed for the Court to carry out its essential functions – e.g., holding {**event**} hearings that do not violate the Respondents’ rights to the effective assistance of counsel. O'Coin's, 362 Mass. at 510.

“Preventing client access deprives respondents of their right to counsel under article 12 and the 6th Amendment to the U.S. Constitution resulting in severe restrictions on their liberty and other Constitutional interests.” Lavallee v. Justices in the Hampden Superior Court, 442 Mass. 228, 232 (2004). Depriving the Respondent of his/her right to counsel also interferes with {**his/her/their**} attorney’s ethical obligations under the Massachusetts Rules of Professional Conduct to act with “reasonable diligence and promptness.” Mass. R. Prof. C. 1.3. Following the coronavirus (COVID-19) outbreak, Petitioner issued new visitation policies and protocol, and subsequently amended those policies since that time. Petitioner’s current policies allow for both virtual and limited, in-person visitation of patients, as well as making “Special Exceptions” for attorneys to provide for “increased access” not allowed to normal visitors.[[1]](#footnote-1) *See also* G.L. c.123, §23(e) (providing access to counsel and to the client’s record); 104 C.M.R. 27.13(e) (“shall have the right to receive, or refuse, visits and telephone calls from his or her attorney or legal advocate”).

Here, by denying timely access to the Respondent’s medical record(s) and meaningful access to {**his/her/their**} attorney, the Petitioner deprives the Respondent of {**his/her/their**} right to effective representation of counsel and {**his/her/their**} due process right to prepare a defense pursuant to the 5th and 6th Amendments to the United States Constitution, article 12 of the Massachusetts Declaration of Rights, G.L. c.123, §5, and the District Court Standards of Judicial Practice, Civil Commitment And Authorization Of Medical Treatment For Mental Illness §3:03, §3:07, §3:08, §8:03, §8:07, §8:08 (April 2019). *See also* Gideon v. Wainwright, 372 U.S. 335 (1963); Commonwealth v. Porter, 462 Mass. 724 (2012); Lavallee, *supra*. Despite reasonable requests made in advance to the Petitioner, as required by the provisions regarding access to records and counsel outlined in DMH Bulletin #20-05R and DMH’s Hospital Visitation Policy {**alternatively** – reference visitation policy of facility in question}, Respondent was denied necessary access to the records and to meet with counsel to prepare {**his/her/their**} defense against the petition(s). As required by DMH’s Hospital Visitation Policy {**alternatively** – reference visitation policy of facility in question}, the Respondent sought communication with counsel by making proper request of the designated representative at Petitioner facility and yet was not provided a meaningful ability to communicate with counsel. {**ADD fact-specific information** here as to reasonable efforts made to comply with the Directive}.

As a result of circumstances related to the COVID-19 pandemic and the Petitioner’s current access-to-counsel practices, the Respondent is forced to file this motion. Despite publicly issued DMH policy to the contrary, these practices fail to provide reasonable and adequate means during the pandemic for counsel to communicate with the Respondent as to the defense of this case. Absent allowance of this motion, the Respondent’s constitutional rights to counsel and to due process will be violated.

1. The due process right to meaningfully prepare a defense through the effective representation of counsel is afforded to the Respondent by Article 12, the 5th and 6th Amendments to the United States Constitution, and General Law c.123, §5 which provides in pertinent part: “[s]uch person shall have the right to be represented by counsel and shall have the right to present independent testimony... shall be allowed not less than two days after the appearance of his counsel in which to prepare his case . . . .” *See* District Court Standards of Judicial Practice §§3:03, 8:03 (April 2019); *see also* 104 C.M.R. 27.16(8)(a) & (c) (providing access to the patient’s records). Preventing the Respondent full access to {**his/her/their**} attorney in the manner in which {**he has/she has/they have**} specifically requested and access to {**his/her/their**} medical record—the evidence against {**him/her/them**}—violates {**his/her/their**} right to counsel and due process and affects the manner by which {**his/her/their**} attorney can meaningfully defend against the petition.

The fact that counsel has been appointed to represent the Respondent is not enough. The constitutional guarantee of the assistance of counsel “cannot be satisfied by mere formal appointment.” Avery v. Alabama, 308 U.S. 444, 446 (1940); Lavallee, 442 Mass. at 235. The right to counsel means the right to the *effective* assistance of counsel. *See* Kimmelman v. Morrison, 477 U.S. 365, 377 (1986); Lavallee, 442 Mass. at 235; Carrasquillo, 484 Mass. at 388. Effectiveness requires prompt actions by counsel, the most significant of which is timely and substantive confidential communications with the Respondent. “There is a myriad [of] responsibilities that counsel may be required to undertake that must be completed long before trial if the [respondent] is to benefit meaningfully from his right to counsel under article 12.” Carrasquillo, 484 Mass. at 380, *quoting*, Lavallee, supra at 235-236. These responsibilities include interviewing the Respondent, and based upon those communications, determining whether to retain an independent medical expert, locating and interviewing identified witnesses, and making decisions about trial strategy. Without sufficient opportunity for confidential communication with the Respondent, and timely provision of the medical record, counsel cannot provide effective representation in regard to these and other critical stages of {**his/her/their**} defense.

1. {**INCLUDE IF MOTION IS CONCERNING A REMOTE VISIT**}DMH’s recently issued “Access and Visitation Policy for [DMH] Hospitals,” which became effective on June 10, 2020, permits in-person visits by attorneys and IMEs involved in commitment-related or criminal litigation. However, the policy also specifically provides for remote access to clients: the hospitals “shall continue to facilitate patient access to technology, and to provide confidential space for communications with attorneys and IMEs for remote visits and consultations . . . .” “[P]atients and their attorneys (and IMEs) are encouraged to utilize their own technology to the extent they can (such as FaceTime, Skype, Zoom, etc.)[.] Hospitals will allow patients to use their own devices for communicating with counsel and IMEs in a space that allows for private and confidential communication.” The policy further provides, “[h]ospitals shall continue to encourage and facilitate the use of telephonic or video conferencing technology for all visits.” Despite this explicit language, the Respondent is being denied remote meaningful and confidential access to his/her/their counsel in order to prepare {**his/her/their**} defense against the petition(s). *See* M.G.L. 123 § 5; 104 CMR 27.13 (6)(a) & (e).

In light of the continued danger created by the COVID-19 pandemic, {the **facility’s**} failure to provide meaningful and confidential remote access as requested places counsel in an untenable position forcing him to meet with the Respondent in person and risk the health and safety of himself, his client, and others at the facility in order to prepare to defend the Respondent. As the SJC recently recognized in Foster v. Commissioner of Correction (I), 484 Mass. 698, 718 (2020) (health risks and treatment limitations associated with COVID-19 in congregate facilities required to be factored into commitment decisions under G.L. c. 123,§ 35), “there can be no real dispute that the increased risk of contracting COVID-19 in prisons, where physical distancing may be infeasible to maintain, has been recognized by the CDC and by courts across the country.” *See also* Baez v. Moniz, U.S. Dist. Ct., No. 20-10753-LTS, ––– F.Supp.3d ––––, (D. Mass. May 18, 2020); Refunjol v. Adducci, U.S. Dist. Ct., No. 2:20-cv-2099, (S.D. Ohio May 14, 2020); Frazier v. Kelley, U.S. Dist. Ct., No. 4:20-cv-00434-KGB, (E.D. Ark. May 4, 2020). Here, the facility’s failure to provide remote access to the Respondent interferes with {**his/her/their**} fundamental right to counsel and right to prepare a defense.

WHEREFORE, for all of the foregoing reasons {**and those provided in the accompanying** **affidavit hereby incorporated by reference}**, Respondent requests that this court ORDER the Petitioner to provide immediate access to records and to facilitate a confidential area or room for Respondent to meet virtually [or in-person] with counsel in order to prepare {**his/her/their**} defense. {**Insert** other specific relief requested}.

**CLIENT**

By {His/Her/Their} Attorney

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Date:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Mary Z. Advocate

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# CERTIFICATE OF SERVICE

I, Mary Z. Advocate, counsel for the Respondent, hereby certify that on this \_\_\_ day of MONTH 2020, I served a copy of the foregoing Petitioner’s counsel by electronic mail.

1. DMH bulletin #20-05R COVID-19 Infection Control and Other Requirements in Response to the COVID-19 Pandemic (May 26, 2020); Bureau of Health Care Safety and Quality Memorandum re: Patient Visitors in Hospitals during the COVID-19 Outbreak (June 6, 2020); Access and Visitation Policy for Department of Mental Health Hospitals and the Department of Public Health Hospital System (June 10, 2020). [↑](#footnote-ref-1)