CHAPTER 2

Admission to a Psychiatric Facility

§ 2.1 Introduction 2

§ 2.2 Voluntary Admissions 2

§ 2.2.1 Admission and Discharge 5

(a) Voluntary Status 5

(b) Conditional Voluntary Status 5

§ 2.2.2 Periodic Review 7

§ 2.2.3 Practice Advisory 8

(a) Three-Day Notice 8

(b) Notice of Impending Discharge 8

(c) Retraction of Three-Day Notice 8

(d) Commitment and Transfer of a Voluntary or Conditional Voluntary Patient 9

§ 2.3 Admission and Discharge of Children and Adolescents 10

§ 2.3.1 Voluntary and Conditional Voluntary Admissions 10

(a) Intensive Residential Treatment Programs 11

(b) Department of Youth Services 11

(c) Department of Children and Families 12

§ 2.4 Involuntary Admissions 13

§ 2.4.1 Three-Day Involuntary Admission Pursuant to G.L. c. 123, §§ 12(a) and 12(b) 13

§ 2.4.2 Application for Temporary Admission by a Qualified Physician, Psychologist, Psychiatric Nurse, or LICSW 15

§ 2.4.3 Application by Police 16

§ 2.4.4 Section 12(b) Admission by Designated Physician 16

§ 2.4.5 Right to Counsel 16

§ 2.4.6 Right to Emergency Hearing for Abuse or Misuse of the Provisions of Section 12(b) 17

§ 2.4.7 Commitments by the District, Municipal, or Juvenile Court Under G.L. c. 123, § 12(e) 19

§ 2.4.8 Length of Involuntary Hospitalization Under Section 12 20

§ 2.4.9 Right to Voluntary or Conditional Voluntary Status 21

§ 2.4.10 Discharge 21

§ 2.4.11 Practice Advisory 21

(a) Due Process and Admissions Under G.L. c. 123, § 12 21

(b) Three-Day Period of Confinement 23

(c) Sufficiency of Clinical Opinion 23

(d) Warrants of Apprehension 23

§ 2.5 Commitment for Alcohol or Substance Use Disorders 24

§ 2.5.1 Practice Advisory 28

DRAFT

(a) Requisite Findings 28
(b) Due Process and Commitments Under G.L. c. 123, § 35 .. 28
(c) Warrants of Apprehension 28

Scope Note

This chapter discusses how a person may be admitted to an inpatient psychiatric facility. It addresses both the voluntary and involuntary admission process.

§ 2.1 INTRODUCTION

This chapter provides a discussion of how a person may be admitted to an inpatient psychiatric facility. Counsel should always examine the legal propriety of the underlying admission as early in the case as possible. It is important to understand that, unlike being admitted to an inpatient medical facility for the treatment of a purely medical condition, *most admissions to psychiatric facilities are involuntary*. In 2018, of the 69,001 admissions to Department of Mental Health–licensed mental health facilities, 50,459 were involuntary admissions under G.L. c. 123, § 12(a) and achieved without court involvement. *Report on the Impact of Chapter 249 of the Acts of 2000: An Act to Reform the Civil Commitment Process for Persons with Mental Illness—2018 Annual Report.* Many people who are admitted involuntarily to a psychiatric facility subsequently apply to be and are accepted as a conditional voluntary patient pursuant to G.L. c. 123, § 10. As a result, a court may never review the propriety of the Section 12 involuntary admission.

Unlike involuntary admissions, all commitments under G.L. c. 123 require the filing of a petition, appointment of counsel, and a court order. In most court proceedings under G.L. c. 123 in which counsel is assigned, the person has already been admitted to a psychiatric facility. However, in a limited number of proceedings, the person may not be in a psychiatric facility at the time of counsel's assignment. This would include emergency proceedings under G.L. c. 123, § 12(e) and commitments for alcohol or substance use disorders under G.L. c. 123, § 35.

Chapter 123 and the regulations of the Department of Mental Health (DMH), 104 C.M.R. § 27.00 et seq., delineate the rights and obligations of the various parties in the inpatient mental health system. Those pertinent to defense counsel in commitment proceedings are discussed in this chapter. Commitment of defendants in criminal cases, including those found incompetent to stand trial, not guilty by reason of mental illness or other mental defect, and inmates of jails and prisons, are discussed later in this book.

§ 2.2 VOLUNTARY ADMISSIONS

A person may be voluntarily admitted to a DMH-operated or -licensed facility for the care and treatment of persons with mental illness on either of two statuses: voluntary or conditional voluntary. G.L. c. 123, § 10; 104 C.M.R. § 27.06.

For the purposes of voluntary or conditional voluntary admission to mental health facilities in the Commonwealth, any degree of severity of a mental disorder, including co-occurring substance use disorders, may qualify a person for admission to a mental health facility at the discretion of the facility director or designee when it is determined that the person is in need of care and treatment and that the admitting facility is suitable for such care and treatment. 104 C.M.R. § 27.05(2).

In contrast, involuntary commitment requires that the person suffer from mental illness, which is defined as a

> substantial disorder of thought, mood, perception, orientation, or memory which grossly impairs judgment, behavior, capacity to recognize reality or ability to meet the ordinary demands of life, shall not include intellectual or developmental disabilities, autism spectrum disorder, traumatic brain injury or psychiatric or behavioral disorders or symptoms due to another medical condition as provided in the *Diagnostic and Statistical Manual of Mental Disorders* (DSM) published by the American Psychiatric Association, or except as provided in 104 CMR 27.18, alcohol and substance use disorders; provided however, that the presence of such conditions co-occurring with a mental illness shall not disqualify a person who otherwise meets the criteria for admission to a mental health facility.

104 C.M.R. § 27.05(1).

In either case, the person must be in need of inpatient care and treatment and the facility must be suitable to provide such care and treatment. G.L. c. 123, § 10; 104 C.M.R. § 27.06(1).

Although DMH practice refers to both voluntary and conditional voluntary admissions, the reality is that there are almost no voluntary admissions and there is no DMH form for a voluntary admission. Nearly all admissions are on a conditional voluntary basis. *See* Application for Care and Treatment on a Conditional Voluntary Basis (CV-300 Conditional Voluntary Form).

For the purpose of involuntary commitment, which is discussed below in § 2.4, there must also be evidence that the person suffers from mental illness that results in a "likelihood of serious harm," which is defined in the statute as

> a *substantial risk* of physical harm to the person himself as manifested by evidence of, threats of, or attempts at, suicide or serious bodily harm;
>
> a *substantial risk* of physical harm to other persons as manifested by evidence of homicidal or other violent behavior or evidence that others are placed in reasonable fear of violent behavior and serious physical harm to them; or

> a *very substantial risk* of physical impairment or injury to the person himself as manifested by evidence that such person's judgment is so affected that he is unable to protect himself in the community and that reasonable provision for his protection is not available in the community.

G.L. c. 123, § 1 (emphasis added). Applications for admission pursuant to G.L. c. 123, § 10 may be made by

- the person, if sixteen years old or older;
- the legally authorized representative or legal guardian of a minor (*see* Application for Care and Treatment of a Minor Under Sixteen (16) Years of Age (CV-300G Form for Parent/Guardian)); or
- a health-care agent, pursuant to a validly executed health-care proxy that has not been revoked.

104 C.M.R. § 27.06(1). With respect to admissions pursuant to a valid health-care proxy, see *Cohen v. Bolduc*, 435 Mass. 608 (2002).

Although G.L. c. 123, § 10 states that a guardian may apply for "voluntary" or "conditional voluntary" admission, G.L. c. 190B, § 5-309(f) provides that no "*guardian shall be given the authority under this chapter to admit or commit an incapacitated person to a mental health facility or a mental retardation facility as defined in the regulations of the department of mental health*." Since "guardian," under G.L. c. 190B, § 5-101, includes "a person who has qualified as a guardian of a minor or incapacitated person pursuant to court appointment," and since an "incapacitated person" can be either an adult or a minor, counsel can argue that the guardian of a minor does not have the authority to admit the minor into a psychiatric facility.

An individual applying for admission may be admitted only if they have the capacity to apply for such admission and wish to receive treatment. 104 C.M.R. § 27.06(1). Before being admitted, the applicant must be afforded the opportunity to consult with an attorney, or a person working under the supervision of an attorney, regarding the legal effect of such an admission. G.L. c. 123, § 10; 104 C.M.R. § 27.06(2). Counsel should always inquire into the circumstances by which the conditional voluntary form was signed. Failure to inform the person of the right to consult with counsel before signing a conditional voluntary admission form raises the question of the legal validity of the conditional voluntary admission. Upon admission, the person must be informed of their legal and human rights within the facility. 104 C.M.R. § 27.06(3). See G.L. c. 123, § 23 and 104 C.M.R. § 27.13 for a delineation of patients' human rights.

The regulations require that, upon admission, each patient shall receive a mental status examination and that a complete psychiatric and physical examination must be conducted within twenty-four hours of admission. 104 C.M.R. § 27.05(4).

§ 2.2.1 Admission and Discharge

(a) *Voluntary Status*

Although rare, a person may be admitted on a truly voluntary basis. The person applying for voluntary admission may be admitted only if they understand that they are in a facility for the treatment of mental illness and that they may leave the facility upon their written request. 104 C.M.R. § 27.06(1)(c)1, (6). A voluntary patient may leave the facility upon written request or upon the written request of the person who applied for admission on the person's behalf without the notice required by a conditional voluntary admission. 104 C.M.R. § 27.06(4). When necessary, the facility staff must provide reasonable assistance in completing documents, including a request for discharge. 104 C.M.R. § 27.13(6)(b). The superintendent of the facility may restrict the person's right to leave to normal working hours and weekdays. G.L. c. 123, § 11. A sixteen- or seventeen-year-old person whose application for admission was made by a legally authorized representative may be discharged in the same manner as any other person on voluntary status. 104 C.M.R. § 27.09(6).

If the person is no longer competent to remain on voluntary admission status but continues to require hospitalization, the facility director must take steps to revoke the person's voluntary status and seek an order of commitment pursuant to G.L. c. 123, §§ 7 and 8. 104 C.M.R. § 27.11(4)(a); *see also Zinermon v. Burch*, 494 U.S. 113 (1990); DMH Policy on Informed Consent 14-01.

(b) *Conditional Voluntary Status*

A person may be admitted to a facility on written application if, in the opinion of the facility, they qualify, have the capacity to apply, and desire treatment. 104 C.M.R. §§ 27.06(1)(a), 27.05(2). The facility must inform anyone who applies for conditional voluntary admission of the following consequences of such an admission, and the person may be admitted only if the admitting or treating physician determines that the person has the capacity to understand that

- they are agreeing to stay or remain at the hospital and accept treatment;
- they must give three business days' written notice of their intention to leave the facility: and
- the facility may petition a court for their extended involuntary commitment and that they may be held at the facility until the petition is heard by the court.

G.L. c. 123, § 11; 104 C.M.R. § 27.06(1)(c), (6); *see* Application for Care and Treatment on a Conditional Voluntary Basis.

If the physician determines that the person lacks the capacity to understand these facts and consequences of hospitalization, the application shall not be accepted. G.L. c. 123, § 11; 104 C.M.R. § 27.06(1); *see also Zinermon v. Burch*, 494 U.S. 113 (1990) (the patient may be voluntarily admitted to a psychiatric facility only if competent to understand the consequences of admission). The form and content of the written three-

day notice is sufficient if it conveys an intention to leave the facility; it need not be on any particular form. 104 C.M.R. § 27.06(5). Upon request, the facility staff must provide reasonable assistance to the person in drafting and submitting the written notice. 104 C.M.R. § 27.13(6)(b).

After receiving the notice, the facility may detain the person for up to three days, which are calculated pursuant to Rule 6 of the Massachusetts Rules of Civil Procedure, under which the day of the notice and any intervening holidays and weekend days are not counted. Since the term "three-day notice" is a misnomer, it is important that counsel inform the person the three-day notice period could be up to six days (if Saturday, Sunday, and a holiday are involved). G.L. c. 123, § 11; 104 C.M.R. § 27.06(5). During the three-day notice period, the person likely will be examined in order to determine suitability for discharge, and "to investigate other aspects of their case including their legal competency and their family, home or community situation in the interest of discharging them from the facility." G.L. c. 123, § 11; *see also* 104 C.M.R. § 27.09(4).

The person must be discharged unless, prior to the expiration of the three-day period, the superintendent or facility director files a petition for commitment or the person applies for conditional voluntary admission. G.L. c. 123, § 11; 104 C.M.R. § 27.09(4). If a petition is filed, the person will be detained at the facility pending a hearing. G.L. c. 123, § 6(a).

A sixteen- or seventeen-year-old person whose application for admission is made by their legally authorized representatives may be discharged in the same manner as any other person on conditional voluntary status. 104 C.M.R. § 27.09(6). Thus, they may file a three-day notice seeking discharge despite their legally authorized representative's wishes. 104 C.M.R. § 27.06(4), (6). A person who submits a three-day notice may retract it by written notice to the facility director. 104 C.M.R. § 27.06(5). The form and content of such retraction will be sufficient if it conveys the person's intention to withdraw the three-day notice. It need not be on any particular form of the facility and shall be made part of the patient's record. 104 C.M.R. § 27.06(5)(c), (d). Upon request, the facility staff must provide reasonable assistance to a person in drafting and submitting a retraction. 104 C.M.R. § 27.13(6)(b).

The superintendent must discharge a patient on conditional voluntary status if the person no longer needs inpatient care. G.L. c. 123, § 4; 104 C.M.R. § 27.11(6)(b). The superintendent may discharge a conditional voluntary patient when it is in the person's best interest (*Williams v. Steward Health Care Sys., LLC*, 480 Mass. 286 (2018)); provided, however, that if a legally authorized representative has applied for the admission, they must be given fourteen days' notice of the discharge. G.L. c. 123, § 10(a); 104 C.M.R. § 27.09(3). With the consent of a legally authorized representative, the superintendent may discharge a patient under the age of sixteen at any time. 104 C.M.R. § 27.09(3).

§ 2.2.2 Periodic Review

All persons admitted to a psychiatric facility, including Bridgewater State Hospital, must be examined by a physician and a psychiatrist periodically, including upon admission to a facility; "once during the first three months after admission, once during the second three months after admission and annually thereafter." G.L. c. 123, § 4; 104 C.M.R. § 27.11(1). During each periodic review, the person must be evaluated to determine whether they have the "capacity to remain on, or to apply for, voluntary or conditional voluntary status, to render informed consent to customary and usual medical care or extraordinary treatment, including administration of antipsychotic medications, or to manage his or her own funds in accordance with the requirements of 104 CMR 30.01(5) [sic] *Evaluation of Ability to Manage Funds.*" 104 C.M.R. § 27.11(4); *see* 104 C.M.R. 30.01(4). If, as a result of the periodic examination or at any other time, it is determined that the person is no longer in need of care as an inpatient, they must be discharged. G.L. c. 123, § 4; 104 C.M.R. § 27.11(6)(b).

If, after a periodic review under G.L. c. 123, § 4 and 104 C.M.R. § 27.11(1), it is determined that the person who is a voluntary or conditional voluntary patient needs further care and treatment, the person must be notified of that determination and of their rights regarding discharge from the facility. Within fourteen days of such notification, if the person wishes to be discharged, they must be discharged unless the facility seeks commitment by filing a petition for commitment. G.L. c. 123, § 4; 104 C.M.R. § 27.11(6)(b). Pending disposition of the petition, the person may be held at the facility. G.L. c. 123, § 6. However, if the facility, after a periodic review, fails to inform the patient of the determination, they cannot file a petition for commitment. *In re M.C.*, 2015 Mass. App. Div. 174 (when the hospital failed to comply with the regulation concerning notice to the patient of its intent to conduct a competency evaluation of the patient's competence to remain at the hospital on a conditional voluntary status, it could not revoke the consent and file a petition for commitment).

If the person is no longer competent to remain on voluntary or conditional voluntary admission status, but continues to require hospitalization, the facility director must revoke the voluntary or conditional voluntary status and seek an order of commitment pursuant to G.L. c. 123, §§ 7 and 8. 104 C.M.R. § 27.11(6)(b); *see also Zinermon v. Burch*, 494 U.S. 113 (1990). A determination that a person is no longer competent to remain on a voluntary or conditional voluntary status that is not made as a result of a periodic review does not come under the ambit of Section 4 or the regulations. In such eventuality, there is no requirement of notice and the facility should proceed to file a petition for commitment. *Matter of M.A.*, 2018 Mass. App. Div. 8 (hospital's evaluation of capacity that was not made in the course of a formal periodic review, but instead as part of ongoing clinical evaluations, did not require prior written notice).

§ 2.2.3 Practice Advisory

(a) *Three-Day Notice*

Rule 6 of the Massachusetts Rules of Civil Procedure governs the calculation of time periods in G.L. c. 123, §§ 7(c) and 12(e). While not expressly applicable to G.L. c. 123, § 11, the three-day period has been calculated in the same manner. In computing the three-day period, the day on which the person signs the three-day notice is not counted. The first day is the day following the signing of the notice; Saturdays, Sundays, and legal holidays are not counted. When the third day falls on a Saturday, Sunday, or legal holiday, any commitment petition must be filed before the close of the court's business on the next business day. Mass. R. Civ. P. 6(a); *see* District Court Standards of Judicial Practice—Civil Commitment and Authorization of Medical Treatment for Mental Illness §§ 3:04, 8:04.

How the three-day period is computed is significant, since a commitment petition filed after the expiration of the three-day period must be dismissed. *See Hashimi v. Kalil*, 388 Mass. 607 (1983) (time limits established in G.L. c. 123 are jurisdictional and should be strictly construed); *see also In re P.I.*, 2014 Mass. App. Div. 116 (Mass. App. Div. 2014); Dist. Ct. Standard 3:01. The time calculation is based on calendar days, not twenty-four-hour periods. If the notice is given at 11:59 p.m. on a Monday, the first day is Tuesday and a petition must be filed by the close of business on Thursday; but if the notice is given at 12:01 a.m. on Tuesday, the first day is Wednesday and the petition must be filed by the close of business on Friday. If the notice is given at 12:01 a.m. on Wednesday, the first day is Thursday, and the petition must be filed by the close of business on the following Monday, or Tuesday if the Monday is a holiday (making the "three-day" notice six days total).

(b) *Notice of Impending Discharge*

The superintendent of the facility may discharge a patient on a voluntary or conditional voluntary status when it is in the patient's best interest. G.L. c. 123, § 10; 104 C.M.R. § 27.09(3). Both the statute and the regulations provide that if the application for admission was made by a legally authorized representative of a minor between the ages of sixteen and eighteen, then the legally authorized representative must be given fourteen days' notice before the patient is discharged. G.L. c. 123, § 10; 104 C.M.R. § 27.09(3).

(c) *Retraction of Three-Day Notice*

The patient or person who submitted the three-day notice may retract it by filing written notice with the facility director. 104 C.M.R. § 27.06(5)(b). This may occur either before the expiration of the three-day period or while the patient is retained at the facility pending a hearing on a petition that was filed after receipt of the three-day notice. *See* G.L. c. 123, § 6. The retraction shall only be accepted if the facility director or designee determines that the patient has the capacity to apply for conditional voluntary status as provided in 104 C.M.R. § 27.06(1)(c).

If the retraction is submitted while the patient is retained at the facility pending a hearing on a petition that was filed after receipt of the three-day notice, counsel will have been appointed, but it is unlikely they will have been notified of the retraction before its submission and acceptance by the facility. The acceptance of a represented person's retraction, executed without the opportunity to consult with counsel, and the resulting withdrawal or dismissal of the commitment petition, is troubling; nevertheless, the practice is common. To protect the client, counsel should inform the facility immediately, preferably in writing through hospital counsel, that respondent's counsel must be notified of any attempt by the facility to persuade the person to retract a three-day notice. Counsel should also advise the client not to sign a retraction, or any other document, including an application for conditional voluntary treatment, without first consulting with counsel. If a retraction is submitted without such consultation, counsel must determine whether the person did so voluntarily and whether they were aware that they forfeited the opportunity to seek judicial review of the legal propriety and clinical necessity of their continued stay at the facility. If counsel is not satisfied that the person's retraction was knowing, intelligent, and voluntary, counsel should object to a motion to withdraw or motion to dismiss the petition and insist that a hearing be conducted. Counsel also should inform the person of their right to submit another three-day notice at a future time.

(d) *Commitment and Transfer of a Voluntary or Conditional Voluntary Patient*

As a general rule, a facility may not petition for the commitment of a voluntary or conditional voluntary patient unless the patient submits a three-day notice of their intention to leave. *Acting Superintendent of Bournewood Hosp. v. Baker*, 431 Mass. 101 (2000) (patient who is on conditional voluntary admission is not at risk of imminent danger because their discharge from the facility is not imminent); *see also Walden Behav. Care v. K.I.*, 471 Mass. 150, 156 (2015); *Matter of M.A.*, 2018 Mass. App. Div. 8 (as long as the person was a conditional voluntary patient, the hospital had no authority to petition for involuntary commitment under G.L. c. 123, §§ 7 and 8, and the District Court was without jurisdiction to hear such a petition).

Pursuant to G.L. c. 123, § 3, and subject to certain procedural constraints (*see* 104 C.M.R. § 27.08(3)–(9)), absent an emergency, patients may be transferred between facilities, as follows:

- Patients on voluntary status may be transferred between facilities only with written consent of the patient.
- Patients sixteen years of age or older on conditional voluntary status may refuse to be transferred.
- A patient sixteen years or older on a conditional voluntary status at a facility may not be transferred from that facility over their objection, or in the case of a minor, or a patient admitted by a health care agent pursuant to a properly invoked and affirmed health care proxy, or over the objection of such minor or their legally authorized representative.

- A patient younger than sixteen years old who has been admitted to a facility pursuant to their legally authorized representative's authority may not be transferred from that facility over the objection of the legally authorized representative.

A refusal to accept a transfer may be deemed to constitute a three-day notice, 104 C.M.R. § 27.08(3)(b), whereupon the facility may file a petition under G.L. c. 123, §§ 7 and 8. *But see Acting Superintendent of Bournewood Hosp. v. Baker*, 431 Mass. 101 (2000). The patient may not be transferred during the pendency of the petition for commitment. G.L. c. 123, § 3. If subsequently committed, the transfer may go forward. 104 C.M.R. § 27.08(34).

An argument can be made that DMH regulations that treat a patient's refusal to accept a transfer as the equivalent of a three-day notice is in conflict with the statute and with *Acting Superintendent of Bournewood Hospital v. Baker*, 431 Mass. 101 (2000), since the person is not seeking to be discharged. Section 7(a)

> clearly requires [proof of] a threat of harm from "the failure to hospitalize." Section 11 speaks to this by requiring the conditional voluntary patient to give advance notice of an intention to leave or withdraw. Absent such notice, there is no discharge as would create a likelihood of serious harm. The conditional voluntary patient is not at risk of imminent danger because she is not free to leave the hospital without first giving a three-day notice of an intent to leave.

Acting Superintendent of Bournewood Hosp. v. Baker, 431 Mass. at 105. *See also*, *Matter of T.P.*, 2019 Mass. App. Div. 123 (a conditional voluntary patient who refuses to accept a transfer is not seeking to be discharged and should not be subject to an involuntary commitment.)

A conditional voluntary patient who has given notice of an intention to leave may not be transferred while a petition for commitment is pending. G.L. c. 123, § 3. A three-day commitment pursuant to G.L. c. 123, § 12(a) may not be used as a way to circumvent the transfer requirements. 104 C.M.R. § 27.08(6).

A person may change their mind regarding acceptance or rejection of a transfer. *See In the Matter of P.M.*, 2015 Mass. App. Div. 177 (patient's oral statement that she had changed her mind was sufficient to affect her agreement to the transfer and was the functional equivalent of a conditional voluntary admission).

§ 2.3 ADMISSION AND DISCHARGE OF CHILDREN AND ADOLESCENTS

§ 2.3.1 Voluntary and Conditional Voluntary Admissions

A parent may apply for the admission of a minor child to a facility on a voluntary or conditional voluntary basis if it is determined that the parent is a legally authorized

representative. A sixteen- or seventeen-year-old person may also apply for admission. However, a person under the age of nineteen may be admitted to an adult unit within a DMH facility only under the following circumstances:

- A seventeen- or eighteen-year-old person may be admitted to a DMH adult inpatient unit if committed by a court under the provisions of G.L. c. 123, §§ 15–18 or if the person is in the custody of the Department of Youth Services and placement in an adolescent facility would create a likelihood of serious harm to the adolescent or others, or the youth is in need of stricter security than is available in an adolescent unit. 104 C.M.R. § 27.05(8)(a)–(b).
- An individual under the age of nineteen may also be admitted to a statewide specialty unit housed within a state hospital, such as the deaf unit at the Worcester Recovery Center and Hospital, so long as this is permitted by regulation and appropriate separate physical space and programmatic services are available. 104 C.M.R. § 27.05(8)(c).

Sixteen- and seventeen-year-old persons are accorded the same rights as an adult admitted on a voluntary or conditional voluntary basis, including the right to leave the facility upon submission of a three-day notice of intent to do so, and the right to remain at the facility, upon written application, despite notice by a legally authorized representative of intention to withdraw such patient. 104 C.M.R. §§ 27.06(7), 27.09(6).

(a) *Intensive Residential Treatment Programs*

An adolescent intensive residential treatment program (IRTP) is a residential mental health program that provides comprehensive treatment and education in a secure setting to adolescents with serious emotional disturbance or mental illness and has the capacity to admit such adolescents pursuant to the provisions of G.L. c. 123, §§ 7, 8, 10, and 11. 104 C.M.R. § 27.04(1). To be admitted to an IRTP, a person must be between thirteen and eighteen years old and have been determined to require continuing care and treatment in a secure residential setting; failure to place the individual in a secure treatment setting would create a likelihood of serious harm by reason of mental illness; and there is no appropriate, less restrictive setting available. 104 C.M.R. § 27.04(2). Individuals who meet the IRTP eligibility criteria may be admitted to and retained in an IRTP only in accordance with the provisions of G.L. c. 123 and the applicable provisions of 104 C.M.R. § 27.00. 104 C.M.R. § 27.04(3).

(b) *Department of Youth Services*

A minor in the custody of the Department of Youth Services (DYS) must be admitted to a DMH facility upon a referral if DMH determines that the applicable admission criteria are met. Such an admission must be treated as though the minor were committed by a court. G.L. c. 120, § 10(c). During the admission, DYS retains custody of the child or adolescent under the terms of the original custody order. Discharge from the DMH facility shall not terminate the control of DYS over the minor and the minor may not be released without the consent of DYS. G.L. c. 120, § 10(e). Alternatively, DYS may relinquish custody and transfer control of a child or adolescent to the DMH

by petitioning the court that had issued the custody order for a commitment to a DMH facility. G.L. c. 120, § 14; 109 C.M.R. § 9.05(2)(c).

(c) *Department of Children and Families*

Practice Note
This section is excerpted from chapter 21 of *Child Welfare Practice in Massachusetts* (MCLE, Inc. 2006 & Supp. 2009, 2012).

Admission of children in the care or custody of the Department of Children and Families (DCF) to mental health facilities is addressed in DCF's regulations at 110 C.M.R. § 11.16. If the child is in the custody of DCF under a Juvenile Court care and protection petition or a Probate and Family Court G.L. c. 119, § 23(a)(3) petition, DCF may consent to admission for up to ninety days. *See* 110 C.M.R. § 11.16(4); *see also D.L. v. Comm'r of Dep't of Soc. Servs.*, 412 Mass. 558, 566–67 (1992). During those ninety days, parents and children have the right to seek judicial review of DCF's custodial decisions, including decisions about medical care. *See Care & Prot. of Isaac*, 419 Mass. 602, 611 (1995); *Care & Prot. of Jeremy*, 419 Mass. 616, 623 (1995). If the child's hospitalization will continue beyond ninety days, DCF must obtain judicial authorization from the court that entered the custody order. *See* 110 C.M.R. § 11.16(5).

If a child is in the custody of DCF under a child requiring assistance (CRA) petition, or is in the "care" of DCF under G.L. c. 119, § 23(a)(1), parental consent must be obtained. *See* 110 C.M.R. § 11.16(3). However, in those situations, if the parents are unavailable or if the parents authorize DCF to consent, then DCF may give consent. *See* 110 C.M.R. § 11.16(4)(b).

In addition to hospital settings, children in DCF care or custody may be placed in locked residential treatment programs for children and adolescents, referred to as IRTPs (intensive residential treatment programs), BIRTs (behavioral intensive residential treatment programs), CIRTs (clinically intensive residential treatment programs), and ARTs (acute residential treatment programs). The same rules about consent to admission apply to these programs.

Upon admission to a mental health facility, G.L. c. 18B mandates DCF notify the parents of the hospitalization and maintain weekly contact with them, begin discharge planning immediately, make referrals for less restrictive placements, and, where necessary, refer the matter to an interagency team. G.L. c. 18B, § 23.

Special Rules for Youth Ages Sixteen and Seventeen

A youth who is sixteen or older may apply for voluntary admission to a mental health facility. *See* G.L. c. 123, § 10; 110 C.M.R. § 11.16(2). In addition, a youth who is sixteen or older who has applied for voluntary admission has the right to leave the facility upon submission of a three-day notice. *See* G.L. c. 123, § 11.

Under DMH regulations, a minor child age sixteen or older who was admitted by a parent or guardian has the same rights as a sixteen- or seventeen-year-old person who

applied for their own admission, including the right to leave upon submission of a three-day notice. *See* 104 C.M.R. § 27.06. What this means is that if DCF admits a sixteen- or seventeen-year-old person to a locked mental health facility, and the teen submits a three-day notice, the facility must release the teen or file a petition for involuntary commitment.

Consent to Antipsychotic Medication

If the child is in the custody of DCF under a Juvenile Court care and protection petition or a Probate Court G.L. c. 119, § 23(a)(3) petition, judicial authorization is required to administer antipsychotic medication. If a child is in the custody of DCF under a CRA petition, or is in the "care" of DCF under G.L. c. 119, § 23(a)(1), parental consent must be obtained. 110 C.M.R. § 11.14.

§ 2.4 INVOLUNTARY ADMISSIONS

Except for commitments for alcohol or substance use disorders pursuant to G.L. c. 123, § 35, a person may be confined against their will only at a mental health facility operated or licensed by the Department of Mental Health to admit patients on an involuntary basis or at Bridgewater State Hospital. Such facilities include the following:

- DMH state hospitals (104 C.M.R. § 26.02(1)(a));
- DMH community mental health centers with an inpatient unit (104 C.M.R. § 26.02(1)(b));
- DMH state psychiatric units within a Department of Public Health hospital (104 C.M.R. § 26.02(1)(d));
- DMH Class III, V, VI, and VII licensed mental health facilities (104 C.M.R. § 27.03(8));
- DMH–licensed psychiatric units within a general hospital (104 C.M.R. § 27.02); and
- DMH–licensed secure intensive residential treatment programs for adolescents (104 C.M.R. § 26.02 and 104 C.M.R. § 27.03(g)).

Male defendants in criminal proceedings who have been found not competent to stand trial, or whose competency to stand trial is at issue, and men acquitted by reason of mental disease or defect may be evaluated at, or committed to, Bridgewater State Hospital, a Department of Correction facility. G.L. c. 123, §§ 15–18.

§ 2.4.1 Three-Day Involuntary Admission Pursuant to G.L. c. 123, §§ 12(a) and 12(b)

Section 12 of Chapter 123 "is the 'primary route' for the involuntary civil commitment of an individual. *Guardianship of Doe*, 391 Mass. 614, 621, 463 N.E.2d 339 (1984)." *Pembroke Hosp. v. D.L.*, 482 Mass. 346, 347 (2019). Section 12 provides for a two-

step process for the "emergency restraint and hospitalization of persons posing risk of serious harm by reason of mental illness."

Section 12(a), allows properly qualified physicians, psychiatric nurse mental health clinical specialists, psychologists, and licensed independent clinical social workers who, "after examining a person, [have] reason to believe that failure to hospitalize such person would create a likelihood of serious harm by reason of mental illness [to] restrain or authorize the restraint of such person and apply for the hospitalization" at a mental health inpatient facility. If an examination is not possible, the enumerated professionals may restrain or authorize the restraint based on "facts and circumstances" known to them, and apply for hospitalization "at a public facility or a private facility authorized for such purpose by the department." If none of the designated professionals are available, "a police officer, who believes that failure to hospitalize a person would create a likelihood of serious harm by reason of mental illness may restrain such person and apply for the hospitalization." Typically, this is accomplished by bringing the person to an emergency room for further evaluation. *See Commonwealth v. Accime*, 476 Mass. 469 (2017) (defendant was brought to emergency room by ambulance, purportedly based on a Section 12(a) commitment); *Kunz v. Northbridge*, No. CV 14-13894-TSH (D. Mass. Mar. 13, 2017) (plaintiff was questioned by police regarding potentially threatening and erratic behavior and brought to emergency room for Section 12(a) evaluation and subsequent admission to a facility).

This initial section 12(a) emergency restraint is solely for the purpose of evaluation and seeking admission to a properly licensed mental health facility. It is the responsibility of the professional authorizing the emergency detention to apply for hospitalization. This is accomplished by completing the application for hospitalization that shall state the reasons for the restraint of such person and any other relevant information that may assist the admitting physician or physician. Whenever possible, the professional who initiates the § 12(a) detention "shall telephone or otherwise communicate with a facility to describe the circumstances and known clinical history and to determine whether the facility is the proper facility to receive such person." Section 12(a) provides no time limit on how long this detention may last, however this issue is currently pending before the Supreme Judicial Court (*In Matter of C.R.*, Mass. Mun. Ct. Boston App. Div., No. 1801MH0235 (Sept. 4, 2019), Supreme Judicial Court docket SJC-12844).

As discussed below, Section 12(b) has a limit of detention of three business days, and it is only logical that an initial detention should not last longer than three business days. A psychiatric civil commitment should involve the "least burdensome or oppressive controls over the individual that are compatible with the fulfilment of the dual purposes of our statute, namely, protection of the person and others from physical harm and rehabilitation of the person." *Commonwealth v. Nassar*, 380 Mass. 908, 917–18 (1980); *Williams v. Steward Health Care Sys., LLC*, 480 Mass. 286, 293 (2018).

As a result of the detention under Section 12(b), a person may be involuntarily admitted to a public or private mental health facility, but not Bridgewater State Hospital, for a period not to exceed three business days. Once at the facility, unless the person was evaluated by a designated physician, the person must be given a psychiatric evaluation

by a designated physician. Unlike Section 12(a), which requires only a “reason to believe,” under Section 12(b) the designated physician must determine that “failure to hospitalize such person would create a likelihood of serious harm by reason of mental illness.” It is clear that the temporary, emergency examination under Section 12(a) is less comprehensive than the examination

> conducted by a physician specifically designated by the Department of Mental Health as having the authority to admit a patient to a psychiatric hospital. The admitting physician has the role of determining whether, in fact, a failure to hospitalize would create a likelihood of serious harm, in contrast to the applying physician, whose function is only to determine whether there is reason to believe that such may be the case.

Reida v. Cape Cod Hosp., 36 Mass. App. Ct. 553, 556 (1994).

Both Section 12(a) and Section 12(b) are documented on the same standard form. *See* https://www.mass.gov/eohhs/docs/dmh/forms/form-aa-5.pdf.

§ 2.4.2 Application for Temporary Admission by a Qualified Physician, Psychologist, Psychiatric Nurse, or LICSW

Physicians, qualified psychologists, qualified psychiatric nurse mental health clinical specialists, and licensed independent clinical social workers (LICSWs) may, after an examination, sign an application for authorization of temporary involuntary hospitalization in order to restrain or authorize the restraint and transport of a person to an authorized facility. The clinician must have “reason to believe that failure to hospitalize the person would create a likelihood of serious harm by reason of mental illness.” G.L. c. 123, § 12(a). If not signed by a designated physician, the “pink paper” is only an application for admission. G.L. c. 123, § 12(b). The physician, qualified psychologist, qualified psychiatric nurse, or LICSW does not need to conduct a full psychiatric examination. Section 12(a)

> does not require as matter of law that the physician conduct a physical examination . . . or a psychiatric assessment. [O]bservation of the patient, taken in conjunction with medical records and other information supplied to him, could be found . . . to have satisfied his statutory duty to examine under § 12(a).

See Reida v. Cape Cod Hosp., 36 Mass. App. Ct. at 555. However, within two hours of the person’s arrival at the facility, unless the designated physician is involved in an emergency, a designated physician must conduct a psychiatric examination. G.L. c. 123, § 12(b); 104 C.M.R. § 27.07(2)(a), (b). Under limited circumstances, the examination may be done via telemedicine; however, the person “shall be examined by a designated physician as soon as possible and no later than the next calendar day following the admission.” 104 C.M.R. § 27.07(2)(c).

§ 2.4.3 Application by Police

In an emergency, if a physician, qualified psychologist, qualified psychiatric nurse mental health clinical specialist, or LICSW is not available, a police officer, who has reason to believe that the failure to hospitalize would create a likelihood of serious harm by reason of mental illness, may restrain a person, transport them to, and apply for their admission at, a mental health facility. G.L. c. 123, § 12(a). Within two hours of the person's arrival at the facility, a designated physician must conduct a psychiatric examination. G.L. c. 123, § 12(b); 104 C.M.R. § 27.07(2).

§ 2.4.4 Section 12(b) Admission by Designated Physician

A physician meeting the criteria contained in 104 C.M.R. § 33.02 and authorized to admit to a facility is a "designated physician." A designated physician who, after examination, determines that the failure to hospitalize a person will create a likelihood of serious harm by reason of mental illness may sign a Section 12(a) "pink paper" authorizing the restraint and transport of the person to an authorized facility. G.L. c. 123, § 12(a). The person may be admitted to an authorized facility without any further psychiatric evaluation. G.L. c. 123, § 12(b); 104 C.M.R. § 27.07(2). Since the person may be admitted solely on the basis of the designated physician's Section 12 form, the designated physician must conduct a psychiatric examination. *Cf. Reida v. Cape Cod Hosp.*, 36 Mass. App. Ct. 553 (1994). While Section 12(a) only requires that one of the qualified clinicians has a reason to believe that the failure to hospitalize would create a likelihood of serious harm by reason of mental illness, an emergency admission initiated by a designated physician requires a determination that the failure to hospitalize will create a likelihood of serious harm by reason of mental illness. G.L. c. 123, § 12(b); 104 C.M.R. § 27.07(2).

§ 2.4.5 Right to Counsel

Once admitted under Section 12(b), the facility must inform the person that it will, at the person's request, notify the Committee for Public Counsel Services (CPCS) of the admission so that counsel may be appointed. Upon notification, CPCS must appoint counsel for the patient "forthwith." G.L. c. 123, § 12(b); 104 C.M.R. § 27.07(3). Counsel must meet with the person no later than the next business day after the appointment is accepted. *See* "CPCS Performance Standards Governing the Representation of Indigent Persons in Civil Commitment Cases," *Committee for Public Counsel Services Assigned Counsel Manual* G(2), G(3).

Persons subject to petitions under G.L. c. 123 are presumed to be indigent. SJC Rule 3:10, § 1(h)(iii). Therefore, they have a right to court-appointed counsel, unless after court inquiry the person is found not to be indigent.

§ 2.4.6 Right to Emergency Hearing for Abuse or Misuse of the Provisions of Section 12(b)

If a person admitted under Section 12(b), or an attorney representing such person, has reason to believe that the admission is the result of the abuse or misuse of the provisions of G.L. c. 123, § 12(b), they may request an emergency hearing in the District Court having jurisdiction over the mental health facility. The request for emergency hearing and other forms are available at https://www.mass.gov/lists/mental-health-court-forms. The court must hear the matter not later than the next business day following the filing, unless a delay is requested by the person or their counsel. G.L. c. 123, § 12(b); Dist. Ct. Standard 6:01.

The Supreme Judicial Court has held that "unless a request for an emergency hearing on its face is patently frivolous, the obligation to hold an emergency hearing is mandatory." *Newton-Wellesley Hosp. v. Magrini*, 451 Mass. 777 (2008). The person has a right to be present at the hearing and to be heard. *Newton-Wellesley Hosp. v. Magrini*, 451 Mass. at 785. The hearing does not necessarily have to be an evidentiary hearing, but may proceed on offers of proof and documents offered by the parties. The judge has the discretion to decide whether testimony is required in light of the alleged abuse or misuse of the process. *Newton-Wellesley Hosp. v. Magrini*, 451 Mass. at 785.

Persons admitted involuntarily under Section 12(b) are accorded the following procedural safeguards:

- a psychiatric examination within two hours by a designated physician, unless the designated physician is involved in an emergency situation, in which case immediately after the emergency ends;
- notification by the facility of the right to counsel;
- upon the person's request, notification to and appointment of counsel by CPCS; and
- the right to meet with the attorney appointed.

Claims of "abuse or misuse" of Section 12(b) are not limited to the denial of one or more of these rights or provisions. The "broad language serves as a catch-all provision to include other circumstances that have resulted in a wrongful Section 12(b) admission." *Newton-Wellesley Hosp. v. Magrini*, 451 Mass. at 784.

In *Newton-Wellesley Hospital v. Magrini*, the Supreme Judicial Court found that the hospital abused and misused the Section 12(b) admission process by effectuating a second Section 12(b) admission (erroneously referred to as a "commitment" in the decision) after the District Court ordered Magrini discharged because the hospital did not file its petition for commitment within the statutorily mandated timeline. *Newton-Wellesley Hosp. v. Magrini*, 451 Mass. at 784. The Supreme Judicial Court found that "[t]he hospital never complied with the court order, and instead continued to confine Magrini against his will in a locked psychiatric unit." However, in footnote 14, the court noted that "[t]his is not to say that a hospital could never recommit a person on

a temporary basis. The statutory scheme does not prohibit such action, but that issue is not before us." *Newton-Wellesley Hosp. v. Magrini*, 451 Mass. at 784, n.14.

In a series of recent cases, the Supreme Judicial Court has underscored the significant rights that may be curtailed by proceedings under G.L. c. 123 and especially Section 12.

> The right of an individual to be free from physical restraint is a paradigmatic fundamental right." *Matter of E.C.*, 479 Mass. 113, 119, 92 N.E.3d 724 (2018), quoting *Commonwealth v. Knapp*, 441 Mass. 157, 164, 804 N.E.2d 885 (2004). General Laws c. 123 governs involuntary civil commitment due to mental illness, and thus may curtail that freedom, but only in particular circumstances, and by way of specified procedures designed to protect due process rights. *See Williams v. Steward Health Care Sys., LLC*, 480 Mass. 286, 292, 103 N.E.3d 1192 (2018), citing *O'Connor v. Donaldson*, 422 U.S. 563, 576, 95 S. Ct. 2486, 45 L.Ed.2d 396 (1975) (statute "written in recognition of psychiatric patients' fundamental right to liberty"). *See also Matter of N.L.*, 476 Mass. 632, 636, 71 N.E.3d 476 (2017) (recent legislative reforms to G.L. c. 123 intended "to afford individuals more due process in civil commitment and medical treatment hearings than had been available previously").

Pembroke Hosp. v. D.L., 482 Mass. 346, 347 (2019) (internal citation omitted).

In *Pembroke Hospital v. D.L.*, Pembroke filed a petition for commitment in the District Court that was denied. Instead of releasing D.L., the hospital transported him to a second hospital for an evaluation pursuant to Section 12(a). Having found that D.L. should continue to be detained, the second hospital returned D.L. to Pembroke, which filed another commitment petition. The Supreme Judicial Court, in finding that the second petition should have been dismissed, held as follows:

> Reading the statute in light of the legislative intent to protect the patient's right to be "free from physical restraint" it is clear that a facility "discharges" an individual under G.L. c. 123 *only when that individual is set at liberty* from involuntary restraint, and not when released from care as happened here. Otherwise, the protections of the statute would be impermissibly weakened, if not rendered meaningless.

Pembroke Hosp. v. D.L., 482 Mass. 346, 352 (2019) (citations omitted; emphasis added).

Pembroke's Section 12(a) application to the second hospital for evaluation and subsequent involuntary readmission of D.L. was an "abuse or misuse" of Section 12. *See* G.L. c. 123, § 12(b); *Newton-Wellesley Hosp. v. Magrini*, 451 Mass. at 784. Because D.L. had not be been discharged and was not lawfully detained under Section 12(b),

the District Court lacked jurisdiction to hear a new petition pursuant to G.L. c. 123, §§ 7 and 8. *Pembroke Hosp. v. D.L.*, 482 Mass. at 354.

A designated physician's clinical decision that failure to hospitalize the patient would create a likelihood of serious harm by reason of mental illness is *not* subject to review at an emergency hearing. *Newton-Wellesley Hosp. v. Magrini*, 451 Mass. at 784 n.13.

If an emergency hearing is requested, the facility may provide the person's mental health records to the court solely for the purpose of the requested hearing. *Newton-Wellesley Hosp. v. Magrini*, 451 Mass. at 784 n.13.

§ 2.4.7 Commitments by the District, Municipal, or Juvenile Court Under G.L. c. 123, § 12(e)

Anyone may apply to a District, Municipal, or Juvenile Court for a three-day commitment of a person thought to be mentally ill, whom the applicant believes the failure to confine would cause a likelihood of serious harm. The court must immediately appoint counsel for the person. After hearing such evidence as the court may consider sufficient, it may issue a warrant authorizing the police to apprehend the person alleged to suffer from mental illness if, in the court's judgment, the condition or conduct of such person makes such action necessary or proper. G.L. c. 123, § 12(e).

Upon apprehension, the person will be brought to the court or other location to be examined by a designated physician or a qualified psychologist. Although the terms "designated physician" and "qualified psychologist" are used in both paragraphs (a) and (e) of Section 12, DMH regulations establish different criteria for certification to conduct examinations under these paragraphs. Evaluations conducted pursuant to paragraph (e) must be conducted by clinicians who meet the criteria established for a designated forensic psychiatrist or a designated forensic psychologist. *See* 104 C.M.R. § 33.03.

Prior to the examination, the person must be afforded the opportunity to consult with counsel. Counsel, with their client's consent, should be present during the examination. Before the examination, the psychiatrist or psychologist must inform the person that any statements made will not be privileged and may be divulged to the court. "[A]ll court-ordered examinations [are] under the ambit of G.L. c. 233, § 20B(b)." *In re Laura L.*, 54 Mass. App. Ct. 853, 859 (2002) (relying on *Commonwealth v. Lamb*, 365 Mass. 265 (1974)). A waiver of the privilege must be knowing, intelligent, and voluntary. *In re Laura L.*, 54 Mass. App. Ct. at 859; *see also* G.L. c. 233, § 20B; *In re Adoption of Travis*, 64 Mass. App. Ct. 1113 (2005).

Although the statute allows for commitment based solely on the court clinician's finding that the failure to hospitalize the person would create a likelihood of serious harm by reason of mental illness, due process requires a hearing. Unfortunately, the statute and case law provide little guidance as to what substantive or procedural rights, beyond the right to counsel, are enjoyed by persons in proceedings under G.L. c. 123, § 12(e). However, because even a three-day involuntary commitment to a psychiatric facility

pursuant to G.L. c. 123, § 12(e) constitutes a substantial deprivation of liberty and restricts other fundamental rights, including a person's Second Amendment rights and the right to privacy, *see* G.L. c. 123, § 36C, a person must be afforded the full panoply of due process protections. At a minimum, this should include

- the right to be represented by counsel;
- written notice of the reasons commitment is sought;
- disclosure to the person of the evidence against them that supports the petition;
- an opportunity to mount a meaningful defense;
- an opportunity to be heard in person and to present witnesses, including but not limited to an independent expert, and documentary evidence;
- the right to confront and cross-examine adverse witnesses;
- a neutral and detached hearing body or official; and
- a written statement by the fact finder as to the evidence relied on and reasons for the commitment.

See Commonwealth v. Durling, 407 Mass. 108, 113 (1990); *see, e.g.*, *Humphrey v. Cady*, 405 U.S. 504 (1972); *Baxstrom v. Herold*, 383 U.S. 107 (1966); *Commonwealth v. Nassar*, 380 Mass. 908 (1980); *Worcester State Hosp. v. Hagberg*, 374 Mass. 271 (1978); *see also* Dist. Ct. Standard 5:00.

Counsel should argue that because of the direct and collateral consequences of a commitment under Section 12(e), e.g., stigma, *see also* G.L. c. 123, § 36C, the petitioner's burden of proof in a Section 12(e) commitment proceedings is beyond a reasonable doubt, which is the standard applicable to commitment proceedings under G.L. c. 123, §§ 7 and 8. *See Worcester State Hosp. v. Hagberg*, 374 Mass. 271 (1978); Dist. Ct. Standards 2:00, 6:00; *In the Matter of F.C.*, 479 Mass. 1029 (2018).

If the court makes sufficient findings, it may order a three-day commitment for further evaluation and treatment. G.L. c. 123, § 12(e).

§ 2.4.8 Length of Involuntary Hospitalization Under Section 12

Regardless of which Section 12 procedure is used, the person (or the parents of a minor) must be informed by the facility that an involuntary hospitalization under Section 12 may not exceed three business days. Although it is not specified in Section 12, the person or parents should be informed that if the superintendent of the facility files a petition for commitment within the three-business-day period, the facility may continue to retain the person until the court hearing on the petition for commitment. *See* G.L. c. 123, § 6(a).

§ 2.4.9 Right to Voluntary or Conditional Voluntary Status

Prior to admitting a person to a facility upon application for involuntary hospitalization pursuant to G.L. c. 123, § 12, the facility must give the person, or their legally authorized representative, the opportunity to apply for voluntary or conditional voluntary admission under G.L. c. 123, §§ 10 and 11. For a person sixteen or seventeen years of age, this opportunity must be given to both the person and their legally authorized representative. 104 C.M.R. § 27.07(1).

A person or their legally authorized representative has the *right to convert* to voluntary or conditional voluntary status at any time within the three-business-day period. 104 C.M.R. § 27.07(1). A mental health professional responsible for a person admitted pursuant to G.L. c. 123, § 12 must inform the person or their legally authorized representative during the Section 12 admission of the right to change status, and this shall be recorded in the person's medical record. 104 C.M.R. § 27.07(1).

While under 104 C.M.R. § 27.01 a person has the *right to convert* to a voluntary or conditional voluntary status, under 104 C.M.R. § 27.06 a person must meet certain criteria to be admitted as a voluntary or conditional voluntary patient. A person may not remain on a conditional voluntary status if they no longer have capacity to remain on that status. *See Zinermon v. Burch*, 494 U.S. 113 (1990).

A person applying for a voluntary or conditional voluntary admission must be afforded the opportunity to consult with an attorney, or a person working under the supervision of an attorney, regarding the effect of such an admission or change in status. G.L. c. 123, § 10(a).

§ 2.4.10 Discharge

A person admitted under Section 12 may be discharged at any time during the three-day period if the superintendent determines that the person no longer needs care and treatment at the facility. G.L. c. 123, §§ 12(c), 12(e); 104 C.M.R. § 27.09(7)(a). If the person was committed pursuant to Section 12(e), the court does not need to approve or be informed of the discharge. If the person has not converted to a voluntary or conditional voluntary admission, they must be discharged upon the expiration of the three-business-day period, unless a petition for commitment is filed by the superintendent. G.L. c. 123, § 12(d). If a commitment petition is filed, the person may be retained pending a hearing on the petition. G.L. c. 123, § 6(a).

§ 2.4.11 Practice Advisory

(a) *Due Process and Admissions Under G.L. c. 123, § 12*

If a petition for commitment is filed prior to the expiration of the three-day period, the hearing on a petition for commitment must be commenced within five business days of its filing. G.L. c. 123, § 7(c). As a result, a person admitted to a facility for three days under G.L. c. 123, § 12(b) or § 12(e), against whom a petition to commit is filed,

may be retained at the facility for up to twelve days, taking Saturdays, Sundays, and potential legal holidays into account, before the propriety of further retention is considered by the court.

In a Section 12(b) emergency hearing, the prohibition on challenging a designated physician's clinical decision that failure to hospitalize the patient would create a likelihood of serious harm by reason of mental illness, found in footnote 13 of *Newton-Wellesley Hospital v. Magrini*, 451 Mass. 777, 784 (2008), lacks a substantial rational and constitutional basis. A person admitted against their will to a mental health facility suffers a substantial deprivation of liberty and, therefore, must be afforded significant and meaningful due process protections. *See, e.g.*, *Humphrey v. Cady*, 405 U.S. 504 (1972); *Baxstrom v. Herold*, 383 U.S. 107 (1966); *Commonwealth v. Nassar*, 380 Mass. 908 (1980); *Superintendent of Worcester State Hosp. v. Hagberg*, 374 Mass. 271 (1978). A Section 12(b) admission is analogous to, and at least as onerous as, a warrantless arrest. The admission results from a private citizen's (i.e., the designated physician's) assessment of the person's mental health, much as a warrantless arrest is the result of a police officer's assessment of a person's conduct. It therefore is appropriate that in a Section 12(b) involuntary hospitalization the same factor (i.e., the physician's exercise of professional judgment) be at issue and the same quantum of proof be applied by a reviewing court as is applicable in the warrantless arrest context. *See In re Harris*, 654 P.2d 109, 114 (1982) (before a summons may issue for the involuntary assessment of dangerousness, there must be judicial finding of "probable dangerousness"). Such a requirement has been imposed in a similar context by the Minnesota Supreme Court, see *State ex rel. Doe v. Madonna*, 295 N.W.2d 356 (Minn. 1980). *See also In re Detention of Wygle*, 910 N.W.2d 599, 602 (Iowa 2018) (discussing need for overt act in mental health and sexually dangerous persons litigation).

At the emergency hearing under Section 12(b), the facility should be made to show, by at least a preponderance of the evidence, that at the time of admission, the facts and circumstances known to the designated physician were sufficient to warrant a reasonable designated physician to conclude that the failure to hospitalize the person would create a likelihood of serious harm by reason of mental illness. *Cf. Commonwealth v. Bruno*, 432 Mass. 489, 513 (2000) (loss of liberty when temporarily committed is tantamount to infringement of arrest; probable cause finding required).

The Supreme Judicial Court's dicta in *Newton-Wellesley Hospital v. Magrini*, 451 Mass. at 784 n.13, that a subsequent commitment hearing is the appropriate time to challenge the designated physician's determination that a person met the commitment criteria for admission is ripe for challenge. At the commitment hearing, which usually occurs many days after the initial detention, courts do not consider the propriety of a person's admission since the determinant factor is the respondent's condition at the time of the trial on the merits.

In addition, the Supreme Judicial Court in *Magrini* made it clear that the District Court may not refuse to consider whether the criteria for admission under G.L. c. 123, § 12(b) were met and, therefore, whether the admission was proper. Where it is determined that the criteria were not met, the person was not properly admitted and the commitment petition must be dismissed. G.L. c. 123, § 7(a); *see In the Matter of C.B.*,

2013 Mass. App. Div. 42 (commitment petition may be filed only against a "patient" of a facility). *But see Matter of E.C.*, 479 Mass. 113, 120 (2018) (hospital had the authority to hold patient under G.L. c. 123, § 6, while the G.L. c. 123, § 16(c) petition was pending following the dismissal of the criminal charge against him).

(b) *Three-Day Period of Confinement*

In calculating the three-day period applicable to a commitment under G.L. c. 123, § 12, Rule 6 of the Massachusetts Rules of Civil Procedure applies. The day that the person is admitted is not counted. Mass. R. Civ. P. 6(a); *see* Dist. Ct. Standards App. B, Memorandum from Chief Justice Connolly: Scheduling Civil Commitment Hearings & Emergency Hearings (Feb. 23, 2007). Since the calculation of the three-day period is significant (a commitment petition filed after the expiration of the three-business-day period may not be heard), *see Hashimi v. Kalil*, 388 Mass. 607 (1983) (time limits established in G.L. c. 123 are jurisdictional and to be strictly construed); Dist. Ct. Standard 3:01 (motion to dismiss must be allowed where statutory times limits not adhered to), counsel must be sure to file a motion to dismiss if faced with this situation.

(c) *Sufficiency of Clinical Opinion*

The criteria for confinement under Section 12(e) are that the failure to hospitalize the person *would* create a likelihood of serious harm by reason of mental illness. While the court need not commit despite the examining clinician's opinion that confinement is warranted, it cannot confine the person unless the clinician believes that the criteria under Section 12(e) are met.

(d) *Warrants of Apprehension*

A warrant of apprehension issued on less than reasonable cause to believe that failure to hospitalize poses a likelihood of serious harm is invalid. The purpose of a warrant of apprehension is to allow for an examination by a designated physician or qualified psychologist to determine whether the person is in need of hospitalization due to a mental illness that makes the person dangerous to themselves or others. The District Court warrant of apprehension provides that the warrant is *not to be executed* "unless the respondent can be brought before a judge prior to 4:30 p.m. on the same day." G.L. c. 123, § 12(e). Therefore, it is legally improper and clinically inappropriate to retain a person who has been detained pursuant to a warrant of apprehension in police custody. If the person served with the warrant cannot be brought before a court clinician immediately, the warrant should not be executed and other steps should be taken, if necessary (e.g., the police may apply for admission pursuant to G.L. c. 123, § 12(a)).

Of similar concern is the duration or effective length of a warrant of apprehension. The purpose of the warrant is a forensic evaluation and, if warranted, hospitalization of a person who is alleged to be a danger to themselves or others by reason of mental illness. Given the fluid nature of mental illness, to conclude that the information as to the person's behavior and condition upon which the court had relied in issuing a warrant of apprehension remains pertinent two days, one week, or two weeks later is not

reasonable. The District Court warrant of apprehension requires that an expiration date be listed, but no directive or guidance as to a standard or maximum duration is provided. G.L. c. 123, § 12(e). As a rule, these warrants should only be issued when the court is open and the person can be apprehended and brought before the court that day. See Warrant of Apprehension, Ex.?? [We do not have a current copy.]

§ 2.5 COMMITMENT FOR ALCOHOL OR SUBSTANCE USE DISORDERS

A person found to have an alcohol or substance use disorder may be committed by a justice of the District Court, Boston Municipal Court, or Juvenile Court for up to ninety days if the court finds that there exists a likelihood of serious harm by reason of the alcohol use disorder or substance use disorder. G.L. c. 123, § 35.

The petition may be filed with the District, Boston Municipal, or Juvenile Court only by a police officer, physician, spouse, blood relative, guardian, or court official without regard to the age, residence, or location of the respondent. Court official is not defined, but it does not include attorneys or court clinicians. Court officers are mentioned in several statutes that refer to officers appointed by the courts to handle official court business. *See* G.L. c. 185C, § 15 (court officers in Housing Court Department "shall preserve order and may serve warrants, mittimuses, precepts, orders and processes"); G.L. c. 185, § 30 (Land Court); G.L. c. 217, § 20 (Probate and Family Court).

The petition must be signed under the penalties of perjury. If the person desires to be committed pursuant to Section 35, the person must have an authorized petitioner file a petition for them. G.L. c. 123, § 35; Uniform Trial Court Rules for Civil Commitment Proceedings for Alcohol and Substance Use Disorders, G.L. c. 123, § 35 (hereinafter "Uniform Rule"). Although Section 35 proceedings may be commenced in any division of the District, Boston Municipal, or Juvenile Court, the age, residence, or location of the respondent may be considered by the judge in determining to which court any warrant or summons will be returnable. Uniform Rule 3(d). Following commencement, a petition may not be withdrawn without leave of court. Uniform Rule 1.

Upon the filing of the petition and any additional sworn statements the court may request from the petitioner at the time of the filing, the case must be brought expeditiously before a judge who must review the petition on the record in court. If the judge determines that either the petitioner is not authorized to file a petition under G.L. c. 123, § 35, or the petitioner's allegation that the respondent is an individual with an alcohol or substance use disorder has no reasonable basis, the judge must dismiss the case. Uniform Rule 2. If the judge does not dismiss the case for one of these reasons, they must schedule an expeditious hearing on the petition. G.L. c. 123, § 35, ¶ 2.

If the respondent is present in court, the court must appoint counsel at that time and proceed in accordance with Uniform Rules 4 and 5. If the respondent is not present, the court must decide whether to issue a summons or a warrant and immediately proceed in accordance with Uniform Rule 3.

If, at the time of the filing of the petition, the court has reasonable grounds to believe that the person will not appear and that delay would present an immediate danger to the person's physical wellbeing, the court may issue a warrant of apprehension, which can be valid for up to five consecutive days, excluding Saturdays, Sundays, and legal holidays, or until such time as the person is presented to the court, whichever is sooner. G.L. c. 123, § 35; Uniform Rules 3(a), 3(c). However, the person may not be arrested pursuant to the warrant of apprehension unless they will be presented immediately before the judge. G.L. c. 123, § 35, ¶ 3; Uniform Rule 3(c).

If the court does not issue a warrant pursuant to Rule 3(a), it must have a summons and a copy of the petition served on the respondent in the manner provided in G.L. c. 276, § 25. Following such service, if the respondent fails to appear at the time summoned, the court may issue a warrant for the apprehension and appearance of the respondent. The issuance of such a warrant shall not require a determination of immediate danger to the physical wellbeing of the respondent. G.L. c. 123, § 35; Uniform Rule 3(b).

If a warrant or summons is issued pursuant to Rule 3(d) or a warrant is executed where it is impractical to transport the respondent to the return court, the respondent may be brought before another court having jurisdiction of cases pursuant to G.L. c. 123, § 35 (the "new court"). The new court shall immediately contact the issuing court and obtain copies of the docket in the case, the petition, and any other documents in the case file. The new court must open a new case file for the matter and make reasonable efforts to notify the petitioner of the location of the new court. The new court, in its discretion, may wait a reasonable time for the petitioner to arrive. The new court must adjudicate the case in accordance with Uniform Rules 4 through 9 and promptly inform the issuing court of its disposition by transmitting a copy of its docket entries to the issuing court. Uniform Rule 10.

Unless the respondent is represented by counsel, the court shall appoint counsel pursuant to SJC Rule 3:10(1)(f)(iii) before or upon the respondent's appearance in court. Uniform Rule 4. The court may appoint counsel upon a respondent's arrest, or even before, to allow consultation before the respondent is brought before a judge. Counsel must be appointed before the court-ordered examination pursuant to G.L. c. 123, § 35, ¶ 3, and the attorney should consult with the respondent before the examination begins.

Upon arrival at the court, the person must be examined by a qualified physician, qualified psychologist, LICSW, or social worker who has been designated to conduct such examinations pursuant to 104 C.M.R. § 33.04. G.L. c. 123, § 35, ¶ 2; Uniform Rule 5. Prior to the examination, the qualified clinician must inform the person that any communication made by the person will not be privileged and may be divulged to the court. Counsel also should advise the client before the evaluation that the client does not have to answer any questions and can stop answering questions at any time, and that what they tell the evaluator is neither privileged nor confidential and can be disclosed in court. *See Commonwealth v. Lamb*, 365 Mass. 265 (1974). Any waiver of the privilege by the client must be knowing, intelligent, and voluntary. *Cf. In the Matter of Laura L.*, 54 Mass. App. Ct. 853 (2002). After the completion of the examination, the judge must hold a hearing expeditiously. Uniform Rule 6.

At the hearing on the petition, the judge may inquire of the petitioner and may take testimony or other evidence from the petitioner or any other person, including a court official. The respondent has the right to cross-examine witnesses, present independent testimony, including expert testimony, call witnesses, and submit documents or other evidence. All testimony must be taken under oath and must be recorded or transcribed. G.L. c. 123, § 35; Uniform Rule 6.

The rules of evidence do *not* apply in proceedings under G.L. c. 123, § 35, except those related to privileges and statutory disqualifications. Hearsay evidence is admissible but may only be relied upon if the judge finds that it is substantially reliable. *In re G.P.*, 473 Mass. 112, 121 (2015).

> In determining whether hearsay is "substantially reliable," the court considers "'(1) the level of factual detail, rather than generalized and conclusory assertions; (2) whether the statement is based on personal knowledge and direct observation; (3) whether the statement is corroborated by evidence submitted by the [respondent]; (4) whether the statement was provided under circumstances that support the veracity of the source; and (5) whether the statement was provided by a disinterested witness.' [*Commonwealth v. Patton*, 458 Mass. 119,] 132-133 [(2010)]. However, the evidence need not satisfy all five criteria to be sufficiently reliable. *Id.* at 133." *Commonwealth v. Pina*, No. 16-P-616 (Mass. App. Ct. March 17, 2017) (unpublished Rule 1:28 decision) (in context of probation violation hearing).

Matter of A.R., 2018 Mass. App. Div. 179; *see also Commonwealth v. Durling*, 407 Mass. 108, 114 (1990); *Commonwealth v. Patton*, 458 Mass. 119, 132 (2010). The court may not draw any adverse inference from a respondent's refusal to testify or to speak during the examination ordered pursuant to Uniform Rule 5 or at any other time during the proceedings. However, the clinician still may offer an opinion and may report the respondent's refusal to the court. Uniform Rule 7.

The court may base its findings only on credible and competent evidence, which must include medical testimony. Uniform Rule 7. The petitioner must prove by clear and convincing evidence that

- the respondent is an individual with an alcohol or substance use disorder as defined in G.L. c. 123, § 35, ¶ 1; and
- a *substantial* (prongs 1 and 2) or *very substantial* (prong 3) risk of harm to the respondent or any other person will materialize imminently as a result of the person's alcohol or substance use disorder, i.e., in days or weeks, not months or years.

Uniform Rule 6; *In the Matter of G.P.*, 473 Mass. 112, 128 (2015).

If, after the hearing, the judge determines that the petitioner has met their burden, the court may commit the respondent for a period not to exceed ninety days to a public or

private inpatient facility approved by the Department of Public Health (DPH) for the care and treatment of alcohol or substance use disorders, followed by the availability of case management services provided by the DPH for up to one year. G.L. c. 123, § 35, ¶ 3. The court's order must specify whether the commitment is based on a finding of alcohol use disorder, substance use disorder, or both. The order must state that the receiving facility, or any facility to which the respondent is transferred, is responsible for providing and maintaining custody of the respondent until expiration or termination of the order, as provided by law.

The judge must also include in the order that the facility, or any facility to which the respondent is transferred, must provide the clerk of the committing court with notice, in the manner directed by the court, of the release, the transfer, or of any escape of the respondent. Uniform Rule 8. If necessary to ensure the person's or others' safety, adult males may be committed to the Massachusetts Alcohol and Substance Abuse Center (MASAC) at the Massachusetts Correctional Institution at MCI/Plymouth or a program operated under a memorandum of understanding with the Hampden County sheriff. Adult females may be committed to a secure facility for women approved by the DPH or the DMH. If the person is committed to MASAC or to a secure facility for women, they must be housed and treated separately from convicted criminals. G.L. c. 123, § 35, ¶ 4. Women and juveniles may not be committed to Department of Correction facilities, unless an adult female is also facing a criminal charge being held on bail. Uniform Rule 8(c) and commentary to the rules.

The superintendent of the facility must evaluate the necessity of the commitment on days thirty, forty-five, sixty, and seventy-five as long as the commitment continues. A person may be released prior to the expiration of the period of commitment upon written determination by the superintendent of the facility that release of that person will not result in a likelihood of serious harm. G.L. c. 123, § 35, ¶ 3; Uniform Rule 8. The committing court must be notified of the person's release. If the person is a defendant in a pending criminal proceeding and is held on bail or otherwise subject to judicial or probation supervision, the person will be returned to court where those charges are pending. Uniform Rule 8. The person shall, upon release, be encouraged to consent to further treatment and shall be allowed voluntarily to remain in the facility for such purpose. G.L. c. 123, § 35, ¶¶ 4, 6.

The court must notify the person who is committed that they are prohibited from being issued a firearm identification card pursuant to G.L. c. 140, § 129B or a license to carry pursuant to G.L. c. 140, §§ 131 and 131F, unless a petition for relief pursuant to G.L. c. 123, § 35 is subsequently granted by the committing court after a minimum of five years. G.L. c. 123, § 35, ¶ 7; Uniform Rule 8(d).

§ 2.5.1 Practice Advisory

(a) *Requisite Findings*

Commitment must be based on competent testimony, which shall include, but not be limited to, expert testimony. G.L. c. 123, § 35, ¶ 3. Regardless of the evidence presented by lay witnesses, including those familiar with the person's behavior and use of alcohol or controlled substances, there must be "medical" testimony by a physician or other person who can offer competent expert testimony that establishes that the person has an alcohol or substance use disorder as defined in the statute and that as a result of such condition there is a likelihood of serious harm. Note that the commentary to the rules states that while a judge must hear "medical" testimony, they may base a decision on other testimony and evidence. The commentary also explains that "in light of the legislative provisions for examination by a psychologist or by a social worker, the meaning of 'medical testimony' extends beyond expert testimony by a medical doctor." Uniform Rule 7 and commentary to the rules (internal citations omitted).

(b) *Due Process and Commitments Under G.L. c. 123, § 35*

The statute and case law provide little guidance as to what substantive or procedural rights, beyond the right to counsel, are guaranteed to persons subject to G.L. c. 123, § 35.

The burden of going forward and the burden of proof by clear and convincing evidence rest with the petitioner. Because involuntary confinement constitutes a substantial deprivation of liberty, a person should be afforded the full panoply of due process protections. *See, e.g.*, *Humphrey v. Cady*, 405 U.S. 504 (1972); *Baxstrom v. Herold*, 383 U.S. 107 (1966); *Commonwealth v. Nassar*, 380 Mass. 908 (1980); *Worcester State Hosp. v. Hagberg*, 374 Mass. 271 (1978). Counsel should be afforded sufficient opportunity to prepare for hearing and to retain an independent clinician. *Cf.* G.L. c. 123, § 5. However, since the statute does not provide for pretrial detention, there may be practical issues to be resolved if an independent clinician is not immediately available.

(c) *Warrants of Apprehension*

A warrant of apprehension issued on less than reasonable cause to conclude that the person has an alcohol or substance use disorder as defined in the statute is invalid. Similarly, a warrant of apprehension that cannot be executed in a timely manner may become stale since it was issued on the basis of then-existing conditions or circumstances.